

Resolving Workplace Disputes:
Government response to the
consultation

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Contents

Resolving Workplace Disputes - Government Response to Consultation	3
FOREWORD	3
EXECUTIVE SUMMARY	6
General response	7
Responses to specific questions	8
1. Mediation (Q 1–7)	8
2. Compromise Agreements (Q. 8–11)	8
3. Early conciliation (Q. 12-20)	8
4. Modernising Tribunals (Q. 21-56)	9
5. Unfair Dismissal qualification period (Q. 57-60)	9
6. Financial Penalties (Q. 61-62)	9
7. Formula for calculating award and payment limits (Q 63-64)	9
8. Rapid Resolution	10
RESPONSES RECEIVED	11
ANALYSIS AND RESPONSE	12
QUESTIONS 1-7: MEDIATION	12
Summary of Responses:	12
Government Response	13
QUESTIONS 8-11: COMPROMISE AGREEMENTS	15
Summary of responses	15
Government Response	17
QUESTIONS 12-20: EARLY CONCILIATION	19
Summary of responses	19
Government Response	21
QUESTIONS 21 – 33: CASE MANAGEMENT POWERS	23
Summary of responses (see Annex B)	23
Government Response	24
QUESTIONS 34 – 44: FACILITATING SETTLEMENTS	25
Summary of responses (see Annex B)	25
Government Response	27
QUESTIONS 45 – 56: WITNESS STATEMENTS BEING TAKEN AS READ, WITNESS EXPENSES, JUDGES SITTING ALONE AND LEGAL OFFICERS	28
Summary of responses (see Annex B)	28
Government Response	29
Witness statements	29
State-funded expenses	30
Judges sitting alone	31
Legal officers	32
QUESTIONS 57-60: EXTENDING THE QUALIFICATION PERIOD FOR UNFAIR DISMISSAL	32
Summary of responses	32
Government Response	33
QUESTIONS 61-62: FINANCIAL PENALTIES	34
Summary of responses	34
Government Response	36
QUESTIONS 63-64: FORMULA FOR CALCULATING TRIBUNAL AWARDS AND STATUTORY REDUNDANCY PAYMENT LIMITS	37
Government Response	38
WHAT HAPPENS NEXT	39
ANNEX A	40
SUMMARY OF QUESTIONS	40
ANNEX B	47

MODERNISING OUR TRIBUNALS - SCHEDULE OF QUESTIONS	47
QUESTIONS 21 – 24: Strike out powers.....	47
QUESTIONS 25 – 29: Deposit powers.....	48
QUESTIONS 30 – 33: Costs powers.....	49
QUESTIONS 34 – 38: The ET1 form.....	50
QUESTIONS 39 – 44 Calderbank-style settlement offers.....	51
QUESTIONS 49 – 51: State-funded expenses.....	53
QUESTIONS 52 – 54: Judges sitting alone.....	53
QUESTIONS 55 – 56: Legal officers	54
ANNEX C.....	55
Respondents to the RWD consultation included:	55

Resolving Workplace Disputes - Government Response to Consultation

FOREWORD

Our vision is for an employment dispute resolution system that promotes the use of early dispute resolution as a means of dealing with workplace problems. The consultation “Resolving Workplace Disputes” set out our ideas, which focused on the need to tackle problems early, before they got to the tribunal stage.

For it is clear that the system is not working as originally intended and is often not a positive experience for either employer or employee. Employers told us that successful reform could encourage them to take on more staff, contributing to economic growth. Evidence of the stress and outcomes for employees suggested reform could also be beneficial for workers.

We are grateful to all those who responded to our reform ideas and set out here a number of important steps we now intend to take to make early dispute resolution more accessible to all.

Firstly, our mediation initiatives, which we believe can help change the whole culture. We know, for example, that smaller businesses are proportionately more likely to find themselves the subject of employment tribunal claims, but are much less likely to have access to in-house HR expertise to help them deal with problems. We also know, from the responses to our consultation, that perceived cost is a barrier to using mediation. Making mediation more accessible and less costly for smaller businesses will provide an opportunity for those involved to deal with problems before they escalate into tribunal claims and, more importantly, preserve the employment relationship with all the benefits that brings. But there are wider benefits - an improvement in employer-employee relationships, the development of organisational culture and the development of “high-trust” relationships, all of which can only be good for business.

Second, we want to promote earlier discussion of issues by both parties, with “protected conversations”. So we plan to consult on a proposal to enable both employers and employees to talk about any concerns they have without fear that such a discussion will be used against them if discussions break down.

Third, there are the steps we propose to take to make compromise agreements an option for those where the employment relationship has ended but where an employment tribunal is not the right solution. We will work to address the concerns raised during the consultation so that compromise agreements are a real alternative for parties.

Where, however, individuals are considering making a claim to a tribunal, we will provide the opportunity for them and their employer to resolve the matter with the help of Acas before a claim is lodged. Through Acas Early Conciliation, parties will be invited to enter into conciliation to see whether they can settle the matter without the need for an employment tribunal.

All of this is intended to help parties to avoid the tribunal process. But, we recognise that judicial determination will still be necessary in some cases, and for those it is important that the system in place is as efficient and effective as possible to minimise the stress, time and cost to all. We set out our proposals for how we thought this could be achieved in the consultation.

What we were told, by many, was that the existing Rules of Procedure were over-elaborate and poorly drafted as a result of piecemeal amendment over recent years. In the words of the Senior President of Tribunals, they can “present real obstacles to robust and effective case management”. This cannot be right. It is important that the Rules allow the Employment Tribunals to meet their obligation to further the overriding objective (i.e. to deal with cases justly), while users can more easily understand the process and have confidence in it. Making further significant but piecemeal changes to the Rules now could only serve to make matters worse, so we have concluded that the time is right for a root and branch review of the Rules.

We have therefore asked Mr Justice Underhill, outgoing President of the Employment Appeal Tribunal, to lead a Fundamental Review of the Rules of Procedure for Employment Tribunals. We have invited him to present us with a revised Code by the end of next April (2012). We hope that revised Rules will help create a more streamlined and efficient system, by ensuring that robust case management powers can be applied flexibly, proportionately, effectively and (insofar as is practicable) consistently in individual cases coming before employment tribunals. We believe that this will complement the package of measures outlined here, meaning that where claims are brought to an employment tribunal, all users’ experiences will be improved.

But we want to do more to resolve disputes quickly and at less cost to parties. To this end, we have begun work with the Ministry of Justice to consider alternative resolution schemes, for certain cases. We are examining the case for a “Rapid Resolution Scheme” which would be open to those with more straightforward claims, and could deliver (for example) a determination without the need for a hearing. There is much work to be done to develop such a scheme, and our proposals will be subject to a full consultation in due course, but it could significantly reduce the number of cases that actually come to a Tribunal, reducing costs, speeding up resolutions and freeing up the system.

Taken together, the measures that we intend to take will support the work Government is doing to deliver a flexible, effective and fair labour market, where employers and workers are informed and empowered and able to sit down and discuss issues with each other. Where problems cannot be resolved in that way, we believe that the proposals will deliver a more user-friendly tribunal process where parties will be better informed about their case and where a focus on case management will help identify weaker claims.



EDWARD DAVEY



JONATHAN DJANOGLY

EXECUTIVE SUMMARY

1. The Government set out its commitment to undertake a review of employment law in the Coalition Agreement. The review was launched in May 2010, and the examination of employment tribunals is a key element of that work. The business community have consistently told Government that their biggest concern in relation to taking on staff is the employment tribunal system and that this fear ultimately acts as a barrier to growth.
2. The Department for Business, Innovation and Skills and the then Tribunals Service (now HMCTS) jointly issued a consultation document on 27 January 2011 that set out a series of detailed proposals on how the system should be changed. The aim was to support and encourage parties to resolve disputes earlier (where possible in the workplace) but, where there is a need to have the matter determined, to ensure that the system works efficiently and effectively, to bring things to a conclusion more swiftly. The consultation closed on 20 April 2011.
3. The first chapter of the consultation paper was concerned with how disputes can be resolved without the need for an employment tribunal. We sought further information from respondents on the extent to which mediation and compromise agreements were used as alternative means of dispute resolution, and the barriers that stood in the way of increased use. We also set out our proposals for making early conciliation available to all through an increased role for Acas. It was clear from the responses to this, and other chapters, that the tribunals system should be the last resort for parties to resolve disputes. There was strong support across all respondent groups for any steps that could be taken to lessen the need for employment tribunals, although caution was urged in relation to how matters were taken forward.
4. The second chapter of the consultation paper proposed a series of targeted amendments to the constitution, practice and procedure of employment tribunals and the Employment Appeals Tribunal. Proposals focused on ensuring as swift, user-friendly and effective a process as possible. Avoiding undue cost (to parties and to taxpayers) was central. While a range of views were expressed, with little consensus on the specific proposals, there was agreement that tribunal processes must be as consistent, efficient, proportionate and effective as possible. However, many commented that the rules were now so over-complicated and burdensome as to make achieving this objective almost impossible and they called for a root and branch review.
5. The third chapter set out Government's intention to introduce fees for employment tribunals. Although the paper made clear that this was not a matter on which we were seeking views at this stage, many respondents

referred to it in their responses. Some observed that the introduction of fees may have an impact on some of the other proposals in the consultation and that, in the absence of detail on what was intended, their responses were less relevant than they might otherwise have been. We recognise that the consultation on fees, while due shortly, is later than we had originally anticipated. However, we have taken into consideration, as far as we can, how the actions we intend to take will be affected by the introduction of fees and this analysis is reflected in the accompanying Impact Assessment.

6. The final chapter of the consultation paper set out our proposals to support business in taking on staff and to meet their obligations. Business has told us that a significant factor affecting their decision to hire people is the potential to end up in an employment tribunal relatively quickly after the individual has joined the organisation. Although opposed by the majority of respondents, we believe that extending the qualification period from one to two years will remove the perceptions of risk attached to taking on a new member of staff, especially for smaller businesses and that this will, in turn, encourage them to grow. The proposal to introduce a system of financial penalties for employers found by the tribunal to have breached an individual's rights was also opposed by more than half the respondents to the question. We also set out our proposals to correct the anomalous effects of the current annual up-rating process on the level of tribunal awards and statutory redundancy payments which saw employers (and Government where the employer was insolvent) subject to paying awards that had increased at a rate well above inflation. Very few respondents, however, offered views on the issue of rounding.
7. We believe that the measures we are taking, set out below, will support growth through addressing business concerns around the perceived risks in taking on staff. By providing greater access to alternative means of resolving disputes, and taking steps to make the tribunal process swifter and more efficient, we are addressing one of the key employment-related concerns of business.

