

1. Your name:

**University of Birmingham - Sian Jackson**

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

University of Birmingham

3. E-mail address:

s.b.jackson@bham.ac.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business ( over 250 staff)

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - The purpose of collective consultation is often achieved promptly within two or three meetings with the real value being in individual consultation. Also, information is not often available 9 months

Line2 - (incl. notice) in advance of a termination date upon which to conduct meaningful consultation. Fundamentally it is minimum period so if the requirements are not met by the end of 30 days then

Line3 - employers will extend the period until the necessary consultation has concluded.

Line4 - Often employees are eager to progress matters once they have been provided with the information required by s188. The University is forced to delay matters until 90 days has expired so there is a

Line5 - period of unnecessary uncertainty for longer than the employees or the University wish. The employee then has to wait for the expiry of the notice period before s/he can move on.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No

9. Please provide comments to support your answer.

Line1 - It is unclear why, if a definition can be provided in the Code of Practice, it could not be included in legislation.

Line2 - It is accepted, however, that the determination is very fact sensitive and may be more

Line3 - appropriate to deal with it in the Code of Practice

Line4 - It is important that the factors to be taken into account in determining 'establishment' are prescribed and relevant guidance given

Line5 - in the code of practice.

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

No

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

Line1 - It is considered that a legislative exemption could be drafted and justified for certain specific types of fixed-term contracts in light of the Stirling case. For example, the most frequent fixed term

Line2 - contract in the HE sector is when it is fixed term because it is linked to external funding and/or for the purpose of a research project. The employee's expectation is clear at the outset about the

Line3 - end date and the employee often has responsibility for securing further funding. It is considered possible to define what may fall within reasons for dismissal which are "related to the individual

Line4 - concerned" in legislation to constitute a valid exemption. This is considered preferable to leaving it open to be determined by case law as Tribunals interpret the Code of Practice.

Line5 - The substantial justification for this exemption was submitted in the call for evidence and it would be in line with what is considered to be the original purpose of s188 for genuine redundancies.

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

No

**14. What changes are needed to the existing Government guidance?**

**No Response**

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

Line1 - A culture change will only occur if the Code of Practice takes account of the practical difficulties posed by the current obligations for collective consultation that were submitted as part of the

Line2 - Call for Evidence.

Line3 - In particular, it is anticipated that a culture change from the unions is likely to be most difficult and specific guidance to seek to address this would be helpful in the Code.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No

**17. If yes, please explain what other approaches you consider appropriate.**

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

Line1 - Often agreement with the unions is not reached no matter how long the consultation period is.

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

Line1 - The administrative burden of conducting collective consultation is significant due to the number of fixed term contracts that expire at the university (the University has to operate to a rolling

Line2 - consultation period). Collective consultation is often futile in these instances because it is linked to external funding, the employee is aware and is applying for alternative further funding

Line3 - themselves. Managers time would be better spent on advising employees on their applications to enable an extension.

Line4 - The substantial absence of anything about which to consult means there is a risk of not collectively consulting, which may then be exploited by the unions, leading to unfunded extensions of fixed

Line5 - term contracts in order to ensure compliance with the letter of the law.

**REPRO DTP**

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**From:** Sian Jackson [s.b.jackson@bham.ac.uk]  
**Sent:** 20 August 2012 12:19  
**To:** Collective Redundancies  
**Subject:** Collective Redundancies: Response to Consultation on changes to the rules  
**Sensitivity:** Confidential  
**Attachments:** 2012.08.20 - University of Birmingham Response to Government Consultation on Collective Redundancies.pdf

Dear Sir/Madam,

I attach the University of Birmingham's response to the consultation on collective redundancies.

Yours sincerely

**Siân Jackson**

Solicitor

Legal Services, University of Birmingham, Edgbaston B15 2TT

Tel: 0121 414 3349 Fax: 0121 414 3200 [s.b.jackson@bham.ac.uk](mailto:s.b.jackson@bham.ac.uk) [www.bham.ac.uk](http://www.bham.ac.uk)

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## Your details

Name: Siân Jackson

Organisation (if applicable): University of Birmingham

Address: Legal Services, University of Birmingham, Edgbaston Park Road, Edgbaston, B15 2TT

Telephone: 1214143349

Fax: 1214143200

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

It is considered that its approach to fixed term contracts will continue to put an unnecessary burden and restriction on businesses. See below.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

The purpose of collective consultation is often achieved promptly within two or three meetings with the real value being in individual consultation. Also, information is not often available 9 months (incl. notice) in advance of a termination date upon which to conduct meaningful consultation. Fundamentally, it is a minimum period so if the requirements are not met by the end of 30 days then employers will extend the period until the necessary consultation has concluded.

Often employees are eager to progress matters once they have been provided with the information required by s188. The University is forced to delay matters until 90 days has expired so there is a period of unnecessary uncertainty for longer than the employees or the University wish. The employee then has to wait for the expiry of the notice period before s/he can move on.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

It is unclear why, if a definition can be provided in the Code of Practice, it could not be included in legislation. It is accepted, however, that the determination is very fact sensitive and may be more appropriate to deal with it in the Code of Practice.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

See above. It is important that the factors to be taken into account in determining 'establishment' are prescribed and relevant guidance given in the Code of Practice.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

It is considered that a legislative exemption could be drafted and justified for certain specific types of fixed term contracts in the light of the Stirling case. For example, the most frequent fixed term contract in the HE sector is when it is fixed term because it is linked to external funding and/or for the purposes of a research project. The employee's expectation is clear at the outset about the end date and the employee often has responsibility for securing further funding.

It is considered possible to define what may fall within reasons for dismissal which are "related to the individual concerned" in legislation to constitute a valid exemption. This is considered preferable to leaving it open to be determined by case law as Tribunals interpret the Code of Practice. The substantial justification for this exemption was submitted in the Call for Evidence and it would be in line with what is considered to be the original purpose of s188 for genuine redundancies.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

See comments above.

**Question 7: What changes are needed to the existing Government guidance?**

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

A culture change will only occur if the Code of Practice takes account of the practical difficulties posed by the current obligations for collective consultation that were submitted as part of the Call for Evidence. In particular, it is anticipated that a culture change from the Unions is likely to be most difficult and specific guidance to seek to address this would be helpful in the Code.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

Often agreement with the unions is not reached no matter how long the consultation period is.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

The administrative burden of conducting collective consultation is significant due to the number of fixed term contracts that expire at the University (the University has to operate a rolling consultation period). Collective consultation is often futile in these instances because it is linked to external funding, the employee is aware and is applying for alternative further funding themselves. Managers time would be better spent on advising employees on their applications to enable an extension.

The substantial absence of anything about which to consult means there is a risk of not collectively consulting, which may then be exploited by the unions, leading to unfunded extensions of fixed term contracts in order to ensure compliance with the letter of the law.

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URN 12/808

1. Your name:

**University of Central Lancashire - Carolyn Wright**

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

University of Central Lancashire

3. E-mail address:

cwright4@uclan.ac.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business ( over 250 staff)

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - This choice would be a minimum period, therefore as an organisation we would have the chance to extend the consultation period if we felt it necessary.

Line2 - A minimum of 30 days would allow a more responsive approach to restructuring and reduce the uncertainty facing affected employees.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

No Response

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Yes

12. Please provide comments to support your answer.

No Response

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

Yes

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

No Response

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

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

No Response

1. Your name:

**University of Salford - Keith Watkinson**

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

University of Salford

3. E-mail address:

k.watkinson@salford.ac.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business ( over 250 staff)

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?



**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

**1. Your name:**

**University of St Andrews - Louise Milne**

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

University of St Andrews

**3. E-mail address:**

lm80@st-andrews.ac.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Large business ( over 250 staff)

Higher Education Institution

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

No Response

**6. Which of the two proposed options should replace the 90-day minimum period?**

No Response

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

No Response

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No Response

**12. Please provide comments to support your answer.**

No Response

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

No Response

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

1. Your name:

**University of York - Janet Haffegée**

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

University of York

3. E-mail address:

janet.haffegée@york.ac.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business ( over 250 staff)

Higher Education Institution

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - This approach would be simple and straightforward to apply and provides certainty for employees and employers from the outset. Within the University sector significant numbers of staff are employed

Line2 - on fixed-term contracts to carry out specific research projects funded by research councils and other external bodies. The availability of on-going funding will determine whether a redundancy

Line3 - situation will arise and this is often not known until a late stage. Under the current arrangements the University is obliged to consult in respect of the expiry of all these contracts although in

Line4 - many cases the staff will continue in employment. The fact that the University could be caught out by a technicality in relation to the consultation period detracts from the purpose of consultation.

Line5 - The removal of the graduated threshold would remove this concern and facilitate more effective consultation in respect of those at risk of redundancy.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Not sure

9. Please provide comments to support your answer.

Line1 - Clarity over the definition of an establishment would be helpful although the range of possible scenarios may mean that it is not be feasible to do so within the the legislative framework.

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

Not sure

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

**12. Please provide comments to support your answer.**

Line1 - Whilst accepting that there are complexities around the exclusion of fixed-term contracts from collective consultation (& conflicting EU Directives), clarity within the legislation would be helpful by

Line2 - avoiding disputes about whether certain cases should be subject to collective consultation as this could detract from the true purpose of consultation . The reason for this is that staff appointed to

Line3 - a fixed-term contract have an expectation from the outset that their employment will cease. Possible options would be to legislate to exclude all staff on fixed-term contracts, staff on expiry of

Line4 - their first fixed-term contract, staff employed on fixed-term contracts for less than a certain period (e.g. 2 years or 4 years in line with fixed-term regulations) or to only include staff on

Line5 - fixed-term contracts where their employment will cease before the expiry date due to redundancy. This would enable employers to focus more on staff for whom termination of employment is not anticipated

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

Not sure

**14. What changes are needed to the existing Government guidance?**

Line1 - See above - clarity over the status of the code of practice is required and, in particular, its role in any tribunal proceedings.

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

Line1 - The focus should be on the process of consultation rather than a heavily prescribed procedure.

Line2 - There should be sufficient flexibility within the code to enable employers, in liaison with appropriate representatives, to determine the approach that best suits their circumstances.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Not sure

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - Training and/or awareness raising of the revised regulations would be helpful. The focus should again be on the process of ensuring meaningful consultation for all parties involved.

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

Line1 - The majority of collective consultation is undertaken in respect of

fixed-term contracts expiring on completion of a particular research project.

Line2 - As such, agreement is hard to reach as continued employment is dependent on securing further external funding or redeployment and this is recognised by Trade Union representatives.

Line3 - A significant restructuring exercise involving 47 staff carried out in 2009 took approx 6 months to reach agreement.

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

Line1 - As indicated above, consultation is primarily carried out in relation to staff employed on fixed-term contracts. Because of the nature of the sector the majority of these staff will not ultimately

Line2 - be made redundant (over the last 12 months consultation has been carried out every quarter although in the majority of cases these redundancies have not materialised and the number per quarter has not

Line3 - exceeded 20).

Line4 - Significant work is required to determine the number of potential redundancies and to provide the necessary data to union representatives. This diverts resources from other areas of the organisation.

**REPRO DTP**

---

**From:** Janet Haffegée [janet.haffegée@york.ac.uk]  
**Sent:** 12 September 2012 09:26  
**To:** Collective Redundancies  
**Subject:** Collective Redundancies: Consultation on Changes to the Rules

**Attachments:** bis\_consultation\_on\_collective\_redundancies\_-\_response\_form[1].doc



bis\_consultation\_on  
\_collective...

Dear Carl

Please find attached submission from the University of York in response to the above consultation exercise.

Kind regards

Janet Haffegée  
HR Manager

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This email was received from the INTERNET.

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## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**



## Your details

Name: Janet Haffegge

Organisation (if applicable): University of York

Address: Heslington, York , YO10 5DD

Telephone: 1904324834

Fax: 1904324837

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe) Higher Education Institution

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

This approach would be simple and straightforward to apply and provides certainty for employees and employers from the outset. Within the University sector significant numbers of staff are employed on fixed-term contracts to carry out specific research projects funded by research councils and other external bodies. The availability of on-going funding will determine whether a redundancy situation will arise and this is often not known until a late stage.

Under the current arrangements the University is obliged to consult in respect of the expiry of all these contracts although in many cases the staff will continue in employment. The fact that the University could be caught out by a technicality in relation to the consultation period detracts from the purpose of consultation. The removal of the graduated threshold would remove this concern and facilitate more effective consultation in respect of those at risk of redundancy.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Clarity over the definition of an establishment would be helpful although the range of possible scenarios may mean that it is not be feasible to do so within the the legislative framework.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

We will need to await the definition within the code of practice to determine this question.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Whilst accepting that there are complexities around the exclusion of fixed-term contracts from collective consultation (& conflicting EU Directives), clarity within the legislation would be helpful by avoiding disputes about whether certain cases should be subject to collective consultation as this could detract from the true purpose of consultation. The reason for this is that staff appointed to a fixed-term contract have an expectation from the outset that their employment will cease.

Possible options would be to legislate to exclude all staff on fixed-term contracts, staff on expiry of their first fixed-term contract, staff employed on fixed-term contracts for less than a certain period (e.g. 2 years or 4 years in line with fixed-term regulations) or to only include staff on fixed-term contracts where their employment will cease before the expiry date due to redundancy. This would enable employers to focus more on staff for whom termination of employment is not anticipated.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

See above - clarity over the status of the code of practice is required and, in particular, its role in any tribunal proceedings.

**Question 7: What changes are needed to the existing Government guidance?**

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

The focus should be on the process of consultation rather than a heavily prescribed procedure. There should be sufficient flexibility within the code to enable employers, in liaison with appropriate representatives, to determine the approach that best suits their circumstances.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

Training and/or awareness raising of the revised regulations would be helpful. The focus should again be on the process of ensuring meaningful consultation for all parties involved.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

The majority of collective consultation is undertaken in respect of fixed-term contracts expiring on completion of a particular research project. As such, agreement is hard to reach as continued employment is dependent on securing further external funding or redeployment and this is recognised by Trade Union representatives.

A significant restructuring exercise involving 47 staff carried out in 2009 took approx 6 months to reach agreement.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

As indicated above, consultation is primarily carried out in relation to staff employed on fixed-term contracts. Because of the nature of the sector the majority of these staff will not ultimately be made redundant (over the last 12 months consultation has been carried out every quarter although in the majority of cases these redundancies have not materialised and the number per quarter has not exceeded 20).

Significant work is required to determine the number of potential redundancies and to provide the necessary data to union representatives. This diverts resources from other areas of the organisation.

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**URN 12/808**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

Not sure

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Democracy is a lengthy process! It takes quite a while to

Line2 - allow people to consider the issues in their complexity and

Line3 - to consider different possible ways forward. Rushing it would

Line4 - lead to more people unhappy about the outcome and very

Line5 - likely a worse outcome than could have been achieved.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Not sure

9. Please provide comments to support your answer.

No Response

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

Not sure

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

No Response

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

Not sure

14. What changes are needed to the existing Government guidance?

Line1 - Allow plenty more time for consultation.

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - HR people in particular need far different training from what

Line2 - they are receiving. The best for a company is not seeking a

Line3 - short term increase in profits at the expense of employees

Line4 - morale and losing expertise.

**18. Have we correctly identified the impacts of the proposed policies?**

No

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

Line1 - Evidence from a large number of businesses where people have been

Line2 - made redundant! The damage done to individuals and their

Line3 - families and the consequent damage to society cannot be

Line4 - undone. Taxpayers pick up the tab for unemployment benefit.

Line5 - People fear losing their job but do not give their best!

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

Line1 - Who said we reached agreement? There was a pretence to consult!

Line2 - Management seemed to have decided the outcome from the

Line3 - and at every step tried to hide information or mislead employees.

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

No Response

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?



**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

NONE

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**HMP -**

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

HMP

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Should remain at 90 days

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No

9. Please provide comments to support your answer.

Line1 - This process supports managers dispersing staff instead of allowing for a full consultation in the first instance

Line2 - redundancy should never be taken lightly and so people should have their human rights and right to dency/fair play protected

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

No

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

Line1 - The changes are not necessary if rights are to be protected

Line2 - The government are wrong to do this altogether

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

No

14. What changes are needed to the existing Government guidance?

Line1 - None

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

Line1 - They are necessary

16. Are there other non-legislative approaches that could assist – e.g. training?



No

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

Line1 - The concept is wrong

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

No Response

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

No Response

## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: 19 September 2012

## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

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You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

Fax: 0207-215 6414

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

The closing date for this consultation is: 19 September 2012

**Your details**

Name:

Organisation (if applicable): HMP

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

\* Should remain at 90 days

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

This process supports managers dispersing staff instead of allowing for a full consultation in the first instance. redundancy should never be taken lightly and so people should have their human rights and right to dency/fair play protected

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

The changes are not necessary if rights are to be protected

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

The Government are wrong to do this altogether

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

**Question 7: What changes are needed to the existing Government guidance?**

None

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

They are necessary

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

The concept is wrong

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

na

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

na

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URN 12/808



1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

**1. Your name:**

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

No Response

**3. E-mail address:**

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Individual

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

No

**6. Which of the two proposed options should replace the 90-day minimum period?**

No Response

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Line1 - Decisions would be made more hurriedly and there would

Line2 - therefore be new scope for unscrupulous managers to

Line3 - take advantage of employees they simply wanted to get

Line4 - rid of

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Not sure

**9. Please provide comments to support your answer.**

No Response

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

Not sure

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

No Response

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

No

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Not sure

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

Line1 - 78 days

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

Line1 - It helped us to effectively re-distribute resources and adequately re-structure

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

Not sure

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - I am happy with the current arrangements

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No

9. Please provide comments to support your answer.

No Response

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

No

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

No Response

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

No

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

Not sure

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

No

19. If you have any evidence relating to possible impacts we would be happy to receive it.

No Response

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

No Response

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

No Response



1. Your name:

**NOMS HM Prison Service -**

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

NOMS HM Prison Service

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

Not sure

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - I believe 90 days is not enough.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No

9. Please provide comments to support your answer.

Line1 - To general a term.

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

No

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

Line1 - Why are they doing this?

Line2 - What plans do the Government have for a collective redundancy programme

Line3 - Which Government departments may be effected by collective redundancies?

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

Not sure

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

Not sure

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

Not sure

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**UCL -**

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

UCL

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**



1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

none

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - lowering the 90 day period would not deliver the governments aims

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No

9. Please provide comments to support your answer.

Line1 - the legislation around redundancies need to be weighted in favour of the powerless individual not the powerful employer

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

No

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

Line1 - FTC legislation should be made stronger in favour of the employee not the employer

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

No

14. What changes are needed to the existing Government guidance?

Line1 - more of the current acas guidance should be in the legislation

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

Line1 - current culture in favour of the employer is currently wrong and should weighted in favour of the employee

16. Are there other non-legislative approaches that could assist – e.g. training?

No

17. If yes, please explain what other approaches you consider appropriate.

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

No

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

Line1 - not long enough for any of the staff to make a decision and the employer tried to break the current law!

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

**No Response**

**1. Your name:**

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

No Response

**3. E-mail address:**

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Individual

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

No

**6. Which of the two proposed options should replace the 90-day minimum period?**

Not sure

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Line1 - The 90 day period is the absolute minimum to carry out

Line2 - any form of meaningful consultation. The concept of

Line3 - reducing this except in exceptional circumstances is

Line4 - madness in the extreme.

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Not sure

**9. Please provide comments to support your answer.**

No Response

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

No

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

Line1 - Codes of practice are always open to interpretation and

Line2 - provide easy means of avoidance. The only way of

Line3 - protecting the rights of groups of workers is through

Line4 - clear legislation.

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

No

**14. What changes are needed to the existing Government guidance?**

Line1 - Codes of practice are not suitable for issues as

Line2 - important as employment protection (on both sides)

Line3 - - only a legislative framework is suitable for this.

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

Line1 - It is impossible to "ensure" that a code of practice

Line2 - can work without a true legislative framework behind it.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - Yes. It is quite reasonable to have non-legislative

Line2 - approaches as well as a legislative framework. Training,

Line3 - redeployment etc could fit in here.

**18. Have we correctly identified the impacts of the proposed policies?**

Not sure

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**Capgemini (on contract to DWP) -**

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

Capgemini (on contract to DWP)

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Outsourcing companies will not spend time and effort required currently, if it's changed to 30 they are more like to be responsive to the idea of making staff redundant rather than 'benching' them.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Not sure

9. Please provide comments to support your answer.

No Response

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Not sure

12. Please provide comments to support your answer.

No Response

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

Not sure

14. What changes are needed to the existing Government guidance?

Line1 - It needs to be less 'wooly' and more definitive. Some ex=department staff are working to specific T's & C's so legislation needs to be full, true and accurate.

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

Not sure

**17. If yes, please explain what other approaches you consider appropriate.**

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

**Not sure**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**



1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

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**No Response**

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

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**No Response**

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

---

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**HP -**

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

HP

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**NOMS -**

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

NOMS

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**



1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - See word form for comments

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

Line1 - See word response form

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

No

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

Line1 - See word response form

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

No Response

14. What changes are needed to the existing Government guidance?

Line1 - In my view this need only be changed if the Government does change the law or introduce a code of practice.

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

Line1 - See word response form

16. Are there other non-legislative approaches that could assist – e.g. training?

No

17. If yes, please explain what other approaches you consider appropriate.

Line1 - See word response form

18. Have we correctly identified the impacts of the proposed policies?

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

Line1 - In my view the Government has identified the possible impacts of its proposals correctly, although I consider it rates too highly the impact that non-statutory measures are likely to have.

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

Line1 - See word response form

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

Line1 - See word response form

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

No

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

Line1 - My brother -in-law dismissed after 17 years loyal service with WPP

Line2 - no consultation - 2 months notice.He has 6 figure mortgage and 2 kids

Line3 - workers need protection financially to make the transition

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

No Response

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

No Response

**REPRO DTP**

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**From:**  
**Sent:** 03 September 2012 17:37  
**To:** Collective Redundancies  
**Subject:** Response to Collective Redundancy Consultation  
**Attachments:** CONSULTATION ON CHANGES TO THE COLLECTIVE REDUNDANCY RULES.docx

Dear Sirs

I attach my response to the Consultation on Collective Redundancy.

Yours sincerely,

University of East Anglia  
Norwich  
NR4 7TJ

This email was received from the INTERNET and scanned by the Government Secure Intranet anti-virus service supplied by Cable&Wireless Worldwide in partnership with MessageLabs. (CCTM Certificate Number 2009/09/0052.) In case of problems, please call your organisation's IT Helpdesk.  
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## CONSULTATION ON CHANGES TO THE COLLECTIVE REDUNDANCY RULES

Response of [redacted], University of East Anglia and

Law School  
University of East Anglia  
Norwich Research Park  
NORIWCH  
NR4 7TJ

### Background

I am [redacted] at the University of East Anglia. I am also [redacted], the international law firm. I have practiced as an employment lawyer for 30 years, and continue to practice while undertaking my academic work.

I advise public and private sector employers of all sizes on redundancy and re-organisation projects, including ones which involve job loss and job changes across several European countries. In consequence I have an appreciation of both the UK law and practice in this field and the approaches of many other EU countries to collective redundancies and to the EU Directive on that topic, and I am aware of the challenges for employers in seeking to consult on, and carry out, redundancies fairly and efficiently across several jurisdictions.

In my earlier career I often advised individual employees and I also used to advise a general trade union, and so I have an appreciation of the issues and concerns of employees and of unions in redundancy situations – which are often not the same.

### Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?

Yes, save in relation to those issues addressed in my answers below – particularly the issues of the nature of any code of practice and of defining what is meant by “establishment”.

### Question 2: 45 or 30 day minimum?

I support a 30 day minimum period for consultation for the following reasons:

1. Experience shows that in the majority of cases 90 days is too long. In my view 30 days will be sufficient for a fair proportion of large scale redundancies. The issue here is to define a *minimum*, and so if longer is required for proper consultation the law already requires the employer to take longer.
2. Many managers are reluctant to consult genuinely or effectively. A long minimum period exacerbates that natural tendency, since leaving key issues of business planning and management uncertain for so long is simply not acceptable to them, so the lengthy period in

fact makes it more likely that they will decide to engage in a sham process, with all issues already in reality irrevocably decided.

3. One of the most difficult issues in practice is for an employer to decide, even with the best legal advice, whether the 30 or the 90 day period applies because of uncertainty about whether several different sites or different parts of the business on a single site are separate "establishments" or not. Making the minimum period 30 days for all collective redundancies would reduce the number of occasions on which this legal uncertainty matters.

As explained below, in my view if the Government is serious about improving redundancy consultation – both in law and in practice – it has a duty to resolve the uncertainty about the meaning of "establishment" in European law, but if, contrary to my urging, the Government decides to do nothing about this then reducing the minimum consultation period for large redundancies to 30 days will at least reduce the number of occasion when this regulatory deficiency matters to employers and employees.

