

COLLECTIVE REDUNDANCIES

Consultation on changes to the
rules

JUNE 2012

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Collective redundancies: Consultation on changes to the rules

The Department for Business, Innovation and Skills is reviewing the current rules on collective redundancy consultation as part of the wider review of employment law.

In response to the Call for Evidence conducted in late 2011, the Government is now proposing changes to the collective redundancy regime. This consultation is seeking views on a package of changes which aims to encourage better quality consultation in large-scale redundancies.

Issued: 21 June 2012

Respond by: 19 September 2012

Enquiries to:

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This consultation is particularly relevant to employers, employees and trade unions.

Foreword from the Minister

This Government's top priority is to achieve strong, sustainable and balanced growth. To do this we need to create the right conditions for businesses to succeed by removing barriers that are preventing them from performing to their full potential.



As a step towards achieving this aim we are reviewing employment law. We want to ensure that businesses can react to changes in market conditions and that they are confident in creating new employment opportunities for the UK labour force. We have already done good work towards this by taking steps to help employers feel more confident about taking on staff, including:

- Extending the qualifying period for unfair dismissal from one to two years;
- Bringing forward reforms to employment tribunals;
- Introducing a greater role for Acas in resolving workplace disputes; and
- Launching the 'Taking on an Employee' tool.

I believe that it is important for employers to consult their workforce over the big issues, including restructuring and redundancy. Asking for their employees' input helps businesses to make better decisions. But it is not the role of government to dictate how that input should be sought. It is our role to create a flexible framework to support high quality consultation and to allow employers and employees' representatives to conduct it in a way that suits their unique circumstances.

But we do not want this flexibility to create an uncaring, hire and fire culture. That is why we are keen to promote good quality consultation over collective redundancies. And we can see from the responses to the recent Call for Evidence that the time is right for change.

The current rules do not fit the current economic climate. They are driving bad consultation and slowing businesses' ability to restructure and they are much more restrictive than the rules in many other EU member states. This has a negative impact on both employers and employees and is threatening the UK's competitiveness.

In this consultation document I am putting forward a package of measures that will revitalise consultation. I want to see consultation take place that focuses on the big issues and creates a system where employers can work with employees to ensure that the right people are in the right place at the right time.

A handwritten signature in black ink, appearing to read 'Norman Lamb'.

Norman Lamb MP

Minister for Employment Relations, Consumer and Postal Affairs

1. Executive Summary

- 1.1 The Government recently concluded a Call for Evidence on the current collective redundancy consultation regime. Information from respondents has suggested that this regime is unsuitable for the current UK labour market. Legislation is too restrictive, while government guidance is not clear enough.
- 1.2 Having identified these issues, the Government is pursuing reform with three objectives: to improve consultation quality; to improve the ability of employers to respond to changing market conditions; and to balance the interests of the employees who are made redundant with those who remain.
- 1.3 To achieve this, we believe an effective collective redundancy regime must have three components:
 - A straightforward legislative framework;
 - A good relationship between employer and employees' representatives; and
 - Mechanisms to allow appropriate government intervention.
- 1.4 Therefore, to create a more effective collective redundancy regime, we are consulting on a package of reforms, based around:
 - Reducing the 90-day minimum period for large redundancies;
 - Issuing a new, non-statutory, Code of Practice which will address a number of key issues affecting redundancy consultations; and
 - Improving guidance for employers and employees on the support on offer from government.
- 1.5 The 90 day period: The Government intends to reduce the minimum period before redundancies of 100 or more employees can take effect and is seeking views on the impacts of using either 30 or 45 days. As at present, where longer is required, it will be possible to continue consulting beyond the minimum period.
- 1.6 This change will allow employers to restructure more quickly, and save them administrative and wage costs, potentially reducing the number of redundancies. Employees will benefit from greater certainty and a less marked impact on morale and productivity. Once the collective redundancy notice has been issued, those made redundant can take advantage of career resources and begin the alternative job search sooner. Those who are not made redundant will face a shorter period of uncertainty about their future and will be better placed to continue their career in the organisation.
- 1.7 A New Non-Statutory Code of Practice: The Code would address the principles and behaviours behind a good quality consultation, with a particular focus on dealing effectively with the most contentious issues. As collective redundancies happen in a variety of circumstances, which can be unpredictable and change rapidly, the Code would give

guidelines but allow enough flexibility for parties to tailor the consultation process appropriately.

- 1.8 Improved guidance on support on offer from the Government: We will review the existing guidance to ensure that it is accurate and fit for purpose and that people who need it are able to access it when they need it. Currently, employers and employees are not always aware of the resources available to them, and when to take advantage of them.
- 1.9 This consultation will run for 12 weeks and is aimed primarily at employers, employees and employees' representatives. The proposed changes extend to England, Wales and Scotland. Northern Ireland has separate legislation in this area.
- 1.10 Responses will be used to determine which option the Government will take in terms of reducing the 90 day period, suggestions for the issues to be covered by the new Code, and government guidance.

How to respond

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

For your ease, you can reply to this Consultation online at:

<https://www.surveymonkey.com/s/36S3QYT>

A copy of the Consultation Response form is enclosed, or available electronically at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/c/12-808rf-collective-redundancies-consultation-form>. If you decide to respond this way, the form can be submitted by letter, fax or email to:

Carl Davies
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3rd Floor, Abbey 2
1 Victoria Street
London
SW1H 0ET

Tel: 020 7215 6220
Fax: 020 7215 6414
Email collectiveredundancies@bis.gsi.gov.uk

A list of those organisations and individuals consulted is in Annex B. We would welcome suggestions of others who may wish to be involved in this consultation process.

Additional copies

You may make copies of this document without seeking permission. Further printed copies of the consultation document can be obtained from:

BIS Publications Orderline
ADMAIL 528
London SW1W 8YT
Tel: 0845-015 0010
Fax: 0845-015 0020
Minicom: 0845-015 0030
www.bis.gov.uk/publications

An electronic version can be found at <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/c/12-808-collective-redundancies-consultation>.

Other versions of the document in Braille, other languages or CD are available on request.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Help with queries

Questions about the policy issues raised in the document, or comments or complaints about the way this consultation has been conducted should be sent to:

Carl Davies
Labour Market Directorate
Department for Business, Innovation and Skills
3rd Floor, Abbey 2
1 Victoria Street
London
SW1H 0ET

Tel: 020 7215 6220
Fax: 020 7215 6414
Email collectiveredundancies@bis.gsi.gov.uk

A copy of the Code of Practice on Consultation is in Annex A.

What happens next?

This consultation exercise will close on 19 September 2012. The Government will publish its response as soon as possible thereafter and within 3 months of the consultation closing. If the consultation supports change to the current rules, we will seek to introduce these changes in Spring 2013. The Government's response will be made available on the Department for Business, Innovation and Skills website.

Consultation questions

Changes to Collective Redundancy Rules - Consultation Questions	
Question 1	Do you agree with the Government's overall approach to the rules on collective redundancy consultation?
Question 2	Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.
Question 3	Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'? Please provide comments to support your answer.
Question 4	Will defining 'establishment' in a Code of Practice give sufficient clarity?
Question 5	Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.
Question 6	Have we got the balance right between what is for statute and what is contained in government guidance and a Code of Practice?
Question 7	What changes are needed to the existing government guidance?
Question 8	How can we ensure the Code of Practice helps deliver the necessary culture change?
Question 9	Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.
Question 10	Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.
Question 11	If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?
Question 12	If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?

2. Introduction

Legislative Framework

- 2.1 Like all other EU Member States the UK is covered by the Collective Redundancies Directive (Directive 98/59). The aim of the Directive is to provide protection for employees in large-scale redundancies, but without preventing employers from taking necessary steps to restructure. Its purpose is not to prevent collective redundancies from taking place or to delay entry into the jobs market once agreement has been reached. It requires that all employers consult with representatives of their employees when large-scale redundancies are planned.
- 2.2 The Directive is implemented in Great Britain¹ through sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA). TULRCA requires that, where an employer is proposing to dismiss as redundant 20 or more employees at a single establishment in a 90-day period, the employer must consult with representatives of their employees (trade unions where they are present) about the redundancies.
- 2.3 The consultation must begin in good time, be conducted with a view to reaching agreement and must cover, at least, ways of:
- avoiding the dismissals;
 - reducing the numbers of employees to be dismissed; and
 - mitigating the consequences of the dismissals.
- 2.4 TULRCA requires that no redundancy can take effect until at least:
- 30 days after the start of consultation where between 20 and 99 redundancies are proposed; or
 - 90 days after the start of consultation where 100 or more redundancies are proposed.
- 2.5 In accordance with the Directive, the employer must also notify the Secretary of State for Business, Innovation and Skills of the proposed redundancies to the same timescale. This is to allow the Government to coordinate the work of its agencies to offer assistance to both the employer and the affected employees.
- 2.6 The minimum time periods relating to consultation are not required by the Directive and as such represent 'gold plating'. However, the Directive does require that notification to the Government takes place at least 30 days before redundancies take effect. None of the minimum time periods impact on the length of employees' individual notice periods, which

¹ Separate provisions exist to implement the Directive in Northern Ireland. The changes proposed in this consultation document refer only to the law affecting England, Wales and Scotland.

will not begin until notices have been issued after the consultation has been genuinely completed.

