Transfer of undertakings (protection of employment) regulations 2006:Consultation responses

1. Your name:

I. Roseman

2. What organisation do you represent (if any)?

None - previous business owner, now employed.

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Individual

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

The TUPE regulations are incredibly onerous in general. I would like to see the proposed reforms go further.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

less than one year

8. Do you believe that removing the provisions may cause potential problems?

No

9. Do you agree that the employee liability information requirements should be repealed?

Yes

As above

10. Would your answer be different if the service provision changes were not repealed?

No

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

12. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No

The proposal doesn't go far enough. It prevents viable organisations suffering from cash flow problems or poor short term market related conditions from selling their businesses at low cost to other providers who may be able to weather economic storms better. Instead

such organisations are forced to declare themselves bankrupt.

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes, strongly agree.

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

I have faced situations where TUPE conditions of service are still being referred to 12 years after transfer. Organisations have to jump through hoops to prove transformational reasons.

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

I think TUPE conditions should apply for no longer than one year in total, without the need for any more legal manipulations. The only people getting rich on the current situation are the employment solicitors, which does not bode well for economic transformation of the country by small business improvement.

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

Yes

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

But it's not the wording itself that matters. It's the interpretation placed on the wording by the courts.

21. Do you agree with the Government’s proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce'

covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

However, this is not a small business problem, and does not really address the problems of small businesses.

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

I think micro businesses should be exempt from TUPE altogether.

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

You cannot expect a yes or a no answer to this question. I think the proposals will have a positive impact on equality and diversity within the workforce. In general employers do not care what race of sex their employees are. They care whether they work or not.

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

In general yes.

1. Your name:

Carole Spencer

2. What organisation do you represent (if any)?

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Individual

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

In my role as a Head of HR, of course this gives me issues to deal with and additional costs, however I cannot in all conscience suggest that the current legislation is anything but fair and right. To remove the application to service provision changes will just result in a massive increase in job insecurity and will see reduced salaries and terms and conditions for staff, who will drift in and out of low paid work, and an increasing number choosing to stay on benefits rather than be in a situation which offers probably no more money and no financial security. Given the number of government tenders which will be affected by this (Supporting People contracts for one) I can't help but wonder whether this is nothing more than a way of reducing the csot of these contracts to the government, at the expense of the workers. This is short sighted in any event as it measn that employers will need to factor in the cost of redundacy at the outset, saving no money over the life of the average contract anyway.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No, I would rely on case law and the common sense of judges to implement it in accordance with the Directive.

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

8. Do you believe that removing the provisions may cause potential problems?

Yes

As stated above, I think it will drive people onto benefits, reduce salaries for the lowest paid, and actually not save businesses any money or work. Smaller companies who loose major contracts will ahve the redundancy burden to bear, probably driving many of them out of business. Very short sighted....

9. Do you agree that the employee liability information requirements should be repealed?

No

10. Would your answer be different if the service provision changes were not repealed?

No

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

I think it is perfectly clear already

12. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes, if there is a genuine situation then this is absolutely necessary. By retaining the service provision section but allowing the ETO reason too, businesses bidding for a contract can factor in any costs (including redundancy costs) when making their bid. This is far more sensible than removing the service provision application.

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

it would lead to multiple cases over whether the overall change was or wasn't less favourable. I don't feel there is any need to change this, it doesn't give a forcefield of protection in per petuity, it simply says that they must be treated as though these tems and conditions were given by the current employer, and cahgnes can always be made by an employer where there are legitimate grounds. If an organisation needs to make changes it has scope to do so and this balances the rights of the employees with the overall needs of the business (providing the situation is genuine and properly managed by the business), so there is no need to pander to unscrupulous employers.

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No Response

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Whilst i can understand that the dynamic approach is the most common sense application, I can see that the static approach gives employers far more flexibility to respond to their own business needs. This also provides the opportunity to move towards harmonised pay rates where these are out of kilter with other employees and provides a long term balanced approach. This would be far better for small businesses in particular and potnetially for employees - better for the business to pay what it can rather than close, and better for staff to be paid an afforddable wage (moved to through a long term planned approach such as red circling) rather than be seleceted for redudnacny or otherwise moved out of the business. Legislation which gave effect to this would be far more balanced and sensible than knee jerk withdrawals of TUPE to service provision chagnes or

a one year time limit.

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

Consistency and the avoidance of reference to the ECHR

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

In a tendering situation there is not always the lead in time to make these changes before the service goes live with the new provider, this would enable the existing and new provider to work togather to achieve the required outcomes in a more planned approach.

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there

is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

redudnancy costs if the service provision chagne is removed.

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes

The proposal for removing the servcie provision cahgne will hit lower paid and probably mostly female workers as they will often apply to traditionally female roles, such as Care and Support.

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

as above

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Your name:

Alex Lohman

2. What organisation do you represent (if any)?

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Charity or social enterprise

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

Your stated problems / difficulties and the assumptions that underpin them are not, in my experiance of numerous TUPE transfers involving what were deemed to be 'service provision' outsourcing exercises, problems or difficulties at all and the eventuial transfers did not result in the effects you state. TUPE did not inhibit competition or increase cost for any party, indeed they made it possible for smaller competitors to compete in the market. Repeal of these provision will destroy ability of SMEs to bid for such contracts.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

8. Do you believe that removing the provisions may cause potential problems?

Yes

SMEs will not be able to compete as they lack the inhouse resources to undertake the outsourced work without access to the workforce currently engaged on the work.

9. Do you agree that the employee liability information requirements should be repealed?

No

10. Would your answer be different if the service provision changes were not repealed?

No Response

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

12. Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

yes

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

Easier to align costs to cover viability of new provider and their business model

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

No Response

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No Response

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government’s proposals will have a positive or negative impact on equality and diversity within the workforce?

No

negative - see above. If staff do not transfer then employees seen as less efficient - in

practice those with dissabilities, would suffer as they tend to be first to be dismissed and hardest to re-employ.

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No - disabled people adversley affected due to less security of employment in a transfer sitaution

1. Your name:

Ariadne Associates

2. What organisation do you represent (if any)?

Ariadne Associates

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Individual

Adviser/consultant

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

It will lead to greater uncertainty for both prospective bidders for work and employees. Employees will not know if they have a right to transfer and bidders will be uncertain what liabilities they may be taking on. It is likely to lead to an increase in disputes and employment tribunal claims, and will particularly put off small business and charities from tendering as they will at a minimum have to spend significant amounts on legal advice

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

3 - 5 years

8. Do you believe that removing the provisions may cause potential problems?

Yes

See above (Q5) - increased uncertainty for contracting organisations and employees leading to increase in Employment Tribunal claims

9. Do you agree that the employee liability information requirements should be repealed?

No

The 14 day time limit is too short - at a minimum information should be provided 28 days before hand. Again this will lead to uncertainty for companies bidding for work as to who exactly they are "inheriting" and will lead to suggestions that companies which have lost contracts are "dumping" staff to the new contractor

10. Would your answer be different if the service provision changes were not repealed?

No - the point is still relevant to transfers which take place under the current (2006) regulations

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is

necessary for the transferee and transferor to perform their duties under that regulation?

Yes

12. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

This seems to match the current case law that an incoming employer must provide benefits of "substantial equivalence" where it cannot replicate those exactly

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

No Response

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that

'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

this will help avoid the situation where staff are transferred (a difficult time for them) and then find that they are "at risk" because of an ETO reason. Being "upfront" about potential changes will ensure that they know where they stand, rather than being forced to go through two separate processes

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

I believe that the most common sense approach is for ACAS to produce a code of practice on TUPE which would be admissible in any subsequent proceedings (similar to the current codes of practice on Disciplinary and Grievance Matters, and Redundancies)

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

See Q24 - the service provision changes are likely to increase uncertainty and an ACAS Code would be a very helpful way to assist with avoiding significant legal codes

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

Employers approaches to equality and diversity are unlikely to be affected

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Your name:

BRAL Limited

2. What organisation do you represent (if any)?

BRAL Limited

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Medium business (50 to 250 staff)

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

The provisions apply to widely, for example preventing companies leave service providers with whom they have unsatisfactory relationships becuase of fear that they will inherit emplyment liabilities as a consequence. This prevents efficient working and discrimiates against UK to UK relationships as an employee is more likely to want to transfer as opposed to, say, services being transferred from the UK to India.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

less than one year

8. Do you believe that removing the provisions may cause potential problems?

No

9. Do you agree that the employee liability information requirements should be repealed?

No Response

10. Would your answer be different if the service provision changes were not repealed?

No Response

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No Response

12. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No Response

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

No Response

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No Response

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No Response

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

No Response

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No Response

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

No Response

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No Response

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No Response

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No Response

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No Response

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with

staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No Response

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No Response

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No Response

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No Response

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No Response

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No Response

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No Response

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No Response

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

1. Your name:

Stephanie Evans

2. What organisation do you represent (if any)?

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Individual

Micro business (up to 9 staff)

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

less than one year

8. Do you believe that removing the provisions may cause potential problems?

No

9. Do you agree that the employee liability information requirements should be repealed?

Yes

10. Would your answer be different if the service provision changes were not repealed?

No Response

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes so that the process is open and transparent

12. Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

No - TUPE puts unecessary burdens on small businesses and restricts if not prevents the development of business activity within the UK economy taht woudl contribute to the

economic growth of the UK

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

Again supports smaller businesses.

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

No Response

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No Response

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

See rpevious answers relating ot eh economic growth of the UK and supporting small and medium businesses

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

21. Do you agree with the Government’s proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

AS above

22. Do you consider that the transferor should be able to rely upon the transferee’s economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

Simplifies the situation for all involved.

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

Simplifies and removes doubt and unneccesary debate

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

I htink micro businesses shoudl be given as much support as possible to make business decisions for growth purposes as simple as possible to allow a real opporutnity for the business to flourish and grow. I think this should be extended to small businesses as well.

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No Response

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Not a yes no question but I dont think it will impact.

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Your name:

3volution LLP

2. What organisation do you represent (if any)?

3volution LLP

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Legal representative

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

Whilst in many cases relating to service provision changes there can be pre-change dispute about whether there is "an organised grouping of employees", what amounts to a "principal purpose" of carrying out the activity etc, which increases costs to both transferor and transferee, in the majority of cases Reg 3(1)(b) has created greater certainty in a lot of cases, and that is preferable for transferor, transferee and employees. I believe that some of the concerns around TUPE providing "gold-plated" protection for employees can be satisfactorily addressed by making changes to some of the ways in which TUPE applies to protect employees and restricts transferees from (for instance making post-transfer changes to terms and conditions of employees) which are also raised in the consultation paper. I have formed this view based on my experiences of advising businesses (both transferor and transferee, including large organisations involved in facilities management who deal with service provision changes day-in, day-out) and their feedback on the main barriers to profitable business in dealing with contracting are not whether TUPE applies or not but difficulties such as post-transfer changes to location, job roles, harmonisation of terms and conditions of employment. Removing service provision changes will lead to increased litigation about whether TUPE does or does not apply, and this will usually be where the potential transferee has refused to accept that TUPE applies and therefore refused to accept the employees who have then lost their employment as a result. I don't see this as a beneficial change, at all, and I am speaking from the perspective of someone who principally advises employers and makes a living from handling ET claims.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to

helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

8. Do you believe that removing the provisions may cause potential problems?

Yes

See my response to Q.5 above

9. Do you agree that the employee liability information requirements should be repealed?

No

10. Would your answer be different if the service provision changes were not repealed?

No. However, I do believe that some changes do need to be made to Reg 11 to provide greater clarity and to assist with information and consultation processes. For instance, I agree with the suggestion that information should be supplied earlier than 14 days pre-transfer. In particular, I disagree with the Government's conclusions expressed at paragraph 7.35, and believe that in tendering situations an obligation on the outgoing contractor to supply certain minimum information on an anonymous basis at the tender stage should be included, and that leaving this to be dealt with in contractual provisions can lead to difficulties for subsequent transferees and that this can in turn adversely affect employees. It also places the incumbent contractor in a stronger position than other bidders. I also believe that Reg 12 should be amended so that the time limit for any claims by transferees for any failures by a transferor to compliy with Reg 11 should not be limited to 3 months from the date of transfer, but 3 months from the date that the transferee has become aware of a claim by a transferring employee for which it is liable and which stems from the transferor's failure to comply with Reg 11 (or to do so on time). As an example to clarify what I mean by this: say a transferring employee believes that he has not been paid an overtime bonus by the transferor that they were entitled to pre-transfer and brings an ET claim against the transferee pursuant to Reg 4(2) on the last day for him to be able to do so, if the reason that the transferee didn't pay the bonus was because of a failure by the transferor to inform the transferee about the employee's bonus (and therefore in breach of Reg 11). By the time that the transferee becomes aware of its potential liability to the transferring employee (i.e. when it receives the ET1 from the ET office), it will be out of time to bring a claim under Reg 12 against the transferor because Reg 12(2)(a) states that time runs from the date of the transfer rather than the date that the transferee becomes aware of a potential liability to a transferring employee. The provision of Reg 12(2)(b) will not assist the transferee in being able to persuade an ET that it should hear any claim brought out of time because the transferee will not be able to show that it was not reasonably practicable to have brought a claim within 3 months of the date of the transfer. In effect Reg 12 leaves a transferee in the position of either having to take the risk that the transferor has complied with Reg 11 and do nothing in the hope that an employee doesn't bring a claim which relates to the consequences of any failure to supply employee liability information, or to bring an ET claim under Reg 12 within 3 months' post-transfer just in case the transferor has not complied with Reg 11. Neither of these are practical.

11. Do you agree, that there should be an amendment to regulation 13 to make

clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes. This will reduce the potential for dispute between transferor and transferee about whether any consultation failures are the transferor's alone or the transferee's for not complying with Reg 13(4).

12. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

Without such a provision, until we have clarity from CJEU in the Parkwood Leisure case transferee employers are at a competitive disadvantage and at risk of being bound by changes to the terms and conditions of employment which it has not been involved in negotiating

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Yes. Transferring employees would still have protection of their terms and conditions of employment at the point of transfer for 12 months, but the transferee would then have some flexibility to manage employee terms more effectively.

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7)

should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

I agree with the reasons set out in the consultation paper

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

This is sensible and prevents artificial pre-transfer consultation not covering inevitable post-transfer redundancies. It will mean that pre-transfer consultation is more meanignful in many cases

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No Response

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Neither positive or negative

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Your name:

A proposed CIC as aspin off from in house LA Day Service Provision

2. What organisation do you represent (if any)?

A proposed CIC as a spin off from in house LA Day Service Provsion

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Charity or social enterprise

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

As someone proposing to take over and run some LA inhouse services as a Community Interest Company, I am completely bound by the huge costs in preserving the current staff groups pay and conditions. They put us at a huge competitive disadvantage in the market place. I would wish to reward staff well to retain and motivate them with the best possible package of pay training and conditions but need to have the flexiblity to do this as a new small enterprise. In addition I need to know that I am not going to have to enter into a ' bad faith ' agreement a part of my contract negotiations with the LA (my current empoyer) wherebye I promise everything will remain the same ,knowing that; I do not believe it can; that I do not really want it to; that economically it is not sustainable and that other commericial competitors would have to promise the same, but already have staff on less good pay and conditions from those in the LA they would seek to TUPE over should they win a contract in a tendering process.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

less than one year

8. Do you believe that removing the provisions may cause potential problems?

No

9. Do you agree that the employee liability information requirements should be repealed?

Yes

My response is predicated on my small area of work in LA Day Services for adults. I think we need much more freedom in this area. Social Care costs are overwhelming LA budgets and lowering the cost base of provision is one of the few ways in which quality can be maitained and improved

10. Would your answer be different if the service provision changes were not repealed?

No

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

yes

12. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes - but I would actually like the emphais to go the other way to support situations in which it cannot be maintained - or perhaps as proposed just for one year everything is set in stone, then ALL terms of employment can be re- negotiated.

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

From my narrow area of interest I think it has to be more flexible as in reality we need to lower our cost base and to find flexible ways of achieving this with the staff group

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

No Response

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No Response

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

No Response

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No Response

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No Response

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No Response

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No Response

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No Response

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

A positive impact as I would be able to employ more trainees, vounteers and apprentices who are usually further away from open employment for reasons connected with, equality and diversity, life chances , disablity, education

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

LA employees in care work would be affected by this process

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Yes

1. Your name:

National Offender Management service (NOMS)

2. What organisation do you represent (if any)?

National Offender Management Service (NOMS)

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Individual

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

a repeal of the 2006 SPC amendments would lead to greater uncertainty as to the application of TUPE to a transfer of a business/work. This is likely to lead to employers who have in-sourced on the basis of the 2006 SPC amendment being disadvantaged with unforeseen redundancy costs when the contract is re-tendered. The increase in uncertainty, due to the removal of the SPC element, will leave such employers with a surplus workforce who otherwise would have been considered in-scope to transfer.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

8. Do you believe that removing the provisions may cause potential problems?

Yes

see comments a Q5

9. Do you agree that the employee liability information requirements should be repealed?

No

the requirements where introduced because the ARD led to a distinct lack of information sharing and a decrease in the ability of both the transferor and transferee to meet their respective informing and consultation obligations. The 2006 requirements should be strenghtened, not weakened.

10. Would your answer be different if the service provision changes were not repealed?

no

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No - 'make clear' is to weak a statement. It should 'require' the sharing of persrciptive

information within a timeframe. This mightnot be achievable in all cases, but it is still better to have solid requirements that could be moved away from on an 'exception only' basis, rather than have an ill defined and non-enforceable set of guides. In addition, and statement like 'should give information to the transferee as is necessary' is likley to lead to onerous requests for information, that when not met will be cited in ET claims involving failures to inform and consult, not to mention the business time taken to corral and format said requested information.

12. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

changes should be allowed to be agreed and i like the fact that it should overall be no less favourable - this will allow some flexibility towards harmonisation and at the same time restrict wholesale erosion of T's and C's.

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Yes, new Collective Agreements can be established and the 'no less favourable' proposal will restrict erosion.

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

this will reduce the number of unfair dismissal claims, where under other circumstances (i.e. non-TUPE situations) the dismissal would have been fair.

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

the transferor does not own the ETO and if they were to make redundancies on that basis they would have to select from the transferor pool of employees, when the employer with the ETO does not have to place it's wider workforce at risk.

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No

more clarity and less interpretation the better

25. If you disagree, what would you propose is a reasonable time period?

obviously not applicable in all cases but 28 days would cover most if not all transfers.

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

I said no because I don't agree with all the proposed amendments.

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

unexpected redundancy costs via the repael of the SPC (see answer to Q5) additional adminstrative costs for unfettered requests for information additional legal costs for the reduced clarity of when TUPE applies

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

questions and response options do not match!

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Your name:

Boston Borough Council

2. What organisation do you represent (if any)?

Boston Borough Council

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Local government

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

The current legislation is complex and whilst we appreciate the risks for employees the current legislation is so prohibitive for business. It may be useful to provide for opportunities for voluntary transfers within the regs so for example in the event of a service provision change of a cleaning contract, the new contractor wished to take on the former employees they could do so legitimately.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

less than one year

8. Do you believe that removing the provisions may cause potential problems?

Yes

For employees more than business. Some employers are unscrupulous whereas others would try to do the 'right thing' if it were at all possible.

9. Do you agree that the employee liability information requirements should be repealed?

Yes

But should be replaced with specific guidance as to what should be provided.

10. Would your answer be different if the service provision changes were not repealed?

No

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes but again specific guidance should be provided.

12. Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely

reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

It is very difficult having different employees on different terms & conditions due to TUPE protection. It is very difficult to harmonise post transfer and this would assist. 'overa;ll no less favourable' needs properly defining in clear guidance otherwise pointless to put this in.

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

I am not familiar with the full details of this case.

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No Response

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

21. Do you agree with the Government’s proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

We have experience of TUPE situations entailing changes in location which were within the same county but very difficult to manage so would welcome such changes.

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

It would be easier to make any necessary redundancies pre transfer although the liability would remain with the transferor but fairer on employees to make their situation clear rather than transfer to a new employer and be made redundant quite quickly.

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

33. Have you any further comments on the issues in this consultation?

No Response

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

Shouldnt be an impact on equality as all staff will be treated equally. Anyone treated unfairly due to equality will have the right to make a relevant claim.

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Your name:

Juli Hicks

2. What organisation do you represent (if any)?

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Local government

5. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

I do not see why the first and second generation transfers should be treated differently. The protections should be the same for both. I also think that professional services should remain included.

6. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

7. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

1 - 2 years

8. Do you believe that removing the provisions may cause potential problems?

Yes

Depending on where you are in any tender/procurement process. This could lead to difficulities over negotiations and ambiguity.

9. Do you agree that the employee liability information requirements should be repealed?

No

10. Would your answer be different if the service provision changes were not repealed?

No Response

11. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

I think that there is the need for some clarity as to what should be provided and when. Again it leads to ambiguity and diffiuculties in the negotiations if you are having arguments about what is 'necessary'. Having been involved with a difficult transfer to a private sector company any ambiguity should be avoided.

12. Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

13. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

14. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

Only if the caveat is in that the terms are not less favourable- it is difficult enough to try and persuade employees and keep morale and performance up when you are going through a transfer process without the difficulties of them knowing that they will lose their T&C's after a year.

15. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

16. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

The parkwood Leisure judgement is around collective agreements agreed by a third party , and I can see that if you have had no influence in the decisions that have been taken (eg over pay negotiations) then that does not seem fair- however it continues to erode the terms and conditions of employees who through no fault of there own have been taken over by other organisations. How far down the chain is it before the original decision for transfer is so diluted that it no longer holds weight and therefore should not penalise an employer? The fact is that in every TUPE the transferee should know what he is taking on in terms of liability so hould honour those agreements.

17. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

18. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

19. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

20. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

21. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No

My concern is that you could get large companies transferring employees then making them redundant by moving the work elsewhere as a way of ridding itself of the workforce and keeping the business. I think there would need to be some restrictions to this.

22. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

I think common sense should prevail- transferors often have employees who wish to leave and the transferee agrees but they are all stuck in limbo due the regulations. There shold be the facility for discussions between all parties to agree dismissals prior to tranfer without the threat of a tribunal case hanging over them.

23. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

24. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

25. If you disagree, what would you propose is a reasonable time period?

No Response

26. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

27. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

28. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No Response

29. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

30. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No Response

31. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

32. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No

33. Have you any further comments on the issues in this consultation?

Ther should be a balance between protection of employees T&C's and sensible converstaions against organisations who want to take the business without the workforce behind it. It is often they that have made it successful in the first place.

34. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

35. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

36. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

2. Your name:

Rumbo Limited

3. What organisation do you represent (if any)?

Rumbo Limited

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Micro business (up to 9 staff)

Consultancy specialising in advising on outsourcings

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

We believe that it is in the interests of both employees and the businesses involved in any change in service provision that TUPE clearly applies, protecting the jobs of employees and maintaining continuity of staff, which is often important on more sophistcated services. Reverting to a less clear situation seems unwise (lack of clarity ends up as a pricing premium, reducing teh resources a customer can invest elsewhere - the premium is often "earned" by non-UK businesses) - as frankly does the recent case law which reduces the likelihood of TUPE applying on a service provision change.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

As we recall, the situation was in fact unclear, which cannot be good for employees or business, though no doubt the legal community will like greater ambiguity. The rest of this comment applies to the following point, ie Q8 - we would suggest that all contracts signed before the change you propose is introduced ought to be judged by reference to the test that was in place at the date the relevant contract was signed. Some deals are very long term.

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

9. Do you believe that removing the provisions may cause potential problems?

Yes

See the comments in Q7

10. Do you agree that the employee liability information requirements should be repealed?

No

We have seen incumbent suppliers cause their customers real dfficulty by refusing to give any information about transfering employees, unless they absolutely have to (it is hard for a new supplier to quote if it does not have an accurate idea of the cost base it will inherit, other than on a cost plus basis - and a cost plus solution is not generally what customers want). Suppliers certainly resist providing information

that would allow a customer to go out and market test in order to decide whether to re-tender or just extend its existing arrangement. While a contract can give broad rights to information we believe that an increasing number of unsophisitcated purchasers in the private and public sectors will fail to draft their contracts apropriately and then be exloited by suppliers, if your proposal goes ahead. In our view a better approach would allow customers to obtain information at various stages over the contract life cycle so that they can manage their contracts responsibly, even if they cannot afford decent advice.

11. Would your answer be different if the service provision changes were not repealed?

No

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

This is far too narrow - see our points in answer to Q10

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Not our field so we offer no view

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

We have no view on this

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No Response

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

The current position seems unnecessarily generous to employees

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

It would in some situations make deals easier to implement, giving the provider a baseline of staff who are all pulling in the right direction, rather than fearing for their jobs

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No

an unneceassary level of detail.

26. If you disagree, what would you propose is a reasonable time period?

No Response

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Anything that is less than clear will add to their costs. See our comments on Q6 and Q10 by way of example

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

We encourage clear regulation that can be easily implemented by business. We wonder whether you might also seek to make it clear whether software as a service or cloud services trigger TUPE. We assume not unless they are specific to a client, but we anticipate that this issue will come up in the near term. Confirmation that TUPE does not apply would in our view make the UK more attractive for these newer service offerings.

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes

teh proposals seem to us to mave n impact on equality or diversity.

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

We have not reviewed the impact assessment.

1. Confidentiality & Data Protection Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

Yes, I would like you to publish or release my response

2. Your name:

MAD HR

3. What organisation do you represent (if any)?

MAD HR

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Small business (10 to 49 staff)

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

In many circumstances service providers lose their "contracts" due to not providing the level of service required by their client. In many cases this is down to those running and/or working on the service provision contract. Applying TUPE in this situation, does not allow for either the new services provider or clients to improve their service provision as the failures may be down to the employees or managers themselves and the new providers just "inherit" the problems. Having to take over employee's existing salaries - which are often inflated directly before transfer by the outgoing provider, does also not allow for new providers to be able to reduce costs and be competitive. Over a period of time, this will have a detrimental effect on the UK economy.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Unsure

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

1 - 2 years

9. Do you believe that removing the provisions may cause potential problems?

Yes

Unethical employers could outsource or insource in order to reduce salaries or get rid of certain employees.

10. Do you agree that the employee liability information requirements should be repealed?

847

The information should be given by the transferor well in advance to allow for comprehensive due diligence.

11. Would your answer be different if the service provision changes were not repealed?

No

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes but clarification and guidance on what this actually means in practice needs to be included

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

As long as it is no less favourable to the employee this would help businesses reduce their management costs

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

A static approach should apply. From a financial perspective, it would be impossible for the new business to budget for changes that they are not involved in e.g. pay increases.

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

It will make the issue a lot clearer and will allow for easier comparison againt European case law

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

26. If you disagree, what would you propose is a reasonable time period?

No Response

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

No

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes

I cannot see that it will have any particular impact

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Too much detail to look through

1. Confidentiality & Data Protection Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

Yes, I would like you to publish or release my response

2. Your name:

Notts County UNISON, branch secretary

3. What organisation do you represent (if any)?

Notts County unison,branch secretary

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Trade union or staff association

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

I feel this would be a significant watering down of the current law, to allow employers more readily to evade TUPE

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

9. Do you believe that removing the provisions may cause potential problems?

Yes

It will lead to all the unclarity. And hence litigation that existed pre 2006

10. Do you agree that the employee liability information requirements should be repealed?

No

11. Would your answer be different if the service provision changes were not repealed?

No Response

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No Response

13. Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely

reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

No

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

It will give carte blanched to employers to change terms and conditions after a year. Overall the change may notbe less favourable but aspects of it could be

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No Response

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Not qualified to answer

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

No

Again,my fear is that this would reduce the rights of the workers

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No

22. Do you agree with the Government’s proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No

This will widen the scope of ETO to the employers advantage

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

This would seem to fast track consultation on redundancies

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No

26. If you disagree, what would you propose is a reasonable time period?

6 weeks

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No Response

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No

34. Have you any further comments on the issues in this consultation?

I think the intent of these proposals is to reduce workers rights,tipping the balance even more in favour of the Employer than it is already,so for that. Reason I totally oppose them

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

The question is highly ambiguous as it contains both ' positive and ' negative ' within it. I feel the proposals and iwill have anegative impact on equality and diversity.

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Confidentiality & Data Protection Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

No, I don't want you to publish or release my response

2. Your name:

1. Confidentiality & Data Protection Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

Yes, I would like you to publish or release my response

2. Your name:

Andrea Denham

3. What organisation do you represent (if any)?

No Response

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Local government

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

This will provide more options and flexability for local government service provision. Outsourced services may be more cost effective without the burden on local government terms & conditions (including pension)

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

less than one year

9. Do you believe that removing the provisions may cause potential problems?

Yes

Likely to lead to redundanices at the point of retendering contracts or outsourcing services. More resistance from trade unions to outsourcing

10. Do you agree that the employee liability information requirements should be repealed?

Yes

The 2 week before transfer deadline should be moved to significantly earlier in the TUPE process as information about the transferring employees is need to determine measures and build new payroll elements into systems.

11. Would your answer be different if the service provision changes were not repealed?

No

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is

necessary for the transferee and transferor to perform their duties under that regulation?

Yes, some examples or statement of what this would include will assist transfers

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

This is essential to new employers having control over policy change and pay awards of the transferred staff group

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Yes, if a static approach applies this allows the new employer to makes changes in line with the rest of their workforce to the transferred group.

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

There are regularly needs to make sustantial changes because of a transfer which are not an option to the new employer e.g. change of office/location. This is often beyond the control of the new employer and should not cause unfair dismissal to be claimed

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

Often reorganisation needs to take place following the merger of services. Ideally you would want services to be restructured for the first day of transfer rather than starting consultation for potential redundancy/job changes from the first day. By allowing transferors to being consultation on changes prior to transfer they have the opportunity to redeployee staff into the remainder of their workforce where appropriate.

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

All transfers are different and it would allow for flexability in determining what was appropriate based on the size of the transferring group and the timescale for the transfer

26. If you disagree, what would you propose is a reasonable time period?

No Response

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No

34. Have you any further comments on the issues in this consultation?

No Response

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

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Yes, I would like you to publish or release my response

2. Your name:

MacRoberts LLP

3. What organisation do you represent (if any)?

MacRoberts LLP

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Medium business (50 to 250 staff)

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

The intention of the proposals is to improve and simplify the TUPE Regulations. However, the proposed repeal seems directly at odds with such an intention. It is our view that the repeal of these provisions would serve only to increase uncertainty in this area for both employers and employees as to when TUPE is applicable, effectively returning us to the pre-2006 position. This lack of clarity would likely give rise to satellite litigation and a resultant increase in legal costs for litigants. This increase in both uncertainty and costs seems at odds with the Government's further intention to boost business growth.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Both domestic and European pre-2006 case law in the context of service provision changes highlights the uncertainty which existed in this area prior to the 2006 amendments. In the absence of specific provision in the Acquired Rights Directive or TUPE 1981, the question of whether outsourcing constituted a "relevant transfer" was decided on a case by case basis. This created a piecemeal legal test, which was inconsistently applied. For example, the ECJ stated in Suzen v Zehnacker Krankenhausservice etc 1997 ICR 662, ECJ Case C-13/95, that protection under the Directive would only be available if at least part of an existing operation (whether assets or staff) was transferred to new ownership. That test was quickly given domestic application by the Court of Appeal in Betts & ors v Brintel Helicopters CA 1997 ICR 792, CA. However, some business functions did not fall under either of the categories identified in Suzen (assets or staff). This problem was pointed out by the Court of Session in The Scottish Coal Company v McCormack [2005] All ER (D) 104, in which it was recognised that an 'infinite range of intermediate possibilities' exist. Another case, Cheesman v R Brewer Contracts, 2001, IRLR 144, went so far as to say that Suzen should be ignored altogether. It appears therefore that the domestic test relating to service provision changes pre-2006 was not aligned with that in the Directive (as interpreted by the Court of Justice of the European Union). A return to this position of uncertainty should be avoided.

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

3 - 5 years

9. Do you believe that removing the provisions may cause potential problems?

Yes

Service providers will have entered into existing contracts on the understanding that TUPE will apply at the end of the contract, and will have tendered appropriately. The commercial consequences could be eye watering. The removal of the provisions would have to be implemented in such a way as to take this into account, perhaps through a staged approach.

10. Do you agree that the employee liability information requirements should be repealed?

No

11. Would your answer be different if the service provision changes were not repealed?

No.

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No. In our view, the Employee Liability Information provisions are beneficial in that they provide for the open provision of information between transferors and transferees. The issue, as highlighted by the Consultation, is that information need only be provided 14 days prior to the transfer. Often, this is too late, and causes problems for transferees. Therefore, it seems counterintuitive to repeal the employee liability information requirements entirely. The suggested amendment to regulation 13 does not remedy this problem. In our view, it would be more appropriate to amend the employee liability information rules so as to impose an earlier date for the provision of the necessary information.

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes. The exception for economic, technical or organisational reasons entailing changes in the workforce provides necessary flexibility for transferees. The proposed amendment of regulation 4 is intended to remove the "significant burden" caused by a lack of provision for post-transfer harmonisation. The removal of the exception for economic, technical or organisational reasons entailing changes in the workforce would act against that intention. It would be a case of one step forward, one step back.

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

We agree that it in an untenable position for employers to be bound without limitation by collective agreements which they have not negotiated and may not be aware of. The current position under TUPE gold plates the Directive, and is unnecessarily restrictive for transferees.

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Yes. A 'dynamic' approach would cause great uncertainty for transferees/employers. Collective agreements relating to an employees original employer may well clash with any variations to terms and conditions made by the new employer. Such a 'dynamic' approach would therefore be directly at odds with the proposed amendment.

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

As currently worded, Regulation 4(9) is too onerous. Currently, a substantial change in working conditions may give rise to claims of constructive dismissal even when that substantial change does not constitute a breach of contract. Furthermore, the substantial change may be out with the transferee's control. The wording of article 4(2) of the Directive strikes a far fairer balance between the interests of the employee and the employer.

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

The position as it stands creates a box ticking exercise. In order to escape liability for automatic unfair dismissal, employees remain employed by the transferor until the transfer and are then dismissed by the transferee for an economic, technical or organisational reason entailing changes in the workforce. This means that employees are employed for longer than is necessary when there is an economic, technical or organisational reason for them not to be. An amendment to enable the transferor to rely upon the transferee's ETO in respect of pre-transfer dismissals would remove this box ticking exercise, increase certainty for both parties, and decrease costs for employers.

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

The provision of guidance on what constitutes 'reasonable time' for the election of employee representatives will allow for a detailed description of what factors should be taken into consideration when determining what is appropriate in any given situation. The amendment of Regulation 13(11) to provide a set timescale would likely be too rigid to appropriately accommodate all cases.

26. If you disagree, what would you propose is a reasonable time period?

No Response

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

No Response

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

We cannot foresee how any of the proposals would have any positive or negative impact on equality and diversity within the workforce. The TUPE regulations apply to the transfer of a workforce, not the recruitment of individuals.

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No.

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Yes.

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Yes, I would like you to publish or release my response

2. Your name:

Legal & General Group Plc

3. What organisation do you represent (if any)?

Legal & General Group Plc

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Large business (over 250 staff)

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

We believe that the TUPE Regulations 2006 have provided clarity and certainty to businesses. Whilst it is not always desirable that employees transfer with the services, the pre-2006 position was confusing and difficult to manage – both for service providers and clients. The fact that TUPE was unlikely to apply, but might sometimes apply, made negotiating agreements for the provision of services difficult and time consuming. If it were possible to change the law so that TUPE never applied to service provision changes then this would be welcomed. However, due to the wording of the Acquired Rights Directive and CJEU case law this is not possible. As such, we believe it would be better for TUPE to continue to apply in the vast majority of service provision change situations. In most cases this makes negotiation of agreements for the provision of services much more straightforward. We do not believe that it would be desirable to return to the Suzen test of trying to establish whether in each particular outsourcing there is a transfer of either significant tangible or intangible assets or a major part of the workforce in terms of numbers and/or skills. Whilst we acknowledge that there has been some litigation in relation to whether TUPE 2006 will apply to particular service provision changes (in particular relating to fragmentation of services), nevertheless we believe that the position under TUPE 2006 Regulations is more straightforward and less liable to challenge.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

9. Do you believe that removing the provisions may cause potential problems?

Yes

Pre-2006 it was difficult to establish whether or not TUPE was likely to be applicable to

service provision changes. This meant that negotiating agreements for the provision of services was time consuming, requiring detailed negotiations and specific drafting for each contract. Under the current regime, TUPE is highly likely to be applicable which makes it easier to negotiate and to agree terms in commercial contracts (including how to apportion liability). Repealing the provision will also cause difficulties in respect of contracts that have already been entered into, many contracts will have been drafted on the assumption that TUPE would apply on termination. This will mean that service providers who have taken on employees and liabilities on the commencement of an agreement are very likely to be left to bear the costs and risks of making redundancies if and when the client changes service provider or brings the services back in-house. As indicated at question 8, if the Government does repeal the service provision changes we believe that there would need to be a lead in period of at least 5 years. This is because businesses will have entered into commercial contracts on the understanding that TUPE would be applicable on termination. By allowing a long lead in time, businesses will have the opportunity to mitigate their risks.

10. Do you agree that the employee liability information requirements should be repealed?

No

It is essential that the transferor is required to provide the information needed by the transferee. The information is not simply required for the purposes of information and consultation, but also to allow the new employer to properly set up payroll etc. We believe it would be extremely unhelpful if the requirement to provide information were removed as the current wording ensures that the transferee at least receives some basic information about the transferring employees. Rather than removing the provisions, we would instead suggest that the transferor should be obliged to provide the information earlier and that they are also required to provide better information (including details of terms and conditions relating to redundancy).

11. Would your answer be different if the service provision changes were not repealed?

No.

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes.

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes.

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

There needs to be more flexibility to allow changes to terms and conditions of employment. Employers should not be bound by a collective agreement to which they are not a party and which they therefore have no power to negotiate. We therefore agree that the Government should limit the applicability of a collective agreement to the shortest period allowed by the Directive and CJEU case law.

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Yes, employers should be given as much flexibility as possible to harmonise terms and conditions of employment.

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No

We do not agree that replacing the current wording at Regulation 4(9) with the wording at 4(2) of the Directive would alter the position. The wording of the Directive states that “the employer shall be regarded as having been responsible for termination of the contract of employment or the employment relationship”. When Employment Tribunals have to interpret this wording, it is difficult to see how it could be interpreted otherwise than the employer having dismissed the employee. As such, the new wording will be interpreted to mean exactly what Regulation 4(9) currently says. We do not believe that simple replacement will be enough. If the Government wishes to achieve its stated objective, then it should replace the wording as suggested and also insert new wording to make clear that Regulation 7 will only be applicable in these situations where the employer has committed a repudiatory breach of contract. In other words, where there is no repudiatory breach of contract, the dismissal will not be automatically unfair and (if Regulation 4(10) were to remain) the employer will not be liable for payment of any un-worked notice period.

22. Do you agree with the Government’s proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce'

covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

It is unnecessarily burdensome (and confusing to employees) that their employment has to transfer to the transferee before they are made redundant.

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No

We believe that putting in place guidance may cause more confusion because what is "reasonable" will always depend on the particular circumstances of the case.

26. If you disagree, what would you propose is a reasonable time period?

We believe that it is not possible to answer this question as it will be dependent on the particular circumstances.

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

No Response

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

We believe that the changes proposed by the Government in respect of service provision changes are unhelpful as this will mean a return to the pre-2006 position of relying on the Suzen test to try to establish whether in each particular outsourcing there is a transfer of either significant tangible or intangible assets or a major part of the workforce in terms of numbers and/or skills. We believe that the position under the TUPE 2006 Regulations is more straightforward and less liable to challenge.

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No.

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Confidentiality & Data Protection Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

Yes, I would like you to publish or release my response

2. Your name:

Crime Reduction Initiatives (CRI)

3. What organisation do you represent (if any)?

Crime Reduction Initiatives (CRI)

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Charity or social enterprise

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

Over the last few years it has become increasingly difficult for not for profit organisations to remain competitive within the public service sector market due to the obligations under TUPE and the protection afford to public sector staff transferring (ie Fair Deal arrangements on pension, enhanced benefits etc), the nature of our business is such that the majority of contract award comes from local authority and local government funding therefore until the obligations under both TUPE and Fair Deal are removed or at least diluted (and SPC will be the main element in this) the restriction will continue on our sector.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

I would not wish to go back to the pre 2006 case law and TUPE Regulations as the changes brought in under the 2006 TUPE Regulations resulted in an easier application of the legislation for employers. Specifically for SPC however, the focus should be on the actual service entity being transferred and those employees specifically assigned to same with less emphasis on the automatic assumption that TUPE applies rather than not ie old TUPE.

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

less than one year

9. Do you believe that removing the provisions may cause potential problems?

No

The fact that employers are used to the SPC arrangements now will result in some issues arising, inevitably for employers to then get used to the new approach but the greater benefit in removing SPC will be dilution of restriction for providers coming into the market and a greater variety of providers involved in competitive tendering and bidding for services - there are already considerable volumes of emloyment tribunal cases being

managed because of SPC, therefore do not see this as having an impact detrimentally by elminating it.

10. Do you agree that the employee liability information requirements should be repealed?

No

Due to the automatic liability obligations on the Transferee it is essential that the requirement remains in place for the Transferor to provide as much employee liability information and data as possible before the transfer takes effect. Transferees will be put in a difficult position both pre tender stage (as they will go in 'blind' to what they need to cover and provide for in submitting their bids etc) and post transfer (if they find out after the transfer about disciplines, grievances that could lead to ET claims, any personal injury claims, etc)

11. Would your answer be different if the service provision changes were not repealed?

No, regardless of getting rid of the SPC, any TUPE transfer that is confirmed to take place, employee liability information must be a part of the consulation process for any and all TUPE transfers.

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes, as above, the Transferee automatically takes on a degree of liability under TUPE anyway, but we will go back to Old TUPE days if we stop providing this level of detail at the relevant stages within consultation - due to TUPE obligation there is no entitlemen to recourse if the Transferee finds themselves having to defend claims and financial obligation for transfering employees.

13. Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

This is the cause of many (too many) employment tribunal claims and will continue to be so if the arrangements don't change. Discussion on changes to terms and conditions will invariably be part of every transfer both pre and post consultation with transferrng employees. The very nature of service provision change results in a change to the way that service is carried out, this has the impact of employees previously carrying out that service doing it in a differrent way ie hours, location, role etc and therefore the fact that the Transferee has won the contract award on the basis they are providing a different service provision should justify the ability of that Transferee to ensure they have the right resources, right place, right arrangements to ensure the service provision is met.

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

yes, for the same reasons above. No commissioner will want a new provider to come in and give them the same service delivery as before, the Transferee has either won the contract award through tendering for a failing service or a service requiring a new approach with new deliverables, therefore the ability of the Transferee to ensure they can put in place the appropriate arrangements and resources to provide this change of service provision should be kept - all ETO reasons should be retained as they cover all areas for

the Transferee to consider in relation to SPC

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

I agree that any collective agreement should either be restricted to one year post transfer or not at all, considering the Transferee was not part of the collective agreement in the first place why should it have to abide by the agreements contained for transferring employees. Currently we do protect contractually based collective agreements in relation to cost of living but this should be changed from the proposed 'no less favourable' position (in the question) as after a year, the transferred employee has worked for the Transferee within the Transferee's organisational framework and therefore this should determine the factors associated and contained with any collective agreement. Goes in line with the arrangements for recognised union agreements - these don't transfer, but post transfer new agreements should be put in place with the union in order that both transferring employees and the Transferee can agree the employment arangements between them (within the new working environment rather than having to check back at the Transferor's working environment)

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

TUPE needs to be flexible in relation to the changing conditions within the workplace therefore I do not agree that a static approach will work. It was because of the Old TUPE restrictions that the new 2006 TUPE came in, therefore any move to return back to old TUPE will be wrong and place further restrictions on Transferees.

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

Yes

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

No

I do not agree with this because of the history and experiences of the UK and EU case law - it is historically known that the EU operates the Directive differently to that of the UK, and visa versa thereofre there has continually been conflict between the EU and UK in the interpretation of the Directive and TUPE. I do however agree that the wording of Regulation 7 should be amended to lift the current protection transferring employees have to the automatic right to protection against dismissal becuase of a transfer taking place -

there are too many different circumtances in which employment terminates as a consequence of TUPE transfers taking place, some of which are genuine and justified but the legislation at the moment does not recognise this.

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

This will bring in line the original requirements under the Directive.

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

This again forms the basis for hundreds of employment tribunal claims and is the subject of debate each time a transfer takes effect. Its currently too vague to interpret within the Regulation sufficiently for Transferees to work with confidently and with the conflict in case law between the EU and UK not able to be relied on, that coupled with the fact that changes usually include location and redundancies it would make the decision making and job matching process a lot easier

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

Our organisation used to follow this process a few years ago, it was on the basis that both Transferor and Transferee and the union reps were in agreement that it was okay to proceed on this basis, employees preferred to do it this way as they knew what their own individual situation was going to be a lot quicker. This worked extremely successfully for all parties, and made the transitional process post transfer much smoother and easier. The impact to the Transferee was less conflict with employees transferring and avoidance of ET claims, along with better consultation with Transferor. Would highly recommend this as a way forward.

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

for the reasons stated above.

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

This has not in my experience been a major problem but the more clarity can be given in relation to this, considering it is a formal process the better, especially in light of situations whereby the employees or Transferor has never been through this type of situation before. It can cause confusion so more clarity would be beneficial. Specific time and deadlines for arrangements should be included to fit in with the consultation process pre transfer.

26. If you disagree, what would you propose is a reasonable time period?

Don't disagree, see above.

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

TUPE applies to one employee/person as to many therefore the same arrangements should apply across the board. A transfer can be one person rather than a service which is why its important to have the regulation apply throughout.

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Effective, robust and confident handling of the TUPE process always ensures a quicker, smoother and less restrictive road through the process of transfer. Many a conflict was resolved when the parties realised they were talking from the same position, but communications up to then had not been effective.

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

There have been opportunity in the past for the Government to amend TUPE or at the very least amend some areas to enable providers an easier time of it through the transfer process. If we continue to work to New TUPE the public service sector market will lose a considerable volume of providers bidding for services, therefore quality and delivery of services will dilute with only a small number of providers being in the position of being able to take on and provide new services. Within the curernt economic climate the current restrictions must be lifted in relation to Fair Deal and TUPE to open up the market and allow more competition through. This includes both private and not for profit sectors

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

Dont think this has anything to do with equality and diversity in relation to workplace. TUPE applies to any employee working in the service to be transferred therefore there is no distinction in that and regardless of the changes proposed, this will not have an impact. The diversity of service providers however will have an impact, and if the proposals are agreed and implemented then you will see a more diverse service supply in terms of providers

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

no

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Cannot comment further.

1. Confidentiality & Data Protection Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

Yes, I would like you to publish or release my response

2. Your name:

PricewaterhouseCoopers LLP

3. What organisation do you represent (if any)?

PricewaterhouseCoopers LLP

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Large business (over 250 staff)

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

We consider that the repeal of the service provision change wording in TUPE would add to the burden on employers, particularly in relation to outsourcing contracts. The current wording, whilst it might amount to “gold plating” of the Directive to a certain degree, provides certainty upon an initial outsourcing and upon second generation and subsequent outsourcing contracts. Repealing the wording would mean that the parties to an outsourcing agreement would be obliged to consider the detailed staffing arrangements relating to the outsourced functions in great detail. Under CJEU caselaw, it will be necessary to consider difficult questions of whether an economic entity is being transferred, and different decisions could result depending on whether the activities are labour intensive, or reliant upon the transfer of assets It is currently difficult to obtain the necessary information on staffing arrangements in outsourcing situations and this situation will become more difficult if the proposed changes on employee liability information are implemented (see our response to question 10 below).We consider that there will be more disputes between the parties to an outsourcing contract on whether TUPE applies if the service provision change wording is repealed. In our view, therefore, this proposed change would not act as a spur to competition within the outsourcing market. The reverse is more likely to be the case. Also, any current uncertainties on who is “assigned” to transferring activities is a separate question to whether TUPE applies in those circumstances and should remain so

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Our reading of the pre-2006 caselaw is that it reflected the position as set out in the 2006 definition of a service provision change. However, employers will not be able, in our view, to simply rely on those cases. This is because UK employment tribunals must adopt a purposive approach to interpreting TUPE and will therefore have to take into account post 2006 CJEU decisions which will again lead to greater uncertainty

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

9. Do you believe that removing the provisions may cause potential problems?

Yes

If the service provision change definition is to be repealed, we consider that there should be a lengthy lead in time. This is because most outsourcing agreements in our experience last for between three and five years. Such agreements currently in place have been entered into on the basis of the current legislative wording, and the parties to these contracts may well be prejudiced if this wording is changed before the contract period expires. For example, an existing service provider could find itself liable for unexpected redundancy costs if employees engaged in transferring activities are not covered by TUPE at the end of the contract period

10. Do you agree that the employee liability information requirements should be repealed?

No

We agree with the limitations on the usefulness of the employee liability information rules in regulation 11 of TUPE as expressed in the consultation paper, and with the fact that the parties to a contract involving TUPE normally rely on arrangements agreed between themselves rather than regulation 11 itself. However, we do not agree that these matters justify the repeal of regulation 11, which remains useful for a number of reasons: • the fact that regulation 11 exists makes it easier to agree on a wider disclosure regime when negotiating contracts; • it acts as a “long-stop” provision when more extensive disclosure cannot be mutually agreed; and • it protects an entity which may have employees transferred to it under TUPE but which is not a party to the contract (for example, a second generation outsourcing provider). We would also point out that, in considering reducing the burden of TUPE on employers, that there is a case for extending the provisions of regulation 11 to cover additional areas where the law imposes obligations following a TUPE transfer. For example, we consider that regulation 11 should include an obligation on a transferor employer to provide information on whether a transferring employee has a work permit or other entry clearance to work in the UK. The transferee employee may become liable to civil and criminal penalties for employing someone illegally, so it is important that this information is provided in advance.

11. Would your answer be different if the service provision changes were not repealed?

No. We consider that regulation 11 should remain in place whether or not the definition of service provision change is repealed. However, we would note that the repeal of regulation 11 at the same time as the service provision change definition will lead to even greater uncertainty because many outsourcing and other situations would still be caught by TUPE.

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes, we agree with this change.

13. Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

This change would give the employer more flexibility without prejudice to employees, subject to the new terms being no less favourable overall. However, this change would result in an anomaly between employees whose terms are covered by collective agreements and those for whom terms have been negotiated individually. We are not aware that terms for the latter group may be changed in this way after any particular period following a TUPE transfer.

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

We agree that if a static approach is determined by the CJEU, such a change would provide additional flexibility particularly where the transferee employer is not a party to the relevant collective bargaining machinery. In such circumstances, continuation of collective terms may be inappropriate and, in many cases, very difficult to achieve

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

Yes

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

We do not see any reason for an employee who has been transferred to a new employer to be placed in a better position than an employee who has remained with the same

employer in relation to changes to working conditions. It is preferable to rely on the UK test of establishing whether there has been a breach of contract, and whether that breach is sufficiently fundamental as to amount to a constructive dismissal.

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

The current situation under TUPE is that it is is difficult for the transferor employer to rely on the transferee's "ETO" reason when dismissing an employee. This can prejudice the employee in some circumstances. For example, the employee may lose out on the transferor's enhanced but non-contractual redundancy payment terms. Also, the employee loses out on the right to be considered for any suitable alternative posts that might be available within the transferor employer (such consideration is necessary as part of a fairly conducted redundancy exercise). We therefore consider that a change here would be desirable but recognise that this could in certain situations adversely affect the employee: for example by losing out on alternative employment opportunities within the transferee employer, and the right to be pooled for redundancy purposes with equivalent employees within the transferee. In any event, such a change as is proposed will also require consideration of whether it is necessary for the legislation to explicitly state that TUPE consultation under regulation 13 may take place concurrently with redundancy consultation under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 so that the transferee employee does not inherit any liabilities here.

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

What is reasonable will depend upon the circumstances of each case and would not be feasible or useful to definite in legislation.

26. If you disagree, what would you propose is a reasonable time period?

-

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No Response

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No Response

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No Response

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No Response

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

re question 16 above, the Fiex-Term Employees Regs 2002 already provide a similar mechanism for looking at overall terms.

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No Response

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

The link at the start doesn't take you directly to these, and a search on site doesn't find them either. ditto

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Yes, I would like you to publish or release my response

2. Your name:

Lifeline Project Limited

3. What organisation do you represent (if any)?

Lifeline Project Limited

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Charity or social enterprise

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

Lifeline would support amendments to the SPC provisions to provide greater clarity for contractors and affected employees over the circumstances in which a SPC transfer is likely to occur. Lifeline would further support such amendments which would reduce the risk of undue hardship to affected employees where there is a dispute between transferor and transferee over the applicability of TUPE. Lifeline considers that this could be achieved through: 1. amending the SPC provisions so as to require the “client” to provide an unequivocal statement as to whether they intend for essentially the same activities to be carried on by the incoming contractor (or by the client on their own behalf) whenever there is a change in contractor; 2. amending the SPC provisions so as to require the relevant contractors and the client and the representatives of affected employees to endeavour to reach an agreement, in good time prior to the commencement of the incoming contractor’s contract, over whether or not TUPE applies to the change in contractor; 3. enabling the relevant parties, in the absence of an agreement to have recourse to the Employment Tribunal for an expedited hearing, prior to the date of the change in contractor for a judicial determination of the issue of whether or not there shall be a relevant transfer. Explanation: A better balance must be struck between the interests of organisations competing for tenders for outsourced services, the interests of the commissioning clients and the interests of the affected employees. Of the three, the need to protect the rights of employees must remain the primary concern, but it is not the only concern. The pre-2006 position, necessitating reliance on the test in “Spijkers” to determine whether a service provision change amounted to a relevant transfer (as a transfer of an economic entity that retains its identity) was proven to be insufficient in ensuring a fair balance of those interests. Because of this, the 2006 Regulations were introduced to include the SPC extension. Seven years later, the 2006 Regulations have highlighted further imperfections or weaknesses, spawning a number of legal challenges to the question of whether or not they are sufficient to determine the question of a relevant transfer in any given case. Our sense is that these legal challenges have gained more impetus and have increased in number following “Metropolitan”. We consider the better alternative to a simple repeal of the SPC Regulations would be to instead address the areas of uncertainty upon which parliament can have an influence through better

regulation. In this regard, we propose placing more emphasis within the legal test for a relevant SPC transfer upon the intentions of the client that intends to purchase the services. This intention should be clearly expressed during the tender process and at the contract award stage. We think that it is essential that clients/commissioners should be legally required to state their opinion as to whether or not TUPE applies to the new contract (e.g.: that they intend through the tender exercise to purchase services which are essentially the same as those which are purchased from the existing provider). That opinion should be legally influential / persuasive. We note that there is already some scope within TUPE to have regard to the intentions of the commissioners within the current TUPE Regulations but this probably is in need of further amendment to have the desired effect: [See Regulation 3 (3) (a) (ii)]. The status quo permits the clients that control the award of relevant contracts, the architects of the putative SPC transfer, to remain silent on the question of whether or not their design (or their redesign) of the services that they require would amount to a relevant transfer under TUPE. We think that is wrong. Clients have a moral if not legal obligation to take a lead on the TUPE question, be they a branch of government or a private business. In the event that there remains a dispute between other interested parties in the tender process over the applicability of TUPE. We propose that the parties should have access to an expedited legal process to help determine the question of whether or not TUPE applies before the transfer date. The timing of the resolution of this question is of critical importance to mitigate/prevent injustice for the affected employees. The present system can result in employees being caught in the middle of a dispute between the outgoing and incoming contractors over whether or not TUPE applies. Such employees find themselves in an invidious position. It is not uncommon for those employees to be instructed by the outgoing contractor (their employer) to turn up for work on the commencement of a new contract at the incoming contractor’s premises knowing that their presence will be unwelcome and only to be turned away. Those employees remain in the middle of a legal dispute between the outgoing and incoming service provider and are left with no real choice but to seek legal redress against those organisations: to seek compensation for unfair dismissal (where they have sufficient qualifying service) and redundancy and loss of notice or pay owing. In most cases employees affected in this way are left without any pay beyond the end of their former employer’s contract. They leave with no notice or payment in lieu of notice and receive no accrued holiday pay. We think that this is a serious flaw in the present system and must change. Until it is changed, and changed for the better, the employees rights will not be adequately protected. We propose the creation of a new right of action at the Employment Tribunal through which the commissioner, the transferor and the transferee can seek, if necessary, a judicial determination of the question of whether or not TUPE applies. Consideration may also need to be given as to whether or not the transfer of the services should continue pending the Judgment of the Tribunal and certainly in the case of the award of contracts for Public Services and possibly also the award of contracts for services in the private sector over a particular value or which affect a particular number of employees. Until this flaw in the TUPE system is resolved, the inequities that render affected employees at risk of sudden joblessness will always arise. We consider that that risk will remain a feature of the TUPE Regulations whether or not the SPC is repealed. Alternative: Should the government proceed with a proposal to repeal the SPC, we think that any such steps should be deferred for at least three years, in order not to cause unfair prejudice to the interests of the holders of contracts that were entered into in the reasonable belief, understanding and expectation that TUPE would apply at the expiry of their contracts provided the client’s requirement for the activities continued. When balancing the interests of affected parties and employees one has to have regard to the interests of the employers who took contracts on under the present regime, in the reasonable belief and expectation that if and when their contract was lost the same legal

rules on TUPE would apply. In other words, those organisations have a legitimate expectation that provided there is a continuing need for essentially the same services once their contract has expired, that TUPE would apply if a contract for those services is awarded to new contractor. We think that to change the system partway through the period of those contracts risks inequity and prejudice for the current contract holders (and their employees) if the effect of repealing SPC would, as it would seem to, mean that TUPE is less likely to apply in service provision change cases. Contractors will find themselves at risk of having to bear redundancy and other termination costs that they may not have factored into the contract price when they sought and won the contract and at a time when it was not reasonably foreseeable that they should. In the circumstances, if the government were to repeal SPC, we propose that those changes are delayed and introduced no sooner than 3 years from any legislative change.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Yes, see explanation to 6 above

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

3 - 5 years

9. Do you believe that removing the provisions may cause potential problems?

Yes

Yes, see explanation to 6 above

10. Do you agree that the employee liability information requirements should be repealed?

No

Lifeline would support amendments to the ELI provisions to provide greater clarity for contractors and affected employees over the relevant employee liabilities and costs at the contract bidding stage. Whilst this information is sometimes made available to putative transferees by the enforcement of contractual powers by the client, this is not always the case. The lack of availability of this information at the bidding stage can deter contractors for entering bids or cause them to drop out of the process once the ELI is available. This is wasteful. Lifeline would propose amending the Regulations to require contractors to provide anonymised ELI at the bidding stage.

11. Would your answer be different if the service provision changes were not repealed?

No

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Yes. Given that TUPE acts to transfer the rights powers duties and liabilities of the transferor employer to the transferee, the transferee should have the power to determine its own pay awards and not be bound by decisions made post transfer under collective bargaining processes that the transferee was not party to.

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

We believe that the law in this area as it stands is clear and sound.

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

26. If you disagree, what would you propose is a reasonable time period?

No Response

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No Response

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No Response

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No Response

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No Response

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

No Response

35. Do you feel that the Government’s proposals will have a positive or negative impact on equality and diversity within the workforce?

No Response

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

1. Confidentiality & Data Protection Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

Yes, I would like you to publish or release my response

2. Your name:

Nick Michaels

3. What organisation do you represent (if any)?

none

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Individual

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

Repeal of the SPC provisions will increase the likelihood employees will be dismissed rather than transferred. This will encourage short-term thinking, increase uncertainty in the labour force and so affect economic activity and encourage employers to ignore any underlying issues.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

3 - 5 years

9. Do you believe that removing the provisions may cause potential problems?

Yes

Contracts let under the SPC arrangements will end after an SPC repeal leading to unforeseen and un-indemnified costs

10. Do you agree that the employee liability information requirements should be repealed?

No

It provides a backstop but does not prevent clients establishing more useful and practical arrangements

11. Would your answer be different if the service provision changes were not repealed?

no

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is

necessary for the transferee and transferor to perform their duties under that regulation?

No; better left to client contractual agreements with out-sourced suppliers or commercial agreement with potential transferees

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer

Yes, but given Advocate General's advice, seems unlikely

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

Yes

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce'

covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

likely to be effective in first generation transfers only and likely to encourage more dismissals rather than effective staff utilisation

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

26. If you disagree, what would you propose is a reasonable time period?

No Response

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

34. Have you any further comments on the issues in this consultation?

No Response

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes

Firstly, this is a very poorly worded questions. How do you know when I tick yes whether I meant negatively or positively? anyway, proposals will overall reduce protection for employees and likey to impact on poorer paid more than higher paid, and this will disproportionately affect women and BME employees.

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

The Impact Assessment was inadequate

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Yes, I would like you to publish or release my response

2. Your name:

Alliance for Finance

3. What organisation do you represent (if any)?

Alliance for Finance

4. E-mail address:

5. Please tick the boxes below that best describe you as a respondent to this consultation on implementing employee owner status

Trade union or staff association

Conferation of Trade Unions

6. Do you agree with the Goverment's proposal to repeal the 2006 amendments relating to service provision changes?

No

The TUPE Regs provide a level of necessary protection to employees to safeguard their employment rights in the event of a transfer, merger or takeover of all or part of a business. We are particularly concerned with the proposal to restrict post-transfer protection of employees' terms and conditions of employment as this could result in harmonisation on a worst practice basis to the detriment of those employees subject to transfer. We believe there should be clearer guidance on the notification of Employee Liability Information including defined timescales for provision. We also oppose the removal of service provision from TUPE as this could result in detrimental changes to the terms and conditions of those employees where a transfer concerns the awarding or loss of a service contract. We do not believe that there is any confusion in having consultation on both redundancy and TUPE and we believe the duty to inform and consult representatives would need to be clearly defined. Merging the two separate obligations together would undoubtedly create confusion and lead to inadequate time for full consultation to take place.

7. Are there any aspects of the pre - 2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such cases situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No Response

8. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes takes effect?

5 years or more

9. Do you believe that removing the provisions may cause potential problems?

Yes

There is no justification for repealing the service provision changes. Removing TUPE protection will inevitably lead to detrimental changes for employees and will lead to

resentment and resistance to outsourcing proposals and other service provision changes. Furthermore we believe it would only cause more uncertainty and confusion rather than stability.

10. Do you agree that the employee liability information requirements should be repealed?

No

11. Would your answer be different if the service provision changes were not repealed?

No

12. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor, should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes, the regulations need to clarify what information should be provided and indicate the timescales that should apply.

13. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No

In our experience, harmonisation often results in a reduction to the overall benefits of employees. While some changes to terms and conditions may be necessary following a transfer these should be on the basis that the overall position of employees is at least maintained and where possible improved. There should be no absolute time limit placed on the protection of terms and conditions and the proposed restriction would almost certainly result in a reduction in terms and conditions for many employees - particularly where there is no collective bargaining in place.

14. Do you agree, that the exception for economic, technical or organisational reasons entailing changes in the worforce should be retained?

Yes

15. The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

There should be no need to apply any artificial restriction on the future applicability of terms and conditions derived from collective agreements. post transfer changes are possible under TUPE where they are unrelated to the transfer itself and we see no particular need to alter the current provisions.

16. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

17. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide

useful additional flexibility for changing such terms and conditions? Please explain your answer

No Response

18. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3 (3) of the Directive)?

No

19. Do you agree with the Government's proposal to amend the wording of regulation 7 (1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and CJEU case law on the subject?

No

We see no reason to reduce the protection against dismissal as a direct result of a transfer as provided in the current regulations.

20. Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No

21. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No

We see no reason to reduce the protection currently afforded to employees.

22. Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No

The current wording is very clear. Extending ETO reasons to cover changes of location would give employers further license to dismiss transferred employees. We see no reason to reduce the protection currently afforded to employees.

23. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

The purpose of the regulations is to protect employment and therefore giving the transferor the ability to use the transferee's potential ETO reason to justify a pre-transfer dismissal would lead to less protection and more redundancies. We do acknowledge there may be some examples where employees would prefer to have certainty as soon as possible and therefore in some cases, provided full and proper consultation has taken place before any decisions are made, it may be acceptable to rely on the transferees ETO reason in such circumstances. However, on balance our answer must be "No".

24. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with

staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

We do not believe that there is any genuine confusion for employers in respect of their obligation to consult with employee representatives on both redundancy and TUPE. On the contrary the proposal to merge the two separate obligations together would undoubtedly create confusion for all parties concerned. Merging the two consultation exercises would lead to insufficient time being devoted to each aspect of the transfer with pressure being applied on employees representatives to conclude consultations prior to the proposed transfer date.

25. Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

Provided the guidelines were enforceable making it clear to the employer that adequate time must be allowed for elections to take place for the subsequent consultations to be thorough and effective. This needs to be taken into account in both employer's transfer timetables. However, given the process in non-unionised workplaces is very much employer controlled, we believe a comprehensive review of these arrangements is needed.

26. If you disagree, what would you propose is a reasonable time period?

No Response

27. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

28. If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No Response

29. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No Response

30. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No Response

31. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No Response

32. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No Response

33. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No Response

34. Have you any further comments on the issues in this consultation?

Q16 - We are opposed to the proposal to limit the application of collectively agreed terms and conditions to 1 year. However, if there ARE to be changes, these clearly should be on the basis that they are no less favourable overall, but unless there are strong collective bargaining arrangements in place, it is difficult to see how this would be realised in practice. Q27 - The benefits of indirect consultation through independent and elected workplace representatives must not be underestimated.

35. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No

Overall, these proposals seem to weaken the position of employees and their representatives.

36. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No Response

37. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Response

Confidentiality & Data Protection

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☒ **Yes, I would like you to publish or release my response**

Your details

Asset Based Finance Association

Please tick the boxes below that best describe you as a respondent to this:

☒ **Business representative organisation/trade body**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☒ **No** ☐

a) Please explain your reasons:

In general, the members of the ABFA support a flexible labour market as this encourages a pro-business economy.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

-

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ **(ii)1- 2 years** ☒ **(iii) 3-5 years** ☐ **(iv) 5 years or more** ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ **No** ☐

c) If yes, please explain your reasons.

Any change to the status quo will cause problems in the short-term.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☒ No ☐

a) If yes, please explain your reasons.

A reduction in prescriptive requirements will support a more flexible labour market.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes but only to the extent that the amendment reflects a commercial agreement requiring one party to act reasonably.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.
-

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes. Businesses - and business rescue - should not be restricted by obsolete practices.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ No ☐

a) Please explain your answer.

As noted above, flexibility is important. However, notwithstanding this, there needs to be a balance to protect employees in the spirit of the original legislation.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☒ No ☐

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

We take a 'static approach' to mean fixing collective agreements to those agreed at the time of transfer rather than subsequently negotiated terms. On that basis our answer is yes; such an approach is essential for a Transferor to understand the liabilities involved in taking on employees.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ No ☒

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

-

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ No ☐

a) Please explain your reasoning.

Flexibility is essential. Finding the right balance between employers and employees does not require gold-plating by government.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

-

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

a) Please explain your reasons.

The problems caused by the current approach in insolvency situations are set out in the consultation document (paragraph 7.74). Allowing the transferor to rely on the transferee's ETO would help address this. As a general point, the transferor should not be put into a worse position by rescuing some part of the business. If there is a genuine reason for redundancy that should apply both pre- and post- transfer.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ No ☐

There is no need for two sets of requirements. In the insolvency context, this can only have a negative effect on the prospects for rescuing a business.

a) If you disagree, please explain your reasons.

-

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ No ☐

a) Please explain your reasons.

As the consultation document notes, what is 'reasonable' will often depend on the circumstances of each case. Flexibility is essential in facilitating business rescue. The guidance developed should cover insolvency situations.

b) If you disagree, what would you propose is a reasonable time period?

-

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☒ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

-

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

-

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☒ **No** ☐

Question 15: Have you any further comments on the issues in this consultation?

No.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐

If properly implemented, we do not see how there could be either a positive or a negative impact on equality and diversity within the workforce.

a) Please explain your reasons

See above.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No comments.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

√ **Yes, I would like you to publish or release my response**

Your details

The Francis Crick Institute

Please tick the boxes below that best describe you as a respondent to this:

√ **Other (please describe)** Scientific Research Institute

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** √

a) Please explain your reasons:

The Francis Crick Institute does not agree with the government's proposal to repeal the 2006 amendments relating to service provision changes. Our HR team have direct experience of managing TUPE transfers relating to service provision charges in and out both pre- and post-the introduction of the 2006 amendments and believe that the provisions of the 2006 amendments have helped to reduce uncertainty as to whether TUPE does or does not apply.

We are therefore concerned that a return to the pre-2006 position would only serve to increase uncertainty which is likely to result in increased costs to our organisation and/or increased litigation in TUPE transfers relating to a service provision change.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

If the service provision test contained in the 2006 amendments is repealed, organisations such as ours would need to reconsider whether in an outsourcing situation there is an economic entity capable of transferring to a new service provider. The Francis Crick Institute is concerned that if an attempt is made to align domestic case law with that of the ECJ, this would go against to the purpose of the Acquired Rights Directive which is to protect employees in a business transfer situation.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

Most organisations enter into outsourcing contracts assuming that TUPE will apply on exit. If the service provision changes were repealed, the impact on exit provisions is likely to be significant.

A lead time of one year is probably too short, whilst five years is, in our opinion too long. A long lead time is likely to lead to uncertainty for parties entering new contracts within the lead time. The Francis Crick Institute would therefore be supportive of a two- three year period of transition before changes are applied.

a) Do you believe that removing the provisions may cause potential problems?

Yes √ No ☐

c) If yes, please explain your reasons.

The Francis Crick Institute is concerned that removing the provisions may cause potential problems because organisations who have assumed that TUPE will apply on exit may find that employees are contractually obliged to transfer to a new supplier, although this is no longer a legal requirement. This may cause operational difficulties and/or increased redundancy costs.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No √

a) If yes, please explain your reasons.

As an organisation due to undergo a large TUPE Transfer in April 2015 , The Francis Crick Institute does not agree with the proposal to repeal the Employee Liability Information requirements. We consider that the requirement to provide employee liability information prior to TUPE transfers is extremely useful to both transferors and transferees.

However, the deadline for the transfer of information (14 days before transfer) is often too late for a transferee to determine whether any further measures are to be proposed and to undertake further consultation, if necessary. Additionally, the information to be exchanged is often too limited and does not include all of the information that a transferee needs in order to manage the contracts of employment post transfer or to consult with staff accordingly.

We would therefore suggest that rather than repealing the requirement to provide liability information, it may be sensible to consider extending the timescale for the provision of information (so that it is provided earlier) and expand the information that is required to be provided.

b) Would your answer be different if the service provision changes were not repealed?

NO, repealing the requirement to provide detailed liability information would make it difficult for transferees to determine the measures they propose. These problems would

only be compounded if the services provision changes were repealed because parties would first have to agree whether TUPE applied. The end result of one or both of these, is a further delay to contract negotiations, additional costs to organisations such as ours and uncertainty for employees.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No – the Francis Crick does not agree with the proposal to amend regulation 13. Our concern is that it is not clear when it will be "necessary" to provide information or what information needs to be provided. Nor is the importance of the accuracy of the information or how it should be provided addressed (Regulation 11 currently states that information must be provided in writing and it should be kept up to date).

We are concerned that the proposed amendment to regulation 13 could leave incumbent service providers with a competitive advantage over prospective service providers to argue what is "necessary" and whether the information is sufficient for the purposes of information and consultation. Transferors may argue that the omission of certain information (e.g. details of any employee claims) is not "necessary" for information and consultation purposes or that it cannot be provided for data protection reasons as it would be unclear when the obligation would arise. We are also concerned that it is unclear what remedy a transferee would have if information is not provided.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes √ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes – The Francis Crick Institute is supportive of the proposal to retain the exception for economic, technical or organisational reasons entailing changes in the workforce

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes √ No ☐

a) Please explain your answer.

The Francis Crick Institute is supportive of this proposal in principle, as it appears to give increased flexibility to employers since Article 13 currently limits the power that employers have to make changes to employees terms with their agreement, although there are times when employees may be willing to do this (e.g. against a back drop of wide-scale redundancies etc.) However, we are not clear from the proposal whether employers would still be able to make changes to terms and conditions set out in a collective agreement where there is an ETO reason.

We are also concerned that this proposal could create an additional group of employees with protected rights post a TUPE transfer and this may make the management of employees post a transfer even more complex.

We believe that Article 3 (3) of the Acquired rights directive is aimed at European style collective agreements that apply across multiple employers and organisations, not one employer as is the case with the majority of collective agreements in the UK.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No √

The Francis Crick Institute does not believe that introducing a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall that the terms applicable before the transfer, will assist organisations such as ours. We are concerned that it will be difficult to interpret in practice and that if "no less favourable terms" are to be assessed on a subjective basis (i.e. from the view point of transferring employees), this may make it more difficult rather than easier to make such changes.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Yes – this would provide additional flexibility for changing terms and conditions. We feel that it is untenable for employers such as the Francis Crick Institute to continue to honour terms following a TUPE Transfer that are subject to change and renegotiation by trade unions or employee bodies with which they have had no relationships and where they have had no opportunity to negotiate such terms.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes √ No ☐

The Francis Crick Institute considers that if a limit of one year were to be introduced, the government should also consider confirming that parties can still make changes to terms

and conditions within this period, provided the reason for the change is not connected to the transfer or they have an ETO reason.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes √ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes √ No ☐

The Francis Crick Institute agrees that the drafting of the restrictions to terms and conditions in regulation 4 should be aligned with the drafting of the protection in relation to dismissal.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes √ No ☐

a) Please explain your reasoning.

The Francis Crick Institute agrees that transferors should not be liable for automatic unfair dismissal claims where changes to working conditions do not amount to a breach of contract and/or a repudiatory breach of contract.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes √ No ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes√ No ☐

a) Please explain your reasons.

The Francis Crick Institute believes that transferors should be able to rely on transferees ETO reasons in respect of pre-transfer dismissals. In practical terms, this will lead to a happier work force (as under the current regime redundancies can only be mentioned as a possibility in a measures letter) but the reality is that most employees would prefer to be made redundant by their current employer rather than transfer to a new employer only to be dismissed.

However, we consider that further thought may need to be given to how this proposal is implemented and in particular to the issue of liability – should the transferor and the transferee have joint and severable liability or should any remedy be apportioned based on which party is most at fault?

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes √ No ☐

a) If you disagree, please explain your reasons.

We feel that this amendment would be useful as the current regime results in delays. However, we feel that further guidance would be required to clarify the issue of liability (as the transferee would not be the employer of the transferring employees at the time of consultation) and to ensure the quality of consultation.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes √ No ☐

a) Please explain your reasons.

What is "reasonable" will depend on the circumstances of each case. Factors could include the number of affected employees, the timing of and reason for the transfer, the sort of work that the affected employees do etc. A set timescale may give certainty but is unlikely to be appropriate for all circumstances. We therefore agree that guidance on the factors of what is appropriate in a particular case would be more beneficial.

b) If you disagree, what would you propose is a reasonable time period?

N/a – we do not disagree

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing

employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ **No** ☐

N/a - The Francis Crick Institute is not a micro business

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ **No** ☐

N/a - The Francis Crick Institute is not a micro business

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐ **No** ☐

N/a - The Francis Crick Institute is not a micro business

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

N/a - The Francis Crick Institute is not a micro business

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ **No** √

Question 15: Have you any further comments on the issues in this consultation?

The Francis Crick Institute has no further comments to make on the issues in this consultation.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐

a) Please explain your reasons

It is our hope that the proposals outlined above will have a positive impact on equality and diversity in the workplace.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

The Francis Crick Institute does not have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

The Francis Crick Institute does not have any comments to make in relation to this.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

☒ **Yes, I would like you to publish or release my response**

Your details

Wragge & Co LLP

Please tick the boxes below that best describe you as a respondent to this:

☒ **Legal representative**

☒ **Other (please describe)** we have responded to this Consultation both as a legal representative generally and following feedback from clients who are large employers and may be transferors, transferees or the Client in any given TUPE scenario.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

The aim of the service provision change ('SPC') provisions was initially to provide some certainty for businesses in an area where the application of the law could be uncertain. This was largely due to applying the *Spijkers* (Spijkers v Gebroeders Benedik Abbatoir CV (24/85) [1986] E.C.R.1119) multi-factorial approach to a service provision change scenario, with uncertain outcomes, particularly in a labour intensive undertaking.

Despite the unsettled nature of the case law on the application of TUPE to outsourcing and insourcing situations, our experience prior to 2006 was that there had become a relatively widespread acceptance that TUPE would apply in the majority of outsourcing situations.

Nevertheless, in general terms we consider that the specific introduction of the SPC provisions in 2006 did bring a greater degree of transparency and certainty for those involved in outsourcing situations. This brought benefits to business in terms of costs savings and increased certainty.

As we noted in our response to the Call for Evidence, the evolving body of case law in this area has introduced new areas of uncertainty in recent years, which to some extent is to be expected with any new statutory concept (and challenges may have become more prevalent as a result of the difficult economic climate). However, we still consider that the SPC model is best suited to the UK business needs, albeit that clarification amendments and/or enhanced guidance could be used as an alternative to repealing the SPC changes in their entirety. We suggested clarification of the SPC concept in light of case law, in particular the extent to which the activities must be sufficiently similar pre and post

transfer, the extent to which fragmentation will avoid TUPE, assignment and the extent of the SPC exemptions.

However, even without that clarification, the working assumption for parties to outsourcing contracts has been, since 2006, that an outsourcing arrangement will fall within regulation 3(1)(b) unless there were specific circumstances to challenge this.

Of course, it should be emphasised that, even if the SPC provisions were repealed, TUPE may still cover a significant number of staff transfers arising from insourcing and outsourcing situations.

The feedback from our clients on repeal of the SPC provisions is mixed. Some have commented that repeal of the SPC provisions may increase competition and lower contract prices. Others, however, have commented that certainty is key and they do not support the repeal of the SPC provisions.

It can be problematic that, on a change of contractor, the same personnel may well be employed after the contract as before, even where the client is unhappy with those personnel. However, whilst potentially reducing this issue, it is not eliminated by repealing the SPC provisions, as in reality many outsourcings will still be caught by TUPE and contractual provisions can deal with this issue in some cases.

If the SPC provisions were removed, for those SPC situations that would not be covered under TUPE, transferees may not have the key staff required, leading to recruitment costs and increased service prices combined with interruptions to services or a reduction in service delivery levels due to loss of experienced employees. Whilst, there may be benefits in not inheriting underperforming employees and recruiting on new terms, the increased competition in tenders and improved service may not be realised.

A key difficulty with repealing the SPC provisions is that of implementing the change and the uncertainty and unintended outcomes for contractors this is likely to create. We discuss one aspect of this problem in our response to Question 2 (on the issue of a time line for implementation).

In addition, if the SPC provisions are removed, then the working assumption that TUPE applies falls away: the parties are then likely to have an initial round of discussions with legal advice as to whether TUPE is likely to apply both on the commencement and the termination of the contract, before even starting to commence negotiations as to how the liabilities in this respect should be apportioned.