General response

8. Over 400 responses to the consultation were received, about 25% from individuals, about 33% from businesses and their representative organisations and the remainder from trade unions, Government agencies, charities, legal representatives and others.

Responses to specific questions

1. Mediation (Q 1–7)

9. Following the consultation, we are even more convinced about the role that mediation can play, as one of the forms of early dispute resolution. There is much work to be done over the coming months and years to change attitudes to mediation and embed it as an accepted part of the dispute resolution process. Government will work with the industry and key stakeholders to make this a reality. As a first step, we intend to explore with large businesses within the retail sector whether and how they might be able to share their mediation expertise with smaller businesses in their supply chain, and will use this as a basis for expanding to other sectors. We will also pilot the creation of regional mediation networks through the provision of mediation training to a number of representatives from local SMEs.

2. Compromise Agreements (Q. 8–11)

10. The Government will address the major concerns raised by business in relation to compromise agreements. We will bring forward an amendment to clarify s.147 of the Equality Act, to provide reassurance to parties that compromise agreements can safely be used. We will also consider how we can develop a standard text for compromise agreements, to help employers worried by the potential cost of legal advice, so that they are encouraged to use compromise agreements where they might otherwise not have done so. In addition, we will consult in coming months on amending section 203(3)(b) of the Employment Rights Act 1996 to enable compromise agreements to cover existing and future claims without requiring long lists of causes of action, as well as introducing a system of “protected conversations” that would allow employers and employees to have open and frank conversations with each other about any employment issue without the existence of a formal dispute. Finally, we will amend the title of “compromise agreements” to “settlement agreements”.

3. Early conciliation (Q. 12-20)

11. The Government intends to introduce the requirement for all potential tribunal claims to be lodged with Acas in the first instance. Acas will offer parties the opportunity to engage in early conciliation in an attempt to resolve the matter without recourse to an Employment Tribunal. Where early conciliation is refused, or is unsuccessful, the claimant will be able to proceed to lodge a claim.

4. Modernising Tribunals (Q. 21-56)

12. The Government has asked Mr Justice Underhill, outgoing President of the Employment Appeals Tribunal, to lead a fundamental review of the Employment Tribunal Rules of Procedure, to address concerns that the Rules have become increasingly complex and unwieldy over time and are therefore no longer fit for purpose. The intention is that the review will deliver a streamlined procedural code. This should save users of the system, as well as taxpayers, both time and money. We intend, at an early opportunity, to take forward changes to the Rules as set out in relation to:

- cost and deposit orders
- witness statements
- witness expenses
- Judges sitting alone in unfair dismissal cases at the earliest opportunity

We expect further changes to follow from the Fundamental Review.

5. Unfair Dismissal qualification period (Q. 57-60)

13. The Government intends to extend the qualification period for unfair dismissal from one to two years.

6. Financial Penalties (Q. 61-62)

14. The Government intends to introduce a provision for employment tribunals to levy a financial penalty on employers found to have breached employment rights. The penalty will be payable to the Exchequer. As a result of feedback, however, we intend to allow judges the discretion about whether to exercise this power, to ensure that employers are not penalised for inadvertent errors.

7. Formula for calculating award and payment limits (Q 63-64)

15. The Government intends to retain the automatic mechanism for up-rating tribunal awards and statutory redundancy payments, but will modify the formula to round to the nearest pound across the limits at the earliest opportunity.

8. Rapid Resolution

16. One further proposal has been identified as a consequence of the consultation process that we believe it is appropriate to progress further.
17. In response to comments made during the consultation process, we will consider whether and how we can introduce a scheme to provide quicker, cheaper, determinations in low value, straightforward claims (such as holiday pay) as an alternative to the current employment tribunal process. Any such scheme could involve non-judicial determination (by legally qualified individuals or otherwise) based only on papers (ie no oral hearing). Potential advantages may include claims being dealt with more quickly than the current system permits and, because of the potential for parties and witnesses avoiding having to attend a hearing, at less cost.
18. There is much still to be done to determine how any process could work. We will consult with key stakeholders as we develop options, and will undertake a full public consultation once this work is complete. We propose, should it prove necessary, to take the powers to enable such a process to be introduced at the earliest opportunity.

RESPONSES RECEIVED

Total number of responses: 412

Respondents

Business representative organisation/trade body	56	13.6%
Legal representative	68	16.5%
Trade union or staff association	27	6.6%
Micro business (up to 9 staff)	13	3.2%
Small business (10-49 staff)	16	3.9%
Medium business (50-250 staff)	17	4.1%
Large business (over 250 staff)	34	8.3%
Individual	102	24.8%
Local Government	12	2.9%
Charity or social enterprise	30	7.3%
Central Government	3	0.7%
Other	34	8.3%

A list of respondents is attached at Annex C.

ANALYSIS AND RESPONSE

QUESTIONS 1-7: MEDIATION

Summary of Responses:

19. The Government call for evidence on mediation generated 308 responses, with broadly equal responses from businesses and individuals (21% and 24% respectively). The majority of respondents were encouraged by the consultation's emphasis on early dispute resolution, as an alternative to the costly and stressful employment tribunal process. A significant proportion of those who responded identified workplace mediation as an effective technique, in principle, to achieve satisfactory resolution in the event of a dispute. This confirmed the anecdotal evidence and research already available.
20. Respondents with experience of mediation most frequently identified relationship and communication breakdown as the issues where mediation would be most helpful. Other areas commonly identified as suitable for mediation, providing there was the agreement of both parties to participate in the process and that there was no criminal offence related to the dispute, were:
- Bullying allegations;
 - Discrimination and diversity issues – although in some cases respondents highlighted that particularly extreme cases in this jurisdiction might not be suitable, for example, harassment cases;
 - Issues of 'fairness' or perceived injustice.
21. Most respondents, including those unfamiliar with the mediation process, agreed that in the case of basic monetary disputes and issues of gross misconduct mediation was unlikely to be helpful. Importantly, respondents recognised that it wasn't just the issue itself that dictated whether or not mediation could be successful, but that timing was also a critical factor. Of those respondents who had practical experience of using mediation, many felt it was not effective once formal discipline and grievance procedures had been instigated, after the employment relationship had been terminated, or once litigation had commenced, but largely agreed that the earlier in the dispute that parties engaged with mediation the better ie to 'nip it in the bud'.

22. However, it was clear that a large number of respondents, whilst aware and supportive of the concept, had never actually used mediation; less than 50% of business respondents said they had experienced mediation.
23. Lack of awareness for both parties was referenced consistently by respondents who don't routinely use mediation, as a barrier to wider use, as were the following:
- Difficulties for parties to identify where and at what stage it can be most useful;
 - Difficulties for employers to understand where it can fit in with formal discipline and grievance procedures;
 - Realistic expectations about what mediation can achieve.
 - The upfront and immediate cost of mediation.
24. The financial cost (respondents cited £800 - £1000 plus VAT for a 1 day mediation session) of an external mediator and the diversion of resources to complete the process appear to be felt more keenly in a smaller organisation; only 8 SMEs and Micros had actually experienced mediation and a large number of businesses identified cost as a significant barrier.

Government Response

25. The consultation confirmed Government's views that a significant growth in mediation of workplace disputes has the potential to lead to a major and dramatic shift in the culture of employment relations. Benefits would include a reduced number of employment tribunals, reduced fears of tribunals amongst employers, and indirectly a benefit to business confidence about job creation.
26. The Government therefore intends to embark on a long term reform programme to build a new approach to resolving workplace disputes so that the use of mediation to resolve disputes becomes a more accepted, and trusted, part of the process. We will start this by building our knowledge and understanding. With the help of the mediation industry, we will take a number of measures to support future growth of workplace mediation as an alternative to employment tribunals.
27. First we need to address the fact that a lack of understanding was the most commonly cited barrier use by respondents. Cost, too, is clearly a major barrier for SMEs and Micros and could explain why take up by these organisations is increasing at a slower rate than larger organisations. We will work with the private sector, as part of 'Every Business Commits', to address the apparent lack of familiarity with

mediation and the fragility of the experience for both employers and employees. We know one bad experience can permanently damage the reputation of mediation as a credible alternative to formal discipline and grievance procedures, and we also know that parties to a dispute are not easily able to identify at what stage of the dispute lifecycle mediation is most effective. We want to give businesses, particularly SMEs and Micros, access to mediation in a low-risk, low-cost way so that they can experience and have confidence in mediation as a resolution tool in the event of further workplace problems.

28. So we propose to undertake a major pilot in an employment-intensive sector and have identified retail, as it has already taken an innovative approach to early dispute resolution and has invested in mediation services, with many larger businesses establishing their own in-house schemes. We are exploring with these retailers how they might be able to share their mediation expertise with SMEs and Micros in their supply chain, in a way that improves the quality of their own in-house scheme and strengthens relationships with their suppliers. We will use what we learn here to support the expansion of the approach into other sectors.
29. Secondly, we want to explore an area-wide approach, to develop mediation networks that run across sectors within a particular geographical area. So we will tackle the cost barrier to the use of mediation by funding mediation training for suitable candidates, from selected SMEs and Micros through a regional mediation training scheme. These new mediators will form local mediation networks in their respective regions and will be available to provide mediation at a low cost to other organisations in their network. We will involve local businesses in the design of the network, ensuring this new mediation service meets their needs and operates in line with their capabilities. We will develop this scheme as a regional pilot in the first instance, to ensure the delivery process is robust and subsequently evaluate the impact of increased access to mediation on workplace disputes within that region.
30. We recognise that there is much to be done to achieve our vision of mediation becoming a more established part of the dispute resolution tool-kit, and Government will continue to work with the mediation industry to embed mediation in the resolution of workplace disputes.
31. We believe these proposals will support and encourage the use of mediation, in many cases for the first time, and will be an effective method of promoting mediation as a way of resolving disputes without recourse to an employment tribunal.

QUESTIONS 8-11: COMPROMISE AGREEMENTS

Summary of responses

32. 268 respondents provided information in relation to compromise agreements (CAs). Of these, 54% said they used CA's "regularly/often" and 28% "sometimes". Only 4% did not use them at all. Respondents indicated that compromise agreements were mainly used for termination/redundancy (where it could cover an enhanced redundancy payment and an agreed reference), the departure of senior executives (where extra conditions, such as confidentiality, share option treatment, communications on the departure are agreed), and for disciplinaries and grievances that could lead to, or have led to, a tribunal claim. CAs were also sometimes used for ongoing employment relationships, for example, where an employer wishes to change the terms and conditions of staff.