An evolving working environment

- 2.7 The obligation to consult has been in place largely unchanged since 1975. The principle is that good quality consultation can increase the effectiveness of any restructuring process and mitigate some of the impacts on individuals.
- 2.8 However, since that legislation was first introduced the working environment has evolved. Business has become more global and, as a result, markets have become more competitive. This means business change is more frequent. The UK labour market has become more flexible. There are over 29 million people employed in the UK and millions of movements in a year between jobs, and between employment, unemployment and inactivity. There is less emphasis on career longevity with a single employer. The legislative balance has also shifted so that there is greater emphasis on individual rights than collective employment rights.
- 2.9 At the same time, advances in IT and communications technologies have made consultation easier and faster to carry-out. Job-seekers have easier access to details about alternative employment or training opportunities.
- 2.10 The changes to the UK's labour market also mean that special treatment for more than 100 redundancies looks increasingly arbitrary. There is nothing to show that 100 redundancies is a trigger for higher impact or greater cost, socially or economically. It is the circumstances of the dismissal (for example site closure or restructuring, economic downturn) that are more likely to govern impact of the redundancies and the length of consultation.

The Call for Evidence

- 2.11 As a result, the Government published a Call for Evidence² in November 2011 which sought evidence on whether existing rules now present a barrier to employment flexibility in the labour market and can put future business success at risk. The concern is to ensure that, in the current economic climate, the Government removes barriers to restructuring to create an environment for long-term growth.
- 2.12 The Call for Evidence sought respondents' views on the current rules on collective redundancy consultation. It was complemented by a series of meetings between BIS officials and key stakeholder organisations.
- 2.13 108 responses were received to the questions posed in the document. The responses were submitted by:

² <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/c/11-1371-call-for-evidence-collective-redundancies.pdf>

- 23 trade unions
- 19 large businesses
- 13 individuals
- 12 business representative organisations
- 8 legal representatives
- 7 local government organisations
- 3 charities or social enterprises
- 2 central government organisations
- 2 medium businesses
- 1 small business
- 18 other respondents

2.14 The Call for Evidence has helped BIS to establish the main issues with the current rules on collective redundancy consultation. Although it prompted a disappointingly small amount of quantitative data on the impact of the current rules, the anecdotal evidence received was sufficient for us to conclude that there is a need for change to the current system.

2.15 As might be expected, employers and trade unions were at odds about the advantages and disadvantages of the 90-day minimum period. However, both were keen to see an improvement in the **quality** of consultation. All respondents were consistent in identifying complexities and variables within the legislative framework that have had a negative impact on behaviour during consultation. Our assessment is that these complexities increase the scope for differences between employers and employees' representatives and challenge the effectiveness of the consultation process. Proposals set out below are based on this evidence, which is explained in more detail in Chapter 3.

The case for change

2.16 The responses to the Call for Evidence demonstrated that there are issues around the current rules for four main affected groups:

- Employers;
- Employees;
- Employees' representatives; and
- Government

It also demonstrated issues around the process of consultation, and in particular that compliance with the current process can detract from the quality of the consultation itself.

Employers

2.17 Employers were agreed that the current regime was affecting their competitiveness at both a domestic and global level. They stated that the current rules (and in particular the longer, 90-day period before redundancies could take effect) delayed their ability to respond to

changing market conditions in a timely way. Their inability to restructure efficiently and effectively can make it difficult for employers to take advantage of new opportunities and so hamper growth.

- 2.18 Employers also highlighted the additional administrative and wage burden imposed by the current regime. This was particularly keenly felt in the retail, construction and higher-education sectors where the inclusion of the termination of fixed-term contracts in the count for collective redundancy consultation is a significant issue.

Employees

- 2.19 Respondents to the Call for Evidence identified a number of issues for employees. Chief amongst them was the impact on morale and productivity caused by the uncertainty of extended consultation periods. Whilst the Call for Evidence made it clear that employees are more likely to accept a decision where they believe that genuine consultation has taken place, it also identified that employees, both those who were eventually made redundant and those who retained their employment, value certainty about their position as early as possible. The negative impact on morale of ongoing uncertainty is greater the longer the consultation lasts.
- 2.20 The current rules also create uncertainties for employees around seeking alternative employment or training opportunities. Respondents said that employees are often torn between their desire to retain their current employment and doubt about whether this is likely. This means individuals are uncertain whether they should be looking for alternative employment as soon as consultation starts and, if they do, whether to accept it as soon as possible or to hold out for their redundancy payment and take a chance on finding alternative employment at a later date.
- 2.21 The Call for Evidence suggested that concerns about protecting the rights of those who are made redundant often crowd out the interests of those who are not. There were concerns expressed that the system could be better at balancing the interests of all employees, including those who remain.

Employees' representatives

- 2.22 The Call for Evidence also highlighted issues for employees' representatives. The trade union view was that the current regime was vital for job protection and allowed them additional time to reduce the number of jobs lost. However, there were also calls from some employees' representatives (chiefly trade unions) to go further. Specifically, they felt that the rules should not exclude those employees working at smaller establishments.

Government

- 2.23 Finally, there is the impact on the Government. Currently the Government offers support through its agencies, including Jobcentre Plus. Government agencies have stated that there is often a lack of understanding among both employers and employees about the help available. They said that they would like to be involved in the process at an earlier stage, but that many employers were reluctant to contact them early, concerned about presenting the consultation as a fait accompli if they did so.

Process of consultation

- 2.24 The Call for Evidence pointed to good consultation as relying on management being open and receptive to ideas and on experienced, pragmatic representatives engaging in the process in a positive way. It needs to be conducted with a view to reaching agreement on the substantive issues surrounding the redundancy, such as ways of reducing the number facing redundancy or mitigating the impact. The evidence suggests that where this happens, consultation results in a better outcome for both the employer and employees and is often completed more quickly. It produces a more positive reaction from the workforce and has a less negative impact on morale.
- 2.25 However, a number of respondents from a cross-section of interested parties identified barriers in the current regime to achieving quality consultation. The Call for Evidence has made it clear that the combined issues of the longer, **90-day period** before redundancies can take effect and the lack of clarity about what constitutes an '**establishment**' are at the heart of the problem. Other issues, such as uncertainty about **what constitutes consultation** also contribute to the confusion. There are concerns, too, about what happens in cases of **insolvency, TUPE, fixed term contracts** and **changes to terms and conditions of employment**. Finally, there is a need to ensure mechanisms for **government engagement** are able to be deployed.

3. Proposals

3.1 This chapter sets out our proposals for consultation. It needs to be read in conjunction with Chapter 3, which sets out in more detail the results from the Call for Evidence and provides the rationale for these proposals.

3.2 The Government has three objectives for reform:

- to improve the quality of consultation;
- to ensure that employers can restructure effectively to respond to changing market conditions; and
- to balance the interests of the employees made redundant with those who remain.

The evidence set out elsewhere in this consultation document demonstrates that there are a number of factors with the current arrangements which make it difficult to achieve these aims. The Government is therefore proposing changes that will better deliver these objectives.

3.3 We want to reinforce the message that good quality consultation is better for all parties and is most likely to deliver the best result in all the circumstances. Quality consultation can:

- deliver better decisions;
- reduce loss of employee morale;
- increase the likelihood of reaching agreement more quickly; and
- leave those who are made redundant in a better position to find alternative employment, while providing certainty to those who are not.

3.4 At the same time, we want to ensure that the framework for collective redundancy consultation is fit-for-purpose - whether redundancies arise as a result of restructuring (be that merger, takeover, change of product or service line, shrinkage or expansion) or business failure. So we want to leave sufficient flexibility to allow each consultation to be tailored to its unique circumstances, including the commercial environment.

3.5 Although many of the issues stem from the legislation as set out in the 1992 Act, not all of them can be addressed by a legislative solution. With this in mind, government is proposing a package of legislative and non-legislative measures that will work together to promote improvements in the quality of consultation.

3.6 We see three elements as being core to helping do this:

A straightforward legislative framework. The more complex the legislative process, the more likely that it distracts from the engagement between employer and employees' representatives.

A positive relationship between the employer and employees' representatives. Ongoing engagement and a positive working relationship between the employer and employees' representatives are key to an effective consultation and to speeding up the process where appropriate.