It is relatively straightforward to determine on commencement whether TUPE will apply as the parties are dealing with existing facts. However, we have noticed that the uncertainty caused by the TUPE Consultation itself has caused issues where commencement is agreed to be at some future point or there are numerous future tranches/transfers planned, as parties cannot be certain whether the SPC provisions will be removed. In an event, it is a much more difficult exercise to determine whether TUPE will apply in relation to termination, particularly as the outgoing service provider has little, if any, control over how the services will continue to be provided.

If the SPC provisions are removed, the result is likely to be that outsourcing costs generally will increase: both parties may need to take legal advice at an earlier stage in the negotiations; there is an increased risk that the outgoing provider will be left with employment liabilities which it will presumably factor into the cost of providing the services

at the outset; and the parties may seek to make (extended) contractual provision to cover both the possibility of TUPE applying or not. However, contractual provisions may not be agreed leaving uncertainty for both parties.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Close consideration should be given to pre-existing case law on the impact of a transferee choosing not to take on the transferor's workforce. This is a particular issue in labour-intensive undertakings where there may be little, if any, transfer of tangible or intangible assets. In *Suzen (Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice [1997] ECR I-1259)* it was held that there may be a transfer where there is a group of workers engaged in a joint activity and the transfer takes over a majority part, in terms of numbers and skills, of the employees assigned to the activities. This led to subsequent cases (including *ECM (Vehicle Delivery Service) Ltd v Cox and others [1999] ICR 1162, Cheeseman & Others v R Brewer Contracts Ltd [1998] UKEAT 909_98_0111, ADI (UK) Ltd v Willer and others [2000] EAT 11_99_1804* and *RCO Support Services and another v Unison and others [2002] ICR 751,* which looked to ascertain the effect of a decision by a transferee not to engage staff. In broad terms, the effect of that case-law is that courts should have regard to the reason why the workforce is not taken on. The unwillingness of a transferee to take on staff will be a significant consideration, whether or not it is driven by a desire to avoid TUPE. Further, the transferee's reason, while not necessarily decisive, will form part of the multi-factorial test in *Spijkers.*

However, there are difficulties in the application of these principles. As things stand there is scope for a blurred distinction between a) situations where TUPE applies but the transferee has an economic, technical, organisational reason entailing changes in the workforce ('ETO reason') justifying dismissals or changes to terms and conditions and b) situations where a potential transferee may, for similar reasons, decide not to take on the transferor's workforce and thereby avoid TUPE altogether (see, for example *Ministry of Defence v Carvey [2001] UKEAT 202_00_2610*,where there was held to be no TUPE transfer because the transferee had a legitimate economic reason for not taking on the staff).

More recent EAT decisions are also unclear about the consequence of finding a TUPE avoidance motive on the part of the transferee. See, for example, *Astle v (1) Cheshire County Council (2) Omnisure Property Management Ltd [2004] UKEAT 0970_03_2005* and *Atos Origin UK Ltd v (1) Amicus and others (2) Compaq Computer Ltd (3) Compaq Computer Customer Services Limited [2004] UKEAT 0566_03_2602.*

If the SPC provisions were repealed, we consider that far greater certainty will be required on this issue if extensive litigation is to be avoided. Some of the Government's other proposals may reduce the future impact of these issues (but not remove them entirely), such as the proposal to amend regulation 4 (changes to terms and conditions) and regulation 7 (dismissals), that an ETO reason will include a change of location and the transferor can borrow the transferees' ETO reason. Please see our answers to Questions 4, 6, 8 and 9.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes

effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

<u>Transitional arrangements</u>

We believe that the transitional provisions are of fundamental importance in relation to the proposed removal of the specific service provision change provisions. This is because parties in outsourcing situations will have entered into arrangements which anticipate that TUPE will apply on termination – if the law is changed, this could undermine the agreement which the parties had reached in relation to the exit provisions.

It is likely that the parties in a case such as this would have assumed that TUPE would apply on exit, and thus that the employment liabilities of the assigned employees would transfer to the new service provider. This will, almost certainly, have been taken into account by the service provider when calculating costs, particularly where the service provider itself inherited employees from a previous provider.

In some cases it may be possible to argue that the termination and re-tendering of a service provision falls within the business transfer test (currently set out in regulation 3(1)(a)). We would anticipate that problems are likely to arise where the re-tendering does not fall within this test, but would have been a service provision change under what is currently regulation 3(1)(b). This is because the proposed change in the law may lead to the employment liabilities not transferring as had been anticipated – this has two major consequences:

- the current service provider is likely to have to shoulder costs it had not originally planned for; and

- employee redundancies are more likely to arise if employment is not transferred.

In relation to the transitional arrangements, we have some concerns about the proposed approach by the Government. A 'lead-in time', irrespective of its length, will not address this issue. The exit provisions in an outsourcing contract are typically agreed at the outset, and a service provider is unlikely to have the option to re-negotiate these once the contract is operative. If the law is changed during the term of the contract, this will have the result of leaving the parties in a situation on exit which is different from the one they anticipated. On this basis, we cannot identify the length of the lead in time which would be appropriate as this does not address the issue of the contracts currently in force. However, we would comment that a lead in time of 5 years plus would seem to be too long a period and could cause considerable uncertainty in the outsourcing market. Our client's feedback was that many contracts are for 1-2 or 3-5 years duration, although inevitably there are some that are considerably longer than this.

One other approach which the Government may consider in relation to transitional arrangements would be to provide that the service provision change provisions will apply to all those contracts entered into prior to a specific date. Whilst this has the advantage

that current contractual arrangements are not disrupted by the proposed change in the law, this does, however, lead to the risk that TUPE could apply on the exit of one contractual arrangement, but not on the subsequent retendering of those services. In this case, there is a big question mark as to where the employment liabilities lie – it would seem that in this case, the current service provider would be able to rely upon the operative transfer provisions, but to which entity do the employees transfer? The Customer may seek to agree contractually with any new provider in this case that it will accept those liabilities as a matter of contract rather than law.

In our view, neither approach is ideal, as in each case there is a risk that the employment liabilities reside with a party which had not accounted for these. In either case, this is likely to lead to more employee redundancies and additional costs.

For other potential issues with the removal of the service provision change provisions, please see our comments in Question 1.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ **No** ☒

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

We do not agree that the Employee Liability Information ('ELI') requirements should be repealed. Our view, and that of the majority of our clients who responded to our request for feedback, was that ELI should be retained. Feedback from clients also suggests that transferees also value the more practical or administrative information, such as how much annual or parental leave has been taken at the transfer date and the current proposals do not address this concern. The majority of clients also wanted ELI to be provided earlier before the transfer, for example, at the tender stage. Whilst ELI is limited in terms of the type of information required and the timing it must be provided, we consider that ELI provides a useful fall-back position for transferees. Enhanced (or any) contractual provision of information (and consequent protection) is not always available. Equally, the Government's suggestion of non-regulatory solutions such as possible Guidance and model terms for contracts will not assist in all cases. Some ELI is likely to encourage a smoother process for the employees and some protection for the transferee, where there is no (or limited) contractual requirements for information.

We also believe that ELI is still relevant even if the SPC provisions are removed because TUPE may still apply under regulation 3(1)(a).

However, retaining ELI, does not exclude an amendment to regulation 13 to provide that the transferor must disclose information to the transferee where it is necessary for the

transferee and transferor to perform their duties under regulation 13. We agree that this proposal should be adopted.

A requirement that the transferor should disclose information to the transferee as is necessary for both the transferor and transferee to perform their duties under regulation 13 would alleviate some of the deficiencies in the ELI provisions. For example, the following information is not included in ELI: restrictive covenants, details of non contractual benefits (share schemes, bonuses and so on), full information surrounding pension provision and benefits under a pension scheme, redundancy and severance arrangements. Whilst this does not cover all that a transferee would ideally discover in due diligence, it is more extensive that required under ELI and is clearly relevant to any measures it may envisage taking.

Rather than the current proposal, it may be more practicable and effective to require the transferor to comply with reasonable requests for information from the transferee in good time to enable the transferee to comply with its obligations to provide measures information.

Of course, this is likely to result in some issues about what is 'reasonable' but even on the Government's proposal there is likely to be a similar issue as to what is 'necessary'.

In many cases this requirement would merely reflect the contractual position, or indeed the contractual provisions are likely to be more onerous. In any event, the requirement should not be limited by the list of information provided under regulation 11 and ELI, and should be an additional obligation, over and above the existing ELI obligation.

There are likely to be more stringent penalties applicable to a failure to inform and consult than a failure to provide ELI (although only the later relates to a claim which can be brought by the transferee). Some of our clients specifically said they would support greater penalties for breach of ELI obligations.

We note that the Government's proposal states that any failure to co-operate would be likely to affect the apportionment between the employees of any liability to employees for failure to comply with regulation 13. However, it is not clear how this will be set out in TUPE and we consider this liability should be specifically dealt with as belonging to the transferee or transferor rather than as part of a joint and several award.
Of course, in many cases there will be contractual indemnities covering the issue which mean there is an incentive to comply with obligations to provide or share information about transferring employees.

We recognise that insolvency is a special situation. Therefore, we also consider that it may be necessary to provide exemptions for insolvency situations where it may not be possible or realistic to comply with any extended regulation 13 requirements**.**

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Current Position

Currently under TUPE, changes by reason of the transfer itself are void. In addition, changes in connection with a transfer can only be made if there is an economic, technical or organisational reason entailing changes in the workforce ('ETO').

Harmonisation

Whilst the Government would support post transfer harmonisation of terms and conditions, it considers that there is a very high risk (based on current CJEU case law) that harmonisation would be incompatible with the Directive. Feedback from our client's strongly favours harmonisation as it is administratively burdensome and prevents efficiencies and synergies being realised. Given the significant administrative and management burden on employers and employee relations issues resulting from different terms and conditions, we support the Government's intention to keep this problem under review and, if an opportunity arises to tackle it, to do so.

In addition, if there are any cases where harmonisation is not by reason of the transfer, Guidance on this would be helpful.

Proposal

However, the Government is proposing to amend the restrictions on changes to terms and conditions so that the restrictions more closely reflect the wording of the Directive (article 4 which is in relation to dismissals) and the CJEU case law on the subject.

Although the exact drafting will be considered after the consultation, the proposed changes would mean that changes by reason of the transfer would be void unless there was an ETO. Other changes made in connection with the transfer would be possible, provided they could have been agreed if there had not been a transfer.

Directive and CJEU law

We note that the Directive does not specifically prevent changes to terms and conditions (the only requirement to observe employees' terms and conditions relates to those agreed in a collective agreement and only until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement). The restriction on dismissals, prohibits dismissals where the ground for dismissal is the transfer itself, unless there is an ETO reasons (article (1)).

The Government suggests that the restriction relating to dismissals is 'equivalent' and can be made in respect of changes to terms and conditions (see para 7.41 of the Consultation). However, the restrictions on changes to terms results from CJEU case law, rather than the wording of he Directive. The CJEU case law on changes to terms prohibits changes by reason of the transfer, however, these cases do not expressly mention an ETO exception (to allow changes made 'because of the transfer itself' if there is an ETO).

The Daddy's Dance Hall case (*Foreningen Af Arbejdsledere I Danmark (applicants) v.Daddy's Dance Hall A/S (respondents) [1988] IRLR 315*) concerned changes made

because of the transfer itself and so we consider there is scope to allow changes if the reason is merely connected to the transfer. (See also *Martin and others (applicants) v. South Bank University (respondents) [2004] ICR 1234*) para 41-42, which talks about allowing changes to terms to the same extent they could be altered before the transfer 'provided that the transfer itself may never constitute the reason for that amendment').

Given that dismissals for an ETO reason are not automatically unfair under the Directive (even where the reason is the transfer), it might seem illogical for there to be no ETO exception for variations to terms and conditions. However, we suggest that there may be some uncertainty with this approach given the CJEU case law referred to above which does not refer to an ETO exception where the reason for the change is the transfer itself.

Summary

In summary, we support (as does the feedback from the overwhelming majority of responding clients) the proposed changes to allow greater freedom to make changes to terms and conditions in the usual course of business, where the reason is not the transfer itself.

If the proposed changes are implemented, we agree that the exception for economic, technical or organisational reasons entailing changes in the workforce ('ETO') should be retained as part of the restrictions to changes to terms and conditions under regulation 4 as there could be some cases where the reason for the change is regarded as the transfer itself but that there might be an ETO although there may be a potential issue of whether the ETO exception could be challenged as going further than the CJEU case law in relation to permitted changes to terms and conditions. If so, this would add to uncertainty and distract from an otherwise useful amendment.

It would also be helpful for legislation to confirm that if, in fact, any changes purported to be agreed are invalid, that the whole agreement becomes invalid and employees would retain their terms and conditions at the date of the transfer, rather than be entitled to cherry-pick the most favourable terms. The case law (*Regent Security Services Limited v Power [2008] ICR 442)* is unsatisfactory in suggesting cherry-picking the best of the pre and post transfer terms is allowed. This seems to protect transferred employees more than required by the Directive and seems to be an unintended consequence of the restriction on post transfer changes to terms and conditions.

Guidance

Even with the proposed changes, employers may not be confident in the legal position and it will be extremely important that the proposed Guidance addresses areas of uncertainty. We consider the key areas to cover include:

i) when a change is *by reason* of or *in connection* with a transfer and the difference between these concepts (including if there are any cases where harmonisation is not by reason of the transfer);

ii) (following *Smith v Trustees of Brooklands College UKEAT/0128/11* and *Enterprise Managed Services v Dance UKEAT/0200/11) when* a change is not by reason of the transfer. It seems clear that it is not a 'but for' test, but there is not much clarity on what what the actual test is or what factors are to be considered;

iii) if the ETO exception remains, clarification (following the obiter comments in *Ackroyd v Meter U Ltd [2012] ICR 834* that the *Berriman v Delabole Slate Ltd [1985]IRLR 305* interpretation of a significant change meaning changes in the numbers employed or the functions performed by the employee is not exhaustive) of what other exceptions there may be;

iv) a change in the makeup of the workforce and that the relevant change can apply to part of the workforce;

v) in respect of the ETO it would be helpful to clarify whether each change to terms and conditions required a stand alone ETO or if it would be sufficient to establish that there was a general ETO within the organisation to justify any other changes to terms and conditions;

vi) given that the Government is not proposing to temporally limit observance of transferred terms and conditions (other than in respect of collective agreements), Guidance would be useful to cover the issue of the 'passing of time'. Although changes after a certain amount of time has elapsed are not specifically permitted in the Directive, the limitation in article 3(3) (limiting future observance of terms and conditions agreed in any collective agreement to one year) seems analogous. However, as the Government is not proposing to adopt this approach (see comments in response to Question 5 below), Guidance explaining this would be useful.

vii) clarification on the status of harmonisation would also be useful as many businesses would be keen to harmonise and, given the difficulties in compatibility with the Directive and case law, it would be helpful to set this out.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

We consider that the wording "derived" in the Consultation is unclear but understand that the Government intends that these amendments mean that the one year restriction applies to individual contractual clauses which have derived from collective agreements and are incorporated into the employment contract (rather than the general terms applicable in a Collective Agreement).

<u>Changes after one year</u>

We agree that there should be a time limit to the future applicability of terms and conditions derived from a collective agreement as allowed by article 3(3) of the Directive. However, the benefit of allowing changes after one year is reduced significantly if overall the terms must be no less favourable. Please see our comments about 'overall no less favourable' below.

We agree that after the period of one year, changes could be agreed (even if the transfer itself is the reason for the variation). Guidance on the mechanisms permitted for changing the collective agreement terms would be useful, given that it will depend on the circumstances.

We note that it is possible, given the wording of the Directive, that the one year limitation will only be relevant to procedural or collective terms of the Collective Agreement which have not been incorporated into a contract of employment. We note that article 3(3) relates to 'the terms and conditions *agreed in any collective agreement*', rather than any contractual rights which have been incorporated into a relevant employee's contract of employment. If that is the effect of the proposal, the change is not as significant as it first appears.

Inevitably, this potential issue reflects the differences in the UK from other Member States with respect to collective bargaining and collective agreements. This is because, in the UK, many workforces do not bargain collectively and, even if they do, collective agreements are not usually binding in themselves. This could potentially mean that the impact of this exception may not be as great as for other Member States because this restriction might only relate to regulation 5 (effect of relevant transfer on collective agreements), rather than regulation 4 (effect of relevant transfer on contracts of employment).

Of course, even if this was the case, provisions of a collective agreement can be a term of an individual's contract if that term is apt for incorporation and actually incorporated into the contract. Contractual construction and incorporation is clearly going to be an area of debate. In any event, if incorporated, their continued effect does not necessarily depend on whether the underlying collective agreement has expired or not. Employers might still be bound by the terms except to the extent proposed by the Government as set out in relation to changes to terms and conditions – please see our response to Question 4.

However, it seems clear that the Government intends that the contractual terms of employment derived from a collective agreement can be changed after a year (even if the reason is the transfer), making the proposal more significant and this would be an additional flexibility to employers over and above the proposed amendments allowing changes to terms and conditions as set out in Question 4.It would seem that, by analogy, this may be permitted by the Directive as the terms of employment in other Member States are more likely to derive from Collective Agreements, rather than individual contracts. So, the proposed amendment must be made to regulation 4 (rather than regulation 5).

'Overall no less favourable'

We do not agree that a one year limit on the future applicability of terms and conditions derived from a collective agreement should be further qualified by the requirement that 'overall the change must be no less favourable' than the terms applicable before the transfer.

The feedback received from our clients was divided on this issue although the majority did not support a 'no less favourable' requirement. We consider that, in reality, it may be that changes cannot be 'agreed' without a similar proviso, although economic conditions may temper this to an extent and willingness to agree will vary according to the relevant economic conditions.

From an employer's perspective, such a condition would bring additional restrictions over and above those required under article 3(3). In addition, it is likely to result in further uncertainty about how 'overall no less favourable' is evidenced or proved; which terms are covered; the potential importance of certain non contractual terms and the difficulty of valuing non financial benefits, whether the test is objective or subjective (some terms are of greater importance to some employees and so there might be no consistency in any one situation between different employees); whether there is a 'cooling off period' where an employee can change his mind; the timing of when the change must be no less favourable from (presumably the date of the transfer, but particular care would need to be taken to ensure that the proviso does not create an ongoing link between any new terms and the original collective agreement from which they were derived); and ultimately whether the changes are valid. As a result, there are likely to be challenges to the concept and validity of changes.

There is a risk that potential ongoing uncertainty may mitigate against employers using this new exception.

We suggest that requiring the changes to be 'overall no less favourable' amounts to gold-plating and may not bring the flexibility envisaged for the parties by adopting the exemption under article 3(3) nor sufficiently help with efficiency/costs pressures. If the proposed qualification of 'overall no less favourable' is implemented, Guidance would be helpful on the issues of the meaning and status of the 'overall no less favourable' requirement and evidencing this to encourage certainty.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☒

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Yes. Even if the outcome of the Parkwood Leisure v Almero-Herron litigation is a static approach, it would be useful to have the option to agree variations after one year (bearing in mind the comments above about whether this change relates to regulation 5 or 4).

However, we suggest that the outcome of the Parkwood Leisure v Almero-Herron litigation is a slightly different point which can be considered separately. It seems likely that a dynamic approach to contractual terms is permitted (provided the other fundamental rights are not infringed).

If there is a dynamic outcome (or in anticipation of this potential outcome) the Government could legislate for a static approach in respect of transferring contractual terms. This would provide certainty for all parties at the point of transfer and going forwards. Employers would not be bound by the negotiations of third parties which it cannot influence and which could be seen as affecting freedom of association.

The Government does not need to be bound by a dynamic outcome because a dynamic approach to transferring terms is not required by the Directive. Current CJEU case law is

clear that the Directive does not require a dynamic approach and the issue of a dynamic approach arises only from the domestic interpretation of contract law. A dynamic approach may effectively result in 'gold-plating' of the Directive (not directly in TUPE but under domestic case law). The Government could side-step this and legislate for a static approach to override any contractual agreement in respect of dynamic collective agreement terms.

We think this is a change the Government could make in response to the Question 5(d) below.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☒ **No** ☐

See response to Question 5 c) above in respect of legislating for a static approach.

In addition, there could potentially be an issue with section 145Bof the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA') (inducements in relation to collective bargaining). Section 145B essentially seeks to prohibit an employer offering an inducement for members of a recognised trade union to agree to the variation of that employees' terms and conditions of employment such that any of those terms are no longer determined by a collective agreement negotiated by/on behalf of the union. We suggest there could be an exception in TUPE to legitimise changes in accordance with the Government's proposal. The Government could consider two further changes to the continued applicability of terms and conditions derived from a collective agreement, namely:

i) allowing changes to terms and conditions (which are subject to a collective agreement) once the collectively agreed terms have expired or fallen away e.g. to be agreed as a matter of general contract law; or

ii) exempting specific categories of employees who are not covered by the laws or practice of the Member States in respect of protection against dismissal as permitted under article 4(1).

These changes have not been proposed (although there has recently been a change to the qualifying period for claiming unfair dismissal, excluding certain categories of employees). In any event, we do not think these further possible changes are necessary as they would not reflect that the UK has a predominately contract based employment relationship, whereas other member states have employment terms and conditions which are largely collective based.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ **No** ☐

We agree it is useful to have the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissals in regulation 7 aligned, although this is not required by the Directive. However, we suggest that the benefits of certainty and reduced litigation are likely to favour aligned drafting of the restrictions to both changes to terms and conditions and to dismissals.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ **No** ☒

a) Please explain your reasoning.

Directive

Article 4(2) provides that if the contract of employment or the employment relationship is terminated because the transfer involved a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract or employment or of the employment relationship.

TUPE

Regulation 4(9) provides: Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in the working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated and the employer shall be treated for any purpose as having been dismissed by the employer.

Regulation 4(10) provides: No damages shall be payable by an employer as a result of a dismissal falling within para (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

Proposal

The Government's proposal to copy out Article 4(2) will not, in our opinion, achieve the desired aim of ensuring that an employee in this case will only have the remedy of a pay in lieu of notice or damages for wrongful dismissal. This is because of the ambiguity of the word 'termination' in Article 4(2), which could well cover dismissal.

Summary

The case referred to, *Juuri v Fazer Amica Oy* [2009]1 CMLR 33 does support the proposition that it is up to Member States to determine the appropriate remedy for a termination of employment, provided that, at a minimum, it covers the salary and possibly other benefits due if required under the national law, for the notice period. On this basis,

the better way to achieve the Government's aims would be to amend regulation 4(10) to state that a termination of employment under regulation 4(9) would not be regarded as a dismissal for the purposes of section 95 of the Employment Rights Act 1996 (unfair dismissal) and only for the purposes of wrongful dismissal.

It should be noted that, if high earners with lengthy notice periods were to pursue breach of contract in the courts, the potential award would still be significant and may exceed the maximum award that would have been available for unfair dismissal. Also, employees who may not have had the qualifying service to claim unfair dismissal could claim for wrongful dismissal. Of course, for lower earners with short notice periods the proposed amendment would potentially reduce the liability as compared with an unfair dismissal claim.

However, we consider that given the case law (*Tapere v South London Maudsley NHS Trust [2009] ICR 1563* and *Abellio London Ltd v Musse & others (2012) UKEAT/ 0283/11/ CEA),* we suggest that this proposal misses a key problem. The issues in relation to the application of regulation 4(9) have revolved around the nature of the change to the working conditions and whether these are to the material detriment of the employee. As material detriment has to be determined on a subjective basis, this can give the employee a potentially wide right to resign and treat himself or herself as having been dismissed. So, in addition to changing the remedy available, further consideration should be given to reversing this so that whether a substantial change to an employee's working conditions (a question of fact) is to the employees detriment is to be assessed on an objective basis rather than a subjective basis.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ **No** ☐

a) Please explain your reasons.

It is our view that the transferor should be able to rely upon the transferee's economic, technical or organisational reason ("ETO reason") entailing changes in the workforce in respect of pre-transfer dismissals of employees.

Regulation 7(2) TUPE says that the ETO reason entails changes in the workforce of either the transferor or the transferee before or after a relevant transfer. However, the courts have interpreted the ETO exception as being available only if the transferor dismissed the employee for reasons concerning its business or if the transferee dismisses the employee for reasons concerning its business. This means that dismissals by a transferor for

reasons related to the transferee do not fall into the ETO exception even if they would do so otherwise (*Hynd v Armstrong and Others [2007] CSIH 16*).

We suggest that TUPE should be changed so that dismissals effected by the transferor for the transferee's ETO reasons should not be automatically unfair. The legal change required would be to allow a transferor to effectively dismiss employees for the transferee's ETO reason, on the basis that the reason relates to the future conduct of the business. In our view, this is not precluded by the Directive.

A clarification of regulation 7(2) TUPE (to follow article 4(1)) would mean that dismissals could in principle be made pre-transfer on either the Transferor or Transferee's reason, without being automatically unfair.

A relaxation of this rule would resolve some real practical issues in relation to business transfers, particularly relocations, overseas Transferees and in insolvency situations and, if adopted, it should be of benefit to businesses.

The employees would still be able to claim unfair dismissal, however the usual principles of fairness would apply and if there was any liability in this respect, it would transfer under TUPE to the transferee.

We consider that this approach would allow transferees greater scope to implement business changes ahead of transfers, without doing away with employees' employment rights.

Insolvency

Relaxation of the rule that a transferee cannot rely upon a transferor's ETO reason would also resolve practical issues in insolvency situations (*Hynd v Armstrong and Other [2007] CSIH 16*). This would mean liabilities from any pre-transfer redundancies where there was an ETO (of either the transferor or transferee) would not fall to the transferee (provided the dismissals were fair). As a result of the transfer of liabilities the business is less attractive for the transferee and in extreme examples, may prevent a purchase. By preventing this transfer of liability, our experience suggests that more sales 'as a going concern' would take place thereby protecting more jobs. In our view, the current position discourages the rescue of ailing businesses.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

However, we suggest that the proposed amendment goes further and explicitly permits (but not requires) the transferor to conduct such consultation as well, for two principal reasons:

- the transferee may come across practical obstacles in conducting such consultation prior to transfer, including possible issues in relation to electing employee representatives and other practical arrangements;

- the transferor may prefer to maintain control over communications with its own workforce pre-transfer.

In principle, if consultation with the transferee can count towards consultation required for post-transfer redundancies, we see no reason why pre-transfer consultation with the transferor should not be transferrable to the benefit of the transferee post-transfer.

This will also tie in with the proposed amendments to the ability of the transferor to rely upon the transferee's reason to make redundancies pre-transfer.

However, clear Guidance would be helpful on distinguishing the TUPE and pre transfer consultation on collective redundancies. This would make the two simultaneous processes easier to handle and avoid confusion for employees. The Guidance should also cover a fair process, for example, considering alternatives in the transferor or transferee and possible pooling issues and clarification of liability risks.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ **No** ☐

a) Please explain your reasons.

We consider it would be impracticable to set an appropriate timescale for election of representatives which would fit all situations. We suggest that what is reasonable will depend on the facts and circumstances of any situation. It would give businesses more flexibility to set an appropriate timescale that fits the scenario, rather than adopting a 'one-size-fits-all' approach. The Guidance should cover the relevant factors to consider and if there is any minimum timescale considered to be 'reasonable', to set that out.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☒ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☒ No ☐

Question 15: Have you any further comments on the issues in this consultation?

We refer back to our response to the Call for Evidence which contains further comments. We note that the Government's response to the Call for Evidence indicates that the Government does not propose to make changes to any areas other than those dealt with in this Consultation, so we have limited our comments to those issues.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

x Yes, I would like you to publish or release my response

Your details

EEF, the manufacturers' organisation

Please tick the boxes below that best describe you as a respondent to this:

x Business representative organisation/trade body

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes x No ☐

a) Please explain your reasons:

Please see EEF's response to the Call for Evidence on TUPE regulations. The SPC provisions were unnecessary gold-plating and have resulted in increased costs for business. They have not achieved the anticipated aims of greater transparency or certainty. However, repealing the SPC provisions will have major repercussions for incumbent contractors who will face significant and unexpected liabilities for making staff redundant if/when they lose the contract (see below). Our member companies have expressed serious concerns about the potential scale of these liabilities and their possible impact upon incumbent contractors, especially SMEs.

In addition, our member companies point out that the worst possible scenario would be a situation of increased uncertainty over whether or not TUPE applies to an SPC. We therefore consider that any repeal of the SPC provisions must be accompanied by:

- transitional arrangements which seek to manage the negative impact on incumbent contractors (see below); and
- improved certainty over the application of TUPE to future SPCs, in particular by the reversal of the decision in *ECM v Cox* (see below).

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Yes. The test in the Directive is whether or not the identity of the undertaking is preserved. In service contracts which predominantly involve the supply of labour, this has been interpreted by the ECJ as meaning that the major part of the workforce would need to be taken on by the incoming contractor before the protection in the Directive would apply.

However, the Court of Appeal in *ECM (Vehicle Delivery Service) v Cox [1999] IRLR 255* ruled that, if the incoming contractor's motive in not taking on the workforce was to avoid TUPE, this could be taken into account as a factor pointing towards TUPE applying. In our view, this decision was an example of unwarranted judicial gold-plating and the Government should explicitly reverse its effect in the new legislation.

In a labour-intensive operation, the incoming employer should have a free choice over whether to:

- preserve the identity of the existing operation by taking on the major part of the workforce (and thereby attracting TUPE); or
- start afresh with a new operation on a TUPE-free basis, in which case the incoming employer would not take on the major part of the existing workforce.

There will be many considerations involved in the incoming employer's decision, including any requirements in the contract itself, the skill of the existing workforce, whether the incoming employer has a workforce of its own etc. A consideration of whether the incoming contractor was motivated to avoid TUPE should be irrelevant**.**

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

In our view, the lead-in period should be linked to the lifetime of the actual contract and not to any fixed period of time.

In our view, the SPC provisions should continue to apply in their current form upon the ending of any current contract, but not thereafter. In other words, on the expiry of a current service contract where staff were transferred under TUPE, the next letting would be on a TUPE basis, but any subsequent letting of the contract would not be. Any contractor bidding for the contract at the next letting (whether the incumbent contractor or any other contractor) would then expect to inherit the existing staff on a TUPE basis at the outset of the contract and would expect to incur the redundancy costs at the end of the contract. All contractors could then price their bids accordingly. This would level the playing field as far as possible, but we recognise that there will be certain commercial implications of the changes which can be mitigated as described below.

Linking the lead-in period to the lifetime of the contract rather than a fixed period of years is:

- a fairer and less arbitrary solution, because contracts inevitably vary in their duration and a fixed period of years may therefore be longer than is necessary in some sectors but shorter than is necessary in others;
- not significantly less certain/definitive, because the relevant parties should be able to pinpoint the actual ending of a contract with relative ease.

If the Government does not implement our proposal, then we would prefer to see as long a lead-in period as possible given the scale of the liabilities faced by incumbent contractors (see below).

a) Do you believe that removing the provisions may cause potential problems?

Yes x No ☐

b) If yes, please explain your reasons.

In answering this question we have assumed that the Government also legislates to reverse *ECM v Cox* and that, whilst some SPCs will continue to be covered by the old TUPE provisions, most SPCs would come out of the scope of TUPE.

The critical problem with the removal of most SPCs from the scope of TUPE is the "pass the parcel" situation that, when the music stops and the SPC provisions are removed, the incumbent contractor will be left with the staff and will be unable to pass them on to the next contractor. The incumbent contractor will then be faced with the liability for making those staff redundant if it loses the contract.

If the incumbent contractor bid for the contract before the possible repeal of the SPC provisions was announced, it might have expected to be able to pass the staff on to any subsequent contractor upon the expiry of the contract and is unlikely to have factored a high risk of redundancy costs into the contract price.

If the employees originally come from the public sector, they are likely to have extremely generous enhanced redundancy terms built into their contracts (and see below about pensions).

Our member companies have voiced serious concerns about the scale of this problem, which, in some contracts, could involve many thousands of employees and hundreds of thousands of pounds.

It is likely that SMEs will be the worst affected, because large employers will be better able to redeploy staff onto other contracts or absorb the redundancy and other costs, such as pension liabilities. Our member companies believe that a significant number of SMEs could go out of business as a result of bearing the severance costs associated with the repeal of SPCs.

In addition, the repeal of the SPC provisions may create an inbuilt advantage for any new contractor looking to win a contract over the incumbent contractor, because the incumbent contractor may be operating with inefficient terms or practices inherited under TUPE whereas a new contractor would not be. The incumbent therefore faces significant commercial disadvantage.

The impact of abolishing the SPC limb of TUPE on pension liabilities also needs further attention. Currently, a company providing services to a local authority may have transferred the employees into its own 'broadly comparable' defined benefit scheme or may have reached an agreement (admitted body status) with the relevant local authority to cover the pension liabilities in respect of the transferring staff for the duration of the contract. When the contract ceases, the 'admitted body contractor' has to pay the 'exit charges' for any deficit in respect of the contract employees (a snapshot is taken of liabilities on the closure date and the employer contractor has to make good any difference). However the employees transfer to the new contractor.

If the SPC limb of TUPE is repealed - and assuming the incumbent contractor and employees do not contend that the remaining limb of TUPE applies – the incumbent contractor may have to make the contract staff redundant. Depending on their age, the

termination of employment may trigger rights to more beneficial redundancy/ early retirement terms (Beckman-type liabilities), which may involve the employer buying additional pension rights for the departing employees; these are the pension liabilities that, where TUPE applies, currently transfer under TUPE (without the need for Fair Deal) because they are outside the pensions exemption.

The incumbent contractor may not have budgeted for these additional liabilities, the scale of which may vary from employer to employer, depending on the profile of its acquired workforce, because it would have assumed the SPC limb of TUPE would be engaged on loss of the contract.

The Government is soon to publish its guidance on the operation of the new Fair Deal Policy. As the current draft of New Fair Deal is worded, it is implicit that staff will be "transferring", not being made redundant. Under new Fair Deal (as with the old) incoming contractors for public work must provide a pension in accordance with new Fair Deal principles, irrespective of whether TUPE applies. Given this, it is imperative that the new guidance on Fair Deal is written with the abolition of SPC in mind.

It is essential then that any revised TUPE legislation, Government guidance following abolition of the SPC Limb of TUPE and on the operation of the new Fair Deal policy on pensions, takes a holistic approach and is transparent on the implications for pension and Beckman-type liabilities when a contract is lost; this is particularly important for SMEs.

The overall impact of the SPC abolition on incumbent contractors will be major, and should not be underestimated. In our view, the Government should mitigate the redundancy and pension liability impact by:

- phasing out the SPC provisions slowly in a way which ties in to the lifetime of the contract rather than a period of years (see above); and
- implementing quickly and before the repeal of the SPC provisions the other proposals in the consultation document relating to changing terms and conditions to allow incumbent contractors the maximum flexibility to change existing terms where these are not competitive (see below); and
- attempting to reconcile the operation of New Fair Deal with the abolition of SPCs and producing transparent guidance on the implications for pension and Beckman-type liabilities when a contract is lost.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No x

Please see our response to the Call for Evidence where we argued that, far from the ELI requirements being repealed, they should be strengthened. Our members tell us that they require better information sooner.

The current ELI requirements require the outgoing employer to provide certain basic information as late as 14 days before the transfer. In our view, this should be increased to a minimum of 28 days.

In addition, the extent of the information to be supplied should be widened to cover:

- information about redundancy terms and arrangements (this will be particularly critical in the run-up to the abolition of the SPC provisions and we believe that this information should be provided earlier than 28 days)
- information about licences/qualifications held by employees where they are necessary in order to perform the job (e.g drivers licences and Health and Safety qualifications)
- information about immigration status, including any current sponsorships
- information about geographical mobility
- any adjustments in place for disabled employees
- any other matter which significantly impacts on the incoming employer's ability to deploy the workforce, for example information needed to order protective equipment
- The exact method of calculation of each employee's pay, which is essential for ensuring that employees are correctly paid post-transfer.

We acknowledge that the supply of ELI is often superfluous in a business acquisition scenario where the parties will generally be in a contractual relationship and the incoming employer is likely to go through a thorough due diligence process, but there will still be some vital information needed, for example immigration requirements. However, even in a business acquisition scenario, it would be helpful to have a legislative requirement to supply employee information in order to overcome the problems and confusion associated with supplying employee information in compliance with the Data Protection Act 1998.

At present, employers still sometimes fall back on employee consent to justify the transfer of certain information, which is likely to be significantly harder in future as a result of the implementation of the proposed new EU Data Protection reforms. The draft regulation currently under consideration by the European Parliament will prevent employers from processing the data of their employees on the basis of their employee's consent. The only clear way in which an employer can with certainty process the personal data of their employees is in order to comply with a legal obligation, which an obligation under the TUPE regulations could create.

In addition, the supply of ELI information is – and will remain- critical in a situation involving a change of contractor where there is no contractual relationship (and no incentive to collaborate) between the incoming and outgoing contractor. The proposal to repeal the ELI requirements seems to be based on an assumption that, following the repeal of the SPC provisions, no change of contractors will be caught by TUPE in future. However, we think this is a dangerous assumption because:

- Some changes of contractor <u>will definitely</u> be caught by TUPE in future, for example in some cases when the incoming contractor chooses to take over the major part of the workforce and thereby engage TUPE;
- Other changes of contractor <u>may end up</u> being caught by TUPE in ways which we cannot anticipate, as a result of future caselaw. TUPE and the Directive will inevitably continue to generate litigation and past experience shows us how the courts (both domestic and European) can interpret TUPE and the Directive in unpredictable ways. The repeal of the SPC provisions cannot be assumed to have entirely certain and predictable results, albeit that we believe the Government should go as far as possible in the legislation to achieve this (for example by repealing *ECM v Cox*). Given the importance of the ELI provisions and the damaging consequences when incoming contractors do not get adequate information in advance, we think it would be dangerous to abolish them or conclude that they are superfluous at this point in time.

- In any event, the SPC provisions will continue to be in place during whatever lead-in period the Government introduces.

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

We do not object to the idea of putting a requirement upon the transferor to disclose information on a legislative footing but we can see scope for considerable argument over what is "necessary" in this context. We think that the better approach is to strengthen the requirement to provide ELI information. The transferor cannot easily predict what the transferee needs to know in order to decide upon what, if any, measures to propose. Supplying ELI information may therefore be simpler than guessing at the transferee's needs. Equally, the transferee cannot easily tell what measures it proposes until it has seen all the ELI information. There will again be similar difficulties encountered following the introduction of the Data Protection regulation referred to above.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes x No ☐

We particularly welcome this proposal because, as highlighted in our response to the Call for Evidence, the barriers to restructuring imposed by TUPE 2006 are a significant problem for business. In many cases, the inappropriate or inflexible employment conditions of the outgoing employer may be a prime reason for the loss of a contract/business, yet under TUPE 2006 these end up being the very things which the incoming employer cannot change. An employee's terms and conditions should not be set in stone simply because they have been subject to a TUPE transfer, yet the current prohibition on any change "connected" with the transfer effectively does cast those terms and conditions in stone. The current law is considerably more restrictive than the Directive requires.

Against this background, we particularly welcome the Government's proposal to scrap the current prohibition on "transfer-connected" changes.

We also particularly welcome the idea behind the proposed new regulation 4(5). In both *Daddy's Dance Hall* and *Martin*, the ECJ made clear that, having taken on a transferring employee on their existing terms, the incoming employer should have the same freedom as the old employer to effect changes. In our view, the new legislation should explicitly adopt and set out this position as its starting point, i.e. that the incoming employer has the same freedom as the old employer to effect changes. This should be the first paragraph in the new legislation.

We accept that the legislation needs to provide that "the transfer itself" cannot constitute the reason for the change. We support the decision to use the expression "the transfer itself" as opposed to "the transfer". However, this paragraph should appear after the proposed new regulation 4(5) and should be a qualification to that provision, rather than the other way around. In other words, the starting point should be that the incoming employer can make contractual changes, rather than that the incoming employer cannot make such changes.

The legislation should then clarify that even changes by reason of the transfer itself are permissible when there is an ETO reason for them (see further on ETO reasons below).

As the Government acknowledges, any new wording along these or similar lines will inevitably create some uncertainty and litigation. However, the Government will need to try to resolve the uncertainty by attempting to define (in guidance) what sort of change might be regarded as "by reason of the transfer itself". The meaning/intended meaning of this expression will not be clear.

As we understand it, the Government intends that:

- change for the purpose of "harmonisation" would be unlawful, because this would, under current EU law, be regarded as change which is "by reason of the transfer itself", but that
- change for any other reason (including reasons "connected" with the transfer) would be permissible.

The guidance should adopt this distinction as a starting point, but will need to expand upon it. We believe that employers will require clear guidance on what constitutes change for the purposes of harmonisation, bearing in mind that most employers do not seek to harmonise terms for the sake of tidying up, but because there is usually an underlying economic benefit to it. We accept that drawing a line which is consistent with the ECJ case law will be difficult, but we believe that the guidance should not shy away from trying to do that. In particular the Government should work with business to produce guidance which addresses the typical "real life" situations in which a business might wish to change terms and conditions after a transfer. Guidance that addresses only the extreme or the unlikely situations is of very little use. See also our comments below in relation to collective agreements and the guidance required on that issue.

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes, but it should be made clear that this exception, (and the necessity for an employer to establish this) applies only to situations where the reason for the change to terms and conditions is the transfer itself. Otherwise, there is a risk that the courts would interpret this exception as meaning that any change must involve an ETO reason and this would leave us in the same unsatisfactory position as with TUPE 2006.

We would repeat the point above that good guidance will be essential if the intended meaning of these provisions is to be clear.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes x No ☐

Subject to b below

a) Please explain your answer.

Please see EEF's response to the Call for Evidence for our evidence of the difficulty which collective agreements can cause. Some small employers report that they are in effect excluded from public sector work as a direct result of the operation of collective agreements. Such agreements can be complex, burdensome and costly, with employers having no control over their future amendments and the potential for the escalation of employment costs.

We therefore welcome the proposal to use article 3.3 of the Acquired Rights Directive to limit the impact of collective agreements.

However, the current proposal would seem to be of limited assistance to most employers. It will assist with the problem of future amendments to collective agreements where the employer is not involved in the ongoing collective bargaining process. However, it would not give UK employers the flexibility to replace one set of terms with another, which would seem to exist in other EU countries. In the UK, the terms of a collective agreement tend to be passported into individual employment contracts. Even if the employer is no longer bound to observe the collective agreement, it must still honour the terms of each individual employment contract. As the consultation paper recognises, the employer would still be bound to observe those terms unless they can be lawfully varied.

In our view, the Government's proposal should go further and provide that any terms which are not asserted or disclosed within a one year period following the transfer should lapse altogether. This would deal with the significant problem of historic rights being asserted a long time after the transfer which the existing employer is unable to verify. For example, one of our member companies recently voiced the possibility of redundancies and the unions responded by giving the current management a copy of a 1970's agreement about redundancy payments which the union asserts is still valid but which the management have not seen until now (having acquired the business in the 1990's). The current management has no way of verifying this agreement or its applicability. Our members report that such situations are commonplace. Employers have little or no way of knowing what working arrangements operated prior to the transfer date and often no way of verifying the information they are given. The Government's current proposal in respect of the applicability of collective agreements would not help such employers. A right to vary terms derived from a collective agreement is of limited assistance when the real issue is the applicability of those terms in the first place. Rights which are not asserted until a long time after the transfer should be capable of rejection. The legislation should override contract law in this regard to provide that terms which are not disclosed or asserted within a year of the transfer should not be capable of enforcement by an employee.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No x

This concept of "no less favourable overall" does not appear in the directive and, in our view, would amount to a new form of gold-plating which would cause considerable practical difficulties and is not necessary.

There are considerable practical difficulties in defining what is meant by "no less favourable overall". For example, if the employer wishes to introduce a new shift pattern, one employee might consider themselves advantaged because the new pattern suits their personal circumstances better, whereas another employee might consider themselves disadvantaged. Changing an attendance bonus might be more favourable for employees whose attendance is high, but less favourable for those whose attendance is low. If an employer reduced sick pay but increases holiday, is that more favourable or not for any particular employee? Historic redundancy terms are often discriminatory on grounds of age and sex – if the incoming employer seeks to change such terms by reason of the transfer, a requirement to ensure that no employee was worse off would result in the employer having to "level up" the benefits to match those of the most advantaged sex/age group.

We also think the proposed gold-plating is unnecessary. Employees are already adequately protected against adverse changes. This is because, as stated above, the terms of a collective agreement tend to be passported into individual employment contracts. Even if the employer is no longer bound to observe the collective agreement, it must still honour the terms of each individual employment contract. As the consultation paper recognises, the employer would still be bound to observe those terms unless they can be lawfully varied whether by collective bargaining or otherwise.

Where collective bargaining exists, the union can be expected to represent employee interests and indeed a focus on whether any particular individual employee might be worse off under any new collective agreement would risk undermining the collective nature of the process. If the incoming employer is seeking to replace previously collectively agreed terms with individual agreements then an individual employee ultimately has the right to withhold their agreement to the change. If new terms cannot be agreed and if the employer is forced to drive through change to an individual employment contract in the absence of agreement then the employer risks constructive and unfair dismissal claims. The employer would need to show good reason for the change, and a fair process. Employees therefore already have significant protection against adverse changes.

Finally, in our view, it is critical that clear guidance is produced on the incoming employer's ability to change collectively-agreed terms post-transfer. As we understand it, the Government's current proposals would allow an employer to seek to vary collectively agreed terms:

- after 1 year where the transfer itself is the reason for the variation (possibly subject to the "no less favourable overall" concept); and
- from day one where there is some other reason for the variation (i.e. apart from mere harmonisation).

Given the critical importance of knowing which of these two situations they find themselves in, employers will require very clear guidance on when their reason will be regarded as "the transfer itself".

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

This litigation seems very unlikely to produce that kind of clarity.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☒ No ☐

See our answer above. The existence of any collectively agreed terms should be declared by the employees and their representatives at or shortly after the point of transfer (currently they form part of the ELI requirements but these are not always complied with and the penalties for non-compliance are not necessarily appropriate to deal with the problem of collective agreements being asserted years after the transfer). Any terms which are not asserted within a one year period following the transfer should lapse altogether.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes x No ☐

(see below)

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes x No ☐

The existing prohibition on dismissals goes too far by making unlawful all dismissals which are "connected" to the transfer and have no ETO reason. The existing prohibition amounts to gold-plating of the Directive and it puts TUPEd employees in a significantly advantaged and protected position compared to non-TUPEd employees, who can be dismissed for any potentially fair reason. The problem is compounded by the current narrow definition of an ETO reason. The Government should bring the law back in line with the Directive by:

- prohibiting only dismissals which are by reason of the transfer itself, unless there is an ETO reason, and

- widening the scope of ETO reasons (see below).

A common situation in which an incoming employer might wish to dismiss employees for a non-ETO-reason is where the employer is seeking to implement changes to terms and conditions. The proposed new regulation 4 will allow employees to agree changes post-transfer. However, employees obviously cannot be required to agree such changes. In some situations a particular employee may choose not to agree to a change. In such cases, the employer has the ultimate and last resort option of terminating the employee's employment and offering re-engagement on the new terms. The employer's ability to dismiss an employee (regulation 7) must therefore be aligned with its ability to agree a contract change with the employee (regulation 4). We therefore support the Government's proposal in this regard.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ No ☐

a) Please explain your reasoning.

We are not clear what the Government's intention is here. If the intention is to make the relevant employer liable for notice pay only, then we do not see how the proposal would achieve this. A provision which made an employer liable for the "termination" of an employee's contract would surely mean that the employer would be deemed to have dismissed the employee for the purposes of the Employment Rights Act 1996, and the employee could then bring a claim for unfair dismissal. This is the case irrespective of whether any such dismissal is also automatically unfair under any other provision of TUPE. We do not understand the basis on which an employee would be precluded from bringing an unfair dismissal claim if the Government implements the current proposal.

Our member companies have also pointed out that liability for notice pay alone can be very significant, especially for senior employees.

In our view, the legislation should provide that, if an employee resigns because the transfer involves a substantial change in working conditions to the material detriment of the employee (we think the word material should be retained) then the employee shall be treated as dismissed BUT there should be no liability to pay notice pay in respect of a notice period which the employee does not work out AND the employee should be explicitly prevented from bringing an unfair dismissal claim unless the change would be sufficient to amount to a constructive dismissal.

The new legislation should also address the unfairness in the current system whereby the outgoing employer faces liability in respect of changes proposed by the incoming employer, over which it has no control.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes x No ☐

See EEF's answer to the Call for evidence where we argued strongly in favour of such a proposal.

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes x No ☐

a) Please explain your reasons.

We agree with the reasons given by the Government in favour of this change. We would also add that:

- In a non-TUPE context, if a future site closure/relocation was known about, and if redundancies were the inevitable consequence, employers do not generally wait until that event had actually happened before starting to consult the affected employees about it and managing the impact upon them (indeed the law requires consultation in good time in advance).
- TUPE 2006 therefore creates an odd situation in which, where there is a known and inevitable site closure/relocation, the relevant employers are supposed to wait until that event has occurred before consulting and managing the impact upon the employees.
- We would disagree that employees necessarily stand to benefit from this enforced delay. For example, the employer might make an extra redundancy to offset the costs of keeping employees employed unnecessarily. In some cases the current state of affairs sometimes leads to the absurd result that the incoming employer accepts all of the transferring staff on a TUPE basis but then dismisses them all on the day after the transfer (there are obviously risks arising in relation to consultation in this approach). The benefit of an extra day's employment is arguably marginal.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes x No ☐

In some transactions, there are benefits to allowing pre-transfer consultation and, in cases where both employers are happy for this to happen, it should be permitted. However, our members tell us that they would like the option of consultation beforehand, but without any legal requirement on the incoming or outgoing employer for this to happen.

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes x No ☐

a) Please explain your reasons.

We do not think that a set timescale could cater for all the different circumstances (numbers, locations, working patterns etc) in which representatives might need to be elected.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes x No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No x

The problem is not confined to micro-businesses but also extends to micro-transfers, i.e. transfers where the employer might have many employees but the transfer only involves a few employees. At present the legislation requires employers to invite their employees to elect representatives even when there is only a very small group affected by the transfer. This is a requirement which many employers and employees find hard to understand, and it sometimes flies in the face of sensible HR practice in the circumstances. In our view, employers should be able to inform and consult with affected employees directly where there are 5 or fewer employees affected by the transfer.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes X☐ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

Yes. Excluding micro businesses will inevitably create a distortion in the labour market and a commercial imbalance. In addition, the terms of any exemption will be very difficult to draft and apply. Potentially, a business employing four workers will not be subject to TUPE where four additional workers are transferred, but should three more workers then be transferred the following day, then the regulation would apply. This we believe is likely to be difficult to implement and create confusion.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes X☐ No ☐

There will be some unavoidable transitional costs involved by the proposed changes, for example securing advice and familiarisation, but we believe that the new effect will be to reduce the impact of TUPE upon micro-businesses.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes x No ☐

(But see our answer to question 3 in relation to the proposed repeal of the ELI requirements.)

Question 15: Have you any further comments on the issues in this consultation?

1. The Government should take the opportunity to correct the anomaly in the existing law whereby claims for failure to consult under TUPE can only be settled by way of ACAS-conciliated COT3 and not by a compromise agreement.

2. We support the Government's proposal to provide better guidance on the test of who is "assigned" to the transferring entity.

3. Our members have requested updated guidance on the application of TUPE to the transfer of insolvent businesses, as there have been a number of important decisions in this area.

4. We also have some concerns around the transfer of non-EEA migrant workers under TUPE. There will be some cases where non-EEA migrant workers are transferred to a new employer under TUPE. In many cases, we would expect that the new job is within the same standard occupational classification that was on the Certificate of Sponsorship assigned to them by their previous employer-sponsor and therefore a new application of leave to remain will not be required.

   However, difficulties will occur when the incumbent employer has a sponsor licence but the new employer does not. Under such circumstances, the employer must make a valid application for a sponsor licence within 28 days of the date the worker's transfer to the new employer, as well as reporting the migrants activity via email, as the new sponsor will not have registered with the UKBA's sponsorship management system (SMS), which is the normal route for reporting activity.

   The application process to become a Sponsor is itself lengthy and burdensome. In addition the UKBA only decides 65% of applications within four weeks. This is a significant period of time for employers to be left not knowing whether their transferee migrant workers are able to continue working for them.

A decision will then be made whether to grant the licence or to refuse it. If the outcome is the latter then the non-EEA migrant transferees will have their rights to work in the UK automatically curtailed, leaving the employer without the workers expected following the transfer. We believe that Government should commit to processing all applications from employers for a licence where this is required in anticipation of, or following a TUPE transfer within 28 days.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐

a) Please explain your reasons
b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

DWF LLP on behalf of National Outsourcing Association

☒ Business representative organisation/trade body

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☒ No ☐

a) Please explain your reasons:

64% of Respondents agreed with the proposal, 48% taking the view that the impact on their organisation would be favourable and 40% stating they were "not sure" what effect the proposal might have. Since service provision changes were expressly brought within the TUPE framework by the 2006 Regulations, transactions, particularly those relating to outsourcing, have been structured on this basis. Any changes will, therefore, inevitably introduce uncertainty and potentially bring increased costs for businesses.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Given the position that applied before the TUPE Regulations 2006, caution needs to be exercised so that commercial organisations which are engaged in planning transactions have certainty as to their legal obligations and employment costs.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☒ (iii) 3-5 years ☐ (iv) 5 years or more ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

Commercial transactions have been structured in line with the service provision change provisions of TUPE. Exit provisions in commercial agreements have been drafted accordingly. Businesses could end up shouldering significant liabilities relating to employees, where it had been anticipated those liabilities would transfer to the new provider. If the Regulations are amended as proposed, there may be a period of 'bedding in' during which clients and contractors are nervous as to where liabilities will fall.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☒

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

Yes. The Employee Liability Information provisions are particularly helpful where there is a second generation outsourcing. Where the transaction involves a transfer from a client to a contractor/ service provider, the provision of ELI can be dealt with under the terms of the commercial deal.

88% of Respondents took the view that the transferor should be under an obligation to provide this information earlier, 70% stating that the information should be provided 1 month before the transfer and 30% saying that this time limit should be 2 months before the transfer.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes, this would assist the parties to comply with their obligation to inform and consult representatives of the affected employees. This could reduce the number of claims for failure to inform and consult.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes, and it should be widened to allow for re-location of the workforce after the transfer.

92% of respondents to our survey took the view that the transferee should be able to harmonise terms after the transfer. Responses were evenly balanced between those who believed that the transferee should be able to do this at any time and those who believed that this should be permitted 12 months after the transfer.

It would be helpful for clear guidance to be issued on the question of harmonisation, to assist organisations.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to

those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

This would provide more flexibility and potentially certainty for the transferee. It would prevent smaller employers inheriting onerous terms and conditions on a long-term basis.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☒

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☒

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ **No** ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ No ☐

a) Please explain your reasoning.

This would limit the scope for unfair dismissal claims where the change in working conditions is not a breach of contract and would therefore provide the transferee with more flexibility to organise its workforce.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

44% of respondents to our survey had faced an issue during an outsourcing transaction when seeking to change location of the workforce post-transfer. 92% of respondents agreed that the Regulations should be amended to make it clear that the transferee may change the location of the workforce, so as not to give rise to automatically unfair dismissals.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

a) Please explain your reasons.

The current position is unduly restrictive and inflexible. We have come across situations where the transferor has wanted to be able to implement redundancies in advance of the TUPE transfer and indeed where the workforce has wanted the same outcome, but due to the current case law, this has presented risks. Employees in this situation have sufficient protection already and changing the Regulations as above would achieve a fair balance of protecting employees on the one hand and allowing employers to restructure the business with certainty.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ **No** ☐

a) Please explain your reasons.

The current provisions work in a satisfactory manner and we have not come across problems with the Regulations as drafted. Guidance would be helpful for employers and employees to understand their obligations with regard to informing and consulting.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☒ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☒ No ☐

Question 15: Have you any further comments on the issues in this consultation?

No

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Voluntary Organisations Disability Group (VODG)

Please tick the boxes below that best describe you as a respondent to this:

✓ Business representative organisation/trade body

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ No ✓

a) Please explain your reasons:

Our members consider that Regulation 3 (1)(b) has produced greater certainty as to when TUPE applies. Many of our members contract with public authorities to provide care and support for service users and are regularly involved in transfers of significant numbers of staff from the public sector or in second generation transfers of former public sector staff. Members acknowledge that there are still areas of uncertainty in interpreting the service provision changes. However, we consider the repeal of the 2006 amendments will create greater uncertainty and would be a backward step. The uncertainty relating to whether the service provision changes apply could be dealt with through clear non statutory guidance being provided.

We consider it will become less attractive for our members to bid for public sector contracts if the service provision change provisions are removed as greater doubt will be created as to whether TUPE applies. We would expect that staff and the unions who represent them who work in a service which is to be transferred will still argue that a change in provider is caught by Regulation 3 (1) (a). The case law is such that most of our members would not feel able to take over a contract on the basis that TUPE does not apply to transfer staff without an indemnity against claims from the contracting body. We think commissioners will be very reluctant to give such an indemnity given the pre 2006 case law relating to service transfers. Therefore we don't consider repeal of the service provision change provisions of TUPE will have the impact that the Government hope they will.

This proposed change also presents a big risk for existing service providers who are currently expecting staff to TUPE out to a new provider at the end of a contract. There is a potential that they could find themselves left with redundancy costs that would have otherwise transferred to a new provider under TUPE. For many of our members who have taken on staff from the NHS or local government this could be a huge cost as they have enhanced redundancy entitlements protected under TUPE. For this reason, if the service provision changes are to be removed it is considered there should be at least a five year delay to reduce the potential adverse effect.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

The main challenge for our members is that the transfers in which they are involved are always labour intensive, with no assets usually transferring on a change of provider. The ECM case would suggest that the reason the workforce is not taken on is a relevant factor

in deciding whether TUPE applies. It is not clear whether if a public body in future says TUPE will not apply whether this would be sufficient under the ECM case to mean that TUPE would not apply. The Cabinet Office statement of practice, Staff Transfers in the Public Sector would clearly need to be rewritten to provide guidance on this if Regulation 3(1) (b) is repealed. We also expect the ECM case may lead to an unhappy stand off on a change of contractors. The outgoing contractor arguing that Regulation 3 (1) (a) applies and the new contractor refusing to take on the staff in the hope that there can then be a finding that there is no stable economic entity that retains its identity. Staff will be caught in the middle and will probably end up bringing Tribunal proceedings against the outgoing and incoming provider because their advisers will also be uncertain as to where liability will sit.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ✓

a) Do you believe that removing the provisions may cause potential problems?

Yes ✓ No ☐

c) If yes, please explain your reasons.

See above

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ✓

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

It would seem that disclosure of information will always be necessary in order for a transferee to be able to comply with its obligation to inform and consult. If you don't have staffing details you can't properly consider whether measures are necessary. We consider the employee liability information is a useful minimum but guidance as to the information that should be provided and when in a tender situation would be appreciated by Members to help them when bidding for contracts.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ✓ No ☐

a) If you disagree, please explain your reasons.

Whilst we agree with the intention to narrow the restriction we consider the Government's proposed wording needs further consideration. Proposed regulation 4 (4) would permit any agreed change that could have been made pre transfer. This is attractive to our members as it would mean any change could be agreed. However, it may go beyond the interpretation of the Acquired Rights Directive in the Daddy's Dance Hall case as under the proposed wording a change could be made by reason of the transfer if agreed. The change could create uncertainty if the wording and intended effect is not sufficiently clear.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes, although in practice it has had limited use.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ✓ No ☐

a) Please explain your answer.

This is desirable although the requirement that the change is no less favourable to the employee appears to go beyond the requirements of Article 3 (3) of the Directive. In addition the revised regulations should make clear that a static approach to consideration of collectively agreed terms should be adopted.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No ✓

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Yes, our members do not wish to be bound by changes to collective agreements to which they are not a party. They cannot negotiate collective agreements to which they are not a

party. A dynamic approach means they can be expected to implement pay rises which don't account for their own financial position (and potentially which they don't get to know about).

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ ✓

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ✓ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ✓ **No** ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ✓ **No** ☐

a) Please explain your reasoning.

It is agreed that greater clarity would be of benefit in relation to this aspect of the regulations. However, we consider that employees may still transfer and then argue the termination is a dismissal. We also think consideration should be given to making it clear that where occupational pension rights are not being replicated (because they do not transfer) that should not give rise to a constructive dismissal or claim that the transfer involves a substantial change in working conditions to employees material detriment.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ✓ **No** ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ✓ No ☐

a) Please explain your reasons.

We consider this will assist when pre transfer it is clear that redundancies will be necessary

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ✓ No ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ✓ No ☐

a) Please explain your reasons.

The circumstances of each transfer differ and therefore what is reasonable will depend on the circumstances of the transfer.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee 0representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ✓ No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ✓

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

This question is not relevant to our members.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ✓ No ☐

Question 15: Have you any further comments on the issues in this consultation?

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons

We consider the impact would be neutral in terms of the workforce.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

VODG members are of the view that greater flexibility around changes to terms and conditions at a time when most members under significant pressure to reduce service costs from commissioners will assist in maintaining a high standard of care and support for the many thousands of disabled service users they support.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Policy Option 1 (b) No. It is not accepted that employees who work on services which are tendered/retendered/taken back in house will not transfer and therefore that there would be savings of between 13 and 30 million. Staff may still transfer under regulation 3 (1)(a).

Our members expect they would need more legal input when submitting tenders for contracts to identify whether TUPE applies and to negotiate appropriate contractual protection where there is greater doubt than is currently the case.

In relation to bidding for public sector contracts the biggest bar for our members is often the obligation to provide broadly comparable pension rights required under Fair Deal – a number of members will not bid for contracts where there will currently be a need to obtain admitted body or direction status.

Dundas & Wilson LLP

Please tick the boxes below that best describe you as a respondent to this:

☐√ **Other (please describe) UK commercial law firm**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☐√

a) Please explain your reasons:

If the aim of any changes to the Regulations is to remove 'gold-plating', we are not persuaded that deleting the 'service provision change' provisions would achieve any significant benefit in practice. If that were done, we would simply go back to a situation where there was greater legal uncertainty over the application of the Regulations domestically, particularly in second generation outsourcing scenarios. We anticipate that this would prompt further references to the CJEU on the applicability of the Directive/Regulations in the context of changes of providers of labour intensive services in particular.

We think that the benefit of any repeal may be disproportionate to the potential uncertainty that it would create (leading to more arguments between transferors and transferees, the need for more legal advice, unanticipated redundancy costs for outgoing service providers if TUPE does not apply on exit (even although the service provision change legislation was in place when the services contract was first entered into) and increased litigation). This is especially so, since we cannot simply go back in time to 2006 and any repeal of the service provision change legislation will be interpreted by tribunals/courts in light of the Government's stated policy objectives, which is likely to increase the amount of litigation in this area.

We have had dealings with firms in a number of EU states. We would mention one point in particular. When speaking to lawyers in the Netherlands, they have made the point that they are attracted to the service provision change concept because of the certainty it can create. In the Netherlands (and other EU states), the legal advice on various in/outsourcing scenarios can, necessarily, be more equivocal than it can be here in the UK.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

In our view, the service provision change legislation should not be repealed. As such, we have no response to this question.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐√ (iii) 3-5 years ☐ (iv) 5 years or more ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☐√ No ☐

c) If yes, please explain your reasons.

See answer 1)a) above.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☐√

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☐√ No ☐

In our view, this would be preferable, since for practical and commercial reasons transferees often wish to change terms and conditions. However, given the CJEU case law, the scope for practical change seems very limited.

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes, although the circumstances in which it applies in practice are unclear and as such it is not used often, in our experience.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible

provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ **No** ☐√

a) Please explain your answer.

At the moment, there is no limit on the amount of time that a collective agreement has to be observed. If a transferee intends to change a collective agreement, it is able to deal with this in the normal way, i.e. via negotiations and discussions with staff/unions. Including the provisions permitted by the Directive would lead to a loss of flexibility for employers, i.e. they would be tied in to making no changes in the first year after a transfer, which we do not think is merited.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☐√

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Yes, but only insofar as the provisions in the collective agreement would be frozen at the point of transfer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐√ **No** ☐

In our view, potential transferees are understandably nervous about the outcome of the *Parkwood Leisure v Alemo-Herron* litigation, since (if the outcome of that litigation is that a dynamic interpretation of collective agreements is permissible) they would not want to be locked in to collective terms, pay awards, etc that are decided by third parties. In practice it might be possible to avoid this, if agreement can be reached among the transferor, the transferee, and the relevant trade unions, but this will not always be achievable. As such, in our view, the only circumstance where there should be a limit on the amount of time that a collective agreement has to be observed is if the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a dynamic approach is permissible.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐√ **No** ☐

However, in our view, the scope for change seems very limited.

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐√ **No** ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐√ **No** ☐

a) Please explain your reasoning.

We agree that it would be preferable to track the wording of Article 4(2), as it is less onerous for employers, whilst at the same time providing the required amount of employee protection. However, we think it raises two key issues.

Article 4(2) states "If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship".

Issue 1 – it would be clearer if the words "by the employee" were inserted after the word "terminated".

Issue 2 – it appears to be assumed in the Consultation Document that, if the employer is deemed to be responsible for the *termination* of the contract of employment, this excludes liability for unfair dismissal, but we think it would be helpful if this point was made clear, either in the amended regulation or any accompanying guidance.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☐√ **No** ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☐ √ **No** ☐

a) Please explain your reasons.

We think that this gives additional flexibility to the transferee and any employees at risk of redundancy. However, we think that it is likely to give rise to two practical difficulties:-

i) It will be difficult for the transferor to show it has acted fairly if it is unclear whether issues of pooling and selection should take account of both workforces.

ii) In light of i) above, the transferor is probably going to have to rely on a great deal of information/help/co-operation from the transferor. In many corporate transactions/outsourcing/etc, this could be built into the transaction documents, but this is not always the case. As such, it may be worth amending Regulation 13(4) to require the transferee to provide this under the "measures" process.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☐√ **No** ☐

Although, we suspect there may be difficulties created by transferors refusing to allow transferees access to their employees prior to a transfer**.**

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☐√ **No** ☐

a) Please explain your reasons.

We think that a specified period would be too prescriptive and would not deal with all situations, especially where for commercial or practical reasons there is a need for short information/consultation process. We would agree that the guidance should make clear that one of the factors to be taken account of is "the timing of and reason for the transfer", which would include commercial need for a quick sale.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐√ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐√ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐√ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☐√

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐√ **No** ☐

Question 15: Have you any further comments on the issues in this consultation?

No.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐√

a) Please explain your reasons

We think that the Government's proposals are likely to be neutral from an equality and diversity perspective.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

We neither agree nor disagree with the analysis and evidence provided in the Impact Assessment.

British Hospitality Association

Please tick the boxes below that best describe you as a respondent to this:

/ Business representative organisation/trade body

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ No /

a) Please explain your reasons:

Before 2006, the contract catering industry (which increasingly also covers other facilities management functions, such as security and cleaning) had already largely accepted that changes of contract (whether from in-house to external contractor, or from one contractor to another) should be handled under TUPE. In any event, clients were likely to stipulate this in contracts. The 2006 amendments therefore made no little or no difference to our members in this sector. A reversion to the pre-2006 law should therefore make equally little difference, but, on balance, given that all changes to regulations carry some costs, it may be better to make no change at this point.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

As indicated above, the issue of whether or not TUPE applied was generally settled in practice in our industry by 2006, so we are not aware of any aspects of the pre-2006 domestic case law which would still need to be considered.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more /

a) Do you believe that removing the provisions may cause potential problems?

Yes / No ☐

c) If yes, please explain your reasons.

Our 5+ year period response to question 2 is based on concern that contracts which were accepted at their inception as coming under TUPE could change status at the end of the lead in period. Contracts in contract catering can last for 5 years or more.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No/

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

If the ELI requirements are repealed, there will need to be some back up provision. In most cases, this will probably be covered in the contract/tender issued by the client, but a back up would do no harm.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes / No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes / No ☐

a) Please explain your answer.

The problem has been well articulated that there are difficulties in having a workforce consisting of groups who have been subject to TUPE transfers at different times and

subject to different terms. Introducing a one year rule would introduce the possibility of flexibility.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes / **No** ☐

Yes, provided this did not mean that existing terms and conditions became blocked.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

No comment.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No /**

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes / **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes / **No** ☐

Questions 7 to 12:

No comments.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes / **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No /

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes / No ☐

Question 15: Have you any further comments on the issues in this consultation?

No.

Questions 16 and 17:

No comments.

Squire Sanders (UK) LLP

☒ **Legal representative**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

Under the 1981 Regulations, the identification of a TUPE transfer in a service provision change scenario was a far more complex task, creating confusion and uncertainty for end user clients and the prospective transferor/transferee in many proposed change of contractor scenarios.

Whilst the 2006 SPC provisions took time to bed-in and continue to generate litigation, they have provided far more clarity as to whether TUPE applies where there is a service provider change (particularly in light of recent case law decisions over the last 18 months, which have given clearer guidance on a number of key points and which some argue already limit the application of the SPC provisions).

A number of our clients (many of whom are involved in second and third generation outsourcing) note that there is a general acceptance of TUPE applying to any service provision change. They (and their competitors) therefore price for contracts and model their bids with the expectation that TUPE will apply. This makes the tendering process more commercially straightforward and a known quantity.

Therefore, even though the 2006 SPC provisions might be regarded as "gold plating" and go beyond the requirements of EU law, it is now over 6 years since their introduction and most businesses have adapted to accommodate them. It is generally understood that in a change of contractor scenario TUPE is more likely to apply than not, so it is now less common for a transferee to seek to challenge its application. In practice then, the commercial negotiation moves on much more quickly from the question of whether TUPE applies to the practicalities of agreeing the appropriate warranties and indemnities in relation to the potential TUPE liabilities and which party will be responsible for each element of those liabilities.

Looked at another way, the practical effect of the 2006 Regulations is, put crudely, the re-allocation of employment related liabilities and costs from the transferor to the transferee. As noted above, this is manageable from a business perspective (in terms of the way in which contracts are priced and negotiated), provided that there is certainty for all concerned. The overwhelming view of those we consulted was that the 2006 Regulations had provided this certainty at least to a large extent.

Similarly, there is a strong feeling that the 2006 SPC provisions are now closer than ever to providing the "level playing field" for which they were originally introduced. Moving from this position by repealing the 2006 SPC provisions and effectively going back to TUPE 1981 rules, will remove that "level playing field" at a stroke. In any borderline situation, it will be more difficult to determine whether TUPE applies. As a result, businesses will increasingly need to seek expert (and costly) legal advice on the potential application of TUPE. It is anticipated that many of the historic TUPE 1981 arguments regarding the

application (or not) of TUPE to any particular service provision change will be rehashed, but against a confusing background of the case law that has been developed since the introduction of the TUPE 2006 SPC rules (whilst repealed, the principles and guidance set out in the case law generated by TUPE 2006 are likely to be relied upon to the extent that they can be argued to also apply to "TUPE 1981" type scenarios). The knock-on effect will be increased delays/costs in relation to many changes of outsourcing arrangements, and subsequently an increase in satellite TUPE litigation.

Where there is uncertainty in any retendering processes, it is anticipated that this will be exploited by opportunistic potential transferees who will "low ball" their price to undercut their competitors' bids, with their price reflecting an assumption that TUPE does not apply. Whilst in the short-term this may lead to a more competitive pricing environment for UK businesses, there is real concern that it will force other parties to protect their interests by resorting to litigation (e.g. any transferors left with unexpected liabilities as a result of the application of TUPE being contested by the new transferee, and also any employees whom the new transferee refuses to recognise as automatically transferring to them under TUPE).

It was also noted by a number of our clients that in what continues to be a very challenging economic environment, potential transferees will increasingly look to cheaper staffing options in order that they can submit a competitively priced bid for new work opportunities. One possible side effect of the relaxation of the UK's rules regarding the application of TUPE in any SPC scenario could be an increase in the amount of "off-shoring". Whilst this may provide a more competitively priced solution for end-user clients, this could have a significant adverse impact on UK employment, which would in turn severely hamper our recovery from the current recession.

For the above reasons, whilst acknowledging the Government's desire to deregulate (something which all those we spoke to were wholly supportive of in the right context), a significant number of our clients feel that the proposed repeal of the 2006 SPC amendments will increase uncertainty, delay, costs and litigation to such a degree, and that any potential benefit to UK businesses in terms of competitive pricing models will be outweighed by the side-effects of reverting to the old 1981 rules. There is also likely to be an adverse impact on UK employment, due to the anticipated increase in offshoring arrangements. In this context then, those we consulted with did not feel deregulation (or at least, deregulation in the manner proposed) was appropriate.

That said, it is recognised by all our clients that the 2006 TUPE rules do provide a "gold plated" level of protection for impacted employees, which puts UK businesses at a potential disadvantage in certain cross-border outsourcing arrangements. It was also recognised that the Acquired Rights Directive itself had generated a large amount of litigation across Europe, with the European case law being difficult to interpret in line with the different manner in which each country had introduced its own legislation to incorporate the provisions of the ARD within domestic law (TUPE being a prime example).

With this in mind, most of the businesses we consulted agreed that the best solution would be for the UK to seek to apply pressure at European level that the ARD itself should be revisited and redrafted to provide a pan-European "level playing field" with greater clarity and certainty for all.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to

ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Prior to the introduction of TUPE 2006, the UK courts spent much time wrestling with the fall-out from the test laid down in the ECJ case of Suzen v Zehnacker Gebaudereinigung GmbH and how this should be applied and interpreted to ensure consistency with the approach adopted by the UK courts.

The position had been largely clarified prior to the introduction of TUPE 2006; albeit the leading case law authorities made it clear that each case would very much be determined on its own facts by applying the relevant tests, which perpetuated an unhelpful degree of uncertainty.

As TUPE 2006 has been in force for over 6 years, UK businesses have been able to largely ignore ARD case-law developments in Europe. Assuming it is to be repealed, it would be very helpful if the Government could issue a guidance document that clearly sets out when there is a "relevant transfer" based on the current European case-law position (or at the very least, a summary of the applicable tests). It would also be helpful if clarification could be issued as to whether the *Spijkers/Cheesman* tests remain applicable to SPC as prior to 2006 TUPE, or whether they need to be modified in light of any post-2006 European case law developments in relation to SPCs.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☒

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

In the vast majority of cases, current service providers/contractors have entered into outsourcing arrangements with end-user clients on the assumption that TUPE will apply if they are replaced by an alternative provider. If TUPE is repealed prior to the expiry of those arrangements, those incumbent suppliers risk having to pick up unanticipated redundancy costs on termination (for staff for whom it was legally obliged to assume responsibility) if the new provider refuses to accept that TUPE applies. The only alternative would be to become embroiled in expensive legal/tribunal proceedings, with no certainty as to the likely timeframe/outcome of those proceedings.

If the proposed changes are brought in, those commissioning services and contractors bidding for work will have greater freedom to exploit arguments that the retendered work will "transfer" on a non-TUPE basis. There are obvious commercial advantages to any potential bidder in seeking to argue that TUPE does not apply. In the same respect, if an end-user client can tender their contract on the basis that TUPE will not apply, it will attract more competitive fee arrangements from bidders working on the assumption that they will be able to start the contract with a clean slate by avoiding the costs normally associated with inheriting transferred staff under TUPE.

If just one bidder during the tender process decides to take on the risk of TUPE not applying and to reflect this in a much reduced price, it potentially puts the incumbent supplier at an immediate disadvantage (as they will not have the option of pricing for the retendered contract without factoring in the cost of existing staff). The result will be an elimination of the level playing field, and the creation of a market in which opportunists take calculated risks at the expense of the incumbent supplier and, more importantly, its affected employees.

As mentioned above, it is anticipated that the repeal of the current SPC provisions could lead to an increase in offshoring in certain sectors (e.g. IT services and certain professional services). Offshoring will have two attractions to bidders looking to win new outsourcing work in the UK. Not only will it allow the bidder to source cheaper workers to price the bid more competitively, but the very act of offshoring will mean that TUPE is less likely to apply where the TUPE 2006 SPC test does not apply.

As regards the lead-in period, a number of our clients have contracts in place which include TUPE indemnity protections that have longer than 5 years left to run. In some cases, the contracts are of 7+ years' duration, and it is typically the contracts of longer duration that have the highest staffing levels and therefore carry with them the greatest level of potential "TUPE related" costs.

Moving the goalposts part-way through the life of a contract by repealing TUPE 2006 is grossly unfair on incumbent suppliers. In some cases the potential cost implications (and any related legal proceedings) could have a devastating effect on those suppliers at the point of termination, given that this change means the contract immediately takes on a very different risk profile compared to when it was originally entered into (that risk profile of course having been a critical factor in the pricing and negotiation of the original contract).

Therefore, unless adequate protection is put in place for incumbent suppliers, we anticipate a trend of employees being made redundant throughout the term of an outsourcing contract in order that incumbent suppliers can mitigate their potential exposure on termination (i.e. in light of the risk that any replacement suppliers might seek to argue that TUPE does not apply).

It is acknowledged that a lead-in period of 5+ years across the board will be far longer than is necessary for many current outsourcing arrangements. Therefore, rather than implement a fixed lead in period for the repeal of the current SPC provisions, a more practicable alternative solution might be to introduce a cut-off date for the TUPE 2006 SPC provisions, with the effect that they will apply until the termination or expiry of any SPC arrangements already in-place as at that date, but thereafter the replacement SPC provisions will apply to any new (or renewed/retendered) outsourcing arrangements.

This alternative approach would allow a "run off" period, whereby all parties know where they stand in relation to arrangements put in place and/or re-negotiated under the current regime, and that the 2006 TUPE rules will apply on the termination of those arrangements (even if such termination takes place in 6 months', 3 years' or 7+ years' time).

It would also allow parties to continue with existing contracts that were priced and entered into on the presumption that the TUPE 2006 rules would also apply on termination, without the fear of being burdened with unexpected (and unfair) costs when the TUPE 2006 rules are repealed.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☒

a) If yes, please explain your reasons.

N/A

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

We do not believe it is desirable to leave the parties to simply cooperate on the disclosure of information as this may not be achievable, particularly in a second or third generation outsourcing situation where there may not be any express contractual provisions in play. Instead, the law should seek to set a minimum framework of information the transferor should give to the transferee and the time by which it must be provided. Given the acknowledged benefits of the employee liability information framework, a preferable option would be to build on that framework by requiring earlier disclosure of better quality employee liability information and to ensure better compliance with those rules.

The current requirement to provide information 14 days before the transfer does not meet the transferee's commercial need to have information, especially on a change of service provider. Instead an approach favoured by almost all the businesses we consulted with, was to (i) have an obligation to provide the relevant information "in good time" as soon as it is clear that a transfer is likely and (ii) to couple this with a backstop date of no less than 28 days before the transfer takes place. As an alternative, a number of clients suggested having a backstop date based on the last payroll date falling at least one month before the transfer date – many highlighted payroll issues and an ability to transfer payroll as significant practical problems, which this approach would alleviate significantly, if not entirely.