33. Of those that responded, the main advantages of CAs were seen as:

- providing certainty that the matter has been resolved and there will be no litigation to follow (over 50%);
- avoiding the cost, stress and time involved in an employment tribunal case (around 40%);
- allowing matters to be resolved quickly (around 30%)
- providing business protection such as confidentiality (around 25%).

34. However, although CAs appear to be widely used, a number of common issues were identified as disadvantages/barriers to use. The main ones cited by those that responded were:

- Cost, both for the employer in terms of the settlement itself, and the employee of the independent legal advice in excess of the contribution provided by the employer (around 22%).

35. Responses suggested that an average cost to employers of drawing up a "standard" agreement was around £750, which covered the cost of drafting the agreement from a standard precedent, advising on the issues and dealing with any negotiations with the employee's adviser. Contributions to the cost of the employee's legal fees were generally between £250-500. For employees, responses suggest that providing advice on a standard agreement can take up to 4 hours, with more complex agreements taking longer. Where the employee faces the possibility of having to cover some of the legal cost themselves, this can dissuade them from agreeing to use CAs. Those who offered views suggested that a solution might be to provide some form of model text, a

“short, standard format compromise agreement, where the contents are straightforward and prescribed by law and the only variations allowed are for add-ons” which would require less legal advice for both parties, thereby saving costs.

36. Linked to this, some 14% of respondents highlighted the complex and prescriptive nature of CAs. They suggested that the inability to use “blanket waivers” to avoid listing all potential statutory claims, in order to comply with the requirement that a CA must compromise “the particular proceedings”, had an effect on the use of CAs. Specifically that this led to longer agreements which ultimately impacted on the legal costs for both parties. Respondents suggested that it ought to be possible to abolish this technicality, while continuing to protect latent personal injury claims and accrued pension rights.

- Employers’ inability to raise the idea of ending the employment relationship by way of a compromise agreement in the absence of a ‘dispute’ as doing so could open them to the risk of a constructive dismissal claim (around 15%)

37. A number of respondents, including CBI, IoD and EEF, complained that employers are unable to start discussions with an employee about ending their employment by means of a CA in the absence of a formal dispute. This is because if such a conversation begins before dismissal, then the discussion can be used as evidence of constructive dismissal in subsequent proceedings. While there is currently the ability for parties to have “without prejudice” discussions, this is restricted to situations where the parties are already in dispute. Some respondents have suggested that a provision should be introduced for either party to initiate a “protected conversation”. This would enable parties to have early conversations, for example about performance issues or retirement plans, without the fear of the matter ending up either in a dismissal (employee) or tribunal case (employer). Indeed, protected conversations are seen by some as a potentially significant new tool to resolve disputes generally – and not simply in the context of compromise agreements – in a way that might preserve the employment relationship.

38. The risk that other employees see the use of a CA as a signal that the organisation settles easily, and so could lead to a claim culture within the organisation, was raised as a concern by around 13% across all those who responded, although it was one of the main barriers for employers (with around 20 per cent raising it as an issue).

39. Lesser-order barriers were the risk that they could become a panacea or safety net for managers, who focus less on performance management

(around 9%), lack of employees' understanding/lack of awareness of potential compensation available; employers' concern over lack of flexibility over which claims can be covered (ie TUPE and collective redundancy cases), and uncertainty about the tax position on legal fees. Very few respondents (7%) identified lack of awareness as a barrier to use.

40. Although not raised as an issue of significant concern to many, there was some evidence that individuals may feel pressured into agreeing terms that are less satisfactory than those that could have been achieved at a tribunal, or to signing away their employment rights. Although individuals are required to obtain independent legal advice on the terms of the CA for it to be considered legally binding, there was some suggestion that introducing a provision for a statutory cooling-off period for employees to consider whether they wish to be bound by the CA might have some merit; the ability to have a period of time in which to properly consider their decision might encourage individuals to have more confidence in CAs, thereby driving up their use.
41. A further issue, raised by around 22% of respondents overall, but of significant concern to legal representatives, was uncertainty as to the validity of compromise agreements covering discrimination issues, following the implementation of s147 of the Equality Act.

Government Response

42. While the use of CAs is more common than we might have thought, those responding to the consultation suggested that there was more that Government could do to increase their use, offering more employers and employees an alternative way of bringing to an end the employment relationship without the costs and stress of going to an employment tribunal.
43. The Government considers that there is merit in providing a model text for employers to use should they wish. Such an approach could save both parties time and money - although some legal advice would still be required, this would be less than at present and, particularly for smaller businesses and more junior employees, may encourage them to use compromise agreements where otherwise they may have been deterred on cost grounds. We will therefore consider how we can develop a standard text that will be available to parties to download, together with the appropriate guidance for its use.
44. We recognise the concerns expressed with regard to the inability to use a blanket waiver as a means of shortening the CA (e.g. "in full and final

settlement of all claims which the claimant has or may have against the respondent...”). As a result, it appears to have become common practice to list in the CA all of the potential claims which a claimant may have, in order to provide comfort that the agreement is sufficiently broad and satisfies section 203(3)(b) of the Employment Rights Act 1996 on “particular proceedings” and other relevant statutory provisions on compromising claims. We will therefore consider whether and how to amend section 203 (and other relevant statutory provisions on compromising claims) to enable CAs to cover all existing and future claims without requiring long lists of causes of action. Any change would only cover claims which it is currently lawful to compromise, e.g. latent personal injury claims could not be compromised. We will consult in the usual way on any changes proposed.

45. The Government will also consult on the introduction of a system of ‘protected conversations’ that would allow employers, or indeed employees, to initiate a conversation about an employment issue at any time (ie without the existence of a formal dispute) as a way of resolving the matter without fear.
46. The Government has also considered the call for a cooling-off period to be introduced to provide claimants with a period of time to reconsider their decision to sign the CA. In the absence of any real evidence that the absence of such a period was having a significant impact on the use of CAs, we consider that such a measure would have the effect of introducing an element of uncertainty into the process. This would water down the appeal and benefits of CAs for business, with the perverse consequence of decreasing their use. Claimants are required to take independent legal advice on the terms of the CA before signing and we consider that this provides adequate opportunity for them to take a view on whether to proceed or not.
47. In respect of two of the barriers identified, the effect of Section 147 of the Equality Act 2010 and that in relation to the tax treatment of legal costs incurred by employees, these are matters that fall outside the scope of this consultation.
48. The Government remains confident that the drafting of Section 147 of the Equality Act 2010 is fit for purpose. However, we are aware that some perceive the section to be unclear in its effect and that this may lead to compromise contracts being used less to resolve workplace equality disputes. The Government has therefore decided to bring forward an amendment to clarify the meaning of Section 147 at the earliest opportunity. This will bring reassurance to employers and employees that compromise contracts can safely be used in resolving employment

disputes relating to alleged discrimination.

49. Termination of employment may involve a legal dispute between employee and employer. This may be settled by negotiation between the parties or by Court proceedings. In either event, the employer may agree to pay legal costs incurred by the employee. Extra Statutory Concession A81 provided that such payments were not charged to tax provided certain conditions were satisfied. HMRC are currently reviewing whether s413A of the Income Tax (Earnings and Pensions) Act 2003 which was introduced to replace the concession has the unintended consequences of excluding agreements that would have been covered and will be consulting on a proposed amendment in December 2011. In the meantime, however, Extra Statutory Concession A81 has not formally been withdrawn and HMRC will continue to operate the treatment available under the concession during this interim period where beneficial to do so.
50. The remainder of the barriers identified appeared to relate in the main to a lack of understanding or awareness of particular issues in relation to the use of CAs. We will therefore review the advice and guidance available to employers and employees to ensure that answers to the sorts of questions identified through this consultation is easily accessible.
51. One further action the Government intends to take is to amend the title of 'compromise agreements', and compromise contracts, as they are referred to in the Equality Act 2010, to 'settlement agreements'. We believe this more accurately describes their content and will help to avoid any party refusing to sign an agreement on the grounds that they do not want to be seen as 'compromising'. We also believe that "settlement agreement" is a more widely understood term, being used in the treatment of contract claims. We will make this change in primary legislation.

QUESTIONS 12-20: EARLY CONCILIATION

Summary of responses

52. Of the 339 respondents who expressed an opinion on whether early conciliation (EC) was likely to be an effective way of resolving more disputes before they reach an ET, the majority – 65% - agreed (although 9% of those agreeing did so on a qualified basis), while 31% disagreed. Support for the introduction of EC came from a broad range of stakeholders, and the majority of both individuals and business respondents were in favour. Of those who disagreed with the introduction

of EC, a number appeared to do so based on a misunderstanding of what was proposed – for example, that parties would be forced to conciliate, or that the clock would stop for a month regardless of whether conciliation was entered into or not.

53. Further analysis taking into account consultation responses and more evaluation data from Acas' current pre-claim conciliation service suggest that EC has the potential to reduce claims to employment tribunals by around 25%, with resulting benefits to business, claimants and the Exchequer. These are set out in the accompanying Impact Assessment.
54. In terms of how and when EC should be used, ie in particular jurisdictions, there was no consensus of opinion; while some argued that it was only likely to be effective in low-value, straightforward and factual claims (eg wages, holiday pay), others suggested that it could be effective in discrimination and unfair dismissal. However, 32% of those who responded to this question argued that EC should be offered in all jurisdictions.
55. With regard to the use of EC in large multiples, there was a significant majority (76% of those who responded) who felt that it was less likely to be effective in such cases, not least because of the difficulties inherent in trying to reach settlement with a number of potential claimants. However, in their response, Acas pointed out that they are effectively already successfully providing pre-claim conciliation in many large multi-party disputes, particularly equal pay, and argued that there is no evidence to suggest that these cases are less susceptible to EC.
56. While the majority (60%) of those who responded to the question considered that one month was a sufficient period for Acas to offer EC, there was a recognition that this might not prove sufficient in every case and there was clear support for a period that was capable of being extended where the conciliator considered there was a reasonable prospect of settlement being achieved. Respondents were concerned, however, that the conciliation period should not be allowed to continue indefinitely.
57. Concerns were expressed by a number of respondents about how the “stop-the-clock” mechanism would work, especially in relation to those claims that enter EC close to the end of the statutory limitation period meaning that, in the event EC is unsuccessful, the claimant will only have a matter of days in which to prepare and submit their ET1.
58. Of those who responded to the questions on amending the statutory basis on which Acas provides both pre and post claim conciliation, the majority supported changing the current pre-claim power to a duty (62%) and

maintaining the current post-claim duty (61%). There appeared, however, to be some uncertainty among respondents about the effect of powers and duties, and this may have influenced how they responded.