Better mechanisms to allow appropriate Government engagement (e.g. Jobcentre Plus). Ensuring individuals and employers are aware of Government assistance that is available and ensuring that Government engagement is triggered early can help improve the prospects for individuals finding alternative employment and/or for businesses to ascertain whether there are other factors that might mitigate the need for redundancies.

3.7 This consultation document therefore seeks views on the following package of changes that aim to bring about the improvements sought through the three elements above:

Reducing the 90-day minimum period and replacing it with either a single 30-day period, or a shortened 45-day period, in order to simplify the legislative framework and remove disincentives to quality consultation;

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

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

Improved guidance on the support on offer from Government to ensure employers and employees understand better how they can manage the wider implications of the redundancy situation and engage Jobcentre Plus at an early stage without undermining the consultation.

Question 1

Do you agree with the Government's overall approach to the rules on collective redundancy consultation?

Reducing the 90-day minimum period for larger redundancies

- 3.8 It is clear from the Call for Evidence responses that the 90-day minimum period is affecting behaviour in a way that is not conducive to good consultation. It is delaying restructuring where consultation is genuinely complete. It is driving employers to break up redundancies in order to avoid the longer period and it is distracting focus from the substantive issues.
- 3.9 Respondents to the Call for Evidence asked for greater flexibility to act to a timetable more suited to their circumstances and for a simpler regime that allowed for a return to consultation focusing on the substantive issues. Chapter 3.1 discusses the issues in more detail.
- 3.10 In response to these suggestions, the Government intends to reduce the 90-day minimum to either:
- a 30-day minimum period for all collective redundancies; or
 - a 45-day minimum period for planned redundancies of 100 or more employees.
- 3.11 For some, it may appear counter-intuitive to argue that the quality of the consultation process can be improved by reducing the minimum period for redundancies of more than 100. But many of the arguments in favour of keeping the 90-day period are based on concerns that it is currently regarded as a maximum rather than a minimum period by employers and that any reduction would automatically mean a reduction in the time taken for consultation. The evidence we received means that we do not share this view.
- 3.12 And we are not persuaded that a minimum of 90 days for more than 100 redundancies remains appropriate in the modern commercial environment. Respondents to the Call for Evidence stated a strong preference for a simple system, rejecting the option of graduated thresholds on the grounds of complexity which would hamper effective consultation and querying the rationale for special treatment for redundancies affecting larger and graduated numbers of employees.
- 3.13 The Government acknowledges that there is a risk that a shorter minimum period could lead to superficial consultations which are closed at the end of the minimum period even if they are not complete. However, this approach would encourage legal challenge. Government will reinforce the importance of meaningful consultation with improved guidance to highlight that the new time period will be a minimum and that consultation should continue beyond this period wherever necessary.
- 3.14 The Government also acknowledges that the proposed reduction in the minimum period could have an impact on the time available for employees to get their personal affairs in order and on the wages available for employees. However, the minimum periods are not designed to provide time for employees to seek alternative employment or sort out their personal affairs. This is the role of individual notice periods.
- 3.15 Individual notice periods can start only once redundancy notices have been issued. The longer minimum period can actually make it harder for employees to plan for life after redundancy as it delays the issue of these notices and the start of individual redundancy consultation. This prolongs the uncertainty for employees and makes it harder for them to plan ahead. The proposed shortening of the 90-day period will not affect employees'

statutory or contractual notice periods so a majority of employees will still have time to seek alternative employment or training opportunities after they have received their notice of redundancy.

- 3.16 The reduction in uncertainty should create an improvement in employee morale. This should, in turn, result in employees who are better placed to take advantage of alternative job opportunities, offsetting any short-term negative impact of less pay. Similarly, employees who are not made redundant will be better placed to adapt to the new requirements of the organisation and to continue their careers.

Question 2

Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.

'Establishment' and fixed-term appointees

- 3.17 There is evidence of confusion around how to define a relevant establishment for the purposes of collective redundancy consultation.
- 3.18 Responses to the Call for Evidence (see paragraphs 4.16-4.22) highlighted that there is a wide range of factors that affect what constitutes an establishment. This diversity and the constraints of European case law make it difficult and risky to define 'establishment' in legislation. The *Rockfon A/S v Specialarbejderforbundet i Danmark*³ case states that 'establishment' is a term of community law and cannot be defined by Member States. The purposive approach to the definition of 'establishment' in *Athinaiki Chartopoiia AE v Panagiotidis and others*⁴, which requires that the concept of 'establishment' is interpreted widely, and the need for flexibility to fit with the current UK labour market would make it very difficult to create a definition that would create any degree of certainty. We intend, therefore, to address this issue in the Code of Practice.
- 3.19 The Government does not agree with the small number of trade union respondents who suggested that we should abolish the 20-employee threshold or to set the threshold to cover an 'undertaking' rather than an 'establishment'. We believe that the 20-employee threshold is still appropriate and in keeping with the Directive. In reference to the 'undertaking' suggestion, the Government believes that this would not be compatible with the Directive. The use of 'undertaking' in other Directives demonstrates that it has a very specific meaning at European level that is not envisaged in the Collective Redundancies Directive.

³ C-449/93 [1995], *European Court reports Page I-04291*.

⁴ C-270/05 [2007] IRLR 284.

Question 3

Do you agree with the Government’s assessment of the risks of taking a legislative route on the issue of ‘establishment’? Please provide comments to support your answer.

Question 4

Will defining ‘establishment’ in a Code of Practice give sufficient clarity?

- 3.20 The Call for Evidence identified concerns with the application of collective redundancy consultation processes to fixed-term appointees (see paragraphs 4.56-4.64). The Government believes that it would be difficult to construct a suitable legislative exemption for fixed-term appointees. The different factors affecting the non-renewal of contracts and the requirement to ensure that fixed-term workers are not treated less favourably than comparable permanent employees make constructing an exemption difficult. The recent judgment in the *Stirling*⁵ case represents a departure from previous thinking in this area, which we will seek to address through guidance and the proposed Code of Practice.
- 3.21 The reduction on the 90-day minimum period should help to mitigate the problems caused by both the ‘establishment’ issue and the practical problems associated with the end of fixed-term contracts.

Question 5

Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.

Improved guidance and a new Code of Practice

- 3.22 Not all the changes we think are necessary to improve the approach to collective redundancy consultation are amenable to legislative solutions. We will therefore review the existing Government guidance to ensure that it is accurate and fit for purpose in advising what employers and employee representatives need to do.
- 3.23 We also want to introduce a non-statutory Code of Practice which will focus on the principles and behaviours that help to ensure that consultation is conducted in the right spirit and considers the correct issues. The aim is to provide advice that will help the

⁵ *University of Stirling v University and College Union*

parties reach agreement which will support effective restructuring and to ensure that the reduction in the 90-day minimum time period does not lead to superficial consultation. The Code of Practice will seek to provide clarity on the contentious issues whilst allowing enough flexibility for the parties to tailor the consultation process to best suit their needs.

3.24 Specifically, the Code of Practice will cover areas including:

- **When consultation should start** to allow employers to get the most from the process and to allow employees' representatives an opportunity to put forward alternative proposals;
- **Who the consultation should cover.** This will include consideration of the factors that could help employers and employees' representatives decide what constitutes an establishment and whether fixed-term appointees should be included. It will also encourage employers not to break-up redundancies into smaller chunks to ensure that as many employees are represented as possible;
- **Who should be consulted,** including identifying appropriate employees' representatives and consulting at the most appropriate level of management;
- **What should be discussed,** including whether this extends to the business decision behind the redundancies and the information that should be provided to employees' representatives. This will attempt to explain the impact of the Akavan European Court of Justice (ECJ) case;
- **How the consultation should be conducted.** This will focus strongly on the spirit of the consultation, ensuring that it is conducted with a view to reaching agreement and that parties are given sufficient time to consider and respond to alternative proposals;
- **When consultation can be considered to be complete;** and
- **Conducting consultations in non-standard circumstances,** including business transfers and insolvencies.
- **How to engage effectively with the Government and the benefits that this could bring.**

3.25 To help devise the new guidance the Department for Business, Innovation and Skills will work with employers and trade unions to ensure that we capture the right information. We will conduct focus groups to help ensure that the guidance presents sufficient detail and is based on strong examples of good consultation. The Government will also consider whether the guidance could be supplemented by case studies demonstrating effective collective redundancy consultation in practice. The Government is keen, therefore, to hear from respondents who would be willing to participate in the development of guidance or case studies.

3.26 The changes described above can only go so far towards achieving the Government's aims. For the right culture to exist that promotes good quality consultation there must also be ongoing engagement and a positive working relationship between employers and employees' representatives.