Another approach would be to consider the phased provision of information, with initial provisional information provided on an anonymised basis, no later than 60 days before a TUPE transfer is anticipated to take place, with the full information to be provided 28 days before the transfer. This would be particularly useful where redundancies are likely to be proposed and the duty to consult under section 188 Trade Union and Labour Relations (Consolidation) Act 1992 triggered, and would complement both the changes the Government is proposing in relation to pre-transfer consultation and those it has already made to the minimum consultation periods applicable where collective redundancies are proposed (i.e. the reduction from 90 days' to 45 days' consultation where 100 or more redundancies are proposed).

There are however, a number of areas where clients have identified that a lack of information can be extremely problematic in a TUPE transfer scenario and are not

currently covered by the ELI framework. They include for example (i) where a transferee states that TUPE will not apply (for instance because they argue a change in the way in which the service is to be provided) or (ii) where a transferor argues that a particular employee should transfer under TUPE, a right to ask for evidence to support that assertion. The introduction of a "right to request" such information, supported by a financial penalty (consistent with that applicable for other breaches of the ELI provisions) was suggested as a means of addressing this significant information gap.

A related suggestion was that the penalty for failure to comply with the ELI provisions should be increased to bring it into line with the protective award. This is something we would encourage the Government to consider regardless of whether any changes are made to the current ELI provisions as there is a consistently held view that the penalties that currently apply where the ELI provisions are not complied with are not an effective means of ensuring compliance.

If the ELI provisions are repealed, we agree that it is sensible to make an amendment to regulation 13 along the lines proposed. However whether the requirement to disclose information where it is necessary for the transferee and transferor to perform their duties will improve the situation will depend on the extent of the disclosure obligation and the nature of the guidance provided. It does have the potential to make the process work more smoothly, however there needs to be enough of an incentive on the transferor to provide the requisite information (in terms of penalties for non-compliance) otherwise there is a risk they will abuse their position.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

N/A

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

We agree that the exception should be retained as this does at least offer employers some degree of flexibility to vary terms and conditions in a TUPE context. That said, there was concern that given the current narrow scope of the ETO exception, employers were not making as much use of that flexibility as they otherwise might.

Including workplace relocation in the definition of an ETO would help align currently conflicting areas of employment law; a place of work relocation amounts to a "redundancy" for the purposes of the Employment Rights Act 1996 but not for the purposes of TUPE. This is an illogical position and an example of where the 2006 Regulations do actually create unnecessary gold-plating. It would also reflect the reality that service provision changes very often involve a change of workplace location.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from

collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

Those of our clients that have inherited collective agreements agree that it would be helpful to be able to re-negotiate those terms and that such a change would give them greater flexibility. If the outcome of the *Parkwood Leisure* case is that the dynamic approach should apply, the need for such a provision becomes even more pressing to avoid a situation where transferees are bound into terms which are completely outside their control and which do not reflect the reality of their workplace relationship.

As noted above, article 3.3 of the ARD allows for such an approach; in fact, some employers already adopt a consultative approach in transfer situations, discussing with unions what an appropriate agreement is in the new setting. Amending the Regulations in this manner would enable all employers to benefit in the same way.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☒ **No** ☐

We would support the inclusion of such a condition but only to the extent that it is required to ensure compliance with the ARD.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Please see above.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☒

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ **No** ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ **No** ☐

a) Please explain your reasoning.

The current provisions which allow staff to opt out of the transfer and potentially bring a claim against the incumbent as a result of prospective changes to their terms and condition proposed by their replacement are non-sensical given that (i) these are changes the incumbent provider has no control over; and (ii) the staff concerned do not even have to establish a fundamental breach of contract in order to be able to bring such a claim. This provision is particularly problematic given that TUPE transfers can (and often do) involve a change in workplace location, something which neither the transferee nor the transferor is easily able to do anything about.

For that reason, the proposed changes to regulations 4(9) and (10) are welcomed as they are likely to remove the scope for unfair dismissal claims where the change in working conditions is either not a breach of contract at all or is a minor breach that would not otherwise give rise to a constructive dismissal claim (a position which is very clearly (and unnecessarily) "gold-plating" an employee's rights simply because they happen to be in a TUPE situation).

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ **No** ☐

a) Please explain your reasons.

As things stand, there are circumstances in which the employment relationship has to be

continued for longer than is needed even though (i) there is a valid ETO and (ii) in practice, it may be beneficial for all concerned to ensure such issues are addressed prior to the transfer date. It has always seemed illogical to suggest that a redundancy effected on the day before a transfer is automatically unfair (because it is effected by the transferor who cannot show an ETO) whereas the same redundancy effected on the day after the transfer would be fair (subject to a fair process being followed). This change would overcome that apparent anomaly.

To ensure any such change is effective however, the Government should also consider ensuring that there is adequate protection provided in the revised Regulations to protect transferors against liability where the transferee is subsequently found not to have a genuine ETO. That said, as there is no obligation on the transferor to rely on the transferee's ETO to make pre-transfer dismissals, in practice, there is an argument to say that they are only likely to do so in practice if they are able to secure full (and effective) indemnity protection from the transferee against any potential liability.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

In practice, many of the businesses we spoke to already undertook such consultation prior to the transfer date by agreement between transferor and transferee albeit that they did so acknowledging that the risk that such an approach might technically not be compliant with the Regulations. In practice, such an approach can be beneficial for all concerned and to that extent, the proposed change will help facilitate this and ensure the parties can proceed without being concerned that their approach may later be challenged.

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ **No** ☐

a) Please explain your reasons.

It is impracticable to define in legislation what is 'reasonable' as this will depend on the circumstances of each case. We therefore agree that further guidance would be helpful. In fact, many of the businesses we spoke to felt that this was one area where more generally, further guidance for employers would be welcomed.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases

where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☒ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☒ **No** ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

If the SPC provisions are repealed, micro businesses face the same challenges as any other in relation to the question of whether an SPC is covered by TUPE and therefore risk incurring additional costs in taking advice and/or having to litigate this issue.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ **No** ☒

Any changes to the ELI rules should be phased in with a lead in period, otherwise it is going to lead to confusion for any contracts which terminate shortly after the rule change.

Question 15: Have you any further comments on the issues in this consultation?

During the course of our discussions with clients and contacts, a number of points were raised which, whilst not referred to in the Government's proposals, are nonetheless worthy of mentioning and are issues which, for the reasons given below, we would urge the Government to look at again with a view to addressing as part of any changes to the 2006 Regulations:

1 The professional services exemption – a significant number of our clients have again raised the fact that professional services ought to be excluded from the scope of the TUPE Regulations. Given that the nature of these services is people-led, to have a situation where, by law, a replacement service provider is required to take on those

staff who will necessarily have been the (or one of the) principal reasons why a client has chosen to take its business elsewhere, risks creating a position whereby professional service providers are “rewarded” for their underperformance by being able to pass employee related liabilities to the replacement provider.

2 Pensions liabilities - a very significant risk area for outsourcing businesses, particularly those looking to take on contracts previously managed by the public sector (or which originated from the public sector) relates to pensions liabilities. The nature and extent of those liabilities can single-handedly transform the dynamic of a commercial contract. However, at the same time, it is often extremely difficult for potential transferees to get a clear idea of what the pensions-related liabilities might be. The businesses we spoke to made clear that this was a significant inhibitor to taking on contracts from (or with their origins in) the public sector, and something that ought to be considered and addressed.

3 Restrictions on compromise agreements – the inability to contract out of claims for failure to properly inform and consult in relation to a TUPE transfer is considered extremely unhelpful. Whilst accepting the underlying policy of not wanting to dissuade businesses from carrying out appropriate information and consultation in relation to a TUPE transfer, the majority felt that enabling parties to contract out of such claims as part of a valid compromise agreement would not actually have that effect. Instead the view was that there are many reasons (both legal and from an employee relations perspective) to encourage businesses to engage in such information and consultation, that this exclusion was unnecessary and created potential uncertainty where parties had reached a genuine (and desired) agreement to compromise any potential claims.

Question 16: Do you feel that the Government’s proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☒

a) Please explain your reasons

We do not envisage any area of the proposals having a direct impact on equality and diversity.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Weightmans LLP

Please tick the boxes below that best describe you as a respondent to this:

☒ **Legal representative**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

This response reflects the views communicated to us by our clients during a series of 5 regional workshops to discuss the proposals.

In general our clients do not welcome the proposal to repeal the provisions relating to service provision changes. They feel that the provisions have introduced greater certainty as to when TUPE applies, and that this certainty has been good for business.

Our clients consider that the aim to reduce the costs will not be achieved by repeal of the provisions. In fact, their repeal is likely to increase costs, as it will give rise to more arguments as to when TUPE will apply and so make commercial transactions more time consuming and expensive.

On the one hand, a number of clients expressed frustration that the same workforce would be transferred, even though that workforce had not been delivering a high level of service. On the other hand, however, some clients expressed the view that, in certain cases, for example in the care sector, the provisions are highly desirable in order that continuity of staffing can be maintained.

Those of our clients who felt that the provisions should be repealed largely felt this way because recent cases have eroded some of the certainty originally provided by the provisions. However, on balance, our clients felt that the provisions relating to service provision change still gave greater certainty than the traditional test.

Whilst we acknowledge that the repeal of the provisions might 'free-up' businesses to produce more innovative bids, it was broadly felt by our clients that increased uncertainty was too high a price to pay.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Our clients did not identify any specific aspects of pre-2006 domestic case law that might need to be considered.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes

effect?

less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☒ (iv) 5 years or more ☐

Our clients generally agreed that a relatively long 'lead-in' period would be required to avoid businesses being 'caught-out' mid contract, where commercial contracts have been entered into on the presumption that TUPE will apply at their conclusion. Our clients broadly agreed that a period of 3-5 years would be appropriate, as they considered this to be the approximate average length of a commercial contract.

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

The key potential problem identified by our clients was an increased level of uncertainty as to when TUPE will apply, perhaps leading higher legal costs and slower transactions. Some clients who operate in sectors where transfers are frequent explained that, when tendering for work, they frequently rely on the fact that they will 'inherit' sufficient staff to carry out the work. If staff do not transfer with a change in service provider it might prove challenging for them to 'staff up' quickly to service the contract.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☒

a) If yes, please explain your reasons.

The consensus of our Clients was that the current arrangements for the provision of employee liability information are not satisfactory: provision of the limited information required by the regulations 14 days before the transfer was considered to be 'too little too late'.

The early provision of information was considered to be vital to effective commercial transactions, as it enables decisions to be made upon on the viability of the contract. By 14 days before the transfer, most key commercial decisions have already been made and the contract awarded.

Our clients consider the current situation to be particularly perilous for smaller employers, who are less likely to be able to withstand a loss suffered through inherited claims or contract issues of which they were not aware.

The view of our clients is that change would be desirable. However, our Clients generally agreed that is extremely useful to have a 'back stop' by which provision of employee liability information is compulsory. It can serve as an effective driver where there the transferor is reluctant to provide information at all.

Our clients felt that the proposed removal of the obligation requiring the provision of information assumed a spirit of co-operation that is often absent from many commercial

transactions, especially between competitors. The scope for non-co-operation may be increased by abandoning the obligation.

Our clients would like the Government to consider retaining a minimum time limit for the provision of employee liability information and retaining a penalty if the information is not provided. However they felt that the appropriate limit should be far earlier than the current 14 days. Whilst commercial transactions will differ, the consensus amongst our clients was that the time limit should be at least 30 days.

b) Would your answer be different if the service provision changes were not repealed?

Our clients acknowledge that, if the service provision changes are repealed, TUPE will potentially apply in fewer situations. Furthermore, we acknowledge that in traditional 'transactional' situations, such as asset sales, the provision of employee liability information is often of less pressing importance, as a reduction in purchase price can usually be negotiated if information is not provided.

Nevertheless, the majority view of our clients was that a clear requirement to provide employee liability information within a given timeframe would still be advantageous. As stated above, the obligation can act as a driver for some commercial transactions. Our clients expressed the view that they would be very reluctant to see the obligation go.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

The view of our clients was that such an amendment would be useful, especially if the time limit for the compulsory provision of employee liability information is removed.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

This proposal was broadly welcomed by our clients as, in theory, the change in wording would narrow the circumstances in which employers would face restrictions in amending terms and conditions. However, some scepticism was expressed as to the practical impact such a change would have. On balance though, the view of our clients was that this amendment may on occasion afford increased flexibility to businesses and should be welcomed for that reason.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Our Clients agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained as this provides crucial flexibility for employers where changes are contemplated.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

Our clients consider that the proposal will benefit business. Our clients felt that it was wrong that an employer could be bound indefinitely by the terms of an agreement which it had no part in negotiating. The proposed change would go some way towards mitigating that perceived unfairness. It was also felt that a 1 year time limit might also provide increased clarity for employees. The clear consensus among our clients was to welcome the proposal. There was broad agreement that UK law should not bind businesses beyond the Directive.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☒

The prevailing view amongst our clients was that business would welcome legislation to limit the operation of Regulation 5 of TUPE as far as possible. Therefore, broadly speaking, our Clients did not welcome the inclusion of this condition. However, there was no strong opposition to the proposal. Our clients appreciated the need to balance flexibility for business with the rights of employees**.**

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

The vast majority of our clients favour the static approach and would welcome the flexibility of that approach. Many clients felt that it would be unfair and unreasonable for a transferee employer to be bound by changes negotiated by the old employer and its trade union after the transfer.

One client pointed out that the binding of the transferor to a pre-transfer collective agreement does not always work in favour of the employee. For example, if pay has been frozen by a pre-transfer collective agreement, employees may not benefit from pay increases awarded at a later date by a transferee.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ No ☒

Our Clients have not identified any other changes.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

This proposed amendment is broadly welcomed by our clients. Again, it is hoped that this change will narrow the circumstances in which dismissals could be automatically unfair following a transfer, reducing risk and fear of financial exposure for businesses. Their prevailing view is that, in this context, UK businesses should not be more restricted than strictly required by European law.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ No ☐

The view of our Clients is that it would be desirable and in the interests of clarity to align drafting in both areas.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ No ☐

a) Please explain your reasoning.

This proposed change is broadly welcomed by our Clients who consider that the current provisions can operate very harshly on employers. Currently, the transferor employer could be liable for an automatically unfair constructive dismissal arising from a TUPE transfer even if no fundamental breach of contract, or any breach of contract at all, has occurred. Our clients felt that it is much fairer to require employees to make out a case of constructive dismissal upon the normal basis (i.e a fundamental breach of contract) if they resign in response to a change in their working conditions. There was a strong consensus that this proposed change will be positive for business.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce"

covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

There was complete consensus amongst our clients to welcome this proposal. Our clients considered that it would be extremely helpful to align the definition of 'entailing changes in the workforce' with the definition of redundancy as this may allow for potentially fair dismissals where the location of the workforce changes following a TUPE transfer.

Our clients did not anticipate that this change would operate unfavourably against employees as, for dismissal to be fair, there must still be a genuine redundancy situation and a fair procedure must be followed.

Many of our clients have experienced in practice a situation where employees in a geographically remote location had been inherited in a TUPE transfer. The prevailing view is that this amendment would be of great practical help to business in a geographically dynamic labour market.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

a) Please explain your reasons.

There was no strong consensus amongst our clients on this proposal and they expressed some concerns about how it would operate in practice.

The main concern was that pre-transfer dismissals might result in selection from a pool made up solely of the transferor's employees, rather than those of both the transferor and transferee, resulting in potential unfairness to the transferor's employees, and potential liability for the transferee. Therefore, some clients felt that the increased flexibility, which is presumably the aim of this proposal, might prove to be an illusion.

Many clients were concerned that this proposal will make redundancy exercises more complex and difficult to administer. Many of them felt that it would be much easier to stick to the 'status-quo', allowing employees to transfer before making redundancies. In their view, if this proposal is to be progressed, further clarification or guidance may be needed on how the changes will affect redundancy pooling.

Some clients expressed reservations that the proposal could enable a transferee to put pressure on a transferor to dismiss or freeze recruitment pre-transfer to facilitate a deal.

While little material impact was envisaged where two organisations are competitors, it was recognised that the proposal may help to streamline the process where the transferee and transferor are able and willing to work together - for example joint ventures, transfers within a single group of companies or other 'amicable' transfers.

On balance, the prevailing view amongst our clients was to welcome the proposal as it would introduce a useful option for them but one that might be of limited use in practice.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

The general consensus amongst our clients was that allowing pre-transfer consultation by the transferee would be a welcome step and would help to streamline the transfer process.

Our clients recognised that the proposal would effectively allow the transferee and transferor to combine the obligations to inform and consult under TULRCA and TUPE into a single process. It was broadly felt that this could be beneficial to employees as it could avoid a more protracted period of uncertainty. Indeed, in some circumstances, a shorter process might result in fewer redundancies.

However, whilst this proposal was welcomed, some concerns were raised as to how it might work in practice. Again, consultation by the transferee before the transfer takes place presupposes a level of co-operation that is unusual in many transfers between competitors.

Some concern was expressed that, with both the transferor and transferee involved in a single or concurrent consultation there was potential for the process to become 'muddled', or at least less tightly controlled, than a consultation exercise executed solely by the transferee or transferor. Some clients raised concerns that a combined process might prove confusing for employees.

However, whilst it was acknowledged that pre-transfer consultation by the transferee might reduce employee protection a little, primarily by shortening the period for which employees facing redundancy would receive pay, it was generally agreed that this change would be beneficial to both employers and employees where co-operation is possible.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ **No** ☐

a) Please explain your reasons.

Our Clients felt that guidance setting out relevant factors as to what might constitute a 'reasonable time' period would be more useful than an amendment to Regulation 13(11).

b) If you disagree, what would you propose is a reasonable time period?

Not Applicable. Please see above.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

Although there were no micro-businesses amongst the clients who shared their views on the consultation with us, there is a strong consensus that it would be sensible to afford micro-businesses the flexibility to consult with employees directly.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ **No** ☒

The prevailing view was that it would be preferable to make this option to referable to the number of affected employees rather than to the size of the workforce. Many of our clients expressed the view that it would be sensible to extend this option to smaller transfers rather than simply to smaller businesses, as many transfers that take place between larger employers will affect only a small number of employees. Our clients felt that many employees in fact prefer direct consultation, especially where only a small number of them are affected. Such a provision might be of benefit to a larger employer with a number of separate smaller sites.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

Our clients did not identify any other proposals that should exempt micro-businesses.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No specific additional costs were identified.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ **No** ☒

The prevailing view amongst our clients is that a significant lead-in period is not necessary for any proposals other than those in relation to service provision changes.

Question 15: Have you any further comments on the issues in this consultation?

The most common difficulty for our clients during the transfer process is determining which employees will transfer under TUPE, especially where different employees spend different amounts of time on a contract pre-transfer. Our clients regularly seek legal advice from ourselves on this point but the issue is not addressed at all in the consultation.

Whilst it is acknowledged that this will always be a practical consideration, based on the work the employee has actually performed, the prevailing view amongst our clients was that further guidance or clarity on this issue would be useful. For example it might be helpful to have guidance on the proportion of work done on the contract, over what pre-transfer period, would deem the employee to transfer.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐

a) Please explain your reasons

There are no immediately apparent areas in which the Government's proposals would impact either positively or negatively on equality and diversity. However, some of our clients raised the possibility that lower paid workers might be disproportionately affected by the repeal of the provisions relating to service provision changes, as such changes are common in lower paid, labour intensive sectors such as cleaning. Some clients speculated that women working part time and members of certain ethnic minorities might be more likely to work in these sectors. However, discussion amongst our clients did not give rise to any definite consensus that these groups would necessarily be negatively impacted by failure to transfer on change of service provider. Some clients observed that, in many situations, affected employees might receive redundancy pay and then find alternative employment after a short period of time in any event.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

We do not have any specific evidence to submit on this point.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Not Applicable.

Anthony Collins Solicitors LLP

Please tick the boxes below that best describe you as a respondent to this:

✓ **Legal representative**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ✓

a) Please explain your reasons:

We consider that Regulation 3 (1)(b) has produced greater certainty as to when TUPE applies. Many of our clients contract with public authorities to provide services or are regularly involved in transfers of staff. We acknowledge that there are still areas of uncertainty in interpreting the service provision changes. However, we consider the repeal of the 2006 amendments will create greater uncertainty and would be a backward step. The uncertainty relating to whether the service provision changes apply could be dealt with through clear non statutory guidance being provided.

We consider it will become less attractive for clients to bid for public sector contracts if the service provision change provisions are removed as greater doubt will be created as to whether TUPE applies. We would expect that staff and the unions who represent them who work in a service which is to be transferred will still argue that a change in provider is caught by Regulation 3 (1) (a). The case law is such that most of our clients would not feel able to take over a contract on the basis that TUPE does not apply to transfer staff without an indemnity against claims from the contracting body. We think commissioners will be very reluctant to give such an indemnity given the pre 2006 case law relating to service transfers. Therefore we don't consider repeal of the service provision change provisions of TUPE will have the impact that the Government hope they will.

This proposed change also presents a big risk for existing service providers who are currently expecting staff to TUPE out to a new provider at the end of a contract. There is a potential that they could find themselves left with redundancy costs that would have otherwise transferred to a new provider under TUPE. For many of our clients who have taken on staff from the NHS or local government this could be a huge cost as they have enhanced redundancy entitlements protected under TUPE. For this reason, if the service provision changes are to be removed it is considered there should be at least a five year delay to reduce the potential adverse effect.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

The main challenge for our clients is that the transfers in which they are involved are always labour intensive, with no assets usually transferring on a change of provider. The ECM case would suggest that the reason the workforce is not taken on is a relevant factor in deciding whether TUPE applies. It is not clear whether if a public body in future says TUPE will not apply whether this would be sufficient under the ECM case to mean that

TUPE would not apply. The Cabinet Office statement of practice, Staff Transfers in the Public Sector would clearly need to be rewritten to provide guidance on this if Regulation 3(1) (b) is repealed in relation to public sector transfers. We also expect the ECM case may lead to an unhappy stand off on a change of contractors. The outgoing contractor arguing that Regulation 3 (1) (a) applies and the new contractor refusing to take on the staff in the hope that there can then be a finding that there is no stable economic entity that retains its identity. Staff will be caught in the middle and will probably end up bringing Tribunal proceedings against the outgoing and incoming provider because their advisers will also be uncertain as to where liability will sit.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ✓

a) Do you believe that removing the provisions may cause potential problems?

Yes ✓ No ☐

c) If yes, please explain your reasons.

See above

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ✓

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

It would seem that disclosure of information will always be necessary in order for a transferee to be able to comply with its obligation to inform and consult. If you don't have staffing details you can't properly consider whether measures are necessary. We consider the employee liability information is a useful minimum but guidance as to the information that should be provided and when in a tender situation would be appreciated by Members to help them when bidding for contracts. We also consider that extending the period in which the information should be provided would be useful. For example, to a minimum period of 28 days before transfer unless there are special circumstances that render that impossible.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ✓ No ☐

a) If you disagree, please explain your reasons.

Whilst we agree with the intention to narrow the restriction we consider the Government's proposed wording needs further consideration. Proposed regulation 4 (4) would permit any agreed change that could have been made pre transfer. This is attractive to our clients as it would mean any change could be agreed. However, it may go beyond the interpretation of the Acquired Rights Directive in the Daddy's Dance Hall case as under the proposed wording a change could be made by reason of the transfer if agreed. The change could create uncertainty if the wording and intended effect is not sufficiently clear.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes, although in practice it has had limited use.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ✓ No ☐

a) Please explain your answer.

This is desirable although the requirement that the change is no less favourable to the employee appears to go beyond the requirements of Article 3 (3) of the Directive. In addition the revised regulations should make clear that a static approach to consideration of collectively agreed terms should be adopted.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No ✓

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Yes, our clients do not wish to be bound by changes to collective agreements to which they are not a party. They cannot negotiate collective agreements to which they are not a party. A dynamic approach means they can be expected to implement pay rises which don't account for their own financial position (and potentially which they don't get to know about).

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ ✓

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ✓ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ✓ **No** ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ✓ **No** ☐

a) Please explain your reasoning.

It is agreed that greater clarity would be of benefit in relation to this aspect of the regulations. However, we consider that employees may still transfer and then argue the termination is a dismissal. We also think consideration should be given to making it clear that where occupational pension rights are not being replicated (because they do not transfer) that should not give rise to a constructive dismissal or claim that the transfer involves a substantial change in working conditions to employees material detriment.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ✓ **No** ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ✓ No ☐

a) Please explain your reasons.

We consider this will assist when pre transfer it is clear that redundancies will be necessary

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ✓ No ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ✓ No ☐

a) Please explain your reasons.

The circumstances of each transfer differ and therefore what is reasonable will depend on the circumstances of the transfer.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee 0representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ✓ No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ✓

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ✓ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ✓ No ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

The repeal in the service provision changes is likely to lead to micro businesses, who may not have access to legal advice or internal HR support to assume TUPE does not apply on a service provision change.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ✓ No ☐

Question 15: Have you any further comments on the issues in this consultation?

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons

We consider the impact would be neutral in terms of the workforce.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Policy Option 1 (b) No. It is not accepted that employees who work on services which are tendered/retendered/taken back in house will not transfer and therefore that there would be savings of between 13 and 30 million. Staff may still transfer under regulation 3 (1)(a).

We expect our clients would need more legal input when submitting tenders for contracts to identify whether TUPE applies and to negotiate appropriate contractual protection where there is greater doubt than is currently the case.

In relation to bidding for public sector contracts the biggest bar for our clients is often the obligation to provide broadly comparable pension rights required under Fair Deal – a number of clients will not bid for contracts where there will currently be a need to obtain admitted body or direction status.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

x Yes, I would like you to publish or release my response

The Direct Marketing Association UK Ltd

Please tick the boxes below that best describe you as a respondent to this:

X Business representative organisation/trade body

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

a) Please explain your reasons:

Agencies have been pitching for contracts for decades and before the 2006 amendments, if a contract was lost, the people working on that contract were either moved to other work within the agency or made redundant.

The 2006 amendment, to bring service provision within the Regulations, did cause both practical and management problems. The 2006 amendments were also seen as gold plating the EU Directive and put the UK out of sync with other European countries leading to more uncertainty.

A service contract is, by its nature, a contract built on the relationship between individuals at the service provider and the client. When an agency pitches for a contract, they have to make the client buy into the agency and its people. Negotiations for a contract can last for many months to ensure the contract meets the needs of both parties and during this time trust and confidence in built in the agency and those at the agency that will work on projects for that client.

The reason therefore for a client to decide to move agencies is they are not happy or have become frustrated with the incumbent agency and the relationship have broken down. The client will look to an alternative agency and will have bought into that agency's people, their way of thinking and their creativity.

Therefore, because this service provision is based on the people involved and the quality of the service they provide, moving the people involved from the old agency to the new agency is not going to solve the issues caused by the breakdown in the relationship with the old agency.

Repealing the 2006 amendments should make the transfer of business easier and more straightforward, and could encourage businesses to follow new business opportunities.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

The DMA are not aware of any such case law.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year X☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes

c) If yes, please explain your reasons.

As the changes introduced by the 2006 amendments caused problems, the DMA believe that there could be potential problems with the removal of the provisions but these can be resolved by changes to contractual provisions and would be negotiated between the agency and the client in respect of contracts already in force.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☐

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☐ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ No ☐

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No ☐

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ No ☐

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ No ☐

a) Please explain your reasoning.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☐ No ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☐ No ☐

a) Please explain your reasons.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☐ No ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☐ No ☐

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ No ☐

Question 15: Have you any further comments on the issues in this consultation?

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

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x Yes, I would like you to publish or release my response

EEF Northern Ireland

Please tick the boxes below that best describe you as a respondent to this:

x Business representative organisation/trade body

The EEF Northern Ireland has had the benefit of reviewing the EEF Limited's Response to the 17 Questions posed in this Consultation and we wish to formally adopt those responses on behalf of the EEF Northern Ireland.

As the TUPE Regulations emanate from a European Directive and are implemented by Regulations that apply on a UK wide bases we believe that Northern Ireland should adopt the same position as GB in respect of TUPE going forward. To do otherwise, would be counterproductive to business growth in Northern Ireland. We are supported by our view on this by our Member firms.

If Northern Ireland were to retain more onerous TUPE regulations as compared to GB this would be a significant disincentive to outside direct investment and also to indigenous firms seeking to expand. This is particularly so in this current economic climate. Whilst we recognise that the devolvement of employment can produce locally sourced solutions we believe that devolvement should be seen as an opportunity to make Northern Ireland more attractive than other jurisdictions rather than less. It is of great importance to enhance the reputation of Northern Ireland as a place that is good for business. We further strongly believe that any place that is good for business is also good for employment and employees. For those reasons we believe that any amendments to the TUPE are carried out on a UK wide basis.

Insolvency Lawyers' Association

Please tick the boxes below that best describe you as a respondent to this:

☒ Business representative Organisation/trade body
☒ Legal representative

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ No ☒

As these provisions appear to be gold-plating, and unique to the UK, the instinctive response is yes. However, in the insolvency context, the migration of a service provided by the incumbent insolvent to a new provider can be as part of a business transfer or as a result of the termination of the contract that the insolvent can no longer perform (and is often in repudiatory breach). It is not helpful to remove the provisions if the effect is to fragment the insolvent business, and render it more difficult to achieve a sale of an integrated whole as a going concern. By splitting the treatment, there are incentives for cherry picking outside of the operational business, which can hasten the cessation of an insolvent business and a loss of value for all concerned.

a) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐(ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more (v) ☐

Do you believe that removing the provisions may cause potential problems?

Yes ☐ No ☐

If yes, please explain your reasons.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☐

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that

regulation?

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

b) Yes ☒ No ☐

The ILA is in general in favour of the removal of gold-plating. If the restrictions on changes to terms and conditions were pared back to remove the "in connection with the transfer" wording (and replacing it with "by reason of the transfer" or similar wording), this might make it easier for purchasers of insolvent businesses to harmonise terms and conditions of transferred employees with those of its existing workforce, thereby removing a disincentive to enter into the transaction. This theme of linking the changes to the actual transfer, rather than any potential transfer, is repeated below. There ought to be a causative link, which is more than mere coincidence [see Q6 below].

a) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ No ☐

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No ☐

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive.

Yes ☐ No ☐

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ No ☐

The ILA would be in favour of any reform that might make it easier for administrators to make necessary changes to the work force for the purpose of achieving the purpose of the administration. It is not clear that the proposed changes (to remove the "in connection with the transfer" wording and replace it with something like "by reason of the transfer") would solve the problem completely, but it would be a step in the right direction. In nearly all trading administrations it is the case that the administrator of an insolvent business (a) will need to dismiss certain non-essential employees early in the administration to minimise the running costs of the administration both to remain within the (usually limited) administration funding available and to preserve the company's assets for the benefit of its creditors as a whole and (b) intends to pursue a business sale with a view to achieving a better outcome for creditors as a whole than would be the case if the company were to go into liquidation, where its assets would be broken up and sold piecemeal, and its employees would all be dismissed,.

As result of *Spaceright v Baillavoine I[2011] EWCA Civ 1565* and *Kavanagh v Crystal Palace (2000) Ltd* UKEAT 0354_12_2011), any type (a) dismissals made by the administrator while he is intending a type (b) sale of the business will necessarily be "in connection with the transfer" and cannot be for a valid ETO reason. They will therefore be automatically unfair. This is because it will almost never be the case that the administrator will have an "intention to change the workforce and to *continue to conduct the business*" [per Mummery LJ, para 47 *Spaceright*] without also intending to achieve a business sale. Consequently administrators will only extremely rarely be able to rely upon a valid ETO reason.

This means in practice that any early day dismissals made by an administrator, whether or not a proposed sale is under negotiation or a prospective purchaser indentified, will necessarily transfer the economic burden for unfair dismissal claims onto any future purchaser. This is a very clear barrier to achieving a business sale that will almost always represent the remaining employees' best or only chance of retaining their current employment.

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ No ☐

a) Please explain your reasoning.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

Any measure that makes it easier for the purchaser to absorb the transferring employees into its own workforce and harmonise terms will improve the chances of making a sale either at all, or at a better price, for the benefit of the insolvent transferor's creditors. Any reformed provision would need to be clear and certain so as to enable both the administrator and the purchaser to take the benefit of it without the risk of uncertainty.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ No ☐

The ILA sees no particular objection to this proposal. However, the timeframes in which insolvent business transfers usually take place may mean that it would be little used in practice. It is unlikely that the insolvent transferor would consent to consultations with the workforce by the prospective transferee unless and until the transaction was confirmed. Usually once this stage is reached, the transaction proceeds immediately, thereby not allowing any time for the proposed consultation. We would expect that to the extent that it is practicable within the confines and timeframes of the business deal, what consultation that can be carried out would normally be undertaken by the transferor. See also the answer given to Q15 below, and the ILA's prior submissions referred to there**.**

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☐ No ☐

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

Yes ☐ No ☐

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☐

b) If so, please give details and s uggestions where these costs cou ld be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Question 15: Have you any further comments on the issues in this consultation?

We refer to our response to the Call for Evidence on the effectiveness of the TUPE Regulations (dated January 2011, a copy of which accompanies this response). As expressed in that response the way in which TUPE applies to insolvency business transfers undermines the rescue culture:

- The combined effect of TUPE and case law seems to be that early day dismissals by administrators in trading administrations, whether or not a prospective purchaser of the business has been identified, are automatically unfair, increasing the burden to be absorbed by any prospective purchaser, thereby creating at worst a disincentive to a purchaser, or at best a reduced price (see answer to Question 6 above).
- Whilst the Court of Appeal decision in *Key2Law (Surrey) Ltd v De'Antiquis* [2011] EWCA Civ 1567 clarifies that an administration will be 'relevant insolvency proceedings' for the purposes of reg 8(2) – (6)) and not 'bankruptcy or analogous

proceedings which have been instituted with a view to the liquidation of the assets of the transferor…' for the purposes of reg 8(7),,it remains the case that the verbatim adoption of the language of article 5.1 of the ARD into the TUPE Regulations is an anomaly (as to which see, eg, para 83 of that decision). What is required is a translation of the ARD language into domestic language, making it expressly clear that administration and voluntary arrangements are 'relevant insolvency proceedings' and liquidations are reg 8(7) type proceedings. The reference in para 6.27 of the consultation was something that had been flagged very clearly by IP's, but was ignored, leading to the difficulties now said to have been clarified by *Key2Law*, albeit a decision which chose to adopt a legal fiction over commercial realities in order to produce the "certainty" now claimed in the consultation at 6.29. The certainty point has been echoed in para [20] of *Kavanagh v Crystal Palace*, without comment on the path to that position. As the certainty of *Key2Law* is dependent upon a legal fiction, it would be vulnerable if future reforms to the administration process (perhaps in relation to pre-pack administrations) undermined the basis of the legal fiction. To pass over the opportunity to make a relatively simple amendment to achieve certainty now, while reforming the TUPE Regulations generally, could prove to be a false economy.

- The third main respect in which the TUPE Regulations are generally unhelpful in insolvent business transfers is the inflexibility they impose with regard to consultation and information obligations. It is regularly the case that the window of opportunity for completing a transfer of an insolvent business is a vanishing one. The timeframe, confidentiality requirements and urgency frequently make it impossible to conduct TUPE compliant consultations without jeopardising the deal for breach of confidentiality, which is clearly not in the employees' interests. If the TUPE Regulations were amended to make compliance an achievable prospect in insolvency situations, it would remove what is currently perceived to be an impossible barrier to compliance, one which may even discourage any attempts. We refer to our response to the Call for Evidence dated January 2011 (copy accompanying this response) for more on this point.

There remains the continuing tension between the objectives of insolvency rescue and the ARD (we appreciate that the latter is not under review), in that the ARD as interpreted shields itself from the reality that going concern businesses provide employment, and that failure leading to cessation, extinguishes it. The unintended consequence of the ARD is, in many cases, to deter rescue, with the consequence that employment is prejudiced, not protected. This is not a new comment at all, but it is not any less true. This tension manifests itself in a clash of duties for insolvency practitioners (those to the creditors, and to comply with the ARD as implemented by the TUPE Regs).

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Confidentiality & Data Protection:
Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box.

[X] **Yes, I would like you to publish or release my response.**

National Union of Journalists

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006: CONSULTATION ON PROPOSED CHANGES TO THE REGULATIONS

RESPONSE BY THE NATIONAL UNION OF JOURNALISTS

Introduction:
The National Union of Journalists (NUJ) is the voice for journalism and journalists in the UK and Ireland. It was founded in 1907 and has 31,000 members.

The NUJ represents its members working at home and abroad in all sectors of the media including staff, students, freelances and "casuals", writers, reporters, editors, photographers, illustrators and those working in public relations.

The NUJ strongly believes that wherever possible it is best to resolve disputes in the workplace through collective bargaining and proper procedures.

This can assist both employers and employees – employees to keep their jobs, employers to keep trained and skilled staff, maintain or build good employment relations and assist in productivity and efficiency, as well as building morale.

The NUJ will support its members in taking cases with merit to Employment Tribunals if it is not possible to resolve at the workplace.

The NUJ is strongly opposed to these proposals. We note that the legislation is the Transfer of Undertakings (Protection of Employment) Regulations 2006. These proposals do nothing at all to protect employment, but would reduce protection and reduce the level of employment and its terms and conditions.

There is no reliable evidence to demonstrate that the proposed changes are necessary or justified. There is also no evidence that the TUPE Regulations have prevented or restricted transfers, outsourcing or restructuring.

The NUJ considers that the proposed changes would lead to increased uncertainty for industry, will result in increased litigation, and also a lack of security for employees.

The proposals would facilitate reducing of pay, a "race to the bottom" resulting in low pay and poverty. There would be less money in the pockets of workers, less to spend and would thus damage the economy rather than stimulate growth. It would also lead to an increase in Government spending on benefits.

Question 1:
Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No.

a) Please explain your reasons:
And
b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

The NUJ strongly opposes this. Increased job security from the Service Provision Changes (SPC) of 2006 will be lost.

The NUJ does not believe that the SPC are a gold plating of the Acquired Rights Directive (ARD). An SPC can amount to a relevant transfer for the purposes of the ARD under Regulation 3(i), including outsourcing of services, in sourcing and second generation outsourcing. It was only after the SPC changes that litigation decreased, with far fewer cases being taken and far less on to the Court of Appeal. They have increased certainty and reduced costly litigation.

Question 2:
If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes take effect?

a) Do you believe that removing the provisions may cause potential problems?
And
b) If yes, please explain your reasons.

Yes. The NUJ opposes the proposals. If the Government does legislate then a period of at least 5 years is the minimum that would be required.

Question 3:
Do you agree that the employee liability information requirements should be repealed?

No. The call for evidence showed that often information is provided too late. Fuller and earlier disclosure should be required to assist potential transferees to have more certainty to the business.

More information would assist employees also and avoid or limit the scope for dispute at a later stage.

a) If yes, please explain your reasons

Not Applicable.

b) Would your answer be different if the service provision changes were not repealed?

No. The employer liability information requirements are relevant and appropriate for all TUPE transfers.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes. The information should also be provided to trade union representatives.

The legislation should make it clear that transferees are required to consult with trade union representatives; this would ensure UK Regulations accord with EU law. This should take place at an early stage.

Question 4:
Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No

a) If you disagree please explain your reasons

The NUJ fundamentally opposes this. Pay and conditions will worsen, leading to low pay and poverty, in itself bad for the economy.

The proposals do not appear to accord with EU law and are likely to lead to increased litigation.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

No. This currently is abused, leading to loss of employment and detriment to terms and conditions of employment.

Question 5:
The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

a) Please explain your answer

This will clearly lead to poorer conditions of work for many people. It is clearly aimed at enabling companies to take over public services and/or restructure.

This will inevitably have a damaging effect on the moral of the workforce, its retention, training standards, health and safety standards and the quality of service.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

If the Government proceeds with the limitation of only 1 year protection proposal, with which the NUJ strongly disagrees, there must at least be provision that any change, either by reason of, or connected to, the transfer, should be no less favourable than the overall terms applicable pre-transfer.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.

The Advocate General in the Alemo-Herron case has given the opinion that a dynamic, rather than static, approach should continue, as currently operates in the UK and that this is permitted by the Directive. It is likely that that opinion is approved by the CJEU.

If so, it should be preserved, and would be in accord with Whent v T Cartledge Ltd and under Article 11 of the European Convention on Human Rights.

Additionally and very importantly, it would go towards preventing a divisive, 2 tier workforce, where only in-house employees are protected by pay rises negotiated annually, whereas outsourced workers may face freezes or reductions in pay.

d) Do you think there are any other changes that should be made regarding the continued applicability of terms & conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No

Question 6:
Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

No

a) If you disagree, please explain your reasons.
And
b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

There should be no weakening of the protections at all. Proper procedures give at least some comfort to employees in what is often a stressful and distressing situation.

Question 7:

Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No

a) Please explain your reasoning.

These are significant protections and should be retained. The right of an employee to resign and claim automatic unfair dismissal when a transfer would lead to a substantial change to their material detriment is an essential safeguard. It accords with the purpose of the Directive, to protect employment.

A remedy of notice pay (and other benefits) is wholly inadequate and would be an encouragement to unscrupulous employers to avoid their responsibilities.

Question 8:
Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No

a) If you disagree, please explain your reasons.

The purpose of the Directive is to protect employment, not the contrary. Mobility clauses and contractual terms may take effect. The Courts have frowned on mobility clauses being so wide as to be unreasonable or having the intention of circumventing legislation and case law.

Location of the workplace is clearly an important factor for most employees, and a significant change could adversely affect not just their work but also domestic life.

Question 9:
Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

a) Please explain your reasons

Hynd v Armstrong is based on UK law and interprets Article 4(1) of the Directive.

It held that there was no good reason why the transferor should be able to rely on a transferee's ETO reason in order to dismiss when it had no valid reason of its own.

Further, the transferor, possibly insolvent, may not be in a position to fully compensate a dismissed employee to whom even a redundancy payment is likely to be an inadequate recompense in any event. The purpose of the Directive and the Regulations would be subverted and an amendment such as proposed would be an encouragement to subvert.

Question 10:
Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

a) If you disagree, please explain your reasons.

Early consultation can assist in establishing good working relations between a transferee and trade unions, but should not be allowed to count for the purposes of collective redundancy consultation.

The transferee is not the employer pre-transfer and this proposal is unlikely to satisfy the Collective Redundancies Directive. That applies both to those proposed to be dismissed as well as those affected by the proposed redundancies or measures envisaged.

At present, there is not even an obligation on the transferee to consult trade union representatives on the transfer.

The proposal is almost certain to lead to unfairness and also to litigation as contrary to the Collective Redundancies Directive.

Question 11:
Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No

a) Please explain your reasons
And
b) If you disagree, what would you propose is a reasonable time period?

The present regulations are particularly weak as to consultation with non-union workers' representatives. The process is controlled by the employer which determines the constituencies, the number of representatives and conducts the election, including counting the ballot.

These regulations need strengthening. A fixed time period in the circumstances is not appropriate.

Question 12:
Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13 (3)(b)(i)), rather than have to invite employees to elect representatives?

No

a) If you answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No. This would be contrary to the ARD which applies regardless of the number of employees.

Consultation should take place with workplace representatives at an early stage and if none exist they should be elected. See Question 11.

Question 13:
Do you agree that micro businesses should be included the all the proposed amendments to the TUPE regulations?

No

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

None of the proposed amendments to the regulations should be made at all. The ARD applies to all businesses, regardless of size and an exemption as proposed would not satisfy the Directive.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

In litigation, quite possibly.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Given that micro businesses may not have access to lawyers, legal aid should be restored for employment rights matters and ACAS properly resourced to advise these businesses. There should also be restoration of proper resources to Law Centres and the Citizens Advice Bureaux also to provide advice, more likely to be to employees.

This is more likely in the long term to save money by limiting or avoiding litigation and welfare benefit payments.

Question 14:
Do you agree that apart from the proposals in relations to service provision changes, there are no other proposals which give rise to the need for a significant lead in period?

The NUJ fundamentally disagrees with all the proposals in the consultation document. It is aimed at subverting the aims of the Directive and does nothing to protect employment or employees.

Question 15:
Have you any further comments on the issues in this consultation?

No.

Question 16:
Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

The proposals will have a negative impact on equality, diversity, the workforce as a whole and on employment generally.

a) Please explain your reasons
And
b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

The NUJ considers that the Impact Assessment is flawed and ignores many of the equality implications of the proposals.

The proposals, clearly aimed at facilitating outsourcing and the privatisation of public services, will lead to lower pay, poorer working conditions and less equality, particularly for women and ethnic minorities.

A report to the TUC Women's Conference in 2012 found:

- 28% of women working full time earn less than £300 per week in the private sector, compared to 8% in the public sector;
- 56% of all women earn less than £300 per week in the private sector compared to 35% in the public sector;
- 77% of women working part time in the private sector earn less than £200 per week compared to 47% in the public sector;
- The private sector has far more low paid jobs than in the public sector. 17%of full time workers in the private sector earn less than £300 per week, compared to 6% in the public sector.

Analysis of a million employees in the lowest paid occupations shows that 74% of cleaners and domestic workers are women of whom 83% work part time [5].

65% of kitchen and catering assistants are women of whom 71% work part time.

The pay equality gap in the public sector is much lower, due to collective agreements applying, than in the private sector, where for women the pay gap remains high.

The ending of collective agreements after 1 year will significantly increase inequality, especially for women. There would be serious implications in equality terms should the proposal to make easier the relocation of businesses and service providers be introduced. This is likely to affect particularly those with caring responsibilities and pregnant women.

Question 17:
Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No. The NUJ considers the Impact Assessment is seriously flawed.

The proposals do nothing to safeguard or protect employment, employees or their conditions of work. That the Government should state that its objective is ensuring “that fairness to individuals, is not compromised, recognising that the Regulations provide important protections” is grossly inaccurate and misleading.

The proposals do nothing of the sort but would operate to the detriment of very many employees.

The Impact Assessment appears to lack evidence or proper evaluations, merely relying on conjecture. The proposals are not based on proper analysis but appear to be driven by political dogma.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

☒ **Yes, I would like you to publish or release my response**

Fox Williams LLP

Please tick the boxes below that best describe you as a respondent to this:

☒ **Legal representative**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

Although the clients who responded to our survey had mixed views on this proposal, a number of respondents raised concerns about a repeal of the 2006 service provision change amendments. Principally the concern is that before the 2006 amendments came into force, there was a great deal of uncertainty in relation to when a service provision change was covered by TUPE (and when it was not). This created unnecessary uncertainty for both employers and employees which led to costly litigation. Our respondents felt that the current situation provided clarity regarding the application of TUPE and this allows them to allocate and negotiate liabilities appropriately between themselves. We share the concerns of our respondents and consider that employers and employees alike would suffer from the uncertainty that repealing the amendments would create.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

As set out above we, along with our survey respondents, do not consider that there was enough clarity in the pre-2006 case law regarding when there was a TUPE transfer in a service provision change scenario.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ **(ii)1- 2 years** ☒ **(iii) 3-5 years** ☐ **(iv) 5 years or more** ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

Please see our response at 1(a).

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☒

a) If yes, please explain your reasons.

It is essential to our clients (and all transferees) that they know the liabilities that they are taking on when employees are transferred to them under TUPE. A large majority of the clients that we surveyed did not agree with the repeal of this provision. They feel that it would become more difficult to obtain the correct information from transferors. Almost all respondents who commented on our question in relation to this proposal felt that if any change was made, that the information should be provided earlier than 14 days before the transfer, so as to allow the transferee sufficient time to make preparations for the transfer. We note that this was also the business response to the Call for Evidence in relation to this topic.

b) Would your answer be different if the service provision changes were not repealed?

It is even more important that an obligation is imposed by legislation in a service provision change scenario since transferor and transferee are often not contracting with one-another and transferees are therefore often not in a position to demand such information from the transferors. In the absence of a legislative requirement, the transferor has no incentive to transfer the essential information to the transferee.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

If anything, this amendment is likely to give rise to more legal uncertainty and disputes. It is likely to make it more difficult for a transferee to obtain the information that would be required to perform its *ongoing* duties as an employer (if it cannot show that these directly relate to any duties that it has under regulation 13 itself).

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☐ No ☒

a) If you disagree, please explain your reasons.

The amendment would not enable employers to harmonise terms and conditions and nor would it introduce greater certainty. It is therefore difficult to see the benefit of changing the law which will bring about the need for employers to seek legal advice regarding the new position.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☒

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Yes ☒ **No** ☐

Please explain your answer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☐

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ No ☐

a) Please explain your reasoning.

This change would only be worthwhile if it provided certainty that unfair dismissal claims would not be possible. The language of the consultation indicates only that it "would be likely to" do so. We do not consider this to be sufficient.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

92.3% of our respondents agreed with the Government's proposals. Our respondents felt that a unified approach across TUPE and the ERA would be beneficial to their businesses.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

a) Please explain your reasons.

An overwhelming proportion of our respondents agreed with this. In particular our respondents commented that this will bring greater certainty for transferring employees. In addition, redundancy consultations will be able to commence before the TUPE transfer, which better reflects the commercial reality of the situation and provides a pragmatic solution to the current problem that the transferee cannot consult with employees of the transferor.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the

transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☐ No ☐

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ☒

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☐

c) If so, please give details and suggesti ons where these costs could b e decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☒ **No** ☐

Question 15: Have you any further comments on the issues in this consultation?

In relation to question 12, our view is that it is not the s ize of the business that is releva nt to the question of direct consult ation, but the number of employ ees affected. Even if the business is very large, if only a small number of employees are affected, direct consultation makes much more practical sense.

Question 16: Do you feel that the Govern ment's proposals w ill have a positiv e or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐

a) Please explain your reasons

b) Do y ou have an y evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do yo u agree w ith the anal ysis and evidence provided in the Impact Assessment? Please give details for an y area of disagreement or if y ou can provide any further knowledge in an area.

Association of Colleges

The Association of Colleges (AoC) exists to represent and promote the interests of Colleges and provide members with professional support services. AoC was established in 1996 by Colleges themselves to provide a voice at national and regional levels for further education and higher education delivered in Colleges. 96% of Colleges are in our membership, including general and tertiary Further Education Colleges, Sixth Form Colleges and specialist Colleges in England, Wales and Northern Ireland. Colleges employ 245,000 people, 128,000 of whom are teachers and lecturers and staff costs (excluding restructuring) total £5 billion, accounting for 65% of total College spending. In some towns in England, Colleges are one of the major local employers after the NHS and/or local authority.

The AoC Employment Team provides advice, policy guidance and representation to members in areas of employment law, industrial relations and HR practice, including the complex TUPE regulations.

To assist us with responding to this consultation, AoC gathered feedback from College Human Resources Directors on the current TUPE regulations. Below is a summary of the key issues highlighted and areas of concern. Responses have been provided to those areas of most relevance to Colleges.

Service Provision Changes

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

AoC agrees with the proposal to repeal the 'Service Provision Changes' transfers concept. The legislation should be more aligned with the Directive so that such changes in service provision will only be covered if they fall under the definition of a transfer under the Directive – where there must be a "transfer of an economic entity that retains its identity".

Colleges find the TUPE regulations complicated, unclear, and difficult to understand and interpret. Colleges are finding that too much of their time is spent on determining whether TUPE applies in a particular situation. The matter is often made more difficult when case law in this area is conflicting, particularly when Employment Tribunals and Employment Appeal Tribunals disagree on decisions based on their interpretation of the regulations.

In the FE sector, transferring services out is common practice. Colleges see this proposal as a sensible approach, particularly if it speeds up the process and the definitions remain clear. This would allow the process to be simplified and make it easier for a transfer to be undertaken. However, there are concerns that this would leave uncertainty that could lead to further case law decisions in the future; as was the case before the 2006 regulations were introduced.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

The outsourcing process from planning for a tender, until eventual transfer, can take a long time, and for larger and more complex services could take a year or longer. Government's

proposal to have a lead-in period prior to any legislation reform so that employers can plan for the change in the law is welcomed by Colleges. Colleges indicate they would prefer a one to two year lead-in period before any change takes effect.

This should allow sufficient time for processes that are already in place or are being planned to continue and for errors or confusion to be kept to a minimum. It will also allow for completion under the existing rules and preparation for the new rules and understanding how they work will work in practice. Colleges are concerned that legislative changes can take too long to implement and these changes are required in the current economic environment.

Employee Liability Information

Question 3: Do you agree that the employee liability information requirements should be repealed?

AoC does not agree with repealing the specific requirements regarding the notification of 'Employee Liability Information' (ELI).

Colleges find this information vital and some think 14 days is not long enough to prepare to transfer any potential staff. One of the biggest issues for employers is obtaining comprehensive information in good time. When this is not received, there can be delays in setting up transferred staff on HR and payroll systems and paying them on time. Transferees need to be fully aware of the staff who are transferring and any particular issues or risks which may impact post-transfer. Having the necessary information and documentation allows for the transferee to plan and prepare for the transfer. Repealing this will make it harder for the transferee to receive the correct information in a timely manner. A simplified system is welcomed.

Replacing the ELI statutory obligation with guidance would not be beneficial to Colleges and may lead to confusion. The proposal is that the transferor should only disclose information where it is necessary for both parties to perform their duties with regards to informing and consulting with employees. If this goes ahead, one party may deem the information necessary and the other may not, which could lead to conflict, delays and the due diligence process would not be rigorous.

Restrictions on changes to terms and conditions

Question 4: Do you agree with Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Government's intention here is welcomed by Colleges.

The current restrictions mean that staff can be doing the same or very similar roles but are paid at different pay rates and often on significantly different and more beneficial terms and conditions because of a past transfer. This not only leads to an uncomfortable working environment, where morale is affected, but also poses the risk of inequity.

One College failed to attract a suitable contractor to outsource their cleaning provision due to favourable terms and conditions. Any scope to change these may make the tender more attractive to contractors.

Greater flexibility is needed to make contractual changes possible post-transfer where the employer and employee have agreed a variation. Some Colleges are reluctant to make any changes post-transfer as they fear the consequences.

Colleges face reduced funding and other business pressures. To maximise organisational performance, this may require a review of working arrangements and contracts of employment to ensure that staff are fully utilised and the business is operating efficiently.

There is a need to have the process simplified and clearer guidelines would be particularly helpful to assist Colleges to implement organisational change without falling foul of the law.

Colleges are aware of that they require sound business justification before being able to make changes to employment contracts, however they would like to be able to harmonise terms and conditions to maintain equality within the workplace and allow for flexibility within the contracts.

TUPE and Collective Agreements

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

AoC agrees that it would be desirable for Government to limit the period during which terms and conditions derived from collective agreements must be observed. One year from the transfer is a reasonable period.

Colleges agree that this will allow greater flexibility in this area and will also help to move to an approach which is consistently applied and mirrored by all organisations. Colleges would find this beneficial however they note that this may not give staff as much protection as they currently receive. Colleges would like to see clearer guidance in this area.

Protection against dismissal

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

AoC agrees that Government should move forward with the proposal to amend the wording in the regulations to make it more closely reflect that of the Directive to reduce any risks of the regulations being construed more widely than the Directive. This is a sensible approach to simplify the process allowing Colleges greater flexibility and further clarity in this area.

Economic, Technical or Organisational (ETO) reasons entailing changes in the workforce

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Currently, where the sole or principal reason for a dismissal is the transfer or is connected with the transfer, the dismissal is treated as automatically unfair unless the reason is for an ETO reason entailing changes in the workforce. The definition has been narrowly interpreted by the UK courts and any dismissal as a result of a change in location would be automatically unfair. Government's intention to amend the regulations to include a change in the location of the workplace to fall under the meaning of 'entailing changes in the workforce', and therefore classed as an ETO reason, is welcomed by Colleges. Colleges see this as a change that will be helpful, particularly in relation to location. The proposal should allow a smooth transfer process.

Further guidance, clarity and examples of economic, technical or organisational reasons is required to help Colleges identify in what circumstances changes can be made to employment contracts.

Collective redundancy rules and interaction with TUPE information and consultation requirements

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

AoC agrees with the above proposal.

Once people are aware of a transfer or change, many of those affected want the process to be carried out smoothly and efficiently avoiding any unnecessary delays in order to minimise anxiety and stress.

General comments received from Colleges

Colleges find they spend a lot of time and money obtaining legal advice due to the intricacies of the current regulations. A review is long overdue and is welcomed by Colleges to simplify the current complex regulations.

Colleges would like to see Government offer further support and guidance to Colleges both as transferees and transferors to ensure that they comply with regulations when managing a transfer process.

Concerns were expressed relating to whether the changes will detract from the clarity and certainty with which all parties (transferees, transferors and staff) can approach a transfer situation. Any changes made must provide greater clarity and certainty.

Colleges want to be in a position where they are able to understand the complexities and any future obligations that may be placed on them post-transfer when a new employment relationship is formed.

Johnson Controls Ltd (JCI)

☒ **Large business (over 250 staff)**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

As a major UK employer, JCI believes that the service provision change provisions have operated successfully since their introduction in 2006. There is a general will in the outsourcing industry to comply with the TUPE Regulations as currently drafted and organisations take comfort from the certainty of knowing that the regulations apply in outsourcing scenarios.

More detailed reasoning behind JCI's view that the service provision change wording should remain are as follows:

- The position created by domestic and European case law prior to the amendments being made in 2006 is critical to JCI's view. The position in 2006 was one of great uncertainty in outsourcing situations and the introduction of the new regulations aimed to address that issue. Restoring the pre-2006 legislative position will simply have the effect of returning the industry to a state of uncertainty.

- Consequently, this would have a significant impact on the costs incurred in outsourcing. The requirement for legal advice to provide clarity in outsourcing scenarios would increase. In addition, removing the service provision change wording would be likely to narrow the circumstances in which TUPE would apply and accordingly would lead to an outgoing contractor incurring significant dismissal costs at the end of a contract and result in the new contractor incurring substantial hire costs to perform the work. These costs would be faced not only by the private sector but also organisations within the public sector where outsourcing is routine.

- JCI notes that the government has expressed concern that the application of these provisions in service change scenarios could operate as a disincentive to tender. JCI regularly tenders for work both within the UK and across Europe and has never found the application of the TUPE Regulations to be a disincentive to competing for work.

- The government has also expressed concern that the application of the TUPE provisions is a disincentive to innovation. Again, JCI's experience is that this is not the case. The routine application of the TUPE regulations in the outsourcing context means that all competitors for work are on a level playing field. This means that operators within the market are forced to seek alternative ways to be innovative. Instead of relying on simply reducing staff levels or their remuneration and benefits to meet performance targets, businesses are forced to innovate by creating new methods of working or investing in technology.

- Finally, JCI strongly believes that the purpose of the ARD and consequently the TUPE Regulations was to ensure that the rights of individuals are protected when

their work moves elsewhere – either as a result of an assets sale or due to a change in contractor. The application of the TUPE Regulations in both scenarios aims to protect employees against exploitation, creating a strong social argument against the potential narrowing of the scope of the Regulations and the return to uncertainty.

- Rather than repealing the service provision change wording, JCI believes that the required objective can be achieved by amending the existing wording. Many of the difficulties that have arisen over the recent application of the provisions have stemmed from the interpretation of "organised grouping of employees". Amending that wording e.g. by making it clear that the Regulations apply to employees who provide services to the client in question, would achieve the necessary clarity.

- Additionally, JCI would like to see the implementation of a mechanism for the predetermination of situations where the applicability of TUPE is in dispute so that the question can be decided prior to the date of a transfer. In addition to the change referred to above, such a mechanism would serve to eliminate any uncertainty**.**

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

JCI's view is that the service provision change wording should be retained but amended. However, should the decision be taken to repeal the current wording, then the pre-2006 case law which determined that individuals or small groups of employees were capable of amounting to an economic entity without wholesale transfers of people or assets would need to be reviewed.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

None of the above – see response below at (c).

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

The general reasons behind JCI's view on this point are set out in the response at Question 1 (a) above. In addition, the majority of outsourcing contracts are entered into for a five year period and in many cases provide for extensions beyond the initial term. It would therefore be impossible to pick an appropriate lead in time which would incorporate all contracts. It would need to operate so that it commences on a certain date and only impacts upon contracts entered into from that point onwards.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☒

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

JCI believes that the employee liability information requirements should remain as a separate obligation. The current legislation works as a useful tool to encourage parties to share information and data which is fundamental to the success of the commercial process.

Incorporating it within regulation 13 and relying on guidance will make the process less certain and increase the litigation risk. It also places an increased obligation on employees and their representatives to consult on detailed issues about which they may not have an accurate or complete understanding.

JCI's preferred approach would be to see the employee liability information provisions amended as follows:

- To extend the list of information required to cover employee rights to redundancy and bonus payments and accrued holiday entitlements.
- To extend the penalty so that it expressly covers the provision of inaccurate information.
- To require the information to be provided 28 days in advance of the transfer, to ensure that any impact upon consultation and also upon commercial modelling can be considered.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☐ No ☒

a) If you disagree, please explain your reasons.

The existing restrictions on harmonisation work well for JCI. As in the issue on service provision change, the position of certainty ensures that JCI and its competitors operate on a level playing field.

Amending the legislation to create an opportunity to allow harmonisation should case law change would create a scenario in which employers may seek to take risks and exploit their employees, placing more scrupulous employers at a competitive disadvantage.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ **No** ☒

a) Please explain your answer.

JCI does not believe that the position in the UK needs to change. The UK legal position on collective agreements differs from the remainder of Europe because collective agreements are not automatically incorporated into contractual terms. This change is therefore not needed against the UK legal backdrop.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☒

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

See above.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☒

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☒

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ No ☐

a) Please explain your reasoning.

A difficulty arises in relation to the ability of employees to claim dismissal in relation to future changes. If employees can claim unfair dismissal in relation to anticipatory changes, then the proposals around advance consultation in Question 10 are not viable.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

a) Please explain your reasons.

In principle there may be circumstances where being able to rely on the transferee's ETO would be beneficial. However, presumably this would mean that the liability for the dismissal would not transfer to the transferee leading to extensive negotiation and drafting to protect the transferor from accepting excess liability. This proposal would be particularly problematic in supplier to supplier scenarios where there is no contractual relationship to deal with the apportionment of liability.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and

Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Whilst JCI have indicated "yes" to Question 10, any such amendment should make it clear that pre transfer consultations will only count towards collective consultation requirements where both parties to the transfer agree that it is appropriate. There may be certain cases where it would not be appropriate or practical for a transferee to begin collective consultation in advance of a transfer.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☐ **No** ☒

a) Please explain your reasons.

As stated above, JCI does not believe that issuing guidance will improve the current position and will create more opportunities for litigation.

b) If you disagree, what would you propose is a reasonable time period?

It is not possible for a reasonable time period to be specified which would work in every individual circumstance. Transfers take place in a variety of scenarios with very different timescales. The concept of reasonableness allows for that differentiation and the penalty for failure is sufficient to ensure that in general people allow an adequate timescale.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☒ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☒ No ☐

Question 15: Have you any further comments on the issues in this consultation?

In addition to the mechanism for pre-determination referred to earlier in this response, JCI also feel that individuals should be able to obtain speedier recourse in disputed TUPE situations. Whether there is scope for ACAS to intervene more widely in such cases is something that JCI would like to see considered.

These suggestions are even more pertinent if the government proceeds to repeal the service provision change wording, returning to the uncertainty of the pre-2006 position.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☒ No ☐

a) Please explain your reasons

Whilst the proposals may not have a direct impact on equality and diversity immediately, JCI have noted a number of scenarios where employees could be exploited or be in a worse position than under the current legislation, thereby demonstrating several sociological arguments against a number of these proposals. When employees lose any level of protection, a negative impact on equality and diversity may result over time.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

See answers already provided.

Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations

UNISON

April 2013

Introduction

UNISON is the UK's largest public service trade union with 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

UNISON has enormous experience of the Transfer of Undertakings (Protection of Employment) (TUPE) regulations 2006 (and its predecessors) in small and large employers in the public, private and voluntary sectors and have been involved in thousands of staff transfers over the years.

TUPE strengthens the rights of staff involved in transfers, providing them with continuity of employment and the same terms and conditions as they had prior to the transfer. The Regulations also protect the accrued pension rights of transferred staff; protect against unfair dismissal and stipulate that trade union recognition and collective agreements in force at the time of the transfer must be maintained.

We believe the TUPE regulations are essential and that, if anything, need to be strengthened to provide greater certainty for workers and employers in all sectors and a more level playing field for public contracting. The current regulations achieve the stated intention of the EU directive to give workers a valuable degree of certainty and protection at the point of transfer. Before the directive workers often faced immediate pay and conditions cuts on day one of the transfer.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

UNISON does not agree that the Service Provision Changes (SPC) should or needs to be repealed. UNISON believes that removing the SPCs will result in unnecessary costs for organisations in form of increased legal advice and litigation.

a) Please explain your reasons:

Prior to the 2006 TUPE changes, there was uncertainty about whether or not a change of service provision was caught under TUPE. This in turn resulted in claims in the appeal courts and the European Court of Justice (ECJ), over for example whether labour intensive activities transferred, or whether the absence of a transfer of assets precluded a transfer of an undertaking.

Repealing the SPCs will not remove the requirement for the parties to consider whether or not there is a relevant transfer under regulation 3(1) (a) (i.e. is it a "relevant transfer"). Indeed to revert to the pre-2006 position, would be to invite litigation over these matters. This in turn will increase legal uncertainty, increase requests for advice, increase litigation

over whether or not there is a relevant transfer, and clog up the tribunal and appeal systems.

A number of the ECJ cases involving the change or contractors and contracting out centred around the application of the multi-factorial test in the *Spijkers v Gebroeders Benedik Abbatoir CV 24/85 [1986] 2 CMLR 296*.

The ECJ case of *Suzen* [1997] is cited as settling the position under the Acquired Rights Directive as to what is a relevant transfer. In this case it was decided that the absence of a transfer of assets to the transferee did not preclude a transfer of an undertaking. However, it also suggested that the determining factor in establishing whether an undertaking had transferred was whether or not a transferee took on employees assigned to the activity. It would follow then that there would be no relevant transfer if a new employer failed to take on employees.

However, domestic case law has clarified that where none of the workforce was taken on, whilst relevant, was not necessarily conclusive of the issue of retention of identity (see *RCO Support Services v UNISON* [2002]). In *RCO Support Services v UNISON* Lord Justice Mummery, addressing the problem posed by *Süzen*, concluded that:

> "...the limits on the application of the Directive set in *Süzen* do not mean that, as a matter of Community law, there can never be a transfer of an undertaking in a contracting-out case if neither assets nor workforce are transferred. *Süzen* does not single out, to the exclusion of all other circumstances, the particular circumstance of none of the workforce being taken on and treat that as determinative of the transfer issue in every case".

Lord Justice Mummery went on to refer to the Court of Appeal decisions of *ECM (Vehicle Delivery) Service v Cox*[1999] IRLR 559 and *ADI (UK) v Willer* [2001] IRLR 542 and said that when deciding if there is a transfer of the undertaking, the *Süzen* decision does not prevent national courts from asking why the employees were not taken on by the new employer; and he concluded that the "fact that none of the workforce is taken on is relevant to, but not necessarily conclusive of, the issue of retention of identity". Mummery LJ said that this "involved an objective consideration and assessment of all the facts, including the circumstances of the decision not to take on the workforce" rather than the subjective motive of the transferee to avoid the EU Acquired Rights Directive (ARD) or TUPE.
In *Balfour Beatty Power Networks Ltd v Wilcox* [2006] EXCA Civ 1240, [2007] IRLR 63, the Court of Appeal has emphasised that the correct approach is the multi-factorial approach.

Following the introduction of the SPCs, it clarified that TUPE applied to outsourcing, a change of contractor or in-sourcing subject always to the conditions in r.3 (3) TUPE applying. The conditions are that there is an organised grouping of employees that continues to carry out the same or similar activities following the transfer. At best, the SPCs bring about a clarification of the law in this area.

In fact, case law since 2006 runs counter to the suggestion that the SPCs are a "gold-plating" of the ARD. There have been a number of EAT decisions which say that there is no SPC, where the activities do not remain the same following the transfer: for example *Metropolitan Resources Ltd v Churchill Dulwich Ltd* [2009] IRLR 190, EAT, *OCS Group UK Ltd v Jones and another* [2009] EAT, *Nottinghamshire Healthcare NHS Trust v Hamshaw and Others* [2011] EAT, *Enterprise Managed Services v Dance* [2011]; *Ward Hadaway v*

Love [2009] (on legal services); *Johnson Controls v Campbell* [2012] (centralised taxi booking service). Not only must the activities in question transfer, but there will not be a SPC if there is a fragmentation of service providers.

The purpose of the SPCs is to apply in the narrow circumstances of there being an organised grouping of employees doing the same or similar activities pre and post transfer where there is a change of service provider.

If the SPC provisions are repealed, it will shift the focus back to r.3 (1)(a) TUPE – i.e. whether there has been a transfer of an entity which has retained its identity. This test is fact specific and focuses on what has happened to the relevant assets (including the workforce) of the relevant entity.

In negotiations with employers, UNISON has been informed that by employers that they are not keen on these changes as it will require employers to:

- Seek legal advice in relation to each transfer involving an SPC, at a cost to the transferor and transferee.
- Hire in a competent workforce to carry on the work, at substantial cost to the transferee in respect of hiring new staff (i.e. as staff will not automatically transfer), and also any damage to service provision and reputation in having no staff continuity.
- Burden the transferor with redundancy costs, i.e. if none of the staff are to transfer.
- Create barriers for SMEs as they will not be able to compete with companies who have the funds to recruit new staff or seek legal advice.
- Dissuade smaller employers for bidding for public service contracts, as they carry an increased risk of being liable for substantial redundancy costs at the end of the contract, and litigation costs.

UNISON's view is that the SPC provisions have increased clarity and certainty and reduced litigation; evidenced by the reduction in the number of cases being appealed to the EAT and referred to the CJEU since the introduction of SPC in the 2006 Regulations.

It has also provided employees with job security and protection of their terms and conditions. This in turn has increased certainty at a difficult time when they are to be transferred to a new employer.

If SPCs are removed the concern is that litigation around what is or is not a relevant transfer will increase. We could see legal challenges where transferee employers decline to take on the employees or key assets of the entity. This in turn will clog up the Employment Tribunals (ET) and there will no doubt be a number of appeals to the higher courts or directly to the Court of Justice of European Union (CJEU) to seek clarity.

The removal of the SPCs will also increase the costs to the State, where employees are made redundant and rely on the State for unemployment benefits. There is also bound to be a damaging effect on public services which the state will have to step in to resolve.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

The Government suggests that *Suzen* correctly interprets the ARD; it follows then that it is Government's intention that there can be no relevant transfer of an undertaking where employees are not taken on by the transferee.

However, the Court of Appeal has stated in the decisions mentioned above at 1a) that when considering if there has been a relevant transfer, a court is not precluded by *Suzen* from considering the motive of the transferor in failing to take on staff following a transfer. The Court of Appeal takes its authority from the *Spijkers* decision which sets out that the test as to whether there is a relevant transfer of an undertaking is based on the multi-factorial test, where none of the individual factors take precedence over the other factors.

UNISON would consider challenging any amended legislation which sought to limit the application of art. 3(1) of the Directive which the ECJ/CJEU has indicated is mandatory. If there is a relevant transfer (whether or not the SPCs are repealed) each case will have to be determined on its own facts.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect? (i) less than one year (ii)1- 2 years (iii) 3-5 years (iv) 5 years or more.

Any repeal should not apply to existing contracts as this will creates uncertainty for staff. Along with the problems set out in 1 above, these changes are likely to increase litigation where transferees opt out of TUPE. There will also be increased costs to incumbent service providers who would need to negotiate revised exit arrangements.

Any end-of-contract risks will also have been priced into contracts. Varying the legal framework mid-contract may trigger an unbudgeted mid-contract increase in cost.

- **Do you believe that removing the provisions may cause potential problems?**

Yes.

b) If yes, please explain your reasons.

As mentioned in question 1) above, there will still be litigation over whether reg 3(1)(a) TUPE applies and the extent to which employers can organise their businesses to avoid taking on sufficient assets to prevent a transferred entity from retaining its identity; or indeed seeking clarification from the CJEU as to whether the Court of Appeal line of decisions mention above complies with the ARD. UNISON thinks that decisions such as *RCO v UNISON* are ARD compliant, and this will simply result in increased costs to employers who have to defend such litigation. We believe that there will in any event be more litigation of the extent to which an employer can "avoid" the operation of TUPE.

This in turn is likely to see the number of cases to the tribunals increasing.
These cases are likely to be stayed whilst test cases are taken to determine if the new provisions are compliant with the Acquired Rights Directive.

From an industrial point of view, the uncertainty to employees as to whether their terms and conditions are likely to remain the same or change will cause industrial tension with current and new employers, if further transfers are envisaged such industrial tensions will no doubt affect service delivery.

In negotiations with employers, UNISON has been informed by employers that they are not keen on these changes as it will require employers to:

- Seek legal advice in relation to each transfer involving an SPC, at a cost to the transferor and transferee.

- Hire in a competent workforce to carry on the work, at substantial cost to the transferee in respect of hiring new staff (i.e. as staff will not automatically transfer), and also any damage to service provision and reputation in having no staff continuity.

- Burden the transferor with redundancy costs, i.e. if none of the staff are to transfer.

- Create barriers for SMEs as they will not be able to compete with companies who have the funds to recruit new staff or seek legal advice.

- Dissuade smaller employers for bidding for public service contracts, as they carry an increased risk of being liable for substantial redundancy costs at the end of the contract, and litigation costs.

In addition public authorities will need to take additional legal advice on TUPE when contracting for services and all parties interested in bidding will need to take legal advice before bidding about whether the SPC apply or not.

Question 3: Do you agree that the employee liability information [ELI] requirements should be repealed?

No.

a) If yes, please explain your reasons

UNISON does not agree that the Employer Liability Information (ELI) provisions should be repealed.

In UNISON's experience, transferor and transferee employers that share ELI with each other, also use their links with trade unions to ensure a smooth transition of services. In particular, information such as which employees are due to transfer is crucial to ensure staff know what is happening, and in order that both employers can be certain that the correct employees are transferring over. For example, without proper ELI, transferees may inherit employees that do not fit into their model of service delivery, and have to be made redundant upon transfer. This will in turn create further costs for transferees.

Without this information, UNISON is aware anecdotally of transferors seeking to transfer employees, whether or not they are assigned to an undertaking in order to "dump" them. Clearer minimum timescales for receiving ELI in advance would ensure transferees were clear on staff pay, pensions, and other associated benefits.

UNISON would also suggest that there is currently insufficient information provided to trade unions and that the ELI should be extended to trade unions. This is in order that the Unions can assist with the process. For example, UNISON has experienced union officials who are able minimise redundancies by seeking to maximise redeployment opportunities for those at risk of redundancy following a transfer. Usually this means following an agreed policy matching people's skills and ensuring training and support is provided.

- **Would the answer be different if the service provision changes were not repealed?**

•

No. Whether or not the SPCs are repealed, the ELI will still be required in respect of relevant transfers under TUPE to ensure the parties communicate with each other, where they would not otherwise be forced to do so. Good employers ensure that this information is shared with trade unions.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes. Regulation 13 should be amended to ensure that broader information is provided to the trade unions; and that the transferor and transferee should be obliged to provide information to each other to comply with the information and consultation process. Any amendment should include the following:

1. Increased transparency over who is assigned to the contract.

2. Employee categories.

3. Fixed penalties where such information is not provided.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No.

a) If you disagree please explain your answer

We do not agree with the proposed amendment wording to regulation 4(4) and 4(5) as this wording does not secure or ensure compliance with the ARD, and instead leaves it up to the courts to interpret these provisions in line with the ARD.

While there is no express provision in the ARD prohibiting changes to terms and conditions, the CJEU has ruled that variations to terms and conditions for the purpose of harmonising terms and conditions would be incompatible with the mandatory requirements under Art 3(1) of ARD (see *Martin v South Bank University* C-4/01[2003] All ER (D) 85 (Nov)).

At an industrial level, this proposed change is likely to create industrial tension and conflict at the beginning of the new contract, where employees will fear post transfer

harmonisation to their terms and conditions. At present there is an assurance that terms and conditions remain post transfer.

Some transferred employees could have protected terms and conditions following equal pay claims. Employers may not harmonise such terms and conditions for fear of finding themselves in breach of compromise agreements, COT3s or equal pay legislation.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

We do not agree with this proposal.

a) Please explain your answer

The role of collective agreements in the UK is different from those in many other EU Member States. This is because, for the most part, the contents of collective agreements are incorporated into individual contracts of employment. Art 3(3) of the ARD is designed for other EU systems where collective agreements are outside a personal contract and have a different status.

The Advocate–General has given his Opinion in the *Parkwood Leisure v Alemo-Herron* case and has made it clear that the "dynamic effect" of collective agreements will continue post transfer. Limiting terms of a contract, which happen to derive from a collective agreement, will run contrary to centuries old common law; to the implied term of trust and confidence; and to Article 11 of the Convention on Human Rights.

Any such restriction will also suggest that collectively agreed terms and conditions somehow obtain an inferior status to other terms and conditions. Contract law does not distinguish contractual terms in this way.

UNISON thinks that this approach is illegal, impractical, and unworkable, and will be seeking to challenge any such change in the courts.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

If the Government decides to adopt the 1 year rule, then yes this protection should be included.

Whilst we disagree with these changes, we note that this could be an area for litigation as to what is "no less favourable overall".

In addition we foresee practical difficulties in accessing whether those changes which have no financial value are "no less favourable overall", when weighed in the balance with financial changes.

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

The Advocate-General's Opinion is that the "dynamic" approach is permissible.
If the Government amends legislation to say that a static approach applies, it will still not provide flexibility for changing terms and conditions which transfer. This is because variations to terms and conditions for the purpose of harmonising terms and conditions would be incompatible with the mandatory requirements under Art 3(1) of ARD (see *Martin v South Bank University* C-4/01[2003] All ER (D) 85 (Nov)).

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No. To make further changes would probably be in breach of the ARD.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

No.

a) If you disagree please explain

Once again this will increase "industrial tension" if staff are put in fear of losing their jobs post transfer.

The CJEU has also referred to the term "connected to" interchangeably with the transfer itself and may not consider that there is such a difference between article 4 of the ARD and r.7 TUPE.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No.

Question 7 : Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No.

a) Please explain your reasoning

This is likely to create satellite litigation on whether or not the contract has been terminated and whether or not notice payments are due to be paid. This is likely to increase costs to the employer.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that

'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No.

a) If you disagree, please explain your reasons

Recent case law has said that relocation is a material change to terms and conditions and can also be a repudiatory breach of contract. In *Tapere v The South London and Maudsley NHS Trust* [2009] IRLR 972, [2009] ICR 1563 the EAT found that the claimant had been constructively dismissed under reg 4 (9) of TUPE, because the change of work location was a substantial change in working conditions to her material detriment. It followed, according to the employment tribunal, that she was entitled to a redundancy payment. The employment tribunal also held that she was automatically unfairly dismissed under reg 7(1) of TUPE in that, whilst there might have been plausible economic technical or organisation reasons for the employers decision, a change in the workplace did not involve a reduction in the workforce or a change in job functions in order to engage reg 7(2) to remove the automatic unfairness.