59. The remainder of the questions around EC focussed on the proposal to introduce a shortened form, and the factors likely to affect the success of EC in complex cases. Respondents had mixed views on the need for a shortened form. Those that thought there was the need for a form had differing views on what information it should contain, with some arguing for a form that captured the minimum information necessary, while others – predominantly from business and legal backgrounds – favoured a more comprehensive form. A number of respondents commented that, setting aside the length of the form, the requirement to complete a formal document would have an effect on the number of weak claims lodged. Set against that, however, were concerns that completing any sort of form might begin to crystallise the dispute in the mind of the claimant and may make an individual less willing to settle the matter before ET.
60. With regard to the factors affecting the success of EC in complex cases, some respondents interpreted “complex” as meaning the facts of the case were complicated and difficult, rather than in relation to the number of jurisdictional complaints per claim. However, those who commented on these questions frequently identified the attitude of the parties and the skills and experience of the conciliator as key factors. While some respondents felt that complex claims were less likely to be successful in EC, because parties would have difficulty assessing the merits and value of the claim at that stage, or because there were likely to be matters that needed investigation before EC could begin, others felt that complex claims were not likely to be more difficult to settle and should therefore be subject to EC.

Government Response

61. We will proceed to introduce EC as the first part of the employment tribunal process. Claimants will be required to submit the details of their claim to Acas in the first instance, and will then be offered the option of engaging in early conciliation. If they, or the respondent, do not want to attempt conciliation, the individual will be able to proceed to make a claim to the ET if they so wish. Similarly, if conciliation is attempted but is unsuccessful, the individual will be able to proceed to lodge a claim. The period for EC will end after 1 month (unless a further period is deemed appropriate) or when it fails, or if either party elect not to enter into EC, whichever is first.
62. Given that there was no consistent view as to where EC would be most beneficial ie which jurisdictions would be more or less appropriate, it will

be offered to parties in respect of all claims other than those where statutory time limits apply that preclude its use ie interim relief. In such cases, which will be clearly specified, claimants will be able to proceed to lodge their claim at ET without first submitting the case to Acas.

63. In the absence of a persuasive argument to the contrary, and given the potential benefits to the system of successful EC in large multiples, we will make EC applicable to all multiples, regardless of size.
64. Government agrees with respondents that some flexibility around the conciliation period is needed, but that the ability to extend the period should not be used as a means of frustrating the process. We will therefore provide for Acas conciliators to be able to extend the conciliation period by up to a further 2 weeks where they believe there is a reasonable prospect of settlement, and where both parties agree.
65. Government recognises that respondents raised valid concerns in relation to how the “stop-the-clock” mechanism will work for claims entering EC close to the end of the limitation period. We will therefore look to make provision for such instances by allowing the claimant a period of up to one calendar month from the date of the Acas certification that EC has been completed in which to submit their claim. While those entering EC late will see a small benefit as a consequence of this approach, and there is a risk, albeit low, that some will use it to “play the system”, we think that this is the most appropriate solution to the problem. We further intend to allow claimants to stop the clock only once in respect of their claim so that they cannot use EC to extend the limitation period indefinitely.
66. Currently, Acas have a power to provide pre-claim conciliation and a duty to offer post-claim (Individual Conciliation, or IC). Government considers that, in making EC a mandatory part of the system, there is a case for amending Acas’ current power to a duty so that EC is recognised as a priority deliverable. This change underlines the importance that we attach to early resolution of disputes. However, we want parties to be able to resolve their dispute at any point without judicial intervention, working out the solution that is best for them. We will therefore leave Acas’ duty to provide post claim, or individual, conciliation unchanged. This will allow Acas to continue to provide IC where both parties request it, and Acas believe there is the reasonable prospect of success, right up to the point of hearing.
67. There will clearly need to be a form of some sort to enable the claimant to make Acas aware that there is a potential claim, as well as with the information necessary for the conciliator to act. There were a variety of views expressed as to what the form should contain, with some respondents suggesting that the ET1 should be used. We take the view,

however, that it is appropriate to make the form easy to complete to minimise the burden on claimants and will therefore introduce a form that seeks to capture only the essential information necessary for Acas conciliators to begin the process.

68. There is still much work to be done to develop the rules underpinning the new process. Respondents have provided much in the way of substantive comment in that regard, but we will continue to engage with stakeholders as the policy develops to ensure that these issues are addressed.
69. An issue raised by a small minority of respondents was the variable quality of Acas services. Acas has already introduced measures to address such concerns through the review and redesign of training programmes to ensure up to date and comprehensive knowledge of employment law, and the introduction of post-graduate qualifications for conciliators. This commitment to continuous improvement of capability will continue to underpin the delivery of Acas' service.
70. A further specific issue that was raised consistently by respondents, across all groups of stakeholders, and regardless of their views on EC, was the issue of Acas resource. Many of those who disagreed that EC was likely to be effective appear to have done so based on their perception that Acas resource is inadequate to allow them to deliver the proposal successfully, while those who supported EC identified resourcing as the biggest risk. The Government recognises that there will be an increased burden on Acas that will require sufficient resourcing. This requirement will be met through the savings that will accrue to the Exchequer as a result of fewer cases requiring determination at ET.

QUESTIONS 21 – 33: CASE MANAGEMENT POWERS

Summary of responses (see Annex B)

71. Under this section of the paper, opinion was very much divided (see Annex A).
72. On the one hand, business welcomed the proposals, often warmly. Without exception, the key business groups (BCC, CBI, CIPD, Forum of Private Business, FSB and IoD) agreed with the proposal to extend strike out powers to judges in Case Management Discussions (as opposed to just Pre Hearing Reviews). That said, opinion was divided on whether strike out should be possible 'on the papers', i.e. without any hearing at all. Similar views were expressed about the deposit regime, and there was broad support for the idea of raising the cap of deposits from £500

per issue to £1000. There was broad support too for the increased cap on costs awards made in the employment tribunal (with the proposal suggesting an increase from £10,000 to £20,000 – subject of course to judicial decisions in individual cases).

73. However, claimant representative groups disagreed strongly with the proposals. They questioned the evidence base on which the proposals were brought forward; and suggested that the ‘problem’ trying to be fixed was not in fact evident at all. In short, consensus here was that the proposals were weighted unduly in favour of respondent businesses, and would have a disproportionate impact on (particularly vulnerable) claimant employees and workers.
74. Other consultees (tribunal judges and members, representative lawyer groups, and other public sector/advisory bodies) broadly sat between these poles. Most recognised the need for flexibility, but questioned the analysis in the consultation paper that the system was quite so ‘plagued’ by a flood of weak and vexatious cases.
75. To the extent that there was any consensus, it was that focus on powers available to judges and tribunals is, on its own, insufficient. What is just as (if not more) important is how those powers are exercised. The judiciary and lawyer groups (Law Society, Scottish Law Society, Employment Lawyers Association, Free Representation Unit) argue strongly that additional prescriptive rules are not the answer. For example, proposals such as that which would allow early reference of allegedly weak claims to a judge to consider strike out or an order for the provision of further information was broadly seen as a bureaucratic way of achieving what could already be achieved now with sensible judicial management.
76. Making that point, many pushed strongly for the root and branch review of the existing procedural rules, as opposed to further piecemeal iterations. The case put was that the rules are, collectively, unduly prescriptive and inflexible. And in that respect, the rules actually act as a barrier for tribunals to do what Government thinks is necessary: manage cases efficiently and proportionately.

Government Response

77. The Government believes that there are strong arguments in favour of a fundamental review of procedural rules and has invited Mr Justice Underhill to lead this work.
78. The particular suggestions proposed through this consultation would entail consideration of various consequential rule changes. For example,

if a judge currently hears a strike-out application in a Pre Hearing Review, s/he is excluded from hearing the final hearing (trial) for fear of having formed an opinion on the merits of the case. If the strike-out powers were to be exercisable in Case Management Discussions, should the same restrictions apply? Should they only apply where a strike-out was actually considered, or approved, or should there be a general separation between case management and trials? What criteria should be applied? What review provisions would be necessary? These are just some of the examples.

79. The Government takes the view that consideration of these issues should properly be for the Fundamental Review. While the review needs to be governed by core principles, if it is to maximise its effectiveness, it will need to have as little prescribed in advance as possible so that those taking forward the work are able to do so unencumbered by unnecessary detail.
80. The Government is minded to expand the use of strike-out powers (e.g. what the test is, where, when and by whom the power can be exercised, and what relief from sanction should apply), but will ask the Fundamental Review to consider this. However, we believe that there are good reasons for acting now to increase the maximum levels of deposit orders and costs awards. As we made clear in launching the consultation, we are determined to address business concerns about weak claims, and we consider that providing the Tribunal with the ability to make orders and awards that can more accurately reflect the true cost to business of defending a claim will assist in meeting that objective. We will therefore take forward secondary legislation immediately to amend the Rules to increase the limit for deposit orders from £500 to £1,000 and cost awards from £10,000 to £20,000. The question of when and how the Judge can make a deposit order will be considered as part of the Fundamental Review, as will the issue of powers that should be available to an Employment Judge or tribunal in circumstances where a party seeks to apply undue pressure on the other during party-to-party negotiations/communications, where it is judged that improper threats are being made.

QUESTIONS 34 – 44: FACILITATING SETTLEMENTS

Summary of responses (see Annex B)

81. In terms of the ET1 form, the main proposal was to incorporate a 'Statement of Loss' within the form, allowing or mandating claimants to outline what it is they think they have lost, and so what

compensation/remedy they are seeking to redress that loss.