**Question 3: Do you agree with the Government's assessment of the risk of taking a legislative route on the issue of "establishment"?**

**Question 4: Will defining "establishment" in a code of practice give sufficient clarity?**

#### **The problem**

The first issue here is to identify the nature of the problem. It is this: under European law the threshold for collective consultation is determined by how many redundancies are proposed in a particular establishment. (The UK has added another use for "establishment" which is to trigger a longer period of consultation when more than 99 redundancies are proposed, but that is a matter of UK law and can readily be resolved.) Unfortunately, ECJ case law is not entirely clear on how an establishment is defined. On the face of things, there is clear case law (*Rockfon*) to the effect that a single site can be an establishment even if it does not have independent management, but UK lawyers are nervous about this authority for two reasons:

- First, EU member states have been given by the Directive a choice between two different ways of defining the threshold size of the redundancy for collective consultation to be triggered. The *Rockfon* case related to a country which had chosen the alternative option from that selected by the UK, and under that alternative collective consultation is more likely to be triggered if the establishment is small. For countries such as the UK which have chosen the alternative trigger, a definition of "establishment" which results in a small operation counting as an establishment makes it less likely that collective consultation will be triggered. For that reason applying the *Rockfon* definition to a UK case will be unattractive to the ECJ.
- There are indications in the *Athinaiki* case that the ECJ might indeed give the word "establishment" a different meaning in a UK case, even though this could not be done without this word meaning two different things in the same piece of legislation. Even

for the European Court of Justice this would be a cavalier piece of legislative interpretation, but it is reasonable to anticipate that the ECJ might well be that cavalier.

### **The best solution**

In the meantime UK lawyers and Tribunals do not know what to do. **What the Government should be doing** is paying the legal costs of the parties to a suitable test case to go to the ECJ for this issue to be resolved. This is the proper responsibility of the UK Government – to ensure that UK citizens have clearly-stated law applied to them. The approach adopted in the Consultation Paper, “Oh, it’s too uncertain, so we can’t do anything about this,” is an abdication of national government responsibility.

### **The next best solution**

Since the Government has not taken the opportunity over recent years to clarify this issue through case law, it should now take the alternative approach of defining “establishment” in UK law on the bias of the *Rockfon* decision and the wait until someone challenges that legislation before the ECJ.

It is true that both these solutions would involve expenditure in legal costs for the Government, but the failure to grasp this nettle is causing costs and uncertainty for employers, unions and employees.

### **Why a code of practice will not work**

A code of practice can guide employers, employees and unions as to how to implement legal provision in practice and as to what, for example, is reasonable and what is not. Codes are for instance valuable in assisting parties to understand how the obligation on an employer to act reasonable in a disciplinary dismissal can be discharged and in deciding how much time off is reasonable for union duties.

What a code of practice cannot do effectively is legislate. The problem with “establishment” is not a problem of what is or is not reasonable consultation, but about the meaning of a word in EU legislation. That problem cannot be resolved by a code of practice even in the unlikely event that such a code gave guidance on that issue - since the code would carry no weight whatsoever with the ECJ – of indeed with UK courts and tribunals. As a practicing lawyer, I would have to advise my clients, “The Code says this is/is not an establishment but I have to tell you that if your case is the one that goes to the appellate courts in the UK or the EU, the code will be irrelevant and the issue remains as uncertain as it was when I advised you last on redundancy 5 years ago.”

### **Question 5: Fixed Term Contracts**

The Consultation paper says that the Government believes that it would be difficult to construct a suitable legislative exemption for fixed-term appointees. I disagree that this is an adequate reason for not legislating for the following reasons:



- The EU Directive on collective dismissal had no difficulty in legislating for such an exemption: see Art 1.2 quoted in paragraph 24 of the EAT judgment in the *Stirling* case
- If the Government does not legislate for an exemption because it is too difficult to word, it will be too difficult to word in a code of practice also – unless the wording in the code is too vague to be of practical use.
- The *Stirling* decision is only an EAT decision, and it is entirely possible that higher UK courts will take a different view, either on appeal in the *Stirling* case, or in a later case. My own view is, for example, that the English Court of Appeal would be likely to take the opposite view to that of the EAT in *Stirling*: on the basis that there is no reason in interpreting the current wording of the statute to think that Parliament considered that if a university closed down, say, a Chemistry department with 25 job losses collective consultation should be required but that it should not be required if 25 staff on fixed term contracts within a department were to lose their jobs because external funding had been lost and the university was not willing to fund further work itself.

In my submission, this is an issue of policy for Parliament to determine by legislation.

#### **Question 6: Balance between code of practice and statute**

In fact, the question here over-simplifies, because there is a significant difference between what has been called a non-statutory code of practice, which carries no special weight in an Employment Tribunal, and a statutory code which a Tribunal must take account of in determining a case. The issue therefore is a choice between statute, statutory code of practice which a tribunal must take account of, and a code of practice which is no more than some useful ideas given by the Secretary of State to employers, unions and employees which they can bear in mind but which has not legal weight.

My clear view is that a “non-statutory code of practice” is positively unhelpful to employers, unions and employees since it adds complication without giving any guarantee, or even reassurance, that following the code will mean the law is complied with.

In contrast a “statutory code of practice” is very useful in the real world to help parties to know what a Tribunal will, and will not, accept as discharging a legal obligation. In relation to redundancy consultation, the obvious topic in relation to which such a code would be useful is when consultation can be regarded as complete. A code, if issued, should also of course restate in simple language matters the are set out in the law such as who constitute “appropriate employees representatives” in particular common factual situations, the legal definition of establishment (that I advocate would be enshrined in statute), and the legal position on expiry of fixed term contracts.

To repeat a point made in relation to questions 3 and 4, a code of practice can guide employers, employees and unions as to how to implement legal provisions in practice and as to what, for example, is “reasonable” in law and what is not. Codes are for example valuable in assisting parties to understand how the obligation on an employer to act reasonably in a disciplinary dismissal can be discharged and in deciding how much time off is reasonable for union duties. What a code of practice cannot do effectively is legislate. For example, the problem with “establishment” is not a

problem of what is or is not reasonable consultation, but about the meaning of a word in EU legislation.

#### **Guidance on when consultation should start**

The proposal to give guidance on this issue is brave, given that the position is very uncertain in EU law. There is some hope that the *United States of America v Nolan* case will resolve the uncertainty – although there must be concern that the ECJ will once again “dodge” the issue as in did in the *Akavan v Siemens* case. It would be prudent to await the ECJ’s judgment in the *Nolan* case.

#### **Question 7: Existing Government Guidance**

In my view this need only be changed if the Government does change the law or introduce a code of practice.

#### **Question 8: How can we ensure the code of practice helps deliver the necessary culture change?**

In my opinion there are two cultural aspects that could usefully be changed:

- The reluctance of management to engage in genuine consultation
- The temptation for unions to prolong consultation, not in order to achieve real change to the proposals or to achieve reductions in job losses, but simply to postpone the day when their members stop earning. This is done at the price of extending the period or worry and uncertainty for employees who, in my experience, would often rather know their fate as soon as possible.

In my view it is highly unlikely that a code of practice will deliver change to either of these unfortunate tendencies. A shorter minimum consultation period, in contract might well lead to desirable changes to these two failings.

#### **Question 9: Would other non-legislative approaches assist – eg training?**

Not in my view.

#### **Question 10: correction identification of the impacts**

In my view the Government has identified the possible impacts of its proposals correctly, although I consider it rates too highly the impact that non-statutory measures are likely to have.

#### **Question 11: How long did it take to reach agreement**

I have advised many employers on large scale redundancy proposals in the last five years. In my experience in those cases where the minimum period was 30 days (ie fewer than 100 redundancies) consultation took between 15 and 45 days, and the employers readily extended the period of

consultation in those cases where active discussion was continuing. I believe the same would happen for larger redundancies if the 90 period is abolished.

In the case of redundancies involving more than 99 dismissals, the consultation typically takes 60 to 90 days but in my opinion this is significantly influenced by the fact that employee representatives (union officials) know that they can insist on the full 90 days. Even then in fact sometimes a shorter period of consultation occurs because employees put pressure on their representatives to end the consultation sooner because, for example, they want to take a voluntary redundancy payment, or they want to be released to take another job, or because they want the anxiety caused by the uncertainty brought to an end.

**Question 12: Effect on regular business**

It is apparent to me from comments made by clients undertaking redundancy consultation that significant management resource has to be devoted to such consultation, but I do not consider this to be a significant disadvantage of our current law and practice on redundancy consultation: most of it would occur in any well-managed business under any legal regime.

In contrast, there is an adverse effect on morale which is particularly important in cases where the redundancy is not a complete site closure. In such cases a lengthy consultation period has an adverse effect on efficiency and on service delivery to customers or clients - which does create extra risk for job security.

University of East Anglia

3 September 2012

1. Your name:

**HMPS -**

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

HMPS

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**Hewlett Packard -**

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

Hewlett Packard

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?



**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

Not sure

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - i do not think that the 90 day period should be reduced

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Individual

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

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14. What changes are needed to the existing Government guidance?

No Response

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

No Response

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No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

Response to Consultation on Collective Redundancies

Page 1 of 1

## REPRO DTP

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**From:** Steadman, Amanda [amanda.steadman@addleshawgoddard.com]  
**Sent:** 26 September 2012 10:17  
**To:** Davies Carl (RGFL); Collective Redundancies  
**Subject:** Response to Consultation on Collective Redundancies  
**Attachments:** Response to Consultation on Proposals for Reform of Collective Redundancy Consultations.DOC

Dear Carl,

Please find attached a response to the Consultation on Collective Redundancies. Apologies for the late submission.

Kind regards,

Amanda.

**Amanda Steadman**  
Professional Support Lawyer  
for Addleshaw Goddard LLP

DDI: +44 (0)20 7160 3310  
Fax: +44 (0)20 7606 4390  
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Working as part of the Legal Sector Alliance to reduce our use of natural resources

<<Response to Consultation on Proposals for Reform of Collective Redundancy Consultations.DOC>>

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## Response to consultation on changes to the rules on collective redundancies

### Introduction:

This response is submitted by Addleshaw Goddard LLP on behalf of one of its clients who wishes to remain anonymous. The client in question is one of the UK's major employers, which falls within the "large business" category for the purposes of the consultation process. The client is a sophisticated employer with extensive HR and legal support and the responses set out below should be viewed in that context.

The responses set out below summarise the views of four of the individuals (three HR managers and one other manager) who have been involved in the client's most recent collective redundancy process (the "**Respondents**").

### Questions:

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

1.1 The Respondents considered that the Government's overall approach was sensible and to be supported. However, it was noted that parties to a collective redundancy consultation involving 100+ proposed redundancies will need to work hard to ensure that meaningful consultation occurs within a reduced consultation period (whether 30 or 45 days). In this respect, the Respondents felt that it was imperative for employee and trade union representatives to have experience of such processes wherever possible. Further, Government guidance should underline the need for parties to consultation processes to effectively engage in the process and not be distracted by unrelated industrial issues.

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

2.1 The view of the Respondents was that the current 90-day period for 100+ proposed redundancies was too long and rarely led to better consultation or outcomes. The experience of the Respondents was that the 90-day period tended to engender a mindset that the process should last 90 days even where full and meaningful consultation had been exhausted at an earlier stage.

2.2 One of the Respondents had experience of similar consultation processes in France, where the length of consultation is unlimited. The Respondent noted that the consultation in that exercise was frequently not meaningful and, in fact, resulted in the same issues being revisited again and again without any progress being made. The lesson to be learnt from this is that extended consultation does not necessarily equate to effective and meaningful consultation.

2.3 The overall view was that a more condensed consultation process is desirable as it:

- increases the likelihood of the parties engaging in a timely manner;
- increases the likelihood of disseminating key information amongst employees;
- increases the likelihood of the affected employees being able to access the support they require; and

- focuses the minds of the participants on the consultation process and encourages better engagement, including on the issue of how to mitigate the effects of the proposed redundancies.
- 2.4 As to the appropriate period, the overall view was that a reduction from 90 days to 30 days was preferable as this would provide a simple, uniform consultation period for all collective redundancies. This would also remove some of the issues surrounding the definition of "establishment": once the 20 employee threshold was reached, the focus would then shift to how meaningful consultation can be achieved, rather than how long the process should be.
- 2.5 However, it was highlighted that in order to complete a meaningful consultation process within a 30-day period:
- the parties would need to agree to, and engage in, an intense meeting structure; and
  - the individual managers and representatives involved would need to be sufficiently experienced and well-prepared. It was difficult to envisage how an effective process could be carried out within a 30-day period by inexperienced and/or ill-prepared participants.
- 2.6 Consequently, it was felt that the Government would need to clearly reinforce the point that the 30-day consultation period is a minimum and that consultation should always continue beyond this if it cannot be properly completed within that timeframe. Whilst the client is aware of its obligations in this respect, this will require a cultural change amongst many employers. Guidance from the Government on what a model consultation process should look like would assist employers in assessing whether it is legitimate to close a consultation after 30 days or whether it should properly be extended.
- 3. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of "establishment"? Please provide comments to support your answer.**
- 3.1 The overall view of the Respondents was that any attempt at a legislative definition of "establishment" in the UK context would be difficult and could quickly become meaningless. The Respondents felt comfortable in relying on case law guidance on the meaning of establishment (as supplemented by appropriate Government guidance) and considered that it was appropriate for Employment Tribunals to assess whether or not employers had taken the correct approach on the particular facts.
- 3.2 As noted in paragraph 2.4 above, the adoption of a uniform consultation period of 30 days would remove some of the issues around the term "establishment". It would be pertinent only to the issue of whether to consult and not to how long the consultation should last.
- 4. Will defining "establishment" in a Code of Practice give sufficient clarity?**
- 4.1 The Respondents' considered that detailed guidance in a Code of Practice should provide sufficient clarity on the meaning of establishment, provided that this was updated to reflect material case law developments.
- 5. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather in legislation? Please provide comments to support your answer.**

5.1 The Respondents did not have a settled view on this matter, partly due to the fact that the client does not have a large volume of fixed-term employees. In a recent collective redundancy exercise, fixed-term employees were included in the process. Broadly, however, the Respondents felt that further guidance would help employers to understand their obligations towards fixed-term employees in a collective redundancy situation.

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

6.1 Please refer to the responses to questions 3, 4 and 5 set out above.

**7. What changes are needed to the existing Government guidance?**

7.1 The Respondents considered that the current guidance is not particularly user-friendly. It is a 20+ page PDF document, primarily made up of text. It was also noted that the guidance document was drafted in 2006 and does not appear to have been regularly updated. The general view was the format of the guidance needed to be modernised to reflect the way in which people now prefer to access information. It was also felt that the guidance should be more pithy and practical, although this would, to some extent, be addressed by the introduction of a Code of Practice.

7.2 Suggestions for changes to the format of the guidance document included:

- move away from a PDF format and place the document onto a website with hyperlinks to any further guidance (e.g. ACAS guidance) or relevant material (e.g. relevant Court or Tribunal judgments);
- introducing a short 1 – 2 page executive summary of the key points, with links through to the relevant chapters of the guidance document if more detail is required;
- ensuring the document is regularly reviewed and updated; and
- introducing a glossary with definitions of the key terms used.

7.3 Suggestions for changes to the substantive content of the guidance document included:

- clear guidance on the trigger point for commencing consultation;
- clear guidance on when it is appropriate and safe for employers to close a particular issue within a consultation process. The Respondents' experience was that there was a great deal of caution around doing so, which often resulted in the same issues being revisited on many occasions, without any movement / change on those issues; and
- clarification that employers are permitted to serve notice of termination where consultation has been genuinely exhausted, even if this is before the expiry of the minimum consultation period, provided always that the notice of termination does not expire before the end of the minimum consultation period.

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

8.1 The Respondents noted that the Code of Practice is to be non-statutory. However, in order to raise the validity of the Code, there would need to be some sort of consequence for non-adherence. One suggestion would be to give the Code a similar status to that of the ACAS

*Code on Disciplinary and Grievance Procedures*, with Tribunals able to take any breach of the Code into consideration and for there to be a potential impact on any compensation awarded in relevant claims (with appropriate credit given to the employer for any meaningful consultation that has been undertaken in compliance with the Code).

8.2 The Respondents also noted that the Code of Practice should focus on delivering a culture change not only amongst employers, but also amongst trade union representatives. There should be an emphasis on the need to engage in a consultation process promptly and pragmatically, including having a clear focus on ways in which the effects of any proposed redundancies can be mitigated (in addition to whether the proposed redundancies can be avoided).

8.3 There were mixed views on the inclusion of case studies as a learning tool. Some felt this could be helpful, whilst others felt that case studies were effective in a classroom environment, but did not work so well on paper.

8.4 Other suggestions for matters to be included in the Code of Practice included:

- a checklist or model of what a good consultation process looks like (e.g. "if you want to achieve meaningful consultation within 30 days, then by the end of week 1 you should have achieved x,y,z; by the end of week 2 etc"). Although this will always turn on the particular facts, it should be possible to provide a broad outline of what a good consultation process looks like. This would be of particular assistance to less well-resourced / supported employers;
- an explanation of the difference between consulting with a view to reaching an agreement and negotiating; and
- guidelines for employers on the appropriate level of internal resourcing to devote to such an exercise. This is of particular importance in light of the recent ACAS research highlighting the often negative impact of redundancy processes on the "tellers" (i.e. those involved in delivering the message to employees / representatives).

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

9.1 The Respondents considered that there were other non-legislative approaches that the Government could explore. One suggestion was to offer hands on support for smaller organisations, perhaps extending to sending an ACAS delegate to the early consultation meetings to ensure that the parties clearly understood their obligations and were "on the right track". However, the effectiveness of such a measure would depend on the quality and experience of the ACAS delegates.

9.2 There were mixed views on the helpfulness of training. Some felt that if training was offered once a consultation process was already underway, then this would be difficult to schedule (particularly in a reduced consultation period of 30 days). However, others felt it could still be useful and, in particular, offering joint training to the employer and employee / trade union representatives could help to build relationships between the parties early on in the process.

9.3 It was felt that a telephone helpline would probably not be useful on the grounds that any advice given would be too generic.

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

10.1 In relation to the issue of how employees behave during the consultation process (i.e. do they seek alternative employment early in the process or do they hold out for their redundancy pay before looking for a new job?), one of the Respondent's noted that long-term employees would not generally seek alternative straight away and would concentrate their efforts on trying to remain within the client's employment. In contrast, employees with shorter periods of service were more inclined to seek employment elsewhere.

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

11.1 In a number of recent collective redundancy consultations (with 100+ proposed redundancies), the Respondents found that the length of the consultation process was usually, but not always, longer where the workforce was unionised.

11.2 Where trade union representatives were involved, there was a general reluctance to engage in a pragmatic discussion, particularly around ways of mitigating the effects of the proposed redundancies. There was a sense that the trade union representatives had to be seen to be protecting their members' interests by prolonging the consultation process, thereby prolonging the period in which their members would be paid. There was also experience of trade union representatives using the consultation process to advance other issues e.g. intra-union issues and regional issues. It was not usually possible to reach agreement with the trade union representatives and the consultation continued for 90 days or longer (although in one case it was completed within 30 days).

11.3 By contrast, the Respondents' experience of dealing with the non-unionised parts of the workforce was that consultation was more focussed and effective, with clear requests for information from employee representatives from the outset. In one particular case, agreement was achieved in around 35 days.

11.4 As a general point, it was the Respondents' experience that consultation can be completed in a timely manner only where the following is in place:

- dedicated management and HR resources
- experienced and well-prepared trade union / employee representatives; and
- appropriate legal support.

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

12.1 The Respondents noted that such processes have tended to have a far reaching effect on the wider business. Although collective redundancy consultations are managed by way of "project groups", the experience was that it had been difficult to isolate the process into those project groups as managers across the business generally wished to be involved given the potential impact on the future shape of the business. The wider business was also impacted in terms of involvement in the search for alternative roles for potentially redundant employees.

12.2 The impact on those at the frontline of the process (i.e. HR and other managers) was notable. These individuals had to devote significant time to the process, with the result that their day job often did not get done. There existed a clear tension between the amount of time that

needed to be devoted to such processes and the day-to-day running of the business at a challenging time.

- 12.3 In terms of personal impact on those at the frontline of the process, the feedback was that it was an "overwhelming and draining" time. This accords with the recent ACAS research on the impact of redundancy processes on those involved in delivering the message to employees (see also paragraph 8.4 above).

1. Your name:

**Birmingham Law Society – President, Mary Kaye,**

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

Birmingham Law Society

3. E-mail address:

Johanna@birminghamlawsociety.co.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

Local Law Society

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No

9. Please provide comments to support your answer.

No Response

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

No

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

No Response

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

No

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**



**REPRO DTP**

---

**From:** Johanna Sahi-Proto [johanna@birminghamlawsociety.co.uk]  
**Sent:** 17 September 2012 12:00  
**To:** Collective Redundancies  
**Subject:** Response to Consultation on Collective Redundancies from Birmingham Law Society  
**Attachments:** 12-808rf-collective-redundancies-consultation-form.doc; Response to Redundancy Consultation - from Birmingham Law Society.doc

Dear Mr Davies,

Please find attached the response from Birmingham Law Society to the Consultation on Collective Redundancies.

I am submitting this response on behalf of Mary Kaye, President of Birmingham Law Society.

Attached are:

- \* the response form with details of the person submitting and
- \* a separate Word document with the actual responses.

Should you have any queries or if there is a problem with any of the documents, please don't hesitate to contact me.

Yours sincerely,

Johanna Sahi-Proto  
Membership & Events Co-ordinator  
Birmingham Law Society  
[Johanna@birminghamlawsociety.co.uk](mailto:johanna@birminghamlawsociety.co.uk)

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## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**

## Your details

Name: Mary Kaye, President

Organisation (if applicable): Birmingham Law Society

Address: 45-51 Newhall Street, Birmingham, B3 3QR

Telephone: 01212224190

Fax: 0121 222 4197

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe) Local Law Society

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

Please see full response in attached document.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Please see full response in attached document.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Please see full response in attached document.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

Please see full response in attached document.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Please see full response in attached document.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

Please see full response in attached document.

**Question 7: What changes are needed to the existing Government guidance?**

Please see full response in attached document.

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

Please see full response in attached document.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

Please see full response in attached document.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

Please see full response in attached document.

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

Please see full response in attached document.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

Please see full response in attached document.

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**URN 12/808**



## Birmingham Law Society Employment Law Committee Meeting

### Draft Answers to Questions set out in the Government's

### Consultation Paper on Collective Redundancies

#### Consultation Questions

##### **Question 1**

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

Yes. The proposed changes would appear to give employers more flexibility when dealing with redundancy situations.

The Government has been consistent in stating that it wishes to cut down the administrative burden on employers in order to boost business and hopefully employment. As its hands are tied in relation to the 30-days period (the minimum set by the EU Directive) it has only the 90 day period with which it can make changes.

There does however need to be balance between employer and employee interests - the document says it will focus on the quality of consultation rather than just the time it takes – this will help employees.

The current extended minimum consultation period may appear to be a safety net for employees to have a period in which to make representations or prepare for redundancy. However in practice the consultation period of 90 days does not appear to add anything of specific value. There will still be a requirement to carry out the consultation until such time as it is complete and the employee will still have the safety net of a notice period should the redundancy go ahead.

The interests of the employees are further protected by the ability to claim up to 90 days pay as compensation for a failure to carry out collective consultation. The retention of the maximum 90 day protective award – will help to balance the clear benefits that will result for employers.

##### **Question 2**

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

The choice of a 45 or a 30 day minimum consultation period are given as options. We prefer the 30 day consultation period for redundancies of 100 or more within a 90 day period.

This is because the 30 day period will be a **minimum** period. To the extent therefore that full consultation has not taken place during 30 days the onus would be on the employer to ensure that the consultation period continues until it has been completed. However, if a full consultation exercise has been concluded within 30 days, employees will have more certainty regarding their own positions and the business can effect the restructure more efficiently.

We recognise that it will be challenging for some employers to complete a meaningful collective consultation exercise within 30 days and this could impact on the quality of the consultation process if it is being rushed. However, we believe this risk will be reduced with the proposals for a comprehensive Code of Practice focusing on what should happen during a meaningful consultation process and the fact that the penalty for failing to comply with the collective consultation provisions will remain at 90 days pay per employee.

**Question 3**

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

We recognise there are potential difficulties that could result from a new legislative definition of "establishment" being implemented. However there are numerous other areas of employment law that are governed by EU Directives where key terms have been defined in UK law and having a legislative definition would help achieve some degree of certainty and so discourage litigation. The potential difficulties of dealing with the issue by way of new legislation needs to be balanced by the uncertainty created when guidance is implemented which is non statutory potentially creating a conflict between existing case law on the issue and the approach set out in the guidance.

It needs to be taken into account that in the EU the UK is almost unique in the way that it has implemented the Collective Redundancies Directive. The Directive gives member states a choice as to how to express when the collective consultation duties will be triggered. It appears that the other member states (with the exception of Holland) have chosen the option of stating that duties will be triggered when a certain percentage of employees at an establishment are to be made redundant. In contrast in the UK the duties are triggered when at least 20 employees are to be made redundant at one establishment. The contrasting means of implementation result in opposing approaches to the definition of "establishment". In the EU the smaller the establishment the greater the chance that consultation duties will be triggered. In the UK the smaller the establishment the less likely the consultation duties will be triggered.

In our view, on balance, new legislation would be preferable to guidance.