This interpretation was confirmed by the EAT in *Abellio London Limited v CentreWest London Buses* Ltd UKEAT/0283/11. It was accepted by the parties that this was a service provision change, and therefore a relevant transfer, under reg 3(1)(b) of TUPE. It was held by the employment tribunal that there had been a substantial change to the employees' working conditions to their material detriment under reg 4(9) of TUPE. The move was additionally a repudiatory breach of contract (in that a mobility clause in the employment contract did not extend to the new location). Therefore the employees were also constructively dismissed for the purposes of reg 4(11) of TUPE. It followed that the dismissals were automatically unfair, being by reason of the transfer. The EAT agreed, citing with approval the decision in *Tapere*.

It is UNISON's view that relocations should only be permitted where contractual terms that transfer under TUPE allow for such mobility clauses. A change of location is void for certainty as it is not defined and is too wide. Nor is it appropriate or relevant to have the definition of redundancy under s.139 (a) (ii) ERA 1996 here, as the transferee will not have ceased "to carry on the business in the place where the employee was so employed".

In any event, it is likely that a change of location is likely to be a "substantial change in working conditions to the detriment of the employee" contrary to Article 4(2) of the ARD, and so any change to TUPE to include a change of location is likely to be contrary to the ARD. It is also likely to be a breach of the implied term of mutual trust and confidence.

It is Unison's view that the impact of extending to changes in the location of the workforce have serious equalities implications which have not been examined under the equality impact assessment on page 55. Such a change is very likely to have a disproportionate impact on women, disabled people, people with caring and child care responsibilities (usually women).

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No.

a) Please explain your reasons

It is for the current employer to consult, not the putative employer. This could lead to an abuse of procurement and contracting processes, with transferees in effect agreeing to pay transferors to make redundancies for them. This could possibly then lead to unfair competition for contracts.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

a) if you disagree, please explain your reasons

The requirements under s.188 TULRCA 1992 seek to avoid dismissals and contain separate obligations under separate European Directives.

The information requirements under s.188 TULRCA 1992 are different to those in r.13 TUPE.

Under Regulation 13(1), the employer must inform trade unions in writing of the following matters: The fact that the transfer is to take place; the approximate date of the proposed transfer; the reason for the proposed transfer; the legal, economic and social implications of the transfer for the affected employees; any measure which the old or new employer will take as a result of the transfer, or if no such measures will be taken, this should be stated; the number of agency workers; the parts of employer where agency workers are working; and the type of work agency workers are doing.

On the contrary the information requirements under s.188 TULRCA are for the purposes of the collective redundancy consultation, and it is mandatory for the employer to disclose in writing to the union: the reasons for the proposals; the numbers and descriptions of employees to be dismissed; the total numbers of employees; the method of selection; the method of dismissal; the method of calculating redundancy payments; the number of agency workers; the parts of employer where agency workers are working; and the type of work agency workers are doing.

It is also unworkable, because such consultation must happen with the current employer, and not the proposed employer. Further any relevant Union will not be recognised by the transferee, and therefore, the requirements to consult with the trade union will not be complied with.

Practically, it is unlikely that such consultation can take place in 45 days without causing confusion. Furthermore, on a practical level a consultation on redundancies pre-transfer will be difficult if the changes are brought to remove the requirement for ELI information to be shared.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

a) Please explain your reasons

We agree that an amendment to reg 13(11) is not really necessary. Since the timescales of TUPE transfers vary greatly and are case specific, having a fixed timeframe lacks flexibility and, in some case, may not be feasible.

Recognised Trade Unions like UNISON carry out this role for their members in any event. Any guidance should contain strong advice to work with Trade Unions.

If you disagree, what would you propose is a reasonable time period.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No. The Government accepts that where there is a recognised trade union for the affected employees, there should be no ability to cut out the union in the information and consultation process even where there are small numbers of employees affected.

a) If you answer to the above qu estion is yes, would it be reas onable to limit this option so that it were only application to micro businesses (10 employees)

A micro business is not defined and creates a further level of uncertainty. In any event, UNISON is of the view that there should be a level playing field between employers and between employees, and the principle should be equal treatment

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes.

a) If not, are there particular areas where micro businesses should be expect? Please explain your answer

N/A

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes. Firstly, a company will now have to decide if you are a micro business, then if TUPE applies.

In UNISON's experience, Micro business (e.g. Academy Schools) tend to get swallowed by large chains. The costs of seeking specialist advice will be a huge burden.

It is the Union's view that these changes will dissuade smaller employers for bidding for public service contracts, as they carry an increased risk of being liable for substantial redundancy costs at the end of the contract, and litigation costs.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No.

Question 15: Have you any further comments on the issues in this consultation?

We are concerned that the Government has not given sufficient notice to the numbers of respondents who have disagreed with these proposals in the previous call for evidence. UNISON is of the view that these changes are misguided, and will only result in very costly litigation.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

It is UNISON's view that the proposals will have a negative impact on equality and diversity within the workforce.

We agree in part with the current equality impact assessment and agree the impact will be as described on page 50 but strongly feel that there is insufficient analysis of data and also an assumption that because there is no conclusive evidence that this means there is no expectation of impact on other protected groups, specifically we disagree there is no expectation of impact on pregnancy and maternity, age and sexual orientation.

Our knowledge and evidence of the impact of privatisation shows that following privatisation there is often 'harmonisation' of terms and conditions post transfer which results in a reduction in pay and conditions. Given the nature of the workforce this is going to impact women, disabled workers and Black workers.

Women make up 65% of the public sector workforce and given the increasing nature of privatisation in the public sector this data must be considered in terms of the equality impact. The TUC analysis in the attached document also highlights the pay differences between private and public sector employers:
http://www.tuc.org.uk/tucfiles/251.pdf

The current Equality Impact Assessment (EIA) does not to have taken account of the transfers data already available from the WERS 2004, however this is significantly out of date and there has been a significant increase in the level of privatisation since 2004. We note WERS 2011 will be used but it is essential that that data is analysed. Additionally the data needs to be considered at a sectoral level as there are real gaps in juts relying on ONS data.

Trade Union Congress (TUC)

Introduction

The Trades Union Congress (TUC) has 58 affiliated unions which represent nearly 6 million members employed in a broad variety of sectors and occupations in the public, private and voluntary sectors. Trade union officials and workplace reps have extensive experience of representing members before and after TUPE transfers.

The TUC is fundamentally opposed to the government's plans to revise the TUPE Regulations. The measures represent a major attack on basic rights at work and the ability for unions to protect their members' interests through collective bargaining. If implemented, the proposals will do nothing to generate growth. Instead they will heighten job insecurity, and lead to a major erosion of pay and conditions and increased inequality for millions of employees affected by TUPE transfers each year.

The government has stated that during the review of TUPE rights *'it will ensure that fairness to individuals is not compromised, recognising that the regulations provide important protections'.* However the TUC is unable to identify a single measure in the consultation document which is designed to protect the interests of working people. As the government's own, albeit inadequate, impact assessment concludes - business will be the primary beneficiaries of the government's proposals; whilst the vast majority of costs will be borne by employees.

Social and economic implications

The TUC is seriously concerned that the government is planning to make sweeping changes to TUPE protections, even though they lack a reliable evidence-base to assess the impact of the proposals or to demonstrate the changes are necessary or justified.

The government has repeatedly asserted it is necessary to deregulate employment law, including TUPE rights, in order to remove barriers to growth and to encourage job creation. However, there is no evidence that the TUPE Regulations has constrained growth or employment levels.

According to Oxford Economics, the UK outsourced sector has a turnover in the region of £199 billion, which is equivalent to approximately 7.5 per cent of total economy wide output. The sector directly supports around 3.3 million jobs, equivalent to 10 per cent of the UK workforce.

Equally there is no evidence that the TUPE Regulations have restricted the ability of businesses or public services to restructure or outsources services. According to the government's impact assessment between 26,500 and 48,000 TUPE transfers take place each year,[1] a figure which is only predicted to increase as a result of growing privatisation in the public sector.

The government claims that their reforms will help to improve the efficacy of the regulations and to reduce burdens on businesses. However many of the proposals are likely significantly to increase transaction risks and costs for businesses:

- It is widely predicted that the removal of the service provision change amendments will result in escalating litigation on when TUPE rules apply.
- Amending the regulations more closely to reflect the wording of the Directive will also create new uncertainties for business and will generate litigation on what the revisions mean in the UK context.
- Proposals aimed at increasing the flexibility for firms to vary terms and conditions post transfer appear to conflict with the requirements of the Acquired Rights Directive and will expose employers to uncertainties and the serious risk of compensation claims.
- The removal of the statutory obligation relating to employee liability information will also expose the new employers to grievances which were unforeseen and for which they have made no financial provision.

The original aim of the Acquired Rights Directive and TUPE Regulations was to facilitate the smooth management of restructuring by securing the interests and commitment of the employees affected. The government's proposals, in particular those aimed at weakening unfair dismissal rights and safeguards for terms and conditions of employment, will seriously undermine this objective. This will reduce employee buy-in, undermine workforce morale and retention and damage employment relations. In turn it will also affect the quality of services delivered.

The government also claims their proposals will help to create a competitive environment in which business can thrive. The TUC believes the opposite is true. The repeal of the service provision changes and increased flexibility for businesses to vary pay and conditions following a transfer will remove the level playing field which currently exists for contractors. It will encourage competition based on reduced pay and conditions rather than on innovation and the quality of service delivery, meaning that reputable businesses will be undercut by unscrupulous operators.

The downward pressure on wages will also have wider economic and social implications. It will reduce the spending power of service sector workers which will do nothing to encourage consumer confidence or stimulate demand in the economy. Rather it will encourage a 'race to the bottom', fuelling low pay, in-work poverty and inequalities. The drive towards low pay will increase pressure on the welfare bill by necessitating in-work benefits, and making it impossible for large sections of the workforce to plan and save for their future retirement.

The TUC therefore strongly urges the government to withdraw its proposals for reforming the TUPE Regulations.

Responses to consultation questions

Question 1:
Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

a) **Please explain your reasons**
b) **Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?**

No. The TUC is firmly opposed to the removal of the 2006 service provision change (SPC) amendments.

The amendments have generated significant benefits for the key stakeholders, including reduced transaction risks and costs and increased certainty for contractors and service commissioners. They have also provided increased job and income security for service sector workers. These benefits will be lost if the amendments are repealed.

Findings from the call for evidence also reveal there is no consensus in favour of removing the measures. Indeed a higher number of respondents favoured retaining the provisions (66 respondents) as compared with those calling for their repeal (47 respondents).

The TUC also does not agree with the premise on which the government proposes to repeal the 2006 provisions. Firstly, we do not accept that the SPC amendments represent 'gold-plating'. It is well-established that an SPC can amount to relevant transfers for the purposes of the Acquired Rights Directive and the under Regulation 3(1). This includes the outsourcing of services, in-sourcing exercises and second generation outsourcing. The impact assessment estimates that at least 65 per cent of all service provision changes would still qualify under TUPE regulations even if SPCs were no longer included.

It is a misnomer therefore to refer to the SPC amendments as gold-plating. Rather these provisions have increased the efficacy of the regulations by increasing certainty and reducing the likelihood of costly and protracted litigation to determine whether TUPE applies.

Secondly, the TUC does not agree that the ECJ case law on the application of TUPE rules to service provision changes became more settled following the *Suzen* case. Indeed the opposite is true. The *Suzen* case introduced a distinction in the way that the Directive is applied to 'asset-reliant' undertakings (which appeared to require the transfer of significant assets) and 'labour intensive' undertakings (which appeared to require the transfer of the entire or major part of the workforce). The decision represented a departure from the multi-factorial test, set out in the *Spijkers* case, which had previously been used to determine whether an economic entity had retained its identity.

In doing so, the *Suzen* case created significant confusion and acted as the catalyst for a series of inconsistent ECJ judgements which, whilst affirming the *Suzen* approach, often resulted in diametrically opposed outcomes.

See for example the ECJ decisions in the *Oy Liikkene* and *Abler v Sodexho* relating to the need for the transfer of assets in asset intensive industries. The vagaries of the ECJ case law created huge uncertainty for contractors and employees and proved a key driving force behind the adoption of the SPC amendments in 2006.

Far from settling the case law, the *Suzen* decision also increased the TUPE related case load for UK courts and tribunals and generated a steady stream of appeals to the Court of Appeal, and in some cases references to the ECJ, on whether or not there was relevant transfer for the purposes of the 1981 TUPE Regulations.

This only stopped in 2007, as a result of the adoption of the SPC amendments in the 2006 Regulations. Since that point, the number of the Court of Appeal decisions on the application of Article 3(1)(a) and 3(1)b has significantly reduced.

The TUC recognises there have been a number of EAT decisions dealing with the requirements of the SPC amendments. This is a natural occurrence with any new legislative rules. The TUC however strongly disagrees with the view that uncertainties created by these cases outweigh the benefits gained from the 2006 amendments. The main focus of the SPC cases relates to whether TUPE rules apply where there has been a fragmentation of services. This is an issue which has also arisen under the standard definition of a transfer. There have also been a limited number of cases to determine whether there was an organised grouping of employees. However a similar test was applied by the CJEU in the *Scattolon* case under the standard transfer provisions. The consultation also inaccurately suggests that the SPC amendments have generated new uncertainties on whether employees were assigned to a transfer. The assignment provision applies equally to a standard transfer as to an SPC.

The removal of the SPC provisions will therefore not necessarily reduce litigation in these areas.

Thirdly, the TUC is not surprised that businesses report that their requirements for legal advice have not diminished since 2006. Contractors and commissioners will always seek legal advice on large commercial contracts, regardless of the legal framework. It is therefore misleading for the government to cite this as a reason for repealing the 2006 SPC provisions.

Fourthly, the TUC does not agree with the government's claim that the repeal of the SPC amendments will promote fair competition. On the contrary, it will remove the level playing field which currently exists for contractors. The main anti-competitive behaviour which the government states it is seeking to address is avoidance tactics by employers. The TUC believes it is completely inappropriate for government to reward employers who seek to evade their legal obligations by simply removing the regulations. Indeed, this sets a dangerous precedent.

Question 2:
If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?
(i) less than one year (ii)1- 2 years (iii) 3-5 years (iv) 5 years or more

The TUC is opposed to the repeal of the SPC amendments. If the government decides to go ahead, it is important that a long lead in period is provided, which should be no shorter than 5 years.

a) Do you believe that removing the provisions may cause potential problems?

Yes

b) If yes, please explain your reasons.

The removal of the SPC provisions is expected to lead to a major increase in litigation relating to whether TUPE applies. This will create legal uncertainty similar to that which

existed before 2006. It will delay restructuring exercises and expose commissioners, contractors and employees to a high level of legal fees.

The TUC is also seriously concerned that the repeal of the SPC amendments will have a detrimental impact on service sector workers, including for those on low pay. There is extensive evidence that contracting out leads to job losses, a serious erosion of pay and conditions of employment, rising inequality and an increased reliance on welfare provision. The removal of the SPC amendments will escalate and intensify these effects.

The government's own impact assessment estimates that the repeal of the SPC will result in a loss in pay and conditions for affected service sector workers amounting to between £10.8 million and £24.1 million per year. In contrast contractors and service commissioners are expected to benefit by an equivalent amount, in the form of reduced costs and increased profits.

The TUC also believes that the removal of SPCs from TUPE coverage will inevitably lead to significant job losses. This will increase job insecurity and levels of unemployment amongst service sector employees. It will also lead to associated redundancy costs for transferors, including the public sector employers. In the case of insolvent businesses, redundancy costs will pass to the Exchequer.

Unions also report that it is not uncommon for cleaning and catering staff to be affected by numerous outsourcing exercises each year. The removal of the SPC provisions will mean these individuals will face heightened job and income insecurity, being uncertain what pay they will receive and whether they will have a job whenever their service is retendered.

The removal of the SPC amendments will also lead to increased inequality for disadvantaged groups, including women and black and ethnic minority workers who are disproportionately employed in contracted out services (see comments on the Equality Impact Assessment below for more details).

The proposal will also affect the quality and consistency of services delivered. The downward pressure on pay will undermine workforce morale and retention, and will ultimately affect the quality of service. The removal of the SPC amendments will also mean that new contractors are less likely to take on the existing workforce. This could a detrimental impact on the elderly and more vulnerable groups who are reliant on social care provision and other public services and who will have developed trusting relationships with staff.

Question 3:
Do you agree that the employee liability information requirements should be repealed?

No

a) If yes, please explain your reasons.

The TUC believes that the proposal to repeal employment liability information (ELI) requirements is misconceived. During the call for evidence many expressed serious concern that information was provided too late. It is incongruous that these responses

are being treated as a reason for deregulating the provisions. Instead the government should strengthen the rules and require fuller and earlier disclosure.

Leaving it to parties to agree voluntarily when, how and what information should be provided will not prove effective. It will lead to less information being supplied. This will create uncertainty and significant risks for contractors and making it difficult for them to prepare accurate business and financial plans. It is also likely to deter some contractors from bidding for contracts.

This proposal will also be detrimental for transferred employees. The failure by the transferor to provide full information about pay and conditions will generate unnecessary grievances between employees and the transferee.

b) Would your answer be different if the service provision changes were not repealed?

No. The ELI requirements are relevant to all TUPE transfers. The impact assessment also estimates that at least 65 per cent of service provision changes will continue to be covered by TUPE even if the SPC amendments are removed.

c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes. The TUC believes that this amendment should be introduced, regardless of any changes to the ELI requirements. Regulation 13 should clearly state that information should be supplied to the transferee at an early stage and should include information of any collective agreement and details relating to all terms and conditions of employment (not only those specified under section 1 of the Employment Rights Act 1996). The transferor should also be required to provide the information to trade union representatives, who can check its accuracy. This will assist in avoiding disputes and employment tribunal claims following the transfer.

There is a widespread perception that transferees are not required to consult workplace representatives prior to the transferor. Regulation 13 should be amended to make clear that the obligation to consult applies to both the transferor and the transferee employers. This change would bring UK Regulations into line with EU law. It would also help to build good working relations between the union reps and the new employer and to reassure transferring employees before the transfer takes place.

The TUC also believes that trade unions should be consulted when the procurement process is being decided. Employees and their representatives have expert knowledge on how business and services operate and can be improved. Workplace representatives can therefore make a valuable contribution to decisions on service reviews, tendering specifications and future delivery plans.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No

a) If you disagree, please explain your reasons.

The TUC is seriously opposed to the proposals to amend Regulation 4. The proposed changes will accelerate the erosion of the pay and conditions of transferred staff, leading to growing inequalities, low pay and in-work poverty. The proposals also appear to conflict with the requirements of the Acquired Rights Directive (2001/23/EC).

The consultation document acknowledges that provisions which allow for the harmonisation terms and conditions are prohibited by the Directive.

Nevertheless the government appears intent on introducing measures which will make it easier to vary contracts to give greater harmonisation.

This approach appears to be both incoherent and foolhardy.

Turning to the specific policy proposals, the consultation document suggests that the Directive only prohibits variations to terms and conditions which are 'by reason of the transfer', and not those which are 'connected with the transfer'. The TUC does not agree that this distinction is valid given the decision of the ECJ in *Martin* case, where the Court appeared to use the terms 'connected to the transfer' and 'the transfer … is the reason' interchangeably. This point is acknowledged in footnote 20 of the consultation document, but is then effectively ignored.

The TUC is therefore not convinced that the restrictions in Regulations 4 & 5 are broader than the requirements of the Directive. Amending Regulation 4 in the way proposed is likely to generate further confusion and uncertainty. It may also mean that some UK employees lose out on their entitlements under EU law.

In the TUC's opinion, the draft text contained in paragraph 7.42 of the consultation document is fundamentally flawed:
1) Sub-paragraph (4) does not take account of the fact that the Directive and decisions of CJEU appear to prohibit variations which are connected to the transfer, as well as those which are by reason of the transfer.
2) Sub-paragraph (5) would drive and coach and horses through employees' protections by appearing to give employers licence to act as if the TUPE rules did not exist. This is clearly not consistent with the Directive.
The text appears to be based on a misreading of the ECJ's decision in the *Martin* case. In paragraph 42 of the judgement the Court made it clear that the transferee had the same ability to vary terms and conditions as the transferor '*provided that the transfer of the undertaking itself may never constitute the reason for that amendment'*. The wording of sub-paragraph (5) would have the opposite effect by providing that a variation to terms and conditions would not be void if the variation could have been made had there been no transfer.
3) Sub-paragraph (5A) ignores the fact that Article 4 of the Directive prohibits all variations where the transfer is the reason for the variation.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

No. The TUC believes that the exception does not comply with Article 4 of the Directive, as interpreted in the *Daddy's Dance Hall* case. In this judgement the ECJ made it clear that the transfer of an undertaking itself may never constitute the reason for a detrimental variation to an employees' terms and conditions of employment. Nothing in the ECJ's ruling or in subsequent ECJ decisions, suggests that even a limited exception to this rule is permissible.

In our opinion Regulation 4(4) and (5) of the 2006 Regulations should be amended to make clear that all variations which are by reason of or connected to the transfer are prohibited.

Question 5:
The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No.

a) Please explain your answer.

The TUC is fundamentally opposed to this proposal, which would limit the ability of unions to protect their members' interest through collective bargaining.

The consultation document and accompanying impact assessment state that the aim of the proposal is to enable non-unionised prospective transferees to compete for contracts involving previously unionised staff by allowing them to reduce previously negotiated pay and conditions. The intention is clearly to make it cheaper for private businesses to restructure and for the public sector to privatise public services.

The TUC believes this policy would have very damaging effects.

Employees are already under immense pressure to respond to the major reorganisation and fragmentation of public services and private sector businesses. The removal of protection for pay and conditions would have serious implications for workforce morale and retention and will in turn affect the quality of services which are delivered. Evidence from the NHS, for instance, shows that staff wellbeing is closely linked to patient satisfaction. Higher turnover resulting from the downgrading of collectively agreed terms and conditions would increase costs for employers and public service commissioners and impact on service continuity and quality and could undermine safety and standards.

Permitting employers to cut collectively agreed terms and conditions will also rapidly expand the two-tier workforce, with in-house employees being protected by negotiated pay and conditions and outsourced staff experiencing pay cuts and reduced terms and conditions. This will fuel increased inequality, low pay and in-work poverty. The proposals are also likely to have a negative effect on on-going negotiations in the public sector and on industrial relations more generally, leading to rising workplace tensions.

The TUC is extremely concerned that the government is even considering implementing a policy which would have the effect of providing *less protection* for contractual rights of

trade union members and those who benefit from collective agreement than those enjoyed by other UK employees. This approach is clearly discriminatory. We also question if it is consistent with the government's obligation under Article 11 of the European Convention on Human Rights.

It is also far from certain if or how the provisions contained in Article 3(3) could be made to work in the context of the UK. The measure was clearly designed for other industrial relations systems where collective agreements tend to be time limited and negotiated terms and conditions are enforceable via legally binding collective agreement or even statute. The presence of sector level bargaining in these countries also means that employees are guaranteed the same pay rate for the job and other conditions following a transfer.

These systems operate on a very different basis to that in the UK, where (subject to incorporation requirements) collectively agreed terms and conditions form part of and are enforceable via the contract of employment. Once collectively agreed terms are incorporated into the contract of employment, their status and enforceability is not affected, even if the collective agreement is terminated.

The ECJ has repeatedly underlined that the contractual rights of employees under national law should be preserved on transfer. The government's proposal therefore appears to conflict with the requirements of the Directive. Equally, the proposal appears to be inconsistent with the basic tenets of UK law. Contract law provides that once a term derived from a collective agreement is incorporated into the contract of employment it has the same status as any other incorporated term.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

The TUC is firmly opposed to the proposal to limit the application of collectively agreed terms and conditions to 1 year.

However if the government is intent on making these changes, it will be essential that this safeguard is introduced. In our opinion, this proposal would not meet the requirements of the Acquired Rights Directive.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?
Please explain your answer

In the *Alemo-Herron* case the CJEU has been asked to determine whether the dynamic approach currently operating in the UK is permissible under the Directive. If the Court follows the opinion of Advocate General Cruz Villalon is followed, the answer to that question will be 'yes'. Given the Advocate General's opinion, we think it is unlikely that the Court will rule that a static approach is required by the Directive.

If this is the case, the TUC believes it is important for the dynamic approach to be preserved. This would be consistent with the basic tenets of contract law, as confirmed in cases such as *Whent v T Cartledge Ltd* and with the government's obligations under Article 11 of the European Convention on Human Rights.

The dynamic approach has also helped to prevent the creation of a two-tier workforce, with in-house employees being protected by annually negotiated pay rises and outsourced staff experiencing pay freezes or even pay cuts.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No.

Question 6:
Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?
a) If you disagree, please explain your reasons.
b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No. The TUC does not agree that dismissal protections should be weakened for in any respect for staff affected by transfers. Restructuring exercises are extremely stressful and can have a seriously detrimental effect on health and well-being. Effective dismissal protections help to reassure staff and improve their sense of security. They also deter employers from dismissing staff in an attempt to circumvent TUPE rules and avoid employee liabilities.

For the reasons as outlined in response to Question 4a, the TUC also does not agree that CJEU draws a distinction between reasons for the transfer and reasons connected with the transfer. We therefore believe that the Regulation 7(1) and (2) accurately reflect the requirements of the Directive. Any amendments to the provisions are likely to create uncertainty and will lead to litigation.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No

a) Please explain your reasoning.

The current provisions provide important protections for staff affected by transfers. The TUC believes that individuals should be able to resign and claim automatic unfair dismissal where a transfer would lead to a substantial change to terms and conditions which is to their material detriment. These provisions are fully consistent with the overall purposes of the Directive to preserve employees' terms and condition where there is a transfer.

The TUC also believes that the right to receive payments for salary (and other benefits) relating to their notice period does not represent an adequate remedy for employees.

Nor does it create an adequate disincentive to deter employers from attempting to circumvent their TUPE obligations.

The fact that transferor employers may face claims for unfair dismissal based on the prospective actions of the new employer is also not adequate grounds for weakening these provisions. The current rules encourage commissioners to monitor their contractors and supply chains to ensure that their employees' terms and conditions are protected. The TUC believes this is good practice and helps to avoid reputational damage for the commissioner. Indemnity arrangements negotiated with transferees also ensure transferors are compensated.

Question 8:
Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No

a) If you disagree, please explain your reasons.

The TUC does not agree that the definition of 'entailing changes in the workforce' should be extended to include changes in location. Requiring employees to move or travel further to work may make it difficult for employees to accommodate their work and caring responsibilities and may disrupt their household and community life.

The aim of the Directive and the TUPE Regulations is to ensure that an employee's terms and conditions of employment should be preserved in relation to the new employer, as if the transfer had not taken place. This includes their place of work. In our opinion the ability of the new employer to require an employee to change their work location should depend on the individual's contract and any relevant mobility clauses.

The TUC is not convinced that the government's proposal is consistent with the requirements of the Directive. The wording of Regulation 7(1) is virtually identical to Article 4(1). UK courts have concluded that 'location' is not included in this provision. The TUC can see no reason why the CJEU would decide the issue differently. Until either the CJEU or the domestic courts reach a different conclusion, the government's proposed amendments does not appear to be permissible.

The TUC also believes that the premise of this question is mistaken. The fact that the UK definition of redundancy is broader than the definition of 'an economic, technical or organisational reason entailing changes to the workforce' is not relevant to the interpretation and application of an EU right.

Question 9:
Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No.

a) Please explain your reasons.

The TUC believes that the government's proposals would not be consistent with the purposes of the Directive. There are also clear policy reasons why the current provisions should be retained.

The Court of Session's decision in *Hynd v Armstrong* is the main legal authority on this issue. The Court concluded that a transferor cannot rely on the ETO of the transferee in order to justify a dismissal prior to a transfer. Although this is a decision of a domestic court, the Court was interpreting Article 4(1) of the Directive. And, as the Court of Session pointed out, the ECJ's decision in the *Dethie* is not relevant as in that case the transferor was not seeking to rely on the ETO of the transferee.

The Court of Session also helpfully identified important policy (as well as legal) reasons why the current provisions should be retained. The Court rightly concluded that if insolvent transferors were able to rely on the ETO of the transferee, there would be every incentive for the transferor to dismiss staff in advance of the transfer in order to avoid employee liabilities transferring to the new employer.

This may mean that the sale of the business was more attractive. However, this approach would not be consistent with the main aims of the revised Acquired Rights Directive to protect employees. It would also leave many dismissed employees out of pocket. The individuals would receive only limited levels of redundancy pay and unpaid wages from the Redundancy Payments Office. They would also face serious difficulties in recovering additional sums from the insolvent company.

The TUC also agrees with the Court that ensuring staff transfer to the new employee means there is an increased possibility they will form part of a larger pool for the purposes of any subsequent redundancy selection. This will clearly be beneficial for the affected employees. It is also consistent with the aims of the Directive to protect staff affected by transfers. Union reps may also be able to work with the new employer to identify ways of avoiding or reducing the need for redundancies.

Question 10:
Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

a) If you disagree, please explain your reasons.

The TUC recognises that it is beneficial for transferee employers to consult with trade unions in advance of a transfer. Early consultation enables the new employer and trade unions to establish good working relations. It also helps to alert union reps to any measures which the transferee considers may be necessary following the transfer, including potential redundancies.

There is currently a widespread perception that new employers are not required to consult prior to a transfer. The TUC believes that the Regulations should be strengthened to make clear that transferees should always consult with trade unions.

However we do not agree that pre-transfer consultation can or should count for the purposes of the transferee's obligations to consult on collective redundancies under section 188 of TULR(C)A 1992. The TUC does not believe that this would be consistent with the requirements of the Collective Redundancies Directive for the following reasons:

- The Directive requires the employer of the affected staff to initiate consultation about proposed redundancies. However, the transferee will not be the employer of the affected staff prior to the transfer.
- Under section 188, the duty to consult relates not only to the employees who are due to be dismissed, but also to employees who may be affected by the proposed redundancies or by measures taken in connection to them. It is likely that proposals for redundancies following a transfer will affect not only transferred employees but also the transferee's wider workforce. It is difficult to see how consultation starting prior to the transfer and involving only group of employees will therefore meet the obligations of s.188 or the Collective Redundancies Directive.
- Starting consultation on collective redundancies prior to the transfer will also inevitably affect the pool identified for the selection of redundancies. It will limit the ability of the representatives of transferring staff to argue that the pool should be broadened to include all or part of the transferee's existing workforce.

Question 11:
Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?
a) Please explain your reasons.
b) If you disagree, what would you propose is a reasonable time period?

The TUC generally believes that the provisions for the election of non-union workers' representatives for TUPE information and consultation purposes are far too weak. The process is in the hands of the employer. The employer determines the constituencies and number of representatives, conducts the election and counts the ballots. In our opinion a comprehensive review of these arrangements is needed.

The TUC does not believe it would be helpful to identify a fixed time period for the election of workplace representatives.

Question 12:
Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No. While managers may decide to consult individually with staff prior to a transfer, this is no replacement for the benefits of indirect consultation through independent and elected workplace representatives. Consultation with workplace representatives can start at an early stage. It enables employers to take the views of employees into consideration before reaching final decisions. Workplace representatives also benefit

from additional protections from dismissal and detriment when engaging in consultation with employers.

Unsurprisingly the TUC believes that consultation is most effective where it involves independent trade union representatives who are trained and have extensive experience of negotiating with employers. It is therefore essential that the government retains the right for recognised trade unions always to be consulted on transfers in micro firms. Failure to do so is likely to conflict with the government's obligations under the Directive and under Article 11 of the European Convention on Human Rights.

The TUC also believes that the government's proposal for an exemption for micro firms is inconsistent with the Directive. The Directive applies equally to all workplaces, regardless of the number of staff employed. It does not allow for exemptions for micro businesses.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Question 13:
Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?
a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

The provisions of the Acquired Rights Directive apply to all organisations, regardless of the number of staff they employ. No provision is made in the Directive for exemptions for micro businesses. Any such exemptions would therefore not be possible.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No. All of the measures proposed in the consultation document are deregulatory.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.
The TUC recognises that most micro businesses will not have internal HR Departments and their managers may not be experts in employment rights. It is important therefore that such firms are able to access reliable information and advice to assist them to comply with their TUPE obligations. To this end, the TUC believes the government should reverse the recent removal of legal aid for employment rights advice. The government should also provide Acas with adequate resources to fund advice and training for small firms.

Question 14:
Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

As outlined above the TUC is fundamentally opposed to all the proposals contained in the consultation document. In our opinion, they should not proceed at all.

Question 15:

Have you any further comments on the issues in this consultation?

No.

Question 16:
Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

The proposals will have a seriously negative impact on equality.

a) Please explain your reasons.
b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.
The TUC believes that the equality impact assessment is woefully inadequate and fails to address many of the equality implications of the government's proposals.

The government's proposals are clearly designed to encourage outsourcing and the privatisation of public services. There is extensive widespread evidence that contracting out and the marketisation of public services is associated with increased inequality, particularly for women and black and ethnic minority workers. The equality impact assessment fails to take this into account.

Analysis carried out by the TUC using data from ASHE 2011 explored pay for women in the public and private sector. This analysis found that:

- Almost a third of women (28 per cent) working full-time earn less than £300 in the private sector compared to 8 per cent in the public sector.
- Over half of all women (56 per cent) earn less than £300 in private sector compared to just over a third (35 per cent) in the public sector.
- Over three quarters of women working part-time in the private sector (77 per cent) earn less than £200 compared to less than half (47 per cent) in the public sector.
- Low paid jobs are far more prevalent in the private than public sectors, with 17 per cent of full-time workers earning less than £300 in the private sector, compared to only 6 per cent of public sector workers

Table 1: Gross Weekly Earnings – gender pay differences

	ALL- FT & PT			FT			PT		
	Less than £200	Less than £300		Less than £250	Less than £300		Less than £200	Less than £150	Less than £100
Public Sector ALL	15.3%	27%		1.7%	6.0%		47.3%	31.4%	19%
Private Sector ALL	20.2%	35.8%		7.6%	17.3%		76.6%	58.3%	32.5%

Public Sector MALE	6.8%	12.7%		0.7%	3.5%		46.8%	34.6%	21.6%
Public Sector FEMALE	19.9%	34.6%		2.4%	7.9%		47.4%	30.8%	18.6%
Private Sector MALE	10.2%	22.3%		5.2%	12.7%		75.6%	58.3%	33.1%
Private Sector FEMALE	34.9%	55.5%		13.2%	27.9%		76.9%	58.2%	32.1%

More specifically, the TUC believes that the government's proposals to remove the SPC provisions, to permit increased harmonisation of terms and conditions following a transfer and to limit the applicability of collective agreements will all lead to a downward pressure on pay and conditions and will increase inequality.
These proposals are also likely to have a disproportionate impact on women and black and ethnic minority workers who tend to be employed in sectors associated with outsourcing, including catering and cleaning.

- Analysis of employees in the lowest paid occupations reveals that 73 per cent of cleaners and domestics are women and 84 per cent of those women work part time.
- Similarly 65 per cent of kitchen and catering assistants are women, of which 73 per cent work part time.

Proposals to limit the applicability of collective agreements will also have a seriously detrimental impact on equality. Collective agreements negotiated in the public sector, including Agenda for Change in the NHS, have been equality proofed. These agreements have succeeding in significantly narrowing the levels of pay inequality in the public sector; whilst in the private sector unequal pay particularly for women remains high.

Research carried out by the TUC in 2012 revealed that for full time employees, the gender pay gap is half that in the private sector. Part-time women suffer a significant pay penalty in both sectors but this is also lower in the public sector. The lowest paid part-time jobs for women are better paid in the public sector – the bottom 10% earn up to £9.98 an hour in the public sector compared to just £7.00 an hour in the private sector.
Gender Pay Gap (median hourly earnings, excluding overtime, for public and private sectors -2011)

	Public Sector	**Private Sector**
All Employees	**18%**	**26.8%**
Full-Time Employees	**9.2%**	**18.4%**
Part-Time	**36.3%**	**42.8%**

Employees		

Limiting the applicability of collective agreements after one year will mean that effective equality protections have been dismantled. This will lead to increased inequality, particularly relating to pay inequality for women. It will also help to create a two-tier workforce with in-house employees being protected by negotiated pay and conditions and outsourced staff experiencing pay cuts and reduced terms and conditions.

The equality impact assessment highlights that the proposals making it easier for businesses and service providers to relocate will have equality implications. However the effects will not be limited to the disabled workers and those with religious beliefs. They will also disproportionately affect women with caring responsibilities and pregnant workers, who are less likely to be able to relocate to travel longer distances for work.

Question 17:
Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

As highlighted throughout this response, the TUC does not agree with the analysis set out in the impact assessment.

The TUC is seriously concerned that the government is proposing wide ranging changes to TUPE protections, even though they lack a reliable evidence-base to assess the impact of the proposals or to demonstrate the changes are necessary or justified.

The main conclusion which can be drawn from the assessment is that businesses will be the primary beneficiaries of the government's proposals; whilst the vast majority of costs will be borne by employees.
The outcome is clearly inconsistent with the government's objective of ensuring '*that fairness to individuals is not compromised, recognising that the regulations provide important protections'.*

There are also major gaps in the impact assessment. For example, the impact assessment fails even to attempt to evaluate the financial costs which will be incurred by employees if the government proceeds with plans to remove restrictions on changes to pay and conditions. The impact assessment also fails to consider or evaluate the increased transaction risks and costs which employers will almost certainly incur if the SPC provisions are removed.

Much of the impact assessment is based on assertion and speculation rather than evidence or financial evaluations. For example, the government has offered no evidence to support the repeated proposition that SPCs lead to under-performing employees being deliberately included within the transferring employees.

The TUC also believes that the evidence provided relating to levels of TUPE related employment tribunal claims is inaccurate and misleading. The impact assessment concludes 'the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims'.

As the consultation document acknowledges, the only specifically TUPE-related claims which are recorded by employment tribunal statistics are those relating to information and

consultation. These figures do not provide a reliable overview of the impact of the 2006 Regulations in employment tribunal claims. The great majority of TUPE-related claims do not relate to the failure by employers to inform and consult but to claims for unfair dismissal and unlawful deductions from wages. And it is precisely these types of claims which are expected to rise if the government proceeds with its proposals.

BATTERSEA AND WANDSWORTH TUC

8.Consultation questions

	Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions
Question 1	Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? **Yes** ☐ **No** ☑ **a)** Please explain your reasons: The present Regulations provide some clarity. Repeal will lead to additional litigation turning on the question of 'business transfer'. **b)** Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?
Question 2	If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect? (i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☑ (iv) 5 years or more ☐ a) Do you believe that removing the provisions may cause potential problems ? **Yes** ☑ **No** ☐ c) If yes, please explain your reasons. See answer to No 1

	Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions
Question 3	Do you agree that the employee liability information requirements should be repealed? **Yes** ☑ **No** ☑ a) If yes, please explain your reasons. Unverified possibly prejudicial information about employees should not be passed on. However, information about collective agreements does need to be passed on b) Would your answer be different if the service provision changes were not repealed? No c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation? Yes
Question 4	Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? **Yes** ☐ **No** ☑ a) If you disagree, please explain your reasons. It would be a diminution of employees' rights b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained? No. It is abused far too frequently in order to 'harmonise' downwards. Harmonisation should be achieved by negotiation + consent
Question 5	The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view? Only by mutual agreement

	Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions
	Yes ☐ **No** ☑ a) Please explain your answer. Harmonisation should be by negotiation + consent b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? **Yes** ☑ **No** ☐ c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? No Please explain your answer. After multiple TUPE transfers, the workforce finds itself in several different unions representing them. However, often only one TU has bargaining rights. d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)? **Yes** ☑ **No** ☐ unions that negotiated the original collective agreements should continue to have the right to update them even if there is ~~another~~ a recognised TU in the workplace
Question 6	Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? **Yes** ☐ **No** ☑ a) If you disagree, please explain your reasons. This would be a diminution of employees' rights b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned? **Yes** ☐ **No** ☑

	Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions
Question 7	Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? **Yes** ☐ **No** ☑ a) Please explain your reasoning. This would be a diminution of existing rights
Question 8	Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996? **Yes** ☐ **No** ☑ a) If you disagree, please explain your reasons. This would interfer with existing mobility clauses (or the absence of them)
Question 9	Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? **Yes** ☐ **No** ☑ a) Please explain your reasons. This would simply be used as a means of avoiding TUPE transfers
Question 10	Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? **Yes** ☑ **No** ☐ but ↓ a) If you disagree, please explain your reasons. Providing non-recognised TUs in a workplace with a fragmented work force + one recognised TU were also consulted.

Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions	
Question 11	Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful? Yes ☐ No ☑ a) Please explain your reasons. less clarity b) If you disagree, what would you propose is a reasonable time period? 28 days
Question 12	Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? **Yes** ☑ **No** ☐ a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)? **Yes** ☑ **No** ☐
Question 13	Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? **Yes** ☑ **No** ☐ a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer. b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

	Changes to Transfer of Undertakings (Protection of Employment) regulations 2006: Consultation Questions
	Yes ☑ **No** ☐ c) If so, please give details and suggestions where these costs could be decreased or avoided entirely. Increased litigation due to less clarity
Question 14	Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? **Yes** ☐ **No** ☑
Question 15	Have you any further comments on the issues in this consultation? It does not deal with the issues raised by workforces resulting from many successive TUPE transfers. Eg There is no obligation to consult any TU other than the recognised TU. This leaves the members of the other TUs with no right to be consulted about TUPE transfers
Question 16	Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? **Yes** ☑ **No** ☐ a) Please explain your reasons. TUPE service transfers affect disproportionately female, ~~and~~ ethnic minority and working class employees. b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.
Question 17	Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Papworth Trust

☒ **Charity or social enterprise**

Papworth Trust is a disability charity and registered housing provider, whose aim is for disabled people to have equality, choice and independence. Papworth Trust helps over 20,000 people every year through a wide range of services including work, leisure, accessible homes and care.

We employ almost 600 staff and in the last year have transferred in 62 members of staff through TUPE obligations.

We have many years direct experience of TUPE both as a transferee and transferor. In particular we have experience in public sector contracts as a provider of the Work Programme and domiciliary social care.

Q1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to Service Provision Changes?

Papworth Trust strongly disagrees with this proposal. We believe that repealing the Service Provision Changes amendments would increase the use of Employment Tribunals to resolve TUPE disputes, and place a burden on the employee to dispute with the transferee and transferor whether TUPE applies to them.

The onus will be on the individual to take the transferor and transferee to an Employment Tribunal and let the courts decide whether TUPE applies.

In our experience, many organisations are becoming more shrewd about the application of TUPE. In a tougher operating environment, organisations are seeking to cut costs by offloading employees through TUPE. This is increasing conflicts between transferor and transferee over whether TUPE applies. Removing the Service Provision Changes amendments will do nothing to resolve this problem.

If the amendments are repealed, Papworth Trust will be far more cautious in bidding for contracts in future, as it is likely to increase our risks and costs.

Instead, Papworth Trust would like to see additional guidance issued, especially to public sector bodies, on their TUPE obligations when letting, re-letting or bringing contracts back in house.

Q2: Do you agree that employee liability information requirements should be repealed?

Papworth Trust strongly opposes repealing the employee liability information (ELI) requirements. We are often asked to provide the ELI in advance of the 14 day window of due diligence. Additionally, we face many barriers in obtaining full and accurate ELI during the 14 day window of due diligence, and firmly believe that repealing the ELI requirements would make this even harder.

The 14 day window is an essential part of the TUPE process and contracting. Our largest costs resulting from TUPE are redundancies, pensions, employees on long-term sickness absence, industrial accidents, and inherited unfair dismissal claims. The ELI provided is

essential in calculating the costs of running the contract, which can be significantly different from what we have estimated when bidding.

For example, we were recently successful in bidding for a home improvement agency contract. During the 14 day window we discovered that three employees due to transfer to us had a defined benefit pension fund which would have cost Papworth Trust £1 million. This is a vast cost for us as a charity with an annual turnover of £20 million. Legal advice was sought during the 14 day window which helped us to avoid the cost.

The information we receive during the 14 day window is often inaccurate or incomplete. We have particular difficulty in finding out what percentage of time an employee spends working on the contract we have won, and therefore whether they are in or out of the scope of TUPE. Often we have to approach employees themselves to ask for further information or for proof, such as timesheets, etc. Where ELI is not provided within the 14 day timescale there is little time for any recourse action to take place, prior to the transfer.

We also ask commissioners to provide the outgoing provider's contract for the service. This helps us to understand whether employees are in or out of scope and the costs of the previous contract. We are usually commissioned to provide a service at a cheaper rate than the outgoing provider. We are unable to properly cost the service without understanding what the existing staffing costs are and how much of those costs we will need to take on under TUPE.

As competition becomes more 'cut throat' it will become even harder to glean the ELI from the outgoing providers, who again may be seeking to cut their costs by offloading under-performing or surplus staff to the transferee who may not be aware of the usual process.

Papworth Trust does not believe guidance for the transferor to disclose information to the transferee would be sufficient to receive full and accurate information in reasonable time before the transfer.

We propose that the current process could be improved by having a longer window of due diligence, preferably 30 days before the transfer. This could be coupled with a 'cooling off' period after the transfer where if the transferor is found to have provided inaccurate or incomplete information, the transferee has a right to withdraw from the contract.

The Government could make the provision of timely and accurate ELI easier by creating a standard template for ELI to be completed by the transferor in all transfers. The form could specifically ask for all of the information the transferee requires, such as the percentage of time employees spend on the contract, their terms and conditions, and sickness absence.

Q4: Do you agree with the Government's proposal to amend the restrictions on changes to terms and conditions to reflect the wording of the Directive?

Papworth Trust agrees with this proposal and believes it would go some way in helping us to create common terms and conditions where the changes are connected to the transfer but not by reason of it.

Ideally, we would still like to see an initial period after which transferred employees could have their terms and conditions aligned with those of existing employees should the new employer wish to do so. It should not be compulsory.

Q8: Do you agree with the Government's proposal that 'entailing changes in the economic workforce' should extend to changes in the location of the workforce?

Papworth Trust welcomes the Government's proposal to include changes in workforce location to the ETO reasons. We would like further clarity on the distance from the former location which would define a 'change of location'. It would be helpful to have clarity on whether this ETO reason would apply only when an employee refuses to travel to the new location.

In summary, we strongly oppose repealing the Service Provision Changes amendments and the obligation to provide Employee Liability Information. These changes would increase burdens and risks, and the likelihood of Employment Tribunals to resolve TUPE disputes.

We welcome the Government's intention to expand the ETO reasons to include a change in workforce location, and to allow changes to terms and conditions if the ETO reason is connected with the transfer, but not by reason of it.

The Union of Construction, Allied Trades and Technicians (UCATT)

Please tick the boxes below that best describe you as a respondent to this:

☑ Trade union or staff association

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ No ☑

a) Please explain your reasons:

By repealing the 2006 amendments relating to service provision changes, the regulations will offer much less clarity in helping companies and service providers to understand when TUPE is likely to apply. UCATT believes that this will herald a return to complicated and inconsistent case law in order to determine what a 'relevant transfer' is. UCATT predicts that this will lead to increased litigation.

Furthermore, UCATT vigorously opposes the removal of protection for workers involved in service provision who face outsourcing or whose employer does not seek to renew or fails to secure a contract when retendering. Many of these workers will now face increased job insecurity and ultimately redundancy. This will prove costly to the service provider in terms of redundancy payments and it will be costly to the employees. The impact of redundancy on individual workers can be devastating, causing financial and health problems and family and relationship breakdown. This has financial costs for the state.

UCATT opposes any measure that will make it easier for workers to be dismissed and calls on the Government to ensure that all workers faced with outsourcing, subsequent contract transfers or insourcing of services, continue to be protected by TUPE. All workers in service provision must retain their current **legal right to move** to the new service provider and be able to preserve their **existing terms and conditions** of employment.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No comment to make.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(iv) 5 years or more ☑

a) Do you believe that removing the provisions may cause potential problems?

Yes ☑ No ☐

b) If yes, please explain your reasons.

UCATT opposes repealing the service provision changes but if the proposals are imposed, UCATT believes that the lead in period should be as long as possible. Introducing a radical change in a short time frame could jeopardise current negotiations between transferors and transferees and cause potential service providers to withdraw from ongoing tendering processes. It could result in transferees waiting until the changes take effect before agreeing to undertake a new contract. This could interrupt or even halt service delivery. A significant lead in time of 5 years or more would act as a deterrent to companies who may otherwise consider delaying.

Removing the provisions may have a further negative impact on service delivery and quality. One of the advantages of TUPE is that it ensures that experienced and skilled staff are transferred to continue to deliver the service. Losing expertise, local knowledge and established relationships with service users will undoubtedly be to the detriment of service delivery and end-user satisfaction. Other services could be adversely affected as service deliverers find that they have to cut overall costs in order to fund redundancy payments.

As outlined in response to question (1), UCATT believes that the proposals will also lead to a lack of clarity and create uncertainty for employers, employee representatives and employees as to whether TUPE applies in their situation. Invariably this will lead to an expansion in the number of legal cases as both employers and employees contest the definition of a 'relevant transfer'. UCATT also fears that this proposal could prompt some companies to find ways of fragmenting and restructuring their business prior to a potential transfer in order to circumvent the regulations.

The 2006 regulations also try to ensure that companies competing for contracts do so on a more level playing field. It is difficult for employers who value their workforce and offer a fair wage and invest in apprenticeships, training and continuing professional development, to compete on price with companies using low paid, low skilled labour.

Repealing the service provision changes will produce a system that effectively rewards and encourages exploitative behaviour and poor employment practices. This will have a demotivating effect on the workforce and will predictably lead to a deterioration in service standards and quality.

The impact of the changes will be hugely injurious to employees working in sectors where there is a high level of outsourcing and in areas where contracts regularly change hands. This includes some of the country's lowest paid workers in cleaning, waste management and maintenance roles, who will now face redundancy when a contract expires. Without the protection of TUPE, these staff will not transfer automatically. Some may be recruited by the company securing the contract but as the duration of some contracts is 2 years or less, many workers will find that they do not qualify for any redundancy payment if their continuity of service from their previous employer is not protected.

Making it easier to dismiss workers will do nothing to promote growth and employment opportunities. Furthermore, this proposal fails to meet the stated objective in the consultation document foreword from Jo Swinson that the revised regulations will provide "continued protection for employees." Huge sections of workers in service provision will be exempt from the TUPE regulations. Increased insecurity at work can only cause further weakening of the overall economy by damaging consumer confidence. Workers in fear of

their jobs spend less. They are much less likely to make substantial financial commitments, for example buying houses, cars etc.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☑

a) If yes, please explain your reasons.

Removing the specific requirements about Employee Liability Information and making this subject to individual negotiation between the transferor and transferee creates a number of problems. Firstly, it fails to recognise the valuable contribution that trade unions can make as employee representatives in checking and validating the accuracy of the information and this proposal doesn't include them in the process. It also fails to solve the problem identified during the call for evidence that the process was not sufficiently transparent and that information was not being supplied in a timely manner. The obvious solution would be to change the time line and ensure that information was supplied earlier in the process, with a final update supplied 14 days before transfer.

b) Would your answer be different if the service provision changes were not repealed?

No, the reasons outlined above remain valid.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes. The regulation should be amended to explicitly state the type of information that is required by the transferee, including full details of collective agreements. It should also make provision for this information to be shared with trade unions.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☐ No ☑

a) If you disagree, please explain your reasons.

UCATT opposes amending the restrictions in regulation 4 on changes to terms and conditions as we believe that this will reduce the current protection for employees. There is already sufficient flexibility for employers to make variations to contracts if there is an economic, technical or organisational justification. Weakening this regulation will result in workers facing attacks to their pay and conditions, many of whom are already low paid. This will mean that more workers will be forced to claim benefits and the state will end up subsidising employers.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

No. There should be no exemptions that allow variations to terms and conditions as a result of, or connected with, a transfer under the TUPE regulations.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ No ☑

a) Please explain your answer.

UCATT opposes any limits to the future applicability of terms and conditions derived from collective agreements. We believe that if harmonisation is an issue for employers, they always have the option of harmonising upwards to extend the terms and conditions of the employees protected by TUPE to the rest of their workforce. Any attempts to downgrade pay or conditions, or undermine current collective bargaining arrangements, will result in fractious industrial relations and will inevitably be met with legal challenges. It is highly likely that such measures are incompatible with the Acquired Rights Directive. Moreover, it will lead to dissatisfaction amongst employees, affecting motivation, turnover and ultimately service delivery.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No ☑

UCATT does not agree with any time limit on the protection of terms and conditions. Furthermore, it is problematic to measure changes that are 'no less favourable' as this is often a subjective assessment. Some workers may prefer access to overtime, whilst others may prefer a shorter working week for greater work-life balance. It is far from straightforward to assign a value to non-monetary benefits. Introducing time limited protection with the option of varying a package even if it is 'no less favourable' will lead to deteriorating industrial relations and increased litigation as employees and employers contest the comparability of any changes.

However, if the Government imposes a limit, it will be essential to have safeguards to ensure that changes are no less favourable than the terms applicable before the transfer.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?
Please explain your answer.

UCATT believes that a dynamic approach is the best way to ensure equality within the workforce and to protect pay and conditions.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ No ☑

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ No ☑

a) If you disagree, please explain your reasons.

UCATT opposes amending the wording of regulation 7 (1) and (2) as we believe that this will reduce the current protection for employees and will give rise to more insecurity, more stress and finally an increased number of dismissals.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☑

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ No ☑

a) Please explain your reasoning.

UCATT opposes amending regulation 4 (9) and (10) as we believe that this will reduce the current protection for employees. Removing the specific reference to a "substantial change in working conditions" will make it harder to workers who face detriment to exercise their right to resign and claim unfair dismissal.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☐ No ☑

a) If you disagree, please explain your reasons.

UCATT opposes extending the scope of the "economic, technical or organisational reasons" to include work relocations. This would allow companies to make staff redundant, even if there is no economic or business reason for the overall workforce to

reduce in size. Under the current regulations of 2006, dismissal because of an inability or unwillingness to relocate would be automatically unfair and should remain so. Including changes in the location of the workforce will be detrimental to people unable to move areas, particularly those with caring responsibilities for children of school age and elderly relatives.

If this measure is introduced, along with a time limit for protections of one year, as outlined in question (5), how can workers plan and budget for the future? It is unreasonable to expect a worker to face the emotional and financial upheaval of moving house, only to find 12 months later, that they face a significant cut in salary or a change to their terms and conditions which makes their employment untenable, such as the loss of flexible working.

This proposal could also create a negative effect on local or regional economies. If companies are allowed to move a business or service out of an area and dismiss the local staff, these mass redundancies will have an enormous impact on the local economy. This will be especially difficult for areas of existing high unemployment where the local job market is unable to accommodate the demand for alternative employment.

UCATT also has fears that companies that relocate a short distance that is within reasonable travelling time, could use this addition to "economic, technical or organisational reasons" to dismiss staff unless there is an explicit definition of 'relocation' in the regulations.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☐ No ☑

a) Please explain your reasons.

UCATT opposes this proposal as it fails to offer any safeguards for employees. Often the transferor and the transferee are competitors and this could be open to abuse. How will rival companies be able to verify, authenticate or challenge the economic, technical or organisational reason given, when important data and information may be withheld on the grounds of commercial sensitivity?

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☐ No ☑

a) If you disagree, please explain your reasons.

UCATT opposes this as it will be financially detrimental to workers who will lose out on wages, notice periods and possibly redundancy pay. A longer period, although this can be stressful, can result in more people meeting the qualifying period for redundancy pay especially in sectors with high staff turnover. This proposal also confuses and potentially

conflates two very different and distinct consultations and therefore reduces the likelihood of the consultation being meaningful. It could also lead to undue pressure and threats from unscrupulous employers who might exaggerate the risk of redundancy in order to get employees and their representatives to agree to a downgrading of their existing terms and conditions as a condition of transfer.

UCATT would welcome greater co-operation between transferors, transferees and trade unions and would support a statutory duty to allow for trade unions to have a dialogue with the transferee prior to transfer. This would ensure a smoother transition and a more appropriate induction timetable. However the dialogue should not include a formal consultation process for redundancies.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☐ No ☑

a) Please explain your reasons.

UCATT believes that guidance is insufficient and can be ignored. In order to tackle this problem, the procedures for the elections of employee representatives should be reviewed and amended to be employee-led rather than employer-led.

b) If you disagree, what would you propose is a reasonable time period?

No comment to make.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ No ☑

It can be very difficult for some people to feel confident to speak freely to their company manager. The election of an employee representative allows for employees to engage with each other, share their anxieties openly and confidentially with their peers and then have their concerns raised collectively without fear of reprisal or being individually identified. Direct consultation removes these safeguards and can result in key issues not being raised, increasing the risk of future disputes**.**

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☑ No ☐

UCATT opposes any opt-out for business regardless of their size but if this change is imposed, then UCATT believes that it should be restricted to business with 10 employees or fewer.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☑ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?
No comment to make.
c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No comment to make.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ No ☑

Question 15: Have you any further comments on the issues in this consultation?

No further comment to make.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons

It is not possible to answer yes or no to the question as written. UCATT believes that these proposals will have a negative impact on equality and diversity within the workforce. These measures will disproportionately affect low-paid workers and low paid workers tend to be from groups with protected characteristics.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No further comment to make.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

UCATT does not agree with the analysis provided in the Impact Assessment. Furthermore, UCATT objects to the inclusion of the shameful statement that "previously there has been a risk of bad employees being passed around" (page 4). This denigrates hard-working, loyal staff who try their best to provide a good service, often within a

framework of inadequate resources and systems. No evidence has been provided for this assertion.

Royal College of Nursing

X Trade union or staff association

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No

a) Please explain your reasons:

The 2006 Regulations have provided greater clarity/certainty for businesses and employees about when TUPE applies, particularly when services are being tendered/re-tendered, leading to fairer competition for bidding contractors. Overall it has reduced unnecessary dispute and litigation about the application of TUPE, which remains of particular importance given the number and range of transfers taking place in the public sector. Removal of the 2006 amendments relating to service provision changes will significantly increase uncertainty, needless anxiety to employees, and costs to employers from inevitable litigation, as was experienced prior to the 2006 amendments.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Prior to 2006 Regulations there was greater uncertainty emanating from the decisions of CJEU (such as the Suzen case) on the application of the Directive to service provision changes. There were unnecessary legal disputes on interpretation of unsatisfactory tests and terms such as "asset reliant" and "labour intensive" undertakings. It will therefore be necessary to return to guidance in cases such as Cheesman v R Brewer Contracts Ltd which examined the convoluted European case law.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(iv) 5 years or more

a) Do you believe that removing the provisions may cause potential problems?

Yes

c) If yes, please explain your reasons.

Further to the issues identified in our earlier response, and above, there is an inherent unfairness to existing service providers who have assumed that TUPE would apply at the end of their contracts, and who will now have to bear unexpected redundancy costs. Many of them are likely to be charitable and private organisations which successive Governments have encouraged to be involved in their 'reforms' of the Public sector.

Question 3: Do you agree that the employee liability information requirements should be repealed?

No

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No

a) If you disagree, please explain your reasons.

The proposed changes to regulation 4 (e.g. removal of a reference to transfer related variation) are unlikely to achieve the Government's intended objective. The ARD and European case law (e.g. Daddy's Dance Hall) would in our view preclude transferees from making variations to contracts. The previous Government had considered a similar issue before the introduction of the 2006 Regulations. It concluded that in view of the European case law, allowing the parties to effect post transfer harmonisation to the detriment of employees, for example, would be incompatible with the Directive. That conclusion is still valid.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

a) Please explain your answer.

This proposal is likely to lead to harmonisation of terms of employment of mainly unionised transferring workforce and non unionised existing workforce of the transferees. It will be difficult to determine whether a varied contract after the transfer would be overall no less favourable, which is likely to lead to more litigation, uncertainty and cost to employers.
It is unlikely that this change would make any practical difference for many of the UK transferees taking over public sector workforce. Unlike many other European counties, the terms of collective agreements are usually not legally enforceable between the employer and the relevant trade union, but are often incorporated into employees' contracts. As such, transferees still would be bound by the limitations under TUPE on changing employees' terms.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Contrary to the above assumption the Advocate General's opinion in February 2013 (which is likely to be followed by the CJEU) concluded that the Directive did not preclude the dynamic approach. He pointed out that, in the UK, collective agreements have their legal basis in individual contracts of employment. Given this, all the indications are that, where dynamic clauses referring to collective agreements transfer to a transferee, "they can be renegotiated and amended by the parties at any time during the term of the employment contract".

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

No

a) If you disagree, please explain your reasons.

The proposed change would mean that dismissals will only be automatically unfair if they are by reason of the transfer (rather than connected with the transfer). This change will simply create more uncertainty and litigation regarding the distinction between dismissals being wholly or in principle because of the transfer rather than for transfer related reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No

a) Please explain your reasoning.

The affected employees would still retain the right to bring constructive dismissal claims and/or claim under regulation 4(11). Removal of regulation 4(9)&(10) is unlikely to reduce the number of claims and would simply add uncertainty and increase litigation costs as the tribunals would have to determine whether the alleged substantial change in the working conditions to the material detriment of the employees also amount to breach of contract.

This change could disproportionately affect some employees sharing protected characteristics under the Equality Act 2010 (in particular disability and gender) who would be adversely affected by substantial changes in their working conditions (e.g. having to travel longer distance as a result of relocation) (e.g. Tapere v South London and Maudsley NHS Trust [2009]).

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No

a) If you disagree, please explain your reasons.

In some cases the change in location may not amount to redundancy (e.g. partial relocation). This change could also disproportionately affect some employees sharing protected characteristics under the Equality Act 2010 (in particular disability and gender) who would be adversely affected by substantial changes in their location of work

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

a) Please explain your reasons.

There will a greater risk, in particular where the transferor is subject to a relevant insolvency proceeding, the employer would simply decide to dismiss the affected employees to make the undertaking more attractive to potential buyers.

Furthermore, in cases of transfers from the public to private sector there will be an additional financial burden on the transferors (and/or the Government) to pay for early redundancies.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

a) If you disagree, please explain your reasons.

This will lead to an anomaly in the operation of the Regulations as under regulation 13 transferees would not still be required to be involved in consultation as they are not the relevant employer prior to the date of the transfer. It begs the question why they should on the one hand remain exempt from consulting with the workforce about measures that they envisage they will take (which could include reorganisation) but on the other hand be allowed to take actions which would count towards consultation on collective redundancies.

Furthermore, it may not be easy at that stage to identify the employees who are proposed to be made redundant partly due to potential objection to the transfer, inadequate cooperation by the transferor, or to have meaningful consultation. This could result in an increase in the number of unfair dismissal and/or protective award claims.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No

a) Please explain your reasons.

It is unclear what the guidance would say. It will not be binding and could therefore be vague and/or open to misinterpretation. It is better to have greater certainty by amending regulation 13(11).

b) If you disagree, what would you propose is a reasonable time period?

14 days

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

No

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

Question 15: Have you any further comments on the issues in this consultation?

Under the Regulations the transferees have no obligation to commence meaningful consultation with the affected employees before the transfer. Amending regulation 13 could make the 2006 Regulations similar to the purpose of collective redundancy consultation. It will also be helpful in TUPE transfers to have a specific timescale for provision of information and consultation depending on the size of the affected employees in one establishment (e.g. to commence the process 30 days prior to proposed transfer in case of 20 or more employees).

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes negative

a) Please explain your reasons

The repeal of regulation 4(9) & (10) and amendment to the definition of ETO could have a disproportionate impact on employees with protected characteristics such as disability (and childcare commitments amounting to indirect sex discrimination)

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

There are cases similar to the circumstances in Tapere where a TUPE related relocation places women with caring responsibilities (or disabled employees) at a particular disadvantage

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

The assessment has failed to fully appreciate the Government's admissions that "*robust up-to-date data are frequently not available*" (page 3) and "*There is little data available on the exact numbers of employers which might be affected and likely costs and benefits for specific effects*" (page 22). The Government is therefore unable to say with any confidence what the impact of service provision changes have been since 2006 to justify its assumption that its repeal will save costs to businesses.

The impact assessment shows that almost 73% of the 174 respondents to the call for evidence in 2012 were either against the proposed change to the service provision change provisions or had made no comments.

Inadequate consideration has been given to the costs to the transferring employees (e.g. as a result of repeal of service provision change).

Financial impact of potential redundancy costs as a result of repeal of service provision change has not been taken into account (page 4)

Regarding removal of the requirement for employee information (page 5) no consideration has been given to the likelihood of increase in the number of claim under regulation 13 as a result of insufficient information.

No assessment has been undertaken on potential increase in financial burden on public sector transferors by making early redundancies (page 11).

British Private Equity and Venture Capital Association (BVCA)

BVCA response to BIS consultation on "Transfer of Undertakings (Protection of Employment) Regulations 2006 – proposed changes"

This response is submitted on behalf of the Legal and Technical Committee of the British Private Equity and Venture Capital Association ("BVCA").

The BVCA is the industry body for the private equity and venture capital industry in the UK. With a membership of over 500 firms, the BVCA represents the vast majority of all UK based private equity and venture capital firms, as well as their professional advisers. This submission has been prepared by the BVCA's Legal & Technical committee, which represents the interests of BVCA members in legal, accounting and technical matters relevant to the private equity and venture capital industry.

Our members have invested £40 billion in over 5,000 UK companies over the last five years. Companies backed by UK-based private equity and venture capital firms employ over half a million people and 90% of UK investments in 2011 were directed at small and medium-sized businesses. As major investors in private companies, and some public companies, our members have an interest in financial reporting matters, the conduct and information presented by such companies, and the burdens placed on the management of such companies.

This response sets out, on behalf of the BVCA, the answers to those questions which are considered to be most pertinent to BVCA members.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? (Yes/No)

Yes.

a) Please explain your reasons:

The BVCA recognises the intention of this proposal, namely, to make business transfers easier. However repealing the 2006 amendments is likely to create its own set of issues to which we refer in our response to question 2, below.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

The BVCA is not entirely clear about the scope of this question. The BVCA assumes it relates to how pre-2006 domestic cases such as Balfour Beatty Power Networks Ltd v Wilcox [2007] IRLR 63, or the EAT case of P&O Transport European Ltd v Initial Transport Services Ltd and others [2003] have interpreted the distinction between "asset reliant undertakings" and "labour intensive undertakings". This is a distinction identified in the European Court of Justice (ECJ) cases of Spijkers v Gebroeders Benedik Abbattoir CV C-24/85 [1986] ECR 1119 and Oy Liikenne Ab v Liskojarvi C-172/99 [2001] IRLR 171.

In summary, the ECJ decided in Oy Liikenne that where tangible assets contribute significantly to the performance of an activity, there can be no transfer if none of the relevant assets are taken over by the new employer. However, the UK courts (e.g. in Balfour Beatty) have interpreted the distinction between asset reliant undertakings and

labour intensive undertakings as not being necessary as a matter of law. As a result of the UK interpretation, TUPE may apply more readily.

The BVCA suggests that, in the context of service provision changes, it would be useful to consider these distinctions further.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect? (i) less than one year (ii)1- 2 years (iii) 3-5 years (iv) 5 years or more

1 to 2 years.

a) Do you believe that removing the provisions may cause potential problems? (Yes/No)

Yes.

b) If yes, please explain your reasons.

The BVCA considers that likely problem areas will be:

- Greater uncertainty around whether TUPE will continue to apply in certain outsourcing situations. The BVCA would welcome government Guidance in order to address this uncertainty.

- Redundancy costs that existing service providers may now have to bear when their contracts expire, if their employees do not transfer to the new service provider (or back in-house). The longer the delay in the implementation of these changes the easier it will be for such service providers to prepare for the changes.

Question 3: Do you agree that the employee liability information requirements should be repealed? (Yes/No)

No.

a) If yes, please explain your reasons.

N/A.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Whilst the BVCA welcomes a requirement for the earlier provision of employee liability information by the transferor to the transferee than currently applies, it considers that supplementary guidance should make clear the extent of such disclosure obligations.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? (Yes/No)

Yes (but see (b) below).

a) If you disagree, please explain your reasons.

N/A.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

The BVCA recognises the difficulty of changing the legislation in this regard whilst at the same time remaining consistent with European law. Whilst the BVCA welcomes the proposal to amend regulation 4 so that it more closely reflects the wording of the Directive, the fact that there is still an inability to harmonise terms will present a significant obstacle to acquisitions due to the additional cost and administrative burden on businesses as a result of having to replicate generous employment terms. However, the BVCA welcomes the fact that the Government has said that it will keep the issue of harmonisation of contracts under review and will tackle this problem if the opportunity arises.

The BVCA is of the view that it remains beneficial to retain the ETO carve out but that it would be useful if the Government could give clear examples in the guidance of the circumstances in which an ETO reason would arise. In particular, the BVCA would welcome additional guidance on what is meant by the phrase "entailing changes in the workforce", albeit that it is recognised that any such guidance would have to be consistent with current European case law.

The BVCA submits that the drafting of new regulation 4(5) is potentially confusing. It is assumed that this wording is meant to clarify that changes can take place where they are not by reason of the transfer. However, a transferor could agree on any variation to contractual terms with the consent of the employees and so this wording could be interpreted as allowing more substantial changes than those intended by the Government.

The BVCA still considers that a time limit after which a harmonisation exercise could no longer be said to be "by reason of the transfer" would be helpful and that such a time limit would not contravene the Directive. It would introduce much needed certainty into this area of law and would enable businesses to be able to plan effectively. The BVCA believes that a period of 12 months would be appropriate in these circumstances.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view? (Yes/No)

Yes (but see (a) below).

a) Please explain your answer.

The BVCA believes that this is likely to have limited practical value in the UK given that the terms of collective agreements are not usually enforceable between the employer and the relevant trade union. Instead, terms from the collective agreements are more usually incorporated into the employees' contracts themselves. Therefore, regardless of these proposals, UK employers will still be bound by the restrictions on making changes to terms and conditions.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? (Yes/No)

Yes (but see (a) above).

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Yes (but see (a) above).

Please explain your answer.

See (a) above.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)? (Yes/No)

The BVCA is conscious that the ECJ has not yet reached its decision in Alemo-Herron and others v Parkwood Leisure Ltd. The Advocate General's opinion (delivered on 21 February 2013) is that the Directive does not preclude member states from providing that "dynamic" contractual clauses referring to existing and future collective agreements will transfer to the transferee on a relevant transfer. If the ECJ decision is in line with the Advocate General's opinion, then the Supreme Court may decide that a dynamic interpretation should apply in then UK. If this is the case, then the one year restriction is likely to be of considerable value. The BVCA considers that the government should pre-empt this (rather than waiting for the Supreme Court to make a determination) by introducing the one year rule at this time.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? (Yes/No)

Yes.

a) If you disagree, please explain your reasons.

N/A.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned? (Yes/No)

Yes. Please also see our response to question 4 in relation to additional guidance which would be welcomed from the Government in relation to the meaning of ETO reason.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? (Yes/No)

Yes.

a) Please explain your reasoning.

The BVCA agrees that Regulation 4(9) and (10) should be replaced with wording which more closely mirrors the wording of the Directive. The fact that the wording links to the actual termination of the contract by the employer rather than allowing the employee to treat the contract as having been terminated should hopefully mean that employees are less likely to seek to bring unfair dismissal claims in circumstances where the changes do not amount to a repudiatory breach of contract.

However, the BVCA also considers that the legislation should be amended to ensure that a transferee is liable (regardless of whether the employee has also objected to the transfer) for constructive dismissal claims which arise from anticipated contractual breaches for which the transferee is responsible.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996? (Yes/No)

Yes. The decisions in Tapere v South London and Maudsley NHS Trust and Abellio London Ltd v Musse had left transferees in an impossible situation and this is a welcome clarification in the law.

a) If you disagree, please explain your reasons.

N/A.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? (Yes/No)

Yes, but only in respect of dismissals falling under regulation 4(9) of TUPE.

a) Please explain your reasons.

The BVCA believes that a general provision which allows the transferor to rely on the transferee's ETO reason is not necessary and could lead to confusion and/ or be open to abuse. However, it can see the sense in allowing the transferor to rely on the transferee's ETO reason in relation to dismissals falling under regulation 4(9) of TUPE. As the transferor can, under regulation 4(9), be liable for the actions of the transferee, it would make sense if the transferor could also rely on any potential defence the transferee might have in relation to its actions.

As set out in our response to the call for evidence, it is worth emphasising that the BVCA's preferred position in relation to regulation 4(9) is that liability for acts of the transferee should pass to the transferee and not remain with the transferor and that constructive dismissals falling under the regulation should be limited to cases of actual or anticipated fundamental breaches of contract.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? (Yes/No)

Yes.

a) If you disagree, please explain your reasons.

N/A.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful? (Yes/No)

Yes.

a) Please explain your reasons.

The BVCA agrees that it is difficult to set a fixed period for all circumstances.

b) If you disagree, what would you propose is a reasonable time period?

N/A.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? (Yes/No)

Yes.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)? (Yes/No)

The BVCA would welcome the option being extended to all employers, provided that the employer has less than 20 employees affected by the transfer in question.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? (Yes/No)

Yes.

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

N/A.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? (Yes/No)

No.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

N/A.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? (Yes No)

Yes.

Question 15: Have you any further comments on the issues in this consultation?

Whilst it is noted that, where pensions are concerned, BIS intends to continue to work with DWP to identify improvements in the information available to employers, we would welcome a commitment from BIS to issue detailed guidance to employers in relation to pensions, particularly in respect of those elements of an occupational pension scheme which are in scope to transfer under TUPE.

Additionally, as stated in our response to the call for evidence, we would welcome confirmation (by way of guidance) that there is no obligation imposed on a transferee to consult (pre-transfer) regarding measures which the transferee envisages taking.

Whilst the proposed amendments to Regulations 4(9) and 4(10) are noted, we consider that further clarification regarding constructive dismissals is required. In particular, we do not believe that it is appropriate that the question of who bears the liability for any constructive dismissal should turn on whether the employee has formally objected to the transfer (a position which creates uncertainty and which is open to abuse). Rather, we consider that the liability for a constructive dismissal which arises from a transferee's threatened breach of contract should always pass to the transferee.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? (Yes/No)

a) Please explain your reasons.

We consider that the impact will be neutral overall.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Whilst we acknowledge that the proposed changes relating to service provision changes and post-transfer changes to terms and conditions are likely to impact low paid workers and potentially, as a result, a disproportionate number of employees from disadvantaged groups, we consider that the changes will be good for business and good for the economy overall, thereby creating more opportunities for any workers who may be impacted.

Additionally, we consider that the ability for transferees to harmonise terms and conditions following a transfer avoids the potential difficulty for the transferee (and inherent inequity) in having a two-tier workforce.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Broadly speaking, we agree with the analysis provided. However, we have the following additional comments:-

- in relation to the SPC proposal, the IA is predicated on the assertion that more service provision changes are caught by TUPE than was the case under the 1981 Regulations. Whilst this may have been the case in the initial period following the coming into force of the 2006 Regulations, this has not been the case recently, as employment tribunals have increasingly been inclined to find that TUPE does not apply to a service provisions change, for example because there is no organised grouping, or because of fragmentation of the activity in question;

- removing the requirement to provide employee liability information is likely to lead to an increase in cost in those situations where the contract does not provide for information to be shared (as there is more likely to be a dispute between the incoming and outgoing service provider which could result in tribunal proceedings); furthermore, it may act as a disincentive to prospective suppliers to bid for a contract;

- uncertainty over when (and whether) a transferee can change terms and conditions of employment following a transfer is likely to lead to increased legal costs for the transferee, together with more tribunal claims by transferring employees (which will be a further cost to the exchequer).

That said, we consider that any additional burden in terms of cost will be outweighed by the benefits to business overall.

DrugScope

Transfer of Undertakings (Protection of Employment) Regulations 2006: Consultation on Proposed Changes to the Regulations

Introduction

1. DrugScope is the leading UK charity supporting professionals working in drug and alcohol treatment, drug education and prevention and criminal justice. It is the primary independent source of information on drugs and drug related issues.

2. DrugScope has around 450 members, primarily treatment providers working to support individuals in recovery from dug and / or alcohol use, local authorities and individuals. Its member agencies are amongst those providing support to over 200,000 people receiving community and residential treatment for drug addiction, plus harm prevention, advice, education and related recovery services to a wider number of adults, young people and children.

The drug and alcohol sector and TUPE

3. Whilst estimates vary, there are thought to be around 30,000 people working in specialist drug or alcohol related roles in the UK, employed across a number of settings including community, residential, outreach, prisons and other elements of the criminal justice sector.

4. TUPE has been particularly relevant to the drug and alcohol sector, which has developed relatively recently from being largely comprised of small and local providers to being one where consolidation and merger have been more common. In addition to the transfer of services between providers from the voluntary and community sector (VCS), the movement of services from the public sector, principally from the National Health Service or local authorities has been a notable trend.

5. Recent and forthcoming changes to the way that drug and alcohol services are commissioned and funded have led to rounds of retendering, whilst the future landscape may be more complex for the drug and alcohol sector and the broader VCS. Current or anticipated changes including public health reforms, Police and Crime Commissioners, Community Budgets and payment by results initiatives including plans laid out in Transforming Rehabilitation may mean that commissioning is more cross-cutting and less thematic. Increased use of joint commissioning for outcomes is not unwelcome but may lead to further change in the structure of services that support vulnerable individuals.

About this response

6. This response has been developed in consultation with DrugScope's member agencies, including CRI, Westminster Drug Project and Equinox. There has not been complete unanimity across DrugScope's membership, so a consensual approach has

been adopted. Several DrugScope members will be submitting individual responses which may differ in detail.

7. DrugScope's work is shaped by our core values and beliefs; we involve our members in our policy work, but we are above all guided by the belief that strong and effective services should be available to all who need them.

8. DrugScope has chosen not to respond to every proposal but has focused on those that are of particular relevance to the drug and alcohol sector.

9. The boxed summaries of Government proposals have been developed by the National Council for Voluntary Organisations (NCVO) and their legal advisers and are included as a summary of the main proposals as we understand them.

10. In addition to this submission, DrugScope is working alongside NCVO and others as part of a broader voluntary and community sector submission.

Consultation proposals

Proposal 1+2: Repeal 2006 Amendments to Service Provision Change (SPC)
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.7-7.23)

The 2006 TUPE Regulations broadened the circumstances where TUPE applies to cover 'service provision changes' (see Article 3 of the 2006 Regulations). As a result currently a 'service provision change' includes contracting-out exercises, changes of service provider and contracting-in exercises, with limited exceptions.
To qualify as a relevant transfer on a service provision change there must be an organised grouping of employees whose principal purpose is to work on the services being transferred.

Proposed change
Government proposes to repeal the 2006 amendments on 'service provision change'. The Government says that the 2006 amendments 'go further than the provisions of the Directive and are thus considered 'gold-plating'. This, it wishes to repeal.
This would mean cases where TUPE applies would rest on the 1981 Regulations and subsequent case law. It means TUPE would apply when service provision changes included a transfer of assets and the service maintains it identity after transfer.