82. This was a particular interest to business groups, who had called for similar reforms ahead of the consultation. As a sector, business was supportive of the proposal, and most consultees here were in favour of a requirement that such information should be provided at the start of a claim. Business groups were also keen to see more specific or targeted information provided by employee claimants, reflecting a need to revise the claim form itself and/or the accompanying guidance.
83. Stakeholder groups representing employees were not supportive. They argued strongly that mandating such information at the earliest stage of ET proceedings would be unfair: it would be difficult for (particularly unrepresented) claimants to quantify loss, because the law is relatively complex; and at the start of proceedings it is impossible to know in many cases what loss has been sustained (for example because the claimant doesn't yet know how long s/he will be out of work, so cannot tell what loss of earnings will be).
84. Not many key stakeholders said that the ET1 form was just right as it stood. Many thought that the form was too long, although (in the experience of the lawyers responding to the consultation) much of the forms were often not completed, or completed fairly poorly wherever the employee claimant was unrepresented.
85. The consultation paper also sought views on further changes that could benefit tribunal forms. The overwhelming message from across the piece was that forms themselves were not so much the issue. Rather, the accompanying guidance was something on which users would welcome focus. The AJTC response in particular articulated a need for guidance to be improved. And many other consultees, from the claimant and respondent perspectives, made a strong case for the value that could be added if such guidance was improved.
86. On the 'Calderbank' formalised settlement offers proposal, some consultees supported the idea in principle, but many broadly agreed about the risk of satellite litigation on what constitutes a 'reasonable' offer/rejection (particularly as many employment cases concern remedies that are not purely financial). This could mean the system becomes more expensive to administer and navigate, which would not meet our overarching objectives. Analysis of the responses suggests that this could be a new and complicated step in a process that the Government is trying to streamline. While further consideration is necessary, the responses received suggest that this proposal has little merit, at least at this stage

Government Response

87. The Government thinks that a **Statement of Loss** – or at least some information provided by the claimant to establish what s/he is claiming by way of compensation – would be useful. But pressing forward with specific form re-design proposals this side of the Fundamental Review is unwise. We anticipate that the Review itself will mean further changes and want to avoid prescribing a new form now, only to have to re-prescribe in under a year's time. It is confusing for tribunal staff and users alike to have lots of different prescribed forms available, but we will develop a new form in parallel with the Fundamental Review, and in particular consult the Expert User Group on specific design matters.
88. On **forms more widely**, we recognise that there may be problems for respondent employers when trying to decipher unclear ET1 claim forms from unrepresented litigants. But template forms, a solution suggested by some respondents, can only achieve so much. While specific forms could be tailored to specific types of claim – so unfair dismissal forms, discrimination forms etc, again, too many forms would be confusing for all involved.
89. **Guidance**, on the other hand, can be tailored without the need for any such confusion. Jurisdictional-specific guidance is given in literature already provided by HMCTS, but users suggest it is not specific or concise enough to be doing the good it needs to. HMCTS will undertake a thorough review of its guidance material, in parallel with the Fundamental Review.
90. Despite the clear support from many quarters, it was also clear that a **Calderbank** model would bring disadvantages both to business where there is the risk that a formalised system like that proposed might lead to more complaints of employees “blackmailing” employers into settling, and to the Exchequer. The extent to which cases would be shortened and final hearings could be avoided is unclear (although it might save some money). But there would be additional work for judges and tribunals, assessing the extent to which a settlement offer made within proceedings had been ‘beaten’ at final hearing. And there would be satellite litigation, too, with appeals over how the powers should be interpreted, all of which may actually increase the cost to the taxpayer.
91. The Government will therefore keep this under consideration, in particular awaiting the outcome of the Fundamental Review. If other measures fail to deliver expected benefits and efficiencies, we will assess in light of the new rules regime what (if any) net benefit could come from reform along the formalised Calderbank lines.

QUESTIONS 45 – 56: WITNESS STATEMENTS BEING TAKEN AS READ, WITNESS EXPENSES, JUDGES SITTING ALONE AND LEGAL OFFICERS

Summary of responses (see Annex B)

92. Proposals under this section of the paper focused on the practice of taking witness statements and asking witnesses to read them out loud during hearings; the payment of expenses to parties and witnesses by the tribunal; the role of lay members; and the possible introduction of legal officers.

- on witness statements, there was a broad consensus that there are potential advantages in certain cases (mainly saving time and expense) and certain risks in others (losing the opportunity to assess the credibility of the evidence, and making the tribunal a more formal/legal forum, so less user friendly for unrepresented parties). The broad consensus was that discretion exists currently and, so long as the clear guidance from the EAT in the case of Mehta is applied consistently; the rules did not need to change. There remains, however, an issue over the extent to which tribunals will apply that EAT guidance consistently, so a rule-change (or some equivalent motivation) may still prove necessary;
- on **witness expenses**, there was little evidence that withdrawing payment of state-funded expenses would impact on the number of witnesses called, but there was a concern about the impact on claimants (who would under this proposal be asked to pay the expenses – i.e. lost wages – of colleagues/former colleagues employed by the respondent). That said, there was an acceptance from many that the present economic conditions make blanket payments less manageable for a taxpayer funded system;
- on **judges sitting alone**, there was broad support for the role played by lay members and little support for the main proposal on judges being able to sit alone on unfair dismissal cases. However, there was some support for judges sitting without wing members in a wider range of employment tribunal cases (for example, in complex litigation involving equal pay); and some support for the removal of wing members from the EAT. In this context, many consultees highlighted the work of academics from the universities of Greenwich and Swansea, currently studying the role of lay members in the employment system. Many consultees encouraged the Government to await this research before deciding how to

proceed in this area; and

- on **legal officers**, there was little interest from key business groups, but there was some support for exploring the idea further amongst other key stakeholders. Opinion, however, was divided, as to what work could be delegated from judges, and to whom eg qualified lawyer, or specially trained administrator.

Government Response

Witness statements

93. Shortly before the consultation paper was published, the Employment Appeal Tribunal handed down a decision in the case of *Mehta v. CSA*. In that case, the President of the EAT held that, very often, reading witness statements aloud "achieves nothing of value" and "wastes the time of the Tribunal and the parties" but sometimes, it might be helpful to read a particular statement – or section of a statement – aloud if it requires further clarification. The draft consultation paper cited this decision. While accepting that there should be some discretion for judges to disapply the general rule (i.e. that witness statements should be taken as read), the consultation proposal sought to limit slightly the scope of the discretion proposed by the *Mehta* judgment – essentially saying that the general rule must be applied unless there are exceptional circumstances.
94. Currently, some employment tribunals in E&W take witness statements as read as a matter of routine, others do not. In Scotland, witness statements are rarely used at all.
95. Judges that adopt the 'taken as read' model as standard claim that it reduces hearing lengths by up to one third. Tribunals in the Bristol Region (where statements are taken as read as a matter of judicial policy) tend to complete more cases per allocated session day than any other region – and show about 20-25% greater efficiency in this regard than the national average.
96. More and more Employment Judges are following this path, and we believe a formalised rule would encourage that culture change still further, and consistently across all regions. Incorporating the *Mehta* guidance into the rules would also help unrepresented litigants (who cannot generally be expected to research case law in order to understand practice and procedure inside hearings).
97. On this basis, and because the rule change would not affect the wider Review, the Government has decided to require witness statements (where taken) to be taken as read, unless a judge or tribunal directs

otherwise. The rule will do no more than codify the *Mehta* decision, so that savings can accrue to parties and the Exchequer where possible, without compromising fairness. We do not consider it appropriate to go any further. We will make the necessary Rule change at the earliest opportunity.

State-funded expenses

98. There were clear arguments for and against this proposal in the consultation responses.
99. Government acknowledge there are risks: that the policy could disproportionately impact on claimants as opposed to respondent employers (ie the claimant being asked to pay the lost wages of witnesses employed by the former employer, which respondent employers would already normally pay anyway); and that the low paid and unemployed will be particularly disadvantaged if there is no exceptional funding mechanism
100. However, those risks must be balanced against the counter arguments. Even with the introduction of fees in the employment tribunal setting, the majority of the system is likely still to be financed by the general taxpayer. There is a clear case – consistent with Government policy of transferring some of the burden of funding the system from taxpayers to users – to ask users to cover any expenses incurred by witnesses they call to give evidence, as and where necessary.
101. Further, while most expenses claims are paid to claimants and their witnesses, the current system also permits respondents and their witnesses to claim from the State for the cost of their time.
102. Given the pressure on public spending, the clear template provided elsewhere by the civil courts and other (but not all) tribunals, and the fact that reducing the cost of the system will translate into lower fees being charged to all users, the Government has decided to proceed with this proposal. Because any means-tested scheme (given that the sum of money paid out is under £300k/year) is likely to cost more than we would save, we do not intend to introduce any such provision. Again, taking this forward now will have no consequential impact on the Fundamental Review and so we will make the necessary rule change at the earliest opportunity to ensure that tribunals and judges have powers to direct parties to bear costs of witnesses attendance, where a witness has attended pursuant to a witness order; and that the party ultimately losing a case should reimburse the successful party for any such costs already paid out.

Judges sitting alone

103. Many consultees commented that the proposal on unfair dismissal cases seemed to have a poor policy rationale. If employment tribunals are to retain members at all – and the consultation paper did not propose abolishing members entirely – then the unfair dismissal jurisdiction would seem one of the most obvious for them to keep a role in. This is because the cases often resolve essentially around questions of fact rather than any complex legal point or black and white factual context which a judge might be better suited to hear alone. Government acknowledges that some claims – for example those where there is significant dispute around the facts of the case – might be more appropriate for a full panel to hear. Indeed, this was accepted in the consultation paper. But there will be claims which an Employment Judge sitting alone will be perfectly well qualified and able to determine. And given the need to ensure maximum value for money to taxpayers, and the costs incurred by using lay members to hear a case, we consider Employment Judges should be given the discretion to make a decision based on the facts of each individual case (basing that decision on the clear statutory criteria applicable to other judge-alone jurisdictions) as to how the overriding interest to treat claims justly is best served.
104. While we acknowledge that users (from all perspectives) value the ‘softer’ benefits said to be brought by members’ participation, we want to ensure that taxpayers’ money is used to best effect. Changing the law to allow judges to hear unfair dismissal cases alone, unless they direct otherwise, could help to ensure that those costs are minimised wherever possible and appropriate. Accordingly, despite the consultation response against the proposal, but given the potential savings available, the Government will proceed with the proposal and will make the necessary rule change at the earliest opportunity.
105. The Government is aware of the pending academic research, and we look forward with interest to the findings of that work. We will use the research to evaluate the findings of the first year of operation, once judges have begun to sit alone in more cases, to see whether a reversal or extension of the policy is necessary.
106. The arguments in the EAT are more clear cut. While many stakeholders are opposed, the (albeit slim) majority of consultees agree. Lay members cost the EAT around £300k a year, and this proposal is likely to save the majority of that (leaving discretion for members to sit where thought necessary by the judge). Given that appeals to the EAT are on a point of law, and there is no fact finding role for judges or members, we will bring forward legislation to alter the default constitution

of the EAT to provide that judges will always sit alone unless they direct that members should be involved.