**Question 4**

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

To provide sufficient clarity for the definition of "establishment" any Code of Practice would need to be very comprehensive and address the weight to be placed on common factors such as location, organisation and management when assessing whether the operation is an "establishment". In our view the best way to provide clarity is to provide a statutory definition of "establishment".

**Question 5**

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

It would appear from recent case law - **University and College Union -Stirling University 2012** – that the issue of whether the expiry of a fixed term contract comes within the definition of a dismissal for a reason not related to the individual is unclear.

It had previously been regarded that the expiry of fixed term contracts would fall within the definition and so count towards dismissals that would trigger the collective consultation obligations on a redundancy.

The definition of redundancy for collective consultation in section 195 of TULRCA 1992 is wider than that for entitlement to redundancy pay in section 139 Employment Rights Act 1996.

Recently in **Greater Glasgow Health Board v Lamont 2012** the Scottish EAT confirmed that for the purpose of redundancy payment where a fixed-term contract is used to cover the absence of permanent employee, and the permanent employee returns to the same position, the expiry of the fixed-term contract will not be regarded as a redundancy – within the Employment Rights Act definition.

There is already some relevant legislation in place. The "Replacements" provisions in section 106 of the Employment Rights Act 1996 provides that dismissal of fixed term employees covering until the return of employees on maternity leave (or suspended due to medical grounds) will be by reason of SOSR rather than redundancy.

It would appear that these provisions have helped to avoid confusion and the addition of a further paragraph to state that the expiry of fixed term contracts would or would not fall within the section 195 definition should, in our view, again be considered. This would provide greater clarity than dealing with the matter through non statutory Code of Practice or guidance.

#### **Question 6**

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

The proposals favour more guidance rather than new legislation. The guidance is not legally binding and any disputes would ultimately be decided on the interpretation and application of the statutory provisions. This could lead to further complexity which would be contrary to the objective of simplifying the collective consultation process in order to promote positive engagement between employer and employees.

The introduction of new statutory provisions may help reduce the chance of that potential difficulty.

It would appear in particular that the treatment of the expiry of fixed term contracts for the purposes of TULCRA could be dealt with on a legislative level.

#### **Question 7**

***What changes are needed to the existing government guidance?***

The Guidance in relation to the definition of "establishment" as mentioned above will have to be provided in more detail. There should also be some further guidance in relation to the timing of dismissals. The collective consultation obligation provisions are triggered by dismissals taking place within a period of 90 days. The guidance should include an indication

as to whether that should be calculated looking forwards or not. For example if there are 2 'lots' of redundancies and the employees in the first lot were not collectively consulted - would the second lot trigger collective consultation if in total it was over 20? The general opinion is no but it is a point that could be covered in guidance.

Similarly warnings can be given in relation to avoidance tactics and what penalties an employer may face if deliberately staggering dismissals to get around the collective consultation provisions.

Practical issues in relation to the consultation process will need to be covered in the guidance. How meetings should be conducted, what needs to be discussed, who and how alternative proposals should be considered, suggested timetable of meetings etc.

In addition, any guidance would need to include comprehensive information about how collective consultation should be dealt with in insolvency situations.

**Question 8**

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

We believe it is very difficult to ensure the Code of Practice delivers the necessary culture change. Where the employer recognises a trade union, the trade union is likely to drive compliance with the Code. However, we do see difficulties arising where there is no recognised union. Elected representatives are very often inexperienced and have received no training on their duties as a representative for the purposes of collective consultation. This very often means that the consultation process is unbalanced in favour of the employer. This will need to be addressed if meaningful consultation and a better quality consultation process is going to be achieved.

**Question 9**

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

In our view training for elected representatives is a key issue.

We believe that the Government should consider producing a Guide for Elected Representatives with an on line training tool. The onus should be placed on the employer to ensure the elected representatives are provided with a copy of the Guide and given access to computer facilities to complete the on line training prior to consultation commencing.

It would be useful for the Guide/Training to include checklists for elected representatives and frequently asked questions so that elected representatives are much better prepared and equipped to undertake their role.

**Question 10**

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

There are no comments on the impact assessment results

**Question 11**

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

No comments on this

**Question 12**

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

No comments on this

**1. Your name:**

**Charles Russell LLP - Joanna Wort**

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

Charles Russell LLP

**3. E-mail address:**

Joanna.Wort@charlesrussell.co.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

Yes

**6. Which of the two proposed options should replace the 90-day minimum period?**

30 days

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes

**9. Please provide comments to support your answer.**

No Response

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

Yes

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

No Response

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

Yes

**14. What changes are needed to the existing Government guidance?**

Line1 - Simplification.

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

Line1 - It may be appropriate to give the code similar status to the current ACAS Code of Practice, with potential penalties for unreasonable non compliance.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

Line1 - In our experience, there is generally agreement to end collective consultation within a 30 day period.

Line2 - This is why we consider a 30 day period is the correct timeframe for all collective consultations.

Line3 - This would enable individual consultation to take place more quickly, which is generally what the workforce want, to reduce the period of uncertainty for them.

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

No Response

**REPRO DTP**

---

**From:** Joanna Wort [Joanna.Wort@charlesrussell.co.uk]  
**Sent:** 19 September 2012 15:25  
**To:** Collective Redundancies  
**Subject:** Collective redundancy consultation

**Attachments:** NFL1-#3331567-v1-Consultation\_on\_changes\_to\_collective\_redundancy\_rules.DOC



NFL1-#3331567-v1  
-Consultation\_...

Please find attached response to consultation, submitted on behalf of Charles Russell LLP (legal services firm - submitted by the employment team).

Many thanks.

Jo Wort

<<NFL1-#3331567-v1-Consultation\_on\_changes\_to\_collective\_redundancy\_rules.DOC>>

Joanna Wort | PSL Associate  
for and on behalf of Charles Russell LLP

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## CONSULTATION ON CHANGES TO COLLECTIVE REDUNDANCY RULES

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

YES

NO

NOT SURE

### COMMENTS

We consider that the Government's approach will assist businesses to reorganise more efficiently, without compromising employee rights.

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

30

45

NOT SURE

### COMMENTS

In our experience, meaningful consultation can be completed within a 30 day period. This has the benefit of allowing employers to restructure more swiftly, whilst also reducing the period of uncertainty for the workforce. The way that statute and case law is currently framed prolongs the uncertainty for the workforce. Employees want to know, on an individual basis, how they are going to be affected. Under the current regime, unless unions/ representatives agree that collective consultation can be brought to an end earlier than the statutory period, then no meaningful individual consultation can take place for some time.

If voluntary redundancies are part of the process, then these cannot currently be effected before the end of group consultation, which is inefficient. By reducing the group consultation period you help resolve the issues for individual employees more quickly, without detracting from the purpose of consultation. It will enable more meaningful consultation to take place.

We believe that the most efficient way going forward is to keep the consultation period at the same level for all collective consultation (ie reduce to 30 days for all collective consultations). We do not think that reducing the timeframe will detract from the purpose of consultation as in our experience the key issues are often agreed within a two to four week timeframe.

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

YES

NO

NOT SURE

**COMMENTS**

We agree that as this area is guided by European case law, attempting to define "establishment" would be too restrictive an approach to take. Some flexibility is needed to allow for changes in European decisions.

Some guidance on the position would however be welcome.

**4 Will defining "establishment" in a code of practice give sufficient clarity?**

YES

NO

NOT SURE

**COMMENTS**

We believe that this approach will give as much clarity as possible and should enable the parties to move on to the important aspects of consultation, rather than debating the issue of establishment. It will not however be possible for the guidance to cover every circumstance, so the guidance will need to be flexible and regularly revisited.

**5 Is the Government right to address the fixed term contract issue in guidance and the proposed code of practice rather than in legislation? Please provide comments to support your answer.**

YES

NO

NOT SURE

**COMMENTS**

The issue of employees on fixed term contracts and collective consultation obligations do not work well together. Often, a fixed term employee's contract will be expiring in any event, but to include them in the numbers for collective consultation may extend their contract.

We consider that the best approach would be to take fixed term workers out of the calculation of the number of redundancies being made for the purposes of collective consultation. This will not impact on the individual employment rights of those on fixed term contracts, just the collective consultation obligations. It will however enable the employer to manage redundancies more efficiently and with greater certainty.

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

YES

NO

NOT SURE

COMMENTS

Yes, subject to the comments at 5 above.

7 **What changes are needed to the existing Government guidance?**

Simplification.

8 **How can we ensure the code of practice helps deliver the necessary culture change?**

COMMENTS

It may be appropriate to give the code similar status to the current ACAS Code of Practice, with potential penalties for unreasonable non compliance.

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

YES

NO

NOT SURE

COMMENTS

We believe this would be disproportionately costly and inconsistent with available resources for other industrial relations issues.

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

YES

NO

NOT SURE

COMMENTS

N/A

- 11 **If you have been involved in a collective redundancy consultation in the last 5 years, how long did it take to reach agreement?**

COMMENTS

In our experience, there is generally agreement to end collective consultation within a 30 day period. This is why we consider a 30 day period is the correct timeframe for all collective consultations. This would enable individual consultation to take place more quickly, which is generally what the workforce want, to reduce the period of uncertainty for them.

- 12 **If you have carried out a collective redundancy consultation in the last 5 years, what affect, if any, did it have on your regular business during this time?**

COMMENTS

N/A

- 13 **Do you have any other comments that might aid in a consultation process as a whole?**

COMMENTS

Whilst ACAS can conciliate on claims for a protective award for failure to inform and consult, these claims cannot be settled in a compromise agreement. We think that this should be changed so that it is possible to contract out of these provisions in a compromise agreement, with all the related safeguards (such as the requirement of receiving legal advice) that these agreements offer.

1. Your name:

**City of London Law Society Employment Law Committee**

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

City of London Law Society Employment Law Committee

3. E-mail address:

Victoria.Kirke@pinsentmasons.com

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - Yes - at present. Given the uncertainty generated by the EU case law, notably Rockfon and Athinaiki, and in particular the observation of the Court in Rockfon that the term "establishment" cannot be

Line2 - defined by individual member states, any attempt by the UK to provide greater certainty in a now statutory definition would be doomed to fail, and would probably have the opposite effect.

Line3 - The only way in which the Government's desire for clarity can be achieved is for the ECJ to provide clearer guidance in a future decided case.

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

No

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

Line1 - In addition to our general observations about the limitations set out in the answer to question 4, we believe that the Government should legislate to provide much needed clarity in this important area

Line2 - If the Government is confident that it can seek to address the issue in guidance and a proposed Code of Practice, it should also be able to construct a workable statutory provision which would exclude

Line3 - the expiry of a fixed term contract from the scope of the collective consultation provisions, while limiting the scope for employers to abuse it. We would be happy to provide detailed comments and

Line4 - suggestions on any draft legislative provision in due course.

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

No

**14. What changes are needed to the existing Government guidance?**

Line1 - We would withdraw the guidance altogether.

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

Line1 - See our answer to 4 above. We do not believe that a Code of Practice would be likely to do so in practice. We look forward to a further opportunity to comment when a draft Code is made available.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - Effective training of employers and employee reps alike will clearly be helpful.

Line2 - However, we believe this is best provided and arranged by employers and / or Trade Unions on a voluntary basis and is not a matter for government.

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

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No Response

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

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No Response

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

---

No Response



**REPRO DTP**

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**From:** Kirke, Victoria [Victoria.Kirke@pinsentmasons.com]  
**Sent:** 19 September 2012 15:57  
**To:** Collective Redundancies  
**Subject:** City of London Law Society Submission  
**Importance:** High  
**Attachments:** City of London Law Society Submission.DOC

Dear Sirs

Please see attached Submission sent on behalf of the City of London Law Society Employment Law Committee.

Yours faithfully

**Victoria Kirke**

Legal PA to Gary Freer  
for Pinsent Masons LLP

D: +44 (0) 20 7054 2545 Ext: 2545  
Victoria.Kirke@pinsentmasons.com  
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## City of London Law Society - Employment Law Committee

### Submission to Consultation on Changes to the Rules on Collective Redundancies

#### Introduction

The Committee is a group of specialists in the field of employment law who practise in the City of London. It includes those who represent employers (many of them global employers) and employees, often the most senior employees. We see our role not as in any way political, but as a group of experts with the experience and expertise to contribute observations on the practicality and workability of any proposed legislation. A full list of the members of the Committee is annexed to this submission.

Our responses to the numbered Consultation questions are set out below.

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

Broadly, yes, subject to the following reservations;

- we have significant reservations about whether a Code of Practice and Guidance would assist Tribunals, employees and employers;
- we believe a failure to address the fixed term contract issue in legislation will represent a significant missed opportunity.

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

We consider that there should be a single minimum consultation period of 30 days, for the following main reasons;

- (i) it would simplify the law, and in particular;
  - a) it would reduce the scope for employers to seek to structure a redundancy programme to avoid crossing a threshold which would trigger a longer minimum consultation period, including in relation to the contentious issue of what constitutes an "establishment";
  - b) as a matter of principle and in practice it does not follow that any particular number of redundancies of itself gives rise to a need for a longer minimum consultation period.

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

Yes - at present. Given the uncertainty generated by the EU case law, notably Rockfon and Athinaiki, and in particular the observation of the Court in Rockfon that the term "establishment" cannot be defined by individual member states, any attempt by the UK to provide greater certainty in a now statutory definition would be doomed to fail, and would probably have the opposite effect.

The only way in which the Government's desire for clarity can be achieved is for the ECJ to provide clearer guidance in a future decided case.

**4 Will defining "establishment" in a Code of Practice give sufficient clarity?**

No, this can only be achieved by the ECJ, as noted above.

We also have significant reservations about non-statutory Codes of Practice and "guidance" in this and similarly difficult and contentious areas of EU and UK employment law. However well defined and well intentioned, all too often their status, and the extent to which regard should be had to them, is not clear to Tribunals, employers and employees alike. They add a layer of complexity and confusion and they give rise to unhelpful "satellite" issues. We

would prefer to leave it to the Tribunals and Courts to provide the necessary interpretation of and guidance on legislative provisions.

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

No. In addition to our general observations about the limitations set out in the answer to question 4, we believe that the Government should legislate to provide much needed clarity in this important area. If the Government is confident that it can seek to address the issue in guidance and a proposed Code of Practice, it should also be able to construct a workable statutory provision which would exclude the expiry of a fixed term contract from the scope of the collective consultation provisions, while limiting the scope for employers to abuse it. We would be happy to provide detailed comments and suggestions on any draft legislative provision in due course.

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

No - see the answers to questions 3, 4 and 5 above.

- 7 **What changes are needed to existing government guidance?**

See our answer to 4 above. We would withdraw the guidance altogether.

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

See our answer to 4 above. We do not believe that a Code of Practice would be likely to do so in practice. We look forward to a further opportunity to comment when a draft Code is made available.

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

Effective training of employers and employee reps alike will clearly be helpful. However, we believe this is best provided and arranged by employers and / or Trade Unions on a voluntary basis and is not a matter for government.

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

Not applicable.

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

Not applicable.

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

Not applicable.

## Appendix A

Member Name	Firm
Gary Freer (Chairman)	Pinsent Masons LLP
Elaine Aarons (Vice Chairman)	Withers Worldwide
Paul Griffin (Secretary)	Norton Rose LLP
Elizabeth Adams	DAC Beachcroft
Kate Brearley	Stephenson Harwood
Helga Breen	Lawrence Graham LLP
Oliver Brette	White & Case LLP
William Dawson	Farrer & Co
John Evason	Baker & McKenzie
Anthony Fincham	CMS Cameron McKenna
David Harper	Hogan Lovells LLP
Ian Hunter	Bird & Bird
Alan Julyan	Speechly Bircham LLP
Sian Keall	Travers Smith
Michael Leftley	Addleshaw Goddard
Jane Mann	Fox Williams
Mark Mansell	Allen & Overy LLP

Laurence Rees	Reed Smith
Nicholas Robertson	Mayer Brown LLP
Charles Wynn-Evans	Dechert LLP

**1. Your name:**

**Clarkslegal LLP - Kimberley Ferrier**

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

Clarkslegal LLP

**3. E-mail address:**

KFerrier@clarkslegal.com

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

Yes

**6. Which of the two proposed options should replace the 90-day minimum period?**

30 days

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

No Response

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



No Response

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

## REPRO DTP

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**From:** Kimberley Ferrier [KFerrier@clarkslegal.com]  
**Sent:** 19 September 2012 17:09  
**To:** Collective Redundancies  
**Cc:** Naureen Hussain  
**Subject:** Final Response to Collective Redundancy Consultation  
**Attachments:** Final Response to Collective Redundancy Consultation.pdf

Dear Sirs

Please see the attached.

Regards

**Kimberley Ferrier**  
Secretary

**T** 02075398036 | **Ext** 8036 | **M**  
**E** [KFerrier@clarkslegal.com](mailto:KFerrier@clarkslegal.com) | **F** 01189395728

**For Clarkslegal LLP**

[Read our Annual Review here](#)

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**Response to Consultation on Changes to the Rules on Collective Redundancies  
Submitted by Clarkslegal LLP**

**19 September 2012**

**1. DO YOU AGREE WITH THE GOVERNMENT'S OVERALL APPROACH TO THE RULES ON COLLECTIVE REDUNDANCY CONSULTATION?**

1.1. **The trigger for consultation:** In considering this broad question, we first considered whether the UK's choice of trigger for collective consultation (20 or more dismissals in a 90 day period, Article 1(a)(ii) of the Directive) was the right choice or whether employers would prefer the alternative trigger (a proportion of the workforce in a 30 day period, Article 1(a)(i)). Employers would have greater flexibility if they could choose in any particular redundancy exercise which of the two approaches to adopt. However, the general consensus amongst those we consulted was that the current trigger of 20 or more redundancies provides more certainty on when the obligation to consult is triggered and for that reason is preferred.

1.2. **Minimum consultation periods:** We have also taken views on whether it is preferable to retain minimum consultation periods or whether it should be left for employers to determine when consultation has been completed. Although removing the minimum consultation periods would significantly increase flexibility, we consider that it would go too far and not provide employees with an adequate level of protection. Many of the employers we consulted reported that the minimum consultation periods impose a standard timetable giving employers certainty, time to assess the situation and manage the whole process. There is concern that the removal of minimum consultation periods would naturally lead some employers to try to rush through the process as quickly as possible and this in turn would have a negative impact on the quality of consultation. In conclusion, we support the concept of minimum consultation periods.

1.3. **The primacy of trade unions:** We note the Government's position in relation to the primacy of trade unions under the collective consultation regime. An issue which we come across frequently when advising employers, and one which employers consulted for the purposes of this response also reported, is ensuring that the representatives in place for consultation adequately represent the views of all the affected employees. Specifically in the private sector, it is not uncommon for only a small minority of the affected employees to be members of the independent trade union recognised for collective consultation purposes. We consider that the key to meaningful consultation is the strength of the tri-partite relationship between the employer, the representatives, affected employees and the rest of the workforce. In our view, employers should have freedom to appoint representatives in a collective redundancy situation so that the affected employees are adequately represented. Although the current law permits employers to elect representatives in addition to the recognised trade union (and it may be useful to have guidance to highlight this), in practice, employers face difficulties in effectively managing a consultation process with union representatives and employee representatives. It is not uncommon for the union to insist on separate meetings and to take the lead in discussions. The current law should be amended to give greater flexibility, for example allowing the union primacy in the consultation process only where they have a certain proportion of the workforce in membership.

1.4. **Changes to terms and conditions:** Although we understand that the current consultation does not extend to the issue of changes to terms and conditions, this is by far the area which causes employers the greatest difficulties. We understand that the aim of the Government is to remove barriers which impede economic growth. Employers are obliged to consider alternatives before implementing

redundancies. One of the most effective ways of reducing the burden on business whilst avoiding redundancies is to change terms and conditions across the workforce or a particular group. Consultation should of course feature in any proposal to change terms and conditions. Indeed, the law on unfair dismissal already provides employees with protection against unfair changes or changes which are implemented unfairly. We do not consider that imposing the current collective consultation regime onto any proposal to make mass changes to terms and conditions is necessary or proportionate. Employers should be able to change terms and conditions more simply over a period of 30 days. Further guidance is needed on how employers should approach collective consultation in relation to mass changes to terms and conditions, particularly on the issue of when such consultation should commence.

- 1.5. **Meaningful consultation:** We agree that employers and representatives should all work towards meaningful consultation. We consider that user-friendly, practical guidance should be available to employers setting out what consultation means in practice and what steps they can take to improve the quality of the consultation. For example, the guidance should include a step by step model consultation process analogous to the ACAS Code of Practice on Disciplinary and Grievance Procedures. The guidance should also cover what information should be made available to the representatives, addressing the particularly difficult issue of sensitive company documents.
- 1.6. **Training:** Continuing the theme of strong relationships based on mutual respect, many of the employers we consulted agree that there is a lack of information and guidance available for employee representatives. The proposed guidance should include a specific section for employee representatives setting out their rights and obligations, but in a practical, user-friendly format. Employers who provide training to the representatives consider that this has a direct impact on the quality of the consultation. However, not all employers can afford to provide such training and it is considered that information and guidance from a neutral source, endorsed by the Government is more likely to be accessed and taken on board by the representatives. Providing information and guidance will help representatives understand the parameters of their role thereby increasing their effectiveness. Education of representatives on the scope of the collective consultation obligation will also in our view improve the quality of the consultation by reducing the scope for dispute. Too often employees volunteer as they see it as their chance to have their say, without realising that they are responsible for representing all of the affected employees. Information and guidance should also cover how representatives should present information to employees in a way that enables them to more fully participate in the process thereby improving employee engagement in the process which would have a positive impact on morale.
- 1.7. **Communication:** As explained above, the general consensus is that a strong relationship between the employer, representatives and the workforce based on mutual respect is the key to meaningful consultation which results in minimal disruption to the business. Communication is a key aspect of this but one which is severely underestimated. Poor communication during a redundancy exercise can have a significant adverse impact on the morale of the affected employees and the wider workforce. Government guidance should include advice to employers on how to manage the communication process during the consultation process, particularly as employers report to us anxiety and uncertainty around how they may communicate with the affected employees and the extent to which such communications need to be in conjunction with the representatives.
- 1.8. **Protective Award:** All but one employer we spoke to felt that the current protective award is too high. Even on the basis that the award is punitive rather than compensatory a potential 30 days award per employee would still be dissuasive to

most employers. In addition, it is often not the only award open to employees in any event; dismissed employees still have unfair dismissal rights (subject to the qualification criteria being met). The current level of protective award is sometimes used as a trade union strategy to tackle a campaign point. The risk of 90 days' pay per employee could potentially put some employers out of business and therefore goes further than is necessary to achieve the aim of encouraging employers to comply with the legal requirements to collectively consult. Furthermore, if the consultation was simplified as proposed it is likely that more employers would commit to the process. We do not consider that the current protective award is proportionate or achieves the Government's aim. In some cases it could lead to a breakdown in the relationship between employer and employee representative that is vital to good consultation.

**2. WHICH OF THE TWO PROPOSED OPTIONS SHOULD REPLACE THE 90-DAY MINIMUM PERIOD AND WHY?**

2.1. We support the proposal to reduce the 90 day minimum period for the following reasons:

- 2.1.1. The 90 day period hampers an organisation's ability and/or appetite to make organisational changes required to respond to market changes; and adversely impacts an organisation's ability and/or appetite to tender for work where a mass redundancy process would apply following a TUPE transfer;
- 2.1.2. The 90 day period has a significantly adverse impact on employee morale and risks disengaging employees, including those who are not affected by the redundancy proposal; in particular, it risks affected employees who would otherwise have survived the redundancy (selection) process feeling anxious and insecure and finding work elsewhere (potentially leading to the wrong people leaving the business or more job losses than might have been necessary);
- 2.1.3. Employers faced with onerous and costly consultation obligations may decide to dismiss the largest number of employees that they need to in order to justify the cost of the whole process. However, if there was a shorter minimum consultation period, employers might not need to make so many redundancies as the less onerous obligations would represent a huge cost saving;
- 2.1.4. Employers look to ways of avoiding triggering the 90 day consultation including staggering the dismissals and narrowly interpreting "establishments". We consider that reducing the 90-day minimum would reduce the need for this practice considerably;
- 2.1.5. There is not necessarily a nexus between the number of proposed redundancies and the complexity of consultation required;
- 2.1.6. The current trigger point of 100 dismissals is an arbitrary figure;
- 2.1.7. The process is a significant drain on HR and management resource, with everyone being focussed on managing the redundancies and line managers having to deal with usual staffing issues;
- 2.1.8. Factors other than the number of employees impacts on the complexity of the consultation and therefore the timeframe over which the consultation discussions need to take place. Those factors are inextricably linked to the particular business proposing the redundancies and it should therefore be a matter for that business, in consultation with the representatives, to decide the appropriate consultation period;
- 2.1.9. The current 90-day minimum period can be met with resistance by decision

makers in businesses and this can shift the focus away from meaningful consultation to simply ensuring that the boxes are ticked to be able to implement redundancies as soon as possible on or following the 90 day period.