Question 6

Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?

Question 7

What changes are needed to the existing Government guidance? ⁶

Question 8

How can we ensure the Code of Practice helps deliver the necessary culture change?

Question 9

Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.

Impact assessment

3.27 An assessment of the impact has been carried out. It can be found at:

<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/c/12-809-collective-redundancies-consultation-impact>.

For more information see chapter 5.

Question 10

Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.

⁶ You can find the current guidance on collective redundancy consultation for employees at http://www.direct.gov.uk/en/employment/redundancyandleavingyourjob/redundancy/dg_10029835 and for employers at <http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1073792401&type=RESOURCES>

Question 11

If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?

Question 12

If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?

Other issues

Insolvency

3.28 Responses to the Call for Evidence showed that there is concern about the way that collective redundancy consultation takes place in insolvency situations. To address this, the Department for Business, Innovation and Skills will review its guidance and ensure that insolvency issues are addressed in the proposed Code of Practice. We will work with all interested parties to investigate ways to encourage higher compliance with consultation obligations in insolvency situations.

TUPE

3.29 The Call for Evidence also highlighted concerns about the interaction of the collective redundancy consultation rules with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The Government is also conducting a review of the TUPE Regulations, which is operating to a longer timescale than the review of the collective redundancy consultation rules. We propose that these issues raised are considered as part of the TUPE review. We are not, therefore, seeking views at this stage as part of the Collective Redundancies review process.

The Protective Award

3.30 Some respondents to the Call for Evidence suggested that the Government should reconsider the current enforcement regime and in particular the Protective Award. The Government is required to ensure that there is suitable enforcement in place to protect employees' access to collective redundancy consultation. This is achieved through the Protective Award, currently set at 90 days pay per affected employee. The Government does not intend to reduce the period of the Protective Award alongside the proposed reduction of the 90-day minimum period. The amount of the award is linked not to the length of consultation but to the efforts of the employer to comply. The Government believes that a 90-day maximum award (which can be reduced by the court on evidence of partial compliance) is an effective, proportionate and dissuasive penalty.

The primacy of trade unions in collective redundancy consultation

3.31 Responses to the Call for Evidence suggested that employers valued the contribution to the consultation process of experienced, well-trained employees' representatives. Where they existed, employers preferred to consult with trade unions or established information and consultation forums. As such, the Government does not intend to change the primacy of trade unions in the consultation process.

4. Evidence

90-Day Minimum Period Before Redundancies Can Take Effect

Consequences of the 90-day minimum period

- 4.1 During 2011, 589,000 people were made redundant. Collective redundancy situations involving 100 or more employees typically result in about 75,000 redundancies per year.
- 4.2 Responses to the Call for Evidence identified a number of advantages and disadvantages associated with the 90-day minimum period, which were also reflected in views about the impact of a change to a 60, 45 or 30 day period.
- 4.3 Some respondents felt strongly that the longer period can provide time to discuss fully the issues and for the parties to react to proposals and counter proposals. It can provide employees facing redundancy with time to make personal arrangements and seek help through counselling or with updating their CV. It can also give access to wages for longer.
- 4.4 However, the majority of responses seemed to suggest that the disadvantages outweighed the benefits. In general the problem stemmed from a lack of flexibility in the current regime. Specifically employers are not able to restructure as effectively and efficiently as they would like and employees are faced with a prolonged period of uncertainty and stress.
- 4.5 This lack of flexibility was compounded by a lack of clarity in the law around the point at which redundancy notices could be issued. A number of respondents stated that meaningful consultation usually lasted for only around 45-days, during which most viable alternatives had been discussed and after which representatives often lost interest and the consultation lost momentum. However, employers are not confident that the law allows them to issue redundancy notices and to move to individual consultation before the end of the 90-day period. This is discussed in more detail in paragraphs 4.40 and 4.41.
- 4.6 Employer concern about the challenges of a 90-day minimum period also meant that interpretation of what is an 'establishment' becomes key. There was evidence of employers seeking to avoid the 90-day minimum period by finding ways to subdivide the number of redundancies and treat them as separate consultations. This is discussed in more detail in paragraphs 4.16-4.22.

Commercial considerations

- 4.7 A number of responses from employers argued that the lack of flexibility makes it more difficult for them to restructure and adapt to changing market conditions. Employers believe this jeopardises the UK's competitive advantage and can mean that UK subsidiaries of large multinationals are left behind by subsidiaries in other countries where restructuring is more straightforward. One respondent stated:

“The particularly lengthy period in the UK, compared to other areas of the world, prevents or delays changes occurring in line with other parts of the business globally. There is a risk that the UK arm of a business gets left behind or is disadvantaged by this”

- 4.8 The prolonged uncertainty during a minimum consultation period of 90 days was also seen as affecting the confidence of investors, suppliers, customers and lenders, with the potential to impact on the long-term viability of a business. It was also argued that the costs associated with keeping employees in employment during the extended period, as well as management costs associated with longer consultation, could result in employers making more employees redundant than might otherwise have been the case and put businesses that may already be struggling at greater risk of failure.

Staff morale

- 4.9 It was argued, too, that employees face difficulties because of the uncertainty of the longer minimum period. The pool of staff affected by the consultation will include individuals who ultimately are made redundant and a number who are not. Until the consultation is concluded, however, there is no certainty over which individuals are which.
- 4.10 In the meantime, employees with in-demand skills (which the employer may wish to retain) may seek more secure employment elsewhere. This could leave the employer short of appropriately skilled workers after the restructuring. One respondent to the Call for Evidence explained:

“...during the 90 day consultation period the natural wastage will increase, losing valuable skills and experience. We will need to recruit to replace during this period.”

- 4.11 Some employees may be clear that they wish to take the opportunity to leave their job but then have to decide between leaving early with no redundancy package or waiting until the 90-days have passed and they can receive redundancy pay. Other employees may delay looking for alternative employment in the hope that it will not prove necessary.
- 4.12 The Government does not consider that it is the purpose of the minimum periods to provide time for employees to seek alternative employment or sort out their personal affairs. This is the role of personal notice periods, which can only start once the redundancy notices have been issued.

Higher or graduated thresholds

- 4.13 The Call for Evidence asked respondents if they could see any benefit to introducing a higher threshold for the longer 90-day minimum periods to take into account very large redundancies or whether there should be a graduated threshold covering a number of different redundancy sizes and time periods.
- 4.14 There was no appetite amongst respondents for this approach. The belief was that a high number of proposed redundancies did not necessarily correlate with complexity of consultation and impact. Some unions argued that all redundancies are high impact for those people involved and a number of employers could see no direct correlation between the number of redundancies proposed and time taken for meaningful consultation. Graduated thresholds were also regarded as being likely to introduce unwelcome complexity to the process.

Agreeing to early release during the minimum period

- 4.15 The Call for Evidence also asked respondents if they would like to have a right to agree to redundancies taking effect before the end of the minimum period. Respondents were

generally unenthusiastic as they felt that it would be difficult to apply in practice. If this were to be introduced it would need to be very carefully defined to ensure that both parties understood when agreement had been reached and that it would not be misused to pressurise employees into leaving earlier than they would like to. This measure would be less relevant if the 90-day minimum time period is reduced.

‘Establishment’

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

4.17 The ECJ has provided guidance on the definition of ‘establishment’ in two main cases. In *Rockfon A/S v Specialarbejderforbundet i Danmark*⁷ the ECJ held that, depending on the circumstances, ‘establishment’ means the unit to which workers are assigned to carry out their duties. For there to be an ‘establishment’, it is not essential for the unit in question to have management that is capable of independently making collective redundancies. The ECJ provided further guidance in *Athinaiki Chartopoiia AE v Panagiotidis and others*⁸ when it held that “an ‘establishment’, in the context of an undertaking, should be interpreted very broadly in order to limit as far as possible cases of collective redundancies which are not subject to the Directive”. An establishment may consist of:

- a distinct entity;
- having a certain degree of permanence and stability;
- which is assigned to perform one or more given tasks; and
- which has a workforce, technical means and a certain organisational structure to allow it to do so.

4.18 Responses to the Call for Evidence made clear that, as defining the relevant establishment is a question of fact, there is concern about how to comply, which distracts from the substance of consultation and creates opportunities for bad practice.

4.19 There is anecdotal evidence of cases where employees who should be covered are not and others where employers have consulted for longer than might strictly be necessary. There is also evidence of inequality in access to consultation with employees of different branches of the same employer having different access to consultation. The highest profile recent example is that of Woolworths, where employees in stores with fewer than 20 employees were not consulted. Some consultations have also taken place at a level of management that does not have ultimate responsibility for the decision to dismiss. In these circumstances the management may not be able to respond to points raised on important issues.