Legal officers

107. The consultation paper did not set out a detailed blueprint for the introduction of legal officers. Instead, it raised the idea, and sought opinions on the types of functions that could be delegated, and the types of person to whom that delegation should take place.
108. While respondents to the consultation agreed that, assuming the work is carried out to the required standard under appropriate and judicially independent supervision, judges carrying out work (a) costs more than non-judges and (b) prevents those judges from doing other – more deserving – work, there was some concern not to lose the benefits of judicial case management in complex cases, and about the details surrounding the independence, quality and appealability of decisions made by persons other than judges.
109. The Government believes that this is an issue for the Fundamental Review to take forward. Only once it is clear what case management powers will exist, how they are drawn, and in what structure, will it be clear what role(s) non-judicial officers can undertake. The Terms of Reference for the Review therefore seek to ensure that consideration of legal officers is built into the process.

QUESTIONS 57-60: EXTENDING THE QUALIFICATION PERIOD FOR UNFAIR DISMISSAL

Summary of responses

110. There were over 200 responses to this part of the consultation. The majority of businesses and business groups who responded welcomed the proposed change. About a quarter of all respondents, agreed strongly that this will have a positive impact on employers' confidence to recruit and retain staff. In a survey of 1,100 of their members, the Institute of Directors told us that large numbers of businesses had expressed concerns about dismissal and the risk of tribunal claims in relation to recruitment plans. 51% of respondents to the survey said that the one year qualifying period for unfair dismissal was a 'significant' or 'very significant' factor in considering whether to take on an additional employee. A separate BCC survey of small businesses reported that dismissal was a major issue for them.

111. Other business stakeholders expressed the view that the proposal will have a positive impact. For example, CBI suggested that “the extension of the qualifying period will have a positive impact on marginal hiring decisions, particularly in smaller firms”, and the BCC welcomed the proposal as a strong signal from Government that it is committed to reducing the burden of employment regulation. Individual businesses agreed that extending the qualifying period would make them more confident to hire. A few argued that, particularly where there are significant training requirements for a post, a longer qualifying period would allow more opportunity to assess individuals and reduce the level of pressure on deciding whether to retain a trainee before 12 months elapse.
112. Although business stakeholders were broadly supportive, the majority of consultation respondents disagreed with the proposal. This included respondents from the legal community, unions and advice providers, who argued that the measure reduces employee rights and is unlikely to achieve its aims. Arguments were also put forward that the proposal will have a disparate impact on particular groups.

Government Response

113. While there are clearly divergent views on the merits of the proposal, we consider that business stakeholders are best placed to evaluate the likely impact on business confidence. Improving business confidence (and the economic benefits which would flow from such an improvement) is a key aim of Government policy.
114. As well as a positive impact on business confidence, we consider that there is a potential secondary benefit for employees recruited into roles with a high training requirement (where there may be a risk of employers taking a cautious approach and dismissing employees before they qualify for the right not to be unfairly dismissed, if there is uncertainty that they will achieve the required standard).
115. The extension of the qualifying period is also consistent with the general aim set out in the RWD consultation of reducing the number of tribunal claims. However, in light of the consultation, we have revised down our estimate of the number of claims that will be saved. This is because we are now assuming that all claims currently under multiple jurisdictions (and including an unfair dismissal claim) will proceed under the other jurisdiction(s). We had previously assumed that half of such claims would be withdrawn. This means that the measure is now expected to result in a reduction in tribunal claims of between 2,100 - 3,200 claims, representing 4% - 7% of all unfair dismissal claims. When the wider impact of early conciliation is taken into account, the impact

decreases further so that we can expect a reduction of around 1,600 – 2,100 claims. The detail of this change is set out in the Impact Assessment.

116. We are unconvinced by arguments made by some respondents to the consultation that there could be widespread substitution of current unfair dismissal claims into other jurisdictions, such as discrimination. There is little evidence that, where there are grounds for a discrimination claim, individuals are currently choosing to pursue an unfair dismissal claim instead. Furthermore, other Resolving Workplace Disputes proposals aim to encourage early resolution of disputes (for example, greater use of pre-claim conciliation). This will help to avoid weak claims from being pursued in other jurisdictions.
117. As detailed in the Equality Impact Assessment, there is a degree of disparity of impact from extending the qualifying period. However, the Government does not consider that, an extension of the unfair dismissal qualifying period would cause a *considerable* disparity of impact on any particular group. Furthermore, we believe that extending the qualifying period is a proportionate means of achieving the legitimate aim of improving business confidence to recruit and retain staff. We are committed to assessing the impact of policy changes and we will monitor the impact, including the equality impact, of this proposal as part of our overall assessment of the implementation of the Resolving Workplace Dispute proposals.
118. As set out in the Impact Assessment, the Government has considered the alternative option of extending the qualifying period only for small businesses. However, there does not appear to be strong evidence that small businesses are disproportionately affected by unfair dismissal rules. Data from a 2008 Survey of employment tribunal claimants shows that 34% of unfair dismissal claims involve businesses with fewer than 50 employees, whereas such businesses employ 37% of the workforce. There was no pattern in responses to consultation to suggest small firms are more concerned about the qualifying period. Furthermore, extending the qualifying period only for small businesses would reduce the benefits associated with this proposal. The Government has therefore decided to go ahead with extending the qualifying period for all businesses.

QUESTIONS 61-62: FINANCIAL PENALTIES

Summary of responses

119. Responses to the financial penalties proposal were divided; 55% of the 270 respondents disagreed that introducing a system of financial penalties would encourage compliance and ultimately lead to a reduction in ET claims, while 43% were in favour and 2% didn't know.
120. A significant proportion of those who answered "no" were business and business representatives (around 40%) as well as the legal community. There were also some individuals and employee representatives who were against the proposal as well as advisory bodies such as Citizens Advice. Of those who were in favour, around half were individuals and trade unions although there were some businesses (including large and small businesses) and business representatives who also agreed.
121. Some 200 respondents offered views on the proposed approach and, again, there was a similarly divided picture with 42% agreeing with the approach suggested, 56% against. 2% didn't know.
122. Those not in favour of financial penalties argued, amongst other things, that the introduction of automatic financial penalties would encourage settlement of weaker cases; would impose more costs on business; would be unfair, particularly where there has been a technical breach, or a small business without HR resource has unwittingly breached the law; and would not necessarily encourage compliance by employers:
123. "..... Very few cases involve a clear cut breach or deliberate breach of employees' rights by the employers. It would be unfair automatically to penalise an employer who has not deliberately sought to deprive an employee of their rights and has simply lost a claim based on more subjective considerations...."
124. Respondents commented that uplifts on compensation of 25% are already available in cases of unreasonable breach of the Acas Code of Practice on discipline and grievance procedures; and that the existing requirements to prepare for and attend a tribunal hearing together with any award made against them is enough of a penalty against employers in breach of their employment obligations.
125. Those who supported the proposal, however, argued that it would focus organisations and managers on the importance of good people management, and observed that financial penalties already operate successfully in other areas such as Health and Safety prosecutions.
126. Some respondents who welcomed the proposal did not agree that the penalty should be levied by the State and instead suggested that the

payments should be made direct to the affected workers.

127. Some respondents who supported a system of financial penalties also put forward alternative proposals. These included that the penalty should reflect the employer's ability to pay; the penalty should be based on the level of bad practice and/or number of repeat breaches; or the penalty should be based on a relative value ascribed to each right. Others thought that both the proposed minimum and maximum should be increased, including removal of the £5,000 upper ceiling.

Government Response

128. In the light of responses to the consultation, in particular the concerns raised about an automatic penalty being unfair eg where there had not been a deliberate breach, the Government has considered a number of options and as a result will be taking forward an amended proposal. We have concluded that the amount of the penalty, including the reduction for payment within 21 days, should remain as set out in the consultation ie:

- The financial penalty will be based on the total amount of the award made by the ET.
- It will be half the amount of the total award so that the level of financial penalty is proportionate to the award.
- There will be a minimum threshold of £100.
- There will be an upper ceiling of £5,000.
- Where a non-financial award has been made by ET for a breach, a tribunal can ascribe a monetary value and so the appropriate financial penalty can be made.
- As an incentive for any penalty to be paid quickly, the penalty will be reduced if there is prompt payment, and that this is set at a 50% reduction if the payment is made within 21 days

129. We believe these levels are appropriate given the existing NMW penalty regime. We do not accept the suggestion that payment of the penalty should be to the complainant rather than the Exchequer as we consider this could provide an incentive for employees to bring speculative claims.

130. However, we have concluded that the penalty should not be automatic. Instead, employment tribunal judges will be given discretionary powers so that they can consider imposing penalties where, in the circumstances, the employer's behaviour in committing the breach had aggravating features, rather than for all breaches as originally proposed.

131. This judicial discretion will mean that employers would not be penalised for unintended or accidental shortcomings, where these are not considered unreasonable behaviour eg a small business with limited HR resource, a concern raised by those opposed to the proposal. Penalties are likely to be imposed in fewer cases as a consequence. We expect they will be imposed in those cases where a judge determines the breach involves unreasonable behaviour, for example where there has been negligence or malice involved. It is these cases for which deterrence effects are more important.
132. Other options considered in light of consultation responses included only penalising repeat offenders; having an administrative level fee rather than the original penalty range proposed; or only penalising in cases where there had been no Acas Code adjustment. These options were rejected on the grounds that they would pose considerable administrative difficulties to apply them fairly, set up costs would be too high, and/or it was considered that there would be little impact on compliance.
133. In summary, Government intends to introduce a provision for the employment tribunal to be able to levy financial penalties on employers found to have breached employment rights. Penalties will be payable to the Exchequer. The power to impose a financial penalty will be discretionary and applicable where the ET is acting at first instance. There will be an appeals mechanism.

QUESTIONS 63-64: FORMULA FOR CALCULATING TRIBUNAL AWARDS AND STATUTORY REDUNDANCY PAYMENT LIMITS

Summary of responses

134. Of the 184 respondents who expressed an opinion on whether the automatic mechanism for up-rating tribunal awards and statutory redundancy payments should be retained, 83% strongly supported retaining an automatic formula rather than, for example, making increases at the Secretary of State's discretion. There were, however, only 30 responses to the question of rounding. Of these, the majority (particularly the unions) favoured retaining the status quo, although there were a variety of alternative suggestions, such as rounding up to the nearest £1, £5, or £50.
135. With regard to moving from RPI to CPI, 45 respondents favoured retaining RPI indexation while 34 favoured moving to CPI; a small number favoured a link to average earnings.