- 2.1.10. There was overwhelming agreement that the 90-day minimum period is too long. One employer that recently underwent a large restructure of its business affecting 178 staff commented that even though consultation took time, as employees were located at various sites across the country, they did not require 90 days in which to properly and meaningfully consult with them. In their experience, it was demoralising for affected employees to have to wait for this length of time before they were told whether or not they were to be made redundant. Employers are concerned that where 90 days' consultation is required this often leads to employees experiencing three months' of silence and being needlessly concerned about their job security, for example when the likelihood of them being actually selected for redundancy is relatively low.
- 2.2. For those reasons, we submit that there should be one 30-day minimum consultation period when an employer proposes 20 or more redundancies at any one establishment. The majority of employers we consulted agreed with this approach, rather than reducing the current 90 days consultation period to 45 days or some other period longer than 30 days.
- 2.3. One further point to note in support of the view that a 90-day minimum period is too long is the minimum consultation period under pensions law. The fact that 60 days consultation is regarded as sufficient to discuss pension changes, which are invariably more complex and detailed, indicates that the current law on collective redundancies is overly burdensome.
3. **DO YOU AGREE WITH THE GOVERNMENT'S ASSESSMENT OF THE RISKS OF TAKING A LEGISLATIVE ROUTE ON THE ISSUE OF ESTABLISHMENT?**
- 3.1. We agree with the Government's assessment and do not consider that the concept of establishment should be addressed in legislation. Indeed, case law has established that "establishment" is a community concept and not open to Member States to define the term in national legislation.
4. **WILL DEFINING ESTABLISHMENT IN A CODE OF PRACTICE GIVE SUFFICIENT CLARITY?**
- 4.1. Practical guidance on how an establishment is defined is welcomed. The guidance should be user friendly and make reference as far as possible to examples or case studies.
5. **IS THE GOVERNMENT RIGHT TO ADDRESS THE FIXED TERM CONTRACT ISSUE IN GUIDANCE AND THE PROPOSED CODE OF PRACTICE RATHER THAN IN LEGISLATION?**
- 5.1. In view of the uncertainty on this issue following the University of Stirling v University and College Union judgment, we would welcome clarification on the treatment of the expiry of fixed term contracts under the collective redundancy consultation regime. Our position, endorsed by the employers we have consulted, is that the non-renewal of a fixed term contract upon expiry should only count as a dismissal for the purposes of collective redundancy consultation if the reason for non-renewal (ie dismissal) is connected to a wider scale redundancy exercise. However, if the reason is unconnected to any wider redundancy exercise, the non-renewal of the contract should not count towards the number of redundancies contemplated for the purposes of triggering collective consultation and neither should the particular employee be considered an affected employee.
6. **HAVE WE GOT THE BALANCE RIGHT BETWEEN WHAT IS FOR STATUTE AND WHAT IS CONTAINED IN GOVERNMENT GUIDANCE AND A CODE OF PRACTICE?**

6.1. We consider that the basic framework should be set out in legislation and that employers should have flexibility to determine how to apply that framework in the particular circumstances that apply to them. We therefore prefer an approach whereby the basic legislative framework is supported by good practice guidance produced by ACAS in a user-friendly, practical format.

6.2. We do not consider that there is benefit in government issuing both a non-statutory code of practice and guidance. This is likely to confuse employers. We consider that guidance material alone would suffice.

**7. WHAT CHANGES ARE NEEDED TO THE EXISTING GOVERNMENT GUIDANCE?**

7.1. This question is addressed above.

**8. HOW CAN WE ENSURE THAT THE CODE OF PRACTICE HELPS DELIVER THE NECESSARY CULTURE CHANGES?**

8.1. As explained above, we do not consider that a code of practice is necessary. A user-friendly, practical guidance note issued by ACAS would be preferred. We have set out below some other suggestions for delivering culture change.

**9. IF THERE ARE OTHER NON-LEGISLATIVE APPROACHES THAT COULD ASSIST EG TRAINING?**

9.1. **HR1 form:** The general consensus is that the current HR1 form is impractical and out of date; it should be reviewed and updated. For example, the "occupational group" categories in question 6 are inflexible and often do not apply to modern organisational structures. In practical terms, the form must be printed off and completed by hand which is time consuming. In addition, many employers have expressed concerns over how to complete it correctly.

9.2. We consider that it would be easier and more cost effective for employers to be able to complete and submit a simplified version of the HR1 form online. The employer should receive an automated email response which confirms safe receipt of the form and signposts the employer to sources of Government guidance as well as details of how to access support from Jobcentre Plus and other agencies.

9.3. **Jobcentre Plus Training and Support:** The support on offer needs to be better publicised. Most employers we consulted had not been aware of the support on offer from Jobcentre Plus. One not-for-profit organisation reported to us that they organised for Jobcentre Plus staff to conduct a benefits workshop for their at risk staff. However, they found that it was very difficult to access the Jobcentre Plus services and that significant time and effort was expended to achieve the desired result. There were logistical difficulties in that there was no main contact and different branches dealt with things differently, so that one centre could not easily provide assistance to employees across all of the affected sites. Only one of the employers we spoke with had reported a positive experience of accessing Jobcentre Plus although that was several years ago. We consider that there should be one website which contains all links to information, guidance and support to employers, employees and representatives involved in a redundancy exercise. As suggested above, the automated response to the HR1 form submission should direct employers to this website to increase awareness of all sources of support.

9.4. See our other suggestions in question 1 above.

**10. HAVE WE CORRECTLY IDENTIFIED THE IMPACTS OF THE PROPOSED POLICIES?**

10.1. No comment.

**11. IF YOU HAVE BEEN INVOLVED IN A COLLECTIVE REDUNDANCY CONSULTATION IN THE LAST 5 YEARS, HOW LONG DID IT TAKE TO REACH AGREEMENT?**

11.1. None of the employers we consulted had experience of a consultation process which continued for longer than 45 days.

**12. IF YOU HAVE BEEN INVOLVED IN A COLLECTIVE REDUNDANCY CONSULTATION IN THE LAST 5 YEARS, WHAT EFFECT, IF ANY, DID IT HAVE ON YOUR REGULAR BUSINESS DURING THIS TIME?**

12.1. Please see the answers to questions 1 and 2 above.



**1. Your name:**

**DAC Beachcroft LLP - Louise Bloomfield**

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

DAC Beachcroft LLP

**3. E-mail address:**

lbloomfield@dacbeachcroft.com

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

Put together with one their clients

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

Not sure

**6. Which of the two proposed options should replace the 90-day minimum period?**

30 days

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes

**9. Please provide comments to support your answer.**

No Response

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

No

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

No Response

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

Not sure

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

Not sure

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

**REPRO DTP**

---

**From:** Bloomfield, Louise [lbloomfield@dacbeachcroft.com]  
**Sent:** 19 September 2012 17:09  
**To:** Collective Redundancies  
**Subject:** Response to Consultation on changes to the rules re Collective Redundancies  
**Attachments:** FINAL response\_110274638\_1.PDF

Dear Sirs

Please see the attached response to the above named Consultation.

Yours faithfully

**Louise Bloomfield**

Associate - Employment & Pensions Group  
DAC Beachcroft LLP  
7 Park Square East, Leeds LS1 2LW

T: +44 (0)113 251 4717

M: +44 (0)7595 122 689

E: lbloomfield@dacbeachcroft.com

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## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**

**Your details**

Name: Louise Bloomfield, Associate

Organisation (if applicable): DAC Beachcroft LLP

Address: 7 Park Square East, Leeds, LS1 2LW

Telephone: 0113 251 4717

Fax:

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative - *this response was put together in conjunction with one of our clients.*
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

## Responses to Government's Consultation on Collective Redundancy Consultation

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

Not sure

In light of the evidence gathered and the experience of clients, a reduction of the 90 day minimum period will be beneficial, in particular in light of the extra wages incurred in a 90 day minimum period and also the uncertainty this often causes employees.

However, the focus appears to be on redundancy situations (i.e. employees leaving) whereas collective consultation is also applicable to changing terms and conditions. Clarity over whether any distinction is to be drawn between this and actual departures by reason of redundancy should be provided.

It is not clear what impact the proposed Code of Practice will have (e.g. will there be any penalty for non-compliance or will non-compliance be taken into account for determining a failure to comply with s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULCRA")). Moreover, the proposal to deal with the definition of "establishment" and how to manage collective consultations in respect of fixed term workers may therefore not be best served in a Code of Practice but by way of guidance. Indeed, it is not clear why a Code of Practice is necessary at all; overall guidance may be simpler and easy to engage with and will not over burden employers and employee representatives alike.

2. Which of the two proposed options should replace the 90-day minimum period? (30 days or 45 days). Please explain why you think your choice would better deliver the Government's aims than the alternative option.

30 days

Whilst it is accepted that a 90 day period has the greatest impact in terms of additional costs for employers and uncertainty for employees, it is considered that replacing it with a minimum 45 day period will not bring with it significant benefits.

We consider that it would be simpler to have a 30 day minimum period for all relevant consultations. This would ensure that all stakeholders in the process know exactly where they stand, particularly where a single change programme affects a number of establishments of varying sizes. It would also reduce instances of employers seeking to organise themselves and the change in such a way as to be able to argue that the shorter minimum consultation period applies.

It is worth highlighting that the consultation periods set down in s.188 TULCRA are **minimum** periods and therefore if a larger redundancy requires a longer period of time for consultation, this is not prohibited by the legislation, but driven by business need. Therefore a 30 day minimum period irrespective of the number of employees affected will not be detrimental to the requirement to consult meaningfully with a view to reaching agreement.

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

Yes

It is agreed that there should not be a statutory definition of establishment as this does not take account of the differences in employers across the UK ranging from single site/single operations to multi site, multi-operational employers. In the majority of cases where redundancies take place at different geographical sites, each site will be an "establishment". However, courts and tribunals are required to look at functional/organisational structure as well as purely geographical factors. For multi-site, multi-operational employers, it is more likely in practice that separate sites may be aggregated to

form one establishment. It is also likely that an organisational grouping of employees is sufficiently cohesive to be treated as an establishment in its own right, even if in practice the employees are at separate locations or have no specific location at all. Equally it is not uncommon for an employee to have employees from more than one establishment at a single site. Therefore, employers should be given sufficient freedom in defining the establishment for it to make sense within their organisation.

It is also considered that the reduction of the consultation period is likely to result in far less emphasis on the definition of establishment in many cases, particularly if there is a 30 day minimum consultation period adopted.

Moreover, we agree with the Government's rejection of the suggestion of using "undertaking" instead of "establishment" as this would cause more confusion on an already multi-layered concept.

#### **4. Will defining "establishment" in a Code of Practice give sufficient clarity?**

No

Although the Code of Practice is said to be non-statutory, it is not clear what potential consequences there would be for failure to adhere to it. We are concerned about "defining" what an establishment is as an establishment should be determined based on the nature of the employer and how it structures its own organisation. Factors set out in case law which refer to location, organisation, function, permanence, stability and where an employee is assigned are all relevant and useful for employers to refer to.

A definition of establishment would, given the diverse nature of employers across the UK, be too restrictive; it should be left to the employer to determine what is reasonable in the circumstances, and for an employee/employee representatives to challenge this if it is felt that it is inappropriate. Guidance will be helpful for employers and representatives as to what factors constitute an establishment but without any one factor being expressed as being determinative.

In addition, for employers where restructures and reorganisations are commonplace, the issue of what an establishment is may have already been agreed with or understood by employee representatives or trade unions, or indeed be enshrined in collective agreements. Therefore providing a definition of establishment in a Code of Practice will be unhelpful whereas guidance to assist employers would be more appropriate.

Most importantly there should be consistency between the s.188 and s.193 TULCRA (HR1 form) requirements, with the latter currently focussing on geography as opposed to the actual business submitting the HR1.

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

No

We consider that the issue of fixed term workers should be addressed in the legislation rather than a Code of Practice. There is already an exemption in TULCRA for fixed term contracts of less than 3 months so we do not agree that it would be difficult to construct a legislative exemption for fixed term workers. At present, the problems created by fixed term contracts mean that the collective consultation rules demand that where an employer proposes to dismiss more than 20 employees at one establishment in a 90 day period, collective consultation is triggered. However, a number of businesses have peaks in work where significant numbers of fixed-term employees may be required.

When the requirement for these employees ceases, the proposed termination of the fixed term contracts (where the number is 20 or more at one establishment) triggers collective consultation which means that they cannot be dismissed within a 30 or 90 day period. This largely negates the reason why fixed term contractors have been hired in the first place, namely certainty as to duration of time with an employer. Indeed for some fixed term contractors, they want this certainty. Furthermore, for

other employers such as academic institutions, they will have rolling fixed term contracts and may unwittingly be triggering s.188 TULCRA routinely throughout the year as fixed term contractors come and go.

Given that fixed term contractors are recruited on that basis (i.e. for a fixed term) and they know when their employment is going to be coming to an end, adding the potential for collective consultation appears unnecessary and does not offer them any more protection than is already afforded to them under their fixed term contracts. It also adds additional cost and time burdens for employers. The collective consultation rules should only apply to those employees for whom the termination of their employment is not an anticipated event (unlike the expiry of fixed term contract) so as to allow for a period to seek redeployment/retraining and to understand the business reasons for their proposed redundancy.

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

Not sure

The threshold for the minimum period for consultation (i.e. the reduction from 90 days to either 30 or 45 days) has to be addressed in legislation.

As per our response to question 5 above, we consider that the issue of fixed term workers could be addressed in TULCRA by way of an exemption.

The list of what is to be included in the Code of Practice (section 3.24 of the Consultation Paper) is ideal by way of guidance for employers and employees and should be designed to complement s.188 TULCRA. However it is not clear what the ramifications will be for failure to adhere to the Code of Practice and therefore it is difficult to assess what should be guidance only and what should be in the Code of Practice (although it is our view that there should be no Code of Practice at all). We consider that s.188 TULCRA already carries with it stringent penalties for non-compliance and therefore would prefer it to be supplemented by guidance only.

**7. What changes are needed to the existing Government Guidance?**

Please see the response to question 6 above regarding our concerns in respect of the distinction between a Code of Practice and guidance.

As it stands the guidance predominantly focuses upon redundancies (i.e. employees actually leaving their employers) whereas s.188 TULCRA is much broader than this in that it captures changes to terms and conditions affecting 20 or more employees. Often employers and employees are confused by this subtlety and therefore the guidance should also address this specific aspect of collective consultation.

**8. Have can we ensure the Code of Practice helps deliver the necessary cultural change?**

We consider that a Code of Practice will add an extra layer of bureaucracy to the collective consultation process.

We do not consider that introducing uplifts and downlifts in compensation will be conducive to facilitating change, given that we consider that this will serve to make the whole process of consultation adversarial and the parties will focus more on who has not done something, rather than the subject of the consultation itself. Moreover, s.188 TULCRA, as articulated further through case law, is already recognised by employers and employees alike as being something to not enter into lightly. Therefore, at best, the Code of Practice should be informative only (akin to guidance) and to help facilitate meaningful consultation rather than to create an extra burden for the parties.

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

Yes



We recognise that for certain employers collective consultation can be daunting, in particular given the potential financial ramification for getting it wrong and also if an employer has not carried out collective consultation before. It may therefore be useful to have an advisory line for employers and also training available.

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

Not sure

As per section 3.21 of the Consultation paper, we agree that the reduction of the 90 day minimum period should help mitigate the problems caused by the establishment issue, in particular if there is 30 day minimum consultation period across the board, as it will mean that the risk of employers seeking to deliberately narrowly draw an establishment in order to circumvent the 90 day consultation period will be removed.

However, we do not agree that the reduction of the 90 day minimum period will help to alleviate the practical problems associated with the end of fixed term contracts. Please refer to the answers to questions 4 and 5 above.

In addition to the proposed legislative changes, we also recommend that the HR1 form is amended to recognise that employers can draw establishments along functional lines as well as geographical lines. This is inextricably linked to the factors which lead to an employer determining what the establishment is and this may be along functional as opposed to geographical lines. We have seen HR1 forms being rejected by BIS on the basis that the numbers of proposed redundancies at specific locations has not been provided. This is in spite of the fact that case law confirms that establishments do not have to be geographically drawn; they can be organisationally or functionally drawn too.

If the Government is minded to introduce guidance on what an establishment is, recognising that it is multi-faceted, this also needs to be reflected in the HR1 form too.

Finally, we are concerned about the impact of changes to the UK legislation and similar changes not being made in Northern Ireland. A number of UK employers have operations in Northern Ireland and when dealing with a large scale restructure, where there may be establishments which cut across the UK and Northern Ireland, this may create a conflict of laws in terms of the minimum periods for consultation, for example.

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

It is worth highlighting that the law enshrined in TULCRA and the case law does not insist on agreement being reached, but rather consultation "with a view to reaching agreement". From experience, given that often collective consultation is almost always a pre-cursor to people leaving a business, employee representatives especially trade unions, will never be seen to agree with an employer regarding its proposals. However it is fair to say that during the process of consultation, common ground is reached on elements of the deployment of the proposal to make redundancies, such as the level of redundancy payments, the dates for employees leaving the business, or the selection criteria. Therefore "agreement" can be possible on the "how to effect the redundancies" rather than the "why the redundancies are required". However, actual agreement should not be a legal requirement.

The length of time taken in a consultation very much depends on the subject matter of the consultation. If it is a site closure or redundancies which are clearly required following the loss of a contract, then the length of time required can often be much shorter than, for example, a consultation relating to a reorganisation where the basis for this is subject to much more scrutiny. In this respect, clarity on the question of when consultation should start and what is required in the context of the "reasons for redundancies" would be welcomed.

**12. If you have been involved in a collective redundancy consultation in the last five years,**

**what effect, if any, did it have on your regular business during this time?**

Any collective consultation exercise does have an impact on business in terms of the creation of uncertainty for employees (including those not directly affected). It is also a distraction from the day to day running of business, and, in particular, if the consultation is on a national scale, can also generate press interest which heightens sensitivities.

Furthermore, if an employer consults with a trade union as part of the process, often the trade union will use co-operation in the process as leverage for other negotiations such as those relating to pay. This may therefore lead employers to seek to time consultations to minimise disruption from an industrial relations perspective, rather than to focus on what is the best timing from a pure business perspective.

1. Your name:

**DAS - Simon Roberts**

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

DAS

3. E-mail address:

simon.roberts@das.co.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - This is a sensible compromise

Line2 - any business making 100+ redundancies will have a major

Line3 - impact locally and employee do need time to prepare for

Line4 - being out of work

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

No Response

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Yes

12. Please provide comments to support your answer.

Line1 - As there will be circumstances where consulting Fixed Term

Line2 - Employee is reasonable by mentioning it in the code, that puts

Line3 - the Focus back on the employer to be reasonable in the

Line4 - circumstances.

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

Yes

14. What changes are needed to the existing Government guidance?

No Response

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

Line1 - An uplift/reduction of compensation where the employer/employee

Line2 - unreasonably fails to follow the code.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

Line1 - less than 30 days

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

Line1 - I have advised employers on collective redundancies and

Line2 - a well run business will have prepared for the redundancy anyway

Line3 - prior to the start of the consultation period. this often makes

Line4 - the 90 day period very long for both employer and employee. quite often this is a stagnant period where the employer must carry on losing money

Line5 - remember that after a 90 day period is often followed by a notice period of up to 12 weeks

**1. Your name:**

**DLA Piper UK LLP - Jonathan Exten-Wright**

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

DLA Piper UK LLP

**3. E-mail address:**

Jonathan.Exten-Wright@dlapiper.com

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

No Response

**6. Which of the two proposed options should replace the 90-day minimum period?**

30 days

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes

**9. Please provide comments to support your answer.**

No Response

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

No

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No Response

**12. Please provide comments to support your answer.**

No Response

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

No Response

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

**REPRO DTP**

**From:** Exten-Wright, Jonathan [Jonathan.Exten-Wright@dlapiper.com]  
**Sent:** 19 September 2012 17:17  
**To:** Collective Redundancies  
**Cc:** Wallace, Sandra; Lord, Katie

Dear Mr Davies

Please find below DLA Piper UK LLP's response to the Government's consultation on collective redundancies:

**Reduction in the 90 day period: 30 v 45 days**

We do not see any significant advantage in having 45 days as opposed to 30 days as the minimum requisite consultation period before redundancies of 100 or more employees can take place. The option potentially risks being seen as an arbitrary distinction as against the 30 day threshold where less dismissals are intended. The proposal to reduce the 90 day period as a barrier to prompt, effective action may well be correct. We would hope that a shorter redundancy process would assist with morale and reduce uncertainty. It will, of course, be possible to continue consulting beyond the minimum period and we would assume that the consultation period would be extended where required. We are of the opinion, therefore, on balance, that the minimum consultation period should be reduced to 30 days.

**A new non-statutory code of practice**

We understand that the Government intends this to address the principles and behaviours behind good quality consultation. We would suggest that any Code introduced would have to be flexible enough to cover a variety of possible redundancy situations.

**Proposal to define establishment**

We suspect that any attempt to define 'establishment' in a Code of Practice or legislation may prove problematic. We would suggest that instead of a statutory definition of 'establishment', guidance as to factors to take into account when determining "establishment" would be useful.

Kind regards

Jonathan

**Jonathan Exten-Wright**  
Partner

T +44 207 796 6619  
F +44 207 153 7706  
M +44 7971 142188  
E jonathan.exten-wright@dlapiper.com



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**1. Your name:**

**Doyle Clayton Solicitors Limited - Gemma Ford**

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

Doyle Clayton Solicitors Limited

**3. E-mail address:**

GFord@doyleclayton.co.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

Yes

**6. Which of the two proposed options should replace the 90-day minimum period?**

Not sure

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes

**9. Please provide comments to support your answer.**

No Response

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

Yes

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes

**12. Please provide comments to support your answer.**

No Response

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

Yes

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Not sure

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

**REPRO DTP**

**From:** Gemma Ford [GFord@doyleclayton.co.uk]  
**Sent:** 19 September 2012 15:40  
**To:** Collective Redundancies  
**Cc:** Tina Wisener; Piers Leigh-Pollitt  
**Subject:** Collective Redundancies: Consultation on changes to the rules: Response Form  
**Attachments:** 2995\_001.pdf

**For the attention of: Carl Davies**

Please find attached Doyle Clayton's Response Form.

Please acknowledge safe receipt.

Kind regards

Gemma Ford

Gemma Ford  
Administration Manager, Reading  
Doyle Clayton Solicitors Limited  
Sovereign House, Vastern Road, Reading RG1 8BT

T: 0118 959 6839  
F: 0118 956 1749  
E: GFord@doyleclayton.co.uk  
W: [www.doyleclayton.co.uk](http://www.doyleclayton.co.uk)



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## **Collective Redundancies: Consultation on changes to the rules : Response form**

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<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**

## Your details

Name:

Organisation (if applicable): Doyle Clayton Solicitors Limited

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

Please see attached.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Please see attached.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Please see attached.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

Please see attached.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Please see attached.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

Please see attached.

**Question 7: What changes are needed to the existing Government guidance?**

Please see attached.

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

Please see attached.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

Please see attached.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

Please see attached.

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

Please see attached.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

Please see attached.



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**URN 12/808**

### Question 1

The three objectives for reform are laudable. It is doubtful that the quality of consultation will improve because of the publication of a new Code of Practice, but perhaps the fanfare of publicity will make employers visit the new Code where previously they might have blundered through it themselves. It is very important to enable businesses to restructure effectively and not lose out in a global market to competitors in Europe and beyond who are not constrained by any minimum consultation period.

### Question 2

The two options are: 45 days for 100 plus redundancies or 30 days for all collective redundancies. We think they both achieve the stated purposes, apart from reducing redundancy numbers. We cannot see that a shorter period will achieve this.

A shorter period will lead to quicker restructuring and administrative/ wage costs savings. However it may lead to greater costs in the form of tribunal claims and 90 day protective awards as there is a danger employers will think the shorter period allows them to shorten the process in all cases and issue dismissal notices even where consultation is not complete.

Having the same minimum period for all "collective" redundancies should reduce focus on what is an establishment (and associated difficulties) and temptation to divide up redundancies into smaller tranches.

In our experience employers and employees often want to know the outcome of consultation as soon as possible. We find that meaningful consultation is often finished well within one month, and employers want to address concerns with individuals. It is often the individuals' concerns that take up the time, and it would be useful to have clarification in the Code that employers may speak with individuals while collective consultation is on-going, provided it is made clear that any issues that are properly to be decided by the employee representatives are not dealt with in individual consultation.

Further, if employers are encouraged to use electronic communication to disseminate information, this is likely to speed up the consultation process.

We agree that consultation should be shortened significantly, and do not have a strong view as to whether it should be reduced to 45 or 30 days. We consider both options would better achieve the Government's aims because:

- It would lead to administrative/ wage costs savings
- Employers can restructure more quickly
- There is a quicker resolution that balances the interests of employees made redundant and those who remain. If collective consultation is not completed in that time, it should continue as these are minimum periods. Any guidance should stress the fact that these are minimum periods.

### **Question 3**

Since Rockfon says that the term "establishment" cannot be defined by reference to the laws of Member States, it would be dangerous to attempt to do so and can only lay us open to a challenge for failing to implement the Directive properly.

### **Question 4**

See above.