⁷ C-449/93 [1995], *European Court reports Page I-04291*.

⁸ C-270/05 [2007] IRLR 284.

4.20 Despite the problems caused by the lack of a definition of ‘establishment’, very few respondents to the Call for Evidence thought that a statutory definition was the right solution. They pointed to the problems caused by the geographical definition used on the HR1 form to demonstrate that a simple definition is not easy to create. One respondent stated that:

“The issue of determining an establishment is complex, especially for organisations...that have multiple business functions and locations spread across the UK... As a result [this organisation] has, on occasion, found it challenging to complete the form HR1 as this more focussed around the translation of “establishment” as a business location whereas we normally give it a broader definition...”

4.21 The wide variety of management structures and working patterns in the UK makes a simple geographical definition of ‘establishment’ unworkable. Many employers organise their businesses by specialism or business unit. Others have large numbers of ‘field’ or home workers who are not assigned to a specific geographic location. And others still have distinct business units or subsidiaries, with little or no operational connection, co-located at the same site.

4.22 This means there are numerous factors to take into account when deciding what constitutes an establishment including:

- Geographical location;
- Management structure;
- Management or financial autonomy;
- Cohesion of the workforce;
- The nature of the work undertaken or type of service provided;
- The contractual relationship between the employee and employer; and
- The level within the company at which the decision to dismiss is taken.

What constitutes consultation?

4.23 One of the challenging elements identified by the Call for Evidence is the question of what constitutes consultation. Legislation defines the process broadly and subsequent case law has not always improved clarity. Taken together, employers can find themselves attempting to apply interpretations that sometimes appear inherently contradictory. It is also easy for employers and employees’ representatives to draw conflicting conclusions about what is required, depending on their interpretation of the purpose and value of consultation.

4.24 The GB legislation requires that consultation must start “in good time” and, in any event at least 90 days before the first dismissals take effect for 100 or more employees or otherwise at least 30 days. It must take place with a view to reaching agreement and must include consultation about ways of:

- Avoiding the dismissals;
- Reducing the number of dismissals; and

- Mitigating the consequences of the dismissals.⁹

4.25 The employer is also required to provide the employees' representatives with information relating to:

- the reason for the proposals;
- the employees affected;
- the proposed process for selection;
- the proposed method and timings of any dismissals;
- the proposed method for calculating redundancy pay; and
- any agency workers employed at the company.¹⁰

4.26 ECJ case law suggests that the requirement that the consultation must take place with a view to reaching an agreement means that it is akin to negotiation and consultation must be properly carried out before redundancy notices can properly be issued.¹¹

4.27 Responses to the Call for Evidence highlighted difficulties for employers and employees' representatives at the start, middle and end of consultation. As with the issues around 'establishment', it is clear that uncertainty is driving some bad practice and placing emphasis on the process rather than the quality of the consultation itself.

Start of consultation

4.28 Consultation about collective redundancies must begin "in good time". However, the responses to the Call for Evidence highlighted that there is confusion about the point at which the obligation to consult is triggered and what is meant by "in good time".

4.29 Trade unions are keen for consultation to start very early in the process to give them maximum opportunity to influence the business decision. Where there is a strong industrial relationship, it is likely that this decision is part of the day-to-day discussions unions have with management. However, where this is not the case, or where the decision is taken by a central management removed from the local employer, engagement will tend to start much later.

4.30 Employers voiced concerns about starting consultation early. They were worried that starting too early would have a negative impact on the confidence of suppliers, customers and lenders. They also stated that starting consultation too early would lead to meaningless early engagement, preferring instead to start consultation when they had a reasonably detailed proposal drawn up. However, this can draw accusations from employees' representatives that the management is unlikely to want to vary their detailed plan and that the consultation is, therefore, not genuine.

⁹ Section 188, TULRCA 1992

¹⁰ Section 188(4), TULRCA 1992

¹¹ Case C-188/03 *Junk v Kuhnel* [2005] IRLR 310.

- 4.31 The ECJ judgment in *Akavan*¹² provides some useful, though not entirely clear, guidance on the trigger for consultation. This case established that the fact that a parent company had contemplated a strategic decision to make changes which had the potential to generate redundancies in its subsidiaries did not of itself create an obligation to consult. It was only when a decision was taken which compelled a particular subsidiary to contemplate or plan for redundancies that the obligation arose. This is because the subsidiary was the employer and the obligation to consult rests with the employer.
- 4.32 So the trigger for consultation to start is the point at which a strategic decision has been taken which make redundancies likely at an identifiable establishment. What constitutes “in good time” after this decision is not clear, but it is likely to be a relatively short time after the decision is taken. What is clear is that the employer does not have to have all of the required information to start consultation. The information can, and should, be provided throughout the course of consultation.

Conduct of consultation

- 4.33 Having considered the trigger point for consultation, it is important to then consider what happens during consultation itself. In previous sections discussing issues around the 90-day minimum period and the ‘establishment’ issue we have identified that consultation often loses focus on the key issue of reducing the number of redundancies or mitigating their impact. As one respondent noted:

“...consultation can become an exercise in investigating the detail of board discussions in an attempt to identify when redundancies may have been an option, a consideration or a possible consequence of strategic policies under review.”

- 4.34 This demonstrates a lack of common understanding about how consultation should be conducted and what should be discussed. The *Junk* judgment made it clear that consultation must be undertaken with a view to reaching agreement and that this was akin to negotiation. But what neither the *Junk* nor *Akavan* judgments clarify is the subject matter for consultation. It is clear that this must include ways of avoiding the redundancies, reducing their number or mitigating their impact. UK case law¹³ states that where the proposed dismissals are inextricably linked to the business decision it is necessary to consult about that business decision. For example, in a closure situation the need for the redundancies would arise as a result of the decision to close the establishment. As such it would be impossible to consider ways to avoid the redundancies without considering the decision to close the establishment. This does not mean, however, that the consultation is about the decision itself. The consultation is always about the potential to avoid redundancies.
- 4.35 In order to be meaningful it is important that the consultation is conducted in the right spirit and follows a process that allows for consideration of options and the offering of alternative proposals. One respondent to the Call for Evidence suggested that consultation should be defined as:

¹² Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and others v Fujitsu Siemens Computers Oy* [2009] IRLR 944

¹³ *UK Coal Mining Ltd v National Union of Mineworkers* EAT/0397/06/RN and EAT/0141/07/RN

“Providing enough information so the person being consulted with can understand, assess and devise a sensible response, and in a timeframe that facilitates genuine exchange and reflection.”

4.36 Another noted that case law¹⁴ defines fair consultation as involving:

- Adequate information on which to respond;
- Adequate time in which to respond;
- Consultation when proposals are still at a formative stage; and
- Conscientious consideration by an authority of the response to consultation.

4.37 To be effective consultation must be conducted between appropriate representatives of both employees and management who have the authority to engage in open discussion and take decisions. It is the responsibility of the local employer to undertake consultation, but it may be more appropriate for consultation to take place with central management if the decision to make redundancies is taken at that level. The representatives must also enter into the consultation with the right attitude and be willing to listen to alternative proposals. It is also key that the consultation remains focused on the central issues and does not focus too much on the consultation process itself.

End of consultation

4.38 It was clear from responses to the Call for Evidence that there is considerable doubt over when consultation has concluded. There was general agreement that an employer would only be confident if the employees’ representatives agree it is finished or it is clear that all the points raised in the consultation have been addressed and the employees’ representatives are raising no new substantive issues. But being certain of this in specific situations was challenging.

4.39 This lack of clarity and assurance for employers can mean that the minimum periods are regarded as maximum periods – i.e. once the 30 or 90 days has passed it is felt that redundancy notices can be issued or can take effect irrespective of whether consultation is genuinely complete.

Issue of dismissal notices

4.40 Questions were raised by respondents about when dismissal notices could be issued and there was a difference of views from some about whether it was possible to issue notices inside the minimum period. One concern was that issuing a dismissal notice could be regarded as evidence that an employer no longer intended meaningful discussions to take place.

4.41 TULRCA requires only that redundancies cannot take effect until 30 or 90 days after the start of consultation; it is silent on the point at which notices can be issued. The Junk judgment states that notices cannot be issued until after consultation is genuinely complete, though it does not refer to minimum periods before redundancies can take effect. So it is clear that notices can be issued during the minimum period but only where

¹⁴ *R v British Coal Corporation* [1994] IRLR 72; *Middlesborough Council v TGWU* [2002] IRLR 332

consultation has genuinely been completed and provided the redundancies do not take effect until after the minimum period has expired.