Implications for the voluntary sector
This would reduce the circumstances where TUPE clearly applies. The purpose of the 2006 amendments was to greater legal certainty as to the definition of a 'service provision change' following EU case law. The 2006 amendments – which Government proposes to retract – were intended to end exposure to fluctuating case law, creating a more level playing field in the tendering process and reducing costs. However there is already a lack of clarity. There are current examples of legal disputes between providers as to whether TUPE applies.

11. **Question 1:** Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision charges?

12. On balance we do not support the proposal to repeal the 2006 amendments in their entirety but acknowledge that there may be some benefits from doing so; we would welcome a commitment to further explore alternatives. We support the intention to simplify this aspect, but are unconvinced that the proposed changes would achieve this. It is not clear that simply returning to pre-2006 definitions would necessarily reduce the burden on employers, which would presumably continue to evolve with and be defined primarily by developments in domestic and EU case law. We are concerned that repeal may merely lead to further uncertainty, for example around the notion of whether or not a service "retains its identity" and could potentially have serious and deleterious effects on services.

13. **Question 2:** Do you believe that removing the provisions may cause potential problems?

14. Whilst we acknowledge the need to provide services that represent value for money, we have concerns about measures that may facilitate aggressive cost-based competition and subsequently a potential reduction in service quality. DrugScope members have reported that maintaining morale in the event of frequent service transfers is crucial, and that their ability to offer a reasonably clear and secure career path with progression makes a vital contribution to their ability to recruit and retain skilled and motivated staff.

15. Consequently the need to consider the legitimate expectations of employees and above all the need to balance the quality and stability of services alongside cost considerations is of vital importance. Government should explore alternatives including retaining protection for services critical to the health, safety and wellbeing of the public.

16. Employment lawyers have also warned of the potential financial risks that may be posed to the outgoing employer (the transferor) due an inability to rely on TUPE to relieve them of potentially large redundancy costs, a factor exacerbated by decreased certainty which may, in itself, require additional expenditure on legal advice to manage and understand.

17. Finally and of particular relevance to the drug and alcohol sector, consideration should be given to transfers from the public sector to the VCS. This sort of transfer is one where different salaries and terms and conditions can be problematic and result in VCS organisations being unable to compete and commissioners being discouraged from exploring options for delivery.

18. This is primarily manifested in the form of Fair Deal pension liabilities which in real terms tend to significantly outweigh the burden of TUPE itself. If Government expects the ambitions of the Open Public Services White Papers to be realised, or the

proposals outlined in Transforming Rehabilitation to succeed, consideration should be given to how pension liabilities in particular can be met by or mitigated for smaller organisations and the broader VCS, for example through financial support to the employee or transferee employer.

Lead-in period.

19. We believe that Government should explore alternatives to the 2006 amendments that may be more likely to provide clarity and might help to address the particular issue of pensions in public sector to VCS transfers. However, should Government proceed with the proposal, more than 1 year lead-in time would be required. Rapid introduction would pose significant problems to transferor organisations, who may have made reasonable assumptions that they would not be burdened by redundancy and related costs due to staff being covered by TUPE.

Proposal 3: The Provision of Employee Liability Information
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.24 – 7.35)

The transferor (outgoing employer) is obliged to provide the transferee (incoming employer) with information about the employees who are to transfer. This is known as 'employee liability information'.
This information must be provided at least 14 days before the relevant transfer. The information must be provided in writing or in a readily accessible form - see Article 11 of the 2006 Regulations.

Proposed changes
Government proposes the repeal of both the stipulated list of Employee Liability Information (ELI) to be provided and the 14 day specification. Instead they propose, 'leaving the exchange of information to be resolved by the parties to transfers'.
They propose this de-regulation should rely upon,
'an amendment […] to make clear that the transferor should give information to the transferee as is necessary to assist the transferee and transferor in complying with their duties under that regulation'.

Implications for the voluntary sector
The poor quality of information and the lateness of its provision to the potential bidder or new employer is a common and significant problem, as evidenced by the VCSE in 2012. Late or incomplete information means organisations don't know what liabilities they are bidding for in contracts – therefore cannot cost or evaluate risks when deciding whether to bid. Sometimes complete information is provided so late that winning bidders have to drop out of the contract as they can't take on the unknown liabilities.

The voluntary sector has previously asked (see our 2012 response to the BIS Call for Evidence) for ELI disclosure to be enforced by commissioners at the point of issuing a tender. We suggested this should be enforced by clauses within the contract specifying when ELI should be shared.
One problem with this suggestion is that at tender stage the transferee is yet to be

identified so this would mean that a transferor would have to provide employee liability information to persons other than the transferee. How would this category of persons be defined? In addition, if similar sanctions would apply the transferor would then be vulnerable to a number of claims for failing to provide information rather than just from a specified transferee. Is this reasonable? If not how could it be managed?

20. **Question 3:** Do you agree that the employee liability information (ELI) requirements should be repealed?

21. We do not believe that ELI requirements should be repealed and are not persuaded by the rationale in the consultation document.

    The impact of repealing the ELI list and timescale

22. It seems unlikely that removing the current and arguably quite minimal requirements would do anything to ease the flow of information to the transferee. DrugScope members have reported varying experience with ELI ranging from the positive in cases where it happens as a matter of routine in some examples of tendering, to the negative when the process has been described as inaccurate and evasive.

23. It appears that current problems relate to the requirements being honoured to the letter rather than the spirit, and it is far from clear that the appropriate response to this would be to abandon the requirements entirely and rely on negotiation and good will between transferor and transferee.

    Alternatives and other considerations.

24. The current provision for ELI can be a strong disincentive against taking part in procurement, and frequently results in wasted time and resources when commencing procurement only to discover much later that the contract is unattractive or unviable.

25. There is a strong case that ELI disclosure should as a matter of routine be enforced by commissioners at the point of issuing a tender, potentially at the Pre-Qualification Questionnaire stage. Where the procurement is “first generation”, the obligation should lie with the commissioning body or current employer themselves.

26. There would clearly be some concerns around confidentiality and compliance with data protection legislation, so some consideration could be given to providing guidance around information that can and should be disclosed in advance. DrugScope acknowledges that commercially sensitive information may be included in some aspects of ELI; consideration should also be paid to this.

27. Finally, Government should give consideration to how this can be enforced and means of redress for organisations receiving inaccurate or late information, for example where costs are incurred as a result of wrong or delayed information, those costs should be recoverable from the party at fault.

Proposal 4: Restrictions on changes to terms and conditions
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.36 – 7.47)

TUPE contains restrictions on changes to staff terms and conditions (T&C) following transfer. Under Regulation 4(4) an employee's terms and conditions cannot be varied if the variations are connected with the transfer – even if both parties agree to the change.
The only exception is where the changes are due to an economic, technical or organisational (ETO) reason entailing changes in the workforce i.e. changes that aren't caused by the transfer itself. Such changes which are not connected to the transfer are permitted in line with other UK employment law.

Proposed changes
Government believes that the restriction on T&C harmonisation is a 'significant problem' and intends to pull it back as far as the EU Directive allows. To make it easier to change T&C, they propose to narrow the prohibition from 'reasons connected with the transfer' to 'the transfer itself'.

Implications for the voluntary sector
The preservation of employment terms is a fundamental purpose of TUPE but can lead to administrative complexity for the transferee (incoming provider) and a 'two-tier' workforce with new staff brought in on different terms.

Again, as with many of these proposals, the risk of stripping away the TUPE 2006 Regulations in order to come into line with the original Directive and case law is that they might generate greater uncertainty.

In its 2012 response to the BIS Call for Evidence, NCVO recommended that Government allow the harmonisation of terms after 12 months.

28. **Question 4:** Do you agree with the government's proposal to amend the restrictions in Regulation 4 on the changes to terms and conditions so that the restriction more closely reflects the wording of the Directive and the CJEU case law on the subject?

29. We support this, but with caveats. Due to the tendency for mergers and consolidation amongst treatment providers and the frequent retendering and transfer of services, many providers now find themselves with workforces that are multiple tier rather than two tier, although there have been differences of opinion about how burdensome or inconvenient this can be. Consequently, there appear to be grounds for implementing the proposed change, with the caveat that harmonisation should be carried out consensually in the same way that an organisational restructure should ideally be. We acknowledge that there will need to be consideration given to harmonisation of substantially different aspects of terms and conditions that may not readily be translatable into cash or benefit terms.

    Alternatives and other considerations

30. DrugScope members have questioned the value of the current exception for economic, technical or organisational (ETO) reasons as their experience has been that it is sometimes used aggressively as a means of implementing changes in terms and conditions. Government should consider ways of strengthening and clarifying this by means of guidance including examples, specifically aimed at enabling non-specialists to better understand their responsibilities and their ability to change terms and conditions.

31. In the absence of the above, it is not immediately clear that amending the restrictions in Regulation 4 will have achieve the aim of providing clarity; as indicated in the consultation document at 7.45, interpretation of the changed regulation will rely on current and emerging case law.

Proposal 5: TUPE and Collective Agreements
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.48 – 7.52)

Currently the transferee (incoming provider) must indefinitely honour the terms and conditions (T&C) agreed as part of a collective agreement prior to the transfer. In the UK, such T&C only have legal weight when incorporated into individual contracts. Examples of types of terms agreed in collective agreements include working time arrangements, sick pay, parental rights etc, and other aspects of staff policies.

Proposed Changes
The proposals intend to allow variation in T&C derived from collective agreements, one year after the date of transfer. Any variation would need to be agreed between employer and employees, and cannot be less favourable than the transferring employee's T&C at the point of transfer.

This would be possible whatever the reason for the variation (ie even if related to the transfer itself).
The terms agreed between employer and employee could not be less favourable than the transferring employee's T&C at the point of transfer.

The Government cites article 3.3 1of the EU Acquired Rights Directive which does allow for variation

32. **Question 5:** The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

33. For broadly the same reasons as above, we support this proposal which should facilitate harmonisation of terms and conditions and has merit.

The impact of the proposed change.

34. The current requirement to honour collective agreements indefinitely makes public to VCS transfers cost-prohibitive. Greater freedom to negotiate this would be welcome if it would serve to address this issue.

Other considerations.

35. DrugScope members have expressed differing opinions on whether retaining the stipulation that revised terms and conditions should not be less favourable adequately reflects the current economic and commissioning environment.

36. With regard to Parkwood Leisure v Alemo-Herron, there is a consensus in favour of a static approach should that be compatible with any new case law stemming from the decision of the ECJ.

Proposal 6: Protection against dismissal (regulation 7)
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.53 – 7.57)

TUPE Regulations (7) prohibit dismissal of employees if the 'sole or principal reason' for that dismissal is 'the transfer itself' or 'a reason connected with the transfer that is not an economic, technical or organisational [ETO] reason entailing changes in the workforce3'.

Proposed Changes
Again, the Government is arguing for a reduction in definition from the 2006 TUPE Regulations (UK) back to the narrower provisions in the Directive.

The 2006 amendments state that a dismissal will be treated as unfair if the reason for dismissal is 'connected' to the transfer. The proposals want to narrow definition by removing the broader term 'connected with the transfer' to 'the transfer itself'.

Implications for the voluntary sector
As with proposal 4 which also deals with T&Cs, the risk is that this may create more uncertainty; but equally the Government is seeking to remove any unnecessary burdens on business e.g. where UK legislation goes beyond what is required by EU legislation.

37. **Question 6:** Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

38. Yes, but again with caveats. Member agencies support the protection implied by "connected with the transfer" although they acknowledge the risks and costs that may arise as a result. Members have again drawn attention to use of ETO reasons that they

perceive to have been possibly somewhat contrived in nature.

The impact of the proposed change.

39. More clarity about whether or not dismissals would be automatically unfair would be welcome. However, there is the possibility that the proposal to amend regulation 7 to "sole or principle reason" (other than for ETO reasons) may be open to exploitation or poor practice.

Proposal 8: Dismissals arising from a change of location
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.68 – 7.71)

Currently, if the incoming employer intends to carry on the business in a different location, but with the same number of staff overall, then any dismissals as a result of the change of location will be classed as automatically unfair.

Proposed Changes
Government argues that TUPE currently gives a narrower than the meaning of redundancy than that under the Employment Rights Act 1996; meaning that a dismissal because of change in location, which could be fair on the basis of redundancy under that Act, could be automatically unfair under TUPE.

Had there not been a transfer and the employer had sought to make the location change, then the dismissal would have been capable of being fair for unfair dismissal purposes. Government argues that,

> 'this appears to be an anomaly which gives rise to potential unfairness for transferee employers, in that they could face claims for automatic unfair dismissal in genuine redundancy situations' (proposals 7.69)

Government therefore proposes to bring amend TUPE regulations,

> 'so that a change in the location of the workplace is within the meaning of 'entailing changes in the workforce' and therefore can be classed as an ETO.

40. **Question 8:** Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

41. We agree with the proposal to extend ETO reasons to include changes in the location of the workforce. In the absence of a TUPE transfer this sort of dismissal would be capable of being fair and would be helpful to align with existing employment legislation. However, such changes of location should be demonstrably done in good faith, and not as a means of avoiding legitimate employer obligations and expectations of reasonableness.

The impact of the proposed change.

42. This should allow providers to become more responsive to service need and delivery arrangements whilst no longer disadvantaging them against peers who have not been through the TUPE process.

Alternatives and other considerations.

43. An explicit requirement that changes of location be both substantive or significant and done in good faith would provide reassurance that the proposed change would not be open to abuse as a mechanism enabling employers to avoid responsibilities.

Proposal 9: Dismissals based on future employee role
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.72 – 7.81)

The transferor (outgoing employer) is prohibited from dismissing an employee for any reason related to the transfer. If they do so, this is automatically classed as unfair dismissal and the liability for this transfers to the incoming employer.

Proposed changes
Government is consulting on whether the transferor should be able to rely upon the transferee's ETO to dismiss staff prior to transfer; and also that fairness of the dismissal should be judged on its merits rather than automatically judged to be unfair.
Government argue that it is 'unduly restrictive' and 'in some cases, employment is continued for longer than the business requires even though there is an ETO'. They also argue that the current position is based upon domestic case law, rather than that of EU Law – the latter of which has said that both the transferor and the transferee can dismiss for ETO.
Government also point out that allowing the transferor to dismiss on the basis of a transferee's ETO might be welcome to some employees, who might prefer to be made redundant by their employer before any transfer, as this would enable them to proceed with seeking alternative employment.

44. **Question 9:** Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

45. There is merit to the idea that the fairness of any dismissal should be judged according to its own circumstances. However, viewed in conjunction with Proposal 10, this may form the basis of a suitable mechanism for the transferee and employees beginning discussions about future requirements at an earlier point, potentially to the benefit of both parties.

46. The impact of the proposed change.
It is likely that the proposed changes will have relatively little impact other than potentially in the event of insolvency or rescue. There appear to be few other

circumstances in which it would be beneficial to the outgoing employer to dismiss someone relying on the transferee's ETO, and there is a clear rationale for employment and staffing decisions being better made by the transferee in most situations.

Proposal 10: Consultation requirements
(See Transfer of Undertakings (Protection of Employment Regulations 2006: Consultation on Proposed Changes to the Regulations, January 2013. Paragraphs 7.84 – 7.91)

Whilst a TUPE transfer cannot itself constitute grounds for dismissal, redundancies connected to the transfer can occur (where there is an ETO reason). If redundancies do occur two duties consult may apply: 1) under TUPE in respect of affected employees prior to the transfer; and 2) under legislation related to collective redundancies.

Proposed changes
The Government proposes to amend legislation by making it clear that consultation by the incoming employer with representatives of the transferring employees fulfils requirements to consult on collective redundancies.

Government gives a number of reasons for this proposal, including:
- Simplification of processes, from two to one, for both employees and employers
- Business efficiency, enabling restructure to occur sooner

47. **Question 10:** Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

48. To enable this change would be expedient, more efficient and would simplify the process for both transferee and employees.

49. However, there would need to be consideration to how this single duty to could be tested and demonstrated as having taken place, and guidance for all parties in the event of relationships and communication between transferee and transferor being irregular, as may be the case (for instance) when bidding unsuccessfully to retain a service contract.

Clarkslegal LLP

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ No ☐

a) Please explain your reasons:

Our experience is that the inclusion of the service provision change ("SPC") definition in the 2006 Regulations was welcomed by employers, contractors and employees as it gives clarity as to when TUPE applies. Since the 2006 Regulations came into force, broadly speaking, the working assumption for those entering into contracts has been that TUPE will apply on a change of a service provider. Our research indicates that this is perceived as creating a level playing field whereby parties can enter into contracts knowing with some degree of certainty that TUPE applies. While the SPC definition goes above and beyond the requirements of EU law, businesses agree that the certainty it gives is preferable to the pre-2006 ambiguity. The businesses we consulted consider that this particular incident of 'gold plating' of the Regulations does not necessarily put them at a competitive disadvantage as it allows them to enter into contracts being able to predict at the outset with more certainty the employment risks and liabilities. Some smaller businesses also explained that the application of TUPE at the outset of a contract enables them to bid for work on the assumption that they will inherit the workforce needed to carry out the services thereby obviating the need for a recruitment process.

The overwhelming consensus of the businesses we consulted is that if the Government repeals the 2006 Regulations in relation to SPC, this will increase uncertainty, perceived risk and therefore increased reliance on legal advice. It is inevitable that this will lead to further litigation and ultimately cost.

We agree that the recent case law developments on the scope of the SPC provisions are not particularly helpful to businesses in that they create uncertainty where services are to be provided by the incoming provider in a different way or where services are fragmented amongst several new providers. However, notwithstanding the diluting effect of these decisions on the SPC provisions, it is considered preferable to retain the SPC provisions than to completely remove them.

Existing contractors on entering into relevant contracts are likely to have assumed that on expiry or termination, TUPE would have applied and so they would not have budgeted for redundancy costs. Some of the not-for-profit organisations we consulted were extremely concerned by the prospect of having to fund redundancies at the end of some of their contracts, reporting that such costs might even result in the close of the organisation. If the proposal to repeal the SPC provisions are implemented, businesses will need a long lead in period. The organisations we consulted said that this should be not less than 3 years.

Although the overwhelming majority of those we consulted preferred to retain the SPC definition, certain advantages to removal of the definition were identified. It is clear from the Consultation on Proposed Changes to the Regulations that a key driver of the proposal to remove the SPC definition is to enable public sector outsourcing to take place outside the scope of TUPE. The result of this would be that public sector staff would unlikely transfer. One business in the private sector that we discussed the proposal with thought

this was a good opportunity for them. If the provisions are repealed this will allow businesses to work on a non-TUPE basis with a clean slate and save cost.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

If the SPC provisions are repealed, it is submitted that the Government should address the pre-2006 Regulations UK case law to align it with the position under the Directive. Specifically, the decisions in ECM (Vehicle Delivery Service) Ltd v Cox and ors 1999 ICR 1162 and ADI (UK) Ltd v Willer and ors 2001 IRLR 542 should be considered. It is submitted that the judgments in these cases do not reflect the Government's aims in proposing to remove the SPC definition, namely to align the UK legislation with the Directive, reduce the number of changes in service provider which amount to a relevant transfer, with the resulting increased flexibility this will give to businesses tendering for contracts in the private and public sector. It is submitted that the revised legislation would need to make clear that in determining whether or not a relevant transfer (under the business transfer provisions) has occurred, it is not relevant to consider the motive of the putative transferee as to why particular assets or employees were not taken on.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☐ No ☐

c) If yes, please explain your reasons.

See answer to question 1 above.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☐

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No. All of the businesses we consulted were extremely concerned by the proposal to repeal the current ELI provisions and we share those concerns. The businesses with whom we discussed the current proposal consider it naive of the Government to think that transferors would volunteer ELI without the law prescribing the content and timing. If no ELI deadline is given, transferees are reliant on the goodwill of the transferor and this is wholly inadequate.

The businesses we consulted all agreed that it was preferable to retain a prescribed list of information which the transferor must provide as this makes the process clearer for all concerned and is in the interests of ensuring a smooth transition. However, the inadequacy of the current ELI framework is the timing of provision of the information. The current deadline of 14 days before the transfer is not sufficient. Businesses have informed us that they require at least one clear calendar month, if not 6 weeks, to set up the transferring employees onto payroll systems. Several businesses also explained the difficulty posed by a transferring population with contractual benefits which the transferee employer does not provide and therefore it needs time to procure the relevant benefit, e.g. private medical cover.

We consider that the ELI provisions should be retained but that the deadline by which the information must be provided by the transferor should be amended so that the duty is to provide ELI as soon as reasonably practicable but, by the latest, 30 days before the relevant transfer.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No. See our response to question 3(a). Also, we do not understand how the type of information that businesses tell us they need in order to effect a smooth transition would be provided if the only obligation to provide information was for the purposes of information and consultation with the appropriate representatives of affected employees.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☐ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ **No** ☐

a) Please explain your answer.

We do not consider that the possible exception in article 3.3 of the Directive is appropriate

for application in the UK. Collective agreements are generally not in themselves legally enforceable under English law. The terms which derive from collective agreements which are protected upon a relevant transfer under the 2006 Regulations are those which have been incorporated into the transferring employees' individual contracts. Accordingly, those terms, albeit deriving from collective agreements, are protected by the Directive and the 2006 Regulations in the same way as individually agreed terms.

Furthermore, it is submitted that putting a date of expiry on collective agreements could unduly disrupt industrial relations. Some businesses expressed concern that this "expiry date" would be used by unions as an invitation to renegotiate the collective agreement rather than giving businesses the flexibility which Government intends. It is considered preferable to retain the current arrangement under which businesses are in any case free to terminate and/or renegotiate collective agreements in accordance with the relevant agreement.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☐

N/A - see answer to question 5(a).

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

If the CJEU adopts the opinion of the Attorney-General in *Parkwood Leisure v Alemo-Herron*, the Government must in our view amend the 2006 Regulations to make clear that terms in individual employment contracts which incorporate pay or other terms and conditions by reference to particular collective bargaining machinery, whether national or otherwise are subject to a static, not dynamic interpretation. The basis of the Court of Appeal's decision in *Parkwood* makes it very likely (on the basis of the A-G's opinion) that the House of Lords will revert to ordinary contractual principles under English law and uphold a dynamic interpretation applying the 2006 Regulations. Such a position is wholly inequitable given it binds businesses to increases in pay and other terms which they did not agree nor were consulted on. It is unacceptable in that situation for the burden (not limited to cost) to be placed on the employer to change individual terms and conditions of employment in order to avoid being bound by future agreements under the relevant collective bargaining machinery. We cannot see that such a variation would be permissible under the 2006 Regulations given that the reason for it would be connected to the transfer (although we note the Government's proposal in this regard).

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☐

See above in respect of question 5(c).

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ No ☐

a) Please explain your reasoning.

We agree that unfair dismissal claims can be founded on changes in working conditions that otherwise would not give rise to a constructive dismissal claim. Bringing the regulations in line with article 4(2) of the Directive would allow employees to have some form of redress, but would also limit the financial exposure of the transferor.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☐ No ☐ - This is a proposal which was widely welcomed by the businesses we consulted.

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☐ No ☐ - although please note our reservations below.

a) Please explain your reasons.

This would allow the transferor and transferee in a business acquisition context, where they are parties to a commercial agreement, to agree more creative solutions for dealing with the staff employees involved without the current significant automatic unfair dismissal liability. However, the businesses we consulted considered it unlikely to be a mechanism

which would be used in the vast majority of transfers owing to the practical difficulties and liabilities associated with implementing dismissals pre-transfer. Firstly, this approach requires the transferor's cooperation. Secondly, pre-transfer redundancy dismissals will give rise to a significant risk of ordinary unfair dismissal unless the transferor pooled the transferring employees with its remaining workforce (where relevant). This gives rise to several ambiguities. Where would the evidential burden lie in the context of unfair dismissal where the reason relied upon by the transferor is that of the transferee? How would the transferor establish the fair reason for dismissal and whether or not it acted within the range of reasonable responses? Would it only have to show that the transferee informed it that it had an ETO reason or would the transferee have to disclose a basis for such assertion? If the dismissal was found to be unfair, how would the TUPE transfer impact on remedy? Would the potential compensatory award extend into the period that the employee would have been employed by the transferee? Also, the definition of redundancy in the ERA 1996 would need to be revisited if the transferor were able to rely on the transferee's ETO reason so as to ensure that the employees would not lose out on their entitlement to redundancy pay. If any amendment to the Regulations are introduced, we would welcome Government guidance on these issues.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☐ **No** ☐ **-** This was another proposal which was widely welcomed by those we consulted.

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☐ **No** ☐

a) Please explain your reasons.

We agree that the current obligation to allow "reasonable" time is preferable to a prescribed timeframe as the tran sactions to which T UPE applies varies so signific antly in terms of the numbers, type and location of employees which are all factors which affect the election process.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ☐

We think the Government should consider extending this proposal to all businesses where the number of employees within scope to transfer are 10 of fewer. The time and resource which is expended by any organisation (regardless of size) in conducting the information and consultation process where there are no existing appropriate representatives is disproportionate if the transfer only involves a small number of affected employees.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐ No ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

N/A

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ No ☐

Question 15: Have you any further comments on the issues in this consultation?

No

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☐

a) Please explain your reasons

No comment

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No comment

CBI

CBI response to consultation on Transfer of Undertakings (Protection of Employment) Regulations 2006

1. CBI members have long called for the TUPE regulations to be reviewed and refreshed as part of the government's Employment Law Review. The day-to-day reality of the regulations has become highly complex, with the result that transfer situations are difficult and frustrating both for businesses and their employees. This consultation provides a welcome opportunity to ensure that the regulations are fit for the modern labour market, more than 30 years after the underpinning directive was introduced.

2. The purpose of employment law is to establish a framework of minimum standards that supports individuals in the workplace while maximising employment opportunities. To be truly effective, regulations should be simple to understand and simple to administer, proportionate, and they must not interfere unduly in the employment relationship between a business and its employees. The TUPE regulations do not currently meet this test.

3. In such a complex field – where regulation and constantly evolving case law interact – reforms need to be considered carefully so that they deliver the intended benefits, and do not create additional complexity. CBI members believe that:

- The primary purpose of the reforms must be to encourage economic activity by enabling the benefits of transfers
- This requires an optimal balance between certainty and flexibility – the 2006 SPC changes have increased certainty but limit flexibility, especially for SMEs. Change in this area needs to meet four clear tests to be effective…
- ….and must be accompanied by progress on business' key demand – the ability to harmonise terms and conditions on a fair basis
- Businesses view repealing Employee Liability Information provisions as an unnecessary step
- Other inconsistencies and inefficiencies around the interaction between TUPE and collective redundancy and unfair dismissal rules must be stripped out.

The primary purpose of the reforms must be to encourage economic activity by enabling the benefits of transfers

4. The basic premise of the Acquired Rights Directive – to ensure that employees that transfer between different organisations do not suffer detrimental changes to their terms and conditions – is one that CBI members support. This protection ensures that transfer activity can be conducted smoothly.

5. However, since 1981, the nature of doing business has changed significantly. Transfer activity – seen then as an exception – is now common practice across the whole economy. Rules that were devised for a different economy, and case law that has developed on an ad hoc basis, have not kept pace with the scale of this change, meaning that the rules are now significantly more complex and prescriptive than the underlying idea that they are designed to promote. The result of these developments is that the framework of rules now acts as a restraint on transfer activity. However, transfers play a vital role in the modern economy, and ultimately support both growth and jobs.

6. For businesses, transfers allow companies to focus on their core activities, without time and resources being diverted to important but ancillary tasks. With non-core activities transferred to companies better-suited to the delivery of these services, the quality of service provision rises allowing better outcomes with fewer inputs. This process is integral to driving productivity improvements that – over the longer-term – generate employment opportunities and prosperity across the economy.

7. Transfers also have an increasingly important role to play in the delivery of public services. By increasing the diversity of service provision, government can harness competition to deliver high quality, efficient, and responsive public services. With demand for public services increasing at a time of budgetary pressure, reducing barriers to diverse provision is more important than ever.

8. The overall aim of the reforms to the TUPE regulations, therefore, must be to ensure that the economy is able to harness the benefits that transfer activity can bring. Amendments to the regulations must enable entrepreneurial and innovative organisations to look for new ways to deliver services, while respecting the underlying aim of ensuring that transfers work for employees as well.

This requires an optimal balance between certainty and flexibility – the 2006 SPC changes have increased certainty but limit flexibility, especially for SMEs. Change in this area needs to meet four clear tests to be effective…

9. The key to delivering economic growth and jobs is to build business confidence, which companies need if they are to plan for the future and to invest. Regulation clearly has an important impact, and it needs to be carefully crafted if it is to have the most beneficial impact. In particular, regulations must tread a fine line between certainty and flexibility. Certainty is required so that companies' legal liabilities are minimised; flexibility is required so that companies can innovate. Reforms to the TUPE regulations – particularly those relating to the SPC changes and the harmonisation of terms and conditions – must ensure that the balance that results is better than that which we have today.

10. The 2006 changes to TUPE regulations meant that the rules reached beyond the provisions of the original directive, so that most instances of service provision were brought into regulatory scope. These changes have had both positive and negative effects.

11. In the positive ledger, the amended regulations have removed the uncertainty as to whether TUPE applies in most transfer situations. This means that both parties to a transfer – transferee and transferor – can focus their attention on 'how' a transfer will be applied, rather than whether it should be. This *can* increase business appetite for transfers because companies taking on a transfer know that they will inherit the staff to service the contract in the first instance, and that they will be able to pass them on in the future.

12. However, this increased certainty comes with an associated reduction in flexibility, which bears most heavily on smaller firms. Because companies know that they will inherit staff – and the costs of administering a transfer – it is significantly more difficult for companies to come up with innovative new means of delivering the same service. This is particularly challenging for smaller, entrepreneurial firms where the costs associated with a transfer will represent a proportionally bigger liability than they do for bigger entities.

13. Given the mixed impact of the 2006 changes, it is imperative that the Government treads carefully. Neither the case for repeal or retention of the changes is unequivocal. On balance, the CBI could support a repeal, but certain conditions would need to be met:

1. Any change must come with a lead-in time that allows for commercial realities. Companies that are bidding for transfers today must know what conditions will apply when the transfer takes place, and when it is re-tendered. In practice, this would suggest a lead in time of at least three years, and regulations or guidance must be explicit about the treatment of contracts concluded under the 2006 Regulations.
2. Changes must be supported by very clear guidance to help businesses understand what the new regulatory framework will require of them. Because of changes in case law, this would not mean simply returning to the pre-2006 situation, and the 2006 changes were introduced because of a lack of certainty at the time.
3. It is not currently clear whether professional services sit under the 'temporary assignment' provision or not and this can lead to significant uncertainty where such services are concerned. While changes are being made to the regulations, it would be extremely helpful if their exclusion from the scope of the regulations could be made explicit.
4. In order to ensure that the 'net' result of any regulatory changes is positive, it is essential that greater flexibility to harmonise terms and conditions is provided. Greater certainty about the terms and conditions applicable post-transfer will ameliorate reduced certainty about whether a transfer should apply in the first place (see below).

…and must be accompanied by progress on business' key demand – the ability to harmonise terms and conditions on a fair basis

14. Businesses find managing multiple term and conditions in their workforce very difficult. It presents a challenge for employee relations to have employees working alongside each other doing the same job but on different terms, especially when a business is trying to integrate two, or more, workforces. The administration is problematic and costly. One CBI member providing evidence for this response has 850 employees and 28 different sets of terms and conditions. Another member described the process of 'on-going education' which has to take place to ensure when new managers join the team the understand how to deal with TUPE transferred employees and over time, with staff change, this becomes harder.

15. Businesses believe a narrower wording – as proposed in the consultation – reflecting the provisions of the original directive would be helpful. There would then need to be very clear guidance for businesses to have confidence in what 'changes by reason of the transfer' as opposed to 'transfer-connected changes' meant in practice so that whether an employee accepts the varied terms or elects to remain on their existing TUPE-transferred terms, there is certainty as to what those terms are.

16. CBI members also believe that government needs to take action to limit the risk of a dynamic approach to terms and conditions applying in the future. While the final verdict of the *Parkwood v Alemo-Herron* case has not yet been released, businesses must not be exposed to the risk of terms and conditions which are outside their control and – very often – do not reflect the reality of the transferee workplace relationship being expanded in their scope. This should be done by time limiting the application of collective agreements, on the terms applicable as at the date of transfer, to a maximum of one year after transfer.

17. Ultimately, however, the greatest benefits require returning to the Acquired Rights Directive itself. Developing case law – including *Martin vs Southbank University [2004]* – has tightened restrictions around harmonising pay. While businesses do not wish to lower the overall level of benefit received – as this would undermine the aim of the directive – it would be highly beneficial to allow companies to have their staff on the same reward package (if not rates of pay etc.) to make it easier to manage their workforce as one entity. To this end, CBI members believe that when an appropriate opportunity arises, the directive should be amended to allow an employer and employee should be able to negotiate agreeable terms following a transfer, providing that they are no less favourable overall at the point of transfer.

Businesses view repealing Employee Liability Information provisions as an unnecessary step

18. When a transfer is taking place it is vital for the transferee business to have accurate, up to date information on those being transferred across. Late provision of information or incomplete data sets
add to the business costs as well as impacting negatively on the employees whom the information refers to.

19. TUPE transfers occur in a range of situations where the relationships between the transferor and the transferee may vary widely. Therefore, it is sensible for the law to set a minimum framework of information that the transferor should give to the transferee.

20. Businesses are concerned that repealing the ELI requirements would not address the current problems with provision of ELI. Some businesses write information provisions into their contracts, but for those relying on the existing 14 day minimum time limit it gives little time to check through the information or conduct any effective consultation with affected employees. One CBI member commented that it can take up to three months to work through the information and discover whether it is correct or not. A wholesale repeal could particularly disadvantage SMEs or first time transferees who have little experience of the operation of the regulations and would not know to include information provisions into their contracts.

21. A more helpful approach would be to require information provision when it is *'reasonably practicable´* before a transfer and with a backstop time limit of at least a month, and to retain the categories of information which ELI will cover.

Other inconsistencies and inefficiencies around the interaction between TUPE and collective redundancy and unfair dismissal rules must be stripped out.

22. A TUPE transfer, by its very nature, is a complex operation. It is therefore essential that the regulations are – as far as possible – simplified and cogent with other regulations if they are to be transparent and beneficial for companies and transferring staff.

Collective redundancy and TUPE consultations must be allowed to run concurrently

23. Responding to the call for evidence the CBI stressed that it should be possible to hold collective redundancy consultations alongside those taking place on TUPE. A legal change giving companies the certainty to do that will allow businesses to restructure more quickly, helping companies better secure their future. In parallel with the amendment to allow the transferor to rely on the transferee's Economic, Technical or Organisational reason, this

measure would reduce the uncertainty and disruption for the staff involved, as well as allowing management – of both transferor and transferee – to be open and honest with employees.

24. In order to ensure the process worked effectively, there would need to be careful guidance on handling. The transferor and transferee would have to work closely together, which could present challenges if there are geographical differences or commercial concerns. Where a collective redundancy consultation is being carried out, the transferee will need to be given access to the transferor's employees. If a transferor is making pre-transfer dismissals it is important that those being made redundant are not integral to the future service delivery. This is an area where additional guidance would be beneficial, and government needs to consider how the joint consultation process could be facilitated.

25. Furthermore, if the transferor breaks the law during the process that liability should not become the responsibility of the transferee. CBI members are very concerned about the transfer of liability in such circumstances, whereby the company against whom a grievance has been raised is not responsible for the resolution. The only effective way to address such concern is by making clear that each party is responsible for their own failures during the course of any such consultation process and ensuring that that there is strong collaboration between the two parties during this process.

Unfair dismissal and redundancy anomalies must be addressed

26. When TUPE transfers take place there may be substantial differences in working conditions which are beyond the control of the transferor business. At present there is an anomaly in the law so that an employer is considered to have unfairly dismissed an employee on the grounds of a substantial change
in their working conditions to their material detriment – even where this would not normally amount to a repudiatory breach of contract. This means that the rights of an employee – who would not have an unfair constructive dismissal claim in any other context – are "gold-plated" simply because of the TUPE context. Removing this anomaly standardises the approach to constructive unfair dismissal. It maintains the protection for employees in situations where a genuine unfair dismissal case exists, but it removes an illogical liability over which the transferor employer can have little control.

27. Difficulties also arise from the fact that firms in practice rarely make use of the Economic, Technical or Organisational reasons for workforce change. Including workplace location changes in this provision would help align areas of employment law by removing the anomaly whereby a place of work relocation amounts to a 'redundancy' for the purposes of the Employment Rights Act 1996 but not for the purposes of TUPE 2006. It would reflect the business reality that service provision changes often involve a workplace location change, for example when an organisation outsources or changes service provider for a better value delivery model.

Employment and Skills Directorate
April 2013

Communication Workers' Union (CWU)

TUPE REGULATIONS 2006: CONSULTATION ON PROPOSED CHANGES TO THE REGULATIONS

The Communication Workers' Union (CWU) is the largest union in the communications sector in the UK, representing over 200,000 employees in the postal, telecommunications and financial and business services industries.

In January 2013 the government launched a consultation on proposed changes to the TUPE regulations 2006. The consultation follows a 'call for evidence' from the government in the autumn of 2012, which indicated that the changes to TUPE regulations were being considered. The CWU submitted evidence to the government's call for evidence.

The CWU is strongly opposed to the proposals outlined in the government's consultation document. If successfully implemented, the proposals would seriously weaken employment protection and would place significant additional cost burdens onto employees. Workers in already low-paying outsourced services sectors will be particularly disadvantaged.

Question 1: Do you agree with the government's proposal to repeal the 2006 amendments relating to service provision changes?
a. Please explain your reasons.
b. Are there any aspects of the pre-2006 domestic case law in the context of the service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No. The CWU strongly opposes the proposal to repeal the 2006 amendments relating to service provision changes (SPCs).

SPCs apply when a service is outsourced for the first time, retendered (resulting in a change in outsourced service provider) or when an outsourced service is brought back in-house. SPCs were introduced into TUPE legislation in 2006 with the intention of making the legal position more certain.

The government's policy does not stem from any consensus over the desirability of the repeal of SPCs. The government undertook a 'call for evidence' on TUPE reform in 2012. The majority who expressed a view on the government's proposal favoured retaining SPCs in TUPE legislation: 66 respondents favoured including SPCs, 47 wanted them repealed, and 61 expressed no view. It is curious that the government has given such little weight to the opinion of respondents on this issue.

The repeal of SPCs from the 2006 TUPE regulations will make the position of workers more precarious. While application of pre-2006 TUPE regulations to SPCs remains unclear and therefore problematic, the move is intended to reduce the scope of their application, meaning fewer workers will be protected and more will face redundancy or the prospect of being hired to undertake the same work for a different employer on inferior terms and conditions. This is clearly bad for workers. Many workers affected by SPCs are employed in low paying sectors, such as cleaning, security and in the case of many of our members, call centres. The government's proposals will make it easier for employers to depress terms and conditions in outsourced services, exacerbating the problem of low

pay. This is not a positive outcome and not an outcome to which the government should aspire.

The government's proposals are bad for business. They will lead to greater uncertainty. Many SPCs - the impact assessment estimates 65% based on 2006 analysis - will remain subject to TUPE following any repeal of the 2006 legislation; however, which transfers are subject to TUPE will become very unclear. This ambiguity will necessarily lead to more legal challenges, increasing the burden on business and workers. The government's priority of reducing the burden on business will not be met; instead the burden will fall disproportionately on those embroiled in legal challenges over the application of TUPE.

Repealing SPCs will limit competition. Smaller companies will be discouraged from tendering for outsourcing contracts as there will be ambiguity as to whether staff will transfer with the work. The potential for having to recruit all staff from scratch will act as a disincentive for tendering for contracts. Savings for customers will only come at the expense of employees, not through genuine competition over efficiency, as happens when employees' terms and conditions are protected. The government acknowledges in its impact assessment that encouraging SMEs to bid against more established firms was one of the drivers of the policy. The fact that it can point to no evidence that an increased number of SMEs have been successful says more about the government's broader lack of evidence on the application of TUPE than it does about the success of the policy. There is no evidence for the government's claim that: "*Removing the service provision changes should act as a spur to competition within the outsourcing market*".

The government has not carried out robust analysis into the effects of the repeal of the SPCs. Instead the proposal is based on a crude assumption that regulation is an undesirable constraint on business. It is clear from the impact assessment published alongside the consultation document that the government has little evidence of the effect of its proposals. The assessment that the repeal of service provision changes will save business between £13m and £30m a year is based on analysis of gains to individuals, in terms of better terms and conditions, identified seven years ago, in 2006. There has been no assessment of whether and to what extent these costs were realised, rendering them of little relevance to the current proposals.

The government's proposals are likely to have the opposite effect to that which it desires. Current protections have facilitated many transfers which have been made possible because unions and employees have been reassured by the protections in the regulations. To water these down will lead to workers and unions opposing more TUPE transfers, with a resultant deterioration in industrial relations.

Question 2: If the government repeals the service provision changes, in your opinion, how long a lead in period would be required before any changes take effect (i) less than one year; (ii) 1 – 2 years; (iii) 3 – 5 years; or (iv) 5 years or more?
a. Do you believe that removing the provisions may cause potential problems?
b. If yes, please explain your reasons

The CWU is opposed to plans to repeal service provision changes (SPCs). If the government seeks to go ahead with this proposal, it should ensure as long a lead in period as possible, at least five years.

Question 3: Do you agree that the employee liability information requirements should be repealed?

a. If yes, please explain your reasons.
b. Would your answer be different if the service provision changes were not repealed?
c. Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under the regulation.

No. We do not agree that employee liability information requirements should be repealed. Currently, the transferor in any TUPE transfer must provide the transferee with employee liability information (ELI) no later than 14 days before transfer.

The timely sharing of information between transferor and transferee is essential to make TUPE transfers work effectively. The government recognises this, stating in the consultation document that: "*The Government appreciates that the provision of ELI helps make TUPE work.*" We do not accept that removing the employee liability information requirement will encourage the timely sharing of information. Instead it sends the wrong signals about the importance of information sharing, will discourage the sharing of essential information and will make TUPE transfers work less smoothly.

Regarding question 3 (c), we support strengthening legislation to ensure adequate information is shared between transferor and transferee. There should also be a requirement to share this information with trade union representatives. However, the government's proposed amendment should be used to enhance, not replace, current requirements; it should not be associated with the government's proposed weakening of employee liability information regulations.

Question 4: Do you agree with the government's proposal to amend restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?
a) If you disagree, please explain your reasons?
b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

No. We do not support proposals that would remove restrictions on varying employees' terms and conditions after transfer.

The government reflects on the problems of two-tier workforces and the administrative burden of managing multiple terms and conditions. We do not believe these issues constitute adequate justification for cutting employees' terms and conditions. There is scope for harmonisation of terms and conditions post transfer, but by levelling-up rather than undermining the terms and conditions of transferring employees.

The government rightly recognises that it is restricted in what it can do in this area by the Directive. It is proposing to amend the wording of the regulations to reflect the Directive and intends that only variations to terms and conditions that are by reason of transfer will be prohibited, rather that variations that are for a reason that is connected with the transfer.

It is not clear that the proposals will succeed in implementing this distinction. Our understanding is that this runs counter to established case law which shows that the

current regulations are not broader than the requirements of the Directive. Moreover, we do not support proposals intended to have this effect. Instead we believe the government is adding further confusion to already complex legislation.

Again, we believe the government's proposals are likely to have the opposite effect to that which it desires. TUPE regulations have made transfers possible by offering reassurance to employees and their representatives; watering down protections will mean workers and unions will be more likely to oppose TUPE transfers.

Question 5: The government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee?
a. Please explain your answer.
b. Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before transfer.
c. If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?
d. Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No. We do not support proposals to allow the variation of terms and conditions derived from collective agreement one year after transfer.

The government is looking for additional routes through which to enable the variation of terms and conditions and levelling-down of workers' terms and conditions post transfer; it is explicitly seeking to create a means through which union-negotiated terms and conditions can be undermined. This is strongly against the interest of transferring employees.

It is very unclear how the government's proposal will work in practice. Collectively bargained terms and conditions in the UK (subject to incorporation requirements) are part of individuals' contracts of employment. Contractual terms are then treated equally, regardless of their source. Any time limit on the applicability of terms derived from collective agreements would be inconsistent with this legal principle.

The implication of the proposal, that elements of individual's contractual terms and conditions, where they are derived from collective bargaining, could be varied one year after transfer, would mean different elements of employment contracts are accorded different statuses. It would also mean that there could be differences in the way members of a group of transferring employees were treated.

For example, a group of employees may be subject to TUPE transfer and within that group a number will have had their pay set by collective bargaining while a number of the group will not. Under those circumstances, different members of the transferring group will be treated differently. The first group will have their pay subject to variation one year after transfer; the second group's pay will be protected. This is clearly discriminatory and not an acceptable outcome.

Again, we believe the government's proposals are likely to have the opposite effect to that which it desires. TUPE regulations have made transfers possible by reassuring employees and their representatives; watering down protections will mean workers and unions will be more likely to oppose TUPE transfers.

We strongly oppose proposals to allow the variation of terms and conditions derived from collective agreement one year after transfer and we question whether they are legally enforceable.

Question 6: Do you agree with the government's proposal to amend the wording of the regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?
a. If you disagree, please state your reasons.
b. Do you agree with the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No. We do not agree with the government's proposal to amend the wording of regulation 7(1) and 7(2). We understand that, as with question 4, the government's intention is to try and allow dismissal protection to be limited to those by reason of transfer and exclude those by reason connected to the transfer. We not believe that such a distinction does or should apply.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?
a. Please explain your reasoning.

No. We do not support the proposal. The implications of the government's amendments are very unclear. They intend to weaken unfair dismissal protection and again further confuse already complex legislation.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?
a. If you disagree, please explain your reasons.

No. We do not support the government's proposals.

The government wishes to extend the definition of 'economic, technical or organisational' (ETO) reasons for changes to the workforce to allow changes in the location of the workforce that result in dismissals to no longer count as unfair dismissal.

Firstly, we oppose the proposal on the grounds that, if achieved, it would seriously weaken employment protection for workers facing TUPE transfers. Secondly, we do not accept that the government can legally redefine the term 'workforce', to include the location at which the work is undertaken, as it suggests. Again, we fear the proposal will only further confuse already complex legislation.

Again, we believe the government's proposals are likely to have the opposite effect to that which it desires. TUPE regulations have made transfers possible by reassuring employees and their representatives; watering down protections will mean workers and unions will be more likely to oppose TUPE transfers.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?
a. Please explain your reasons.

No. We do not think the transferor should be able to rely on the transferee's ETO reasons for pre-transfer dismissal of employees.

The proposals weaken employment protection for employees in the case of TUPE transfer. There is a significant risk that the proposals would exacerbate the risk of dismissals. Transferors may use the opportunity to rely on the transferee's ETO reasons to, for example, make the company more attractive to sell.

Given, as the government notes, transferees often do not receive sufficient information on transferring staff from the transferor until the moment of transfer, there is a real risk of unnecessary dismissals taking place. The decision as to whether to dismiss for ETO reason should be based on the transferee's thorough analysis of all necessary information, including details on transferring employees. It should not be based on the transferor's anticipation of the transferee's needs nor should the transferor have the opportunity to use ETO reasons for its own gain.

Moreover, we do not believe the government can amend TUPE in this way while complying with Article 4(1) of the Directive.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?
a. If you disagree, please explain your reasons.

No. We do not support the proposals to allow consultation with transferring employees prior to transfer to count towards the subsequent duty on the transferee to undertake collective redundancy consultations following transfer.

Firstly, decisions over redundancies need to be taken by an employer in possession of all the facts about its operation. Prior to transfer, as acknowledged by the government, it is unlikely that this will be the case. Transferees often do not receive all appropriate information about the workforce in a timely manner. In the absence of this information, fair and informed decisions about redundancy are unlikely.

Secondly, rather than clarifying the purpose of consultation, consulting on transfer and redundancy simultaneously is likely to lead to considerable confusion, notably for employees, but also for the transferor.

Thirdly, the purpose of collective redundancy consultations is to look at how the number of redundancies can be reduced. These proposals will make this much harder. Employees and their representatives need to be able to look in detail at the reasons for redundancy and need to engage directly with the employer seeking to make redundancies. This would be very difficult in a situation where the employees faced with redundancies are not yet employed by the company proposing the redundancies.

Fourthly, there is a duty to consult all employees affected by the proposed redundancies. This includes not just the employees who may be made redundant, but also the wider workforce. This wider workforce includes employees working for the transferee. Therefore, pre-transfer consultation is unlikely to cover the whole group of workers. A pre-transfer consultation also artificially limits the pool for the selection of redundancies to those employed by the transferor, rather than also including those already employed by the transferee.

Finally, we do not see how the proposals could be implemented while remaining compliant with the European Collective Redundancies Directive, which places a collective redundancy obligation on the employer. In the scenario envisaged by the government the transferee undertaking consultation is not yet the employer

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?
a. Please explain your reasons.
b. If you disagree, what would you propose is a reasonable time period?

No. We do not support the government's proposal. We do not think it is necessary to amend the legislation to attempt to define what constitutes a 'reasonable time' for the election of employee representatives.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?
a. If your answer to the question above is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No. We do not support the government's proposal to amend regulation 13. We believe all businesses, regardless of size, should be required to consult with employees through elected employee representatives.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to TUPE regulations?
a. If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
b. Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?
c. If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No. We do not support the government's proposed amendments and therefore would not support their imposition on micro businesses. Moreover, we do not support the variation of TUPE legislation by business size.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no proposals which give rise to a specific lead-in period?

No. We do not support the government's proposals. However, given the problems identified above, were they to be introduced, they would likely benefit from as long a lead-in period as possible and the opportunity for reflection this brings.

Question 15: Have you any further comments on the issues in this consultation.

No.

Question 16: Do you believe the government's proposals will have a positive or negative impact on equality and diversity within the workforce?
Please explain your reasons.

a. Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

We believe the proposed changes will have a negative impact on equality and diversity within the workforce. Notably, the government's proposals to restrict the scope of consultations will make it harder to take account of equality and diversity issues in TUPE and collective redundancy situations.

The repeal of service provision changes will disproportionately affect vulnerable workers in outsourced services, many of whom are women.

Moreover, as much of collective bargaining seeks to achieve agreements which support equality and diversity among the workforce, if the government's proposals are successful in undermining collectively bargained terms and conditions, they will have a negative impact on equality and diversity.

Question 17: Do you agree with the analysis and evidence provided in the impact assessment? Please give detail for any area of disagreement or if you can provide any further knowledge in an area.

We do not agree with the analysis provided in the impact assessment. We believe it is fundamentally flawed and provides a very weak evidence base from which to proceed.

Baker McKenzie LLP

INTRODUCTION

Baker & McKenzie is a global private practice law firm with offices all around the world. Our London office includes a team of over 30 employment law specialists, as well as pensions and employee benefits specialists. We provide advice exclusively to employers and act for many of the UK's leading businesses.

One of our particular areas of expertise is TUPE, which forms part of our highly-regarded Collective Rights practice. Our team has advised both users and suppliers on the employment terms of a wide range of domestic and international outsourcing agreements, in different industry sectors, including both first and second generation outsourcings. We regularly advise on practical implementation, employee relations and communications issues, as well as on the agreement itself. In particular we have experience of the complex issues arising from "off-shoring" both within and outside Europe.

We also have extensive experience of advising on re-organisations, large-scale redundancies and the employment aspects of M&A transactions and post-acquisition integration both in the UK and globally. Where appropriate, we have provided a risk analysis of the options available, have prepared communications, and have helped our clients plan the implementation and communication process, whether in the UK or at a multi-jurisdictional level.

Our Collective Rights practice also focuses on employee representative issues, including industrial/trade union relations, information and consultation strategy, (both in general and in relation to the UK information and consultation legislation), and European Works Councils issues.

We have set out our responses according to the section and question numbers used in the Consultation Paper.

SERVICE PROVISION CHANGES

1. Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No, we do not agree with this proposal.

a) Please explain your reasons

Our experience is that the service provision change (SPC) test provides considerably greater certainty as to whether TUPE applies, most particularly in relation to outsourcing arrangements, second generation transfers, and insourcings. That has been good for business and has reduced disputes and litigation about the issue. It is now much less common to have a "stand off" between two parties, with one party claiming that TUPE applies and the other claiming that it does not, and with the impacted employees having to bring claims against both parties to protect their position.

Moreover, although the legal position prior to the introduction of the SPC test was uncertain, to the extent that any pattern did emerge, the pre-2006 case law showed the domestic courts adopting a broad interpretation of the Regulations in service provision change-type cases. Because of that, the introduction of the SPC test has not resulted in

any significant "gold plating" in this area. If the SPC test is removed, we consider that this will reintroduce the uncertainty and, if the courts follow the approach of the pre-2006 case law, will be unlikely to lead to less "gold plating".

Since 2006 the majority of commercial contracts, in particular outsourcing agreements, have been negotiated on the basis that the SPC test exists, and that there is therefore likely to be a transfer of employees on termination of that outsourcing agreement when the services transfer back to the customer or to a new supplier. Repealing the SPC test will mean that businesses that have priced contracts assuming that employees will transfer on termination will be left in a situation where they will unexpectedly have to incur redundancy costs as the employees will remain with them after they lose the contract. Many of those contracts are for long periods of time, many for 5 years or longer.

Whilst we consider that the Government should retain the SPC test, we do think that they could take this opportunity to narrow its scope as far as offshoring is concerned as this is one area in which the SPC test does have a "gold plating" effect. In our view, the traditional TUPE test is unlikely to apply in most offshoring cases, whereas the SPC test is much more likely to apply. In the majority of offshoring cases, all parties would prefer that TUPE did not apply, so the removal of the SPC test in the context of offshoring would be beneficial.

The Government may, therefore, wish to consider limiting the SPC test to on-shore transfers, and to provide that it will not apply where the work goes overseas unless the traditional TUPE test is also satisfied. We consider that the Dircetive prevents the traditional TUPE test being restricted in the same way.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

We do not consider that there is anything the Government can do to resolve the uncertainty which existed prior to the SPC test being introduced (hence our recommendation that it be retained).

The main area where the UK courts diverge from the EU case law is in the context of outsourcing-type arrangements in labour-intensive industries. In order to avoid simple TUPE-avoidance, the UK courts take into account the motivation of employers in not taking over employees where it takes over labour-intensive activities but with minimal other assets. This is a broader test than the test identified in the EU jurisprudence (although we are not aware of the CJEU ever having being asked to expressly consider the issue of motivation and anti-avoidance).

The EU case law in Süzen v Zehnacker Gebäudereinigung G.m.b.H.krankenhausservice [1997] ICR 662 (ECJ) and subsequent decisions held that where the provider of a service changes, but the new provider takes over no assets or staff, then the ARD does not apply. However, in the UK domestic cases of ECM (Vehicle Delivery Service) Ltd v Cox [1999] ICR 1162 (CA) and Adi (U.K.) Limited v Firm Security Group Limited [2001] EWCA Civ 971 (CA), the Court of Appeal took the view that TUPE is intended to provide protection for employees. Accordingly, in labour intensive cases, there will be a transfer if, although the workforce is not taken on, it is established that the reason or principal reason for this was to avoid the application of the Regulations.

While the Government may wish to consider tackling this divergence in the case law, we consider that such a measure may not be consistent with the Directive.

In view of the above, we consider that retaining the SPC test would be a more effective way to provide certainty to all parties in service provision change cases.

2. If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect (i) less than one year; (ii) 1 - 2 years; or (iii) 3 - 5 years? (iv) 5 years or more?

Since 2006 the majority of commercial contracts, in particular outsourcing agreements, have been negotiated on the basis that the SPC test exists, and that there is therefore likely to be a transfer of employees on termination of that outsourcing agreement when the services transfer back to the customer or to a new supplier. Repealing the SPC test will mean that businesses that have priced contracts assuming that employees will transfer on termination will be left in a situation where they will unexpectedly have to incur redundancy costs as the employees will remain with them after they lose the contract. Many of those contracts are for long periods of time, many for 5 years or longer.

Ideally, if the Government decides to proceed with the repeal, the repeal would not apply to existing contracts that were entered into before the repeal is effective. However, such an approach to the repeal would be complicated, as in practice outsourcing agreements are much more complicated, and may be terminated in part, extended, or form part of a broader global services agreement which sets out the commercial basis on which employees transfer. It is difficult to see how sensible provisions could be drafted that would cover all of those type of arrangements.

However, we do believe that providing for a long lead-in period of 3 years or more would mitigate some of the unexpected consequences of the repeal. We would therefore suggest a lead in period as long as practicable, and in any event no less than 3 years.

a) Do you believe that removing the provisions may cause potential problems?

Yes.

b) If yes, please explain your reasons.

Please see our answer to question 1 above.

3. Do you agree that the employee liability information requirements should be repealed?

No, we do not agree that the employee liability information requirements should be repealed, although believe that amendments would be useful.

a) If yes, please explain your reasons.

For the reasons set out below, our recommendation is that rather than repealing the employee liability information provisions, the Government should consider:
• amending the time at which the information should be provided. We consider that the ideal position would be to include an overriding obligation to provide it in good time prior to

the transfer to enable the parties to comply with their obligations, with a default period of at least 28 days before the transfer (subject to a special circumstances defence for transfers that arise at short notice);

• amending the list of information to be provided to the type of information typically required by employers to prepare for the transfer and assess the liabilities that they may incur as a result of the transfer;

• allowing parties to contract out of Regulation 11; and

• introducing a requirement, or option, to enable parties to provide information at an earlier stage for the purposes of carrying out due diligence.

We consider that Regulation 11 serves a useful purpose, although it has some shortcomings which we think the Government could address.

Regulation 11(6) specifies that the information must be given no less than 14 days before the relevant transfer. This is too late in the process, leaving limited time for a transferee to confirm all the relevant terms and conditions and prepare to employ the transferring employees. Given that, in most transactions, the agreement will be signed more than 14 days before the transfer, the provision is not helpful to potential transferees.

We do not think that removing the list of types of information which must be provided would be helpful - having a list to which the parties can refer provides a useful baseline. However, we would recommend that consideration is given to the categories of information requested, since our experience is that much of the information which a transferee would typically require pre-transfer is not covered, e.g. details of any enhanced redundancy or severance payments policy; any confidentiality agreements and/or agreements containing post-termination restrictions; and details of any recognised unions and the constitution/mandate of any local or national works councils, or any other employee representative body. Conversely, some of the information which is required is of limited importance to employers pre-transfer, e.g. details of minor disciplinary or grievance procedures undertaken within a two year period prior to the transfer.

In our experience, parties sometimes negotiate different provisions. Where parties have clearly agreed between them what will be provided and when, it would be helpful to permit them to contract out of Regulation 11, so that their contractual agreement alone governs the transfer of information.

Finally, Regulation 11 does not address the fact that parties also require information before it is certain that a transfer will take place for the purposes of due diligence, for example in order for a potential buyer or bidder for a contract to understand basic information about employees, their roles and costs associated with them. This is necessary in order to assist potential transferees in deciding whether to bid for contracts, prepare to employ staff, and consider at the earliest possible stage, what measures may be needed and as such it is in the employees' interest as well as the interests of a transferee. Regulation 11 does not fulfil this need.

We agree with the Government's view, set out at paragraph 7.27 of the Consultation Paper, that data protection issues should not really be an issue based on the ICO's Guidance. However, businesses often take a different position in practice and are reluctant

to provide information, based on their concerns around data protection, particularly where this information falls outside the scope of Regulation 11.

If the Government does repeal the employee liability information requirements, then information provided in the context of a TUPE transfer which currently falls within Section 35 of the DPA will no longer do so. This will give rise to the same data protection difficulties as currently exist in respect of information falling outside the scope of Regulation 11 and information that is provided early for due diligence purposes. We do not consider that the Government's proposed amendment to Regulation 13 as set out at (c) below would avoid this problem, given the scope for disputes as to what information is "necessary" for the parties to perform their obligations under Regulation 13.

Whether or not the Government repeals the employee liability information requirements, we would welcome:

- a clear statement that employees' consent is not required where personal information is disclosed in response to a genuine due diligence request as part of a TUPE transfer, provided that the transferee and the recipient take appropriate measures to protect the data. This might for example involve anoymising data where possible at an early due diligence stage, (but recognising that anonymity may not be absolute in some circumstances), and requiring that recipients take reasonable care of the data; and

- confirmation in TUPE itself that that full (i.e. not anonymised) data should be provided once it is clear that a transfer is likely.

b) Would your answer be different if the service provision changes were not repealed?

No, our answer to question 3 would remain the same whether or not the service provision changes were repealed.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No, we do not agree with this proposal as we consider that it would lead to uncertainty and the potential for disputes between the parties as to what is "necessary" for them to perform their duties. The strict legal obligations of the transferee pre-transfer are limited to the provision of information regarding measures it is proposing to take. In reality, therefore, the transferee needs the majority of the employee liability information to enable it to prepare for the transfer rather than to comply with any particular legal obligations. If the Government wishes to define the requirement to provide information pre-transfer by reference to the reasons why this information is needed, we would suggest requiring the provision of such information as is necessary to enable the parties to prepare for the transfer, to avoid an
argument by the transferor that no information is necessary.

RESTRICTIONS ON CHANGES TO TERMS AND CONDITIONS

4. Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Not fully.

We agree that there is merit in adopting the wording of the Directive which relates to the protection of terms and conditions (Article 3). We do not consider that it makes sense to adopt the language from Article 4, which addresses protection from dismissal, as that will defeat the Government's reasons for making the change and risks incorporating further unnecessary restrictions into the UK Regulations, which will be less business friendly as a result.

In our view, the restrictions on changing terms and conditions of employment applied under domestic law go further than required by the Directive or the case law of the CJEU as explained below. We consider that the Government should do all it can within the scope of the Directive to enable transferees to agree changes to terms and conditions with employees that they inherit under TUPE.

However, we do not agree with the Government's proposal to reflect the wording of Article 4 of the ARD. We consider that it would be more appropriate to reflect instead the wording of Article 3, as this is the provision of the ARD which deals with changes to terms and conditions and on which the EU cases on this issue are based, and provide guidance on how this should be interpreted. This would have the advantage of retaining flexibility, as any changes to EU case law would then flow automatically through to UK domestic case law.

In the leading ECJ case on this issue, *Foreningen af Arbejdsledere i Danmark -v- Daddy's Dance Hall A/S* [1988] IRLR315, the ECJ determined that changes were ineffective where the change was by virtue of the transfer itself. However, provided that the reason for the variation was not the transfer itself, the parties would be free to make changes to terms and conditions in so far as this was permitted under national law.

The UK courts have taken a more restrictive view based on their interpretation of *Daddy's Dance Hall* and the UK Regulations. It is arguable that the European case law has been interpreted too widely by the UK courts and that provided employees transfer on their pre-transfer terms and conditions, their rights under the ARD have been satisfied and there is nothing to prevent them subsequently agreeing to changes. However, the legal position remains unclear. To the extent that the CJEU takes a less restrictive approach, we would support that approach being adopted by the UK courts. Introducing the Article 4 wording risks introducing unnecessary restrictions. Adopting the Article 3 language will ensure that the UK courts can take an approach which is consistent with that of the CJEU.

a) If you disagree, please explain your reasons.

See above.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes. See further our response to question 8 below.

TUPE AND COLLECTIVE AGREEMENTS

5. The Government is considering using article 3.3 of the Aquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is that desirable in your view?

No.

a) Please explain your answer.

We support introducing greater flexibility for employers in respect of agreeing changes to collective agreements as well as terms and conditions. However, we consider that the structure of UK law relating to collective agreements means that such a provision is unnecessary in the UK and may create new unnecessary restrictions.

To the extent that the terms of a collective agreement are validly incorporated into an employee's contract, they become part of the terms and condition of employment and are, therefore, subject to the normal restrictions on making changes to terms and conditions under Regulation 4(4).

Otherwise, collective agreements are typically not legally enforceable (unless expressly stated to be enforceable - which is unusual), and are regularly changed in the context of TUPE transfers. A provision which permits changes after one year may be construed as a prohibition on making changes before the end of that one year period, which would be a detrimental change for employers.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Please see (a) above as to why we do not think that the proposed provision should be adopted at all.

If the Government does introduce the proposed provision, we consider that a requirement for any change after the one year period to be no less favourable overall than the terms that applied before the transfer will be difficult to apply, as it may be difficult to evaluate whether some changes to terms and conditions are less favourable or not e.g. where there is a variation to shift patterns, but no overall increase in the hours worked or decrease in pay.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.

Yes, we consider it would be useful if the *Parkwood Leisure* litigation were to confirm that a "static" interpretation applies i.e. that where an employee's contract incorporates terms of a collective agreement to which the transferee is not a party, the transferee is only bound by the terms as they exist at the date of transfer and not by subsequent amendments to those terms. We note that the ECJ in the case of *Werhof v Freeway Traffic*

Systems Gmbh & Co KG [2006] IRLR 400 indicated that the static interpretation is permissible under EU law. 11

When referring to the CJEU the question of whether a "dynamic" interpretation is permitted by EU law, the Supreme Court appeared to suggest that it would adopt a dynamic interpretation if this was permitted (even if not required) by EU law. However, we consider that this would be unhelpful, as it could leave transferees with no control over certain terms and conditions upon which their employees are employed. In view of the fact that EU case law has confirmed that a static approach is permissible, we consider that the Government should take legislative steps to reverse the decision of the Supreme Court in the *Parkwood Leisure* litigation in the event that they apply a dynamic approach where this is not strictly required under EU law.

d) Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No.

PROTECTION AGAINST DISMISSAL (REGULATION 7)

6. Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes, we agree with this proposal.

a) If you disagree, please explain your reasons.

As stated above, we agree with this proposal.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

As noted in our response to question 4 above, we are not convinced that relating the drafting of restrictions to changing terms and conditions to the dismissal provisions of the Directive is necessarily the best approach.

REGULATION 4(9) & (10): A SUBSTANTIAL CHANGE IN WORKING CONDITIONS TO THE MATERIAL DETRIMENT OF AN EMPLOYEE

7. Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No, we do not agree with this proposal. We would suggest that instead of pursuing its current proposal, the Government should remove Regulations 4(9), (10) and (11) and replace them with wording which would achieve certainty and make clear that there will only be a right to claim constructive dismissal if the changes to working conditions actually amount to a repudiatory breach of contract.

a) Please explain your reasoning.

According to pre-2006 domestic case law (specifically the Court of Appeal decision in Rossiter v Pendragon plc [2001] IRLR 256), where a transfer involved a substantial change in working conditions to the detriment of the employee, the employee would only be entitled to claim constructive dismissal if the change in working conditions constituted a repudiatory breach of contract.

Introducing Regulation 4(9) effectively reversed the position so that an employee could treat himself as having been constructively dismissed in the event that a transfer resulted in a substantial change in his working conditions to his material detriment, even if such change did not amount to a breach of contract. We assume that the change was made because the Government may have thought that Article 4(2) of the Directive created an EU law right to protection from dismissal even where there was no breach of contract. Regulation 4(10), which provides that notice pay is not payable in those cases, appears to have been an attempt to mitigate the effect of Regulation 4(9).

Ideally, the Regulations would adopt the position in Rossiter v Pendragon.
If that is not possible, we would support in principle a change which only enables an employee to bring a claim for notice pay, rather than unfair dismissal, in those circumstances. However, we do not think that adopting Article 4(2) of the Directive would achieve that aim. We consider that Article 4(2) may well be construed by UK courts as meaning that an employee will be treated as having been dismissed by the employer if there is a substantial change to working conditions to the detriment of the employee. Nothing in Article 4(2) expressly limits the provision to changes that constitute a breach of contract, and we consider that being treated as having 'terminated the employment contract' is likely to be deemed to be a dismissal for unfair dismissal purposes even where there is no breach of contract. Therefore, the result may well then be that an employee can bring both an unfair dismissal claim, as well as damages for loss of notice, which is worse than the current position.

ECONOMIC, TECHNICAL OR ORGANISATIONAL REASON ENTALING CHANGES IN THE WORKFORCE ("ETOs")

8. Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes, we agree with this proposal.

a) If you disagree, please explain your reasons.

We agree with the proposal.

DISMISSALS BASED ON FUTURE CONDUCT OF THE TRANSFEREE

9. Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes, we agree that, in principle, the transferor should be able to rely upon the transferee's ETO reason in respect of pre-transfer dismissals of employees.

a) Please explain your reasons.

Although we agree with the proposal, we note that some difficulties could remain with regard to redundancy consultation requirements.

In particular, there would be limits on the extent to which the transferor could meaningfully consult where the ETO is that of the transferee, as the transferor has no ability to influence the transferee's actions post-transfer nor any prospect of finding alternatives to the redundancies. This could weaken the protection afforded to employees by s188 of TULRCA. If this is a concern, a possible solution to this would be to amend s188 to permit the parties to consult jointly prior to the transfer.

Giving employees the chance to discuss the proposed redundancies with the transferee would allow them more of an opportunity to influence the outcome of the consultation.

COLLECTIVE REDUNDANCY RULES AND INTERACTION WITH TUPE INFORMATION AND CONSULTATION REQUIREMENTS (REGULATION 13)

10. Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing the consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes.

a) Please explain your reasons.

We support the Government's proposal to expressly permit a transferee to consult prior to the transfer, for the reasons set out at paragraphs 7.84 to 7.89 of the Consultation Paper. We would suggest that any period of consultation prior to the transfer should be set off against the applicable consultation period post transfer.

We would also suggest that the Government should consider permitting employees to waive their rights to bring proceedings for a protective award and/or enforce a protective award under a compromise agreement.

DUTY TO INFORM AND CONSULT EMPLOYEE REPRESENTATIVES

11. Rather than amending Regulation 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives, do you think our proposal to provide guidance instead would be more useful?

Yes, we agree with your proposed approach.

a) Please explain your reasons.

We agree with this proposal for the reasons set out by the Government at paragraph 7.92 of the Consultation paper.

b) If you disagree, what would you propose is a reasonable time period?

N/A.

CONSULTATION REQUIREMENTS FOR MICRO BUSINESSES

12. Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

To the extent that this flexibility is permitted by the Directive, we think that it would be beneficial for both micro businesses and larger employers. If the Government considered that it could make this option available to businesses with more than 10 employees without coming into conflict with the requirements of Article 7(5) and (6) of the Directive, we would be supportive of such a proposal.

Article 7(5) of the ARD includes a small employer exemption to the I&C obligations by permitting member states to limit the I&C requirements to those businesses with sufficient employees to meet the conditions for the election of employee representatives. Our view is that for the purposes of the UK, that provision effectively means the Information and Consultation of Employees Regulations 2004. Under those Regulations, only undertakings which employ 50 or more employees (in accordance with the rules for calculating employee numbers set out in those Regulations) are required to elect employee representatives if an appropriate application is made by employees.

However, there is a further potential exemption under the Directive. Article 7(6) provides that a member state can provide that consultation is not necessary and that, instead, information can be provided directly to employees where there are no representatives of the employees through no fault of their own. Since employees who are employed in businesses with at least 50 employees can now request an I&C body under the 2004 Regulations, if there is not currently one in place then arguably that is because the employees have not requested one. Therefore, the Article 7(6) provisions would apply to that employer. Currently, under Regulation 13(3) of TUPE, an employer is required to elect employee representatives where there is no recognised trade union or an existing employee representative body. We do not consider that such a provision is required by the Directive; instead, under the Directive, if an employer has no representative body in place the employer has the option of providing the specified information directly to employees rather than going through an election process.

Even if the Government does not wish to introduce that provision in its entirety, where the obligation is only an information obligation, and there is no existing representative body (irrespective of how many employees are employed), we believe it is compatible with the Directive to allow the information to be provided directly to employees. That would avoid the farce of the employer having to provide information about the TUPE transfer in order to elect employee representatives, for the sole purposes of providing the information they have already given to elect representatives. We consider that the process is unnecessarily burdensome.

CONSULTATION REQUIREMENTS FOR MICRO BUSINESSES

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

As explained above, we consider that larger employers would also find it useful to be able to consult directly with employees where there is neither a recognised independent union, nor existing employee representatives.

EXEMPTION FOR MICRO BUSINESSES

13. Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?
c) If so, please give details and suggestions where these costs could be decreased or avoided entirely

No comment.

TRANSITIONAL ARRANGEMENTS AND COMING INTO FORCE OF AMENDMENTS

14. Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No, we do not agree. We consider that there would need to be a significant lead-in period if the employee liability information provisions were to be repealed as, in our experience, many existing contracts define the obligations on the parties to provide information by reference to these provisions, and many of our clients rely on the fact that they are legally entitled to receive that specific information.

OTHER ISSUES
15. Have you any further comments on the issues in this consultation?

We have no further comments.

16. Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?
We do not consider that the Government's proposals will have an identifiable effect, either positive or negative, on equality and diversity within the workforce.
a) Please explain your reasons

In our view, the proposals would apply equally across all sections of the workforce.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

We have no evidence relevant to this question.

17. Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

We have no comments to make on this question.

The Institute of Employment Rights

The Institue of Employment Rights is an independent charity. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

This IER Response, kindly drafted by the expert named, reflects the views of the author not the collective views of the Institute.

The responsibility of the Institute is limited to approving its publications, briefings and responses as worthy of consideration.

The Head of Thompsons Solicitors' Trade Union Law Group and has taken Appeals to the Supreme Court and European Court of Human Rights. He is a specialist in TUPE transfers and consultation, as well as other aspects of collective employment law.

Introduction

Two fundamental features of the Acquired Rights Directive (the "Directive") need to be kept firmly in mind:

(i) as with its predecessor, the purpose of the Directive is to promote the harmonisation of relevant national laws providing for the protection of employees in the event of a transfer of an undertaking and requiring transferors and transferees to inform and consult; and

(ii) the purpose of the legal measures in relation to which harmonisation is to be promoted is the safeguarding of employees in the event of a transfer of an undertaking.

The Court of Justice has consistently held that the purpose of the Directive is *not* to achieve a uniform level of protection across the EU. Instead, the objective is *"partial harmonisation"1*. Against this background, it is misplaced for some to speak of the current version of TUPE "gold-plating" the requirements of the Directive.

1 See for example Juuri v Amica Oy Case C-396/07 [2009] 1 CMLR 33

What those who use the term mean when they complain that the current version of TUPE "gold-plates" the Directive is that, in certain limited circumstances (and the inclusion of Service Provision Changes is one example), the protections afforded by TUPE may exceed the bare minimum requirements of protection laid down by the Directive. It is a gross manipulation to say that if TUPE exceeds the minimum requirements of the Directive, then that amounts to "gold-plating". Instead, what is clear amongst these interests is a desire to see the Directive implemented so as to provide for the absolute minimum of employee protection.

Notwithstanding the purpose of TUPE and the Directive,, it is impossible to identify one single measure in the consultation document which is even claimed to further the aim of safeguarding employees' rights. This is a set of proposals aimed at benefiting employers and is, as the Impact Assessment acknowledges, likely to disadvantage the low paid (especially women), and those with disabilities.

Even then, the proposals are not backed up by a sound evidence base, an issue we return to in our answer to Question 17. At this stage, we draw attention to three features:
(i) throughout the summaries of questions in the Impact Assessment, additional "IA" questions are asked which seek estimates of the likely costs and benefits of the various

proposals. This gives the impression that BIS is not able to quantify and analyse the projected costs and benefits-even though it has now set a timeline for the implementation of the proposals;

(ii) the most prominent proposal is the abolition of Service Provision Changes ("SPCs"). The fact that there is no consensus that this is desirable is reflected in the outcome of the BIS Call for Evidence in 2012 in which there as w a majority in favour of retaining SPCs. In fact, amongst lawyer practitioners in the field, we understand there to be a consensus in favour of retaining SPCs; and (iii) much reliance is placed on the Employment Tribunal data. Yet, as BIS acknowledegesAs BIS acknowledges, the only figures reproduced relate to information and consultation claims under TUPE. The vast majority of claims are for unfair dismissal and/or unlawful deductions form wages. These are not taken into account at all. BIS then proceeds to the conclusion that *"In summary, the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims"*. This simply doesn't follow.

In addition, the approach consistently adopted through the consultation of proposing amendments which "more closely reflect the wording of the Directive" or even "copy out" the relevant provisions of the Directive is not, in our view, helpful to anyone. As we have highlighted, the Directive does not seek to achieve full harmonisation of the laws across the EU. Many areas are left to the determination of Member States. In those circumstances, it is simply irresponsible.and bound to generate litigation and confusion for all concerned, to adopt a seemingly blanket policy of simply seeking to mirror the text of the Directive.

We also note that, at many points, BIS is at pains to emphasise what it sees as the possible anti-competitive effects of not making the amendments it proposes. We do not accept most of those propositions-and they are not backed up by argument or evidence.

We turn now to questions posed in the consultation.

Question 1:
Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No

No.

a) Please explain your reasons

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as implemented by the Court of Justice of the European Union).

a) The government seems to base this proposal on its statement that the introduction of SPCs in 2006 *"may have actually imposed unnecessary burdens on business, and questions whether they have delivered the benefits actually anticipated."* The government's reasoning seems to be that the position on the application of the Directive became more settled as a result of the Suzen2 case, and subsequently; that the numbers of Employment Tribunal claims has been increasing and various competition-related arguments.

That reasoning simply ignores the facts.

The position on the application of the Directive (and TUPE) certainly –did not become more settled after the Suzen case. Quite the opposite in fact. - and we strongly suspect that most experienced practitioners, whether acting for employers or employees, would agree.

The Suzen case which introduced the apparent distinction between the application of the Directive to labour-intensive undertakings (which seemed to require the transfer of a major part in terms of their numbers and skills of the workforce) and asset-reliant undertakings (which seemed to require a transfer of significantassets). That was a departure from the previously applicable multi-factorial test set out in the Spijkers case as to the circumstances in which an economic entity retained its identity. That departure came as a significant surprise to practitioners and led to uncertainty-not just in the United Kingdom, but in other EU Member States as well.

That uncertainy, directly caused by by the Suzen case, led to a series of cases in the Court of Justice which appeared to reinforce the distinction. These included Vidal4 (organised group of wage-earners in a labour-intensive undertaking capable of amounting to an economic entity); Oy Liikkene5 (no retention of identity where no substantial transfer of assets in asset-reliant undertaking); Abler v Sodexho6 (a requirement to prepare meals in the hospital kitchen amounted to a taking-over of substantial assets); and CLECE7 (in a labour-intensive undertaking, the non-transfer of staff meant there was no transfer).

That sequence of cases in the Court of Justice led to still greater uncertainty in the United Kingdom Courts which had to grapple with the extent to which the Court of Justice really meant to resile from its previous jurisprudence and the particular problem of TUPE-avoidance in labour-intensive undertakings UK Courts have pointed out that the classifications of asset-reliant and labour-intensive undertakings are simply opposite ends of the same spectrum8 - and even questioned whether the Court of Justice intended to say that it was necessary, as a matter of law, to distinguish between labour-intensive and asset reliant undertakings9. Indeed the UK Courts have been prepared to find that there was a transfer notwithstanding the absence of a transfer of assets in a business which was arguably asset reliant10.