### **Question 5**

There is a risk of gold-plating if the Government addresses the issue in legislation (gold-plating is something it is seeking to avoid) rather than simply "copying out" the Directive wording, which is the current position. Provided the guidance/code is detailed, it should be able to deal with the issue more clearly than in legislation.

### **Question 6**

It is not currently clear what the difference will be between guidance and code of practice.

### **Question 7**

The guidance needs to be more detailed. At the moment it is a basic summary of the law, but it needs more detail and practical examples. A step by step approach would be helpful, with suggested timelines and sample letters etc.

### **Question 8**

The Code of Practice cannot deliver any culture change, although a PR campaign may assist. The Code of Practice should focus on the benefits to organisations of having an effective consultation process. At present, fixed consultation periods are all too often seen as hurdles to be overcome, particularly where there are site closures and where employers may think that consultation will be futile. If the Code of Practice can give assistance as to the matters that can and should be consulted about in such circumstances, that may help to deliver a culture change.

### **Question 9**

Not sure – there may be some organizations that would benefit from training, but in our experience, most organizations will not spend the time on such matters until they are directly affected by them. Training that is directed at HR professionals may bear fruit and assist with any culture change.

### **Question 10**

No comment on the impact assessment.

### **Question 11**

Our experience comes from advising organisations with their collective redundancy consultations. Agreement is generally reached with the employee representatives at a relatively early stage (often

well within the first 30 days), as the representatives' constituents tend to want to push for individual consultation which does not start until the collective consultation is completed. The representatives often feel that they can and do make a difference on peripheral matters but tend to recognise that on fundamental issues (such as whether to close a site or not or the selection criteria that determines which groups of employees are saved and which are not) they will not have any sway over management. Agreement on the principles behind redundancies is therefore often reached at any early stage.

#### **Question 12**

We would need to collate evidence from our clients before being able to provide a meaningful response to this question.

**1. Your name:**

**Employment Lawyers Association - Lindsey Woods**

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

Employment Lawyers Association

**3. E-mail address:**

lindseyw@elaweb.org.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

No Response

**6. Which of the two proposed options should replace the 90-day minimum period?**

No Response

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

No Response

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No Response

**12. Please provide comments to support your answer.**

No Response

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

No Response

**14. What changes are needed to the existing Government guidance?**

---

No Response

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

---

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

---

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

---

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

---

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

---

No Response

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

---

No Response

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

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No Response

## REPRO DTP

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**From:** Lindsey Woods [lindseyw@elaweb.org.uk]  
**Sent:** 18 September 2012 11:24  
**To:** Collective Redundancies  
**Cc:** John Evason; 'Harrison, Paul'; b.mckenna@unison.co.uk  
**Subject:** Collective Redundancies: Consultation on changes to the rules  
**Attachments:** ELA Response\_Collective Redundancy Consultation\_18Sep12.pdf

Please find attached the response from the Employment Lawyers Association (ELA) to the above consultation.

I would be grateful if you could confirm safe receipt.

Regards,

Lindsey Woods  
Head of Operations  
Employment Lawyers Association

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**Collective Redundancies:  
Consultation on changes to the rules**

**Response from the Employment Lawyers Association**

**18<sup>th</sup> September 2012**



# **Collective Redundancies: Consultation on changes to the rules**

## **Response from the Employment Lawyers Association**

### **INTRODUCTION**

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of the ELA under the chairmanship of John Evason and Paul Harrison of Baker & McKenzie LLP to consider and comment on the Consultation on changes to the rules on collective redundancies. Its report is set out below. A full list of the members of the sub-committee is annexed to the report.

Our comments are set out against the consultation questions.

### **Questions**

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

We agree that the overall approach is sensible, save that we consider that a statutory solution to the fixed term contract issue would be preferable.

In addition, we note that there are no proposals relating to the issue of insolvency and collective consultation. It states that "the Government is keen to explore options for improving understanding of obligations in these circumstances and on raising levels of compliance" and points out that this would benefit employers, employees and the Exchequer.

As stated previously, some members of our working party were of the view that it would be beneficial to provide some form of incentive for insolvency practitioners to comply with their consultation obligations. Other members felt that this was unnecessary and inappropriate.

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

2.1 Ultimately the minimum consultation period is a question of policy on which we cannot comment.

2.2 However, if the 90 day period is replaced with a 30 day period then this would remove the need to consider whether 100 or more redundancies were proposed at a particular establishment during a 90 day period. This would simplify the law, furthering the government's aim of having a straightforward legislative process. It would make the initial assessment of the precise numbers affected less critical and avoid employers seeking to structure redundancies in such a way as to avoid triggering a longer consultation period. It

would also reduce the number of situations in which the precise meaning of establishment was critical. Therefore, we see advantages in having a single minimum consultation period.

- 2.3 More generally, there are advantages and disadvantages in having a shorter minimum consultation period - although the practical significance of these advantages and disadvantages are reduced when the difference between the consultation periods is only 15 days (rather than 60 days, as at present). As we set out in our response to the Call for Evidence:
- 2.4 *In circumstances where consultation can be completed in less than [45] days, the advantages for employers in having a shorter minimum consultation period include:*
- (a) *Being able to implement redundancies or restructurings sooner will save ongoing employment costs and bring forward any efficiency savings from the new structure. Where the changes are critical to the survival of the business, this may make it more likely that the business can be saved;*
  - (b) *A shorter consultation period and more rapid implementation of changes will reduce disruption to the business. A collective consultation process can distract both the employees who are potentially affected and management from focusing on the day to day running of the business.*
  - (c) *Having a longer minimum period can set expectations on the part of employee representatives (and management) as to how long the process "should" last and may lead to the process taking longer than would be required to satisfy the requirements of consultation. This can prolong the period of uncertainty for employees and increase the likelihood that high performing employees, who would ultimately be retained in employment, will find alternative employment before the consultation process is complete.*
- 2.5 *The advantages for employees in having a longer minimum consultation period include:*
- (a) *Where consultation takes less than [45] days, they are likely to have a longer period of employment and so earn salary for a longer period than they would do if the 45 day minimum was not required;*
  - (b) *Where consultation takes less than [45] days, they are also likely to have more notice of their eventual dismissal and so longer to look for alternative employment, whilst still in employment.*
  - (c) *Although the requirement to consult "in good time" ensures that there would still be a legal obligation to consult to the same standard as at present, the minimum period of consultation may tend to set expectations as to how long consultation should last and so lead to longer consultation in practice. A shorter minimum period may lead to increased pressure from employers to end consultation before it is actually complete, reducing the time employee representatives have to consider the proposals and affect the consultation process.*
- 2.6 *The disadvantages for employees include:*
- (a) *Employees who find alternative work may want to take voluntary redundancy during the consultation period. However, employers are reluctant to agree to this as a voluntary redundancy will generally amount to a dismissal and so it could mean that the first proposed dismissal has taken place during the consultation period and*

*before the end of the period for notifying the Secretary of State and put the employer in breach of s188 and s193 TULRCA and at risk of a protective award in respect of all employees who are ultimately dismissed, including those dismissed after consultation is complete. Employee representatives may also be reluctant to agree to employees taking voluntary redundancy during the consultation period as it reduces their power base.*

- (b) As noted above, the minimum consultation period may in practice have the effect of extending consultation. A longer consultation period can lead to prolonged uncertainty as to whether an employee has a role.*
- (c) The period between announcement of a redundancy exercise and its implementation can be a period of reduced morale both for redundant employees and for those who will ultimately remain and moving more swiftly to the new structure would reduce this.*

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

- 3.1 We agree that, given the current uncertainty in EU law as to the meaning of establishment and how this would be applied in a UK context, it would be difficult to set out an authoritative definition of establishment in legislation. There would be a risk of infraction proceedings and in any event any definition would be interpreted in the light of ECJ decisions. Therefore, even a statutory definition might not provide clarity in the long term.

As we said in our response to the Call for Evidence:

- 3.2 *"As the Call for Evidence acknowledges any guidance on what constitutes an establishment will need to be consistent with ECJ case law. The two leading cases at ECJ level are Rockfon A/S v Specialarbejderforbundet i Danmark and Athinaiki Chartopoiia. Both cases state that the meaning of "establishment" is a term of Community law and cannot be defined by reference to the Member States.*
- 3.3 *In Rockfon the ECJ held that "establishment" means (depending on the circumstances) the unit to which workers are assigned to carry out their duties and stated that this did not have to have management which can independently effect collective consultancies.*
- 3.4 *In Athinaiki the ECJ expanded on this and held that:*
- "an 'establishment', in the context of an undertaking, may consist of a distinct entity, having a certain degree of permanence and stability, which is assigned to perform one of more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks"*
- 3.5 *It went on to hold that it was not necessary for an establishment to have legal autonomy, economic, financial, administrative or technical autonomy. Nor was it necessary for there to be a geographical separation between different "establishments".*
- 3.6 *These decisions point to a number of factors which could be taken into account in identifying an "establishment". However, there are a number of difficulties in making from this a list of factors which would be helpful to employers in identifying an establishment:*

- (a) *Both cases make clear that the relevant factors depend on the circumstances of each case. They do not seek to lay down factors which will always be relevant and nor do they purport to be exhaustive.*
- (b) *Both Athinaiki and Rockfon stated that a purposive approach should be taken to the meaning of "establishment" in order to maximise the situations where there will be an obligation to consult. In both cases the national consultation requirements under consideration were such that the smaller the establishment, the more likely there would be to be an obligation to consult. This led them to adopt a wide definition of establishment, under which a relatively small unit could amount to a separate establishment. However under the UK legislation the reverse is true, the larger the establishment identified, the more likely it is that there will be 20 people within that establishment who the employer proposes to dismiss<sup>1</sup>. Therefore the direction to take a purposive approach conflicts with the actual identification of the meaning of establishment, when applied in a UK context. Given that, on the one hand, the ECJ states that there is a term of Community law which cannot be defined according to Member States, but on the other hand there is scope to vary the meaning depending on the circumstances, it is not clear how the ECJ would approach the definition of establishment in a UK context.*

#### **4. Will defining "establishment" in a Code of Practice give sufficient clarity?**

- 4.1 Defining "establishment" in a Code of Practice will not provide the degree of clarity which would be desirable as it has no binding effect. However, for the reasons set out above, such clarity may ultimately need to come from the ECJ. A Code of Practice which was clearly drafted would be more helpful than simply retaining the current statutory provisions with no guidance and might help to establish a common approach, pending further guidance from the ECJ and higher courts.
- 4.2 If "establishment" is defined in a Code of Practice consideration will need to be given to the guidance on the HR1 form. As we pointed out in our response to the Call for Evidence the current guidance on form suggests that each separate site will always be a separate establishment and that each site will be an establishment, which may not be legally correct or consistent with what is included in the Code of Practice. However, the wording on form HR1 has the benefit of being clear and given that this is an issue which gives rise to criminal liability it is helpful to have a clear indication of the interpretation which BIS will take.

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

- 5.1 We consider that the fixed-term contract issue would be better dealt with by legislation, given that the Government has options for legislating under the Directive.
- 5.2 A literal application of the current legislation would appear to have the effect that most non-renewal of fixed term contracts would fall within the scope of the consultation obligation. The EAT decision in *University of Stirling v University and College Union* seeks to achieve a practical outcome in relation to the application of collective consultation obligations to fixed term contracts. However, the analysis of the EAT in that case is not clear. The EAT seemed

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<sup>1</sup> We note that in *MSF v Refuge Assurance Plc* the EAT was of the view that UK law was not compliant with the Directive in this regard and that an obligation to consult should be triggered where 20 or more redundancies are contemplated across *all* establishments. It then went on to follow the approach in *Rockfon* adopting a broad interpretation of "establishment".

to consider that the very fact that an employee contemplated at the outset that their employment would be for a limited period means that the non-renewal of their contract relates to them as an individual, and so takes them outside the scope of the definition of redundancy under TULR(C)A 1992. However, that reasoning would seem to apply to all fixed term contracts and yet the EAT contemplated that expiry of some contracts (if the reason for non renewal relates to a business decision which could lead to significant job losses) would fall within the collective consultation obligations. A future division of the EAT could depart from the decision and there is likely to a period of uncertainty as to the correct application of the law, which would not be removed simply by guidance in a non-statutory Code of Practice, whereas a legislative solution could bring clarity and simplify the law.

As we outlined in our response to the Call for Evidence:

- 5.3 *Currently, there will be a dismissal for the purposes of the legislation if an employee is "employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract" (s298 TULRCA and s95 Employment Rights Act 1996). This is subject to s252 TULRCA which excludes from the scope of the collective consultation provisions anyone employed on a fixed term contract of 3 months or less or a contract for a specific task which is not expected to last for more than 3 months, where the employee has not been employed for more than 3 months<sup>2</sup>.*
- 5.4 *The difficulty to which this can give rise is that at the point at which the obligation to consult arises, there may already be fixed term contracts which are due to expire during the consultation period. If the employer does not propose to extend them under the same contract and the reason for non-renewal is not related to the individual concerned, then this would be a person whom the employer proposed to dismiss as redundant. If the contract is not renewed and the dismissal goes ahead, the employer will be in breach of s188 and s193 TULRCA because one of the proposed dismissals will take place before the completion of consultation/the minimum consultation period.*
- 5.5 *However, in these circumstances it may make no commercial sense for the employer to extend the contract and the reasons for not doing so may be entirely unrelated to the main redundancy proposals. If the employee has genuinely been taken on for a specific task which has ended there may be no work for the employee to do. It may be that some cases could be dealt with on the basis that the reason for non-renewal is a reason relating to the individual or by reference to the special circumstances defence. However, the scope of both concepts are uncertain and there may be cases where neither apply (e.g. a small number of employees taken on to prepare for a particular event). The employer is faced with the choice of extending the contract (if the employee will agree) of an employee who is not required or risking failure to comply (which could theoretically lead to an award in respect of all redundant employees and criminal liability). Whilst the risk of any penalty being imposed in practice seems low and employee representatives may be prepared to take a pragmatic approach, the apparent lack of a lawful way to allow the employee to leave early is unsatisfactory.*
- 5.6 *One solution would be to exclude the expiry of a limited term contract from the scope of the collective consultation provisions. Article 1(2)(a) of the Directive provides:*
- "(1) This Directive shall not apply to - (a) collective redundancies effected under contracts of employment concluded for limited periods of time except where such redundancies take place prior to the date of expiry or completion of such contracts."*

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<sup>2</sup> This provision appears to apply even if such contracts are terminated before their expiry, which appears to go beyond the exception permitted by article 1(2)(a) of the Directive.

5.7 *There may be a concern that a complete exclusion could lead to employers taking on employees under a succession of fixed term contracts to provide flexibility to avoid the application of the collective consultation obligations or that it could lead to collective consultation not applying in circumstances where it would be desirable e.g. because fixed term contracts are prevalent in a particular sector (e.g. see the facts of Lancaster University v University and College Union). In fact, the scope to use fixed term contracts to evade collective consultation would be limited by providing that it was only on expiry of the contract that the dismissal would be excluded from collective consultation obligations and by the fact that the use of successive fixed term contracts (for four years or more) is limited by the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. However, if this was a concern, a more limited exclusion could be considered.*

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

See answers to 3, 4 and 5.

**7. What changes are needed to existing government guidance?**

The existing guidance is very short and would need to be substantially expanded to provide useful practical support and cover all the issues proposed in the consultation paper. In addition to the areas outlined, it would be helpful for the Code of Practice to address how to deal with employees who wish to leave before the consultation process is complete. Any Code would

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

It might be helpful to provide real case studies with named employers which highlight the benefits to employers of engaging openly in the consultation process and providing full information.

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

In our experience consultation is more productive when both employee representatives and employer representatives know what is expected of them and how the process should work. Where representatives (and in particular employee representatives) are inexperienced, training is very helpful in improving the quality of consultation. The availability of online training from ACAS may be a relatively cheap and efficient way to achieve this.

It could also be beneficial for employees at risk of redundancy to have access to interview and CV training during the collective consultation process. This might be achieved through links with BIS and charities that provide outplacement and through working closely with the Job Centre Plus. In the event that the affected employee's employment is terminated on the grounds of redundancy and they have received outplacement during the redundancy process then they may be able to obtain re-employment quicker than if they had to wait until their dismissal for such training.

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

N/A.

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

N/A.

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

N/A.

Members of ELA Working Party

**John Evason & Paul Harrison, Baker & McKenzie LLP (Co-Chairs)**

**Sue Ashtiany, Ashtiany Associates**

**Sophia Catchpole, Suffolk County Council**

**Emma Clark, Abbiss Cadres**

**Felicia Epstein, Pattison & Brewer**

**Philip Farrar, Hill Dickinson LLP**

**Siobhan Bishop, Wragge & Co, LLP**

**Amanda Steadman, Addleshaw Goddard LLP**

**Richard Kenyon, Field Fisher Waterhouse LLP**

**Nigel Mackay, Squire Sanders**

**Chris Thompson, Gately**

**Charles Urquhart, Clyde & Co**

**Alistair Woodland, Clifford Chance LLP**



REPRO DTP

From: Wallace, Tamsin [TamsinWallace@eversheds.com]  
Sent: 17 September 2012 12:08  
To: Collective Redundancies  
Subject: Eversheds' response to collective redundancies consultation  
Attachments: CAR\_LIB1-#7080532-v1-Collective\_consultation\_response\_-\_Eversheds.DOCX

Please find attached our response to the collective redundancies consultation.  
Many thanks

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**Eversheds' response to the consultation issued by the Department for Business, Innovation and Skills on collective redundancies.**

**Q1. Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

If the Government's overall approach is best summarised by the three objectives identified in paragraph 1.2 (improving the quality of consultation; improving the ability of employers to respond to changing market conditions; balancing the interests of the employees who are made redundant with those who remain), then we do agree. However, we disagree with specific components of the package of reforms aimed at delivering those objectives, or harbour concerns over how some will take shape in practice (please see further below).

**Q2. Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

The 30 day period because:

- it is a minimum period and employers will remain under a duty to go beyond 30 days in complex consultations to ensure meaningful consultation;
- it introduces consistency by having a single 30 day period which is simpler to apply than a stepped approach;
- having a 45 day minimum for larger-scale redundancies and 30 days for others is arbitrary and not based on evidence;
- modern communications support a shorter period: instantaneous communication (as opposed to, for example, posting letters or using notice boards) has transformed consultation in practice;
- it gives employees greater certainty, both those wishing to find alternative employment and those staying;
- it provides employers with the flexibility to restructure more quickly in a fast-moving competitive environment;
- the EU Collective Redundancy Directive has a 30 day period in relation to informing the authorities and this is considered a sufficient period for "crisis" redundancies.

**Q3. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of "establishment"? Please provide comments to support your answer.**

Yes, we agree with the reasons outlined in paragraph 3.18. As such, we believe that the Government cannot define "establishment" in legislation without risking litigation and possible infringement action, both of which would hinder UK competitiveness.

In the context of reviewing the confusion around "establishment", it could be argued that the UK should explore the alternative provision triggering consultation under the Directive, at Article 1(a)(i), in preference to the existing 90 days/20 employees approach. We would reject this approach on the grounds that it would add more uncertainty, given the need to count total number of employees, and not remove the need to decide what constitutes an establishment.

**Q4. Will defining "establishment" in a Code of Practice give sufficient clarity?**

No. We disagree with this approach and make the following comments:

- As noted in question 3, the Government is not in a position to *define* "establishment". This applies equally to a Code of Practice as it does to legislation.
- It is unclear from the consultation paper whether s207 TULRCA, which requires courts to take account of BIS Codes, applies to the proposed Code. Given that "establishment" is an EU term, it is our view that the courts are best placed to interpret the term according to the Directive and case law, unfettered by the requirement to take account of a Code (which has the potential to inject further legal confusion).
- However, we agree that all parties would benefit from an explanation (as opposed to a definition) of the practical factors to consider when deciding what is an "establishment". The nature and scope of such an explanation makes it apt for inclusion in guidance, not a Code.
- Our experience is that issues relating to the definition of "establishment" arise in a small minority of cases. As such, any action taken should be proportionate to the size of the problem.

**Q5. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments in support of your answer.**

No. We are in favour of a legislative solution which excludes the expiry of all fixed-term employees from collective redundancy consultation, reflecting the concerns raised by our clients (see, for example, the employer problems outlined in the consultation at paragraphs 4.59 onwards).

We disagree with the Government's proposal and its reasoning for the following reasons:

- UK law excludes already those employees who are on a fixed-term contract of three months or less from collective redundancy consultation. As such, it is difficult to understand the comment at paragraph 3.20 of the consultation that it "would be difficult to construct a suitable legislative exemption" for those on fixed term contracts because of concerns over less favourable treatment.
- The Collective Redundancy Directive allows for fixed-term contracts to be excluded from the requirement to consult upon their expiry. That Directive has not been expressly amended in the light of the Fixed-Term Workers Directive. However, the consultation, at paragraph 4.57, implies that the UK is no longer able to exercise the fixed-term employee exclusion, due to the later fixed-term employee protections. We do not understand that the Fixed-Term Directive implicitly overturns the Collective Redundancy Directive in this way. Alternately, if the Government has concerns that the UK's Fixed-Term Regulations have "gold-plated" the Directives to produce such a result, then the Regulations should be amended to provide for the exclusion.
- Even if the UK Fixed-Term Regulations make the exclusion of fixed-term contracts from collective consultation *prima facie* discriminatory, then it should be considered whether the exclusion provided for under the Collective Redundancy Directive provides an objective justification.
- At paragraph 3.20, the consultation implies that the different factors affecting the non-renewal of contracts complicates the wording of any legislative exclusion. We do not agree and it is our view that the non-renewal of fixed-term contracts is generally understood in law and practice.
- The uncertainty caused by the case of *Stirling v UCU* (discussed in the consultation at paragraph 4.58) could be resolved by legislating to exclude the expiry of all fixed-term employees from collective redundancy consultation.
- The real problems associated with a "rolling process" of redundancies (identified at paragraph 4.62), for example, identifying when each process of consultation should begin, how long it ought to go on for and when notice can be issued, could

be addressed by excluding the expiry of fixed-term employees from collective consultation.

- In summary, given the legal and practical problems caused by including fixed-term contracts in collective consultation (per the consultation at 4.59 onwards), and our concerns over the legal reasons given for not legislating to exclude the expiry of fixed term contracts, we respectfully request that the Government considers obtaining counsel's opinion in this matter.

**Q6. Have we got the balance right between what is for statute and what is contained in government guidance and a Code of Practice.**

Given our difference of opinions expressed in questions 4 and 5, we do not agree that the balance is right. More generally, we have found it difficult to comment whether the balance is right, in the absence of criteria explaining which content is best contained in guidance, as opposed to a Code of Practice.

**Q7. What changes are needed to the existing government guidance?**

The existing guidance would benefit from content on tricky practical/legal issues. For example:

- It could examine the difficulties that arise around the 90 day/20 employee trigger, such as where the employer initially proposes fewer than 20 redundancies and then unexpectedly is required to make further redundancies within the same 90 day period – the guidance could clarify:
  - Whether the employer is required to consult about the redundancies that are already underway
  - What happens if the employer has already dismissed those employees?
  - What if the employer collectively consulted with the initial employees (despite not being under a legal duty to do so), how does section 188(3) impact on later redundancies?
- It could consider the discrepancy between the Directive, which provides that consultation should begin when redundancies are contemplated, and the UK legislation, which provides that it must begin when they are proposed.
- It could describe the level of detail required, in relation to the statutory information disclosed by the employer, in order to strike a balance between the needs of the employer and the needs of the representatives.
- The inter-relationship between s188 and TUPE would benefit from informed guidance. Also, the extent to which employers are expected to provide training for employee representatives.

**Q8. How can we ensure the Code of Practice helps deliver the necessary culture change?**

No comment

**Q9. Are there any other non-legislative approaches that could assist – eg training? If yes, please explain what other approaches you consider appropriate.**

No comment.

**Q10. Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.**

No comment

**Q11. If you have been involved in a collective redundancy consultation in the last 5 years, how long did it take to reach agreement?**

Our experience reflects the description given in the consultation at 4.1 onwards, for example, that consultations typically take 30 days or more to complete and that during the 90 day exercises, meaningful consultation can end 30-50 days early, particularly with closures.

**Q12. If you have carried out collective redundancy consultation in the last 5 years, what effect, if any, did it have on your regular business during this time?**

No comment.

**Eversheds LLP, September 2012**

1. Your name:

**Fox Williams LLP - Paula Volkmer**

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

Fox Williams LLP

3. E-mail address:

PVolkmer@foxwilliams.com

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

Line1 - Only question to which they responded. See PDF response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

REPRO DTP

**From:** Paula Volkmer [PVolkmer@foxwilliams.com]  
**Sent:** 14 September 2012 17:00  
**To:** Collective Redundancies  
**Cc:** David Murphy; Joanna Chatterton  
**Attachments:** Collective Redundancy Consultation Response 14.09.12.PDF

Dear Sirs

Please see attached our response in relation to the BIS consultation on changes to the collective redundancy rules.