Government Response

136. To avoid further increases well above the rate of inflation (and associated costs to business) there is a strong policy imperative to reduce the rounding element. The Government will therefore amend the formula to round to the nearest pound. We do not propose to eliminate rounding all together in order to avoid the calculation of payments becoming unwieldy.
137. As employers bear the cost of redundancy payments (except where the employer is insolvent, where the cost is borne by the National Insurance Fund) there will be a net saving to business (and government) from reducing the rounding element. We estimate this to be £8m per annum for 'One-In-One-Out' purposes, with a further saving of £4-5m per annum to the National Insurance Fund (and further savings of around £2m per annum in insolvency payments).
138. These changes to the formula would also have the effect of curbing increases in the other limits. However, as these are effectively sanctions for failure to comply with the law this effect does not fall within the scope of OIOO. The Government believes applying the same formula across the board will ensure the calculations are consistent and reasonably simple to understand.
139. The Government will therefore retain the automatic mechanism for up-rating tribunal awards and statutory redundancy payments and will modify the formula to round to the nearest pound across the limits at the earliest opportunity.
140. Moving to CPI would be consistent with Government's policy on the indexation of benefits and tax credits. However, the Government recognises that there are reasonable arguments that a measure of inflation more closely linked to pay is more relevant when considering levels of compensation for redundancy and infringements of employment law.

WHAT HAPPENS NEXT

141. The Government will bring forward a Bill as soon as the Parliamentary timetable permits to take forward those proposals requiring primary legislation.
142. Regulations to implement proposals in relation to increasing the maximum amounts for costs and deposit orders, witness statements, witness expenses, judges sitting alone in unfair dismissal cases and extension to the unfair dismissal qualifying period will be brought forward shortly. The Government intends these regulations to have effect from April 2012, subject to Parliamentary procedures.
143. In addition, we will undertake further consultations in relation to our proposals on compromise agreements and Rapid Resolution.

ANNEX A

SUMMARY OF QUESTIONS

1. To what extent is early workplace mediation used?
2. Are there particular kinds of issues where mediation is especially helpful or where it is not likely to be helpful?
3. In your experience, what are the costs of mediation?
4. What do you consider to be the advantages and disadvantages of mediation?
5. What barriers are there to use and what ways are there to overcome them?
6. Which providers of mediation for workplace disputes are you aware of? (We are interested in private/voluntary/social enterprises – please specify)
7. What are your views or experiences of in-house mediation schemes? (We are interested in advantages and disadvantages)
8. To what extent are compromise agreements used?
9. What are the costs of these agreements? (Note: it would be helpful if you could provide the typical cost of the agreements, highlighting the element that is the employee's legal costs)
10. What are the advantages and disadvantages of compromise agreements? Do these vary by type of case and, if so, why?
11. What barriers are there to use and what ways are there to overcome them?
12. We believe that this proposal for early conciliation will be an effective way of resolving more disputes before they reach an employment tribunal. Do you agree? If not, please explain why and provide alternative suggestions for achieving these objectives.
13. Do you consider that early conciliation is likely to be more useful in some jurisdictions than others? Please say which you believe these to be, and why.
14. Do you consider Acas' current power to provide pre-claim conciliation should be changed to a duty? Please explain why?

15. Do you consider Acas' duty to offer post-claim conciliation should be changed to a power? If not, please explain why.

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

17. We would welcome views on:

- the content of the shortened form;
- the benefits of the shortened form;
- whether the increased formality in having to complete a form will have an impact upon the success of early conciliation.

18. We would welcome views on:

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

19. Do you consider that the period of one calendar month is sufficient to allow early resolution of the potential claim? If not, please explain why.

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

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

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

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

24. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on:

- the frequency at which respondents find that there is a lack of information on claim forms;
- the type/nature of the information which is frequently found to be lacking;
- the proposal that “unless orders” might be a suitable vehicle for obtaining this information;
- the potential benefits of adopting this process;
- the disadvantages of adopting this process;
- what safeguards should be built in to the tribunal process to ensure that respondents do not abuse the process, and;
- what safeguards/sanctions should be available to ensure respondents do not abuse the process?

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

26. Do you agree that employment judges should have the power to make deposit orders otherwise than at a hearing? If not, please explain why.

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

28. Do you agree with the proposal to increase the current level of the deposit which may be ordered from the current maximum of £500 to £1000? If not, please explain why.

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

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

31. Anecdotal evidence suggests that in many cases, where the claimant is unrepresented, respondents or their representatives use the threat of cost

sanctions as a means of putting undue pressure on their opponents to withdraw from the tribunal process. We would welcome views on this and any evidence of aggressive litigation.

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

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

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

34. Would respondents and/or their representatives find the provision of an initial statement of loss (albeit that it could be subsequently amended) in the ET1 claim form of benefit?

35. If yes, what would those benefits be?

36. Should there be a mandatory requirement for the claimant to provide a statement of loss in the ET1 claim form be mandatory?

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

38. How could the ET1 claim form be amended so as to help claimants provide as helpful information as possible?

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

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

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

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

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

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

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

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

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

48. What are the disadvantages of taking witness statements as read?

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

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

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

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

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

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

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

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

- the qualifications, skills, competences and experience we should seek in a legal officer, and;
- the type of interlocutory work that might be delegated.

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

- Employers;
- Employees.

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

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

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

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

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

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

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

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

ANNEX B

MODERNISING OUR TRIBUNALS - SCHEDULE OF QUESTIONS

Details of the responses to the questions posed under the 'modernising our tribunals' section of the consultation paper are set out below:

QUESTIONS 21 – 24: Strike out powers

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

- 220 consultees responded. 112 consultees (51%) were in favour; 64 (29%) were against and 44 (20%) were neutral or undecided. Particular support was expressed by businesses and their representative groups, and by lawyers, whereas opposition came in particular from employee representatives

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

- 206 consultees responded. A range of views were offered, highlighting risks and benefits.

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

- 145 consultees responded. 68 consultees (47%) were in favour, 62 (43%) were opposed and 15 (10%) were neutral. Supportive groups were businesses and their representative groups, while lawyers and employee representatives were generally opposed

24. We have proposed that respondents should, if they are of the view that the claim contains insufficient information, be able request the provision of further information before completing the ET3 fully. We would welcome views on:

- the frequency at which respondents find that there is a lack of information on claim forms;

- the type/nature of the information which is frequently found to be lacking;
 - the proposal that “unless orders” might be a suitable vehicle for obtaining this information;
 - the potential benefits of adopting this process;
 - the disadvantages of adopting this process;
 - what safeguards, should be built in to the tribunal process to ensure that respondents do not abuse the process, and;
 - what safeguards/sanctions should be available to ensure respondents do not abuse the process?
- 190 consultees responded. 88 consultees (44%) were in favour of the proposal, 37 (19%) were opposed, and 70 (37%) were broadly neutral. Evidence was split on the extent to which the issue was a problem. Most business and many lawyers suggesting that there was a real concern to be addressed insofar as the provision of insufficient information was concerned. Most claimant-side representatives disagreed

QUESTIONS 25 – 29: Deposit powers

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

- 237 consultees responded. 158 consultees (67%) were supportive of the proposal, 71 (30%) were opposed and 8 (3%) were neutral. Again, it was typically employers and employer representatives, together with lawyers, who sat mainly in the positive camp. Unions and other employee representatives were mainly opposed

26. Do you agree that Employment Judges should have the power to make deposit orders otherwise than at a hearing? If not, please explain why.

- 222 consultees answered the question about ordering deposits otherwise than at hearings (i.e. on paper). 137 consultees (62%) were in favour, 75 (34%) were opposed, and 10 (just under 5%) were neutral. Responses followed the same pattern as above

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

- 221 consultees answered the question about modifying the ‘little reasonable prospect of success’ test which has to be met before a deposit order can be made. 87 consultees (39%) were supportive of reform, 124 (56%) were opposed and 10 (just under 5%) were neutral. Employer

bodies were marginally supportive, lawyers were fairly evenly split, and employee representatives were wholly opposed

28. Do you agree with the proposal to increase the current level of the deposit which may be ordered from the current maximum of £500 to £1000? If not, please explain why.

- 237 consultees answered the question about doubling the current £500 'cap' on deposit orders. 127 consultees (54%) were supportive, 97 (41%) were opposed and 13 (5%) were neutral. Clearly in favour were employers and their representatives, and lawyers. Employee representatives and individuals were opposed

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

- 229 consultees answered the question about introducing deposit powers to the EAT. 123 consultees (54%) were in favour, 93 (41%) were opposed, and 13 (6%) were neutral. Employer groups and businesses were largely supportive, while employee representatives were opposed

QUESTIONS 30 – 33: Costs powers

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

- 224 consultees responded. 124 consultees (55%) were supportive, 97 (43%) were opposed and 3 (1%) were neutral. Individual employers were strongly in favour, most employer representatives were supportive and so were lawyers, although the majority was not huge. Employee representatives were strongly opposed

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

and

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

- what evidence will be necessary before those sanctions are applied;

- what those sanctions should be, and;
 - who should be responsible for imposing them, and for monitoring; compliance – for example regulatory bodies like the Solicitors Regulation Authority and the Claims Management Regulator, or employment tribunals themselves.
- 155 consultees provided views and evidence on the ‘aggressive litigation’ questions, with many citing anecdotal examples of behaviour causing a concern but little consensus over what could/should be done

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

- 197 consultees responded. 66 consultees (34%) were supportive, 124 (63%) were opposed and 7 (4%) were neutral. There was no strong support from any quarter, and very strong opposition from employee representatives

QUESTIONS 34 – 38: The ET1 form

34. Would respondents and/or their representatives find the provision of an initial statement of loss (albeit that it could be subsequently amended) in the ET1 form of benefit?

- 176 consultees responded. 139 consultees (79%) agreed that Statements could be useful, 36 (20%) disagreed, and 1 (0.6%) was neutral. Employers, their representatives, lawyers and the judiciary were strongly supportive, while no one section of consultees was wholly opposed

35. If yes, what would those benefits be?

- 185 consultees answered the question about the usefulness of Statements of Loss. A range of views were given on benefits and risks.

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

- 202 consultees responded. 132 consultees (65%) said yes, 68 (34%) said no and 2 (1%) were neutral. The split was similar to the above, although there was stronger opposition from employee representatives and from individuals

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

and

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

- 154 consultees responded. A range of views was offered.

QUESTIONS 39 – 44 Calderbank-style settlement offers

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

- 170 consultees responded. 128 consultees (75%) agreed that it would, while 42 (25%) thought that it would not. No consultees were neutral. Support was received fairly consistently, with no one sector answering in the negative by a majority view.

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

- 196 consultees responded. 123 consultees (63%) agreed, 38 (19%) disagreed and 35 (18%) were neutral. Again, no single sector of stakeholders responded with a majority negative view.