The problem for the UK Courts in relation to labour-intensive undertakings was that the determination as to whether a transfer had occurred seemed to depend on whether the new employer was willing to take on a major part of the existing workforce. The new employer could seemingly circumvent the application of TUPE by declining to take on a major part of the workforce. This led to a sequence of cases (at Court of Appeal level) dealing with the discrete issue of the importance to be attached to the new employer's unwillingness to take on a major part of the workforce11., and culminating in the absurdity revealed by the Atos case.

Until 2007, there was a steady stream of appeals to the level of the Court of Appeal (and, in some cases, references from UK Courts to the Court of Justice) dealing with these fundamental issues relating to whether or not there was a transfer for the purpose of the 1981 version of TUPE (ie before the introduction of SPCs in 2006). In fact, it is probably fair to say that appeals and references on issues other than the application of TUPE/the Directive were relatively few and far between. The issues being pursued on appeal were *not* esoteric and of limited application; they were fundamental and wide-ranging, such as the correct approach to asset-reliant and labour-intensive undertakings and how to take

account, in labour-intensive undertakings, of the new employer's unwillingness to take on the workforce.

That all changed very dramatically following the introduction of SPCs in 2006.

Since the Court of Appeal's decision in the Balfour Beatty case13, appeals to the Court of Appeal dealing solely with the application of Regulations 3(1)(a) and 3(1)(b) have all but dried up. There is the Court of Appeal's decision in Hunter v McCarrick14, which clears up the point that, for there to be an SPC, the activities after the transfer must be carried out for the same client. But there is not much else.There have also been no decided references to the Court of Justice from courts in the United Kingdom dealing with the corresponding subject matter under the Directive.

It is true that there have been appeals to the Employment Appeals Tribunal dealing with some of the requirements for an SPC. The first issue to emerge was the effect of fragmentation of services following transfer15. It can not be said that the issue of fragmentation creates the wide-spread uncertainty that differing approaches to asset-reliant and labour-intensive undertakings created. It is instead a relatively confined and esoteric issue, necessarily to be decided on the facts on a case by case basis. In any event, this is an issue which has also arisen under the standard definition of a transfer (ie pre-2006)16. It is not a major issue of uncertainty generated by the existence of SPCs, as is suggested at paragraph 7.13 of the consultation document.

Likewise, there is the issue of "assignment". Again, contrary to what is suggested at paragraph 7.13 of the consultation document, the existence of SPCs does not introduce new uncertainties as to which employees are assigned. Regulation 4 provides for the automatic transfer of employees employed by the transferor and assigned to the organised grouping of resources or employees. As such, the relevant assignment provision caters both for standard transfers and SPCs. Such uncertainties as there are apply equally to assignment in the context of standard transfers and SPCs17.
It is essential that a sense of proportion is maintained. The issues of fragmentation and assignment are not unique to SPCs. They did not arise as distinct issues because of the introduction of SPCs. In any event, it is simply not true to suggest that they represent a major issue of uncertainty when viewed in the context of the aftermath of the Suzen case.

Other issues have emerged in relation to SPCs. There has been a handful of appeals to the Employment Appeals Tribunal dealing with how to determine whether there is an organised grouping of employees which has as its principal purpose the carrying out of the activities in question; what is meant by a contract for the supply of services; and the need for the client to remain the same. It is true that all of these issues are applicable only to SPCs. But it is also true that the number of appeals to the EAT raising these issues is very limited indeed.

We think that HHJ Judge Burke QC accurately stated the position in the Metropolitan Resources case: the service provision change provisions were introduced *"to remove or at least alleviate the uncertainties and difficulties created, in a variety of familiar commercial settings, by the need under TUPE 1981 to establish a transfer of a stable economic entity which retains its identity in the hands of the alleged transferee, particularly in the case of a labour-intensive operation".18*

It is therefore absolutely clear that the existence of SPCs has greatly reduced the scope for dispute as to whether TUPE applies. A return to the pre-SPC position will lead to a

return to the escalation in the number of cases contesting whether there has been a transfer. This will inevitably increase the costs for businesses as more and more cases are litigated, increase the burden on the Employment Tribunal and Courts system and lead to a diminution in the protection of employees. What the government clearly intends as a de-regulatory measure will not only diminish the protection employees have, it will also increase the burdens on business (through additional risk and litigation).

Further, the competition-based arguments at paragraphs 7.13 to 7.14 of the consultation document are not substantiated by any evidence, or are simply perverse. No evidence is presented as to the effect that the reason for re-tendering a contract is often that the identified of the persons performing the contract. No explanation is given as to why it is anti-competitive for staff the transferor wishes to keep on to be re-assigned prior to transferor (even if this is a widespread practice). In any event, it simply does not follow from these two flawed notions that *"Removing the service provision changes should act as a spur to competition within the outsourcing market".*

At paragraph 7.14, BIS says that *"….Prior to the 2006 amendments, it was necessary to establish whether TUPE applied, whereas now advice is often needed to see how TUPE might be avoided, or concerning how its effects might be mitigated…"*. BIS tells us that this means that the need for legal advice has not been diminished.

We think that it is wholly inappropriate for BIS to acknowledge as legitimate the efforts of employers to circumvent an important piece of social legislation. Still less do we think it appropriate for BIS to use the desire by some employers to seek advice as to how to avoid TUPE as a justification for removing SPCs from TUPE.

We elaborating on why the use of Employment Tribunal statistics relating to information and consultation claims under TUPE only to support the contention that SPCs should be abolished is misleading in our answer to question 17. But, for now, we wish to draw attention to an important statement appearing under the heading of "Employment Tribunal data" on page 24 of the Impact Assessment:

"However, it should be noted that as there are so many TUPE transfers occurring every year and a comparatively low number of tribunal cases, TUPE legislation should be viewed as an area where there is good compliance."

Coupled with our arguments as to the dramatic decrease in disputes as to the application of TUPE since the introduction of SPCs, we consider that this is yet further evidence that including SPCs within TUPE is generally working well.

There should be no attempt to revert to the pre-2006 situation and to do so would inevitably restrict the protection for employees and re-introduce the previous uncertainty as to when TUPE applies. Re-considering the 2006 domestic case law would inevitably lead to questions of compatibility with the Directive-and yet more confusion.

Question 2:
If the government repeals the service provisions changes, in your opinion, how long a lead in period would be required before any change takes effect (i) less than one year; (ii) 1-2 years; or (iii) 3-5 years (iv) 5 years or more?

The government should not repeal the service provision changes, If it is determined to whatever the consequences, then there should be as long a lead in period as possible, and certainly no less that five years**.**

a) Do you believe that removing the provisions may cause potential problems? Yes/No

b) If yes, please explain your reasons.

a) Yes.
b) See our answers to question 1.

Question 3:
Do you agree that the employee liability information requirements should be repealed? Yes/No

No.

a) Please explain your reasons.
b) Would your answer be different if the service provision changes were not repealed?
c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

a) The fact that the current arrangements may be leading to late provision of inadequate information is not justification for repealing the employee liability information provisions.

It is in everyone's interest that there is a formal requirement, set out in the Regulations, for the provision of employee liability information. This is particularly important for the transferring employees because disputes as to their entitlement are less likely to arise if the transferee has been told before the transfer what those entitlements are.

b) No.

c) On balance, we would favour such an amendment subject to the proviso that non-provision of the information would not be any defence to a claim brought by an employee representative for a failure to inform and consult under Regulation 13.

Question 4:
Do you agree with the government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? Yes/No

No.

a) If you disagree, please explain your reasons.
b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

a) There is general agreement that harmonisation is not permitted by the Directive. BIS's stated desire to make it easier to vary contracts to give greater harmonisation is inconsistent with that prohibition.

BIS seems to take the view that the Directive only prohibits variations which are by reason of the transfer, as opposed to variations for a reason which is connected with the transfer. We don't think that distinction is valid in the light of the Court of Justice's most recent detailed judgment dealing with the issue in the Martin19 case. We refer in particular to paragraphs 44 and 45 of the Court of Justice' judgment which use the phrases *"…the alteration of the employment relationship is nevertheless connected to the transfer……"* and *"…..the transfer of the undertaking is indeed the reason for the unfavourable alteration of terms….."* interchangeably.
19 Martin and another v South Bank University C-4/01 [2004] IRLR 74

In fact, we think that the current version, in seeking to make the distinction between variations by reason of the transfer and those for a reason connected with the transfer, and permitting variations for a reason connected with the transfer where there is an economic, technical or organisational reason entailing changes in the workforce, does not comply with Article 4 of the Directive. It is perhaps surprising that this issue has not been referred to the Court of Justice from the UK courts.
In an area so nuanced and fraught with controversy as this, it is not helpful for BIS simply to propose the amendment of the restriction in regulation 4 *"so that the restriction more closely reflects the wording of the Directive"*.

In any event, we think that the indicative text put forward at paragraph 7.42 of the consultation paper is flawed. First, the new subparagraph (4) does not take account of the fact that the Court of Justice apparently also prohibits changes which are for a reason connected with the transfer.
Secondly, the new subparagraph (5) misunderstands the effect of paragraph 42 of the Court of Justice's judgment in the Martin case. There, the Court explains very clearly that the ability of the transferee to vary terms and conditions is the same as the transferor's, provided that the transfer of the undertaking itself may never constitute the reason for that amendment. The new subparagraph (5) would operate the other way round: the voiding provision of subparagraph (4) would not apply if the variation was one which could have been made had there been no transfer.

Thirdly, the new subparagraph (5A) does not take account of the fact that Article 4 of the Directive prohibits variations where the reason for the variation is the transfer, and makes no separate provision for variations where the reason is connected with the transfer.
It's not clear exactly what the government has in mind. What it has indicated as a possible proposal is fatally flawed and is likely to lead to outright confusion.

b) No. As explained, we do not think that the exception for economic, technical or organisational reasons complies with Article 4 of the Directive.

Question 5:
The government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view? Yes/No

No.

a) Please explain your answer
b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? Yes/No
c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.
d) Do you think there are any other changes that should be made regarding the continued applicability of term sand conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive? Yes/No

a) The reason behind this proposal isn't made explicit in the consultation document, but it is in the accompanying Impact Assessment. The Impact Assessment explains that the rationale for the proposal is that employees transferring from unionised employers (especially those transferring to non-unionised employers) are likely to cause large costs to the new employer, and that the proposal may enable more non-unionised potential transferees to bid in areas where employees are unionised. In other words, the reason is to enable prospective transferees to avoid union-bargained terms after one year.

The point has been made many times during the course of the Alemo-Herron litigation that the legal structure within which collective agreements operate at the individual level in the United Kingdom is different to the legal structures in other EU Member States. In the United Kingdom, collectively bargained terms (subject to their incorporation) are enforceable through the individual contact of employment. That is very different from many Member States where collectively bargained terms are enforceable through statute explains that the rationale for the proposal is that employees transferring from unionised employers (especially those transferring to non-unionised employers) are likely to cause large costs to the new employer, and that the proposal may enable more non-unionised potential transferees to bid in areas where employees are unionised. In other words, the reason is to enable prospective transferees to avoid union-bargained terms after one year.

The point has been made many times during the course of the Alemo-Herron20 litigation that the legal structure within which collective agreements operate at the individual level in the United Kingdom is different to the legal structures in other EU Member States. In the United Kingdom, collectively bargained terms (subject to their incorporation) are enforceable through the individual contact of employment. That is very different from many Member States where collectively bargained terms are enforceable through statute.

Time and time again, the Court of Justice has said that the Directive requires that the contractual rights of employees under national law should be preserved on transfer21. And if terms from a collective agreement become incorporated into a contract of employment, then they should be protected to the same extent as any other terms of the contract of employment.

A number of features of the system of collective bargaining in the United Kingdom fortify this conclusion. First, terms derived from collective agreements only become incorporated into contacts of employment, and therefore legally enforceable if the parties to the contract of employment so agree (expressly or impliedly). Secondly, the parties are perfectly free to

agree that future changes in the collectively bargained terms will also become incorporated into contracts of employment.

Thirdly, terms derived from collective agreements will only become incorporated into contracts of employment if they are apt for incorporation22-and terms relating to pay generally are regarded as apt for incorporation. Fourthly, because the terms derived from the collective agreement become terms of the contract of employment, it makes no difference to their legal enforceability via the contract of employment if the collective agreement is terminated23. Fifthly, it follows that the question whether a given employee is entitled to the benefit of the terms of a collective agreement falls to be determined solely by reference to the terms of their contract of employment, rather than by reference to membership of a trade union, or whether the employer is party to the collective agreement or is operating within a given sector.

The proposal would also create a two-tier system of contractual rights under the contract of employment. Rights not derived from collective agreements would be protected to the extent provided for by Regulation 4 without temporal limitation. Rights derived from a collective agreement would only be protected to the extent provided for by Regulation 4 for one year, after which they could be amended by varied. To provide for asymmetrical protection of contractual rights depending on the source of the rights is not only perverse, it is also bound to lead to confusion. Quite apart from the blatant unfairness of the proposals, issues are bound to arise.

For example, what happens if an individual contact of employment replicates terms agreed collectively? Also, the logic of the proposal seems to be that, where a collective agreement is terminated, terms which became incorporated into contracts of employment before its termination may acquire a greater degree of protection once the collective agreement has expired. That is bizarre.

The proposal will also create an impediment to long-term, mutually beneficial, collective bargaining. As matters stand, a union could enter into, say, a three year pay deal and be reasonably confident that it would be honoured by the employer. That may be an incentive for the union to make concessions for the benefit of the business. If there was then a transfer during the three year period, the three year pay deal would be protected as a contractually incorporated term.

The position would be very different under the government's proposal. In the event of a transfer during the first two years of the pay deal, it would become open to the transferee to seek to re-negotiate the deal one year after the transfer.

It is true that, absent the transfer, the employer could have sought to re-negotiate the three year deal during its currency and it might have chosen to do so. But, an incoming transferee would be much more likely to feel (at best) ambivalent about honouring an agreement it had not negotiated itself and which it could now vary by agreement. It is all to easy to envisage long-term collective agreements simply refusing to be honoured. The necessary consequence is that union would be less likely to enter into long term agreements.

b) If, contrary to what we have said, variations to collectively bargained terms are to be permitted after a year, there should be a requirement that any change should be no less favourable than the terms applicable before the transfer.

c) The question is misplaced. The outcome of the Alemo-Herron case is likely to be a determination as to whether or not the dynamic approach currently operating in the United Kingdom is *permissible* under the Directive. If the Opinion of Advocate General Cruz Villalon is followed, the answer to that question will be “yes”. We think it unlikely, in the light of the Advocate General’s opinion, that the Court will rule that a static approach is *required* by the Directive.

Repeating the point we made in our answer at a), we think that there are overwhelming grounds, given the legal structure in the United Kingdom, for preserving the dynamic approach adopted though cases such as Whent v Cartledge24 and BET Catering Services Ltd v Ball.

And there are further grounds for retaining a dynamic approach. The expectations of the employees who have the benefit of dynamic clause in their contracts are certainly that those dynamic clauses will continue to be honoured unless and until the terms are varied validly or the contract is terminated.

Further, it may well be the case that the introduction of such a measure would constitute a disincentive or restraint on the use by employees of union membership to protect their interests in contravention of Article 11 of the European Convention on Human Rights26.

A particular issue would arise in relation to the application of section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). That provision, which is intended to implement the Strasbourg Court's judgment in the Wilson case, makes it unlawful for a worker who is a member of an independent trade union to have an offer made to her or him if acceptance of the offer, together with other worker's acceptance of offers made to them, would have the "prohibited result". The "prohibited result" is that any of the worker's terms and conditions of employment will no longer be determined by collective agreement. The intent of the proposal is, to use the government's language, to unburden business from the effect of collectively bargained terms. Yet, if the proposal is implemented and employers do seek to use this facility as a means to move away from collectively bargained terms, they would apparently be inviting Employment Tribunal claims under Section 145B TULRCA.
It may also be possible to characterise ongoing entitlements under dynamic clauses as property or possessions for the purpose of Article 1 Protocol 1 of the Convention27, meaning that any interference would require justification.

27 See Murungaru v Secretary of State for the Hoe Department and others [2008] EWCA Civ 1015

Further, if the government were somehow to seek to impose a requirement for a static interpretation for contractual terns derived from collective agreements, that would offend basic principles of ordinary contract law. As matters stand, once a term has become incorporated into a contract of employment, or any other contract for that matter, it has the same status as any other express term of the contract. To provide somehow that a dynamic incorporation clause morphs into a static clause on a transfer of an undertaking would be to make a unique example of collectively bargained terms and their incorporation into contracts of employment.

d) No.

Question 6:
Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? Yes/No

No.

a) If you disagree, please explain your reasons.
b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

We think that the existing structure of regulation 7 is likely to be the most accurate implementation of Article 4 of the Directive.

We refer back to what we say about the way in which the Court of Justice does not make the same distinction between variations which are by reason of the transfer and variations which are for a reason connected with the transfer (see in particular paragraphs 43 and 44 of the Court's judgment in Martin). We think the same applies to dismissals by reason of, and for reasons connected with, the transfer.

We also believe that Article 4 does preclude dismissals which are for a reason connected with the transfer which are not for an economic, technical or organisational reason entailing changes in the workforce.

This interpretation of Article 4 is supported by the Court of Justice's decisions in Bork28 and Jules Dethier.

b) No.

As we have said, in Martin the Court of Justice uses the phrases "by reason of the transfer" and "for a reason connected with the transfer" interchangeably. According to the Court of Justice in that case, variations for both types of reason are not permitted by the Directive.

Further, Article 4 of the Directive permits dismissals for a reason connected with the transfer which are also for an economic, technical or organisational reason entailing changes in the workforce. There is no such exception, either in the Directive or the Court's case law, for variations to terms and conditions.

Question 7:
Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? Yes/No

No.

a) Please explain your reasoning.

It is clear that the remedies available where the employee is entitled to terminate the contract of employment in the circumstances envisaged by Article 4(2) are for Member States to determine - subject to the restrictions we set out below.

We do not think that it is safe to rely on the Court of Justice's decision in the Juuri case (which is not reported and has been the subject of little academic commentary) as establishing that Member States have a free hand, subject to providing for notice payments and other benefits during the notice period, to determine the remedies available where the contract is terminated in the circumstances envisaged by Article 4(2).

First, that case was heavily influenced by the fact that the substantial detriment relied upon was the expiry of a collective agreement and its replacement with another. The fact that the detriment operated *"independently of any failure on the part of the transferee employer to fulfil its obligations under that directive"* is specifically referred to when the Court gives its conclusions on this aspect.

Secondly, as acknowledged by the Court of Justice in the Juuri case, the freedom to choose ways and means of ensuring that a Directive is implemented does not affect the obligation incumbent on all Member States to adopt in their national legal systems all measures necessary to ensure that the directive concerned is fully effective in accordance with the objective it pursues. Further, as the Directive is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor.

The government will not be meeting those requirements if it simply copies out Article 4(2) of the Directive. Instead, it will be introducing a measure guaranteed to lead to more uncertainty and litigation.

Question 8:
Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purpose of the Employment Rights Act 1996? Yes/No

No.

a) If you disagree, please explain your reasons.

Save that Regulation 7(1)(b) expresses the "reason" in the singular, the operative wording is exactly the same as that set out in Article 4(1) of the Directive, which provides "……economic, technical or organisational reason entailing changes in the workforce".

We are not aware of any decision of the Court of Justice touching on the definition of "workforce" in Article 4(1). But courts in the United kingdom have consistently held that the term "workforce" connotes *"the whole body of employees as an entity: it corresponds to the strength or establishment"*. That definition of "workforce" adopted by the courts in the United Kingdom does not include the location at which the work is carried out. There is no reason to suppose that the Court of Justice would define the same word any differently. There is a further reason to support this definition of the word "workforce" for the purpose of Article 4(1).

The words "….entailing changes in the workforce……" must be taken to qualify the preceding words "….economic, technical or organisational reason…". If they didn't, they would be superfluous. And if location was to be included within the concept of workforce, it is difficult to see why other aspects of terms and conditions would also not be included within the definition of "workforce".

Therefore we do not think that the proposal put forward by BIS can be accommodated within Article 4(1) of the Directive.

Question 9:
Do you consider that the transferor should be able to rely on the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? Yes/No

No.

a) Please explain your reasons.

The current position - that a transferor is not able to rely on a transferee's ETO reason - is based on domestic law. But it is based on domestic case law which considers and interprets Article 4(1) of the Directive ie the Hynd v Armstrong case. As was recognised by the Court of Session in that case, the Court of Justice's decision in the Dethier case is not relevant because in that case the Court was not considering the situation of a transferor relying on a transferee's ETO reason.

The Court of Session's reasoning in Hynd v Armstrong is sound. It correctly construed Article 4(1) of the Directive as meaning that an ETO reason relied upon by the transferor to justify a dismissal as fair had to be its own ETO reason. It added that there was no reason why the transferor should be able to rely on a transferee's ETO reason when it didn't have a valid one of its own.

As the Court of Session remarked, that conclusion was fortified by two further considerations. First, there are the insolvency situations referred to at paragraph 7.77 of the consultation document. If the transferor is insolvent, there would be every incentive, if the transferor were able to rely on the transferee's ETO, for the transferor to dismiss the employees to make the sale of the business more attractive. This would subvert the purpose of the Directive. In our view, avoiding this outcome should be given more weight than permitting such dismissals so as to make the purchase of the business a more attractive proposition.

Secondly, we consider that the prospect of enabling a larger pool for redundancy selection purposes is a factor in favour of maintaining the current position. It is likely that any impact in terms of a larger pool will favour the employees whose employment is to transfer. That is in accordance with the purpose of the Directive. It may also be more likely that collective redundancy consultation obligations would be triggered.

Article 4(1) of the Directive does not, in our view, permit the government to amend TUPE so as to enable transferors to rely on transferees' ETO reasons - and there are sound policy reasons for this.

Question 10
Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purpose of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992, therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? Yes/No

No.

a) If you disagree, please explain your reasons.

We doubt whether such an approach would be permitted by the Collective Redundancies Directive. Article 2 of that Directive provides that the consultation obligation is triggered when an employer contemplates collective redundancies. And it is the employer which has to begin consultations. The transferee, of course, will not be the "employer" in advance of the transfer.

From the employees', and their representatives', perspectives, there has long been a defect at the heart of the information and consultation obligations. The widely held view is that the transferee is not required to consult with the employee representatives of the transferring affected employees in advance of the transfer. The reason for this is that the obligation to consult contained in Regulation 13(6) applies only to an employer of an affected employee which envisages that it will take measures in relation to an affected employee.

It would be grossly unfair if the transferee were to be able to take advantage of an ability to consult about collective redundancies before the transfer without at the same time being required to consult with those employee representatives for the purpose of Regulation 13 of TUPE.

There is also the issue of pool selection for redundancy purposes we have already referred to. If consultation is effectively allowed to start before the transfer in respect of redundancies to be made after the transfer, it is virtually certain that the pool selected will include only employees of the transferor, thereby denying them the opportunity to advance a case for a selection pool encompassing the transferee's existing employees.

Further, the consultation required by TULRCA relates not only to the employees to be dismissed, but also to the employees who may be "affected" by the proposed dismissals or by measures taken in connection with them. If pre-transfer consultation is allowed to count, there is every chance that there will be two groups of employees under consideration - those employed by the transferor and those otherwise "affected" employees of the transferee. We don't see how the consultation could work effectively in those circumstances.

There are also practical reasons why the government's suggested approach should not be adopted. First, the employee representatives for the transferor's transferring affected employees will probably not be familiar with the workings and business of the transferee before the transfer. It is unrealistic to expect them to be in a position to consult about ways of avoiding dismissals, reducing the numbers of employees to be dismissed and ways of mitigating the consequences of the dismissals in advance of the transfer. It may well even be unrealistic to expect transferees to be in the necessary state of readiness in advance of the transfer to supply sufficient information to the transferor workforce's employee representatives. These points carry particular weight as the government introduces measures to shorten the period within which consultation must commence where 100 or more redundancies are proposed.

It is essential to have in mind that the purpose of the Collective Redundancies Directive is to find ways of *avoiding* dismissals, reducing their numbers and mitigating the consequences. It is not to enable redundancies to be rushed through as quickly as possible.

A problem which has always existed with the consultation obligations under TUPE would also be exacerbated if the transferee were to be allowed to consult about collective redundancies in advance of the transfer.

Question 11:
Rather than amending Regulation 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No.

a) Please explain your reasons.
b) If you disagree, what would you propose is a reasonable time period?

Further provisions contained in guidance are less likely to be legally enforceable than if they appear in the Regulations themselves. We do not think it is either necessary or appropriate to put forward a fixed time period.

Question 12:
Do you agree that the regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employees representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? Yes/No

No.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees) Yes/No

In our view, amending Regulation 13 to permit micro businesses to inform and consult directly with affected employees without making arrangements for the election of employee representatives is not permitted by Article 7 of the Directive.
As the Court of Justice held in European Commission v United Kingdom37, the objective of what is now Article 7 is to enable employees to be informed and consulted about the transfer through their representatives. It is not open to Member States to permit a situation to exist whereby employers are not required to inform and consult employee representatives.

37 Commission of the European Community v United Kingdom of Great Britain and Northern Ireland [1994] IRLR 392

There are two exceptions to this. The first is that provided for in Article 7(5) of the Directive, which permits Member States to limit the obligations of paragraphs 1,2 and 3 *"…to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees"*. In the United Kingdom, there is no such condition for the election or nomination of a collegiate body representing the employees. The first exception is not therefore available.

The second exception is where the employees, through their own default, fail to elect employee representatives. Unless the employees fail to elect representatives, that exception is not available.

Question 13:
Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? Yes/No

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes/No
c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

It will be apparent that we oppose all of the amendments proposed by the government – mostly on the grounds that they introduce greater uncertainty and/or do not comply with the Directive.
Whatever the government decides to do by way of amendment, the amendments should apply equally to micro businesses. To provide otherwise would lead to the intolerable position of different provisions applying to different organisations. Quite apart from being confusing and unfair, that may well be, to coin a term much favoured by BIS, "anti-competitive".

Question 14:
Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes/No

We believe that all of the proposals are fundamentally flawed, for the reasons given above.

Question 15:
Have you any further comments on the issues in this consultation?

No.

Question 16:
Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? Yes/No

They will have a negative impact.

Please explain your reasons.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

In our view, the quality of the Equality Impact Assessment is woefully inadequate given the extent and potential impact of the proposals put forward by BIS.

It is inevitable that the proposals, if implemented, will have a negative impact on equality and diversity within the workforce. Despite what is said at page 53 of the Impact Assessment document, it must be the case that the introduction of SPCs in 2006 extended the coverage of TUPE to many low paid workers who would not previously have been protected. To remove that protection will necessarily have an impact on the low paid.

We also believe that there will be disproportionate impact on women (particularly where they are low paid) and those with disabilities, and possibly by reference to ethnicity and religion or belief.

We are surprised that these potential impacts were not explored more thoroughly before the proposals were published.

Question 17:
Do you agree with the analysis and evidence provided in the Impact Assessment? Please details for any area of disagreement or if you can provide any further knowledge in an area.

No.

Page 2 of the Impact Assessment seeks to answer the question why government intervention is necessary in relation to TUPE. The answer is laced with unsubstantiated propositions and anecdote: that TUPE could be creating an unnecessary burden on business, reducing the efficiency of the supply side of the economy and that the consultation is driven by "other feedback" and by the increase in Employment Tribunal cases related to TUPE (a claim which we address below).

The policy objective to be achieved is simplification of TUPE and cutting out "unnecessary gold-plating".

We don't think that stated policy objective is consistent with the rationales given for the separate proposals in the consultation document, which are more to do with conferring advantages on employers at the expense of workers.

The specific analysis and evidence for the removal of SPCs points out that transferors *"could end up with surplus employees, whilst the transferee needs to recruit"*. According to the evidence presented by BIS, up to 40,000 SPCs per year may be removed from the scope of TUPE. We consider it to be inevitable that removing SPCs from TUPE coverage will lead to significant job losses. Further, the associated redundancy costs will lie with the transferor and, in the public sector, that means public sector employers (or for insolvent employers, the Exchequer).
BIS offers no evidence to support the repeated proposition that SPCs lead to under-performing employees being deliberately included within the transferring employees.

And the department does not even attempt to advance a cost benefit, even for employers, beyond the recoupment of the £13million to £30million benefits estimated to have accrued to individuals arising out of the introduction of SPCs.

The specific analysis for changing the wording of restricting changes to terms and conditions does not even set out a description of the monetised costs for the main affected groups. A key risk is identified in terms of employers potentially not being confident enough to avail themselves of the amended provisions even if they are introduced. We think that this should have been, and should still be, properly investigated.

On the analysis and evidence in relation to limiting the effect of collective agreements, although it is an objective we condemn, the government is at least clear in why it is proposing these changes: to make it easier for non-unionised employers to bid for contracts and avoid having to pay unionised terms and conditions.

The other specific analyses and evidence for specific proposals follow in similar vein. There is no quantification and analysis of costs and benefits. There are occasional statements as to how particular measures might lead to beneficial results for employers.

Whilst we appreciate the difficulties in obtaining data as to the number of TUPE transfers each year, the evidence produced at pages 22 to 24 is at best unconvincing. The only

conclusion which can sensibly be drawn is that BIS doesn't really know how many standard transfers, and how many SPCs, there are each year. That is not an encouraging position from which to propose wholesale changes to the Regulations.

But perhaps most objectionable is the use of the Employment Tribunal Data to reach the conclusion that: *"…In summary, the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims".*

As the consultation document acknowledges, the only claims which are recorded as being TUPE-related are claims relating to information and consultation. And claims in this category have risen from about 1000 in 2006/2007 to about 2500 in 2011/2012. This is against a background of TUPE applying to something less than 37,000 transfers in 2006 and around 77,000 in 2011/2012. It is acknowledged by BIS that, with so many TUPE transfers taking place each year, this is still a comparatively low number of Tribunal cases and that TUPE legislation should be viewed as an area where there is good compliance.

But the figures for information and consultation cases can not possibly provide a reliable picture of the overall operation of the Regulations. The great majority of TUPE-related claims do not present themselves as claims for a failure to inform and consult. They are instead claims for unfair dismissal and unlawful deductions from wages, which types of claims are likely to engage many of the issues raised in this consultation.

It is, at best, misleading to say that figures for failure to inform and consult cases under TUPE can be used as a driver for the subject matter of this consultation.

GC100

This submission is on behalf of the Association of General Counsel and Company Secretaries in the FTSE 100, generally known as the GC100. There are currently 127 members of the group, representing 82 companies in the FTSE 100.

The GC100 is grateful for the opportunity to respond to this consultation on proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Our response on the matters on which you are seeking views is set out below.

Please note, as a matter of formality, that the views expressed do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?
Yes No

a) Please explain your reasons:

The GC100 does not agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes for the reasons set out below.
The GC100's main objection to the proposal is that it will create uncertainty about whether TUPE applies to outsourcings (and in particular to second and third generation outsourcings).

The current rules have the benefit of clarity and predictability for all parties concerned. Employees know who their employer will be and there is less scope for an incoming supplier in a second or third generation outsourcings to argue that TUPE does not apply. In the GC100's experience, global outsourcings are much easier to negotiate in the UK than in other European countries to which the Acquired Rights Directive (*2001/23/EC*) (the Directive) applies because the parties accept that the outsourcing is caught by TUPE.

In contrast, the removal of the service provision change rules and alignment of the definition of a transfer with that in the Directive would risk a return to the unpredictable and inconsistent situation resulting from the domestic case law under TUPE 1981.

The position will actually be more complex and less straightforward than it has been since 2006 (given the need to determine whether there is an economic entity that will retain its identity after the transfer by reference to the principles in *Ayse Süzen Gehnacker Gebaudereneinigung GmbH, Krankenhausservice [1997] IRLR 255 (ECJ*)). This is likely to lead to an increase not a decrease in litigation. It will also result in unnecessary additional management time spent negotiating whether TUPE applies on a change of service provider when previously the parties would have simply accepted that it did apply.

In the GC100's view, the service provision changes should be retained. However, some of the GC100's members consider that it would be sensible to introduce an exemption for professional services.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

As the GC100 considers that service provision changes should be retained it does not consider that any additional amendments can or should be made to the legislation in order to align it more closely to the test under the Directive. If the service provision change legislation were to be repealed, then it would be preferable to make clear in the legislation, consistent with the case law on the Directive, that an economic entity for its purposes can be established by reference to an organised grouping of employees as well as an organised grouping of resources.

In the view of the GC100, any attempt in an amended TUPE to address the pre-2006 lines of authority based *on RCO Support Services Ltd v Unison* [*2002] IRLR 401 (CA)* and *ECM (Vehicle Delivery) Ltd v Cox [2002] IRLR 401* (CA) would be misguided and would only succeed in increasing the risk of further uncertainty. Such amendments could seek to remove from the test of whether there is a transfer of an undertaking the *potential* relevance of the motive of the alleged transferee in not taking on the relevant employees and could seek to ensure that the principle established in *Ayse Süzen Gehnacker Gebaudereneinigung GmbH, Krankenhausservice [1997] IRLR 255* (ECJ) has primacy such that the mere transfer of a service contract without more could not constitute a transfer of an undertaking.

The GC100 considers that the domestic case law prior to 2006 demonstrates the width, flexibility and truly multi-factorial nature of the test under the Directive and regulation 3(1)(a) of TUPE. Consequently, to seek to amend the generality of the test derived from the Directive and its ECJ and domestic case law would risk breaching the overall multi-factorial approach declared applicable by the ECJ in *Spijkers v Gebroeders Benedik Abbatoir [1986] CMLR 296* (ECJ) and therefore risk uncertainty and challenges to the validity of any such amendments in terms of their compliance with the Directive.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?
(i) less than one year (ii)1- 2 years (iii) 3-5 years (iv) 5 years or more

As stated in the response to Question 1 above, the GC100 is not in favour of the complete repeal of the service provision change rules.

However, if the Government does repeal these rules, the GC100's view is that a sufficiently long lead-in period would be required in order to:

- Allow current contracts to come to an end.
- Enable commercial parties to renegotiate exit provisions in current long-term contracts to protect the outgoing supplier/customer if, as a consequence of

GC100 Response: Consultation on Proposed Changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 the repeal of the service provision change legislation, TUPE does not apply on termination of the contract.

Enable those service providers who may face unexpected and material redundancy/termination liabilities on cessation of their contracts to be able to manage their staffing arrangements over time to mitigate the liabilities they might then face as a consequence of the repeal of the service provision change legislation.

One option would be to include transitional provisions which provide that if a transfer of service takes place in respect of a contract which was entered into before the repeal date then TUPE would still apply to transfer staff to the successor supplier. Transfers taking place under contracts entered into after the repeal date would be subject to the new rules. This would of course lead to a commercial premium being applied by the successor supplier or on the extension of existing contracts.

It is extremely difficult to set a time frame, as repealing the provisions will create difficulties whenever the repeal comes into effect. For example, the length of contracts may vary significantly in different industries. However, given the difficulties inherent in managing this sort of change and the cliff edge nature of any specific implementation date for the repeal of service provision changes, the GC100 would prefer a lead in period of more than 5 years if the regrettable step of repealing the service provision change legislation is taken.

a) Do you believe that removing the provisions may cause potential problems?
Yes No

c) If yes, please explain your reasons.

Please see answer to Question 1 above.

Question 3: Do you agree that the employee liability information requirements should be repealed?
Yes No

a) If yes, please explain your reasons.

The GC100 does not consider that the employee liability information (ELI) requirement should be repealed. The GC100 proposes that the requirement should be retained, but the list of information to be provided by the transferor and the associated provisions should be amended in order to ensure that the obligation is improved and made more useful to the commercial parties to a TUPE transfer, with consequent additional benefits for the affected employees whose positions and entitlements would then be confirmed by the transferor more comprehensively in advance of transfer. (This point is recognised in paragraph 7.28 of the Consultation.)

In the GC100's view, it is helpful to have a statutory requirement on the transferor to provide specific employment-related information to the transferee. This is particularly important in second and third generation outsourcings in circumstances where there is no contractual relationship between the outgoing and incoming supplier and the outgoing supplier refuses to co-operate with the incoming supplier. Furthermore, it is in transferring employees' best interests to have correct information with regard to their terms of employment supplied to the transferee. However, the majority of opinion within the GC100 is that the list of employee liability information currently prescribed is inadequate and should be expanded but in any event should remain certain in its scope (for example, in relation to accrued holiday, restrictive covenants, share option entitlements, health and safety and personal injury records, trade union recognition and other consultation arrangements and the like).

If the Government does decide to expand the list of employee liability information, the GC100 considers that there should be a relatively long lead-in period before this change would take effect. This would enable employers to make any necessary changes to their internal record keeping and other procedures in order to enable them efficiently and without undue burdens to provide such additional information (such as, centralising the information).

Information which in any event should be included in an expanded list of employee liability information in addition to that currently prescribed could include:-

- Details of employee consultation arrangements.
- Copies of any applicable recognition agreements and collective agreements.
- Copies of employees' contracts.
- Copies of all applicable employment policies and staff handbooks.
- Pension contribution rates.
- Job description setting out the 5 key tasks, skills and experience of transferring employees.
- Full details of contractual and non-contractual benefits and transferring employees' locations.
- Full details of contractual and non-contractual policies and procedures.

The GC100 is firmly of the view not only that the ELI obligation should be retained but also that the requisite and preferably expanded ELI should be provided at an earlier stage than the current latest date for provision of (in principle) 14 days before transfer. The options would either be an earlier long stop date of a minimum of 28 days prior to transfer (with some of our members considering 40 days to be appropriate) - which would be the GC100's preference - or a flexible requirement that the ELI be provided sufficiently far in advance of transfer to enable the transferee to identify, and inform the transferor of, any measures which it would envisage taking in respect of the transferring employees. To amend the ELI provisions in this way would assist the smooth handling of the transfer process. If the parties agree to exchange the ELI earlier than the long stop date, it would also be useful for the legislation to confirm that named data may nonetheless still be provided (without breaching the Data Protection Act 1998).

However, if the government does repeal the ELI obligations and places the obligation to exchange information on the transferor and the transferee, then there should be certain safeguards to ensure that a transferor is incentivised to provide the information requested. Currently, there is a penalty of at least £500 for each transferring employee in respect of whom a transferor fails to comply with the ELI obligation. It would be sensible to increase this penalty so that there is a meaningful sanction if sufficient information is not received in relation to a transferring employee.

b) Would your answer be different if the service provision changes were not repealed?

As explained in the answer to Question 3(a) above, the position would be more difficult without the service provision change rules because of the absence of a contractual nexus between outgoing and incoming suppliers in second and third generation outsourcings. There is a significant concern that removal of both the service provision change rules and the employee liability information requirement would widen the risk for incoming suppliers of inadvertently inheriting employees that they were not expecting to transfer. This is particularly so because some of the service provision changes would still be caught under the transfer of economic entity rules.
Nonetheless, even if the service provision change legislation were repealed, the employee liability information obligation is crucial to protect those transferees who do not have the benefit of contractually negotiated warranties, indemnities and transfer provisions to ensure they are adequately informed about and aware of the liabilities which they inherit with the transferring employees.

c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

In the GC100's view, it would be much simpler to retain the requirement to provide specific employee liability information. In the absence of a specific statutory list of information, there is scope for dispute about what information the transferor should supply to the transferee in order for them both to comply with their obligations under regulation 13. It is conceivable that transferees would argue that they require a prohibitively long list of information, given the broad meaning of "measures" (for the purposes of regulation 13(2) and 13(6)). The transfer of the information obligation to regulation 13 in this way would risk increased uncertainty and litigation. A specific and detailed obligation imposed on the transferor would be preferable to a generic obligation to disclose information necessary to enable the transferor and transferee to perform their duties under regulation 13.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?
Yes No

a) If you disagree, please explain your reasons.

The GC100 is not persuaded that the proposal to remove transfer-related reasons from the prohibition on changes to terms will make a substantial difference. There seems to be little judicial guidance on the difference between "by reason of the transfer" and "connected

with the transfer". Therefore, it does not necessarily follow that it will be easier to effect changes in terms as a result of the removal of the words "a reason connected with the transfer". Nonetheless in order to align the domestic legislation with the Directive and to improve the business flexibility that this would produce the GC100 considers that this proposal should be implemented.

The GC100 also agrees that it would be useful for regulation 4 to specifically provide that it will be possible to make changes that could otherwise have been made under national law (that is, to reflect the ECJ's decision in *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988]* IRLR 315 (ECJ)). In particular, it would be extremely helpful to specify in regulation 4 that employers are permitted to offer employees the option of transferring over on their current terms or accepting the transferee's new terms (without cherry picking between the two).

Under the current arrangements, it is not clear whether an employee's agreement to accept the transferee's terms in preference to their existing (transferor) terms would be void, which results in the unnecessary circumstance of an employee being required to object to the TUPE transfer and/or sign a compromise agreement in order to (voluntarily) accept the transferee's terms and conditions. The fact that an employee cannot voluntarily agree changes to their terms does not make sense when the rest of the workforce that is unaffected by TUPE would be able to agree such changes

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

For completeness, and to ensure flexibility where there is nonetheless some form of connection between the contract change and the transfer, the GC100 considers that this exception should be retained even though in practice its experience is that the application and value of this exception is rare. If the proposal in question 8 is adopted (expressly to provide that relocation can constitute an economic, technical or organisational reason entailing changes in the workforce (ETO reason)), this provision could become more useful to employers in terms of increasing their flexibility to offer appropriate rates of pay following a relocation to a different job market.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?
Yes No

a) Please explain your answer.

Assuming that the ECJ follows the AG's opinion in *Parkwood Leisure Ltd v Alemo-Herron (C-425/11)* (namely, that a dynamic interpretation of TUPE applies in relation to collective agreements which are re-negotiated after the transfer), then the GC100's view is that it would be useful to include a provision reflecting Article 3.3 of the Acquired Rights Directive limiting the requirement on the transferee to observe collectively agreed terms up to at least one year after the transfer.

b)Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?
Yes No

The GC100's view is that the suggested proviso that any changes to terms after that point should be "no less favourable overall than the terms applicable before the transfer" goes further than the requirements of the Directive and is unnecessary.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?
Please explain your answer.

The change would not be required if the ECJ decides that a static approach applies.

D) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?
Yes No

Other than making the changes referred to above with regard to the ability to change terms and conditions of employment, the GC100 does not consider that any other changes are required.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?
Yes No

a) If you disagree, please explain your reasons.

The change would be beneficial on the basis that it would make it, in theory, easier for employers to dismiss and re-engage employees after the transfer without the risk of an automatically unfair dismissal claim. To reflect more precisely the GC100

Response: Consultation on Proposed Changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 wording of the Directive would ensure that TUPE goes no further than necessary to implement the Directive into domestic law. Arguably, potentially prohibiting dismissals connected with, rather than those the reason for which is, the transfer goes further than the Directive strictly requires. However, as previously stated in the answer to Question 4, it is not clear to the GC100 that removal of transfer-connected reasons would necessarily achieve this (given the blurred distinction between dismissals

that are by reason of the transfer and those that are for a reason connected with the transfer).

Furthermore, in the experience of members of the GC100, disputes tend to centre on whether there is an ETO reason rather than whether the dismissal is by reason of the transfer or for a reason connected with it. That said, if the wording of the provision was confined in the way proposed there would be more focus on the issue of causation and where a dismissal was because of rather than connected with the transfer. There would still be the potential for dispute but the domestic legislation would more closely match the provisions of the Directive.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?
Yes No

As the principles of invalidity are the same effectively under the Directive, it makes sense for the two tests to be the same.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?
Yes No

a) Please explain your reasoning.

In the GC100's view, this could be a valuable amendment as it would enable employees to leave with some form of compensation if there are changes which are to their disadvantage post transfer but which do not amount to breaches of contractual terms. The position would be simpler and more certain if the consequences of objection in such circumstances would be service of, or compensation for, the applicable notice period rather than an unfair dismissal claim. Employees would still be protected by being entitled to their notice period or damages in respect thereof if they chose to leave in such situations rather than leaving without notice as would be the case under a "simple" objection to transfer.

That said, in the opinion of the GC100, it would be preferable for any amendment explicitly to specify the implications of termination (namely, that an employee would not be deemed to be dismissed and would only be entitled to notice pay) rather than simply copying out Article 4(2) of the Acquired Rights Directive and having to rely on ECJ case law for interpretation, which would leave the situation unclear. In cases of breach of contract, a traditional claim of constructive dismissal of course remains available for employees under the existing regulation 4(11). On this basis, the GC100 does not agree that a "copying out" amendment as proposed should be made but would support a change to regulation 4(9) specifiying that the consequence of reliance on its provisions would be a wrongful dismissal claim if the applicable notice period were not actually served out or (where provided for in the contract of employment) paid out, in accordance with the contract of employment

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes No

The GC100 agrees that the current situation is unworkable and considers that expressly including relocation as an ETO reason would be a very sensible change.

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?
Yes No

a) Please explain your reasons.

The GC100 agrees that the proposal is helpful for transferees; particularly in combination with the proposal to include relocation as an ETO reason. However, the proposal does not take account of the risks and practicalities for the transferor of pre-transfer dismissals under normal unfair dismissal principles (given that liability for normal unfair dismissal, as opposed to automatic unfair dismissal, remains with the transferor). For example, transferring employees who are dismissed prior to the transfer may argue that they should have transferred to the transferee and been pooled with the transferee's staff.

The GC100 would, however, be comfortable with such a change as the transferor would not be obliged to rely on this provision. It would in practice be a matter for agreement between the transferor and transferee.

Nonetheless, this proposed amendment would improve flexibility and efficiency in circumstances where, for example, relocation makes redundancy at the point of transfer inevitable. Furthermore, the proposal could help encourage a rescue culture where the transferor company is insolvent. Administrators would have more scope to effect pre-sale redundancies and the transferee would be less concerned about the transfer of liability for automatically unfair dismissal.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?
Yes No
a) If you disagree, please explain your reasons.

The GC100 believes that this amendment would be extremely helpful for all parties. The current situation can result in employees transferring over to the transferee only to be made redundant shortly afterwards. This is clearly very challenging for employers and employees alike. Transferees have to pool transferring employees with their existing employees, even though they do not know them. This makes it difficult to achieve a fair selection process.

Commercially, the transferor will often pick up redundancy costs whether they are incurred pre or post transfer. The proposal would allow the transferor to take control of the

redundancy process which can be particularly helpful from an employee relations perspective.

From a practical perspective, the proposal would mean that the transferor and transferee would need to co-operate with each other. For example, the transferor would have to give the transferee access to the appropriate employee representatives for a particular pool and to provide the transferee with full information so that it can complete the form HR1. Consultation could take place at the transferee's offices to manage any concerns that the transferor may have regarding confidentiality.

The proposal would also allow transferor employers to deal more flexibly with employees who do not want to transfer and who ask the transferor to make them redundant.

The Trade Union and Labour Relations (Consolidation) Act 1992 would also need to be amended to reflect this change. In addition, consideration should be given to the Collective Redundancies Directive (98/59/EC) to ensure that any such change was consistent with the Directive.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?
Yes No

a) Please explain your reasons.

The GC 100 agrees that it is impracticable to define in legislation what amounts to a "reasonable time". It will vary depending on the size and scale of a particular transaction.

In any event, GC100's members have not encountered this as a real practical problem in the past. In limited cases where this has been an issue, guidance would be helpful.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?
Yes No

The GC100 agrees that regulation 13 should be amended to allow micro businesses to inform and consult affected employees directly where there are no elected representatives. The proposed amendment reflects what happens in reality.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?
Yes No

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?
Yes No

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

The GC100 considers that micro businesses should be subject to all aspects of TUPE. To exclude micro-businesses would potentially impact adversely on the other parties involved in transactions with them.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?
Yes No

The proposed amendments impose the same benefits and burdens on micro-businesses as others and correctly so in the view of the GC100 given the underlying application of the Directive to all businesses regardless of size.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

N/A

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?
Yes No

As mentioned in the answer to Question 3, the GC100 believes that if the list of employee liability information is expanded (as it recommends that it should be), a significant lead-in period would be required to enable organisations to centralise the necessary information.

A significant lead-in period would also be necessary if the requirement to provide employee liability information was removed entirely. In these circumstances, organisations would need to renegotiate existing contracts to include specific obligations on outgoing suppliers to supply employee information.

Question 15: Have you any further comments on the issues in this consultation?

No.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?
Yes No

a) Please explain your reasons

We do not have sufficient available statistics to reach any conclusions on this question.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

None available.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

We do not have any specific comments in relation to the analysis and evidence provided in the Impact Assessment.

Chartered Institute of Personnel Development (CIPD)

Background

1. The CIPD is the leading independent voice on workplace performance and skills. Our primary purpose is to improve the standard of people management and development across the economy and help our individual members do a better job for themselves and their organisations.

2. Public policy at the CIPD exists to inform and shape debate, government policy and legislation in order to enable higher performance at work and better pathways into work, especially for young people. Our views are informed by evidence from 135,000 members responsible for the recruitment, management and development of a large proportion of the UK workforce.

3. Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level. We draw on our extensive research and the expertise and experience of our members on the front-line to highlight and promote new and best practice and produce practical guidance for the benefit of employers, employees and policy makers.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

5. No. The current provisions in relation to service provision have been in force for a number of years and have attracted relatively little criticism. Indeed they were welcomed at the time by the contracting sector as introducing a more level playing field. They removed a major source of uncertainty by ensuring that most service provision changes are covered by the regulations.

6. Most employers will be unhappy if the law on this issue is restored to its pre-2006 state. A significant element in employer concerns about regulation is the frequency of change. Reversion to the earlier law will mean a combination of short-term change and continuing uncertainty. The suggestion that the existing law represents "gold-plating" will be seen to be a political argument, rather than one that reflects the likely burden on employers.

7. We would not see advantage in adopting any of the "halfway house" solutions discussed in paragraphs 7.17 to 7.21 of the consultation paper. We recognise that where a law firm, for example, has a contract to provide services to a large client and that client ceases to use that law firm, staff in the law firm that spent most of their time on work for that client may have rights under the TUPE regulations. It's not clear, however, how "professional services" would be defined for the purpose of an exemption, or on what basis exclusion of people employed in such services might be justified.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect: (i) less than one year; (ii)1- 2 years; or (iii) 3-5 years? (iv) 5 years or more?

Do you believe that removing the provisions may cause potential problems?

8. Members believe that a realistic lead time, should the Government decide to make this change, would need to be at least 2 years in order to accommodate the bidding process.

9. The problems we foresee as a result of removing the service change provisions are outlined in our response to Question 1.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

10. No. As the consultation paper recognises, the provision of employee liability information (ELI) helps make TUPE work. It is hard to see how business transfers could work in practice unless such information is supplied on a timely basis, and it is in the wider public interest to see that commercial decisions are made on the basis of reliable information. One member has commented that it would be "horrifying" to remove the ELI provisions. The substitution of a bland requirement on transferors to disclose information "where it is necessary for the transferee and transferor to perform their duties" under regulation 13 would in practice lead to more transferors neglecting this aspect of their obligations. Members agree that in many cases information is supplied at the last minute and suggest that the statutory requirement should stipulate 28 days before the transfer. Small firms cannot insist on getting indemnities against unanticipated costs arising from the transfer and are dependent on receiving timely information.

11. Paragraph 7.28 of the consultation paper sets out a model of how the ELI provisions ought to work, including their provision to the transferee at an early stage. CIPD members agree with this model and would welcome a requirement that ELI information should be supplied at the tender stage.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

12. CIPD members believe strongly that the lack of provision for post-transfer harmonisation of terms and condition is a significant burden on employers. Harmonisation under the existing TUPE regulations often involves challenging negotiations with trade unions and significant costs for the business.

13. Our preference would be that, where a change to terms and conditions is *agreed* between both parties, that should be a sufficient defence against a claim under the regulations. This should be on the basis that the employees transferring don't suffer an overall detriment to their terms and conditions. We also suggest that the agreed changes should take effect from the date of transfer to avoid the significant cost and time it is likely to create for the transferor in making these changes prior to transfer.

14. We would support the suggestion in paragraph 7.43 for copying wording from CJEU case law and prohibiting harmonisation where this is "by reason of the transfer". The precise wording may be critical in particular cases and the change considered here might have been helpful in the case of *EMS v Dance and Others*.

15. We also welcome the suggestion (paragraph 7.46) that the Government should produce guidance on how employers might approach making changes to terms and conditions. It would be important, not simply to aid understanding, but to offer employers positive advice so as to minimise the chances that agreed changes could be struck down.

16. We agree that the exception for economic, technical or organisational (ETO) reasons entailing changes in the workforce should be retained, despite the limited protection that it currently affords employers.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

17. CIPD strongly supports the proposal to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. It is not clear why an employer should be bound for an indefinite future period by collective agreements whose terms are liable to be changed on a regular basis without him having an opportunity to influence them in any way.

18. It is unclear how far this change will help employers to harmonise employment terms after a year. Changes to the terms and conditions of individual employees will still be subject to the case law surrounding harmonisation, whether or not the collective agreement continues to apply.

19. CIPD would support the suggestion that any new terms should not be less favourable overall than those applying before the transfer.

20. We note that, if the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, this may possibly make legislative change in this area unnecessary.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

21. CIPD would support amending the wording of regulation 7 as proposed, so as to align the drafting of restrictions in relation to both terms and conditions and dismissal.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

22. This proposal would make a marginal change in the regulations. However since it would in principle reduce the scope for unfair dismissal claims, while requiring the employer in return to meet terms including payment of salary during the notice period, and since it is essentially a technical change that is unlikely to require employers to change their approach to managing TUPE, it can be supported.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

23. We agree that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' should cover all the different types of redundancies for the purposes of the Employment Rights Act 1996. We share the Government's belief that the intention of the Directive is to allow dismissals for genuine business reasons and that the change proposed is consistent with that intention.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

24. Given the CJEU has said that both transferor and transferee can rely on ETO reasons for dismissal, we believe the regulations should be amended to allow the transferee to rely on the transferee's ETO. This change will enable the transferor to rely on an ETO reason to effect redundancies pre-transfer, and will be welcomed by members.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

25. There may be differences of interest between transferor and transferee in relation to the timing of consultation on redundancies. There may also be a risk that the transferee is unable to rely on an ETO reason for redundancy while the employee is still working for the transferor. Provided both parties are willing to agree, however, there can be no objection to the transferee employer discharging his statutory duty to consult employees prior to - rather than following - the transfer and this already happens in some cases. Members suggest that consultations may be more

meaningful if conducted at an early stage, though perversely this could also lead to an increase in the number of protective awards.

26. Since the transferor will anyway have to consult on the transfer, the Government might where appropriate encourage transferor and transferee to conduct joint consultations on what will often be essentially the same set of proposals.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

27. We agree that it is enough for the *regulations* to require a "reasonable" time for employees to elect representatives. Some additional *guidance* might however be helpful.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

28. In general, the CIPD does not believe that there should be separate provision for micro businesses in relation to employment protection, since this implies the creation of a dual labour market and could inhibit rather than encourage small firms to grow.

29. If a threshold is to be set for micro businesses, this should at least be consistent across different areas of legislation. Any analogy with the threshold of 20 applying to collective redundancies would be wholly false since, as the paper makes clear, this figure refers to the number of employees to be made redundant, not to the number of employees in the organisation.

30. We recognise that small businesses would find it easier to consult employees directly rather than through representatives. However there are potential benefits in holding collective consultation, in that all employees can be informed of what is proposed at the same time, and given the opportunity to develop a shared response. It would be helpful to steer micro businesses to hold some form of workforce meeting, rather than consult employees individually, though we recognise that this could hardly be done by legislation and would be better suited to guidance.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

31. Yes (see the answer to question 12 above).

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

32. Yes.

Question 15: Have you any further comments on the issues in this consultation?

33. No

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

34. We see no basis for anticipating either a positive or negative impact on equality or diversity.

The Federation of Small Businesses (FSB)

FSB response to BIS Consultation on Proposed Changes to the 2006 Transfer of Undertakings (Protection of Employment) (TUPE) Regulations

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the above named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party political, and with approximately 200,000 members, it is also the largest organisation representing small and medium sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute 51 per cent of GDP and employ 60 per cent of the private sector workforce.

Our response to this consultation focuses primarily on the proposed repeal of the provision regarding service provision changes (SPC). The FSB believes that while the 2006 regulations provided greater clarity concerning the coverage of TUPE, they have also significantly increased the potential costs to small businesses. This is because TUPE has subsequently applied to areas where it previously did not – namely, contracting out, second generation contracting out and contracting in. In these situations, transferee businesses can incur unexpected employment liabilities regardless of whether the business requires additional staff to successfully manage a new contract. This increases costs and in some cases makes it uneconomical for the business to carry out the work in question.

It is important to note that in the current economic climate the vast majority of businesses are running as cost-effectively as possible. SPC liabilities can therefore be a disincentive to bid for contracts and can also impact on service quality, in that the transferee has little control over the quality or skill level of the employees transferring. Furthermore, the SPC provisions have little regard for the client, whose reason for wishing to re-tender the contract may have been dissatisfaction with workers on the existing contract.

While small businesses with existing contracts will be affected by the repeal of the SPC, on balance the FSB supports the changes. However we believe the process of repeal needs to be managed carefully, and should be phased in gradually to give businesses with existing contracts sufficient time to plan for the changes to the law and make any necessary restructuring to their workforce. Given the duration of contracts can vary substantially, we would suggest a minimum lead-in time of 5 years. An alternative option would be to fix the lead-in period to the lifetime of individual contracts. In practice, this could work by delaying repeal until the next but one transfer, in other words TUPE would apply to the next transfer of a service contract, but not the one after that. The benefit of this approach is that it would level the playing field between existing and prospective contractors, since both would bid for the contract at the next letting in the knowledge that they would be liable for any subsequent redundancy costs once the contract ends, as TUPE will no longer apply. Each business would be able to price this additional risk into their bids. We would suggest that Government explores further the merits of this approach before making a final decision on the repeal procedure.

Among the other proposed changes to TUPE in the consultation, the FSB welcomes the proposal to limit the future applicability of terms and conditions derived from collective agreements to one year from transfer. By and large, employers will protect jobs in TUPE transfers as far as is feasibly possible but it remains anathema to business that transferee employers are bound by collective agreements that they were not even a party to and have no power over.

While we would generally welcome any change of wording to the provisions restricting changes to contracts to bring them closer in line with the wording of the Acquired Rights Directive, and we would support the establishment of Government guidance in this area to bring further clarity to business, we believe the Government could go further to address the restrictions on harmonising terms and conditions post-transfer which can be a big disincentive to transferees. BIS notes that 'there is no express provision in the Directive prohibiting changes to terms and conditions', but is mindful of existing case law in this area. We would encourage the Government to explore the possibility under the Directive, of altering existing provisions so that employees could agree to changes to their terms and conditions of employment post-transfer (in the same way that they can agree in any other scenario of changing terms and conditions). This would help reduce the burden on transferees and in insolvency cases, increase the likelihood that jobs can be safeguarded. Importantly, employees would still have sufficient protection because any changes to their terms and conditions of employment could not be made unilaterally by the employer i.e. without the employee's express agreement.

After careful consideration, the FSB does not support the proposal to repeal the Employee Liability Information provision (ELI) under the current TUPE regulations. We agree that there are problems with the current provisions requiring information to be made available at least 14 days before transfer (as it encourages some transferors to withhold information until the latest possible opportunity), but we do not believe the solution is to remove the 14 day requirement. On the contrary, many businesses have argued that it should be extended. The FSB feels the proposal to amend regulation 13 to allow the 'exchange of information to be resolved by the parties to transfers' and encourage the transferor to 'disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties regarding information and consultation' is too vague, and it remains to be seen how this will work in practice and be interpreted in the courts. While the use of model terms for contracts on the provision of information, including the scope of such information, would be useful, this should complement rather than replace the existing 14 day requirement.

Furthermore, if the repeal of ELI were to come in prior to the repeal of the service provision changes, this will create substantial difficulties for transferees in second generation contracting-out situations, who are disproportionately affected because they have no form of contractual relationship with the transferor in order to be able to discuss, obtain information and negotiate. We have said in the past that it would also be helpful to introduce a pre-bid disclosure requirement on the customer (the contract giver) rather than everything being reliant on the transferor, who may be uncooperative having lost the contract to a rival. Our view on this has not changed.

Lastly, the proposal to allow micro businesses to consult directly with individuals rather than through representatives is welcome. Under the current TUPE regulations, micro businesses have to go through the process of electing a representative and holding a ballot. Not only can this process be very time consuming, it is often not in the interests of

the employees (in such a small workplace, it would be easier and less intimidating to consult directly with them).

We trust that you will find our comments useful and that they will be taken into account. We also ask you take into account comments made by the FSB during a recent meeting with BIS officials to discuss the proposed changes.

Confederation of Passenger Transport (UK)

Please tick the boxes below that best describe you as a respondent to this:

☒ **Business representative organisation/trade body**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

In our members' view, the reasons for introducing this clarification in 2006 seem to have been forgotten. This radical option would replace one set of less-than-ideal rules with another.

Our members are active in five markets in which labour-intensive service contracts are let, mostly (but not exclusively) by the public sector.

a) tendered bus services (outside London)
b) bus services for Transport for London
c) home to school transport
d) tram and other light rail operating concessions
e) operation of long distance coach services

In most of these markets, a change of service provider typically involves the work of no more than ten staff at one time. In these cases, the current Regulations are seldom a significant hindrance to bidders or to transferors. By the same token, their repeal in respect to changes of service provider would not cause any particular problem.

Significant problems arise, however, with markets b) and d). In these cases, the loss of a contract or concession can involve the transfer of more than a hundred jobs without transferring the employing company. Continuity of service provision is extremely important, and it is normal for bus drivers – the main group of workers affected in market b) – to take a bus back to the premises of the transferor on one day, and take another from the garage of the transferee on the next day in order to drive it up and down the same route. We recognise all the issues that the Government has identified in its consultation, but in the case of these markets, the uncertainty introduced for both bidders (mainly high recruitment costs) and existing contractors (mainly high severance costs) would be considerable. This is likely to be factored into prices in the long run, so the tendering authorities would see no benefit, or may even see prices rise.

It takes at least three weeks to recruit and train a bus driver, and we can see a strong risk that service delivery will be poor while the new workforce is recruited, trained and "beds in", while at the same time the previous contractor (or the state, if the business fails) is saddled with redundancy costs. Potential continuity of employment is important to many of the people who work for our members, and repeated episodes of redundancy and job hunting are likely to increase turnover in the driver workforce, along with the costs associated with this. It will also affect the relative attractiveness of similar jobs on London Underground, where there is no competition for operating contracts, and on the buses. There are not large prizes to be won, in our view, in terms of the pay and conditions of

existing bus contractors being too generous for the current market. These benefits have already been taken by the operation of the current system of competitive tendering.

If TUPE is disapplied from changes of service provision, we fear a significant burden of challenges over the existence, or otherwise, of a relevant transfer, based on the fact that "part of a business" has transferred.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

We do are not qualified to answer this level of detail.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☒

Five years would be appropriate, as operators have already entered into contracts that will expire in five, six, seven or eight years' time.

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

See our answer to question 1. We have looked at the option of creating a threshold, in relation to the size of the group of workers employed by the transferor to carry out the contract, above which a relevant transfer would exist, but we came to the conclusion that this was unjustifiably arbitrary.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☒

a) If yes, please explain your reasons.

Although these details can give rise to procedural claims where there has been no real detriment, we are aware of a common scenario of an "unfriendly" transfer where the transferee relies on this provision to get important information from the transferor.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is

necessary for the transferee and transferor to perform their duties under that regulation?

Yes

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

This would be helpful.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☒ **No** ☐

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Post-transfer negotiations in our sector have generally been conducted on the assumption that transferred employees do not benefit from changes incorporated, after the transfer, in collective agreements made by their old employers. If the outcome of *Parkwood Leisure v Alemo-Herron* establishes that this is a false assumption, the Government's proposal to allow changes after one year would become important and urgent.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☒

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ **No** ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ **No** ☐

a) Please explain your reasoning.

This would be preferable to the current position for our industry.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ **No** ☐

Please note that we would welcome this change even if the Government decides not to disapply TUPE from changes of service provider.

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ **No** ☐

a) Please explain your reasons.

This should improve flexibility for employers

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ **No** ☐

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ **No** ☒

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

To clarify, micro businesses will not incur new costs as a result of their size, but the costs they incur (such as having a large proportion of their workforce that becomes surplus to requirements) may be greater in proportion to their turnover.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☒ No ☐

Question 15: Have you any further comments on the issues in this consultation?

No

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☒

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Yes. However, we feel that the impact assessment should look in more detail at different sizes of transfer.

Accord Housing Association

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☑ **No** ☐

a) Please explain your reasons:
current requirements are excessive

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

no view.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☑ (iii) 3-5 years ☐ (iv) 5 years or more ☐

a) Do you believe that removing the provisions may cause potential problems ?

Yes ☐ **No** ☑

b) If yes, please explain your reasons.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ **No** ☑

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

no.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

yes.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on

the subject?

Yes ☑ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☑ **No** ☐

a) Please explain your answer.

makes it simpler - less complex for HR/Payroll

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☑ **No** ☐

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Yes

Please explain your answer.

a 'dynamic' approach leaves the new employer hostage to fortune, with T+Cs out of its control

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☑

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☑ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☑ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☑ No ☐

a) Please explain your reasoning.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☑ No ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☑ No ☐

a) Please explain your reasons.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☑ No ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☑ No ☐

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☑ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ **No** ☑

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☑ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☐ unsure

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☑ No ☐

Question 15: Have you any further comments on the issues in this consultation?

We will welcome improved guidance on "assignment"

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐ Too soon to say

a) Please explain your reasons.

see above

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

no evidence available currently

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No current information available to us to take a different position to what is set out.

British Medical Association

INTRODUCTION

The BMA view is that the changes proposed to these regulations would provide less certainty and protection for employees subject to a transfer, and would have a detrimental impact on employees in some cases. If enacted the proposals are likely to reduce clarity and result in further costly litigation for both employees and employers. Although we would like to see the current regulations remain in place, we do agree with some of the proposals in relation to micro-businesses.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No

a) Please explain your reasons:

The current regulations provide for a higher degree of certainty, and any move away from the current provisions is likely to result in further costly litigation for both employees and employers. The original service provision changes amendments were designed to provide more clarity in this area and to this extent they should be retained. If the 2006 amendments are repealed then labour intensive activities such as the National Health Service would see more litigation, including by medical staff being transferred.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Repealing the further specific protection given to service provision changes would not be in the best interests of employees or employers. Any steps taken to align the test of whether TUPE applies with the Directive will represent a removal of employee protection and greater uncertainty for the employer.

The consultation paper refers to Spijkers v Gebroeders Benedik Abattoir cv & Anor 1986 as the leading case on the issue of whether there is a transfer. The European Court of Justice held that the question could only be determined by reference to all the circumstances of the case. However, as recognised in the consultation paper (page 24 footnote 11), in the context of a service provision change this will "usually come down to whether the assets transfer".

Suzen v Zehnacker Gebaudereinigung 1997, also referred to in the consultation paper, stresses this assets test and, in so doing, highlights how easy it would be for unscrupulous employers to avoid TUPE under the provisions of the Acquired Rights Directive. In this case, the European Court of Justice stressed that a transfer of the same economic activity was not sufficient: there had to be a transfer of an economic entity. This was defined as "*an organised grouping of resources and employees to achieve a specific economic objective*". There would only be a transfer of an economic entity if a significant proportion of the assets of that economic entity transferred to the transferee. In the case of labour intensive economic entities, where the workforce is the key asset, the test was to see if the majority of the workforce transferred, whether in terms of numbers or skills.

Given that reasoning, it became clear that it was open for the transferee to avoid TUPE simply by not taking on the staff following the transfer of a service.

The UK courts in response to this clear threat to the effectiveness of TUPE sought to raise this as a further factor to take into account the alleged transferee's motive for refusing to take on the employees.

The case of ECM Vehicle Delivery Service v Cox and others 1999 was the first "TUPE evasion" case. The Court of Appeal held that the alleged transferee's motive for refusing to take on the employees working in the economic unit was a factor that the Tribunal could take into account when deciding whether or not TUPE applies.

The Court of Appeal's approach was followed in a number of cases, for example Unison v RCO Support Services and Another 2000 and Sinclair v Argyll Training Ltd 2000. However in other cases, for example, ADI Ltd v Firm Security Group, 2001 and Oy Lii Kenne Ab v Orskojarvi and Juntunen 1999, the stricter approach in Suzen was applied. This resulted in the degree of uncertainty that eventually led to the amendment of TUPE in 2006 to expressly incorporate service provision changes.

It would appear to be the Government's intention that the strict asset test in Suzen should be preferred. However, if it is, the courts should still be entitled to consider the reasons behind the transferee's failure to take on the workforce in a service provision context.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(iv) 5 years or more

a) Do you believe that removing the provisions may cause potential problems?

Yes

c) If yes, please explain your reasons.

Many commercial contracts will be for a number of years in length and will have been budgeted for on the basis of employees transferring under the service provision change. A shorter lead in period would cause potential commercial issues. Furthermore, please see the reply to Question 1 a) above.

Question 3: Do you agree that the employee liability information requirements should be repealed?

No

a) If yes, please explain your reasons.

The provisions currently provide for a statutory minimum level of information concerning employees transferring to be passed to the transferee by the transferor. This will assist the transferee in understanding any individual and/or collective issues which may exist at the point of transfer. The provision of this detail and that of any collective agreements allows the transferee to enter into discussion over such issues with the employee and their Trade

Union representatives at an early stage. The provision of the information would also allow for better business planning on behalf of the transferee business.

The creation of guidelines and model terms for contracts with no penalty if the provisions are not followed would inevitably lead to disputes and increased costs where organisations failed to follow such advice.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

No

a) If you disagree, please explain your reasons.

The current 2006 Regulations restrict the ability of a transferee to make a variation to an employees contract of employment where such variation is in 'connection' with the transfer, unless there is an Economic, Technical or Organisational reason entailing a change in the workforce.

The current provisions are clear and provide a degree of protection for employees that their legitimate contractual expectations will be protected by the transferee. The proposed amendment would allow the new employer to argue more widely that the transfer was not the real reason for the variation, therefore resulting in increased litigation and consequent costs to both employees and employers.

A change in the wording to 'the transfer itself' is too narrow. Given that many businesses would wish to vary terms and conditions downwards in order to save costs, they are likely to argue that costs are the reason for the variation rather than the transfer itself. In addition, in recent cases, the exception that changes can be made if not connected to the transfer has been very widely applied.

In Enterprise Managed Services Ltd v Dance & others 2011 it was held that TUPE did not prevent changes to terms and conditions where they were driven by the success of pre-transfer changes to the transferee's existing employees' terms in order to improve productivity. In these circumstances – almost akin to harmonisation - it was held that the changes were not transfer related.

In Smith and others v Trustees Of Brooklands College 2011 the employees were part-time teaching assistants but were paid full-time rates. The transferee sought to reduce their rates of pay because the HR Director believed that the existing rates were a "mistake", in that they were not reflected anywhere else in the sector, and were contrary to the guidelines set out by the employees' trade union. It was held that this was not a reason connected with the transfer. It was not enough that the change would not have happened "but for" the transfer.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No

a) Please explain your answer.

Collective agreements provide for a negotiated settlement on a range of contractual and non contractual issues, they also provide a degree of certainty and expectation for both parties.

A 12 month period of protection is too short and the transfer itself, or a reason connected to it, should be no good reason to amend a collective agreement in any event.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

No, employees have a legitimate expectation that where their terms and conditions derive from a collective agreement and it is incorporated into their contract any changes to the collective agreement in the future will also be incorporated should the collective agreement continue post transfer. Any changes to the collective agreement could be detrimental as well as beneficial to the employee

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

No

a) If you disagree, please explain your reasons.

See reply to Q 4 above

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

No

a) Please explain your reasoning.

The current provisions work well and provide the employee with a degree of certainty over working conditions as well as contractual terms at a time of uncertainty. If the current provision were removed, then there is the possibility of the transferor imposing the transferees working conditions prior to transfer without proper consultation and agreement.

In addition to the points raised, the proposed changes may not necessarily lead to fewer 'problems'. In addition to the claim for notice under TUPE that would still exist, the employee could resign and claim constructive dismissal on the grounds that there has been a breach of the implied term of mutual trust and confidence.

The right to do this was established in the case of Oxford University v Humphreys 1999. Mr Humphreys was employed by Oxford University to set and mark exam papers. The University decided to transfer that activity to the Associated Examining Board who told him that his terms and conditions of employment would be changed. He resigned and successfully claimed constructive dismissal against the University.

Given that there will be additional legal arguments concerning trust and confidence, this proposed change is likely to lead to further litigation costs for the parties.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

No

a) If you disagree, please explain your reasons.

No amendment regarding place of work should be included in any amended Regulations, given the possible detrimental impact on employees being either moved or made redundant by the transferor immediately on transfer. This would be likely to increase litigation costs relating to the terms of any workplace move.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

No

a) Please explain your reasons.

If an amendment is made in this way then it would put the transferring staff in a detrimental position when compared to the remainder of the transferor's staff. The pool for redundancy etc would be confined to the transferring staff and not all staff at the transferee post transfer.

It is clear that the proposed change would mean that employees would lose out on monies/wages that they would have continued to receive after the transfer until the usual point of dismissal.

In practice, there must be questions over the level of investigation that the transferor should carry out in relation to the transferee's reason. Will the transferor be able to rely on the instruction from the transferee? It would be surprising if that was sufficient except in the clearest of cases.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

No

a) If you disagree, please explain your reasons.

This proposal would mean that employees would miss out on salary that would have continued post transfer when consultation currently has to take place.

There is also an issue concerning cooperation between transferor and transferee, as there will be no requirement that the consultation take place before the transfer. The transferor's workforce may not wish the employer to allow for this early consultation.

There could be arguments too relating to the employer being under a duty to begin consultation at the earliest point in time to comply with TULRCA 1992. Could the

transferee face challenges that they did not take steps to try and consult pre-transfer even though no express obligation to do under the TUPE changes?

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

a) Please explain your reasons.

Each individual workplace will result in a different scenario. Where there is already an informal employee representative structure the timescale may be shorter than where there is no such structure and the transfer will occur across many sites eg GP surgeries

b) If you disagree, what would you propose is a reasonable time period?

N/A

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

For the reasons set out above, save for the answer to Question 12.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Potential litigation costs

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

Question 15: Have you any further comments on the issues in this consultation?

No

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

No negative

a) Please explain your reasons

The proposal under Question 9 may have a detrimental impact on older workers.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

N/A

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No – see answer to 16 above.

Universities and Colleges Employers Association (UCEA)

Please tick the boxes below that best describe you as a respondent to this:

X Business representative organisation/trade body

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes

a) Please explain your reasons:

The change would help to avoid the current situation where under-performing contracts are re-tendered but the new service provider has to retain the same staff. However, the change does introduce the potential for uncertainty over the application of TUPE.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Not aware of any.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(ii)1- 2 years

a) Do you believe that removing the provisions may cause potential problems ?

Yes

b) If yes, please explain your reasons.

As above, the change could lead to complexity and uncertainty in interpreting the application of TUPE.

Question 3: Do you agree that the employee liability information requirements should be repealed?

No

a) If yes, please explain your reasons.

Not applicable

b) Would your answer be different if the service provision changes were not repealed?

No. Employee liability information is necessary, so it is preferable to have a legal minimum. There is a risk that if it is left open to negotiation between the transferor and transferee there may be omissions, particularly in service provision changes if the transferor has lost the contract and is not cooperating with the transferee (the new contractor).

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

a) If you disagree, please explain your reasons.

Not applicable

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes. There needs to be some flexibility, which the ETO reason exception provides. Also, retaining the ETO may reduce the need to make redundancies if transferee employers are able to make changes to terms and conditions. However, it may be helpful to have clearer guidance on what constitutes an ETO reason.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

a) Please explain your answer.

It would remove gold-plating of the Directive. Future changes to collective agreements should not be enforced on organisations that have no influence over the changes. Therefore, even if there were a dynamic interpretation in the Parkwood Leisure case, the one-year point would be helpful.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Unsure

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Yes

Please explain your answer.

The terms and conditions of transferred staff would cease to be amended in line with a collective agreement determined outside the (transferee) organisation. Therefore, there would be a greater focus on internal relativities inside the new (transferee) organisation which may encourage transferred staff to consider changing their terms and conditions.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Unsure

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more

Yes

a) If you disagree, please explain your reasons.

Not applicable

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

a) Please explain your reasoning.

The proposal should reduce ambiguity and complexity, and will remove gold-plating of the Directive. It should reduce unfair dismissal claims.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce'

covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

a) If you disagree, please explain your reasons.

Not applicable

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Unsure

a) Please explain your reasons.

The current arrangements can lead to unhelpful delays in carrying out business decisions. However, there was also a view expressed that decisions to dismiss should be taken by the transferee and not the transferor.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

a) If you disagree, please explain your reasons.

Not applicable

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

a) Please explain your reasons.

Each transfer is different, with very different timescales that depend on a number of factors. Guidance is preferable so that it can be interpreted in line with different situations.

b) If you disagree, what would you propose is a reasonable time period?

Not applicable

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing

employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Not applicable to the HE Sector.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Not applicable to the HE Sector.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Not applicable to the HE Sector.

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?
c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

Question 15: Have you any further comments on the issues in this consultation?

No

Association of Recovery Professionals ('R3')

Comments by the Association of Recovery Professionals ('R3') in response to the consultation document issued by the Department for Business Innovation and Skills in January 2013

Introduction

The Association of Business Recovery Professionals ('R3') represents insolvency practitioners authorised to practise in all jurisdictions of the UK. R3's membership comprises licensed insolvency practitioners, lawyers and other professionals involved in the insolvency and turnaround industries. Over 97% of authorised insolvency practitioners are members of R3.

TUPE and insolvency

Our interest in the TUPE Regulations is primarily in relation to their effect in formal insolvency proceedings. We have commented before on this aspect of the Regulations, both in response to the original consultation carried out in March 2005 and in response to the call for evidence issued in November 2011. We also wrote to the Minister about the Regulations following the debate in the House of Lords on 3 May 2006.

In our previous submissions we drew attention to the poor drafting of the Regulations, which do not accurately reflect the wording of the underlying Directive, and pointed out that it would require extensive litigation to arrive at a stable and workable interpretation of the Regulations as they apply to insolvency. As noted in paragraph 6.30 of the consultation document, the Court of Appeal decision in Key2law (Surrey) Ltd v De'Antiquis appears to have settled for now the question of how the courts will apply the Regulations in the future. The effect of the CA decision is that the relief afforded by regulation 8 of the Regulations will never be available in administrations, which are the most commonly used rescue procedures in formal insolvency cases. This means that the situation will continue largely as it did before the 2006 Regulations came into effect. Potential purchasers will continue to be cautious about taking on employees and incurring pre-transfer liabilities, which will lead to bids for going concern sales being discounted, to the detriment of creditors. It may also see a move towards liquidations being used.

We have the following comments in response to the specific questions raised in the consultation document. Questions which are unanswered reflect the fact that we have no opinion on the point at issue.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

We agree that this would be helpful.