Yours faithfully

**Fox Williams LLP**

Paula Volkmer  
Associate  
for and on behalf of Fox Williams LLP, Solicitors

Direct dial: +44 (0) 20 7614 2668  
Direct fax: +44 (0) 20 7614 1468

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**COLLECTIVE REDUNDANCIES:**

**RESPONSE TO BIS CONSULTATION ON CHANGES TO THE RULES**

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.**

We agree that it would be difficult to effectively address fixed-term contracts in legislation. Since fixed term contracts vary greatly in their nature, and are used in a wide range of different scenarios, the factors affecting the non-renewal of fixed term contracts are extremely varied. It is therefore difficult to draft one rule to apply to such a variety of circumstances. Our view is that it would therefore be better for the issue to be dealt with in guidance and the proposed Code of Practice which can be more flexible and principles based.

Although a number of these points were raised in the call for evidence quoted in the consultation, we would like to draw your attention to the particular problems which the guidance is likely to deal with. We are particularly concerned by the indication in the consultation that the Government may be intending to reverse the EAT's decision in *University of Stirling v University and College Union*. Our view is that the EAT's decision that the expiry of a fixed term contract does not necessarily give rise to a redundancy for the purposes of collective consultation is an accurate reflection of commercial reality.

We are a firm of solicitors who act for clients in various sectors. In our experience in relation to short-term fixed contracts, particularly in relation to clients who have significant seasonal fluctuations, it can make no sense from the business or the employee's perspective to treat the expiry of certain workers' contracts as redundancies.

An example of this would be in the retail sector where shop assistants are appointed for a fixed term over the Christmas period to allow the business to cope with high levels of seasonal demand. If the business intends to appoint more than 100 seasonal staff for a fixed period of, for example, 4 months, "redundancy consultation" would have to begin after a month of employing these individuals. This creates a high administrative burden for the employer, resulting in resources being diverted from other areas of the business. Further, the consultation serves no real purpose for the employees or the employer, since both parties are entering into their relationship in the full knowledge that it is for a fixed period of 4 months, after which it expires. It creates poor employee morale, and is simply unnecessary for all concerned. If the seasonal fluctuation takes place at a time when redundancies of long-term workers are taking place, it clouds the process for those genuine consultations which may then become much longer – despite the fact that the other workers (i.e. the seasonal workers) being made "redundant" are entirely unconnected with the redundancies of the long-term employees.

In order to deal with the complexity of this issue, and in order to best promote business and growth within the UK, we therefore consider that the guidance and Code of Practice would best serve the interests of both employers and employees affected by collective redundancies, by confirming the decision of the EAT in *Stirling*, i.e. that expiry of a fixed term contract does not necessarily give rise to a redundancy for the purposes of collective consultation and that the deciding factor should be whether any of the reasons for the dismissal related to the individual.

14 September 2012  
David Murphy  
Senior Associate  
for and on behalf of **Fox Williams LLP, Solicitors**

Direct dial: +44 (0) 20 7614 2633



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T: +44 (0)20-7628 2000 F: +44 (0)20-7628 2100  
mail@foxwilliams.com | www.foxwilliams.com

**1. Your name:**

**Lyons Davidson - David Sillitoe**

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

Lyons Davidson

**3. E-mail address:**

dsillitoe@lyonsdavidson.co.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

No Response

**6. Which of the two proposed options should replace the 90-day minimum period?**

45 days

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

No Response

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

Yes

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

Line1 - In our experience, large-scale redundancy consultations have has usually

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

No Response

**REPRO DTP**

---

**From:** David Sillitoe [dsillitoe@lyonsdavidson.co.uk]  
**Sent:** 19 September 2012 17:32  
**To:** Collective Redundancies  
**Cc:** 'Peter Orton'; 'Michelle Lennaghan'; 'Peter Orton'  
**Subject:** Collective redundancies consultation response  
**Attachments:** Collective redundancies consultation response form V2.pdf

Dear Mr Davies

Please find attached Lyons Davidson's response to the consultation on collective redundancies.

If you have any queries, please do not hesitate to contact me.

Best Regards

David Sillitoe  
Principal Associate  
Employment Law Group  
LYONS DAVIDSON SOLICITORS

TEL: 0113 368 7871  
FAX: 0113 368 6150

<<...>>

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**RESPONSE TO CONSULTATION ON CHANGES TO THE RULES  
GOVERNING COLLECTIVE REDUNDANCIES**

**Your details:**

Name: David Sillitoe

Organisation: Lyons Davidson

Address: Victoria House, 51 Victoria Street, Bristol, BS1 6AD

Telephone: 0117 904 6000

Fax: 0117 904 6006

Responding as: Legal representative

**Question 1: Do you agree with the government's overall approach to the rules on collective redundancy consultation?**

We do not wish to comment on this point as it seems to be essentially a political question. Lyons Davidson seeks to respond to consultations from an apolitical standpoint. Our concern is to see that employment law operates effectively and in a manner that demonstrably provides fairness to all parties.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

45 days.

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

The first of the Government's three objectives for reform is "to improve the quality of consultation". The consultation document sets out at paragraph 4.5 that a number of respondents to the call for evidence stated that "meaningful consultation usually lasted for only around 45 days". If a lower minimum period were set, this would increase the possibility that the consultation process may be brought to a close before meaningful consultation had fully taken place. This would also seem to demonstrate that 45 days is an appropriate period for large-scale redundancies.

The second objective is "to ensure that employers can restructure effectively". We do not consider that an additional 15 days before dismissals can take effect is likely to significantly hamper companies' ability to restructure. Indeed, it may well be argued that proper consultation is likely to increase the effectiveness of a restructure.

The third objective is to "balance the interests of the employees made redundant with those who remain". Again, we don't consider that an additional 15 days is likely to impact significantly on the uncertainty caused by collective consultation. The primary concern must be to create the best environment for effective and meaningful consultation to take place.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes.

**Please provide comments to support your answer.**

We agree for the fundamental reason that the ECJ has stated in the *Rockfon* case that "the term 'establishment', as used in the Directive, is a term of Community law and cannot be defined by member states." Although it would in theory be possible to seek to define 'establishment' in UK legislation, this would not in reality be an authoritative definition, which would lead to uncertainty and mean employers essentially relying on an invalid definition.

Guidance in a Code of Practice would provide some degree of assistance.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

The answer to this question depends on what is meant by "sufficient".

How beneficial such a definition would be would depend on the quality of said definition in the Code of Practice. However, it is difficult to conceive of a definition or guidance that will provide sufficient certainty to enable companies and employees to decide with complete confidence that their interpretation of a situation is correct given that, ultimately, the only truly valid arbiter of whether an 'establishment' has been defined correctly is the Tribunal and Court system.

For maximum benefit and so that the position is clear, we suggest that the guidance sets out the factors that a Tribunal will need to consider and makes it clear that, ultimately, it will be a Tribunal that makes the decision (with the possibility of an appeal).

**Question 5: Is the government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No.

**Please provide comments to support your answer.**

We consider that this issue is capable of being addressed through legislation - presumably to codify existing case law (*Stirling*) - and that doing so is preferable to relying on a Code of Practice as it will provide greater certainty.

We do not agree that the Government should feel constrained by a "requirement to ensure that fixed-term workers are not treated less favourably than comparable permanent employees". The Directive itself provides an option for states to exclude fixed-term contracts and it would be possible to prohibit any claims for less favourable treatment by reason of differential treatment relating to collective consultation, in the same way that men are prevented from claiming discrimination relating to more favourable treatment of women on maternity leave.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes.

Save for our response to question 5, and specifically with reference to paragraph 3.24 of the consultation document, we consider that the balance between what is proposed for statute and what is proposed for guidance and a Code of Practice is correct.

The statute already sets out the trigger point for the number of employees, the minimum period of consultation that must follow, and the minimum legal requirements with which the employer must comply (for example the information that must be provided to representatives). Employers should have a degree of flexibility to decide how best to carry out the consultation process; if the matters proposed for the guidance or Code of Practice were contained in legislation there is a risk that the process would become too prescriptive.

Alternatively, if those elements included in the legislation were only contained in the guidance or Code of Practice, there is a risk that both employers and employees would face uncertainty about what process needs to be followed and accordingly that proper consultation would not take place.

**Question 7: What changes are needed to the existing Government guidance?**

The present guidance does little more than set out the requirements imposed by the legislation.

We agree that the guidance should seek to assist employers and employees to ensure that consultation is conducted properly and considers the correct issues.

We consider that information on limitation dates for employment tribunal claims would be a useful addition. Guidance on the definition of 'establishments' and other technical points would also be beneficial.

The Code of Practice should be referred to specifically in the guidance.

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

To ensure the Code of Practice helps deliver the necessary culture change employers need to be aware of its existence. The Code needs to be advertised and easily found from a search on the internet and relevant websites, such as BIS.

The Code of Practice itself needs to be of practical use and easy for employers to understand and apply so that they will refer to it and use it to guide consultation. The Code should also emphasize the importance and benefits of carrying out proper consultation and the impact failing to do so may have.

**Question 9: Are there any other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes.

We are aware that other European Jurisdictions use "Social Plans" to cushion the effect of the redundancy on the affected employees. Although we understand that a Social Plan often involves financial measures, it can also contain access to redeployment and retraining schemes or outplacement support to assist employees in obtaining new employment. This appears to be a useful non-legislative approach which combats the effects of large scale redundancies.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes.

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

In our experience, large-scale redundancy consultations have usually taken the full 90 day period.



**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

N/A.

1. Your name:

**Peninsula Business Services Ltd - Nicola Mullineux**

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

Peninsula Business Services Ltd

3. E-mail address:

nicola.mullineux@peninsula-uk.com

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Where minimum consultation periods for 90 proposed redundancies is 30 days, there is no real need to increase that minimum period by a further 15 days where another 15 employees are potentially facing

Line2 - redundancy, which would be the case should a 45 days consultation period be chosen. The inequality of the 2 current time periods is being addressed in this consultation and if the longer period of 90

Line3 - days is no longer considered practically viable, then neither is continued disparity of 30 days for 'smaller' exercises and 45 for 'larger' ones.

Line4 - 30 days also provides consistency across the board with the Government notification requirements.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - We agree because of the constraints indicated in case law on the issue. We feel a Code of Practice would provide the best manner in which to address the issue.

Line2 - Given the only 2 leading options for approaching this issue are legislation or a Code of Practice, and the Government have already

established they have no intention of using legislation, then a Code

Line3 - of Practice must be used. The Code of Practice should be used to explain the guidance that already exists through case law (e.g. Rockfon) in a clear manner. It will only give clarity if it gives an

Line4 - interpretation of certain terms often used in explaining what an 'establishment' is, for example, 'permanence', 'stability' and 'autonomy'. To say that it should be defined broadly so as not to

Line5 - preclude application of the legislation to some sets of circumstances is not sufficient enough without providing a clearer indication of how it is to be interpreted. Neither is it sufficient to say

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

Yes

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes

**12. Please provide comments to support your answer.**

Line1 - Guidance, by its very nature, usually provides a more rounded understanding of how an issue should be interpreted.

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

Not sure

**14. What changes are needed to the existing Government guidance?**

Line1 - The Code of Practice referred to in the responses above should be a statutory Code of Practice, therefore having the same status as the current Acas Disciplinary and Grievance Code of Practice.

Line2 - It should not be, as indicated in the consultation document, a non-statutory Code of Practice.

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

Line1 - By making it a statutory Code of Practice.

Line2 - Case law findings should be clearly explained in plain english and examples of practical application should be given.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - Training should be offered to employment law practitioners. This approach would disseminate information in a much more pro-active way to ensure employers are complying with requirements in line

Line2 - with any Code of Practice issued. If training were given to employers themselves, it is doubtful that they would trust their ongoing understanding of what they had learned. Employment law

Line3 - practitioners would be able to place information in the context of the current understanding of employment law and act more effectively with it.

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

**REPRO DTP**

---

**From:** Nicola Mullineux [nicola.mullineux@peninsula-uk.com]  
**Sent:** 18 September 2012 14:37  
**To:** Collective Redundancies  
**Subject:** Consultation Response  
**Attachments:** Collective-redundancies-consultation-form.doc

Dear Sir/Madam

Please find attached Peninsula Business Services' response to the Collective Redundancies Consultation.

**Kind Regards**

**Nicola Mullineux**  
**Research Co-ordinator**  
**Employment Advice Services**  
**Peninsula Business Services**  
**Tel: 0844 892 2772 Ext: 6453**

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## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**

## Your details

Name: Nicola Mullineux

Organisation (if applicable): Peninsula Business Services Ltd

Address: The Peninsula, 2 Cheetham Hill Road, Manchester M4 4FB

Telephone: 8448922772

Fax:

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

Reducing the barriers that have been domestically imposed to the growth of working Britain should play its part in re-establishing a thriving economy. The consultation document points out that the minimum consultation periods are not required by the Collective Redundancies Directive therefore were not at the heart of any policy decisions taken when drafting the Directive.

We agree that special treatment of potential redundancies involving 100 or more individuals is increasingly arbitrary. The Government should not stand still and be inactive when evidence suggests that change is required.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Where minimum consultation periods for 90 proposed redundancies is 30 days, there is no real need to increase that minimum period by a further 15 days where another 15 employees are potentially facing redundancy, which would be the case should a 45 days consultation period be chosen.

The inequality of the 2 current time periods is being addressed in this consultation and if the longer period of 90 days is no longer considered practically viable, then neither is continued disparity of 30 days for 'smaller' exercises and 45 for 'larger' ones. 30 days also provides consistency across the board with the Government notification requirements.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

We agree because of the constraints indicated in case law on the issue. We feel a Code of Practice would provide the best manner in which to address the issue.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

Given the only 2 leading options for approaching this issue are legislation or a Code of Practice, and the Government have already established they have no intention of using legislation, then a Code of Practice must be used. The Code of Practice should be used to explain the guidance that already exists through case law (e.g. Rockfon) in a clear manner.



It will only give clarity if it gives an interpretation of certain terms often used in explaining what an 'establishment' is, for example, 'permanence', 'stability' and 'autonomy'. To say that it should be defined broadly so as not to preclude application of the legislation to some sets of circumstances is not sufficient enough without providing a clearer indication of how it is to be interpreted. Neither is it sufficient to say that it is a question of fact left for the courts to decide.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Guidance, by its very nature, usually provides a more rounded understanding of how an issue should be interpreted.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

The Code of Practice referred to in the responses above should be a statutory Code of Practice, therefore having the same status as the current Acas Disciplinary and Grievance Code of Practice. It should not be, as indicated in the consultation document, a non-statutory Code of Practice.

**Question 7: What changes are needed to the existing Government guidance?**

No response provided

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

By making it a statutory Code of Practice.

Case law findings should be clearly explained in plain english and examples of practical application should be given.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

Training should be offered to employment law practitioners. This approach would disseminate information in a much more pro-active way to ensure employers are complying with requirements in line with any Code of Practice issued.

If training were given to employers themselves, it is doubtful that they would trust their ongoing understanding of what they had learned. Employment law practitioners would be able to place information in the context of the current understanding of employment law and act more effectively with it.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

No response provided.

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

No response provided.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

No response provided.

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**URN 12/808**

**1. Your name:**

**Pinsent Masons - Chris Mordue**

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

Pinsent Masons

**3. E-mail address:**

Christopher.Mordue@PinsentMasons.com

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

Not sure

**6. Which of the two proposed options should replace the 90-day minimum period?**

30 days

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Line1 - See word response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Not sure

**9. Please provide comments to support your answer.**

Line1 - Not entirely. We agree that the scope for a statutory definition is restricted by the need to comply with EU case law. However, that case law is limited to a handful of cases, all of which resulted in

Line2 - an essentially geographical approach under which a particular site was held to be an establishment in its own right. This reflects the fact that the cases concerned a different trigger for consultaion

Line3 - than that adopted under UK law - the option in article 1(a)(i) as opposed to article 1(a) (ii). In these cases, the purposive approach adopted by the ECJ favoured treating different geographical sites

Line4 - as separate establishments. The organisational elements of the test essentially operate to reinforce this outcome by stressing that the site does not have to have autonomous management to be classed

Line5 - as an establishment. We believe it is open to the Government - consistently with the EU case law - to adopt a definition of establishment that

focuses on the employee's normal place of work

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

Not sure

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

Line1 - The key point is that there is no EU requirement (including under the Fixed Term Workers Directive) for collective consultation over dismissals which occur at the end of fixed term contracts.

Line2 - UK legislation is gold plated and this produces an enormous and unsatisfactory burden on many business sectors. Only a change in legislation can deliver this exemption.

Line3 - The recent Stirling case has added new confusion to this area by taking a contrivousal and legally dubious approach to the question of whether the reason for the dismissal at the end of a ftc is for

Line4 - a reason not relating to the individual employee. It would be unwise to embed this uncertainty through attempts in the Code to explain when a dismissal at the end of a ftc is or

Line5 - is not within the scope fo consultation. The correct solution is to exempt all dismissals at the end of a ftc from s188

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

No

**14. What changes are needed to the existing Government guidance?**

Line1 - More can be done in terms of legislative change - eg excluding dismissals at the end of ftc's, allowing voluntary redundancies within the notification period, and improving the interface with TUPE by

Line2 - allowing a transferee to carry out collective consultation prior to the date of transfer (this cannot be achieved through the TUPE regulations alone, s188 needs to be amended too).

Line3 - The suggested scope of the Code of Practice carries real dangers of inadvertently creating new legal requirements and compliance burdens. Guidance on when consultation should start risks setting a

Line4 - benchmark which requires consultation to begin before the minimum notification period. Guidance on what should be discussed and how, risks

creating a new legal standard by

Line5 - which the quality of consultation would be judged. Great care needs to be taken to avoid adding to existing case law principles.

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

Line1 - As highlighted above, it is important that the Code does not add to existing case law requirements and is not prescriptive about when and how consultation should take place. That would essentially

Line2 - result in a non-legislative code having the effect of writing new laws and filling in gaps in existing case law. This will increase compliance burdens on business and encourage disputes in which

Line3 - unions argue that a departure from the code involves a breach of s188. The use of case studies would be helpful in our view - and we believe that it would be better if those parts of the Code which

Line4 - did not summarise existing case law were limited to case studies, as opposed to giving "best practice" guidance through a set of principles and practices which could then become benchmarks against

Line5 - which legal compliance is judged.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - Training for non- union employee representatives is often very important in developing a framework for effective consultation. It can be difficult for employers to provide this training,

Line2 - especially when there is no standing body of representatives and consultation is undertaken with representatives elected for a specific redundancy consultation exercise especially as some

Line3 - representatives may be made redundant and the benefit of their training lost to the employer.

Line4 - On-line training - eg video based or interactive training - aimed at employee representatives would be a valuable and accessible and cost - effective method of providing this type of training.

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

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No Response

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

---

No Response

**REPRO DTP**

**From:** MORDUE Christopher [Christopher.Mordue@pinsentmasons.com]  
**Sent:** 18 September 2012 14:42  
**To:** Collective Redundancies  
**Subject:** Response to consultation  
**Attachments:** 12-808rf-collective-redundancies-consultation-form1.doc; 41811945\_2.doc

Dear Sirs

We attach our completed response to the current consultation on changes to the rules on collective redundancy consultation, along with a more detailed submission specifically addressing the issue of whether dismissals at the expiry of fixed term contract should continue to be covered by the duty to consult. This latter submission draws on our experience of the operation of the current rules in the Higher Education sector and reflects a strong view within that sector that the current regime is impractical and unnecessarily burdensome.

We would be happy to discuss these issues in more detail with BIS.

Kind regards

Christopher Mordue  
Partner  
for Pinsent Masons LLP

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## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**

## Your details

Name: Chris Mordue

Organisation (if applicable): Pinsent Masons

Address: 1 Park Row Leeds LS1 5AB

Telephone: 1132945194

Fax: 1132448000

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

Not entirely. While the reduction in the current 90 day notification period for large scale redundancies is welcomed, we believe that an important opportunity to make further legislative changes is being missed. In particular, the current legislation gold plates the EU directive by including dismissals on the expiry of fixed term contracts - maintaining that status quo will perpetuate a significant and unnecessary regulatory burden on UK employers.

We also have serious concerns - highlighted below - about the content and impact of the proposed code of practice, in particular the risk that this will actually serve to add new compliance and process burdens on employers and promote disputes.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

A single notification period of 30 days in all cases is easier to understand and administer. A separate period for 100 or more dismissals would continue to create uncertainty and disputes - for example where there are arguments about whether separate workplaces are part of a single establishment. There is no actual correlation between the number of redundancies proposed and the length of consultation required.

Maintaining two separate notification periods produces arbitrary and unsatisfactory results - there is no real difference between 99 redundancies and 100, and no rationale for requiring employment to be maintained for 30 days in the case of 99 dismissals but 45 in the case of 100. The additional 15 days would impose an additional cost to business of 1500 days' pay in the case of 100 dismissals compared with 99 dismissals.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Not entirely. We agree that the scope for a statutory definition is restricted by the need to comply with EU case law. However, that case law is limited to a handful of cases, all of which resulted in an essentially geographical approach under which a particular site was held to be an establishment in its own right. This reflects the fact that the cases concerned a different trigger for consultation than that adopted under UK law - the option in article 1(a)(i) as opposed to article 1(a)(ii).

In these cases, the purposive approach adopted by the ECJ favoured treating different geographical sites as separate establishments. The organisational elements of the test essentially operate to reinforce this outcome by stressing that the site does not have to have autonomous management to be classed as an establishment. We believe it is open to the Government - consistently with the EU case law - to adopt a definition of establishment that focuses on the employee's normal place of work.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

We are not convinced that this is possible. If the Government feels unable to adopt a legislative definition, it is hard to see how it is easier to offer a definition in a Code of Practice, especially a non-binding Code. At best, all that could be done would be to summarise principles in existing case law. The legal test under EU law and UK case law is impressionistic - it is ultimately a question of fact for the tribunal rather than a tight set of questions which produce definitive answers.

Many of the areas of uncertainty which concern employers - eg whether business divisions across multiple sites are an establishment - are unaddressed in the case law. Others- eg mobile sales forces - have produced conflicting results. Businesses are looking for certainty and clarity and a legislative approach would be preferable to a Code which did not produce definitive answers to these questions.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

No. The key point is that there is no EU requirement (including under the Fixed Term Workers Directive) for collective consultation over dismissals which occur at the end of fixed term contracts. UK legislation is gold plated and this produces an enormous and unsatisfactory burden on many business sectors. Only a change in legislation can deliver this exemption.

The recent Stirling case has added new confusion to this area by taking a contrivousal and legally dubious approach to the question of whether the reason for the dismissal at the end of a ftc is for a reason not relating to the individual employee. It would be unwise to embed this uncertainty through attempts in the Code to explain when a dismissal at the end of a ftc is or is not within the scope fo consultation. The correct solution is to exempt all dismissals at the end of a ftc from s188

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

No. More can be done in terms of legislative change - eg excluding dismissals at the end of ftcs, allowing voluntary redundancies within the notification period, and improving the interface with TUPE by allowing a transferee to carry out collective consultation prior to the date of transfer (this cannot be achieved through the TUPE regulations alone, s188 needs to be amended too).

The suggested scope of the Code of Practice carries real dangers of inadvertently creating new legal requirements and compliance burdens. Guidance on when consultation should start risks setting a benchmark which requires consultation to begin before the minimum notification period. Guidance on what should be discussed and how, risks creating a new legal standard by which the quality of consultation would be judged. Great care needs to be taken to avoid adding to existing case law principles.

**Question 7: What changes are needed to the existing Government guidance?**

No specific comments

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

As highlighted above, it is important that the Code does not add to existing case law requirements and is not prescriptive about when and how consultation should take place. That would essentially result in a non-legislative code having the effect of writing new laws and filling in gaps in existing case law. This will increase compliance burdens on business and encourage disputes in which unions argue that a departure from the code involves a breach of s188.

The use of case studies would be helpful in our view - and we believe that it would be better if those parts of the Code which did not summarise existing case law were limited to case studies, as opposed to giving "best practice" guidance through a set of principles and practices which could then become benchmarks against which legal compliance is judged.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

Training for non-union employee representatives is often very important in developing a framework for effective consultation. It can be difficult for employers to provide this training, especially when there is no standing body of representatives and consultation is undertaken with representatives elected for a specific redundancy consultation exercise especially as some representatives may be made redundant and the benefit of their training lost to the employer.

On-line training - eg video based or interactive training - aimed at employee representatives would be a valuable and accessible and cost-effective method of providing this type of training.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

No specific comment

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

N/A

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

N/A

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**URN 12/808**

## PINSENT MASONS

### SUBMISSION TO BIS – COLLECTIVE REDUNDANCY CONSULTATION

#### THE CASE FOR EXCLUDING DISMISSALS AT THE END OF FIXED TERM CONTRACTS FROM CONSULTATION

##### 1. INTRODUCTION

In addition to the general response we have submitted to the current consultation on the reform of collective redundancy legislation, we are writing to make a more detailed submission on one specific issue, namely whether dismissals occurring on the expiry of fixed term contracts should continue to fall within the scope of this legislation. In our view, maintaining this position – as is currently proposed - would mean passing up an important and valuable opportunity to ease the burden of employment law on business and in particular to eliminate the unnecessary "gold plating" of EU Directives in UK legislation.