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

- 172 consultees responded. 160 (93%) expressed no clear view.

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

- 197 consultees responded. 104 consultees (53%) agreed, 65 (33%) disagreed, and 28 (14%) were neutral. The clearest support came from business and business representatives, while clearest opposition came from Claimant representatives. Lawyers and judges were far from unanimous, but there was clear support from among those sectors

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

and

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

- 110 consultees responded. A range of views was offered.

QUESTIONS 45 – 48: Witness statements being taken as read

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

- 210 consultees responded. 118 consultees (56%) said yes, 81 (39%) said no and 11 (5%) were neutral. Business, business representatives and lawyers were more likely to be in the former camp, while claimant representatives were more strongly in the 'no' camp.

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

- 275 consultees (the highest recorded response to any single question) answered the question about whether witness statements should be taken as read by default. 129 consultees (47%) agreed, 136 (49%) disagreed and 10 (4%) were neutral. Support and opposition were fairly evenly spread, though lawyers and employers fell more often in the supportive camp and individuals were more often in the opposed camp

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

and

48. What are the disadvantages of taking witness statements as read?

- 163 consultees responded. A range of views was offered.

QUESTIONS 49 – 51: State-funded expenses

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

- 196 consultees responded. 102 consultees (52%) were supportive, 90 (46%) were opposed and 4 (2%) were neutral. The most supportive sector was individual businesses, and the most anti was employee representatives.

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

- 202 consultees responded. 78 consultees (39%) thought that the decision should be universal, 105 (52%) disagreed and thought that exceptional cases should be allowed, and 19 (9%) were neutral. The pattern above was broadly reflected again in terms of key supporters and detractors.

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

- 191 consultees responded. 78 consultees (41%) agreed, 108 (57%) disagreed and 5 (3%) were neutral.

QUESTIONS 52 – 54: Judges sitting alone

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

- 227 consultees responded. 76 consultees (33%) supported the proposal, 143 (63%) were opposed and 8 (4%) were neutral. The most significant opposition was from the judiciary, lawyers and representatives of claimants. Only individual businesses were, as a sector, in favour, and the margin was slight.

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

- 194 consultees answered the question about judges sitting alone in the EAT. 116 consultees (60%) were supportive, 55 (28%) were opposed and 23 (12%) were neutral. Clear support was expressed by employers and employer representatives. Lawyers were also (although only marginally) in favour.

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

- 137 consultees responded.

QUESTIONS 55 – 56: Legal officers

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

- 175 consultees responded. 134 consultees (77%) saw merit in the idea, 34 (19%) disagreed and 7 (4%) were neutral.

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

- the qualifications, skills, competences and experience we should seek in a legal officer, and;
- the type of interlocutory work that might be delegated.

- 112 consultees responded.

ANNEX C

Respondents to the RWD consultation included:

3 Paper Buildings
Acas
Acas East Midlands Employment Relations Forum
Acorn Mobility Services Ltd
Addleshaw Goddard LLP
Administrative Justice & Tribunals Council
Advanced Computer Software PLC
Advice Services Alliance
Affinity Sutton
Age UK
Allied Milling and Baking
AMiE (ATL)
Ascribe Ltd
ASDA
Association of Convenience Stores
Association of Recruitment Consultancies
Association of Teachers and Lecturers
ATC Lasham Limited
Association of Train Operating Companies
Axiom Healthcare
B&Q
BASW (The College of Social Work)
BECTU (Union)
Brussels European Employment Relations Group
Berwin Leighton Paisner LLP
Bibby Consulting and Support
Biddle Air Systems Ltd
Blake Laphorn Solicitors
Brantano UK Ltd
Bristol Community Transport
British Chambers of Commerce
British Dental Association
British Furniture Manufacturers
British Hospitality Association
British Retail Consortium
British Shipping
Broadway

The Business Services Association
BT People Consulting
CAOS Conflict Management
Capital International
Castlewood Hotels
Catalyst Mediation Ltd
Cause UK Campaign Group
Confederation of British Industry
Centre for Effective Dispute Resolution
Central London Employment Tribunal
Changing Pathways Limited
Charles Russell LLP
Chartered Institute of Personnel and Development
Chartered Society of Physiotherapy
Chessington World of Adventures
Choice Support
Citizens Advice Bureau
Civil Mediation Council
Civitas: The Institute for the Study of Civil Society
Clifford Chance
Cloisters
Conflict Management Plus Ltd
CMS Cameron McKenna LLP
Connect Assist Ltd
Consensio Partners Resolution Ltd
Cope Safety Management Ltd
Core Solutions Group
Cornwall Council
Council of Employment Judges
Council of Employment Tribunal Members' Associations
Cox Cooper Ltd, Business & Employment Law Solicitors
Cranmore
Croner, part of Wolters Kluwer UK Ltd
Crown Prosecution Service
Communication Workers Union
Cybersupport UK Ltd
Design Initiative Ltd
DHL GBS UK Ltd
Disability Law Service
Disabled Employees, Working Parents
DLA Piper UK LLP
Doyle Clayton Solicitors Limited
DWF LLP

E.ON UK Plc
EAD LLP
Eastcliff Services Limited
Engineering Employer's Federation
Employers Forum on Disability
Employment Appeal Tribunal Judicial Members and President
Employment Appeal Tribunal Lay Members' Committee
Employment Law Solicitors Direct
Employment Relations Solicitors
Employment Tribunal Members Association London Central
Employment Tribunal Members serving the West of England
Employment Tribunal President, Scotland
Employment Tribunal President, England and Wales
Employment Tribunals London North West
Employment Tribunals Aberdeen
Engineering Construction Industry Association
Entrepreneurs Club
Equality and Diversity Forum
Equality and Human Rights Commission
Essex Mediation
Eversheds LLP
Federation of Small Businesses
Fellows Associates
Forecast Consulting & Communications Ltd
Forum of Private Business
Fox Williams LLP
Free Representation Unit
George Davies Solicitors LLP
Globis Mediation Group
GMB Union
Greater Manchester Chamber of Commerce
Greater Manchester Pay and Employment Rights Advice Service
Hampshire Chamber of Commerce
Hardwicke
HBJ Gateley Wareing Manchester LLP
HBJ Gateley Wareing LLP
Herbert Smith LLP
Hogan Lovells International LLP
Hollingworth Toyn & Co Ltd trading as Flowers by Suzanne
HomeWorkers Worldwide
HR Advantage Ltd
HR Solutions
Humane Resources Ltd

Impact Housing Association Limited
Incorporated Society of Musicians
Institute of Directors
Irwin Mitchell LLP
Jayhawk Limited
JEM Advisers
John Stamford Associates
Joint Industry Board for the Electrical Contracting Industry
Kathleen Bolt Mediation Services Ltd
Kent County Council
Kuit Steinart Levy LLP
Langdon Industries Ltd
Law Centres Federation
Leeds City Council
Legal Services Commission
Leigh Day & Co
Lemon & Co
Libra Consulting UK Ltd
Liverpool Employment Tribunal Members Association
Liverpool John Moores University
Lloyd's of London
Local Government Employers
London Borough of Camden
London North West Employment Tribunal Members Association
Lowdham Leisureworld
London School of Economics
Lyons Davidson Solicitors
Macdonald & Company
Mace and Jones
Maclay Murray & Spens LLP
MacRoberts LLP
Manchester Metropolitan University Business School
MarketOne Europe LLP
Marks and Spencer Plc
Martin Searle Solicitors
McGrigors LLP
Mediare Mediation Services Ltd
Mediation at Work Ltd
Mediation Works
Medical Research Council
Member of Chartered Institute of Linguists (CIOL)
MHA Charity
Mind Charity

Mishcon de Reya Solicitors
Montgomery Litho Group
Morrish Solicitors LLP
Morton Fraser LLP
Morton Fraser LLP
MSE Ltd
Museum of London
Mytime Active
NASUWT Union
National Union of Teachers
Nationwide Building Society
Nautilus International
Network Partnership Limited
Network Rail
NHS Employers
North East Chamber of Commerce
North West Employment Law
National Union of Journalists
Osborne Clarke
Outward Housing
Parfitt's Bakery Limited
Pay and Employment Rights Service
PCS Lea Valley Branch & Luton Trades Council
Peninsula Business Services Ltd
Pennington Choices Ltd
People Resolutions Ltd
Pinsent Masons LLP
Police Federation of England and Wales
PricewaterhouseCoopers
Prospect
Public & Commercial Services Union
Public Concern at Work
Quality Solicitors Burroughs Day
Questionmark Computing Limited
RadcliffesLeBrasseur
RBS Plc Mentor Services
Recruitment and Employment Confederation
Red Earth Consultancy Ltd
Reed Smith LLP
Resolvex People Solutions
Riley HR Solutions Ltd
RMT Union
Royal National Institute of Blind People

Road Haulage Association
Rolls Royce
Royal College of Nursing
Russell Jones & Walker
Scottish Association of Citizens Advice Bureaus
Scottish Mediation Network
Scottish Mediation Registered Mediator
Scunthorpe and District Citizens Advice Bureau
Shakespeare Putsman LLP
Silverman Sherliker LLP solicitors
Simmonds International
Simpson and Marwick
Simpson Millar LLP
Sit-Up Ltd
Society of Local Council Clerks
Southampton Advice & Representation Centre Ltd
Sprecher Grier Halberstam LLP
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Stephenson Harwood
Stewarts Law LLP
STL Technologies Ltd
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Stonewall
Scottish Trade Union Congress
Tesco Stores Ltd
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The Children's Trust
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The Electrical Contractors' Association
The Employment Lawyers Association
The General Council of the Bar
The Law Society
The Law Society of Scotland
The Mercian Labels Group
The Newspaper Society
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Thomas Cook Group
Thompsons Solicitors
Tim Johnson / Law

Total Conflict Management Group
Travers Smith LLP
TSSA Union
Trade Union Congress
Tunbridge Wells Citizens Advice Bureau
Turning Point Scotland
Union of Construction, Allied Trades and Technicians
UFS Union
UNISON Union
Unite the Union
Universities and Colleges Employers Association
University of Oxford
University of Wolverhampton
Union of Shop, Distributive and Allied Workers
Verity Law HR Consulting
VIVO (Standard Life)
Voice the Union
Wakefield Council
West Midlands Police
Westminster City Council
White Knight Laundry Services Ltd
Whitton Day Nursery Ltd
Willerby Holiday Homes
Working Families
WorkMatters Consulting
Workplace Law Human Resources
Wragge & Co LLP
Yorkshire and Humberside Employment Rights Network
Yorkshire Employment Tribunal Members' Association
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