Relationship with individual consultation

- 4.42 Issues were also identified with when individual consultation can begin. Some respondents noted that some employers were keen to start an individual dialogue with affected employees at an early stage and would like to be able to carry out individual consultation alongside the collective consultation. This could be helpful to the overall process. A union representative argued against this, considering that formal individual redundancy meetings should not commence until after the collective consultation is complete.
- 4.43 Conversely, another respondent argued that individual consultation is not an irrevocable step towards implementing a redundancy in the same way that giving notice is and commencing individual consultation may therefore not be inconsistent with ongoing collective consultation, provided the employees with whom it takes place and the issues discussed do not suggest that, in practice, issues still being discussed collectively have in fact already been determined.

Insolvency

- 4.44 Businesses in financial difficulty will sometimes need to enter an insolvency procedure such as administration. In these circumstances insolvency office-holders are under pressure to act quickly in order to either rescue the business or to achieve the best return for creditors. This may include a reduction in the number of staff employed by the business. If the business is no longer viable, it will have to be closed with the loss of all staff.
- 4.45 Employers involved in insolvencies where there is a possibility that large-scale redundancies will be necessary are required to consult about those redundancies. The special circumstances that the legislation allows for may well permit the minimum time period to be shortened in some insolvency situations, though case law shows that insolvency is not a special circumstance in itself.
- 4.46 Should an employer in administration or facing insolvency fail to consult they could be made to pay a Protective Award of up to 90 days' pay per affected employee. If the insolvent company does not have sufficient funds to pay the Protective Award, it is paid by the Government through the National Insurance Fund (NIF). Payments made through the NIF are capped at 8-weeks' pay at a maximum of £430 per week.
- 4.47 The Call for Evidence demonstrated that there is a belief amongst employers and insolvency practitioners (IPs) that there is a conflict between the IP's obligation to either rescue the business or get the best outcome for creditors and the employer's obligation to consult over collective redundancies. IPs believed that the timeframes for consultation and the lack of viable alternatives to redundancy often made meaningful consultation impossible.
- 4.48 However, insolvency is rarely a surprise to the employer. Except in the rare circumstances that are caused by an unexpected calamity (physical or financial) for example, short notice removal of funding or cancellation of an order, insolvency is likely to be the result of a steady decline in the company's performance.

4.49 Improving compliance with the collective redundancy consultation rules would help to realise benefits for employers, employees and the Exchequer. However, this is not straightforward to achieve. The Government is keen to explore options for improving understanding of obligations in these circumstances and on raising levels of compliance.

TUPE

- 4.50 Where an employer plans to transfer part of its business (assuming it is a relevant transfer under TUPE), the employer has duties in relation to informing and consulting affected staff. This requires the employer to inform representatives of any affected employees of various matters, essentially when and why the proposed transfer will take place, the implications of the transfer for any affected employees, any measures (e.g. a reorganisation) which are envisaged in connection with the transfer which might relate to affected employees, (or if no such measures are envisaged, that fact), and any measures that the employer envisages the new employer taking in relation to affected employees who will transfer across (or if none are envisaged, that fact).
- 4.51 This information must be given long enough before the proposed transfer to enable the employer to consult with the representatives. If the employer envisages taking measures in relation to an affected employee which relates to the transfer, the employer must consult the representatives of that employee with a view to seeking their agreement to the proposed measures. This is likely to apply where there is a planned sale of part of the business, a demerger or a change of service provision (e.g. a contract previously with one service provider is given to a new one).
- 4.52 Often business transfers are accompanied by redundancies. The new employer who is taking on the function may already have employees to carry out some or all of that function; they may wish the function to be carried out in a different location; or they may feel that they can carry out the function with fewer employees.
- 4.53 It is currently the case that the transferee employer cannot be certain it has fulfilled its obligation to consult about large-scale redundancies until after it becomes the employer of the transferring employees – i.e. until after the business transfer has taken place. The redundancies, therefore, cannot take place until after the minimum period set out in TULR(C)A and the employees' notice periods.
- 4.54 The Call for Evidence highlighted that the current regime is causing problems for employers and employees. That employers cannot be certain that they have fulfilled their obligation to consult over collective redundancies before the transfer significantly delays post-transfer restructuring. It causes employers to have to continue to pay workers for whom they have no work. This is particularly acute where the transfer involves a change in location for the function being carried out, where employers need to retain premises to accommodate employees who have no work and future with the firm. The additional costs associated with these issues are a key factor deciding whether the transfer will go ahead.
- 4.55 As a result of the lack of flexibility in the process, employees are facing long periods of uncertainty and are not receiving the meaningful consultation to which they are entitled. Once the transfer has taken place the employer commonly has limited options as to which employees he is able to retain and which he is not. As such there cannot be meaningful consultation over alternatives to redundancies. If the transferee could consult with

employees in advance of the transfer then they would be more aware of the likely outcome for them and would have better access to redeployment opportunities within either the transferee or transferor company.

Fixed-term contracts

- 4.56 The current law excludes employees working on fixed-term contracts of three months or fewer from the calculation for collective redundancy consultation. All other fixed-term appointees are included if the reason for their dismissal is not related to them as an individual.
- 4.57 The Collective Redundancies Directive allows for fixed-term contracts to be excluded from the requirement to consult. However, the subsequent fixed-term workers Directive (Directive 99/70), implemented by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, provides employees on fixed-term contracts with the right not to be treated less favourably than a comparable permanent employee. The Regulations provide protection for employees employed on a succession of fixed-term contracts.
- 4.58 The current law suggests that the dismissal of fixed-term appointees could be classed as a redundancy which may need to be included in the count for collective redundancy consultation, even where the reason for their dismissal is the natural ending of the contract which is not renewed. However, the recent judgment in the *Stirling* case has cast some doubt on this issue. In that judgment the Scottish EAT held that the expiry or non-renewal of a fixed-term contract does not necessarily give rise to a redundancy for the purposes of collective consultation. The EAT held that the deciding factor was whether any of the reasons for the dismissal related to the individual. When considering this, the reason for the contract and the reason for its non-renewal (e.g. the end of maternity or sick-leave cover) should be taken into account.

Problems caused by fixed-term contracts

- 4.59 Employers responding to the Call for Evidence suggested that the inclusion of fixed-term employees is an example of gold-plating the implementation of the Collective Redundancies Directive. Particular problems, especially in the higher education, retail and construction sectors, have been reported both in determining when the requirement to consult applies and in applying the consultation rules in practice.
- 4.60 On occasion, employers are forced to extend fixed-term contracts to meet the end of the 90-day minimum period, despite there being no work for the employees in question. The requirement to observe the minimum periods also reduces flexibility for employers to meet the fluctuating demands of the business – the very reason fixed-term employees are used in manufacturing or retail.
- 4.61 Including fixed-term employees in collective redundancy consultations creates additional uncertainty for permanent employees. It can result in permanent employees being brought into a redundancy pool when this may not otherwise have been the case. The inclusion of large numbers of fixed-term contracts can also divert consultation away from the issues that impact on permanent employees facing redundancy and the additional burden on the employer can result in resources being diverted from other, more productive, business activities.

- 4.62 In the higher education sector, which makes widespread use of fixed-term contracts, employees are made aware of the end point of their contract at the start of it. The opportunity to renew the contract is often complicated by the reliance on external funding for the continuance of the work. Higher Education Institutions (HEIs) regularly face the prospect of 20 or more fixed-term contracts expiring in a 90-day period. This results in them engaging in a continuous cycle of collective redundancy consultation. This results in a significant administrative burden for the employer.
- 4.63 This consultation is often of limited benefit to either the employer or the employee. Decisions about ongoing funding are often not known until close to the end of the contract and employees in HEIs are often keen to move to a different establishment in order to further their careers. Individual consultation is often of more use to both parties.
- 4.64 Trade union respondents to the Call for Evidence felt very strongly that employees on fixed-term contracts should remain within scope of the collective redundancy consultation rules. Employers, especially those representing HEIs believed that individual consultation was more important and that a robust system for that should replace the need for collective consultation. Employers also felt that the law should be changed to make the end of a fixed-term contract an automatically fair reason for dismissal. Other respondents felt that use should be made of the Directive's exemption.

Changes to terms and conditions of employment

- 4.65 In response to the Call for Evidence, both employers and trade unions highlighted issues around the application of the collective redundancy consultation rules to situations where employers dismiss their workforce and re-engage them on different terms and conditions.
- 4.66 This is a highly contentious issue. Employers believe that the requirement that collective redundancy consultation takes place in these circumstances significantly delays their ability to take measures which could be critical to ensuring the continued viability of the business. They argue that the issues that are required to be discussed, such as ways of reducing the number of redundancies, are not relevant to these situations.
- 4.67 Trade unions believe that employers are using the consultation requirements to bully employees into accepting worse terms and conditions. They believe that the threat of redundancy brought about by the start of consultation unsettles the employees and drives them to sign worse contracts in order to avoid being made redundant.
- 4.68 While Government recognises the concerns for both employers and employees, we do not consider that it can be addressed through changes to the collective redundancy consultation rules. To exempt these circumstances from the requirement to consult would deprive employees of an important opportunity to be consulted about the changes to their terms and conditions. However, the proposed reduction in the 90-day minimum period should address some of the concerns raised by employers about delays to restructuring.