In this submission we will:

- explain why we consider that this is a change which the Government made without infringing EU law;
- set out the business case for change. In summary, the current rules place a very heavy and unnecessary burden on those businesses and sectors which (entirely legitimately) use a high volume of fixed term contracts. In most cases, the very rationale for the use of a fixed term contract means that the dismissal is inevitable. The ability of employers to avoid the dismissal is very much constrained, and will typically depend on factors that cannot be influenced through discussions between employees and trade unions/representatives. The scope for meaningful consultation is extremely limited, meaning that this category of dismissal does not sit easily within the current legal framework. The law places some employees – for example those in the HE sector – under a permanent duty to consult. This heavy burden of consultation is therefore imposed to very little purpose, if the consultation required cannot realistically lead to the identification of ways to avoid the dismissals concerned.
- explain why the recent EAT decision in *University of Stirling v UCU* has left the current legal position in relation to collective consultation on the end of fixed term contracts in an ambiguous, uncertain and unsatisfactory state, increasing the need for a legislative solution.

Our submission will draw heavily on our experience of the operation of the current rules in the Higher Education sector and the particular difficulties faced by universities through their heavy use of fixed term contracts. We understand that many of our university clients and contacts



have made submissions to this consultation and the earlier Call for Evidence which are very much in line with the submissions made below. We have shared this response with many institutions in the sector and there is strong support for the submissions we make – for example institutions such as the London School of Economics, University College London and University of East London have specifically confirmed that we can cite them as endorsing this submission.

## **2. REMOVING THESE DISMISSALS FROM THE SCOPE OF TULRCA IS COMPATIBLE WITH EU LAW**

Currently, the collective redundancy consultation provisions in TULRCA 1992 apply to all dismissals, including those which occur on the expiry and non-renewal of fixed term contracts. The only exclusion is for fixed term contracts of very short duration – 3 months or less and where the employee concerned has no additional prior continuous service with that employer.

By contrast, the relevant EU Directive on collective consultation exempts entirely those dismissals which occur at the end of fixed term contracts. The domestic UK provisions are in this respect clearly more extensive than the corresponding EU legislation and are manifestly "gold plated" compared with the text of the Directive.

We note that the Government's consultation paper makes reference in this context to the EU Fixed-Term Contract Directive. The implication is that the Government is concerned that that Directive may be breached if TULRCA was amended so as not to require collective consultation in relation to dismissals occurring at the expiry of fixed term contracts. In our view, no such infringement would occur and the Fixed Term Workers Directive presents no barrier to the change we advocate in this submission.

We would note that the Fixed Term Workers Directive was adopted in June 1999, shortly after the current version of the Collective Redundancies Directive. Despite the time which has since elapsed, the Collective Redundancies Directive continues to exclude dismissals occurring on the expiry of fixed term contracts. We submit that if this exclusion was considered to be contrary to the Fixed Term Workers Directive, action to correct the position would have been taken by the EU before now.

In any event, we believe that it is clear that the two Directives are not in conflict, and that the change we advocate would not infringe the principle of non-discrimination adopted in respect of fixed term workers under the Fixed Term Workers Directive. That principle of non-discrimination is actually limited in scope. The prohibition of (unjustifiable) less favourable treatment on the ground of fixed term contract status applies only in relation to terms and conditions of employment granted by the employer. It has no wider application. The Fixed Term Workers Directive does not require member states to provide that statutory employment rights – for

example obligations in respect of collective consultation – are equivalent for fixed term and indefinite contract staff.

Even if that analysis is not accepted, the principle of non discrimination is not absolute. Differential treatment of fixed term employees is lawful if it can be objectively justified. We believe that the business case for change highlighted below would form the basis of a valid objective justification argument. In relation to the "proportionality" aspect of the objective justification test, we think it is important to stress that the change we advocate would not remove fixed term contract staff from the legislation entirely – dismissals occurring before the expiry of the fixed term would still remain within the scope of the s188 obligation. So, any exclusion would be limited, applying only to dismissals at the end of the fixed term contract.

In our opinion, any concerns that the Fixed Term Workers Directive requires dismissals which occur on the expiry of fixed term contracts to be included in the scope of section 188 TULRCA are seriously misplaced. Allowing this unfounded concern to act as a deterrent to change would risk compounding the current "gold plated" nature of the domestic legislation by taking an unnecessarily cautious approach to the requirements of the Fixed Term Workers Directive.

### **3. THE CASE FOR CHANGE**

For business sectors which use fixed term contracts extensively – for example, higher education, retail, IT, and construction – the impact of this "gold plating" is very substantial. In order to make clear the nature of the burden imposed – and how this impacts in practice - we will highlight in particular the impact on the Higher Education sector.

#### **3.1 Use of fixed term contracts in HE**

The HE sector employs many thousands of staff on fixed term contracts. Statistics from the Higher Education Statistics Agency show that, in 2010/11, one third of the academic workforce in the HE sector were employed on a fixed-term contract basis - some 60,320 academic staff on fixed term contracts compared to 120,860 academic staff on open ended contracts. It may be helpful to explain in more detail two particular scenarios in which fixed term contracts are typically – and legitimately - used by employers in the HE sector.

The first area in which fixed term contracts are heavily used in the HE sector relates to research activity. Universities undertake research on the basis of project-specific research funding from external third parties such as the research councils. These grant funds include monies to meet the cost of employing the researchers who will work on the research project. This research funding is allocated by the funders on a project by project basis and is, by its very nature, finite. Without that funding, the researchers would not be employed – the universities cannot sustain the employment of these researchers from their own funds. Fixed term contracts are therefore used for research activity because the employment of these staff cannot be guaranteed beyond the end of the period for which research funding is available. These researchers will always be

at risk of dismissal when their current research funding/fixed term contract expires, unless further external research funding becomes available for new projects on which they can be employed.

Fixed term contracts are also a common method of employing "teaching only" staff within the HE sector. These are staff who are engaged and deployed to supplement the teaching carried out by "core" academic staff. The need for employees to undertake these duties fluctuates from term to term and from one academic year to another, depending on the number of students enrolled onto the degree courses and programmes offered by the employing university. Universities can only accurately quantify their requirements for such teaching at the start of each academic year. Consequently, a fixed term contract is used to offer employment for the period over which demand for the employee's services can be predicted with any certainty. At the end of the academic term or year, these fixed term contracts will terminate. The same employee may well be offered a new fixed term contract for the following academic year but this will depend on the amount and nature of additional teaching required in that period.

### **3.2 A permanent obligation to consult**

One inevitable legal consequence of using any fixed term contract is that at the end of the fixed term, a dismissal scenario will arise. Employers using a high volume of fixed term contracts will face a high number of dismissal scenarios, and feel very acutely the impact of employment law obligations in relation to dismissals.

This is even more so when there is no set date or dates on which the fixed term contracts are due to expire. In the HE sector, the fixed term contracts of research staff may expire at any point in the year - such dismissals are an everyday event. As a result, the threshold of 20 proposed dismissals within a 90 day period is triggered on a continuous and rolling basis. The effect is that universities are placed under a continuous – indeed, permanent - duty to collectively consult. The managerial and administrative burden imposed by that permanent obligation to consult cannot be understated.

### **3.3 The difficulty of meaningful consultation**

A further difficulty faced by employers is that the nature of fixed term contract dismissals makes conducting the type of consultation required under the legislation very difficult.

The purpose of collective consultation under the legislation is to seek agreement on ways and means of avoiding the dismissals, reducing the number of dismissals and mitigating their impact. For the obligation to carry out consultation to be meaningful, there must be something substantive which the employer and the trade union can consult about and a realistic prospect that alternatives can be identified which would reduce or avoid the need for the redundancies in question.

However, whenever a fixed term contract is used, the expiry of that contract, and therefore the dismissal that will occur at that stage, is essentially predetermined. Where fixed term contracts are used properly, there will be a clear and readily understood reason why employment cannot be guaranteed beyond the end of the fixed term. As a result, it is difficult to consult about how such dismissals can be "avoided" – the dismissal is determined at the outset of the contract.

If, for example, an employee is hired for 12 months to cover the absence of another employee on maternity leave, he or she understands that there is no guarantee of employment beyond this period. If the maternity leaver returns to the business, the fixed term employee will be dismissed. The employer has no choice about this – the maternity leaver is entitled to return if she wishes. The dismissal of the fixed term employee and the rationale for it were identified at the start of the contract and it is difficult to see how the employer can meaningfully discuss how the dismissal can be avoided.

Turning to the HE sector, in both of the scenarios described above, the prospects of avoiding the redundancies – ie continuing the employment of the fixed term contract staff – depend entirely on factors outside of the direct control of the employer and the trade union. They are not factors which cannot be materially changed by consultation.

- In the case of research staff, the possibility of continued employment beyond the expiry of the fixed term depends entirely on whether or not the university succeeds in winning new research funding from external third parties. Collective consultation between the university and its recognised trade unions cannot meaningfully contribute to that process of seeking research funding or influence the decisions made by external funders. Universities are in any event continuously soliciting research grant funding as part of their every day business.
- In the case of teaching only staff, the prospects of continued employment beyond the current fixed term depend on student recruitment and the courses/modules chosen by those students. Again that is not a factor which can be realistically altered or influenced by collective consultation.

We believe that the exclusion of this category of dismissals from the EU Collective Redundancy Directive was very much based on this inherent difficulty in consulting on ways to avoid dismissals which have been pre-determined through the use of a fixed term contract.

### **3.4 The timing of consultation compound these problems**

For HE institutions, the difficulty of undertaking the type of consultation required is exacerbated because the current legal framework forces universities to commence collective consultation well before the expiry of the fixed term contract in question and long before the university can know with any certainty whether or not the dismissals notified are actually in fact likely to occur.

In the case of research staff, for example, the availability of new research funding is often confirmed only shortly before the expiry of the current funding and fixed term contract. However, in many cases collective consultation must begin at least 90 days before this date. At this point in time, it is very often the case that no further research funding has been identified. However, in very many cases, new research funding for new projects becomes available and this in turn allows the employment of these researchers to be continued. However, it is often only very close to the expiry of the fixed term contract – and close to the end of the period of collective consultation – that these opportunities for redeployment materialise.

The employer cannot wait to begin consultation until the position becomes clearer, because that would risk breaching the timescales under TULRCA and those for conducting a fair dismissal. The net result of all this is that universities are forced to notify and consult about many more dismissals than actually occur in practice.

Essentially, their notification to the trade union is not a notification of proposed dismissals - it is simply a notification of the number of fixed term contracts which are due to expire in any given 90 day period. The consultation that takes place is consultation about hypothetical dismissals, many of which will not in fact materialise. The fact that the number of redundancies which actually occur is far less than those "proposed" or notified is in no way a reflection of a "successful" outcome to collective consultation – as noted above, these outcomes are actually dependent on decisions taken by external third parties and not influenced by consultation itself.

This requirement to consult over hypothetical dismissals inevitably wastes time and resources on the part of both employer and the trade union.

### **3.5 Summary**

In summary, we believe that the current inclusion of dismissals at the end of fixed term contracts within the scope of the collective redundancy legislation is illogical. It serves no constructive purpose to impose an obligation to consult if the scope for meaningful consultation and avoiding the dismissals is effectively ruled out by the reality of the factors underlying the use of fixed term contracts. In our submission, the imposition of a significant and time consuming consultation process, which serves no real practical purpose, is a clear example of the type of red tape burden on business which the Government has pledged to remove.

## **4. EXEMPTION IS THE ONLY PRACTICAL SOLUTION**

In our view the only workable solution to this problem is to remove dismissals which occur at the expiry of fixed-term contracts from the scope of the collective consultation legislation altogether.

The proposed reduction of the 90 day notification period to 45 or 30 days would of course be welcomed by employers. However, it would not materially resolve the difficulty of conducting meaningful consultation when the dismissal at the end of the fixed term contract is essentially

pre-determined by the reason for the fixed term or is wholly dependent on events which cannot be controlled or influenced by collective consultation. Furthermore, the requirements of unfair dismissal legislation, and internal HR processes, are likely to mean that individual consultation over the potential dismissal would still commence in excess of 30 days before the expiry of the fixed-term contract. If collective consultation remained a legal requirement, that would have to commence in parallel at the same time – otherwise the employer would be vulnerable to arguments that action taken in individual consultation is inconsistent with genuine collective consultation. Consequently, even a 30 day notification period would oblige university employers to notify a significant number of potential dismissals which ultimately will not occur.

Amending TULRCA to remove dismissals occurring on the expiry of fixed term contracts would not materially diminish the substantive employment rights of fixed term contract staff. They would retain the right not to be unfairly dismissed and their right to statutory redundancy payments, subject to eligibility criteria. They would also retain the right to be granted indefinite contract status after a period of employment on successive fixed term contracts. In our view, the factors which determine whether or not employment can be continued beyond the end of a fixed term contract, and whether redeployment opportunities exist, are essentially issues to be considered at the individual level, rather than at the level of consultation with trade unions. Accordingly, a requirement for individual but not collective consultation is better suited to the reality of the issues which need to be addressed in these cases.

## 5. **THE STIRLING CASE – A PROBLEM, NOT A SOLUTION**

Reference is also made in the consultation paper to a recent Employment Appeals Tribunal decision - *University of Stirling v UCU*. The implication appears to be that this case has eased the regulatory burden on employers, making the exclusion of dismissal at the end of fixed term contracts from the scope of collective consultation unnecessary. That is not in fact the case – in our view the *Stirling* case actually serves only to make the law more uncertain than it was before.

The rationale adopted in *Stirling* was novel and surprising to many employment law practitioners. We are, to be frank, rather dubious about the approach adopted in that case and regard it as either vulnerable to being overturned on appeal, or of being distinguished by tribunals in future cases.

The first important point about this judgement is that it expressly does not determine that all dismissals at the end of fixed term contracts fall outside the scope of collective redundancy consultation.

The actual point on which *Stirling* was decided was that proposed redundancies only fall under 188 if they would occur for “a reason not related to the individual concerned.” Until now, that definition had been understood as excluding dismissals for misconduct, performance and ill-

health. In *Stirling* the EAT decided that the dismissals on the expiry of the fixed term contracts in question were for reasons which did relate to the individual employee and it was on that basis that s188 was held not to apply.

The contracts considered in *Stirling* fell into four categories. They included temporary contracts to cover sick leave and maternity leave, a contract to teach 3 course modules, and a fixed term research contract where the fixed term was linked to the availability of external funding. (The latter two categories are the typical uses of fixed term contracts within the HE sector described above.) The EAT concluded that:

- the reason for all four dismissals was that the employee had agreed to a fixed term contract and accepted that it would come to an end at a particular date or on the occurrence of a particular event;
- the reason for the dismissal was one which relied on the individual employees' own approach to their employment with the employer. They had agreed at the outset that their employment would be for finite periods defined by dates or tasks. The circumstances were considered not to involve a termination being imposed on them against their wishes.
- the employees had accepted at the outset that their fixed term contracts would terminate at the defined point. The only means by which they could, thereafter, continue in the University's employment would be if they were offered and accepted another fixed term contract, circumstances referred to as 'renewal' but, properly analysed, involving two consecutive fixed term contracts. Unlike employees employed under indefinite contracts, they did not have any reasonable expectation of employment for an indefinite period.

While we have sympathy with this line of reasoning – indeed, it reflects many of the comments we make in our business case for change – it appears legally dubious because it seems to conflate the dismissal which occurs on the expiry of a fixed term contract with the reason for that dismissal. It approaches the question of whether the dismissal "is for a reason relating to the individual" by focusing on the employee's state of mind at the outset of the contract, rather than on the employer's need or ability to continue the employment at the end of the fixed term. A critical element of the reasoning is an assumption that the fixed term contract staff agreed and accepted that their employment would terminate at the end of the fixed term contract (rather than that they simply took what was offered to them) and accepted that there was no reasonable expectation of employment beyond that term. It could be argued that this ignores the reality of the employee's position, particularly if there is evidence that any of the employees concerned had fixed term contracts with the same employer which were renewed or extended in the past. Further, if the employee's evidence to the tribunal is that this was not their state of

mind when they accepted the contract, the rationale for the approach in *Stirling* would appear to fall away.

It is for those reasons that we regard this as a decision which may not withstand appeal or be readily followed in future cases. Tribunals – sceptical of this approach – would be free to decide that, on the facts as presented to them, the employees' expectations were different, so that a different outcome can be reached.

Employers need employment laws which are certain and are applied in predictable ways. The real difficulty with *Stirling* is that it creates a scenario under which it is only a tribunal that can ultimately decide whether or not the dismissal was for a reason relating to the individual. The answer to this question depends in part of the claimant's evidence and how it is assessed by the tribunal. So, effectively, employers have been placed in a position in which they must "second guess" the decision that a tribunal would make about whether the dismissal is, or is not, within the scope of s188. The very significant financial penalties of making the wrong call on the application of collective consultation – due to the high level of the protective awards, and the number of employees involved – make this an area of considerable risk for employers.

The *Stirling* case has therefore created a very uncertain position. Clarity and certainty can best be restored to this area by excluding from s188 any duty to consult in relation to dismissals on the expiry of fixed term contracts.

We would be very happy to discuss these issues further with BIS.

**Chris Mordue, Partner**  
**Pinsent Masons LLP**  
**18 September 2012**

**Contact – [christopher.mordue@pinsentmasons.com](mailto:christopher.mordue@pinsentmasons.com) (tel: 0113 2945194)**



**1. Your name:**

**Simmons & Simmons - Philip Bartlett**

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

Simmons & Simmons

**3. E-mail address:**

philip.bartlett@simmons-simmons.com

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

Yes

**6. Which of the two proposed options should replace the 90-day minimum period?**

30 days

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

**12. Please provide comments to support your answer.**

No Response

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

Yes

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

1. Your name:

**Squire Sanders (UK) LLP**

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

Squire Sanders (UK) LLP

3. E-mail address:

clare.mcnicholas@squiresanders.com

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - See PDF response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - Yes, we agree that it would be difficult to provide a statutory definition of "establishment".

Line2 - We think it would be useful to have specific factors (maybe focussing on where an employee is employed) set out in the Code of Practice which could be taken into account by employers when considering

Line3 - this issue, but we recognise that ultimately this will be something that has to be judged on the particular facts of the case and we believe that many of our clients will still seek legal advice on

Line4 - this issue before proceeding. As with so much of employment law, there is no straightforward "yes or no" answer

Line5 - – and whilst our clients might get frustrated by this they are at least used to dealing with such uncertainty.

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

Not sure

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

Line1 - Unlike defining an "establishment" in legislation, we do not believe it would be difficult to construct a suitable legislative exemption for fixed-term appointees

Line2 - , not least by reference to the definition in the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

Line3 - We are still in favour of extending the exemption for fixed-term contracts from 3 months to one year, as this is likely to cover most fixed-term contracts.

Line4 - We recognise however that the reduction of the 90-day minimum period should help to alleviate the problems (and costs) in this area.

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

Yes

**14. What changes are needed to the existing Government guidance?**

Line1 - Broadly, yes, although see responses to Questions 4 and 5.

Line2 - We need to make sure, if there is a separate Code of Practice plus Government Guidance, that things do not become confusing. Any Guidance should support and supplement what

Line3 - is stated in the Code of Practice, in the same way that Acas produced additional Guidance to support the Code of Practice on Disciplinary and Grievance Procedures

Line4 - (noting of course that the redundancy Code of Practice will be non-statutory).

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

Line1 - The current guidance is fine as far as it goes – it provides a basic overview of the position governing large-scale redundancies, but it does not address in sufficient detail the tricky issues that

Line2 - employers have to grapple with, such as the meaning of an “establishment”, when consultation should start and finish, how to deal with a shifting number of proposed redundancies, etc.

Line3 - See comments above re: interaction of Guidance and Code of Practice. We would be interested in participating in the development of Guidance or Case Studies.

Line4 - We believe it will take more than a new non-statutory Code of Practice to deliver culture change. Providing further clarification on difficult issues should, however,

Line5 - at least remove some of the uncertainty and scope for disagreement between employers and employees/employee representatives/trade union representatives.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

**REPRO DTP**

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**From:** McNicholas, Clare [Clare.McNicholas@squiresanders.com]  
**Sent:** 17 September 2012 10:01  
**To:** Collective Redundancies  
**Subject:** Our Response to the Collective Redundancy Consultation  
**Attachments:** BIS Response Collective Consultation.PDF

Please find attached our Response to the Collective Redundancies Consultation.

**Clare McNicholas**

Professional Support Lawyer

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## Collective Redundancies: Consultation on changes to the rules: Response form

A copy of the consultation on Collective Redundancies: Consultation on changes to the rules can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207 215 6414

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

The closing date for this consultation is: **19 September 2012**

## Your details

Name:

Organisation (if applicable): **Squire Sanders (UK) LLP**

Address: 7 Devonshire Square, London, EC2M 4XH

Telephone: 2076551000

Fax: 2076551001

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business (over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade Union or staff association
- Other (please describe)



**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

Broadly, yes. Our clients were heartened to see that the Government wants to simplify the current legislative framework and make it easier for employers to respond to changing market circumstances, in particular its proposals to reduce the minimum 90-day consultation period.

We believe that insolvency situations should however be exempted from the consultation period altogether. These situations often arise at short notice, require quick decisive action, and are commercially sensitive so it is rarely possible to engage in collective consultation. Additionally, consultation may affect and demoralise the workforce at a time where commitment to the business could provide the best chance of saving jobs through the insolvency process.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

In our experience, and as we are talking about a minimum rather than a maximum period, our clients would be in favour of introducing a 30-day minimum period for collective redundancies. For starters, this has the advantage of simplicity - all collective redundancy exercises will then have the same minimum consultation period - thus avoiding confusion for employers. Moreover, there is no mathematical logic in the assumption that more people at risk necessarily makes the consultation process any longer or more complex. Further, our experience shows that in many cases of collective consultation, all the important issues are dealt with within 30 days and the longer consultation period has no meaningful purpose. Avoiding the sharp step and vastly increased cost implicit in crossing from 99 to 100 proposed redundancies will free businesses from trying to run their business round the needs of the redundancy process rather than the other way around.

In our view the shorter 30-day minimum period would better deliver the Government's aim of improving the ability of employers to respond to changing market conditions. It would also address the Government's objective of balancing the interests of employees who are made redundant with those who remain. As many of the Responses to the Call for Evidence showed, the longer the minimum consultation period the more likely employees are to suffer from stress and uncertainty (they just want to know if they will be adversely affected rather than thinking they may receive an extra 60 days' pay due to the longer consultation process) – and the greater the likelihood a business may lose strong/marketable employees, as they may leave because they are uncertain about whether or not they are going to be made redundant.

It should be remembered that we are talking about a minimum period here – there is nothing to stop employers consulting for longer if there are still issues to discuss, but we have had little or no experience of cases where it has not or would not have been possible to comply with all the obligations to inform, consult, consider, decide and respond within 30 days. The remainder of the 90 days is usually just wasted. The temptation not to wait so long can also lead employers to have to increase severance amounts to head off failure to consult protective award claims.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of "establishment"?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Yes, we agree that it would be difficult to provide a statutory definition of "establishment".

We think it would be useful to have specific factors (maybe focussing on where an employee is employed) set out in the Code of Practice which could be taken into account by employers when considering this issue, but we recognise that ultimately this will be something that has to be judged on the particular facts of the case and we believe that many of our clients will still seek legal advice on this issue before proceeding. As with so much of employment law, there is no straightforward "yes or no" answer – and whilst our clients might get frustrated by this they are at least used to dealing with such uncertainty.

**Question 4: Will defining "establishment" in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

Probably not, as so much depends on the particular facts of the case. However, to the extent the Government can provide guidance on the sort of factors that will be taken into account by a Tribunal when deciding what constitutes an establishment this will be welcomed by our clients.

It may be useful to give examples of what has been held to constitute an establishment in previous Tribunal decisions, to give employers an idea of how Tribunals may approach this issue.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Unlike defining an "establishment" in legislation, we do not believe it would be difficult to construct a suitable legislative exemption for fixed-term appointees, not least by reference to the definition in the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

We are still in favour of extending the exemption for fixed-term contracts from 3 months to one year, as this is likely to cover most fixed-term contracts.

We recognise however that the reduction of the 90-day minimum period should help to alleviate the problems (and costs) in this area.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

Broadly, yes, although see responses to Questions 4 and 5.

We need to make sure, if there is a separate Code of Practice plus Government Guidance, that things do not become confusing. Any Guidance should support and supplement what is stated in the Code of Practice, in the same way that Acas produced additional Guidance to support the Code of Practice on Disciplinary and Grievance Procedures (noting of course that the redundancy Code of Practice will be non-statutory).

**Question 7: What changes are needed to the existing Government guidance?**

The current guidance is fine as far as it goes – it provides a basic overview of the position governing large-scale redundancies, but it does not address in sufficient detail the tricky issues that employers have to grapple with, such as the meaning of an “establishment”, when consultation should start and finish, how to deal with a shifting number of proposed redundancies, etc. See comments above re: interaction of Guidance and Code of Practice.

We would be interested in participating in the development of Guidance or Case Studies.

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

We believe it will take more than a new non-statutory Code of Practice to deliver culture change. Providing further clarification on difficult issues should, however, at least remove some of the uncertainty and scope for disagreement between employers and employees/employee representatives/trade union representatives.