Question 4(b): Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes. It is essential to retain the ETO exception as it can in some cases restrict the extent of the liabilities passing to the transferee.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

We agree. In insolvencies it might help to restrict the risk of liabilities passing over where dismissals are made to render the business more saleable but before any particular transfer is contemplated. This could help to mitigate the effects of the Court of Appeal decision in Spaceright Europe Ltd v Baillavoine.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes. This could help to facilitate sales in insolvency situations.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes. The problems caused by the current approach in insolvency situations are clearly set out in paragraph 7.74 of the consultation document. Allowing the transferor to be able to rely on the transferee's ETO reason would clearly help to mitigate these problems.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes. There seems to be no need for two sets of requirements.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

We agree that guidance would be helpful. It will be important to ensure that special guidelines are developed for insolvency situations. We should be happy to discuss this further with the Department in due course.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes, this seems sensible. However, we suggest that this provision is extended not just to micro-businesses, which have ten or fewer employees, but to businesses with 50 or fewer employees, in line with the European Commission's definition of a 'small' business.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes.

Road Haulage Association

Response of the Road Haulage Association to the open consultation on the proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006

Key concerns of the Road Haulage Association

- The RHA welcomes measures that will help reduce the costs involved in effecting a transfer of undertakings in general, but of smaller enterprises in particular
- The RHA supports efforts to allow micro businesses to opt out of the TUPE requirements that compel them to consult employees through nominated representatives instead of dealing face to face, when total staff numbers are very small
- In particular the RHA welcomes improved guidance to help employers facilitate smooth TUPE transfers when there is no in-house human resource or legal expertise

The Road Haulage Association (RHA) is the trade and employers organisation for the hire-and-reward sector of the road haulage industry. The RHA represents some 7,000 companies throughout the UK, with around 100,000 HGVs and with fleet size and driver numbers varying from one through to thousands. Generally, RHA members are entrepreneurs, including many family-owned businesses as well as some plcs. Without the activities of RHA members the UK would come to a halt both socially and economically.

We are limiting this response to making some general points, rather than addressing each individual consultation question.

The current difficult economic conditions have affected our membership significantly and it is our view that the outlook is likely to remain challenging. In the current climate it is likely that some of our members will have to restructure their organisations by either curtailing the level of some activities they currently undertake, or indeed by taking on work from competitors. As a result members may have to deal with issues related to TUPE.

The RHA agrees with the goal of making TUPE regulations easier for all employers to comply with, especially smaller enterprises. So we very much welcome the recognition that better online guidance for employers, staff and trades unions needs to be provided to facilitate the smoothest possible transfers under TUPE.

For many RHA members, particularly in the small and medium sized enterprise sector, as well as micro-businesses additional clarity in the guidance on the regulations is essential if the transfer process is to proceed efficiently.

We also agree that micro businesses should be able to engage directly with employees about a possible transfer under TUPE, so they are not solely obliged to go through specially nominated representatives where there is no recognised trade union, or existing representatives. We think this proposal is sensible and proportionate in the case of small employers where very few staff will be affected.

To conclude the RHA supports measures that seek to assist smaller and micro-businesses which we feel are greatly disadvantaged by existing red-tape and regulatory burdens.

Cleaning and Support Services Association

Submission to the Department of Business, Innovation and Skills
Consultation on Proposed to changes to TUPE Regulations

Introduction and Summary

The Cleaning and Support Services Association (CSSA) is the trade association for UK employers in the contract cleaning industry. Its members account for some 70% of turnover in the contract cleaning industry.

The CSSA is pleased to have the opportunity to present the views of its members to the Department of Business, Innovation and Skills (BIS) following a round table discussion with CSSA members and BIS representatives. This discussion allowed members to give their opinions on the proposed changes, the effects such changes may have on their businesses, and alternative proposals or further amendments they would recommend to make the proposed changes more beneficial to businesses.

In summary:

- No repeal of the regulation including service provision changes explicitly under TUPE
- No repeal of the requirement to pass employee liability information no later than 14 days before a transfer
- The CSSA supports a number of proposed amendments to ETO reasons for dismissal alongside clearer guidance on their use
- Members would like to see more guidance with how TUPE interacts with other important employment legislation, such as the Data Protection Act, to avoid current bad practices
- The CSSA's members support greater guidance on TUPE and its effect on pensions in given scenarios

The UK Contract Cleaning Industry

The UK contract cleaning industry is large and very fragmented, with in excess of 9500 separate corporate businesses, and many thousands more engaged in informal and semi formal cleaning activities. The CSSA estimates that the total size of the UK cleaning market is just under £10 Billion per year, of which 40% is outsourced to contract cleaning companies. There are some 900,000 people employed in the cleaning sector in the UK and around 400,000 of these work for outsourced firms.

Due to the recent global financial crisis, there has been a significant impact on cleaning companies, with clients moving away from value oriented activity and having a renewed focus on price. As a result of this, margins in the cleaning sector remain narrow, and the continued sluggish economic growth raises concerns that the priority afforded to cleaning will decline further, with the worst case scenario seeing clients eliminating their cleaning services entirely.

Service Provision Changes

The inclusion of Service provision changes explicitly under the 2006 regulations has been important for cleaning businesses in increasing clarity around what type of transfers fall under the regulations, with the pre-2006 situation being described at 'complex, unclear and producing a higher number of litigations to determine if TUPE did or did not apply'. Cleaning companies fear that repealing the provision covering service provision changes

would bring a return this unclear and complex situation, adding costs to businesses already under pressure due to the economic climate.

Cleaning businesses do not agree with arguments that the great number of case law examples on the pre-2006 application of TUPE to help determine its application will also be helpful in the post-2013 regulations if the provision covering service provision changes were repealed. Smaller and medium sized business voiced particular concerns that they would not have the resources and capability to research these examples to help avoid litigation in the event of a transfer. It is felt that the current regulations provide a degree of certainty as to whether TUPE applies, reducing the need for litigation to establish whether it does or does not. Therefore most members do not understand the reasons for wanting to repeal a provision that provides clarification in an already complex set of regulations and would inevitably increase ambiguity. Although the current regulations are far from perfect, in comparison to the situation prior to the 2006 regulations, the current regulations are a 'lesser of two evils'.

The CSSA would like to also raise concerns over the potential detrimental effect repealing the service provision change provision would have on employees whilst two companies debated the application of TUPE. The employees would be left in the wilderness, morale and efficiency and work productivity would suffer and costs would be incurred as well for both parties involved in the transfer.

Small businesses within the CSSA stated that despite some issues with the current 2006 regulations, including service provision changes within them has helped these smaller businesses to mobilise efficiently and effectively contracts that they had won. Whilst there are instances of the transfer of relevant information being done at the very latest, it was felt that if there had not been the TUPE regulations to fall back on it would be much more difficult for small businesses to obtain the necessary information before the date a client insisted a contract be mobilised. This concern also relates to the proposal to repeal the specific requirements regarding employee liability information, with members stating that although being far from perfect, the current regulations as they are, are a 'lesser of two evils' compared to the pre-2006 regulations. The specific inclusion of service provision changes under the regulations and the specific requirement of certain employee liability information are extremely helpful as a final fall back during a transfer process for businesses to conclude a transfer successfully.

Other areas of concern around the effects of repealing the service provision changes regulation was that repealing the regulations covering service provision changes would galvanise union activity against the government, as it would see the repeal as allowing employees rights to be infringed more easily, something that causes CSSA members considerable concern. An additional point of issue is the treatment of pensions of employees from ex-local authorities if service provision changes were repealed, and especially who would be required to fund the pension of such employees if they had been outsourced prior to the proposed 2013 changes to the current regulations.

In the event that the service provision changes regulations have been repealed despite the opposition to it outlined here, CSSA members would like the phase-in period for the change to either be the maximum time outlined or even extended if possible. The CSSA would like to acknowledge that if there were a phase-in period agreed, as the moment of the cut-off point approached there could well be cases of 'pass-the-parcel' contracts, whereby companies seek to end contracts or start new contracts before or after the specific cut-off date, so that contracts do not overlap this date and the transition in the

regulations and therefore avoid liabilities, resulting potentially in anti-competitive behaviour.

Additionally, the CSSA believes that the wording of the consultation document indicates the government may have already made a decision to repeal the regulations covering service provision changes as it is regarded as ‘gold-plating’ when compared to many other member states and the EU directive which do not include service provision changes in their own, respective, national TUPE regulations. It must be acknowledged though that a reason for this is that many other member states are governed more by collective agreements and work councils during a TUPE transfer, and thus the need for governments to legislate for this type of transfer is removed. In the UK, with the absence of widespread collective agreements, legislation specifically making service provision changes covered by TUPE is the best way of ensuring clarity for UK employers and employees in all sectors that the regulations are relevant to the transfer being undertaken.
A final point the CSSA and its members would like to make about the potential repeal of TUPE covering service provision changes was that of ‘case law rights’, whereby there would be the likely scenario that even if the UK government aligned its TUPE regulations more to that of the EU directive, if a company appealed to the European Court of Justice, the court would use EU case law examples, whose rulings of when TUPE applies or not may be different to that of the UK courts. This may cause long, protracted legal processes and costs on businesses that delay transfer and inevitably impact on business growth and profitability.

Employee liability information
As with the proposal to repeal the regulation specifically including service provision changes under TUPE, the CSSA members consulted on these proposals did not agree with the proposal to repeal the specific requirements regarding the notification of Employee Liability Information.

In fact many members consulted expressed the desire to see the time frame expanded from the current 14 day minimum required time. CSSA members believe this would help get the required information sooner. As well as an expanded time frame, members proposed including a more defined list of required information (including, for example, holiday pay and entitlements left) so as to aid the overall transfer process in being smoother. Even with the current regulations, there is sometimes an element of ‘blind bidding’ in the contract cleaning sector, where companies are bidding for contracts without any knowledge of the employees they may be taking on and any liabilities that some of these employees may have. Repealing the requirements for passing on employee liability information by a given date would only serve to increase this dilemma for cleaning contractors not wanting to be hit with liabilities that were unknown during the tendering process, consequently driving down business, competition and affordability.

Although the specific requirements would be repealed in the original proposal, the consultation document indicates that they would be replaced with a requirement under regulation 13 that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under this regulation, allowing for a case-by-case scenario rather than a ‘one-size-fits-all’ approach the current regulations assume. The practicalities of such a new arrangement of leaving it up to the parties involved as to when information should be disclosed are a major concern to CSSA members, as there is likely to be some animosity between the company that has just lost part of its business to a rival in what is a highly competitive market.

The CSSA makes an alternative proposal to create a ‘standstill arrangement’ at the point a contract is put up for tender, so that employees terms and conditions cannot be changed after that point. Such a ‘standstill arrangement’ would also limit the practice of ‘bumping’ staff around sites before a contract is changed so that the outgoing contractor does not lose its best staff, but does offload some of its underperforming staff onto the incoming contractor, thus reducing the incoming contractor’s ability to mobilise their new service effectively. Equally it has been sometimes observed that immediately before a transfer is about to take place, the outgoing contractor will get all the employees it expects to be transferred out to sign new contracts with increased pay and other benefits so as to hurt the profitability of the incoming contractor when they take over these employee contracts. If a ‘standstill arrangement’ were in force, companies would not be able to employ underhand tactics such as this and would therefore provide no impetus for delaying the disclosure of employee liability information.

CSSA members also highlighted that even with the current regulations, there is the issue of information being disclosed late which leads to unions being consulted about potential changes to the workforce at the last minute, thus making the arrangements necessary before a transfer rushed through and potentially creating further problems and need for litigation in the future. Companies are keen to consult unions as soon as possible but without the relevant information they do not know which unions or representatives to consult, and thus face accusations and challenges that are not actually the fault of the incoming contractor.

Finally, as there is a high proportion of migrant workers in the contract cleaning sector, businesses endeavour to get the required documents to make sure employees have the right-to-work in the UK before transferring them over. Home Office requirements regarding sponsor takeovers state that an existing sponsor must inform them of the takeover within 28 days of the transfer taking place, and the new incoming sponsor must apply for a sponsorship licence also within 28 days. Often employers find that if the disclosure of information as required under TUPE is made at the last minute, the resulting disclosure of information to the Home Office regarding sponsorship is also done in a hurry, adding to the likelihood of potential oversights and resulting in the incoming contractor being faced with civil penalties for not disclosing all or the correct information regarding migrant workers, which may not be the fault of the incoming contractor. Therefore members would like to see other such legislative requirements like that from the Home Office, and how they interact with the TUPE requirements, taken into consideration and the potential impacts of changes in TUPE before a final proposal is made.

Economic, Technical or Organisational Reasons for dismissal

CSSA members believe that amending the regulations regarding ETO reasons would give the required improvements to the operation of TUPE in the service provisions sectors rather than simply repealing their inclusion in the regulations altogether. The consultation document states that many of the proposed changes regarding ETO reasons are to provide as much flexibility as possible for employers to make changes in the workforce. It is believed that changing the wording to reflect that in the EU directive is sufficient enough to do so.

An alternative however to help improve the operation of TUPE would be to set a time limit as to its application, so that after a certain date post-transfer, changes can be made that would not potentially fall foul of TUPE regulations. In the proposals the government is considering limiting the length of time that a transferee must honour the terms and conditions agreed as part of a collective agreement. In principle the CSSA does not

disagree with the government proposal to use article 3.3 of the directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. The CSSA recommends the government considers going further and introduces a time limit on the applicability of TUPE for all employees regardless of the presence of collective agreements, which are not currently common in the UK anyway, so that variations in terms and conditions that are a result of the transfer itself can be implemented, leading to a reduction in 'two-tier' workforces. Appropriate guarantees that varying terms and conditions would not have a detrimental effect on the employees' material well-being would also have to be included in any future change to the regulations.

Although there is no time limit in theory to the current regulations, case law implies that it is usually between two to four years after a transfer that TUPE-related actions can be brought against an employer. Benefits to including a time limit for the application of TUPE include the avoidance of 'cherry-picking' terms and conditions by employees after a significant period of time has passed since the transfer itself took place. An example among cleaning companies was given of employees signing new contracts with the new contractor at the time of the transfer, but several years later, in the process of signing another new contract, they reverted to their previous pre-transfer contract and wanted some terms and conditions from that contract reinstated, claiming not doing so would be a violation of TUPE regulations regarding no changes to terms and conditions to the material detriment of the employee. A time limit on the application of TUPE would also aid in the harmonisation of terms and conditions – something that is constantly brought up by businesses as an obstacle to successful integration of transferred employees into the new employer's workforce. Any inclusion of a time limit however would have to regard the treatment of employees and benefits achieved through continuous service with the previous, pre-transfer employer.

There was also concern that a lack of clarity around what constitutes an ETO reason means companies, fearful of falling foul of TUPE regulations, are not deploying novel and innovative changes to cleaning contracts (which are usually preconditions for a service provider winning a contract) in order to improve efficiency, profitability and employee health and safety. This also means that the market is not as competitive as it could be, as smaller businesses for example may not want to bid for a contract that, if it won, would mean if had to take on a number of staff it could not sustain whilst also remaining profitable.

Finally, members stated that it would be beneficial to employers if more guidance could be given as to how to challenge disputed transfers. Such guidance should be explicit and not allow it to be left up to the parties involved to decide disputes, as it is highly unlikely either side would be willing to compromise due to the nature of the transfer taking place in a highly competitive environment. Additionally, it was felt that guidance on the best approach to having discussions with employees not being transferred and helping them understand the relevant ETO reasons for why they are not being transferred would be very beneficial for employers, as sometimes lack of employee understanding of ETO reasons may be a factor in any future unfair dismissal claims being brought against the new employer.

Further points

CSSA members would also like to see specific guidance given on how TUPE interacts with other legislation, particularly the Data Protection Act and Equalities Act regarding equal pay. In instances where a service has been outsourced from the public sector, companies may find that those taken on from the public sector are paid more than those that were already employed by the company. Having a 'two-tier' workforce is not regarded as

sustainable or conducive to efficient work practices, therefore it may be that the company has to raise the pay terms and conditions of all employees to match that of the former public sector workers, eating into the profit margins of the company and perhaps negatively affecting their ability to keep to the contract terms they initially agreed to.

A further piece of legislation that often comes up during a TUPE transfer is the Data Protection Act, and is often used as an excuse for not passing on employee information as required under the Employee Liability Information provision; either information is delayed because of the Act or part of the information is withheld. It would be beneficial if specific guidance could be given on how these two acts are meant to interact with one another, which would potentially speed up the process of exchanging employee information and aid to the smoothness of the transfer process.

Furthermore, case law has brought attention to the issue of whether TUPE applies in situations where both the client and the contractor change. Recent court rulings have established that in certain circumstances when both the client and the contractor change, TUPE does not apply. It is feared that now the principle has been established, businesses may seek to engineer a client change to enable them to opt-out of being covered by TUPE, and the protections it gives to both employees and employers. It was requested that closing this loop-hole be looked into if the provision covering service provision changes is not repealed.

A specific issue within the cleaning industry that the CSSA would like to highlight is that of gangmaster organisations taking business away from legitimate small companies. A level playing field is sought by all so that the market is as open, fair and competitive as possible, but the practice of these gangmaster organisations undermines that level playing field. If micro-businesses are exempted from being covered by the TUPE proposals, then it could lead to a growth in the illegal working industry and further squeeze small businesses out of the market and the industry. Therefore we welcome the inclusion of micro-businesses under the scope of TUPE.

Finally, the issue of pensions has been raised several times by CSSA members. Businesses are still unclear as to how to transfer, or indeed if they need to transfer over, pension provisions for all staff and how to write such costs into the bidding process so as to avoid any unforeseen costs if the contract is won. As the EU Directive does not give specific details on the issue of pensions either, members were unsure as to how the government will proceed with giving guidance or legislation on the matter.

Conclusion

Overall, it is felt by members that the government has ‘an undue haste to legislate’ without properly thinking through the large variety of impacts some of the proposals will have on businesses. If these perceived adverse effects are to be avoided, then members urge the government to carefully consider the evidence from each industry and amend the proposals accordingly, as continuing to legislate with the current proposals will significantly hinder businesses in the long term in achieving their maximum potential capabilities.

Finally, as a general point regarding whatever final changes are made, CSSA members urge the government to make any associated advice as to the use of TUPE very explicit and clear, so that there is little or no doubt as to how the regulations apply in transfer and service provision change scenarios. Doing so will mean all parties involved are left in no doubt as to where they stand with the regulations, and is a better process for getting co-

operation between businesses rather than letting the parties decide on a case-by-case scenario, which may likely result in bad transfer practices taking place.

A summary of member opinions is as follows:

- No repeal of the regulation including service provision changes explicitly under TUPE
- No repeal of the requirement to pass employee liability information no later than 14 days before the transfer
- Recommendation to consider extending the minimum time limit to disclosing information to be in line with time limits of other legislation
- Consideration of alternatives to extending the minimum time limit, for example introducing a ‘standstill arrangement’ instead of time limits
- Support for the amendment to ETO reasons so as to make it easier for businesses to make changes in the workforce after a transfer.
- Make what constitutes and ETO reason clearer and give specific guidance on matters regarding consulting non-transferring employees on the end of their employment
- Consider the possibility of introducing a time limit on the application of TUPE that covers all employees transferred not just those that are part of a collective agreement
- More consideration and guidance on the interaction of TUPE with other legislation e.g. Date Protection Act and Equalities Act regarding equal pay
- Closing loopholes associated with situations where both client and contractor change at the same time to avoid businesses ‘opting-out’ of TUPE
- Support the inclusion of micro-businesses under the regulations
- Support consideration to be given to the issue of pensions with explicit guidance produced for businesses to follow

ACAS

TUPE CONSULTATION ACAS RESPONSE

Acas welcomes the opportunity to respond to this consultation. TUPE is an issue about which we receive many enquiries: last year the Acas helpline dealt with around 30,000 calls on the subject and the page on the Acas website about TUPE received around 200,000 visits.

TUPE is widely regarded as one of the most complex pieces of employment legislation and one where change could introduce uncertainty. In its daily dealings with employers and employees, through the Acas helpline and conciliation, it is clear that both parties prefer certainty and clarity of approach. Certainty can also have economic benefits by reducing the potential for conflict and litigation. The proposed changes appear significant and Acas is concerned that there is a risk that some of the proposals could re-create the uncertainty which surrounded TUPE prior to the 2006 Regulations.

For this reason, Acas welcomes the suggestion in the BIS consultation paper that guidance be produced to explain a number of areas of TUPE. Acas suggests that guidance supporting particular amendments should be sufficiently detailed to provide clarity around the changes. Officials would be willing to review and comment on any drafts during the development of the guidance, in particular commenting on aspects relating to the employment relations perspective.

In responding to your consultation we have not attempted to answer all of the questions posed but rather have concentrated on those questions where we feel the changes will have most impact.

Question 1:

Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No

a) Please explain your reasons.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

The Acas council notes that a complete repeal of the 2006 amendments could lead to uncertainty which in turn can impact negatively on employment relations. The leading case law in 2006 prior to the inclusion of service provision changes within TUPE was conflicting and led to much uncertainty and confusion. Disputes often arose about whether TUPE did or did not apply in a particular situation and Acas believe that there is a risk that their proposed removal could re-create that uncertainty. There is a risk that uncertainty may lead to an increase in need for help and guidance (for instance with an increase in the volume of TUPE related calls to the Acas helpline); in disputes, and in litigation. Acas recalls situations where transferors often denied that a transfer had taken place and refused to pay a redundancy payment, and transferees argued that TUPE did not apply so they were not going to take on existing staff. Employees often found they had no alternative but to take the matter to tribunal to determine the situation.

TUPE currently accounts for 11% of Acas collective conciliations which totalled 56 cases during the period April to October 2012. Each collective conciliation case has multiple claimants and the numbers ranged from several hundred to one or two employees per claim. There is a risk that uncertainty could lead to additional disputes and litigation as parties challenge whether TUPE does or does not apply in a particular situation. This is likely to lead to additional costs being incurred by all parties.

Question 3:

Do you agree that the employee liability information requirements should be repealed? Yes/No

If yes, please explain your reasons.

Would your answer be different if the service provision changes were not repealed?

Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Acas has no view on whether this provision should be repealed or not. However we are concerned that the 14 day requirement to provide employee liability information prior to a transfer is too short and believe that a longer period would be more appropriate.

On the other hand Acas conciliators report that they deal with some organisations who will never provide information regardless of the provisions and some who will only comply if there is a requirement which says they must.

Employee liability information only generates a small number of tribunal cases per year but Acas believes that the short deadline creates problems for employees and additional unforeseen expenses for employers.

Conciliators report that problems arise if information is passed to the transferee at a late stage. This leaves them unable to consult on a timely basis which means that employees feel left out of the loop and not kept informed by the transferee. Information is often withheld or forgotten by the transferor which makes it difficult for the transferee to take full account of their responsibilities shortly before the transfer date. This can create unforeseen problems which generate confusion around the time of the transfer. This can lead employees to believe that their terms and conditions are being eroded which result in claims to the employment tribunal being presented.

Jaguar Land Rover

Introduction

Jaguar Land Rover (JLR) is the leading premium automotive business in the UK, with three manufacturing facilities and two dedicated research centres. JLR employs over 25,500 people directly in the UK and supports 190,000 jobs including suppliers, dealerships and in the wider economy. In 2012, our export revenue from the UK approached £13bn, 85% of our total revenue**.**

Key Points
Jaguar Land Rover recognise that TUPE is highly complex and the scope for changes is limited by the requirements of the parent Directive. It is important that practical changes are made to update the legislation to reflect the dynamic nature of the working environment and reduce the burden on business whilst protecting fairness to employees.

- Employer Liability Information should be provided earlier
- Liability should be joint for pre-transfer employment obligations
- 2006 Service Provision Changes should be repealed
- Provision for post-transfer harmonisation of terms and conditions of employees with existing employees is needed and would be very welcome
- TUPE should be amended to ensure that change of location of the workplace following transfer does not lead to an automatic unfair dismissal – ETO reasons extended is sensible.
- Duty to inform and consult representatives. There should be provision to consult representatives of the other employer.

Employer Liability Information
Employer Liability Information should be provided earlier than 14 days prior to the transfer, the current requirement is insufficient as it is too close to the transfer. A more helpful approach would be to require information provision when it is *'reasonably practicable´* before a transfer. Within a reasonable time frame in advance of the transfer and in any event at least a month in advance, save for where there is not a month between notification and the transfer date.

Service Provision Changes
Jaguar Land Rover believe the regulations covering service provision changes should be repealed. It is not helpful to businesses. In the long-term businesses need certainty to make decisions. One big consideration in insourcing/outsourcing is the cost factor and if it cannot be determined whether or not TUPE applies you cannot determine costs. Would not want a repeal to lead to greater uncertainty about whether or not a particular service provision change constitutes a 'relevant transfer' and, therefore, whether or not the TUPE regulations apply to it.

Increasing the scope for post-transfer changes to terms and conditions
Jaguar Land Rover assert that provision for harmonisation of terms and conditions is needed, as post transfer the current Regulations create a two tier system and cause

administrative and cost burden for employers. The current restrictions are a barrier to employee relations and effective management. We would be pleased to see an introduction of an element of acceptable harmonisation. We would not want increased risk of employee/employer disputes.

That said, we would not want a wholesale approach. Having an arrangement whereby changes are made after a defined period should not be viewed as changes “by reason of transfer” may help with allowing harmonisation. A static approach is preferred so that we do not have to rely on promises other parties have made.

Duty to inform and consult
Jaguar Land Rover would like to be able to run TUPE and collective redundancy consultation at the same time and therefore we would like pre-transfer redundancy consultation to be permitted. In addition, remove the requirement to provide employee representatives with details of agency workers used by the transferor, not just those working on the activity to be transferred. Careful guidance would be needed.

Requests

- Detailed unrestrictive “real” guidance on any changes that is not so prescriptive to cause satellite litigation.
- Changes to have desired effect of simplification.

European Employers Group

European Employers Group response to the BIS consultation document on proposed changes to the TUPE Regulations

European Employers Group provides a network for multinational employers with operations in Europe. It was established in 2011, and has member companies based in Europe, the US and Japan, who are drawn from a range of business sectors and have employees around the world.

Member companies are frequently engaged in TUPE transfers within the UK (and elsewhere in Europe), both transferring employees in or out of their organisation, or as a client outsourcing activities.

We welcome this opportunity to comment on behalf of member companies in response to the consultation document issued by the Department for Business, Innovation & Skills (BIS) on proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

This response is based on feedback given to BIS officials by member companies at two meetings held with them in August 2012 and in March this year. We are grateful for the opportunity to discuss the proposals directly with officials during these meetings.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No.

No.

a) Please explain your reasons.

We recognise that the Government is seeking to remove "gold-plating" from the transposition of the Acquired Rights Directive in the TUPE Regulations, and that it is doing so in response to general calls from business for less regulation. We appreciate its objective in this regard with this proposal.

However, in this instance, the unanimous view of colleagues who attended the meetings with BIS was that they preferred the greater certainty created by the current law – even if it meant bringing more transactions within scope of the Regulations – over the uncertainty that would result from removing the service provision category, since some service provision changes would be within scope and others would not.

There is also a fear that, if the proposed change to the law were made, suppliers with contracts that expired and which are no longer within scope of the Regulations could find themselves with large numbers of employees on their hands who would have to be made redundant, thereby incurring large, unexpected redundancy costs. Alternatively, it could lead to suppliers asking for long term redundancy/Beckman indemnities on the basis that the TUPE Regulations will not apply to the transaction, or they cannot be certain it will, should they lose the contract . Long term indemnities are seen as high risk and expensive, and could, in cases of small/medium scale transactions, make some outsourcing deals unviable.

It was not felt that providing additional Government guidance on the scope of the Regulations if the proposed change in the law were made, would help the situation.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect (i) less than one year; (ii)1- 2 years; or (iii) 3-5 years? (iv) 5 years or more?

a) Do you believe that removing the provisions may cause potential problems? Yes / No

b) If yes, please explain your reasons.

As noted above, we do not believe the Government should repeal the service provision changes. However, if it were to do so, it should have a long lead in period of 5 years, and it should prevent the change in the law applying to contracts signed before the final law was published. However, this would create a complex situation of different legal provisions applying to different transactions, and this is another reason why we do not think the law should be changed in the way proposed.

Question 3: Do you agree that the employee liability information requirements should be repealed? Yes/No

No. Again, we appreciate that the Government proposal here is intended as a deregulatory measure, however the unanimous view at the meetings with BIS was that companies find the statutory requirement to provide employee liability information by a deadline as a useful back-up measure. However, the 14-day deadline is considered too short (for the reasons given in the consultation document) and member companies would prefer a longer period of 28 days.

If yes, please explain your reasons.

Would your answer be different if the service provision changes were not repealed?

No. We would prefer the requirements to remain in place, with a longer deadline, whether or not the service provision change category is removed.

Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

We did not discuss this point at the meetings with BIS.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? Yes / No

Yes we agree. The current very strict restrictions on changes to terms and conditions in the UK is very problematic, so this proposal to limit the restrictions as far as possible is welcome. As noted at the meeting, it seems some other countries take a more relaxed approach to the question of changes to terms and conditions than the UK, eg in France it

is possible to agree changes via a collective agreement after 15 months. This illustrates the very conservative approach adopted by the UK when it comes to transposing EU directives.

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes we agree.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view? Yes / No

Yes.

a) Please explain your answer.

This is a welcome change that is specifically allowed by the Acquired Rights Directive, and so its non-use up to now has been example of gold-plating in the UK transposition. Limiting the applicability to one year will give some additional flexibility to vary T&Cs.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? Yes / No

Yes. This will help to protect employees' terms and conditions on a TUPE transfer, but in a more flexible way than at present.

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.

At the time of writing, the Advocate-General has given his opinion on the case, but the European Court has not yet ruled. On the assumption that the European Court agrees with the Advocate-General's opinion, and that of the Supreme Court – that the TUPE Regulations provide for a "dynamic" approach, whilst the Acquired Rights Directive only requires a "static" approach – we consider that the TUPE Regulations should be amended to provide for a static approach. This is needed to avoid the very unsatisfactory situation where a transferee could become bound by changes to employees' terms and conditions which neither of them had any involvement in negotiating.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)? Yes / No

We did not discuss this at the meetings with BIS.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? Yes / No

Yes. The current wording applying to dismissals for a reason connected to a transfer creates uncertainty as to what "connected to" means, and also goes beyond the requirements of the Acquired Rights Directive.

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned? Yes/No

Yes, it makes sense to align the two provisions.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? Yes /No
a) Please explain your reasoning.

Yes. This will remove some of the unfair elements of the current law which can mean the transferor or transferee suffering the consequences of something done by the other party, and will remove gold-plating from the Regulations.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996? Yes / No

Yes. This will simplify the law and correct the situation where a change of location could give rise to an automatically unfair dismissal.

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? Yes / No
a) Please explain your reasons.

Yes. This is a sensible and welcome change. It is not right that a dismissal for an ETO reason, which would be permissible if made after the transfer, is prevented from taking place prior to the transfer.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the

transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? Yes / No
a) If you disagree, please explain your reasons.

Yes we agree. This will alleviate the current situation where necessary redundancies have to be delayed because consultation for collective redundancy purposes cannot start until after the transfer.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful? Yes /

No

a) Please explain your reasons.

Yes, some flexibility is needed around timescales to reflect different circumstances.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? Yes / No

Yes. It is ridiculous to force employees to elect representatives when there are very few affected employees.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)? Yes / No

Rather than limit it to micro businesses, we would suggest confining it to situations where 10 or fewer employees are to be transferred.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? Yes/No

Yes. It will make the law unduly complex if the rules are different on points of detail for micro businesses compared with others.

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes / No

No.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes / No

Yes.

Question 15: Have you any further comments on the issues in this consultation?

We would like to see the obligation removed to provide information on the use of agency workers during a TUPE transfer. It will not be relevant in a TUPE transfer and consequently employers may be caught out by this recently-introduced obligation and incur a significant penalty. This obligation should be confined to permanent employee consultation bodies established under the Information & Consultation of Employees Regulations – as indicated in Article 8 of the Temporary Agency Workers Directive.

Association of School and College Leaders

Proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations

Response of the Association of School and College Leaders

1 The Association of School and College Leaders (ASCL) represents over 17,000 heads, principals, deputies, vice-principals, assistant heads, business managers and other senior staff of maintained and independent schools and colleges throughout the UK. ASCL has members in more than 90 per cent of secondary schools and colleges of all types, responsible for the education of more than four million young people. This places the association in a unique position to consider this issue from the viewpoint of the leaders of secondary schools and of colleges.

2 The association sees this type of issue from the points of view of its members both as employers and employees.

3 ASCL sees the key changes to be:

- Repealing the regulations relating to "service provision changes". The government accepts this change would require a lead-in period.
- Removing the obligation to provide employee liability information, but making it clear that transferors should disclose information to the transferee to aid the information and consultation process.
- Amending the provisions restricting changes to terms, giving protection against dismissal and giving the right to resign in response to a substantive change in working conditions, in each case to reflect the wording of the underlying directive and ECJ case law more closely.
- Providing that "entailing changes in the workforce "includes changes to the workforce's location. Enabling the transferee to consult with the transferring employees on collective redundancies prior to transfer.
- Whether transferor (outgoing employers) should be allowed to rely on the transferee's (future new employer) ETO reason to dismiss an employee pre-transfer? Presently, ahead of a proposed transfer, the existing/outgoing employer cannot rely on the prospective new employer's ETO reason to dismiss an employee prior to the transfer in anticipation of it – to do so would amount to automatically unfair dismissal. (pages 39-41 Consultation document)

4 The first two are of no concern to ASCL.

5 The third could impact upon our members as employees since it is intended to make it easier for the organization taking over the business to harmonise employees' terms and conditions without facing potential claims for constructive dismissal or breach of TUPE. Pay, working hours, holidays and other conditions could be changed to meet business needs and local conditions. On the other hand, our members as employers can take advantage of this. On balance, this may lean too far towards the employer.

6 The fourth is intended to address the anomalous situation where employees are transferred to a new organisation which wishes to carry on the business in a different location. Under current provisions because they are either deemed to have TUPE transferred or declined to transfer they are not entitled to a redundancy payment prior to the transfer. This change seems reasonable.

7 The fifth change we do have concerns about.

8 This scenario could arise when the workforce of two schools or colleges are combining (provided they had different employers) or where the transferee needs fewer employees to continue the work. If the government does decide to permit transferors to dismiss for the transferee's ETO reason, there could be some consequences with which we would not be happy:

9 It could mean that employees are made redundant more quickly and could lose out on wages they would otherwise have earned had their employment continued until the transfer. It is not clear how far in advance of a transfer the transferor would be permitted to dismiss – if the transferee makes its position clear ahead of the transfer, dismissal could potentially occur several months before, perhaps even 6-12 months before in the most extreme cases.

10 It could result in greater job losses, or at least an ability to select more individuals from the transferor's workforce for redundancy, as opposed to the workforce of the transferee which it is combining with. If an underperforming school or college or one with a deficit is merging with a more successful organization, this could result in more of the former institution's staff being made redundant solely because of the health of their former employer, rather than based on their ability to their job, which would appear unfair.

11 If the transferor dismisses for an ETO reason, they remain responsible for paying the redundancy payment – liability would no longer pass to the new prospective employer. Should the transferor run into financial difficulties or become insolvent this could result in employees losing the enhanced element of their redundancy payment and any enhanced notice pay to which they are entitled to. Statutory minimum redundancy payments and notice would still be recoverable from the government via the RPO.

12 There do not appear to be any proposals or guidance about how certain the transferor needs to be that a transfer is actually going to take place. It is not uncommon for transfer proposals to fall through. Employees could find themselves dismissed in advance of a transfer which subsequently never takes place.

13 I hope that this is of value to your consultation, ASCL is willing to be further consulted and to assist in any way that it can.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

☒ **Yes, I would like you to publish or release my response**

Your details

Professor John McMullen

Please tick the boxes below that best describe you as a respondent to this:

☒ **Legal representative**

☒ **Other (please describe) ACADEMIC**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

My submission is that the Service Provision Change Rules in the 2006 regulations were very carefully thought out and took 5 years (between 2001 and 2005) to formulate. There was extensive consultation at that time. Both sides of industry considered that the Service Provision Change Rules would be beneficial. The certainty of TUPE applying on service provision change is better than the uncertainty of TUPE not applying. The aim was also to avoid litigation costs and transaction costs. In my opinion there has been a marked falling off of litigation and a reduction in transaction costs and an orderly approach by transferors and transferees to responsibilities under the TUPE regulations that did not exist before 2006. Before 2006 the EAT (in my view fairly) said:

> "The law in the UK is in a state of critical uncertainty. It is almost impossible to give accurate advice to [parties] involved in possible transfers with any degree of certainty" (*Complete Clean Ltd v Savage*) (2002) UKEAT 668

To remove the SPC provisions throws us back on the test of a transfer of an economic entity retaining its identity under the Directive. To be sure, this test applies in all other European countries, apart from the UK. But my experience of working with foreign lawyers is that they say does not make the process any easier or clearer. In many European countries there is significant litigation on the concept of a transfer of an economic entity retaining its identity as applied to outsourcing. *Ayse Süzen* gives rise to extraordinary uncertainty and unfairness. The Directive will only apply to outsourcing where there is a transfer of significant tangible or intangible assets or, failing that, the taking over by the new employer of a major part of the workforce in terms of numbers and skills. This involves the Court analysing whether the function changing hands is asset reliant or labour intensive. This will lead to litigation. In many cases, where it is not entirely clear to the

parties whether the function is asset reliant or labour intensive there will be an increase in litigation. The *Süzen* test smacks of unfairness in relation to labour intensive functions where no assets are available to transfer. For in such a case, the new contractor can simply avoid the TUPE regulations by refusing to take on the employees. This is a circular and unsatisfactory test: "Whether I have the right to transfer depends on whether I do transfer".

b) Are there any aspects of the pre -2006 domestic case law in the context of service uprovision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

I do not believe the problem will be made any better by proposing to repeal certain case law prior to 2006 which attempted to apply a purposive interpretation to the *Süzen* model. You presumably have in mind cases such as *ECM (Vehicle Delivery Service) Ltd v Cox* [1999] IRLR 559 where the Court purported to apply a purposive interpretation to the question of when TUPE applied (by using, for example, the motive test). In other words, though under *Süzen,* in a labour intensive function, the new employer could prevent the application of TUPE by refusing to take on the employees, the tribunals might be able to take into account the motive of the employer in so doing. So if the motive was to get around the TUPE regulations, the TUPE regulations should still apply. However attempting to negate the effect of such case law (if that is wise) would not take away the basic problem of the application of the *Süzen* test, and the analysis in each case of whether a function is labour intensive or asset reliant and all that litigation that entails. I foresee an increase in tribunal litigation and an increase in transaction costs for business in these proposals and strongly argue against the repeal of the SPC provisions.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☒

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ No ☐

c) If yes, please explain your reasons.

As I say, I see enormous problems with increased litigation and transaction costs. The late 1980's and 1990's were characterised by tri-partite employment tribunal cases with the outgoing contractor asserting that TUPE applied and the incoming contractor asserting that it did not, with no alternative for the employee, in each case to bring employment tribunal litigation citing all potential parties. It is true to say that there has been a glut of cases on the Service Provision Change rules in the last 18 months, which are, at times, pedantic and which give arguments for disputing a TUPE transfer. This cluster of cases deal in some cases with points that are simply obvious (the non application of the SPC rules to contracts the main purpose of which is to supply goods; the requirement that, on a changeover, the service by the new provider must be provided by the same, original client; and the broad view that the activities after the transfer compared with before must be broadly the same). This does not mean the SPC rules should be changed or repealed. These cases have simply classified the working of the SPC rules. Any piece of legislation

must be judged in the light of changing commercial practices. It is a measure of success of the SPC rules that the number of cases on the SPC provisions in the Appellate Courts is relatively small over a total period of 6 + years. The current law is elegantly and lucidly synthesised by Judge Peter Clark in *Enterprise Management Services v Connect* – Up Ltd UKEAT/2011/0462. Plain enough for all to understand.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ **No** ☒

If yes, please explain your reasons.

The employee liability requirements are a genuine attempt to protect a transferee who has no legal connection with the transferor. The aim is to avoid sharp practices where no information is given by the outgoing contractor to the incoming contractor. This disadvantages both the employers and importantly, the employees. The concept of employee liability information was specifically negotiated by the British Government in the process leading to the revision of the Acquired Rights Directive in 2001. Its defect is that 14 days before the transfer is simply not long enough for the parties to comply with their obligations. My preference is to retain employee liability information obligations but to *increase* the length of time before which they need to be supplied.

b) Would your answer be different if the service provision changes were not repealed?

NO

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

If this were to result in information being supplied (to the fullest extent possible and, as a minimum, as required under regulation 13) at an earlier stage that is presently the case then I would support this. But my view is that regulation 11 should be built on rather than eroded.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☐ **No** ☒

a) If you disagree, please explain your reasons.

I see no intellectual objection to aligning the provisions of regulation 4 on the prohibition of changes in terms and conditions more closely with ECJ case law, under *Daddy's Dance Hall*, where the change is prohibited and void if by reason of the transfer itself. But fresh case law will be generated and the change will be a burden in terms of this litigation.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

I think the so-called exception here for economic technical or organisational reasons entailing changes in the workforce has always been misguided. It does not comply with European Law (nowhere in the *Daddy's Dance Hall* case is the concept of the ETO reason cited as a permissible reason for a change in employment contracts that are by reason of the transfer itself). And the consensus in case law and in practice is that it is of no assistance. Changing terms and conditions does not entail a change in the workforce. Retaining the ETO 'defence' simply misleads employers in thinking change is possible in circumstances where it is not.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ **No** ☒

a) Please explain your answer.

Liberty to permit applicability of terms and conditions derived from a collective agreement one year from the transfer is contained in the Directive. To use that derogation is a policy decision. But I am against it because it will create a two-tier workforce i.e. those whose terms are governed by collective agreements (one year protection) and on the other hand employees whose terms are not governed by collective bargain (no limit on protection).

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☒ **No** ☐

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

It seems likely that the European Court will decide that Member States are entitled to apply a dynamic approach to collective agreements if there is a dynamic term in an employment contract which transfers to a transferee.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☒

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ No ☒

a) If you disagree, please explain your reasons.

I see no objection to this if the policy decision is to align the regulations with the Directive is taken. But my concern is a practical one. It will change the law to no discernible advantage and lead to fresh litigation.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☒

The two concepts are different. Stated above, the concept of an employer's latitude where there is an economic technical or organisational reason entailing a change in the workforce under regulation 4 is probably contrary to European Law and, as discussed above, is useless in practice. The ETO reason defence should therefore only apply to regulation 7 (in line with the Directive).

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ No ☒

a) Please explain your reasoning.

I believe the interpretation of regulations 4 (9) and 4 (10) are well established and give rise to certainty. The argument in the consultation paper that relies upon *Juuri v Frazer Amica Oy* CC-396/07 would I think be wholly confusing and unhelpful. It should be remembered that regulation 4 (9) was specifically introduced by the 2006 regulations to counter a suggestion that the previous law (which depended entirely on constructive dismissal) was in breach of the Directive. I believe a change is unnecessary.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

This suggestion seems to be eminently sensible. There is a question mark whether such a change would be in compliance with the Directive and I would warn that the change would

be liable to test in a case before the European Court. The expression "entailing changes in the workforce" does not seem to include a change merely to any term on the employment contract, including location. But there is no doubt that practitioners and business would welcome this change.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☐ No ☒

a) Please explain your reasons.

I do not believe that a transferor should be allowed to rely upon a transferee's economic technical or organisational reason entailing changes in the workforce in respect of pre transfer dismissals. I believe to provide this would be contrary to the spirit of the Directive. I believe the case law, (which says that the ETO reason must relate to the future conduct of the business which the transferor cannot have if it is disposing of the business) is correct. To depart from it would in my view infringe Directive.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☐ No ☒

a) If you disagree, please explain your reasons.

I believe this proposal would conflict with another Directive obligation, under the Collective Redundancies Directive. The Acquired Rights Directive and the Collective Redundancies Directive are separate measures. If an employer is proposing to make redundancies in respect of which the collective obligations apply, is only when the transferee is an employer that he can do this.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ No ☐

a) Please explain your reasons.

I agree this subject is far better dealt with in guidance.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing

employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ **No** ☒

The Directive does not allow for an exemption from the obligation to inform and consult with employee representatives in respect of small businesses.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ **No** ☒

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ **No** ☒

I think the proposal to bring in these proposals in October 2013 for those with obvious merit (such as the amendment which provides for change of location to be an economic technical or organisational reason entailing changes in the workforce) is just too soon. Advisors and business need to adapt. My recommendation would be for changes other than the SPC proposals (which I believe should not come in in any event) should be 6 April 2014.

Question 15: Have you any further comments on the issues in this consultation?

No

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☒

a) Please explain your reasons

The inclusion of small businesses might give rise to equality and diversity issues.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

No comment

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

In the short space of time allowed for by the consultation document, to respond (just 3 months) it has not been possible to conduct empirical research which would inform material and conclusions in the impact assessment. The suggestion would be to extend the consultation period to allow for such research to be undertaken.

Northumberland County Council

Please tick the boxes below that best describe you as a respondent to this:

☒ **Local government**

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☒ **No** ☐

a) Please explain your reasons:

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ **(ii)1- 2 years** ☒ **(iii) 3-5 years** ☐ **(iv) 5 years or more** ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☐ **No** ☒

c) If yes, please explain your reasons.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☒ **No** ☐

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☒

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Yes, it is unreasonable for a new employer to have to contiune to honour terms which it has no influence over in the negotiation of such terms; nor where those terms did not apply to the employee at the time of transfer

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☒ No ☐

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ No ☐

a) Please explain your reasoning.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

a) Please explain your reasons.

It makes sense to do so. The transferee and transferor should be working together on such issues as they affect the same group of employees.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Question 11: Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes ☒ **No** ☐

a) Please explain your reasons.

Guidance is always more useful than strict Regulations which then become subject to futher challenge

b) If you disagree, what would you propose is a reasonable time period?

N/A

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ **No** ☒

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ No ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☒ No ☐

Question 15: Have you any further comments on the issues in this consultation?

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ No ☒

a) Please explain your reasons

I think the impact would be a neutral effect

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

GMB

RESPONSE TO CONSULTATION: BIS: TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006: CONSULTATION ON PROPOSED CHANGES TO THE REGULATIONS

GMB, Britain's general union, represents over 600,000 members throughout the UK in both the private and the public sectors. We have members working in the following areas of:
Financial, commercial and professional services
Clothing and textiles
Construction
Furniture Manufacturing
Energy and Utilities
Engineering
Food and Leisure
Process Industries
Public Services
Voluntary and Community/Third Sector

GMB welcomes the opportunity to respond to the consultation. GMB members in all of these areas have first-hand experience of the Transfer of Undertakings (Protection of Employment) Regulations 2006. GMB has extensive experience in addressing issues that arise in these circumstances, providing collective and individual support to members affected.

GMB is a TUC affiliated union and draws attention to the TUC response and evidence. GMB, like other trade unions, is a not-for profit organisation, and exists to protect and support its members. GMB believes that there are key reasons for maintaining all of the existing TUPE protections, and to extend these where appropriate. GMB believes that the 2006 Regulations have provided additional and helpful clarity for all concerned. GMB is fundamentally opposed to all of the proposals in the consultation paper.

The preamble to the European Business Transfer Directive states that "It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded". The emphasis is on the safeguarding of employee's rights. GMB believes that any consideration of TUPE should reflect this central objective.

There are various factors which GMB believes should be borne in mind when considering the TUPE 2006 Regulations:

- Contracting out will often lead to job losses
- Pay and conditions of employment may be adversely affected,
- There is often an increase in inequality particularly being felt by women and black and ethnic minority workers who may be concentrated in outsourced areas
- Affected workers (both those who transfer and those who remain) may be subject to ill health and stress, affecting turnover, motivation and productivity
- There is a danger of a race to cut terms and conditions between employers in order to secure the work, with all the adverse consequences that may result such as inefficiency and poor service quality

European and UK law seeks to address these issues by providing protections to the affected employees in respect of safeguarding pay and conditions, and giving them a voice through their representatives on the impact of transfers, requiring information, consultation, and negotiation over envisaged measures arising out of the transfer. GMB has extensive experience in acting on behalf of members affected in these respects.

The TUPE Regulations create a level playing field for employers. Since 2006 the TUPE Regulations have provided greater clarity to employers, who have more commonly been those that have challenged whether TUPE applies or not. It is noteworthy that there are fewer legal cases now arising on this issue than before.

GMB believes that in the current economic climate the protections provided by TUPE are increasingly essential. To weaken the protections now would be a retrograde step. There is no evidence that the 2006 Regulations have "gold-plated" the requirements of the Directive, and in particular no evidence that the 2006 Regulations have done so in respect of the service provision changes. GMB is concerned that there are no proposals to protect workers, and all of the proposed changes are to the benefit of employers. The Impact Assessment itself acknowledges that the main beneficiaries will be employers.

As stated above, GMB believes that any consideration of the 2006 Regulations should reflect the objectives of the Directive. GMB opposes the proposed changes which also are likely to increase costs and risks to employers:

- Amending the TUPE Regulations without any reason or evidence that there are difficulties is likely to create greater uncertainty and with it increased litigation.
- The amendments will encourage litigation to determine what the changes will mean in the context of the UK
- The proposals to increase employer flexibility to vary terms and conditions are in conflict with the requirements of the European Directive
- The removal of employee liability information will expose new employers to potential grievances which were unforeseen and for which they have made no provision
- The repeal of the service provision changes will remove the level playing field and encourage completion based on reduced pay rather than on the quality of service provision which will be exploited by the most unscrupulous of employers
- The race to the bottom in wages will reduce workers' spending powers and have a negative impact on the wider economy and social conditions. There will be increased pressure placed on the welfare system.

GMB calls on the Government to withdraw the proposals.
This response now goes on to consider the specific questions in the consultation paper.

Question 1
Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No
a) Please explain your reasons
b) Are there any aspects of the pre-2006 domestic law in the context of service provision change cases which might need to be considered with a view to helping top ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No. GMB is fundamentally opposed to the proposals.
The 2006 amendments have created important benefits by:

- Cutting transaction risks and costs
- Increased certainty for all parties
- Increased job security and income for workers

These benefits will be lost by repeal. GMB notes that in the response to the call for evidence a majority called for them to be retained. The Government is incorrect to describe the 2006 amendments as “gold-plating”. The European Directive envisages that a service provision contract can be a relevant transfer. This includes outsourcing, insourcing, and second generation outsourcing. GMB notes that according to the Impact Assessment that a least 65% of all service provision changes would still qualify under TUPE even if such contracts were excluded. The provisions have enhanced the Regulations by creating certainty and reducing the risk of litigation.

GMB believes that European case law became more unsettled after the *Suzen* case, with difficult distinctions emerging between “asset-reliant” undertakings and “labour-intensive” undertakings. It was a move away from the test set out in the earlier case of *Spijkers,* which listed a number of factors that should be taken into account. *Suzen* led to confusing and inconsistent European decisions and formed the backdrop to the desirability of the 2006 amendments. *Suzen* also increased the amount of UK case law on whether the (then) 1981 Regulations applied. Since the 2006 amendments the number of UK cases has fallen significantly.

Whilst there are cases dealing with the service provision change provisions, this is only to be expected when new rules are established. It is not the case that these have created uncertainties, as the consultation suggests, and GMB disagrees that this outweighs the benefits of the 2006 amendments. The cases primarily concern fragmentation issues, which also arises in the standard definition cases as illustrated by pre 2006 cases such as *Fairhurst Ward v Botes Buildings*. In addition issues concerning whether there is an organised grouping of employees have featured in European cases relating to the standard provisions. GMB does not accept that the 2006 amendments created uncertainty over the issue of assignment as these apply equally to standard transfers. It is wrong to suggest that removing service provision changes from the scope of TUPE will cut down on the risk of litigation as the consultation appears to suggest.

In our experience employers will always seek advice on commercial arrangements whatever the legal framework, and it is wrong to suggest that because their need to seek advice has not reduced that this is caused by the 2006 amendments. The level playing field that exists now will be removed and repealing the 2006 amendments will not promote fair competition. It will instead reward those employers who seek to avoid their obligations by removing the 2006 amendments.

Question 2:
If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect (i) less than one year; (ii) 1 – 2 years; or (iii) 3 – 5 years (iv) 5 years or more?

GMB opposes the repeal of the service provision changes from the scope of TUPE.

a) Do you believe that removing the provisions may cause potential problems? Yes/No

Yes, removal will cause problems. If they are to go ahead the lead in period should be at least 5 years.

b) If yes, please explain your reasons

GMB believes there will be a significant increase in litigation relating to whether TUPE applies or not. This will create uncertainty, lead to delays in the process, and increase legal costs.

GMB believes that the changes will have a negative impact on workers in these areas, who will often be on low pay to begin with. Contracting out leads to job losses, cuts in pay and conditions, and more pressure on welfare benefits.

GMB notes that according to the Impact Assessment there will be a loss in pay for such workers totalling between £10.8 million and £24.1 million a year, with an increase for contractors and service commissioners by a similar amount.

Job losses are likely to follow. This will lead to increased job insecurity, higher unemployment, and increased redundancy costs. Insolvent businesses will have increased redundancy costs which will fall on the state.

GMB represents many members in areas such as catering and cleaning which are susceptible to transfers on a frequent basis. The removal of the 2006 Amendments will impact negatively on this group with greater job and income insecurity and, as a result, a further negative impact on the health of these workers. Particular groups will be adversely affected including women and black and ethnic minority workers.

There will be negative impacts on quality of service, morale, and retention of employees. The removal of the 2006 amendments will discourage contractors from taking on the existing workforce. The Care Industry is a particular area likely to be adversely affected by the removal of the 2006 amendments: the elderly and the vulnerable that rely on such provision will lose the relationships and trust that they have developed with existing employees**.**

Question 3
Do you agree that the employee liability information requirements should be repealed? Yes/No

No.

GMB believes that the proposal to repeal these requirements is inappropriate given that the responses to the call for evidence highlighted the fact that information is often provided late. GMB believes that the rules should be strengthened and that leaving it to voluntary disclosure will be unsatisfactory. Less information will be disclosed and business planning will be impeded. Transferred employees will face the prospect of deficient information being provided about terms and conditions, as often occurred pre-2006. This will in turn create problems that the new employer has to address.

a) If yes, please explain your reasons

b) Would your answer be different if the service provision changes were not repealed?

No. This information is relevant to all transfers including service provision changes.

c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes. GMB believes that Regulation 13 should clearly state that information should be provided to the transferee at an early stage and should include information relating to any collective agreement and all details concerning terms and conditions of employment. This should not be restricted to the information required under section 1 of the Employment Rights Act 1996. This information should be provided to trade union representatives.

Regulation 13 should also be amended to make it clear that the obligation to consult concerns both the transferor and the transferee. This would be in line with European law and have beneficial industrial relations results.

GMB also believes that the selection/procurement process should be covered under the obligation to consult so that trade unions have the opportunity to contribute to consideration of service reviews, tender requirements, and the service delivery plans. Trade unions are in a good position to make a valuable input into the process.

Question 4
Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is relation to dismissals) and the CJEU case law on the subject? Yes/No

No.

a) If you disagree, please explain your reasons.

GMB is fundamentally opposed to these proposals. They will exacerbate the race to the bottom in cuts in pay and terms and conditions.

GMB notes that the European Directive does not permit such changes, and the consultation document appears to acknowledge this. Yet the Government intends to proceed with them.

GMB disagrees with the assertion in the consultation document that changes "connected to the transfer" are not prohibited by the Directive whereas changes "by reason of the transfer" are prohibited. European case law, as highlighted by *Martin v South Bank University*, uses the terms interchangeably without the distinction suggested.

GMB believes that TUPE Regulations 4 and 5 are not wider than the European Directive. The proposals will lead to the loss of rights to UK employees not justified under European law. Turning to the draft suggested at 7.42 in the consultation document GMB makes the following comments:

(4) This ignores the fact that the Directive prohibits such variations

(5) This undermines employee protection and is inconsistent with the underlying objectives of the European Directive – the draft suggests that a variation would not be void if it could have been made had there been no transfer, which is clearly out of step with European law
(5A) this ignores the prohibition of such changes by the European Directive, see for example Article 4 of the Directive

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

No. GMB believes that this is inconsistent with longstanding European case law; see for example the well-known case of Daddy's Dance Hall. The Court held in this case that the transfer may never of itself justify detrimental changes to terms and conditions.
GMB believes that the Regulations should be amended to make it clear that all variations by reason of or connected to the transfer are not permitted.

Question 5
The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall change was no less favourable to the employee. Is this desirable in your view? Yes/No

No.

a) Please explain your answer

GMB is fundamentally opposed to this proposal.

GMB objects to the underlying premise outlined in the consultation document which is to allow non-unionised transferees to compete for contracts involving unionised employees by allowing them to cut negotiated terms and conditions. GMB believes:

- The removal of protection of employee's pay and terms and conditions in this way will be very damaging – employees are already under pressure when transfers take place
- Workforce morale, workforce retention, and service quality will be adversely affected
- It will expand the two tier workforce
- It will increase inequality, low pay, and increase poverty for those in work
- It will have a negative impact on industrial relations leading to disputes and tensions

GMB argues that the provisions in the European Directive regarding collective agreements were designed for systems that operate very differently from the UK. In many European countries collective agreements are legally enforceable whereas they rarely are in the UK. They are often time limited, and negotiated terms and conditions are enforceable via a legally binding collective agreement. In the UK such terms become part of the individual contract through the process of incorporation, and the terms remain part of the individual contract even if the collective agreement is terminated.

European case law has confirmed that contractual rights of employees under national law should be protected on transfer. The proposal seems to be at odds with European case law and the Directive. It is also at odds with UK law on contracts which provides that incorporated terms retain their status alongside other contractual terms.

GMB believes that the proposal will provide less protection for contractual rights of trade union members and those covered by the collective agreement than other employees. This clearly amounts to unjustifiable discriminatory treatment and GMB believes that it falls foul of Article 11 of the European Convention on Human Rights (see for example European Human Rights decisions such as *Wilson & NUJ v UK*, and *Demir and Baykara v Turkey*)

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? Yes/No

No. GMB is fundamentally opposed to this proposal. This would not comply with the European Directive.

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.

GMB believes that the full court is likely to follow the opinion of the Advocate General to the effect that the dynamic approach to collectively agreed terms applies as opposed to the static approach. This would be consistent also with the approach taken by the UK Courts, see for example the GMB case of Whent v T Cartledge. It would also be consistent with the approach taken by the Human Rights court in respect of Article 11 of the Convention (Freedom of Association). The dynamic approach has beneficial consequences: it helps avoid a two-tier workforce, pay freezes and pay cuts for outsourced employees.

d) Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mimnd the limitations of Article 3(3) of the Directive? Yes/No

No.

Question 6
Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) s that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? Yes/No

No.

a) If you disagree, please explain your reasons.

GMB believes it is wrong to weaken employee protection against dismissal in these circumstances. TUPE transfers can be very stressful times for the employees affected, and protections against dismissal provide some reassurance. They discourage the worst

of employers from dismissing employees in an attempt to avoid TUPE and employee liabilities. Any amendments will be likely to increase uncertainty and the prospect of litigation.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned? Yes/No

No. Regulation 7 as drafted accurately reflects the requirements of the European Directive and European case law.

Question 7
Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? Yes/No

No.

a) Please explain your reasoning.

GMB believes that individuals should still be able to resign and claim automatic unfair dismissal where the transfer would lead to a substantial change to terms and conditions which is to their material detriment. This is consistent with the European directive. He right to receive salary and benefits for the notice period alone is inadequate remedy, and would not deter an employer from seeking to avoid TUPE.

The present rules encourage clients to monitor contractors to ensure that terms and conditions are not eroded. GMB believes that there is no justification for weakening employee protection because the transferor employer might face unfair dismissal claims as a result of the action of the transferee employer. GMB notes that it is common practice for indemnity arrangements to be entered into in TUPE transfers between the employers.

Question 8
Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996? Yes/No

No.

a) If you disagree, please explain your reasons.

GMB is opposed to the proposal. Requiring employees to move can be disruptive and impact on caring responsibilities and other aspects of daily life. The European Directive aims to protect employees when a transfer occurs, and this includes with regard to their location. GMB believes that any change of location should depend on the existing contract of employment e.g. if there is a mobility clause. The Directive does not permit the change and the courts and the tribunals in the UK have, in our experience, taken the view that location is not included in the provision. Further the UK definition of Redundancy is broader than the definition of ETO entailing changes in the workforce. GMB questions the relevance of this to the European rights currently under consideration.

Question 9
Do you consider that the transferor should be able to rely upon the transferee's economic, technical, or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? Yes/No

No.

a) Please explain you reasons.

GMB believes the proposals are not in accord with the European Directive. GMB believes that if transferors, and particularly insolvent transferor's, were able to rely on the ETO of the transferee this would encourage the transferor to dismiss employees in advance of the transfer in order to avoid employee liabilities transferring to the new employer. This concern is reflected in UK case law; see for example *Hynd v Armstrong*. This might make the sale of the business more attractive but it would be outwith the underlying objectives of the Directive. In the case of insolvency the employees would be restricted to limited statutory recovery of redundancy and other wages. Preserving the number of employees who transfer will enlarge the possible pool for redundancy selection, be beneficial for the affected employees, and be consistent with the objective of protecting affected employees. Consultation with trade unions can then take place in the usual way with a view to reducing the number and mitigating the effect of the redundancies.

Question 10
Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? Yes/No

No.

a) If you disagree, please explain your reasons

GMB does not agree that pre-transfer consultation should count for the purposes of the transferee's obligations to consult collectively over redundancies. This would not be consistent with the European Collective Redundancies Directive:

- The transferee is not the employer prior to transfer, and the obligation to consult is with *the employer*
- Section 188 of TULRCA requires consultation over affected employees i.e. not just those affected by redundancies or measures, and the wider workforce of the transferee is likely to be affected
- Consultation prior to transfer over a limited group of employees will not comply with either the UK or European rules on collective redundancy consultation
- The pool of employees to be identified for potential redundancies will be limited

Question 11

Rather than amending Regulation 13 (11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful? Yes/No

No.

a) Please explain your reasons

GMB believes that the provisions for these elections are unsatisfactory. The process is left in the hands of the employer, who decides upon the constituencies, the number of representatives, and carries out the election.

b) If you disagree, what would you propose is a reasonable time period?

GMB does not believe that it would be appropriate it identify a fixed or "reasonable" time period for election of workplace representatives.

Question 12
Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13 (3) (b) (i)) , rather than have to invite employees to elect representatives? Yes/No

No.

GMB recognises that employers may consult with employees individually but this is not the same as consultation through independent and elected workplace representatives, and is most effective when it is with trade union representatives. GMB believes that it is essential that the right for recognised trade unions to be consulted on should remain in relation to transfers involving micro firms. This would otherwise fall foul of obligations under the European Directive and Article 11 of the Human Rights Convention.

a) If your answer to the above questions is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)? Yes/No

No. GMB believes that the proposal for an exemption is inconsistent with the Directive. The Directive applies equally to all employers regardless of size.

Question 13
Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? Yes/No

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

GMB believes that the European Directive applies to all employers, regardless of size. There is no provision for exemptions based on size.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes/No

No. All of the proposals are de-regulatory.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

GMB recognises that micro employers may not have internal personnel departments or be familiar with all aspects of employment law. In this regard it is essential that ACAS is provided with adequate resources to fund advice and provide training for small firms.

Question 14
Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes/No

GMB is opposed to all of the proposals in the consultation document. In our view they should all be withdrawn.

Question 15
Have you any further comments on the issues in this consultation?

GMB repeats that all of the proposals should, in our view, be withdrawn.

Question 16
Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? Yes/No

GMB believes that the proposals will have a significant adverse impact on equality.

a) Please explain your reasons.
b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

GMB believes that the Impact Assessment is unsatisfactory and does not address the equality issues raised by the proposals. GMB believes that contracting out is associated with increased inequality particularly for women and black and ethnic minority workers. GMB refers to the evidence provided by the TUC in this regard and notes that the repeal of the service provision changes from the scope of TUPE, to permit increased harmonisation of terms and conditions, and restricting the applicability of collective agreements will lead to a "race to the bottom" and increased inequality.

As illustrations:

- Of the 1 million employees in the lowest paid occupations 74% of cleaners are women and 83% of them work part time
- 65% of kitchen and catering assistants are women, of which 71% work part-time

These are areas where contracting out is prevalent and the impact of the proposed changes are likely to be most acutely felt. The TUC response provides a comprehensive illustration of the impact of the proposed changes.

Question 17

Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

As indicated in our response above GMB disagrees with the analysis in the impact assessment. GMB is concerned that changes are proposed without there being an evidential basis to support them:

- Business will be the primary beneficiaries, employees the losers
- Fairness to individuals is being compromised
- There is no assessment of the financial costs to employees if cuts to pay and conditions are permitted
- There is no assessment of the transaction costs and risks to business if the repeal of the service provision changes proceeds
- There is no evidence to support the claim that allegedly “under performing” employees are deliberately included in transfers
- There is no evidence to support the claim that the enforcement of the TUPE Regulations have generated an increasing number of employment tribunal claims. The only statistics concern information and consultation claims, and these do not provide an accurate picture of the effect of the 2006 Regulations
- The types of claims likely to increase if the Government proceeds with the proposals will be for unfair dismissal and unlawful deductions from wages

GMB calls on the Government to abandon the proposals.

GMB
National Office Legal Department

Employment Related Services Association (ERSA)
Response from the Employment Related Services Association (ERSA) to the BIS Transfer of Undertakings (Protection of Employment) Regulations 2006: consultation on proposed changes to the regulations

Introduction

Please accept this paper as evidence from the Employment Related Services Association (ERSA) to the Department for Business, Innovation and Skills consultation on proposed changes to the regulations on Transfer of Undertakings (Protection of Employment).

ERSA is the trade body for the employment related services industry, sometimes known as the welfare to work industry. ERSA has a diverse membership covering the private, public and voluntary sector. Members deliver a range of programmes to support jobseekers into sustainable employment including, the Work Programme, Work Choice, ESF Families and the Youth Contract.

The following submission has been informed by ERSA's HR Forum which is made up of over 80 senior HR professionals and meets on a quarterly basis to share best practice and problem solve collectively. This submission also utilises the findings of the 2012 ERSA Employment Related Services Salary and Benefit Survey, which covered 17 member organisations and 12,000 staff and included overall staff demographic information as well as salary and benefits for 13 job roles, divided by geographical location.

TUPE reform has significant implications for the smooth operation of welfare to work services. 2011 marked a significant transitional period for the industry as the government replaced most existing welfare to work contracts with the Work Programme. This led to the transition of several thousand staff between employment providers in the private, voluntary and public sectors. ERSA believes that this is one of the largest and complicated TUPE case studies in recent years and it is possible that 10,000 staff left the industry during this transitional period. One of the biggest issues was a lack of clarity on where TUPE applied. The repercussions of TUPE are significant for the industry with our 2012 Salary and Benefit Survey revealing that 80% of providers did not have their organisations' terms and conditions harmonised one year after TUPE transfer.

Executive Summary

- ERSA supports the majority of the government's proposed amendments to TUPE legislation.
- ERSA partially supports the proposal to repeal the 2006 service provision changes but only if further clarity is provided on where TUPE applies.
- However, ERSA strongly disagrees with the proposal in question 3 to repeal the employee liability information (ELI) requirements. ELI information is essential for transferee organisations and can sometimes necessitate incoming organisations pulling out of a contract. Furthermore, ERSA would support the extension of the information provided under ELI
- requirements, such as staff sick leave, and supports any guidance to encourage ELI information being given 28 days prior to the transfer where possible.
- In responding to this consultation, ERSA has only commented on questions that are of direct relevance to members. Please note that whilst it has not commented on these amendments, ERSA is broadly supportive of the proposed amendments outlined in questions 6, 7 and 9.

Consultation Response

Question 1: Do you agree with the government's proposal to repeal the 2006 amendments relating to service provision changes?

ERSA partially supports the government's proposal to repeal the 2006 amendments relating to service provision changes (SPC) but only under the provision that this is replaced with further clarity on where TUPE applies.

The 2006 SPC additions have increased the applicability of TUPE and have not provided the clarity that was expected. Given that sometimes a change in service provision can be due to dissatisfaction with the original service, it is not always satisfactory for transferees to accept all employees under TUPE. Providers report that sometime the transferor will "cherry pick" the best performing employees prior to the transfer allowing the less productive employees to transfer to the new service provider. Adding to the applicability of TUPE can therefore be problematic and can mean a heavy expense in terms of time and money to deal with under-performing employees. It also ensures a slow start to the new contract and is likely to have been a contributory factor in the performance of the Work Programme in its early stages.

ERSA suggests that in addition to amending legislation on this issue and/or clarifying guidance, that commissioning bodies consider TUPE when new contracts are created and provide direction on whether TUPE will apply. This would help to alleviate some of the uncertainty regarding the applicability of TUPE which adds considerable legal costs for organisations considering taking on a contract.

Question 2: If the government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

ERSA considers one year would be an adequate lead in period if the service provision changes were to be repealed. A limited timescale will create cost issues for current suppliers. Ideally, the changes would take effect around the next large tendering round in 2015/ 2016 when Work Programme contracts come to an end. That way bidding providers can submit tenders on the basis of the revised TUPE regulations and the liability that they may have at the end of the contract.

Question 3: Do you agree that the employee liability information requirements should be repealed?

No. ERSA does not support the repealing of employee liability information (ELI) requirements. This is essential information for any organisation gaining staff through TUPE and helps to create a smooth lead in period. While sometimes there is co-operation between the parties that means that additional information is passed between them and this is done in a timely manner, ERSA members report that this is not always the case and on occasion late provision of ELI is used as a tactic to transfer additional employees at the last minute.

Additionally, ERSA members report organisations do not always provide adequate ELI information causing operational issues for the incoming provider who may be unaware who is transferring and under what terms, almost up to the transfer itself. When ELI data is insufficient, providers may be required to do some additional research to get the necessary information and they need time to do this, pre-transfer. One example of this was an

incoming provider, who found out after further research that the majority of employees who were to be transferred over, had been on sickness leave for more than two months.

In certain cases members report that ELI information supplied at the last minute can necessitate the transferee withdrawing from the contract. This will cause disruption and uncertainty for the commissioning body, the organisations involved in the transfer and the employees of these organisations. ERSA would therefore call for the provision of ELI information 28 days before transfer (when there is enough time between the awarding of the contract and the transfer).

ERSA also calls for ELI information to be widened to include more detailed information on issues such as sickness leave. BIS will need to carefully consider whether this should be done on a statutory or code of practice basis as the former might promote satellite litigation about information provided.

Question 4: Do you agree with the government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

AND

Question 5: The government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes. ERSA supports the government proposals in questions 4 and 5. The inability to harmonise terms and conditions places a severe burden on employers, as well as affecting employee engagement, causing dissatisfaction in the workplace and on occasion, directly contravening equality legislation. This inability to harmonise terms and conditions for employees who have transferred into the organisation has had a big impact on the employment related services industry, resulting in some employees doing the same role but having different term and conditions. The 2012 ERSA Salary and Benefit Survey found that over 80% of respondents did not have terms and conditions harmonised in their organisation, while 24% of respondents had over 20 sets of terms and conditions in their organisation. There should be a point in time where terms can be harmonised as long as they are overall no less favourable. If changes to terms are agreed by an employee even if they relate to the transfer, as per standard variations to terms, the employee should then not be able to rely on pre transfer terms further down the line, if it suits.

Question 8: Do you agree with the government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes. ERSA supports the government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce. Confusion about the inclusion of changes to the location coming under economic, technical and organisational (ETO)

reasons could scare off potential bidders. In addition such an approach may make liabilities unclear, as well as placing a burden on the organisation receiving people under TUPE who may have existing premises that they wish to run operations from. However, it is important that any new legislation around this does not override any existing geographical mobility clauses within contracts.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes, ERSA is supportive of the proposed amendment. If redundancies will be taking place following a TUPE transfer, this amendment will enable them to take place in a more timely and efficient manner, and will reduce salary costs for incoming organisations. Members report that pre-transfer consultation is already taking place in some instances. This approach however relies on the cooperation between the transferee and transferor, which can be difficult when the transferor organisation bid, but failed to win, a new contract.

ICAEW

Our ref: ICAEW Rep 58/13

Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: consultation on proposed changes

Memorandum of comment submitted in April 2013 by ICAEW, in response to Department for Business, Innovation and Skills consultation paper Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: consultation on proposed changes published in January 2013

INTRODUCTION

ICAEW welcomes the opportunity to comment on the consultation paper Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: consultation on proposed changes published by Department for Business, Innovation and Skills (BIS) on 17 January 2013.

WHO WE ARE

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners. ICAEW's Insolvency Committee is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of ICAEW licence holders.

GENERAL COMMENTS

While in theory the proposals in the consultation paper look sensible, as ever the 'devil is in the detail' and we have some concerns from an insolvency perspective and also (commercially) regarding how the proposed revised regulations will operate in practice, which we set out below. Please note we have not commented from an employment law perspective and therefore have not answered all the detailed questions.

We remain concerned that the 2006 TUPE regulations, which 'copy out' of the Directive's categories of insolvency proceedings, lead to a lack of clarity and we do not agree that the

decision in Key2law (Surrey) Ltd v De'Antiquis has provided sufficient clarity. While this case provides certainty in relation to administration (that TUPE applies in all cases), other areas of uncertainty remain and we believe that certain insolvency proceedings, eg, fixed charge receiverships, should be excluded from the TUPE regulations (in our view, it is certainly not clear from the 2006 Regulations that administrative receiverships are excluded). We therefore do not agree with the Government's position set out in paragraphs 6.29 and 6.30 of the consultation document; in our view the TUPE 2006 Regulations should be amended to make it clear that certain insolvency proceedings, eg, administrative receiverships, are excluded.

We do not support the proposal to introduce joint and several liability as between the transferor and transferee for pre-transfer employment obligations, which we fear will lead to commercial issues in practice, and will cause particular problems for any transfers made within formal insolvency processes (see paragraphs 6.34 et seq in the consultation document). For instance, if these liabilities are deemed to be joint and several, the transferee will be very likely to endeavour to make the transferor take them on, which (in insolvency cases) will cause the Insolvency Practitioner to incur expenses (time costs and legal fees) in defending such claims, depleting funds that would otherwise be payable to creditors. We therefore consider that this should instead be left between the parties and dealt with in the Sale and Purchase documentation.

We have a major concern regarding the Government's view that 'economic, technical or organisational reason entailing changes in the workforce' do not include insolvency, whereas in our view insolvency (and any associated lack of ability to pay employees) is per se an economic reason (see Q4b and Q8 below).

We support the proposal to allow micro businesses to inform and consult employees directly regarding transfers, rather than through representatives, in cases where there is neither a recognised union nor existing representatives (see paragraph 7.2 in the consultation paper). See also our comments at Q12.

Regarding pensions (page 45 of the consultation document), we consider that it would be detrimental to transfers if defined benefit pension liabilities transferred without the transferee expressly agreeing to take them on. It is unlikely that business sales from an insolvency (where a defined benefit scheme existed) would be possible if the liability for the defined benefit scheme would transfer to the buyer. In general, purchasers of insolvent businesses do not take on the liabilities of the insolvent seller, and if it is legally mandated or contractually agreed that they do so the price is reduced accordingly.

We would also like to draw your attention to our response to BIS's earlier consultation, ICAEW Rep 12/12, including our recommendation that the regulations should be amended to restrict the consultation period following an insolvency event to a maximum period of 14 days (please see our reasoning at paragraph 2 et seq of that previous response).

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Q1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Please explain your reasons.

Yes

a) Please explain your reasons:

We think the Government's concern that the 2006 service provision changes actually introduced a disincentive to bid (by imposing employment liabilities on successful bidders) is valid, and we are strongly of the view that these provisions should be repealed in respect of re-tenders (ie, 'second generation outsourcing'), given the requirement to transfer staff is likely to conflict with other commercial objectives (eg,. a desire to change the staff on the contract). However, if these provisions are not repealed, we are concerned about the Government's proposal not to exclude professional services. Inclusion could result in confusion over whether services such as statutory audit were covered. If they were, this would impact upon the proposals being considered by, among others, the Competition Commission and the European Union in relation to the audit market. If mandatory rotation of audit firms or change following mandatory tendering resulted in the same personnel being required to remain on the post-tender audit, the objective of those proposals would be defeated. Therefore, unless these provisions are repealed, we would suggest that statutory audit is specifically excluded from these provisions (which we believe should be relatively easy to carve out).

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No comment.

Q2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?
(i) less than one year
(ii)1- 2 years
(iii) 3-5 years
(iv) 5 years or more

No comment.

a) Do you believe that removing the provisions may cause potential problems?

No comment.

c) If yes, please explain your reasons.

No comment.

Q3: Do you agree that the employee liability information requirements should be repealed?
We support the repeal of these provisions, but we further note that it is important for any guidance produced by the Government that deals with the provision of information at the tender stage should take a sensible view of insolvency. For example, such guidance needs to recognise that different timescales will apply (for example, 8 weeks' notice is not appropriate where there is a likelihood that the insolvent business will cease trading in days, if not immediately, rather than weeks).

a) If yes, please explain your reasons.

No comment.

b) Would your answer be different if the service provision changes were not repealed?

No comment.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No comment.

Q4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

We support the Government's proposal to remove the gold plating and permit changes in employment terms where such changes either could have been agreed in the absence of the transfer and/or where the reason for the changes is an economic, technical or organisational reason entailing changes in the workforce. We agree the Directive and relevant EU case law is sufficiently clear and we therefore support the Government's proposed 'copy out' approach in paragraph 7.46.

We also note the Government recognises that the current lack of provision for post-transfer harmonisation of terms and conditions causes significant problems, but is concerned that any provision allowing parties to agree to variations to terms and conditions for the purpose of harmonising terms and conditions would be incompatible with the Directive. We agree with the principle that there should be an ability to harmonise post transfer and we therefore urge the Government to lobby for appropriate changes at EU level to enable provisions to be implemented that would make it easier to renegotiate employment contracts to achieve greater harmonisation of terms and conditions after a transfer (provided no less favourable).

a) If you disagree, please explain your reasons.

No comment.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes. Please also note our major concern regarding the Government's view that 'economic, technical or organisational reason entailing changes in the workforce' do not include insolvency. In our view insolvency, and any associated lack of ability to pay employees, is per se an economic reason. It would be very helpful if the TUPE provisions could recognise and cater for the fact that, where a transfer is made within a formal insolvency process, there is no money available to provide these worker protections and that there is a balance to be struck between the need for such protections and the need for a rescue

culture. This point is also relevant to the Government's views as set out in paragraphs 7.65 to 7.81 in the consultation document (and we therefore reiterate this point at Q8 below).

Q5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

No comment.

a) Please explain your answer.

No comment.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No comment.

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.

We note that the CJEU case of Parkwood Leisure v Alemo-Herron will establish whether the Directive allows (or even requires) Member States to provide that employees are entitled to the benefit of future collective agreements relating to their original employer (a 'dynamic' approach), or whether employees can only be entitled to the terms of collective agreements applicable at the time of the transfer (a 'static' approach). We strongly agree with the Government that a static approach should apply, as the dynamic approach is not commercially viable in our view (we do not believe that a transferor who renegotiates terms with their employees a number of years following a transfer of a different tranche of employees should be required to inform the transferee employer of those transferred employees).