Government engagement with employers and affected employees

- 4.69 Government intervenes in redundancy situations to support employees in finding new jobs and training and to minimise the effect of severe economic shocks when these occur. As well as the need for consultation with employees, the 90 day minimum consultation and

notification period was originally introduced in part to ensure that there was enough time for Government to act in large scale redundancies. In today's working environment, however, with the increased prevalence of individual notice periods and increased speed of communications, it is not clear whether it is necessary to require a longer statutory timescale to allow for Government interventions.

- 4.70 Support for individuals is provided by the Department for Work and Pensions (DWP) through the Jobcentre Plus (JCP) Rapid Response Service (RRS).¹⁵ This offers locally provided advice, guidance and practical help in searching for new jobs and training opportunities. Assistance is offered in all cases where 20 or more redundancies are proposed, and the employer therefore submits notification to Government through the HR1 form. However, the scheme is not restricted, and any employee who faces redundancy or any employer who proposes a small number of job losses can approach DWP directly, no matter the length of the consultation period.
- 4.71 Other Government interventions are deployed as needed in cases of economic shock. These aim to link together Local Government, Agencies and Central Government with the combined objective of improving the local environment for employment and industry. When this happens, it is often in the employer's interests to allow the consultation to carry on beyond the minimum period if that facilitates Government intervention. This can help with skills retention or ensuring that a site closure is managed effectively.
- 4.72 There was widespread agreement between all groups of respondents that the number of staff being dismissed from any one employer was not the correct parameter on which to judge the impact of a redundancy. In particular, it was thought that there are a range of factors which can contribute to the economic effect of redundancies, including the local economy, range of jobs available and the skills set of those affected. It was also noted by several respondents that the impact of a redundancy on the individual and their family is always severe, no matter how many others were let go at the same time.
- 4.73 There was anecdotal evidence that in some cases, the minimum consultation period can delay the start of RRS assistance, meaning there can be up to 90 days before staff begin to receive the assistance they are entitled to. This is because employers sometimes feel that by engaging with JCP, it could appear that proposed redundancies were a foregone conclusion, thereby undermining the consultation and leaving them vulnerable to challenge from the union concerned. It was observed that this is an unintended consequence of the minimum consultation period, and has the most severe detriment to staff needing advice.
- 4.74 Contributors were clear that the effectiveness of any Government response relies on time and opportunity to engage fully with employers and employees from an early stage. We propose, therefore, a Code of Practice that includes guidance on how to engage effectively with Government.

¹⁵ Equivalent services in Scotland are provided by PACE (Partnership Action for Continuing Employment) and in Wales by ReAct II.

5. Impact Assessment

5.1 To accompany this consultation document, the Department for Business, Innovation and Skills has developed an Impact Assessment (IA), which can be found at

<http://www.bis.gov.uk/assets/biscore/employment-matters/docs/c/12-809-collective-redundancies-consultation-impact>

5.2 The IA is designed to establish the likely impact of the policy proposals and to inform their development. It considers the impact on employers, employees and the Government and seeks to quantify these impacts where possible.

5.3 The evidence and data available on the impact of the current collective redundancies regime is limited. To try to enhance this evidence base, the Government conducted a Call for Evidence between November 2011 and January 2012. The evidence provided in response was useful in identifying the groups affected by the current rules and, therefore, by any proposals to change them. These were identified as:

- **Employers of 100 or more people** are subject to the longer, 90-day minimum period set out in the rules around large scale redundancies if they make 100 or more people redundant. These proposals could reduce the amount of labour costs paid by these employers if consultation periods reduce, and allow them more flexibility to adjust to changing circumstances. However, this effect is partly offset by a reduction in output that would have been produced in many cases during consultation.
- **Employees who are involved in collective consultation but are not made redundant.** Administrative data (HR1) suggests that over the last five years on average only 17 per cent of those employees consulted were actually made redundant. Many more employees are consulted but not made redundant. These proposals would potentially shorten the period of consultation and if guidance is effective, improve the quality reducing the negative impact on employees' morale and productivity.
- **Employees made redundant.** Those that are made redundant as a result of a large scale collective exercise are likely to receive their redundancy notice more quickly than under the current situation, and therefore be paid for a shorter period of time by their current employer. Depending on their job search behaviour the changes will affect people differently. For some they may be able to move to a new job more quickly, for a small number of people this may cause them to need to claim job-seeker's allowance (JSA) where they may previously have moved straight into alternative employment. Those that would have claimed JSA for a time anyway may do so sooner, but the duration of time spent claiming JSA will be unaffected.
- **Wider Economy.** Whilst changes in the rules will affect employers and employees involved in collective redundancy consultations, the economy-wide effect may be a rise in productivity if employees move more quickly to new employment or can move on more quickly within their current employment, as the identified impact of

employees being less productive during collective consultation should be reduced. Whilst affected employers should also see a drop in labour costs (with associated reductions in output as workers leave more quickly), these effects are both local to the firm and aggregate at the economy level.

5.4 We are keen to improve the quality of the evidence in the IA through this consultation exercise. The questions asked throughout the consultation document are designed to gather information on the overall impact of the proposals. However, there are some other aspects where we would appreciate additional information in order to enhance our understanding of the current regime. In particular, BIS is keen to understand:

- exactly how long it takes to reach an agreement through collective redundancy consultation within the minimum time period (i.e. whether or not the consultation genuinely runs for the full 90- or 30-day period); and
- how employees behave during the consultation process (i.e. do they seek alternative employment early in the process or do they hold out for their redundancy pay before looking for a new job?) **If you have any evidence on this point we would be happy to receive it.**

Annex A: The Consultation Code of Practice Criteria

- Formal consultation should take place at a stage when there is scope to influence policy outcome.
- Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
- Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
- Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
- Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Sameera De Silva,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Sameera on 020 7215 2888
or e-mail to: Sameera.De.Silva@bis.gsi.gov.uk

Annex B: List of Individuals/Organisations consulted

Acas	British Chambers of Commerce
Accenture	British Deaf Association
Administrative Justice & Tribunals Council	British Dyslexia Association
Age UK	British Footwear Association
Aitken Law	British Hospitality Association
Alliance for Inclusive Education	British Inst. Human Rights
Amey Plc	British Jewellery Giftware and Finishing Federation
Ashfords Solicitors	British Precast Concrete Federation
Asset Based Finance Association	British Printing Industries Federation
Associated Society of Locomotive Engineers and Firemen	British Red Cross
Association of British Insurers	British Retail Consortium
Association of Business Recovery Professionals	British Security Industry Association
Association of Chief Executives of Voluntary Organisations	Broadcasting Entertainment Cinematograph and Theatre Union
Association of Colleges	Broadway Homelessness and Support
Association of Convenience Stores	Builders' Merchants Federation
Association of Optometrists	Business in the Community
Association of Plumbing and Heating Contractors	Business Services Association
Association of Recovery Professionals (R3)	BVCA – The British Private Equity and Venture Capital Association
Association of Recruitment Consultancies	Capgemini
Association of School and College Leaders	Capita
Association of Teachers and Lecturers	Carewest Ltd.
Assura Medical	CBI
Astar Management Consultants Ltd	Centre for Policy on Ageing
Astrazeneca UK Limited	Centre for Policy studies
B.I.G. Business Services	Centre for the Study of Human Rights, London School of Economics
Baker and McKenzie LLP	Chair of RPC
Baker Tilly	Chamber of Shipping
Bakers, Food & Allied Workers	Charity Commission
Barking & Dagenham College	Chartered Society of Physiotherapy
BBH Partners LLP	Chemical Industries Association
Best Limited	Choice Support
Biggart Baillie LLP	Chores
Birmingham Law Society, Employment Law Committee	CIPD
Blue Triangle (Glasgow) Housing Association	City and County Healthcare
Bond Pearce LLP	Civil Engineering Contractors Association
Bournemouth Transport Limited	Claims Management Regulator
BPE Solicitors LLP	Clarkslegal LLP
Brechin Tindal Oatts LLP	Cleaning and Support Services Association
Britain's General Union	Clifford Chance
British Accounting Association	Communication Workers' Union
British Air Line Pilots Association	Community
British Association of Colliery Management	Confederation of British Wool Textiles
British Ceramic Confederation	Confederation of Paper Industries
	Confederation of Passenger Transport
	Confederation of Shipbuilding and