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No comment.

Q6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes

We support the proposal to remove the current gold plating and bring regulation 7 back in line with the Directive.

a) If you disagree, please explain your reasons.

No comment.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No comment.

Q7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?
We have not answered this question as it raises technical employment law issues.

a) Please explain your reasoning.

No comment.

Q8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

We have not answered this specific question, but would like to reiterate our major concern (see Q4b above) regarding the Government's view that 'economic, technical or organisational reason entailing changes in the workforce' do not include insolvency, whereas in our view insolvency (and any associated lack of ability to pay employees) is per se an economic reason. It would be very helpful if the TUPE provisions could recognise and cater for the fact that, where a transfer is made within a formal insolvency process, there is no money available to provide these worker protections and that there is a balance to be struck between the need for such protections and the need for a rescue culture. This point is relevant to the Government's views as set out in paragraphs 7.65 to 7.81 in the consultation document.

If you disagree, please explain your reasons.

No comment.

Q9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?
We have not answered this specific question, but we do have some comments on this section of the consultation document.

At paragraph 7.77, in our view the Hynd v Armstrong approach deters business rescues, meaning there is either a much lower purchase price or potential bidders are put off completely, which not only worsens the position for creditors but also means there is no transfer and all the employees may be redundant (rather than some being kept on by

virtue of a sale of the business). We note that the administrator of a company will retain all staff that are needed to run the business in order to maximise its value (and potential return for the creditors), so will not unnecessarily dismiss employees.

At paragraph 7.79, the Government suggest a possible amendment that 'where the reason is solely to get an enhanced sale price, this would not normally qualify as an ETO' (our emphasis), but we are concerned about how reasons 'solely' to get an enhanced sale price would be interpreted. We note that an administrator's duty is to maximise value for the creditors as a whole, whereas these proposals would appear to go against this general duty and a balance needs to be struck between these various objectives. Please also see our comments in paragraphs 4 and 5 from ICAEW Rep 12/12 mentioned at paragraph 12 above, reproduced below:

When a purchaser makes an offer for a business … the price is normally discounted to take into account the likely costs of dealing with and settling TUPE liabilities, including unfair dismissal and/or protective award claims, which might fall on the purchaser. If this discounted offer is less than the price that could be obtained for the assets on a break-up basis, the officeholder will normally be obliged to reject the offer, close the business down and sell the assets piecemeal, thus fulfilling the statutory obligation to obtain the best outcome for creditors. Of course, the business and all the associated jobs will be lost.

There should not, in principle, be a penalty (the above reduction in price, which leads to closure being preferable to a going concern sale) for taking the commercial decisions required to preserve some employment, which effectively leads to no employment. However, decisions on who is dismissed must be justifiable and discrimination on sex, race or age grounds is not acceptable.

Please also see our comments at Q8 above that insolvency should be included as an 'economic, technical or organisational reason entailing changes in the workforce'.

a) Please explain your reasons.

See above.

Q10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes, we support the Government proposals as set out in paragraphs 7.84 to 7.91 in the consultation document, which would allow (but do not require) consultation by the transferee with staff who are due to transfer as we consider such joint consultation will reduce bureaucracy.

a) If you disagree, please explain your reasons.

No comment.

Q11: Rather than amending 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No comment.

a) Please explain your reasons.

No comment.

b) If you disagree, what would you propose is a reasonable time period?

No comment.

Q12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

As mentioned in our general comments, we support the proposal to allow micro businesses to inform and consult employees directly regarding transfers, rather than through representatives, in cases where there is neither a recognised union nor existing representatives. However, we query whether this easement should be restricted to micro-businesses (ie, businesses with 10 or fewer employees) as we believe it may be appropriate for this threshold to be set higher (eg, 20 or possibly more), and that the Government should reconsider the cost/benefit of setting the threshold so low.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

See paragraph 48 above.

Q13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

No comment.

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

No comment.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No comment.

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

No comment.

Q14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

No comment, except to agree that there will need to be transitional provisions to ensure that transfers which take place before the legislation is amendment are not retrospectively adjusted (as mentioned in paragraph 7.107 of the consultation document).

Q15: Have you any further comments on the issues in this consultation?

1. No comment.

Q16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

2. No comment.

a) Please explain your reasons

3. No comment.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

4. No comment.

Q17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No comment.

ISS UK Limited

✓ Large business (over 250 staff) - 45000

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

No

a) Whilst not perfect, the SPC elements of the TUPE Regulations have made a significant impact on providing clarity over the application of the Regulations to this type of transfer. The emerging domestic case law, particularly in the last 2 years has helped further refine this complex area of law to provide a much needed level of consistency for procurement authorities and bidders.

For an outsourcing company like ISS, complete repeal of the SPC amendments would bring about a return to the uncertain landscape of pre 2006, with an increased likelihood of litigation and an inevitable increase in the pressure on the already overburdened Employment Tribunal Service.

Are memories of this that short? ISS is always keen to adhere to the regulations but cannot say the same for many of its competitors. Without the SPC amendments, it is far more likely that companies will seek to argue that TUPE has no application to the transfer, leaving the affected employees without the protection that was intended. As well as the negative impact on employees, the increased uncertainty in bidding processes is likely to lead to increased likelihood of dispute and litigation between clients and companies and, in our view places at risk effective competition between bidders based solely on price with no attention being paid to issues such as quality and competence. ISS believes that this places service users increasingly at risk. An example of this is in the NHS where our observation is that hospital cleaning standards are at risk of compromise from an almost total emphasis on cost, with the possibility of service failures of the type seen at Maidstone Hospital NHS Trust several years ago.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No comment

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(iv) 5 years or more

a) Do you believe that removing the provisions may cause potential problems?

Yes

b) If yes, please explain your reasons.

The underlying principles of the legislation, namely to protect employee rights, will be significantly eroded. From an employer perspective, many companies have entered into commercial contracts, employing thousands of employees with the expectation that at the termination or expiry of those commercial contracts, TUPE will apply so as to protect their employment rights and ensure that they have the right to continue working if they chose to. Repeal of the SPC elements of TUPE leaves the landscape unknown with the potential for those employees to lose out on employment continuity.

In addition, without a lengthy lead in period, many companies will find themselves incurring significant ,but unanticipated severance costs which will impact adversely on its business. Bidders will be deterred from bidding for large complex multi-disciplinary or consortium bids where there are obvious economies of scale for procurement authorities in favour of smaller, single client contracts with limited risk to the detriment of the tax-payer.

Question 3: Do you agree that the employee liability information requirements should be repealed?

No

a) If yes, please explain your reasons.

ISS would recommend the obligation is extended to 28 days, where possible.

The current regime is already wholly inadequate; to reduce the requirement further would lead only to more difficulties for transferees who have very little time to analyse the provided data before mobilising the assigned employees. The ability for a transferor to delay in providing any information at all until 14 days before the transfer is not in the interests of either; procurement authorities seeking a smooth transfer of service provider, the transferee or the employees. If this requirement was repealed and / or the list of prescribed information was reduced or removed, this would lead to increased disruption at the commencement of a new contract. This would not be beneficial to either employers or employees and would be a retrograde step. The repeal of the requirements to supply such information is in our view likely to increase in the potential for contract failures to the detriment of clients, procurement authorities and the government, as transferee contractors feel obliged to re-negotiate contract terms, have recourse to costly litigation to recover losses or seek to walk away from contracts due to unforeseeable risks being incurred.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes – However, this should be in addition to (and not instead of) the prescribed ELI.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more

closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes

a) Please explain your answer.

A complete prohibition on the ability of an employer to change the terms and conditions of a collective agreement entered into prior to the transfer is a rigid and inflexible approach which exceeds the requirement of the Directive. Relaxation of this prohibition after a one year period, strikes the right balance between protecting the employee and allowing the transferor the required flexibility to manage its business going forward.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

No

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Yes. A static interpretation again strikes the right balance between preserving historic rights and allowing much needed flexibility by a transferor. A dynamic approach is overly restrictive and could potentially stifle the ability of a transferor to grow its business and deliver change to the benefit of service users and customers.

d) Do you think there are any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

No

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes

a) Please explain your reasoning.

Amending TUPE to reflect the wording of the Directive will avoid the current ambiguity. In addition, the change will also ensure that constructive unfair dismissal claims cannot be brought in the absence of the employee being able to demonstrate that there has been a fundamental / repudiatory breach of contract.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes

a) Please explain your reasons.

Where an ETO exists, extending the employment of individuals for longer than required is a too restrictive approach. A transferee should be entitled to rely on the ETO of the transferor in respect of affected employees and, instead the test should be an assessment of whether the dismissal was fair in all the circumstances, rather than automatically unfair. This, in our view, will also enable procurement authorities and clients to drive out the full

benefits of change arising from the outsourcing of services to the obvious benefit of service users and tax payers.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes

a) If you disagree, please explain your reasons.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes

a) Please explain your reasons.

Detailed guidance will give a useful steer towards the factors relevant to the question of what constitutes ‘reasonable time’ in any given set of circumstances. However, the special circumstances provisions should be retained and the punitive nature of the penalties under Regulation 13 be amended to exclude technical breaches of the regulations which have no significant impact on the rights of affected employees.

b) If you disagree, what would you propose is a reasonable time period?

N/A

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

No

The ability to consult directly should be expanded to include all businesses not just micro businesses. From a business perspective electing representatives adds logistical,. administrative and financial burdens to a transfer (election processes, training reps, providing them with facilities and time to fulfil their duties etc.) to both transferors and transferees with no obvious benefit to affected employees. Employees generally prefer to be given the information directly and engaged individually rather than via a colleague.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

N/A

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

No

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

N/A

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes

Question 15: Have you any further comments on the issues in this consultation?

Employment Tribunals should be given the power or discretion to apportion liability between the two Respondents for failure to consult rather than the liability being joint and several.

If there has been direct communication with employees rather than via the appropriate union this shouldn't be considered a wholesale breach of regulation 13 (2).

Case law has established a number of tests as to whether an individual is assigned to an undertaking and eligible to transfer. It would provide useful clarity for this to be included in the legislation or guidance notes.

There seems to be an undue haste to legislate – Some recent changes to employment law appear to have not been thoroughly thought out and have/will lead to undesirable side effects that make business harder and hinder competition at a time when the government's interest lies in stimulating competition. Legislating in haste leads to employers repenting in tribunals

There have been references by officials to the removal of "Gold Plating" in relation to TUPE. However, in ISS's view, as a multi-national Company operating across Europe, such statements show a fundamental misunderstanding of the nature of both employment law and culture in the UK when compared with that found in continental Europe. In our experience many European countries have not included SPC provisions in their corresponding "TUPE" regulations as a specific provision, as it is already provided for in industry-wide, works council and collective arrangements.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

a) Please explain your reasons.

The proposals to repeal the entirety of the SPC provisions of TUPE are likely to have a negative impact on equality and diversity. Without the protection of the TUPE Regulations, new employers transferors are more likely to offer less favourable pay and conditions to transferring workforces leading to low pay and inequality. It is ISS's belief that without some regulation, there is the likelihood of unscrupulous employers driving down pay for excess profit, leading to the increased take up of welfare benefits, at a time when the Government is striving to bring the cost of welfare under control. ISS believes that low pay also leads to a high labour turnover, a poorly trained workforce and poor quality services. In essential public services such as health and education it may lead to increased risk to patients and school children.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

We have a significantly diverse workforce in terms of race and gender. In common with our knowledge of other similar Companies providing outsourced services it is reasonable to conclude that the proposed changes overall may have a negative adverse impact on ethnic minorities and women.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No Comment.

The Royal College of Midwives April 2013

The Royal College of Midwives (RCM) is the trade union and professional organisation that represents the vast majority of practising midwives in the UK. It is the only such organisation run by midwives for midwives. The RCM is the voice of midwifery, providing excellence in representation, professional leadership, education and influence for and on behalf of midwives. We actively support and campaign for improvements to maternity services and provide professional leadership for one of the most established clinical disciplines.

The RCM welcomes the opportunity to respond to this consultation and our answers to the consultation topics are set out below.

General Comments
In the Business Innovation and Skills impact assessment accompanying the consultation document, it says that:

"TUPE regulations aim to implement the EU acquired rights directive by: safeguarding employees' rights where a business, part of business or a service provision in which they are engaged changes hand."

In fact, it is impossible to identify one single measure in the consultation document which is even claimed to further the aim of safeguarding employees' rights. This is a set of proposals aimed at benefiting employers and is, as the impact assessment acknowledges, likely to disadvantage the low paid (especially women), those with disabilities and (possibly) those belonging to particular ethnic or faith groups.

Even then, the proposals are not backed up by a sound evidence base, an issue we return to in our answer to question seventeen. For now, we highlight three features of the evidence base:
throughout the summaries of questions in the Impact Assessment, additional "IA" questions are asked which seek estimates of the likely costs and benefits of the various proposals. This suggests to us that the department for Business Innovation and Skills (BIS) does not possess sufficient data on the costs and benefits of its various proposals to enable it to decide whether they are appropriate - notwithstanding the fact that it has already undertaken a call for evidence, and (now) published a timeline for implementation; a central plank of the proposals is the abolition of Service Provision Changes ("SPCs"). There is no consensus to the effect that this is desirable. The BIS Call for Evidence conducted in January 2012 revealed 66 respondents who favoured retaining SPCs, 47 who favoured repealing them and 61 expressing no view. In fact, for reasons we will develop, there are very good reasons for retaining SPCs; and a central plank of the evidence is the Employment Tribunal data. As BIS acknowledges, Employment Tribunal statistics for unfair dismissal claims related to TUPE are not presented separately to other unfair dismissal claims. The same is also true for unlawful deductions from wages claims related to TUPE. Yet the only figures reproduced by BIS relate to information and consultation claims under TUPE. BIS then proceeds to the conclusion that *"In summary, the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims"*. To draw that conclusion form the statistics reproduced is, at best, misleading.

In addition, the approach consistently adopted through the consultation of proposing amendments which "more closely reflect the wording of the Directive" or even "copy out"

the relevant provisions of the Directive is not, in our view, helpful to anyone. The Directive does not seek to achieve full harmonisation of the laws in Member States. Many areas are left to the determination of Member States. To avoid uncertainty, we are strongly of the view that, as long as compliance with the Directive is preserved as a minimum standard, the government should seek to explain, in the Regulations themselves and not in guidance, how TUPE is intended to operate in the context of United Kingdom labour law.

We also note that, at many points, BIS is at pains to emphasise what it sees as the possible anti-competitive effects of not making the amendments it proposes. We do not accept most of those propositions. But one related aspect we think that BIS should have referred to is the situation of in-house bids in public sector contracting. Reducing the protections guaranteed by TUPE has the effect of making it more difficult for an in-house bid to be successful because the opportunities for contract variation by the in-house team are likely to be less than in the private sector. We turn now to questions posed in the consultation.

Question One: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Yes/No

Emphatically "no".

a) Please explain your reasons

At paragraph 7.12, BIS announces that the government "suggests" that the 2006 SPCs *"may have actually imposed unnecessary burdens on business, and questions whether they have delivered the benefits actually anticipated."* The government seems to make this suggestion on the following premises:

- that the position on the application of the Directive became more settled as a result of the Suzen3 case, and subsequently;
- that the numbers of TUPE-related Employment Tribunal claims has been increasing; and
- various competition-related arguments, the most striking of which is the government's apparent approval of employers taking advice as to how to avoid the application of TUPE.

The position on the application of the Directive (and TUPE) - whether for SPCs or standard business transfers - didn't become more settled after the Suzen case. Quite the opposite in fact. - and we strongly suspect that most experienced practitioners, whether acting for employers or employees, would agree.

It was the Suzen case which introduced the apparent distinction between the application of the Directive to labour-intensive undertakings (which seemed to require the transfer of a major part in terms of their numbers and skills of the workforce) and asset-reliant undertakings (which seemed to require a transfer of significant assets). That was a departure from the previously applicable multi-factorial test set out in the Spijkers case as to the circumstances in which an economic entity retained its identity.

The uncertainty generated by the Suzen case was the driving force behind a sequence of cases in the Court of Justice which appeared to reinforce the distinction. These included Vidal (organised group of wage-earners in a labour-intensive undertaking capable of amounting to an economic entity); Oy Liikkene (no retention of identity where no substantial transfer of assets in asset-reliant undertaking); Abler v Sodexho (a requirement

to prepare meals in the hospital kitchen amounted to a taking-over of substantial assets); and CLECE (in a labour-intensive undertaking, the non-transfer of staff meant there was no transfer).

See Scottish Coal Co Ltd v McCormack and others [2005] SC 105, approved in Balfour Beatty Power Networks Ltd v Wilcox [2007] IRLR 63

But the UK Courts have pointed out that the classifications of asset-reliant and labour-intensive undertakings are simply opposite ends of the same spectrum - and even questioned whether the Court of Justice intended to say that it was necessary, as a matter of law, to distinguish between labour-intensive and asset reliant undertakings. Indeed the UK Courts have been prepared to find that there was a transfer notwithstanding the absence of a transfer of assets in a business which was arguably asset reliant.

Unsurprisingly, the approach adopted by the Court of Justice in relation to labour-intensive undertakings was perceived as creating difficulties by the UK courts. The problem was that the determination as to whether a transfer had occurred seemed to depend on whether the new employer was willing to take on a major part of the existing workforce. The new employer could seemingly circumvent the application of TUPE by declining to take on a major part of the workforce. This led to a sequence of cases (at Court of Appeal level) dealing with the discrete issue of the importance to be attached to the new employer's unwillingness to take on a major part of the workforce.

The absurdity of the position reached is well illustrated by the Atos case. The new employee was initially willing to take on a minority of the existing workforce but subsequently decided not to take on any of them in order to ensure that there was no transfer. After dismissing the concept of a deemed transfer of employees, the Employment Appeal Tribunal held that, in the context of an undertaking which will require fewer workers, the correct approach was to consider whether those who have been taken over constitute a major part of the workforce required after the transfer.

Until 2007, there was a steady stream of appeals to the level of the Court of Appeal (and, in some cases, references to the Court of Justice) dealing with these fundamental issues relating to whether or not there was a transfer for the purpose of the 1981 version of TUPE (i.e. before the introduction of SPCs in 2006). The issues being pursued on appeal were *not* esoteric and of limited application; they were fundamental and wide-ranging, such as the correct approach to asset-reliant and labour-intensive undertakings and how to take account, in labour-intensive undertakings, of the new employer's unwillingness to take on the workforce.

That all changed very dramatically following the introduction of SPCs in 2006.

Since the Court of Appeal's decision in the Balfour Beatty case14, appeals to the Court of Appeal dealing solely with the application of Regulations 3(1) (a) and 3(1) (b) have all but dried up. There is the Court of Appeal's decision in Hunter v McCarrick15, which clears up the point that, for there to be an SPC, the activities after the transfer must be carried out for the same client. But there is very little, if anything, else in terms of appeals to the Court of Appeal dealing solely with the application of Regulations 3(1) (a) 3(1) (b). There have also been no decided references to the Court of Justice from courts in the United Kingdom dealing with the corresponding subject matter under the Directive.

It is true that there have been appeals to the Employment Appeals Tribunal dealing with some of the requirements for an SPC. The first issue to emerge was the effect of fragmentation of services following transfer. It can not be said that the issue of fragmentation creates the wide-spread uncertainty that differing approaches to asset-reliant and labour-intensive undertakings created. It is instead a relatively confined and esoteric issue, necessarily to be decided on the facts on a case by case basis. In any event, this is an issue which has also arisen under the standard definition of a transfer (i.e. pre-2006)17. It is not a major issue of uncertainty generated by the existence of SPCs, as is suggested at paragraph 7.13 of the consultation document.

Likewise, there is the issue of "assignment". Again, contrary to what is suggested at paragraph 7.13 of the consultation document, the existence of SPCs does not introduce new uncertainties as to which employees are assigned. Regulation 4 provides for the automatic

transfer of employees employed by the transferor and assigned to the organised grouping of resources or employees. As such, the relevant assignment provision caters both for standard transfers and SPCs. Such uncertainties as there are apply equally to assignment in the context of standard transfers and SPCs.

Other issues have emerged in relation to SPCs. There has been a handful of appeals to the Employment Appeals Tribunal dealing with how to determine whether there is an organised grouping of employees which has as its principal purpose the carrying out of the activities in question; what is meant by a contract for the supply of services; and the need for the client to remain the same. It is true that all of these issues are applicable only to SPCs. But it is also true that the number of appeals to the EAT raising these issues is very limited indeed.

It is therefore absolutely clear that the existence of SPCs has greatly reduced the scope for dispute as to whether TUPE applies. A return to the pre-SPC position will lead to a return to the escalation in the number of cases contesting whether there has been a transfer. This will inevitably increase the costs for businesses as more and more cases are litigated, increase the burden on the Employment Tribunal and Courts system and lead to a diminution in the protection of employees.

Further, the competition-based arguments at paragraphs 7.13 to 7.14 of the consultation document are not substantiated by any evidence, or are simply perverse. No evidence is presented as to the effect that the reason for re-tendering a contract is often that the identified of the persons performing the contract. No explanation is given as to why it is anti-competitive for staff the transferor wishes to keep on to be re-assigned prior to transferor (even if this is a widespread practice). In any event, it simply does not follow from these two flawed notions that *"Removing the service provision changes should act as a spur to competition within the outsourcing market".*

At paragraph 7.14, BIS says that *"….Prior to the 2006 amendments, it was necessary to establish whether TUPE applied, whereas now advice is often needed to see how TUPE might be avoided, or concerning how its effects might be mitigated."* This statement is used by BIS to support its conclusion that the need for legal advice has not been reduced by the existence of SPCs. It is then also suggested that the efforts to avoid the application of TUPE are anti-competitive.

We think that it is wholly inappropriate for BIS to acknowledge as legitimate the efforts of employers to circumvent an important piece of social legislation. Still less do we think it appropriate for BIS to use the desire by some employers to seek advice as to how to avoid TUPE as a justification for removing SPCs from TUPE.

We will elaborate on why the use of Employment Tribunal statistics relating to information and consultation claims under TUPE only to support the contention that SPCs should be abolished is misleading in our answer to question seventeen. But, for now, we wish to draw attention to an important statement appearing under the heading of "Employment Tribunal data" on page 24 of the Impact Assessment:

"However, it should be noted that as there are so many TUPE transfers occurring every year and a comparatively low number of tribunal cases, TUPE legislation should be viewed as an area where there is good compliance."

Coupled with our arguments as to the dramatic decrease in disputes as to the application of TUPE since the introduction of SPCs, we consider that this is yet further evidence that including SPCs within TUPE is working well.

b) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as implemented by the Court of Justice of the European Union).

For the reasons we have given, we are firmly of the view that there should be no attempt to revert to the pre-2006 situation and that to do so will inevitably restrict the protection for employees and re-introduce the previous uncertainty as to when TUPE applies.

Question Two: If the government repeals the service provisions changes, in your opinion, how long a lead in period would be required before any change takes effect (i) less than one year; (ii) 1-2 years; or (iii) 3-5 years (iv) 5 years or more

The government should not repeal the service provision changes, if it is determined to remove the provisions whatever the consequences, then there should be as long a lead in period as possible, and certainly no less that five years.

a) Do you believe that removing the provisions may cause potential problems? Yes/No

Yes removing the provisions will cause problems.

b) If yes, please explain your reasons.

There are the issues we raised in our answer to question one. In addition, the problems for service providers will be substantial. They will have been awarded contracts on the basis that they can off-load employee liabilities should the contract be awarded to another provider. That will no longer be the case where the transfer amounts to an SPC but not a standard business transfer.

Question Three: Do you agree that the employee liability information requirements should be repealed? Yes/No

The RCM does not agree that employee liability information requirements should be repealed.

a) Please explain your reasons.

The fact that the current arrangements may be leading to late provision of inadequate information is not justification for repealing the employee liability information provisions.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

On balance, we would favour such an amendment subject to the proviso that non-provision of the information would not be any defence to a claim brought by an employee representative for a failure to inform and consult under Regulation 13.

Question Four: Do you agree with the government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject? Yes/No
a) If you disagree, please explain your reasons.

There is general agreement that harmonisation is not permitted by the Directive. BIS's stated desire to make it easier to vary contracts to give greater harmonisation sits uneasily with that consensus.

BIS seems to take the view that the Directive only prohibits variations which are by reason of the transfer, as opposed to variations for a reason which is connected with the transfer.

We don't think that distinction is valid in the light of the Court of Justice's most recent detailed judgment dealing with the issue in the Martin20 case. We refer in particular to paragraphs 44 and 45 of the Court of Justice' judgment which use the phrases *"…the alteration of the employment relationship is nevertheless connected to the transfer……"* and

20 Martin and another v South Bank University C-4/01 [2004] IRLR 74

"…..the transfer of the undertaking is indeed the reason for the unfavourable alteration of terms….." interchangeably.

In fact, we think that the current version, in seeking to make the distinction between variations by reason of the transfer and those for a reason connected with the transfer, and permitting variations for a reason connected with the transfer where there is an economic, technical or organisational reason entailing changes in the workforce, does not comply with Article 4 of the Directive. It is perhaps surprising that this issue has not been referred to the Court of Justice from the UK courts.

In an area as nuanced and fraught with controversy as this, it is not helpful for BIS simply to propose the amendment of the restriction in regulation 4 *"so that the restriction more closely reflects the wording of the Directive"*. It is the wording of the Directive that has led to controversy and uncertainty for the last 35 years.

In any event, we think that the indicative text put forward at paragraph 7.42 of the consultation paper is flawed. First, the new subparagraph (4) does not take account of the fact that the Court of Justice apparently also prohibits changes which are for a reason connected with the transfer.

Secondly, the new subparagraph (5) misunderstands the effect of paragraph 42 of the Court of Justice's judgment in the Martin case. There, the Court explains very clearly that the ability of the transferee to vary terms and conditions is the same as the transferor's, provided that the transfer of the undertaking itself may never constitute the reason for that amendment. The new subparagraph (5) would operate the other way round: the voiding provision of subparagraph (4) would not apply if the variation was one which could have been made had there been no transfer.

Thirdly, the new subparagraph (5A) does not take account of the fact that Article 4 of the Directive prohibits variations where the reason for the variation is the transfer, and makes no separate provision for variations where the reason is connected with the transfer.
It's not clear exactly what the government has in mind. What it has indicated as a possible proposal is fatally flawed and is likely to lead to outright confusion.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

No. As explained, we do not think that the exception for economic, technical or organisational reasons complies with Article 4 of the Directive.

Question Five: The government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view? Yes/No

No.

a) Please explain your answer

The reason behind this proposal isn't made explicit in the consultation document, but it is in the accompanying Impact Assessment. The Impact Assessment explains that the rationale for the proposal is that employees transferring from unionised employers (especially those transferring to non-unionised employers) are likely to cause large costs to the new employer, and that the proposal may enable more non-unionised potential transferees to bid in areas where employees are unionised. In other words, the reason is to enable prospective transferees to avoid union-bargained terms after one year.

The point has been made many times during the course of the Alemo-Herron litigation that the legal structure within which collective agreements operate at the individual level in the United Kingdom is different to the legal structures in other EU Member States. In the United Kingdom, collectively bargained terms (subject to their incorporation) are enforceable through the individual contact of employment. That is very different from many Member States where collectively bargained terms are enforceable through statute.

Time and time again, the Court of Justice has said that the Directive requires that the contractual rights of employees under national law should be preserved on transfer. And if terms from a collective agreement become incorporated into a contract of employment, then they should be protected to the same extent as any other terms of the contract of employment.

A number of features of the system of collective bargaining in the United Kingdom fortify this conclusion. First, terms derived from collective agreements only become incorporated into contacts of employment, and therefore legally enforceable if the parties to the contract of employment so agree (expressly or impliedly). Secondly, the parties are perfectly free to agree that future changes in the collectively bargained terms will also become incorporated into contracts of employment. Thirdly, terms derived from collective agreements will only become incorporated into contracts of employment if they are apt for incorporation-and terms relating to pay generally are regarded as apt for incorporation. Fourthly, because the terms derived from the collective agreement become terms of the contract of employment, it makes no difference to their legal enforceability via the contract of employment if the collective agreement is terminated. Fifthly, it follows that the question whether a given employee is entitled to the benefit of the terms of a collective agreement falls to be determined solely by reference to the terms of their contract of employment,

rather than by reference to membership of a trade union, or whether the employer is party to the collective agreement or is operating within a given sector.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer? Yes/No

If, contrary to what we have said, variations to collectively bargained terms are to be permitted after a year, there should be a requirement that any change should be no less favourable than the terms applicable before the transfer.

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions? Please explain your answer.

The question is misplaced. The outcome of the Alemo-Herron case is likely to be a determination as to whether or not the dynamic approach currently operating in the United Kingdom is *permissible* under the Directive. If the Opinion of Advocate General Cruz Villalon is followed, the answer to that question will be “yes”. We think it unlikely, in the light of the Advocate General’s opinion, that the Court will rule that a static approach is *required* by the Directive.

Repeating the point we made in our answer at a), we think that there are overwhelming grounds, given the legal structure in the United Kingdom, for preserving the dynamic approach adopted though cases such as Whent v Cartledge and BET Catering Services Ltd vBall.
And there are further grounds for retaining a dynamic approach. The expectations of the employees who have the benefit of dynamic clause in their contracts are certainly that those dynamic clauses will continue to be honoured unless and until the terms are varied validly or the contract is terminated.

Further, it may well be the case that the introduction of such a measure would constitute a disincentive or restraint on the use by employees of union membership to protect their interests in contravention of Article 11 of the European Convention on Human Rights. It may also be possible to characterise on-going entitlements under dynamic clauses as property or possessions for the purpose of Article 1 Protocol 1 of the Convention, meaning that any interference would require justification.

Further, if the government were somehow to seek to impose a requirement for a static interpretation for contractual terns derived from collective agreements, that would offend basic principles of ordinary contract law. Once a term has become incorporated into a contract of employment, or any other contract for that matter, it has the same status as any other express term of the contract. To provide somehow that a dynamic incorporation clause morphs into a static clause on a transfer of an undertaking would be to make a unique example of collectively bargained terms and their incorporation into contracts of employment.

d) Do you think there are any other changes that should be made regarding the continued applicability of term sand conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive? Yes/No

No.

Question Six: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject? Yes/No

No.

a) If you disagree, please explain your reasons.

We think that the existing structure of regulation 7 is likely to be the most accurate implementation of Article 4 of the Directive.

We refer back to what we say about the way in which the Court of Justice does not make the same distinction between variations which are by reason of the transfer and variations which are for a reason connected with the transfer (see in particular paragraphs 43 and 44 of the Court's judgment in Martin). We think the same applies to dismissals by reason of, and for reasons connected with, the transfer.

We also believe that Article 4 does preclude dismissals which are for a reason connected with the transfer which are not for an economic, technical or organisational reason entailing changes in the workforce.

This interpretation of Article 4 is supported by the Court of Justice's decisions in Bork29 and Jules Dethier30. We note that BIS does not say which case law of the Court of Justice it relies on to support the opposite conclusion.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

No.

As we have said, in Martin the Court of Justice uses the phrases "by reason of the transfer" and "for a reason connected with the transfer" interchangeably. According to the Court of Justice in that case, variations for both types of reason are not permitted by the Directive.

Further, Article 4 of the Directive permits dismissals for a reason connected with the transfer which are also for an economic, technical or organisational reason entailing changes in the workforce. There is no such exception, either in the Directive or the Court's case law, for variations to terms and conditions.

Question Seven: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive? Yes/No

No.

a) Please explain your reasoning.

The Court of Justice has consistently reaffirmed that the Directive is intended to achieve partial harmonisation of the laws in Member States31. It is clear that the remedies available where the employee is entitled to terminate the contract of employment in the circumstances envisaged by Article 4(2) are for Member States to determine - subject to the restrictions we set out below**.**

We do not think that it is safe to rely on the Court of Justice's decision in the Juuri case (which is not reported and has been the subject of little academic commentary) as establishing that Member States have a free hand, subject to providing for notice payments and other benefits during the notice period, to determine the remedies available where the contract is terminated in the circumstances envisaged by Article 4(2).

First, that case was heavily influenced by the fact that the substantial detriment relied upon was the expiry of a collective agreement and its replacement with another. The fact that the detriment operated *"independently of any failure on the part of the transferee employer to fulfil its obligations under that directive"* is specifically referred to when the Court gives its conclusions on this aspect32.

Secondly, as acknowledged by the Court of Justice in the Juuri case, the freedom to choose ways and means of ensuring that a Directive is implemented does not affect the obligation incumbent on all Member States to adopt in their national legal systems all measures necessary to ensure that the directive concerned is fully effective in accordance with the objective it pursues33. Further, as the Directive is intended to safeguard the rights of employees in the event of a change of employer by allowing them to continue to work for the transferee employer on the same conditions as those agreed with the transferor34.

The government will not be meeting those requirements if it simply copies out Article 4(2) of the Directive. Instead, it will be introducing a measure guaranteed to lead to more uncertainty and litigation**.**

Question Eight: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purpose of the Employment Rights Act 1996? Yes/No

No.

a) If you disagree, please explain your reasons.

Save that Regulation 7(1)(b) expresses the "reason" in the singular, the operative wording is exactly the same as that set out in Article 4(1) of the Directive, which provides "……economic, technical or organisational reason entailing changes in the workforce".

We are not aware of any decision of the Court of Justice touching on the definition of "workforce" in Article 4(1). But courts in the United Kingdom have consistently held that the term "workforce" connotes *"the whole body of employees as an entity: it corresponds to the strength or establishment"35*. That definition of "workforce" adopted by the courts in the United Kingdom does not include the location at which the work is carried out. There is no reason to suppose that the Court of Justice would define the same word any differently. There is a further reason to support this definition of the word "workforce" for the purpose of Article 4(1).

The words "….entailing changes in the workforce……" must be taken to qualify the preceding words "….economic, technical or organisational reason…" If they didn't, they would be superfluous. And if location was to be included within the concept of workforce, it is difficult to see why other aspects of terms and conditions would also not be included within the definition of "workforce".

Therefore we do not think that the proposal put forward by BIS can be accommodated within Article 4(1) of the Directive.

Question Nine: Do you consider that the transferor should be able to rely on the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees? Yes/No

No.

a) Please explain your reasons.

The current position - that a transferor is not able to rely on a transferee's ETO reason - is based on domestic law. But it is based on domestic case law which considers and interprets Article 4(1) of the Directive i.e. the Hynd v Armstrong36 case. As was recognised by the Court of Session in that case, the Court of Justice's decision in the Dethier37 case is not relevant because in that case the Court was not considering the situation of a transferor relying on a transferee's ETO reason.

The Court of Session's reasoning in Hynd v Armstrong is sound. It correctly construed Article 4(1) of the Directive as meaning that an ETO reason relied upon by the transferor to justify dismissal as fair had to be its own ETO reason. It added that there was no reason why the transferor should be able to rely on a transferee's ETO reason when it didn't have a valid one of its own.

As the Court of Session remarked, that conclusion was fortified by two further considerations. First, there are the insolvency situations referred to at paragraph 7.77 of the consultation document. If the transferor is insolvent, there would be every incentive, if the transferor were able to rely on the transferee's ETO, for the transferor to dismiss the employees to make the sale of the business more attractive. This would subvert the purpose of the Directive. In our view, avoiding this outcome should be given more weight than permitting such dismissals so as to make the purchase of the business a more attractive proposition.

Secondly, we consider that the prospect of enabling a larger pool for redundancy selection purposes is a factor in favour of maintaining the current position. It is likely that any impact in terms of a larger pool will favour the employees whose employment is to transfer. That is in accordance with the purpose of the Directive. It may also be more likely that collective redundancy consultation obligations would be triggered.

Article 4(1) of the Directive does not, in our view, permit the government to amend TUPE so as to enable transferors to rely on transferees' ETO reasons - and there are sound policy reasons for this**.**

Question Ten: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purpose of the requirements

to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992, therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies? Yes/No

No.

a) If you disagree, please explain your reasons.

We doubt whether such an approach would be permitted by the Collective Redundancies Directive38. Article 2 of that Directive provides that the consultation obligation is triggered when an employer contemplates collective redundancies. And it is the employer which has to begin consultations. The transferee, of course, will not be the "employer" in advance of the transfer.

38 Council Directive 98/59/EC

A problem which has always existed with the consultation obligations under TUPE would also be exacerbated if the transferee were to be allowed to consult about collective redundancies in advance of the transfer.

From the employees', and their representatives', perspectives, there has long been a defect at the heart of the information and consultation obligations. The widely held view is that the transferee is not required to consult with the employee representatives of the transferring affected employees in advance of the transfer. The reason for this is that the obligation to consult contained in Regulation 13(6) applies only to an employer of an affected employee which envisages that it will take measures in relation to an affected employee.

It would be grossly unfair if the transferee were to be able to take advantage of an ability to consult about collective redundancies before the transfer without at the same time being required to consult with those employee representatives for the purpose of Regulation 13 of TUPE.

There is also the issue of pool selection for redundancy purposes we have already referred to. If consultation is effectively allowed to start before the transfer in respect of redundancies to be made after the transfer, it is virtually certain that the pool selected will include only employees of the transferor, thereby denying them the opportunity to advance a case for a selection pool encompassing the transferee's existing employees.

Further, the consultation required by section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 relates not only to the employees to be dismissed, but also to the employees who may be "affected" by the proposed dismissals or by measures taken in connection with them. If pre-transfer consultation is allowed to count, there is every chance that there will be two groups of employees under consideration - those employed by the transferor and those otherwise "affected" employees of the transferee. We don't see how the consultation could work effectively in those circumstances.

There are also practical reasons why the government's suggested approach should not be adopted. First, the employee representatives for the transferor's transferring affected employees will probably not be familiar with the workings and business of the transferee before the transfer. It is unrealistic to expect them to be in a position to consult about ways of avoiding dismissals, reducing the numbers of employees to be dismissed and ways of mitigating the consequences of the dismissals in advance of the transfer. It may well even be unrealistic to expect transferees to be in the necessary state of readiness in advance of the transfer to supply sufficient information to the transferor workforce's employee representatives. These points carry particular weight as the government introduces measures to shorten the period within which consultation must commence where 100 or more redundancies are proposed.

It is essential to have in mind that the purpose of the Collective Redundancies Directive is to find ways of *avoiding* dismissals, reducing their numbers and mitigating the consequences. It is not to enable redundancies to be rushed through as quickly as possible.

Question Eleven: Rather than amending Regulation 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

No.

a) Please explain your reasons.
b) If you disagree, what would you propose is a reasonable time period?

Further provisions contained in guidance are less likely to be legally enforceable than if they appear in the Regulations themselves. We do not think it is either necessary or appropriate to put forward a fixed time period.

Question Twelve: Do you agree that the regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employees representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives? Yes/No

No.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees) Yes/No

In our view, amending Regulation 13 to permit micro businesses to inform and consult directly with affected employees without making arrangements for the election of employee representatives is not permitted by Article 7 of the Directive.
As the Court of Justice held in European Commission v United Kingdom39, the objective of what is now Article 7 is to enable employees to be informed and consulted about the transfer through their representatives. It is not open to Member States to permit a situation to exist whereby employers are not required to inform and consult employee representatives.

39 Commission of the European Community v United Kingdom of Great Britain and Northern Ireland [1994] IRLR 392

There are two exceptions to this. The first is that provided for in Article 7(5) of the Directive, which permits Member States to limit the obligations of paragraphs 1,2 and 3 *"…to undertakings or businesses which, in terms of the number of employees, meet the conditions for the election or nomination of a collegiate body representing the employees"*. In the United Kingdom, there is no such condition for the election or nomination of a collegiate body representing the employees. The first exception is not therefore available.

The second exception is where the employees, through their own default, fail to elect employee representatives.

Question Thirteen: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations? Yes/No

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.
b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses? Yes/No
c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

It will be apparent that we oppose all of the amendments proposed by the government – mostly on the grounds that they introduce greater uncertainty and/or do not comply with the Directive.

Whatever the government decides to do by way of amendment, the amendments should apply equally to micro businesses. To provide otherwise would lead to the intolerable position of different provisions applying to different organisations. Quite apart from being confusing and unfair, that may well be, to coin a term much favoured by BIS, "anti-competitive".

Question Fourteen: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period? Yes/No

We believe that all of the proposals are fundamentally flawed, for the reasons given above.

Question Fifteen: Have you any further comments on the issues in this consultation?

No.

Question Sixteen: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce? Yes/No

They will have a negative impact.

a) Please explain your reasons.
b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

In our view, the quality of the Equality Impact Assessment is woefully inadequate given the extent and potential impact of the proposals put forward by BIS.

It is inevitable that the proposals, if implemented, will have a negative impact on equality and diversity within the workforce. Despite what is said at page 53 of the Impact Assessment document, it must be the case that the introduction of SPCs in 2006 extended the coverage of TUPE to many low paid workers who would not previously have been protected. To remove that protection will necessarily have an impact on the low paid.

We also believe that there will be disproportionate impact on women (particularly where they are low paid) and those with disabilities, and possibly by reference to ethnicity and religion or belief.

We are surprised that these potential impacts were not explored more thoroughly before the proposals were published.

Question Seventeen: Do you agree with the analysis and evidence provided in the Impact Assessment? Please details for any area of disagreement or if you can provide any further knowledge in an area.

No.

Page 2 of the Impact Assessment seeks to answer the question why government intervention is necessary in relation to TUPE. The answer is laced with unsubstantiated propositions and anecdote: that TUPE could be creating an unnecessary burden on business, reducing the efficiency of the supply side of the economy and that the consultation is driven by "other feedback" and by the increase in Employment Tribunal cases related to TUPE (a claim which we address below).

The policy objective to be achieved is simplification of TUPE and cutting out "unnecessary gold-plating".

We don't think that stated policy objective is consistent with the rationales given for the separate proposals in the consultation document, which are more to do with conferring advantages on employers at the expense of workers.
The specific analysis and evidence for the removal of SPCs points out that transferors *"could end up with surplus employees, whilst the transferee needs to recruit"*. According to the evidence presented by BIS, up to 40,000 SPCs per year may be removed from the scope of TUPE. We consider it to be inevitable that removing SPCs from TUPE coverage will lead to significant job losses. Further, the associated redundancy costs will lie with the transferor and, in the public sector, that means public sector employers (or for insolvent employers, the Exchequer).

BIS offers no evidence to support the repeated proposition that SPCs lead to under-performing employees being deliberately included within the transferring employees.
And the department does not even attempt to advance a cost benefit, even for employers, beyond the recoupment of the £13million to £30million benefits estimated to have accrued to individuals arising out of the introduction of SPCs.

The specific analysis for changing the wording of restricting changes to terms and conditions does not even set out a description of the monetised costs for the main affected groups. A key risk is identified in terms of employers potentially not being confident enough to avail themselves of the amended provisions even if they are introduced. We think that this should have been, and should still be, properly investigated.

On the analysis and evidence in relation to limiting the effect of collective agreements, although it is an objective we condemn, the government is at least clear in why it is proposing these changes: to make it easier for non-unionised employers to bid for contracts and avoid having to pay unionised terms and conditions.
The other specific analyses and evidence for specific proposals follow in similar vein. There is no quantification and analysis of costs and benefits. There are occasional statements as to how particular measures might lead to beneficial results for employers.

Whilst we appreciate the difficulties in obtaining data as to the number of TUPE transfers each year, the evidence produced at pages 22 to 24 is at best unconvincing. The only conclusion which can sensibly be drawn is that BIS doesn't really know how many standard transfers, and how many SPCs, there are each year. That is not an encouraging position from which to propose wholesale changes to the Regulations.

But perhaps most objectionable is the use of the Employment Tribunal Data to reach the conclusion that: *"…In summary, the employment tribunal numbers show that the enforcement of the TUPE regulations have generated an increasing number of employment tribunal claims".*

As the consultation document acknowledges, the only claims which are recorded as being TUPE-related are claims relating to information and consultation. And claims in this category have risen from about 1000 in 2006/2007 to about 2500 in 2011/2012. This is against a background of TUPE applying to something less than 37,000 transfers in 2006 and around 77,000 in 2011/2012. It is acknowledged by BIS that, with so many TUPE transfers taking place each year, this is still a comparatively low number of Tribunal cases and that TUPE legislation should be viewed as an area where there is good compliance.

But the figures for information and consultation cases can not possibly provide a reliable picture of the overall operation of the Regulations. The great majority of TUPE-related claims do not present themselves as claims for a failure to inform and consult. They are instead claims for unfair dismissal and unlawful deductions from wages, which types of claims are likely to engage many of the issues raised in this consultation.

It is, at best, misleading to say that figures for failure to inform and consult cases under TUPE can be used as a driver for the subject matter of this consultation.

British Security Industry Association

Members' response to the Department for Business, Innovation and Skills' consultation on proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006

1. Foreword by the Chief Executive

The British Security Industry Association is the trade association for the private security industry in the UK. Its members provide over 70% of UK security products and services and adhere to strict quality standards.

Dealing with Transfer of Undertakings (Protection of Employment) – aka TUPE – Regulations 2006, is a daily occurrence for our members and it is probably no exaggeration to say that TUPE affects our industry more than any other.

Further to the consultation issued by the Department for Business, Innovation and Skills relating to proposed changes to TUPE, the British Security industry Association (BSIA) – the trade association representing over 70% of the UK's private security industry – sought the views of its members in order to provide a comprehensive response on behalf of the private security industry.

The response from BSIA members, across all regions of the UK and a broad spectrum of industry sectors, has enabled the Association to provide the Department for Business, Innovation and Skills with the detailed results contained in this report.

There is significant support from our membership on the need for change with a broad consensus of support for the proposed changes. However, it was noted, with some concern, that a significant proportion of the industry finds the Regulations difficult to comprehend and that the amendments to Service Provision Changes and Employee Liability Information would be counterproductive.

There was total support for a number of the questions asked: including areas such as the exception for economic, technical or organisational reasons entailing changes in the workforce, be retained. However, there were strong reservations about the intended removal of the Service Provision Changes and Employee Liability Information.

These proposals are generally seen as a positive move by our members in that they are seen to remove unnecessary burden from industry. However, both the BSIA and its members are keen to ensure that the proposed changes in regulation do not serve to open the flood gates to poor management practice which was indicative of this area prior to TUPE regulation being introduced.

2. Introduction

The Coalition Government's set of proposals on reforming the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') is part of their initiative to provide more flexibility for both employees and employers to create a working environment in which businesses can flourish and grow.

The British Security Industry Association ('BSIA') welcomes the Government's Employment Law Review as it has long believed that the regulatory burden on employers has become far too great and is restraining businesses from achieving their true potential. Nevertheless, any reforms have to be carefully thought through as ill considered changes to the existing laws may have the opposite effect to that which was intended.

The BSIA has a very real concern that the suggested repeal of the service provision changes will be a retrograde move which could create great uncertainty as to whether TUPE does or does not apply. The very last thing the BSIA wants is to see a return to the pre 2006 position in which contractors were unclear as to whether their contract losses or gains would be caught by TUPE.

This would result in an increase in litigation at great cost to the industry, both financially and in terms of management time. Furthermore, the uncertainty would have an adverse impact on the thousands of employees who are affected by TUPE every year.

3. The British Security Industry Association's response

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Reply: The BSIA has grave concerns that the Government's proposals will not achieve their stated aim of removing unnecessary burdens on businesses. Indeed, it is the firm view of our members that the proposals will actually increase the burden on businesses.

As the Consultation Paper rightly points out, one of the main objectives in introducing the 2006 changes was to give some degree of certainty to the parties of a transfer. This was particularly the case in service provision changes (SPC), where typically the transferor would have no contractual relationship with the transferee. Prior to the 2006 changes the parties to a SPC were dogged with uncertainty as to whether TUPE would apply in any particular case.

Whilst the case of Ayse Suzen v Zehnacker Gebaudereingung2 had helped reduce the level of uncertainty for both employers and employees in SPC situations, it still left such cases to the discretion of the Employment Tribunals. Different Tribunal outcomes could occur in cases which shared almost identical facts. Provided the Employment Tribunal considered the various factors laid down in the authorities, then their decisions would be extremely difficult to appeal.

The introduction of the 2006 Act effectively limited the degree of discretion to which individual Employment Tribunals could apply in SPC cases. In the vast majority of SPC transfers it is now the norm that all parties accept that TUPE applies. Of course there are a small number of complicated cases, such as fractional transfers or those with several diffuse service providers, which cause uncertainty. But the exceptional nature of these cases is such that they would have to be reviewed carefully in any event.

We note the comment in paragraph 7.12 that the existing 2006 SPC might act as a disincentive to bid. Whilst we recognise this is a concern, we believe an ever greater danger would be the ensuing uncertainty created in the market if the SPC provision was removed. Contractors, large or small, would be uncertain as to whether to cost on the

basis of Tupe applying or not. Outgoing contractors would be potentially saddled with redundancy liabilities for which they had made no provision and would be unlikely to recover from their (former) clients.

The uncertainty would not confine itself to the contractors. It would adversely affect both clients and the employees. Far from acting as a spur to competition within the outsourcing market it could have the very opposite result to that which is intended. Most clients, in our experience, will not be influenced whether to go out to tender or not by TUPE considerations. Similarly, if clients are unhappy with members of the contractor's workforce they already should have the means to deal with this problem. Similarly, as regards the issue of staff being moved into other positions, whether into or out of transferred contractors, clients already have the ability to ensure that any impact is minimised by using the appropriate contractual terms in their agreements with the contractor. We do not consider this to be a persuasive argument to justify the removal of the SPC provision.

Finally, we recognise that the need for legal advice may not have diminished since the introduction of the SPC provision in the 2006 Regulations. Unfortunately, the drafting of the Acquired Rights Directive and the manner in which it has been interpreted by courts and tribunals means that the need for legal advice will be a constant factor whatever Regulations are passed in the UK. We believe that the increased uncertainty created by any removal of the SPC provision could force even more employers, clients and employees to seek legal advice. Furthermore, the probable profusion in resulting litigation will add significant costs to employers, both in terms of management time and money.

While the existing SPC provision in the 2006 Regulations are far from perfect, it is the firm view of the BSIA that it is preferable to reverting back to the previous position of uncertainty which characterised the pre-2006 position.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

Reply: In the event that the Government decided to repeal the service provision changes then the BSIA would look for an extensive lead in period, preferably five years. Since the 2006 Regulations the vast majority of contractors have not included any provision for redundancy payments in their tenders. This was made on the assumption that if the contractor subsequently lost the contract then the service provision changes would apply and redundancy payments would not have to be made. The removal of the service provision changes makes it far more likely that Tupe will not apply, thereby triggering redundancy payments for the affected staff. In many cases these payments will be high, reflecting the long service of the employees whose previous service with other contractors will have been transferred under Tupe.

A five year lead in period will provide the contractor with an opportunity to make financial provision for future redundancy payments. It will also give them time to negotiate indemnities from clients for such costs, although this will prove challenging as in these straightened economic circumstances clients will be reluctant to add to their financial obligations for a liability that does not rest with them.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Reply: One of the great weaknesses in the pre-2006 situations, particularly with regard to second generation contracting, was the inability of the transferee to extract reliable information concerning the transferor's employees assigned to the contract in question. The transferor had no statutory right to any such information and in second generation contracts there would be no contractual relationship between the transferor and transferee. The transferee's only means of extracting contract information was by either calling on the goodwill of the transferor (a somewhat optimistic exercise given that they would be competitors) or persuading the client to use its influence on the transferor. In many situations the transferees only found out the true employee liability information when they commenced the contract. Unless they were fortunate enough to have secured appropriate indemnities from the client, then the transferee would have to bear the additional cost of any unforeseen liabilities.

Whilst we note the comment in the Government paper that 'in most business transfers there is usually co-operation between the parties', this most certainly does not apply to second generation outsourcing in the service sector. Even if the Government removes the service provision change then this will not resolve the issue because Tupe transfers will still occur in this sector.

All in all the pre-2006 position as regards employee liability information was deeply unsatisfactory. The 2006 Regulations, by imposing a duty to provide employee liability information to potential transferees, undoubtedly improved the situation. Transferees are now entitled to be informed of key information at least two weeks before the transfer and have some comfort that the information is accurate. Those contractors refusing to supply information or who provide inaccurate information can now be called to account. This has led to a great improvement in the exchange of relevant information.

Any attempt to dilute the 2006 Regulation in this regard would be a retrograde step. The security industry would be thrown back into a vacuum of uncertainty. While the existing situation is not ideal, it is a distinct improvement on the pre-2006 position.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Reply: The BSIA has long been concerned over the restrictions imposed on the transferee after a transfer and therefore welcomes the Government's proposal to amend regulation 4.

We also believe that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Reply: The BSIA agrees with the Government proposal on limiting collective agreements. This would give contractors some flexibility (and certainty) when dealing with collective agreements.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Reply: The BSIA sees much merit in the Government's proposal and supports it.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Reply: The BSIA agrees with the Government proposal. The current 'gold plating' in the 2006 Regulations creates uncertainty and adds to the regulatory burden on contractors.

Question 8: Do you agree with the Government's proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Reply: The BSIA fully supports the proposal that dismissals due to relocations should be covered by grounds of 'economic, technical or organisational reason entailing changes in the workforce'.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissal of employees?

Reply: It has to be said that the scenario prompting this proposal is not a common one for members of the BSIA. However, we can see the reasons why such a change would be beneficial, particularly in first generation outsourcing. We therefore support the proposal.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective agreements?

Reply: Although this is an issue that rarely affects BSIA members we recognise that the existing law creates unnecessary duplication and it would seem sensible to be able to treat the Tupe and collective redundancy consultations as one and the same.

Question 11: Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Reply: The entire issue of the requirement to elect employee representatives is a moot one within our industry. The nature of the industry, characterised by relatively small numbers of employees based at several locations, does not lend itself to a comfortable application of this particular aspect of the Acquired Rights Directive.

Nevertheless, we understand the constraints that the Directive imposes on the Government. With this in mind we welcome anything which would help retain as much flexibility in applying these obligations as possible. Accordingly, guidance would be preferable to any amendment to the existing Regulation.

Question 12: Do you agree that Regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)) rather than have to invite employees to elect representatives?

Reply: The ideal situation as far as the BSIA concerned is one in which this proposal could be applied to all businesses, not just micro ones. However, we recognise that this is not possible under the existing provisions of the Directive.

We are somewhat nervous about supporting anything which might create an uneven playing field and place one business at an advantage compared to another. However, our members are in support of this proposal.

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Reply: As mentioned above in our reply to question 12, the BSIA does not support any measure which would provide one business with a competitive advantage against another. We therefore agree that micro businesses should be included under all the proposed amendments.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Reply: We agree that other than the service provision changes, there is no particular reason why a lead-in period is required for the other proposals.

Question 15: Have you any further comments on the issues in this consultation?

Reply: No.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Reply: The BSIA has no evidence or indications to suggest that the Government proposals would have a negative impact on equality or diversity within the workforce.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Reply: The one criticism we have of the Impact Assessment is that it appears to have given insufficient consideration to contractors operating in the service industry. Second generation outsourcing in the service sectors affects thousands of employees every year. It far outweighs both first generation outsourcing and conventional business purchases.

We believe that the Government's proposal in respect of service provision changes appears not to have taken adequate account of the negative impact such a change would create in the outsourcing industry.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

☒ Yes, I would like you to publish or release my response

☐ No, I don't want you to publish or release my response

Your details

Local Government Association

Organisation (if applicable): Local Government Association

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this:

☐ Business representative organisation/trade body

☐ Central government

☐ Charity or social enterprise

☐ Individual

☐ Large business (over 250 staff)

☐ Legal representative

☒ Local government (**see comments below**)

☐ Medium business (50 to 250 staff)

☐ Micro business (up to 9 staff)

☐ Small business (10 to 49 staff)

☐ Trade union or staff association

☐ Other (please describe)

This response is submitted by the Workforce Team of the Local Government Association (the LGA). The LGA's role is to support, promote and improve local government and to speak with one voice on behalf of local government. The LGA covers every part of

England and Wales and includes county and district councils, metropolitan and unitary councils, London boroughs, Welsh unitary councils, fire, police, national park and passenger transport authorities. The Workforce Team of the LGA offers advice on employment issues and represents local government employer interests to central government, government agencies, trades unions and European institutions.

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☒ **No** ☐

a) Please explain your reasons:

Yes, on balance local authorities support the proposal but there are some concerns that the removal might create uncertainty as to whether a transfer situation falls within a TUPE transfer.

However, the effect of the repeal of the SPC provisions may have a limited impact in the local government sector, because in any event there is an expectation that TUPE will nearly always apply to such transfer situations. This is because the Cabinet Office Statement of Practice on staff transfers in the public sector (commonly referred to as 'COSoP'), which applies to local authorities, expects that TUPE should apply to transfers of functions within, and to and from, the public sector unless there are exceptional reasons for not applying it.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

No comment**.**

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

No comment.

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ **No** ☐

c) If yes, please explain your reasons.

The removal of the provision could in some cases cause confusion as to whether TUPE applies. However, clear guidance would help address this issue and in any event because of COSoP, for local authorities the default position would remain that TUPE applies.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ **No** ☐

a) If yes, please explain your reasons.

We have not answered yes or no to this question as local authorities have mixed views on this proposal. Some local authorities support the repeal, because they tell us that a two-week requirement does not in practice allow enough time for employee information to be assessed, and can in some cases mean the transferring employer waits right up to the two-week deadline before providing information. Therefore they view the provision is of

little use and they would prefer to see such matters addressed in guidance. However, some authorities takes the view that the ELI requirements should be kept as it ultimately ensures that information is provided, but with a longer timescale of, say, four weeks.

b) Would your answer be different if the service provision changes were not repealed?

No.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

No comment.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes. Local authorities repeatedly tell us that they find the restrictions on making changes to terms and conditions in a TUPE context a significant problem. Therefore the ETO exception should be retained as it is at least one option which can be explored to achieve change.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☒ **No** ☐

a) Please explain your answer.

As indicated in our response to question 4, local authorities would welcome any change that reduced the restrictions on enabling transfer related changes to terms and conditions.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☒ **No** ☐ although clear guidance would need to accompany the condition.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Yes.

Please explain your answer.

Yes, because the static approach means the employer retains more direct control over the terms and conditions which apply to its employees.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☐

No comment.

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ **No** ☐ however clear guidance must accompany any such change.

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☒ **No** ☐ again though clear guidance must accompany any such change.

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ **No** ☐

a) Please explain your reasoning.

Because this should reduce the risk of the TUPE going further in its protections than is required under the Directive. However it is important that any such amendment is accompanied by clear guidance.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ **No** ☐

a) Please explain your reasons.

Authorities support the proposal as it will allow parties more flexibility in transfer situations and allow an earlier resolution of matters.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Question 11: **Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?**

Yes ☐ **No** ☐

No comment.

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ **No** ☐

No comment.

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐ **No** ☐

No comment.

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ **No** ☐

No comment.

Question 15: Have you any further comments on the issues in this consultation?

As well as the points already indicated in this response, guidance to accompany the amended Regulations should cover TUPE as a potential defence to equal pay claims and the application of the public administration exemption (regulation 3(5)).

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐

No comment.

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

No comment.

Confidentiality & Data Protection

Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

☒ Yes, I would like you to publish or release my response

☐ No, I don't want you to publish or release my response

Your details

Linklaters LLP

Organisation (if applicable): Linklaters LLP

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this:

☐ Business representative organisation/trade body

☐ Central government

☐ Charity or social enterprise

☐ Individual

☐ Large business (over 250 staff)

☒ Legal representative

☐ Local government

☐ Medium business (50 to 250 staff)

☐ Micro business (up to 9 staff)

☐ Small business (10 to 49 staff)

☐ Trade union or staff association

☐ Other (please describe)

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

Benefits of service provision changes

Pre-2006 there was a significant amount of uncertainty concerning whether or not TUPE would apply to an outsourcing/insourcing transaction. It was necessary for the parties to get legal advice on every transaction to assess the risk of whether or not TUPE would apply, with an inevitable increase in legal costs. Further, as ultimately the only bodies able to decide whether or not TUPE applied are the Employment Tribunal and the High Court, it was not possible for legal advisers to give a definitive answer. As a result, many contracts would include clauses drafted to try to cover both the possibility that TUPE did apply and that it did not apply, which again increased legal costs and uncertainty for the parties.

Some of our clients have commented that they have found the service provision change amendment a help rather than a hindrance as it has eliminated much of the pre-2006 confusion, which provides certainty in commercial negotiations. The ability to be clear that TUPE does or does not apply is more important than whether or not TUPE goes beyond the requirements of the ARD.

Recent case law (e.g. *Eddie Stobart v Moreman* [2012] IRLR 356 and *Enterprise Management Services Ltd v Connect-Up Ltd* [2012] IRLR 190) has undermined this clarity to a certain extent by raising a number of questions as to whether or not particular transactions will fall within the service provision change; however, it is still possible to assess with a degree of certainty whether or not TUPE will apply.

Effect of repealing the amendments

If the service provision change amendments are repealed, the clarity achieved since 2006 would be lost and we do not consider that this would be beneficial for any parties.

We are also concerned that many employees and employee representation bodies are used to assuming that TUPE does apply on a service provision change. If the provisions are repealed, employee expectations that there will be a transfer on such transactions could lead to a significant number of disputes, increasing the burden on business. As commented, the only bodies that are able to decide whether or not TUPE applies are the Employment Tribunal and High Court. If there is a dispute at the time of the transaction, it can take a matter of years before the dispute is resolved by the Tribunal/higher courts, leading to confusion and costs for all parties involved for a significant length of time.

A number of our clients have advised that they would prefer to work within the existing regime (even with the changes introduced by recent case law) than have the amendments repealed and return to the pre-2006 confusion.

Anti-competitiveness

We also do not agree that the service provision changes are anti-competitive and put England and Wales at a disadvantage compared to Europe. Our experience is that it has become standard practice for the costs associated with employees transferring, or the parties deciding that employees will not transfer, to be negotiated at a commercial level and factored in to the price of transaction, so it is not a material factor. Where we have advised on transactions involving service provision changes across multiple European countries, such transactions are generally more straightforward in England and Wales where it is clear that TUPE does apply. In other countries there can be extensive debate between the parties as to whether or not the local equivalent of TUPE applies, which complicates the transaction and increases costs.

Alternative recommendation

Rather than repealing the service provision change amendments, it would be more helpful if the Regulations were amended to provide a statutory framework to overrule the narrowing of the ambit of the service provision change (e.g. on employee assignment) changes recently introduced by case law (in particular, see *Hunter v McCarick* UKEAT/0617/10; *Nottinghamshire Healthcare NHS Trust v Hamshaw* UKEAT/0037/11;

Enterprise Management Services Ltd; *Eddie Stobart* and *Seawell Ltd v Ceva Freight (UK) Limited* UKEAT/0034/11).

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

If the SPC provisions are removed then the regulations should deal with the position where:

a)a new contractor declines to take over the major part of the existing workforce from the old contractor, in a labour intensive undertaking, or

b)where assets are not transferred in an asset reliant undertaking,

and how this would affect the question of the retention of identity, as the previous case law caused considerable uncertainty.

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☒ (iv) 5 years or more ☐

There is no perfect lead-in period, but we consider that three to five years is likely to be most appropriate.

Less than two years would not be sufficient for our clients to accommodate the changes in current tendering negotiations, as the pre-contractual process can take up to two years for large-scale arrangements. There would not be any benefit to extending the lead-in period for more than five years as there will still be a significant number of outsourcing arrangements for longer than this period and such a long lead-in would confer no particular benefit as parties wait for the changes to come into force. Parties to existing contracts are unlikely to renegotiate their terms in response to the change in the law.

A lead-in period of three to five years would give enough time to audit existing contracts and get new contracts in order without unnecessarily prolonging the wait.

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ **No** ☐

c) If yes, please explain your reasons.

The key problems will be lack of certainty and an increased cost to business. Please see response to question 1 for full details.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ **No** ☒

a) If yes, please explain your reasons.

We agree that, for many transactions, the provision of information as set out in Regulation 11 is too little too late. However, we do not agree that the solution to these problems is to repeal the employee liability information requirements in their entirety.

The consultation paper proceeds on the assumption that the parties will co-operate, or at least that there will be a contractual relationship between them which will enable the provision of employee information to be regulated by the contractual arrangements. However, in many transactions there is no direct contractual relationship between the transferor and transferee, or the contract between them is an old one and so does not contain exit provisions. In such cases the transferee is dependent upon the goodwill of the transferor (or, in a second-generation outsourcing, reliant on any leverage the client can exert on its outgoing service provider) for the provision of any information above the minimum set out in the Regulations. This will continue to be the case even if service provision changes are repealed, as many outsourcing/insourcing arrangements will still fall within the ambit of "a transfer of an economic entity which retains its identity." Even where there is a commercial agreement between the transferor and transferee, the employee liability information provisions in TUPE give support to any contractually agreed exchange of employee information.

Our clients have reported significant difficulties as a result of transferors refusing to provide more than the bare minimum information under TUPE. If the employee liability information requirements are repealed, these difficulties will be exacerbated as transferors will be under no obligation to provide even limited information shortly before the transfer. While the requirements are not perfect, they do at least provide a minimal amount of protection for transferees to rely on.

Rather than repealing the requirements, it would be more beneficial for transferees if TUPE provided that employee information must be given longer in advance of the transfer. We have spoken to clients about what would be a reasonable timeframe, and have been advised that six weeks before the transfer would be the minimum, but two to three months would be ideal. This period is required for practical purposes such as setting up payroll. To prevent the risk of small transfers being unnecessarily delayed because of this requirement, this could be made subject to a shorter timescale where this is agreed between the parties, or subject to the period of notice that is required to terminate the outsourcing contract if shorter than this. No such requirement should arise until notice to terminate the outsourcing agreement has been served.

We have considered the information that is typically required by transferees and think that any arrangements in relation to redundancy and severance is key additional information that should be specified in the Regulations. Otherwise, while there is more information that is commonly needed, bearing in mind the range of transactions that TUPE applies to we consider that the information currently specified in Regulation 11 provides a sufficient fall-back position for transferees.

b) Would your answer be different if the service provision changes were not repealed?

No. Regardless of whether or not service provision changes are repealed, information about the transferring employees will still be needed.

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

We have concerns about the way that this question has been phrased. It is only performance of the **transferee's** duties under Regulation 13 (i.e. to provide information to and consult with the transferee's affected employees and to provide details of measures to the transferor) that requires disclosure of information about the transferring employees. Performance of the **transferor's** duties under Regulation 13 (to provide information to and consult with the transferor's affected employees) does not require the disclosure of information to the transferee.

Assuming that the question only relates to the transferee's duties, such an amendment may be helpful in terms of getting information at a sufficiently early stage for the transferee to assess what measures it may take post-transfer; however, this would not be sufficient on its own. Information about the transferring employees is not just needed to enable the transferee to assess measures; it is also needed for practical HR

matters such as putting payroll arrangements in place in good time ahead of the transfer. The suggested amendment to Regulation 13 would not assist with this.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

We have some reservations on how much of an impact the change will actually have, particularly in light of the way in which European case law restricts the ability to make changes to terms and conditions. However, any step, however limited, towards enabling changes to be made post-transfer is likely to be helpful.

In our experience, transferees generally consider that the risks associated with changing terms and conditions post-transfer are minimal, particularly where the employees are no less worse off overall, and so take the view that it is more practical to make any changes regardless of TUPE. This is particularly the case with pensions provisions, where it is more practical to amend the contributions that an employee is contractually entitled to rather than amend the terms of the transferee's pension scheme with each transfer.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes.

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ **No** ☐

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ **No** ☐

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☐

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ **No** ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ **No** ☒

a) Please explain your reasoning.

We do not consider that this would make any difference in practice. S.95(1)(a) Employment Rights Act 1996 states that for the purposes of unfair dismissal law "an employee is dismissed by his employer if the contract under which he is employed is terminated by the employer (whether with or without notice)". Amending TUPE so that the employer is responsible for a "termination" rather than a "dismissal" would therefore have no effect.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

We wholeheartedly agree with this proposal. It has always been an anomaly that a genuine redundancy based on a change in location in connection with a transfer is automatically unfair under TUPE. We have been advised by some clients that they have always proceeded on the basis that geographic redundancies are a valid economic, technical or organisational reason entailing changes in the workforce (with some comfort being drawn from the fact that some downsizing in workforce is also usually involved) and have taken the risk of this being disputed. This proposal will make it much clearer that, where there is a genuine redundancy on relocation grounds, there will also be a valid economic, technical or organisational reason entailing changes in the workforce and so provide reassurance for the parties.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ **No** ☐

a) Please explain your reasons.

We agree the transferor should be able to rely on the transferee's reason for pre-transfer dismissals.

In our experience, many transferors prefer to handle dismissals themselves as they have an existing relationship with the employees. We have also been advised by some clients that employees would often prefer to be dismissed by the transferor as they then have the option of having any severance payment paid into their existing pension scheme, which is not possible once their employment has transferred to the transferee. This amendment will enable them to do so and minimise the risk of an unfair dismissal claim.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

We consider that this amendment is likely to be helpful, although in our experience this issue does not cause significant problems.

A potentially significant drawback of this amendment is that the transferor's co-operation will be required, so it would be beneficial if this could be addressed in the Regulations.

One issue that is not addressed in the consultation paper is how the parties will assess the point at which the obligation to carry out a collective redundancy consultation has been triggered. Case law has held that the obligation to consult arises when there is a proposal to dismiss, i.e. before a definite decision has been reached. In transactions where TUPE applies where, for example, a change in workplace is involved, the transaction inevitably means that there will be dismissals. It would be helpful if the Regulations could be amended to clarify that the consultation is about the proposed dismissals and that it is sufficient to start consultation once the commercial arrangements have been signed. Case law does not deal with the

interaction between redundancy consultation and TUPE transactions, so this should be considered when drafting the amended Regulations.

It would also be helpful if the amendment could clarify that redundancy consultation by the transferor pre-transfer counts for the purposes of collective redundancy consultation by the transferee. Based on Regulation 4(2)(b) (that any act of the transferee before the transfer shall be deemed to be an act of the transferee) this should already be the case, but confirmation of this point in the Regulations would avoid any possible misunderstanding.

Question 11: **Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?**

Yes ☐ **No** ☐

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☒ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

n/a

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ **No** ☒

Question 15: Have you any further comments on the issues in this consultation?

The consultation does not address the operation of TUPE within an insolvency situation. Of specific concern to us is administrations, which have been held not to constitute "bankruptcy proceedings or analogous insolvency proceedings instituted with a view to the liquidation of the assets of the transferor", although in practice many administrations are instituted with a view to liquidation of assets.

The obligation to inform and consult with employee representatives on the sale of a business in administration can be impractical for an administrator to comply with. Further, the transfer of employment liabilities can be a deterrent for potential purchasers of businesses in administration, undermining the "rescue culture" aims of insolvency law.

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☒

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

n/a

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

n/a

Confidentiality & Data Protection

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☒ Yes, I would like you to publish or release my response

☐ No, I don't want you to publish or release my response

Your details

Durham County Council

Organisation (if applicable): Durham County Council

Address:

Telephone:

Fax: -

Please tick the boxes below that best describe you as a respondent to this:

☐ Business representative organisation/trade body

☐ Central government

☐ Charity or social enterprise

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☒ Local government

☐ Medium business (50 to 250 staff)

☐ Micro business (up to 9 staff)

☐ Small business (10 to 49 staff)

☐ Trade union or staff association

☐ Other (please describe)

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ☒

a) Please explain your reasons:

The consultation document acknowledges that the pre-2006 arrangements were unclear and created a huge amount of uncertainty. The 2006 amendments significantly clarified the situation. You are now proposing to return to a set-up which you yourselves describe as "uncertain" and confusing. This would create uncertainty and confusion. Were this change to be implemented, our concern would be that organisations such as Durham County Council would spend a lot more time consulting with lawyers over whether TUPE may apply to various services tenders where, at present, the possible TUPE implications, while potentially onerous for some bidders, are at least fairly clear.

We would suggest that a more sensible approach would be to come up with an updated definition for TUPE-relevant service provision changes which retains the clarity of the 2006 amendments whilst removing some of the more onerous elements for bidders - rather than returning to an old arrangement which all parties agree was uncertain and confusing.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☒ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

a) Do you believe that removing the provisions may cause potential problems?

Yes ☒ **No** ☐

c) If yes, please explain your reasons.

See above - you would be returning to a situation which your own consultation document describes as "uncertain" and confusing.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ **No** ☒

a) If yes, please explain your reasons.

We have answered "no" here, but feel it is important to explain our view.

The consultation document acknowledges the current problems - particularly that the requirement for liability information to be supplied 14 days prior to any transfer does not always allow sufficient time for the incoming employer to set up the necessary payroll and other HR arrangements for the employees transferring to them.

Repealing the requirements altogether, as proposed, would only make this problem <u>even worse</u>.

The consultation document states: *"The Government considers that any mechanism to require the provision of information at tender stage would unduly interfere with the procurement process"*

The government is, in our view, completely mistaken on this point. It is the view of Durham County Council's Corporate Procurement team that such a requirement at tender stage would be generally <u>helpful</u> to the tender process.

b) Would your answer be different if the service provision changes were not repealed?

No

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Yes

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Yes

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

a) Please explain your answer.

-

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☒ **No** ☐

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

(We have no comment on this point)

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

a) Please explain your reasoning.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

a) Please explain your reasons.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ **No** ☐

a) If you disagree, please explain your reasons.

Question 11: **Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?**

Yes ☐ **No** ☒

a) Please explain your reasons.

This is an area in which clarity in the regulations would be much more constructive than simply "guidance" which could too easily be ignored.

b) If you disagree, what would you propose is a reasonable time period?

We have no specific proposal here - what is important is that there is clarity in the regulations.

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☒ **No** ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☒ **No** ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☒ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☒

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

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Yes ☐ **No** ☐

Question 15: Have you any further comments on the issues in this consultation?

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐ ***(We have no comment on this point)***

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.

Yes - the evidence itself, and the analysis of some of the problems of the current TUPE arrangements, is reasonable. It is unfortunate that some of the proposals being made, particularly with regard to employee liability information requirements, do not join up more logically with the analysis.

Confidentiality & Data Protection

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✓ Yes, I would like you to publish or release my response

☐ No, I don't want you to publish or release my response

Your details

Trowers & Hamlins

Organisation (if applicable): **Trowers & Hamlins**

Address:

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☐ Trade union or staff association

☐ Other (please describe)

Question 1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ **No** ✓

a) Please explain your reasons:

If service provision changes are taken outside the remit of TUPE then organisations are far less likely to tender for contracts which will result in considerable redundancy costs once the contract has come to an end. Some smaller organisations might go bust as a result of unanticipated redundancy costs. The proposed change is likely to make bidding for a contract unattractive and uncompetitive.

In addition, if the service provision change is removed sooner rather than later, government bodies will be at risk of contracts finishing early so that the risks of redundancies are avoided. Some clients of ours have suggested that, if removed, it will mean they will recruit solely on a fixed-term basis, which will mean instability for staff, as well as in the staffing for care providers, and more importantly for the people they support.

We have conducted our own survey amongst our clients and currently only 7% budget for redundancies to take place on the contracts they provide for other organisations. Clearly then, for most of our clients the removal of service provision changes would make any contracts they bid for much more expensive than they currently are once redundancy costs have been factored in.

b) Are there any aspects of the pre -2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii)1- 2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more ☐

The vast majority of respondents to our survey (86%) thought that there should be a lead in period. 36% felt that this should be less than a year; 28.5% felt it should be 1-2 years; 28.5% felt it should be 2-3 years; and 7% felt it should be 3-5 years.

a) Do you believe that removing the provisions may cause potential problems?

Yes ✓ **No** ☐

c) If yes, please explain your reasons.

See response to question 1 a) above.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ✓ No ☐

(57% of respondents)

a) If yes, please explain your reasons.

The 14 day period is thought to be "impractical" and an inadequate period to properly assess risks and consult effectively. It was felt by those we surveyed that the 14 day period is sometimes used by transferors as the default, and that it is also used as a means to delay exchange of information.

b) Would your answer be different if the service provision changes were not repealed?

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

It was felt by some of the respondents to our survey that this amendment was not sufficiently certain. One respondent pointed out that the period of time that was "necessary" would need to be agreed by both parties and suggested that, in the absence of agreement, there should be a default period. Another respondent felt that in order to ensure that the information is passed on it is helpful to have a clear defined legal requirement in order to make sure that the transferor passes on the information needed in time for the transfer.

Question 4: Do you agree with the Government's proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ✓ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ✓ No ☐

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No ✓

The majority of those surveyed (71%) did not agree.

c) If the outcome of the *Parkwood Leisure v Alemo-Herron* litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

d) Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive)?

Yes ☐ No ☐

Question 6: Do you agree with the Government's proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☐ No ☐

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☐

Question 7: Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes✓ No ☐

The majority of those surveyed (57%) agreed. However, for the 43% who weren't in favour of the change it was felt that it could be used by unscrupulous employers to dismiss staff cheaply and worsen terms and conditions.

a) Please explain your reasoning.

Those surveyed felt that the new provision would lessen the likelihood of tribunal claims, though it would still depend on the circumstances and whether the change was considered to be a reasonable one or not.

Question 8: Do you agree with the Government's proposal that "entailing changes in the workforce" should extend to changes in the location of the workforce, so that "economic, technical or organisational reason entailing changes in the workforce" covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☐ No ☐

a) If you disagree, please explain your reasons.

Question 9: Do you consider that the transferor should be able to rely upon the transferee's economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☐ No ☐

a) Please explain your reasons.

Half of those surveyed were in favour of this, and 43% were not in favour (7% did not respond). Those respondents who were not in favour felt that any dismissal was the transferee's responsibility as a transfer could fall through at the last moment. It was felt that liability for any dismissal should stay with the transferee, and that it should be the transferee's responsibility to find alternative employment or offer redundancy.

Question 10: Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☐ No✓

57% of those surveyed were against this.

a) If you disagree, please explain your reasons.

It was felt that whilst staff at risk of TUPE are often anxious and would feel more confident with their current employer, their current employer would have to be informed and confident in their discussions with the potentially redundant staff. It was felt that the transferor would potentially be exposed to unnecessary risk.

Question 11: **Rather than amending 13(11) to give clarity on what a "reasonable time" is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?**

Yes ✓ No ☐

71% of the respondents to the survey felt that more guidance would be useful.

a) Please explain your reasons.

It would give everyone an opportunity to understand their obligations.
For those who didn't feel that guidance would be useful, there was a varying scale of opinion as to what a reasonable period for the election of representatives for the purpose of information and consultation would be. There was also a feeling from some quarters that a time frame should not be specified as it will depend on the individual circumstances.

b) If you disagree, what would you propose is a reasonable time period?

Question 12: Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes ☐ No ☐

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes ☐ No ☐

Question 13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

Yes ☐ **No** ☐

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes ☐ **No** ☐

c) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

Question 14: Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

Yes ☐ **No** ☐

Question 15: Have you any further comments on the issues in this consultation?

Question 16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes ☐ **No** ☐

a) Please explain your reasons

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

Question 17: Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.