Engineering Unions
 Construction Confederation
 Construction Plant Hire Association
 Cordant Group plc
 Council for Employment Tribunal Members Associations
 Council of Employment Tribunal Judges
 Council on Tribunals
 DAC Beachcroft LLP
 Dairy UK
 Deloitte
 DfT
 DHL Services Ltd t/a DHL Supply Chain
 Disability Awareness in Action
 Discrimination Law Association
 DLA Piper
 Dorset County Council
 Dundas & Wilson LLP
 East of England Local Government Association
 Economic Solutions Ltd
 EEF
 Electrical Contractors' Association
 ELGAR (Employment Law Group Applicants' Representatives - Birmingham)
 Employers Forum on Age
 Employers in Voluntary Housing
 Employment Appeal Tribunal
 Employment Law Bar Association
 Employment Lawyers Association
 Employment Related Services Association (ERSA)
 Employment Tribunal President for England & Wales
 Employment Tribunal President for Scotland
 Engineering Construction Industry Association
 Enterprise Rent-A-Car
 Equalities National Council
 Equality and Diversity Forum
 Equality and Human Rights Commission
 Equality Network
 Ernst & Young
 Ethnic Minorities Law Centre
 European Employers Group
 Eversheds LLP
 Facilities Management Company
 Fawcett Society
 FDA
 Federation of Master Builders
 Federation of Small Businesses
 Fire Brigades Union
 Fitzpatrick Wilkes & Co.
 Food and Drink Federation
 Foresight Coaching and Consultancy
 Forum of Private Business
 Free Representation Unit
 Freight Transport Association
 Freshfields
 Fujitsu
 HRXchange
 Glass and Glazing Federation
 GMB
 Go-Ahead London
 Government Equalities Office
 Halifax Opportunities Trust
 Harmony Home Care Ltd.
 Health Protection Agency
 Heating and Ventilation Contractors' Association (HVCA)
 Heriot Watt University
 Hestia Housing and Support
 Hewlett Packard
 Hogan Lovells
 Housing 21
 HR Business Partner – Pre-Sales & Bidding Igen Ltd
 Immigration Service Union
 Impax Asset Management Group plc
 Imperial College London
 Tania Johnson
 Carl Allen
 David McLeod
 Graham Parish
 Dr. Paul Latrielle
 Nicola Laverton
 David Morgan
 Mrs Lynn Tong
 Jan Britton
 Kim Heapey
 H Chown
 Komal Tekchandani
 Carolyn Simpson
 John Conrad
 Clif Arrow
 Simon Fillery
 Brian Napier QC
 Prof. John McMullen
 Adam Saunders
 Laura Emson
 Jonathan Dunning
 Alex Nicholas

Maureen Brown	McCann Erickson Advertising Limited and associated McCann Worldgroup agencies, part of the Interpublic Group network
Jo Sanders	Mencap
Victoria Holland	Metrobus Ltd
Robert Morris	Midland Heart
Nadine Willow	Miller Samuel LLP
Linda Hill	MIND
Mark Busby	Morrish Solicitors LLP
Barry Cusack	Morton Fraser LLP
Samantha Osborne	National Association of Colliery Overmen, Deputies & Shotfirers
Nita Clarke	National Association of Head Teachers
John Short	National Association of Probation Officers
Insolvency Lawyers' Association	National Association of Schoolmasters
Institute of Chartered Accountants in England & Wales	Union of Women Teachers
Institute of Chartered Accountants of Scotland	National Centre for Independent Living
Institute of Directors (IOD)	National Council for Voluntary Organisations (NCVO)
Institute of Employment Rights	National Farmers' Union
Irenicon Ltd	National Federation of Retail Newsagents
Jobcentre Plus	National Federation of Roofing Contractors
John Lewis plc	National Hairdressers Federation
Joint Industry Board for the Electrical Contracting Industry	National Pharmacy Association
Keele University	National Trust
Kent County Council	National Union of Journalists
KIDS	National Union of Rail, Maritime and Transport Workers
KPMG	National Union of Teachers
Law Society Scotland	Nationwide Building Society
Lawford Kidd	Nautilus International
Lawrence Graham LLP	Newspaper Society
Legal Services Commission	Northumberland County Council
Leigh Day & Co Solicitors	Norton Rose LLP
Leonard Cheshire Disability	Nottinghamshire County Council
Lewis Silkin LLP	NUT
Liberata UK Limited	OGN Group
Link Group Limited	OGN North Sea LTD
Linklaters LLP	Outward Housing
Liverpool Law Society	Papworth Trust
Living Ambitions	Peninsula Business Services Ltd
Local Government Association	People First
Local Government Employers	PGA
London Borough of Camden	Pinsent Masons LLP
London Councils	PricewaterhouseCoopers
Low Pay Commission	Professional and Business Services Group
LSE	"Professional Trades Union for Prison, Correctional and Secure Psychiatric Workers "
Lupton Fawcett	ProjectHR Limited
Maclay Murray & Spens LLP	Prospect
Making Space	
Marks & Spencer plc	
Maternity Action	
MBM Commercial LLP	

Public and Commercial Services Union
 RADAR
 Radio, Electrical & Television Retailers
 Association – RETRA
 Recruitment & Employment Confederation
 Retail Motor Industries Federation
 RM plc
 Road Haulage Association
 Robert Gordon University
 Ron Colebrook
 Ross Harper
 Royal College of Midwives
 Royal College of Nursing
 Royal Holloway University of London
 Royal National Institute for the Blind
 Royal National Institute for the Deaf
 Rushcliffe Borough Council
 Scholastic Ltd
 Scope
 Scotland Employment Tribunal Members
 Association
 Scottish Discrimination Law Association
 Scottish Engineering
 Scottish Government
 Scottish Trade Unions Congress
 Simmons & Simmons LLP
 Simple HR Ltd
 Social Enterprise Coalition
 Society of Motor Manufacturers and Traders
 Somerset Care Ltd.
 South East Employers
 Southdown Housing Association
 Southern Housing Group
 Spinal Injuries Association
 Squire Sanders (UK) LLP
 St Mungo’s Community Housing Association
 Stonewall
 Tata Steel UK Ltd
 The Connect Team Limited
 The Institute of Practitioners in Advertising
 (IPA)
 The Law Centres Federation
 The Law Society of England and Wales
 The London School of Economics and
 Political Science
 The National Federation of the Blind of the
 United Kingdom
 The Salvation Army
 The Society of Labour Lawyers
 The University of Manchester
 Thompsons McClure Solicitors
 Towers Watson
 Trade Association Forum
 Transport and General Workers' Union
 Transport for London
 Transport Salaried Staffs' Association
 Travers Smith LLP
 Trowers & Hamblins LLP
 TUC
 UCATT, Union of Construction, Allied
 Trades and Technicians
 UCU
 UDM, Union of Democratic Mineworkers
 Union of Finance Staff
 UNISON – the public service union
 UNISON Dartford Local Government
 Unite the Union
 United Kingdom Contractors' Union
 United Kingdom Disabled People’s Council
 United Kingdom Homecare Association
 Unity
 Universities and Colleges Employers
 Association (UCEA)
 University & College Union
 University of Bedfordshire
 University of Birmingham
 University of Bradford
 University of Oxford
 University of Sheffield
 University of Southampton
 University of St Andrews
 USDAW
 Vehicle Builders & Repairers’ Association
 Voluntary Organisations Disability Group
 Wales Office
 Welsh Government
 West Midlands Council
 Whalley Range 11-18 High school
 Worcestershire County Council
 Wragge & Co LLP
 Xact Group
 Zurich Financial Services

Annex C: Collective Redundancies: Consultation on changes to the rules response form

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 19/09/2012

Name:
 Organisation (if applicable):
 Address:

Please return completed forms to:

Carl Davies,
 3rd Floor Abbey 2, 1 Victoria Street
 London SW1 H 0ET

Telephone: 020 7215 6220
 Fax: 020 7215 6414
 email: collectiveredundancies@bis.gsi.gov.uk

If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group from the list below.

	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 overall approach to the rules on collective redundancy consultation?

Yes No Not sure

Comments:

Question 2

Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.

30 45 Not sure

Comments:

Question 3

Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'? Please provide comments to support your answer.

Yes

No

Not sure

Comments:

Question 4

Will defining 'establishment' in a Code of Practice give sufficient clarity?

Yes

No

Not sure

Comments:

Question 5

Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.

Yes No Not sure

Comments:

Question 6

Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?

Yes No Not sure

Comments:

Question 7

What changes are needed to the existing Government guidance?

Question 8

How can we ensure the Code of Practice helps deliver the necessary culture change?

Question 9

Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.

Yes No Not sure

Comments:

Question 10

Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.

Yes No Not sure

Comments:

Question 11

If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?

Question 12

If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No

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1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

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