**Question 9: Are there any other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

None that we can think of.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

We have nothing further to add in response to this question.

**If you have any evidence relating to possible impacts we would be happy to receive it.**

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

Not applicable – responding as a legal representative.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

Not applicable – responding as a legal representative.

**Other Comments**

**17 September 2012**

1. Your name:

**The Law Society - Emily McCarron**

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

The Law Society

3. E-mail address:

Emily.McCarron@LawSociety.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

19. If you have any evidence relating to possible impacts we would be happy to receive it.

**No Response**

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

**No Response**

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

**No Response**

**REPRO DTP**

---

**From:** Emily McCarron [Emily.McCarron@LawSociety.org.uk]  
**Sent:** 17 September 2012 14:22  
**To:** Collective Redundancies  
**Subject:** Law Society response  
**Attachments:** Law Society response\_ Collective Redundancies Sept 2012.pdf

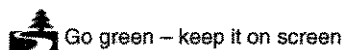
Dear Madam/Sir,

Please find attached the Law Society response to the BIS consultation on collective redundancies.

Regards,

**Emily McCarron**  
**Employment Law Policy Adviser**  
The Law Society, 113 Chancery Lane  
London WC2A 1PL  
t: 020 7316 5507  
Ext 4763  
[www.lawsociety.org.uk](http://www.lawsociety.org.uk)  
Follow us on Twitter: [LSFamSocJustice](https://twitter.com/LSFamSocJustice)

I currently work part time and only check emails during office hours on Monday and Wednesday and on Tuesday afternoons. For enquiries outside of these hours please contact Lucy Sherwood on ph 020 7320 9559 or email [lucy.sherwood@lawsociety.org.uk](mailto:lucy.sherwood@lawsociety.org.uk).



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The Law Society

# **Collective Redundancies: Consultation on changes to the rules**

Response to the Department for Business, Innovation and Skills consultation

September 2012



## Introduction

The Law Society is the representative body for more than 140,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Employment Law Committee ('the Committee'). The Committee is made up of senior and specialist employment lawyers from across England and Wales. Committee members provide advice and representation to employers and employees through practice in City and regional firms, local government, industry, trade unions and law centres. Some Committee members are fee-paid employment judges.

Our interest in employment law and practice is to influence policy changes to secure 'good law making', to provide clarity for employers and employees, and to avoid possible unintended consequences. We welcome this opportunity to provide comments on the proposal to remove the third party harassment provision from the Equality Act 2010. Our comments reflect the concerns of solicitors with daily experience of putting employment law procedures into practice.

### **Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

The general practice of the Law Society is not to comment upon a government's overall approach to relationships in the employment market as a political matter. We do, however, strongly support the need for guidance on the support which is on offer from Government.

### **Question 2: Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Given the choice between replacing the ninety-day minimum period with a period of either thirty or forty-five days, we prefer the former. Having a single consultation period, regardless of the number of potential redundancies, will provide certainty and clarity for all concerned.

As paragraph 3.13 highlights, certainty outweighs any disadvantages resulting from a shorter time limit. The greater the number of redundancies, the greater the impact both in terms of the individuals and the wider community.

Under either option (as stated in paragraph 3.13 of the Consultation Paper) the improved guidance must make it abundantly clear that 'the new time period will be a minimum and that consultation should continue beyond this period wherever necessary'.

### **Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'? Please provide comments to support your answer.**

Yes. Settled case law is available and widely understood. Although case law will of course continue to evolve, a new statutory definition would create new uncertainties and consequently give rise to litigation.

As paragraph 3.18 states, the primacy of EU law relating to the definition of establishment, which makes it difficult and risky to create any other definition, needs to be acknowledged.

That said, the points of difficulty in determining an 'establishment' which we raised in our response to the Call for Evidence could be usefully addressed in the Code of Practice: They include:

- mobile workforce;
- a number of sites which are geographically close but nonetheless distinct;
- two or more employers in the same group carrying on business at the same site or group of sites; and
- employers organising their business along regional management lines.

In defining an 'establishment', the following should be taken into account:

- employees working exclusively from home;
- management of reporting lines;
- percentage of time spent at a particular site;
- the degree of organisational integration between sites; and
- the provisions of the contract of employment.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Whether defining 'establishment' in a Code of Practice will give sufficient clarity depends upon the clarity of the definition itself. We would repeat the points made in our response to the Call for Evidence – see further the answer to question 3 above.

Whatever the definition, clarity will only come from case law.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.**

The judgment in the Stirling case has been welcomed by those employers who make use of fixed-term contracts.

Our understanding is that the Employment Appeal Tribunal in Scotland decided that the phrase 'related to the individual' means 'something to do with him such as something he is, or something he has done' and considered that that could be distinguished from a reason relating to the employer, such as the need to change its business.

That fairly straightforward distinction should be capable of being read across into legislation to provide clarity and certainty in what would otherwise be a fraught aspect of this area of law. In our opinion, this would not be provided by simply providing guidance in a Code of Practice.

We made the point in our response to the Call for Evidence that the potential conflict with the protection afforded to fixed-term employees by the Fixed-Term Employees Regulations (Prevention of Less Favourable treatment) Regulations 2002 will need to be addressed.

It would be preferable to clarify when fixed-term contracts should be included as redundancies for the purposes of collective consultation under s 188 rather than try to address this through changing the minimum consultation period.

**Question 6: Have we got the balance right between what is for statute and what is contained in government guidance and a Code of Practice?**

Our preference is that all important matters (including the fixed-term contract issue referred to at question 5 above) should be addressed in legislation. This will offer a degree of certainty, albeit subject to the development of case-law.

Leaving key issues to a Code would lead to uncertainty and generate litigation.

In our response to question 9 of the Call for Evidence we said that the issues to be addressed in the Guidance should include:

- what triggers the start of the consultation period;
- consultation meetings need not continue throughout the whole period;
- it is permissible to conclude the process if discussions have been taken as far as possible (preferably with clear agreement), but employers should not be tempted to conclude the consultation process prematurely;
- if the consultation process has been genuinely concluded steps can be taken in connection with individual redundancies, provided that dismissals do not take effect before the expiry of the consultation period.

It might also be helpful to include guidance on how to establish that the consultation process has run its course, and when.

**Question 7: What changes are needed to the existing government guidance?**

The guidance for employees contains a section headed 'Consultation with individuals'. That section has two bullet points which state that individual consultation will normally involve speaking to the employee about why he or she has been selected and looking at alternatives to redundancy.

It is suggested that those two bullet points could be expanded upon to include discussions about the reasons for the redundancies and how they could be avoided or reduced. These are matters that would be explored in collective consultation, but can usefully be explored in individual consultation too whether or not collective consultation is also being undertaken.

The guidance for employers is not as comprehensive or as clear as that produced for the employees and requires a fairly significant overhaul. In particular, the section in the employee guidance under the heading 'Information during consultation' is far preferable to the equivalent section in the employer guidance under the heading 'What information must you provide?' In particular, the final paragraph of that section in the employer guidance ('Consultation does not have to end in agreement') should be replaced by the far clearer section of the guidance for employees under the heading 'Collective consultation process'.

A further point arising from the guidance for employers is that the second bullet point under the heading 'Collective redundancy notification and consultation' about consultation with workplace representatives does not reflect the law accurately when it states, 'These may be either trade union representatives and/or elected employee representatives for those employees not represented by a union'.

Section 188 (1B)(a) makes it clear that if the employees are of a description in respect of which the employer recognises an independent trade union, consultation must be undertaken with representatives of that trade union. This is the 'primacy of trade unions' referred to at paragraph 3.31 of the consultation document.

The sentence could be read as meaning that the employer may choose to consult with elected employee representatives of employees who are not members of one of its recognised trade unions.

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

If reliance is to be placed on a Code and if that Code is to be of real value, it should be given weight equivalent to that given to Acas Codes of Practice by section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

We agree that training of both employers and employee representatives would be beneficial.

**Question 10: Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.**

We infer from the category of employer '< 20' that the category, 'Small' means 20 or more employees. If that is right, it is incorrect to say that Small employers are not 'in scope'.

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

This question assumes that agreement is the usual outcome of a consultation process but in our experience that is rarely achieved. For understandable reasons, trade union representatives are reluctant to have it said that they have agreed to the steps which the employer ultimately puts into place leading to dismissals among the workforce.

That said, our members have experience of numerous collective redundancy consultations and no single period of time can be pinpointed as to when it could be agreed that the consultation had run its course. By and large, however, with commitment from both 'sides' that point can usually be reached within 30 days. There will always be some cases where this is not possible for example relating to the complexity of the issues, the distribution of employees and shift patterns or indeed time of year.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time? Not applicable.**

1. Your name:

**The Law Society of Scotland - Brian Simpson**

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

The Law Society of Scotland

3. E-mail address:

BrianSimpson@lawscot.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

**No Response**

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

**No Response**

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

**No Response**

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

**No Response**

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

**No Response**

14. What changes are needed to the existing Government guidance?

**No Response**

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

**No Response**

16. Are there other non-legislative approaches that could assist – e.g. training?

**No Response**

17. If yes, please explain what other approaches you consider appropriate.

**No Response**

18. Have we correctly identified the impacts of the proposed policies?

No

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

Line1 - The Government has perhaps not considered that if the proposals are passed it could lead to a spike in unemployment and therefore have a knock-on effect on the inflows and outflows and alter the

Line2 - statistical curve of the unemployment figures. In addition, much of the research that has been done appears to have been carried out with employers in mind, to lessen the administrative burden on them

Line3 - and we would be concerned that not sufficient consideration has been given to employees and what the proposals would mean for them.

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

**No Response**

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

**No Response**

**REPRO DTP**

**From:** Brian Simpson [BrianSimpson@lawscot.org.uk]  
**Sent:** 05 September 2012 08:41  
**To:** Collective Redundancies  
**Subject:** BIS Consultation : Collective Redundancies Changes to the Rules-Law Society of Scotland Response  
**Importance:** High  
**Attachments:** EMP-BIS Collective Redundancies Consultation on changes to the rules-Law Society of Scotland Response.doc

Dear Sirs,

**Re: BIS Consultation : Collective Redundancies Changes to the Rules.**

In relation to the above consultation. I attach the response submitted on behalf of the Law Society of Scotland. Please contact me direct if you have any questions in relation to this.

Regards  
Brian Simpson  
Law Reform  
The Law Society of Scotland  
DD: 0131 476 8184  
Mobile:07854 457 124  
Fax 0131 225 4243



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of SCOTLAND**  
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## **BIS: Collective Redundancies, Consultation on Changes to the Rules**

**The Law Society of Scotland's Response**

**September 2012**



## **INTRODUCTION**

The Law Society of Scotland aims to lead and to support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in legislative and public policy decision making processes.

To help us do this we use our various Society Committees which are made up of solicitors and non solicitors, and ensure the benefit from knowledge and expertise from both within and out with the solicitor profession.

The Law Society of Scotland's Employment Law Sub Committee (the committee) welcomes the opportunity to respond to the Department for Business, Innovation & Skills consultation: Collective Redundancies, Consultation on Changes to the Rules.

The committee has the following comments to put forward.

## **GENERAL COMMENTS**

We note that the UK Government's consultation is concerned with three main reforms

1. Reducing the 90 day minimum period for large redundancies.
2. Issuing a new, non-statutory, code of practice which will address a number of key issues affecting redundancy consultations.
3. Improving guidance for employers and employees on the support on offer from Government.

In respect of these, we offer the following general comments.

**1. Reducing the 90 day period.** This is intended to reduce the minimum period for redundancies to either 30 or 45 days. It will still be possible to continue consulting beyond the minimum period and the Government's rationale for this is that it will allow employers to restructure more quickly, and save them administrative and wage costs, potentially reducing the number of redundancies. Our view is that the reform will certainly allow employers these benefits but we cannot see how that alone could reduce the number of redundancies. Our fear is that the reform is simply going to make it easier for employers to get rid of large numbers of people in a shorter space of time. That will result in greater redundancy costs and perhaps crucially (should they subsequently be in a position to take on staff, following an upturn) greater recruitment costs for business. There would be no incentive for businesses to retain staff but on alternative hours, in the hope that the need for staff would increase in the future. The Government also states that a shorter redundancy process will actually make it easier for those made redundant to find new jobs as they can begin their alternative job search sooner, however we do not think the current financial climate has really been taken into account and it seems more likely to be the case that if people are made redundant sooner they will be out of work for longer.

We note that the Government suggests that: *"Once the collective redundancy notice has been issued, those made redundant can take advantage of career resources and begin the alternative job search sooner."*

We suggest that this does not take account of the reality of the current financial climate which is, after all, leading to an increasing number of redundancies.

**2. New non-statutory code of practice.** The Government intends this to address the principles and behaviours behind a good quality consultation and to provide guidelines but allow flexibility for parties to tailor their consultation appropriately. Initial thoughts on this would be to establish whether the new non-statutory code of practice would be similar to the ACAS code. For example, would there be penalties for non-compliance and the potential uplifts to awards if the proper procedures are not followed, or if this is simply a guidance document, would employers routinely be able to breach it without suffering any consequences? We do not think a non-statutory code will encourage employers to engage in meaningful consultation.

Anecdotally good quality consultation is the exception rather than the norm. We are aware of a number of cases recently where there has been no attempt whatsoever to consult. That results in automatic breach of the TULRCA obligations which in turn usually means an award from an Employment Tribunal of a protective award of thirteen weeks which more usually than not is paid ultimately by the tax payer. Good quality consultation, even if only to take place over a shorter period, would be encouraged by employers being penalised heavily for not complying with their consultation obligations by way of fines and/or individual director disqualification from being able to hold directorships, in circumstances where they have ignored their obligations.

**3. Improve guidance on support.** The current guidance on collective redundancies is being reviewed to ensure that it is accurate and fit for purpose and the Government's view is that employers and employees are not aware of the resources available to them. In our view improved guidance can only be a good thing, as from both an employer's and employee's point of view more information being available at the time of such a collective redundancy can only be to the advantage of all. However, a concern would be about how this is filtered to employees. At the moment there are resources like the direct.gov website but a lot of employees do not know this exists. There must be some better publicity for employees facing this type of situation so that they can adequately find resources to help them.

In relation to the questions posed within the consultation document, we respond as follows:

**Q1 Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Response: No – shortening the consultation period will tend to favour employers and in our view it would lead to it being easier to make large scale redundancies, without properly considering alternative options. In addition, in practical terms, large scale redundancies usually require a lot more time for consultation. See for example the consultation with BAE and the Trade Unions (over eleven thousand redundancies announced in late 2011) where in fact all sides are seeking further time to consult not less time as proposed by the Government. The Government's proposal itself states that for some it may appear counter-intuitive to argue that the quality of the consultation process can be improved by reducing the minimum period for

redundancies and we would agree with this statement. Collective large scale redundancies should be the subject of good quality consultation and either a 30 or 45 day period would seem insufficient. In addition, it is questionable if it complies with the EU Directive 98/59 which provides for employer and Union consultation with a view to reaching agreement see *Junk v Kuhnel* [2005] IRLR 310. The Government also acknowledges that there is a risk that a shorter minimum period could lead to superficial consultations and we would agree with this point.

**Q2 Which of the two proposed options should replace the 90 day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

Response: Whilst not convinced that either solution would be better than the current 90 day period it would seem that the 45 day consultation period would be better in that it would give employees some certainty as to when they can expect to find out the results of consultations when collective consultations begin.

**Q3 Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of "establishment", please provide comments to support your answer.**

Response: Yes, we would agree with the Government's assessment of risks. The term "establishment" has a very specific meaning in the context of wider employment law in areas such as equal pay, TUPE etc and it would be important that the concept of 'establishment' is kept consistent throughout. It is the Government's intention to address this in the code of practice. This could be a good idea, however it would be important that the concept of establishment was kept consistent with the use of establishment as a term in other areas of employment law.

**Q4 Will defining "establishment" in a code of practice give sufficient clarity?**

Response: Again the answer to this would be yes as long as the definition is consistent with the current definitions of establishment in the *Employments Rights Act 1996* and *Trade Union*

*Labour Relations Consolidation Act 1992*. In any event, given the recent *USDAW v Woolworths*<sup>1</sup> case it would appear that the law is tolerably clear.

**Q5 Is the Government right to address the fixed term contract issue in guidance and the proposed code of practice rather than in legislation? Please provide comments to support your answer.**

Response: In our view it would be sensible to consider the fixed term contract issue in legislation rather than the code of practice. Fixed term workers have a right not to be treated less favourably than permanent employees in other areas of employment, and it would be sensible for a statutory provision to ensure that they are not to be subject to less favourable treatment in respect of collective redundancies.

**Q6 Have we got the balance right between what is for statute and what is contained in Government guidance and code of practice?**

Response: This is a difficult balance to draw. However, the proposed code of practice covers the main areas that we would expect to be addressed in a collective redundancy consultation, with the possible exception of the fixed term employee protection which may be better reserved for statute. It does however remain to be seen what the final content of the code of practice would be and comments may need to be sought on this separately.

**Q7 What changes are needed to the existing Government guidance?**

Response: The current Government guidance on the direct.gov website in relation to collective redundancy is succinct and gives good advice on the requirements for consultation over collective redundancies and the process involved. However, clearly a redundancy is a very distressing situation for an employee and it may be helpful if there were links to relevant statutory provisions or indeed more detailed guidance for employees, as some employees may wish to take it upon themselves to do more thorough research into the process. In respect of

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<sup>1</sup> *Usdaw and others v WW Realisation 1 Ltd (in liquidation)* ET/3201156/10

the employer advice at the [businesslink.gov.uk](http://businesslink.gov.uk) again this is succinct, however most employers even of a fairly small nature would employ professional legal representation before considering a collective redundancy and the business link website would probably be used more for guidance than actually advisory purposes.

**Q8 How can we ensure the code of practice helps deliver the necessary culture change?**

Response: In our view the best way to ensure the code of practice delivered the necessary culture change would to make it more employee friendly. There could be a section explaining exactly what the employee should expect to go through on a step by step basis, to ensure that it is not too employer-focused. It would also be important that the code of practice is couched in employee friendly language and is not too technical, as collective redundancies can involve staff at any level and in the main will cover the spectrum of employees from manual workers up to executives. In addition, we would suggest that severe sanctions for not complying with the code of practice would drive employers to implement it.

**Q9 Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Response: It is difficult to say if the non-legislative approaches could assist until the code of practice is available. It may be that nominated employees could be trained in the collective redundancy process so that if it happens at their workplace they could be point of contact for employees. However this could have the effect that if certain people were sent for training, employees could fear that the collective redundancy process was about to start and could be counterproductive. We are aware of good employers securing and paying for specialist training for those employees elected by their colleagues to be workplace representatives and the feedback has been positive.

**Q10 Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.**

Response: The Government has perhaps not considered that if the proposals are passed it could lead to a spike in unemployment and therefore have a knock-on effect on the inflows and outflows and alter the statistical curve of the unemployment figures. In addition, much of the research that has been done appears to have been carried out with employers in mind, to lessen the administrative burden on them, and we would be concerned that not sufficient consideration has been given to employees and what the proposals would mean for them.

**Q11 If you have been involved in a collective redundancy consultation in the last 5 years how long did it take to reach agreement?**

Response: Our experience is that with large scale redundancies, consultation for longer than the initial ninety day period which the current law specifies has been necessary. The key to a successful collective redundancy process is to involve consultation at an early enough stage in the employer's thinking, which these proposals would effectively turn on its head. We are aware that in the majority of cases agreement is not reached on every aspect. Workers' representatives are often understandably reluctant to present the redundancy plan as a joint project.

**Q12 If you have carried out a collective redundancy consultation in the last 5 years, what effect, if any, did it have on your regular business during this time?**

Response: Our experience, in advising employers, is that if the employer is large enough to have a dedicated HR department and function, (which most employers contemplating large scale redundancies would have) the impact on the day to day activities of the business is minimal, in that HR can drive the process. If the employer is smaller it impacts more. However, staff morale can be remarkably buoyant if the redundancy situation is handled well, and in accordance with the duties to consult. Regular business is more likely to be impacted in situations where there is no consultation, the consultation is meaningless, or staff do not believe that their employers are consulting in a meaningful way. Any change must address these two very important factors.

**For further information and alternative formats please contact:**

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**1. Your name:**

**Thompsons Solicitors - Jennie Walsh**

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

Thompsons Solicitors

**3. E-mail address:**

JennieWalsh@thompsons.law.co.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

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

No Response

**6. Which of the two proposed options should replace the 90-day minimum period?**

No Response

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

No Response

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No Response

**12. Please provide comments to support your answer.**

No Response

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

No Response

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

**REPRO DTP**

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**From:** Jennie Walsh (Thompsons Solicitors) [JennieWalsh@thompsons.law.co.uk]  
**Sent:** 18 September 2012 12:51  
**To:** Collective Redundancies  
**Subject:** Thompsons response  
**Attachments:** Thompsons response to collective redundancies consult.doc

Please find attached Thompsons Solicitors' response to the consultation.

Regards

Jennie Walsh

Jennie Walsh  
Thompsons Solicitors  
DD: 020 7290 0025  
Mob: 07711 378877

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# Department for Business, Innovation & Skills

## Collective Redundancies : Consultation on changes to the rules

### Response from Thompsons Solicitors

September 2012

#### About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Question 1	<b>Do you agree with the Government's overall approach to the rules on collective redundancy consultation?</b>
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Thompsons welcomes the commitment to consultation which the government sets out in paragraph 3.3. Measures which genuinely facilitate consultation are to be welcomed. But Thompsons is keen to ensure that any changes do not throw the baby out with the bathwater.

We note that the consultation document acknowledges that many employers do not understand the help available to them. While this is true, it is not a justification for changing the rules. An employer who wishes to discover their options has plenty of opportunity to do so. Googling "redundancy" brings up numerous pages where advice to employers is readily and freely available. We are concerned that there should not be a repetition of earlier consultations where a significant part the problem lies in employer inertia, but safeguards are removed rather than that issue addressed.

The length of the consultation period does not increase the risk of 'superficial consultations'<sup>1</sup>. And changing the periods does not address the problem of employers who have no wish to consult. Some feel that doing so would be commercially disadvantageous, others that it is an unwelcome restraint on their ability to take decisions about their organisation. For this reason we have some concerns about the aims of allowing "...each consultation to be tailored to its unique circumstances, including the commercial environment"<sup>2</sup> and consider that it could be open to abuse and lead to poor decision-making, exposing employers to employment tribunal claims.

Employers who wish to discharge their obligations fully, and in good faith, should not be impeded by complexity. Nor should they be harshly penalised. The focus should be on securing the compliance of employers who do not. This paper's proposals do not do that.

Thompsons agrees that certain aspects of the consultation rules would benefit from reform, particularly the uncertainty over what constitutes an establishment<sup>3</sup> and circumstances where consultation is genuinely complete within the prescribed period.

<sup>1</sup> Paragraph 3.13

<sup>2</sup> Paragraph 3.4

<sup>3</sup> S.188(1) *Trade Union and Labour Relations (Consolidation) Act 1992*

<b>Question 2</b>	<b>Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative option.</b>
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In our view, neither option in its current form is a desirable replacement as they do not tackle the qualitative nature of the consultation undertaken.

It is not uncommon for consultations to be sabotaged by the suppression of information, delay in correspondence, and congestion of diaries. This is employed deliberately by numerous unwilling employers and such tactics are only encouraged by a reduced period.

We are surprised to see the view that "...this approach would *encourage legal challenge*"<sup>4</sup> from a government so recently keen on reducing claims to Employment Tribunals. We would still prefer changes that focus on encouraging compliance.

Thompsons suggests a system whereby consultation is mandatory but can be brought to an end at any time where both sides certify their agreement to that result. By placing both sides in a position of reliance upon the other compliance is encouraged. A lengthier period would actually discourage time-wasting.

Thompsons recognises the uncertainty inherent in a redundancy situation. We are less convinced that lengthier consultations produce more uncertainty for anyone. The issue of whether to jump before being pushed is one faced by everyone in a redundancy situation. Those deciding to jump have less time to look for new employment where consultations are shorter. The observation about improving employee morale<sup>5</sup> misjudges the nature of being in a redundancy situation. Hastening a possible redundancy notice ought not to be considered a morale improving fillip.

<b>Question 3</b>	<b>Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'? Please provide comments to support your answer.</b>
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No. Thompsons believes that the government has bottled out of this issue.

In the recent call for evidence on compensated no fault dismissals<sup>6</sup> the government showed an interest in the Australian model and the "greater certainty" which it provided. Thompsons notes with interest that in that model the Australian approach is not to slice employers up into individual sites or locations, but to treat them as a whole. The definition of 'genuine redundancy' is an example:

*(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:*

*(a) the employer's enterprise; or*

*(b) the enterprise of an associated entity of the employer.<sup>7</sup>*

A solution to the 'establishment' problem could be to look at the employer as a whole. This approach has the advantage of meeting the government's objective of being "a straightforward legislative framework".<sup>8</sup>

We also note that in Australia only 15 proposed redundancies are required to trigger consultation requirements.<sup>9</sup>

<sup>4</sup> Paragraph 3.13

<sup>5</sup> Paragraph 3.16

<sup>6</sup> *Dealing with Dismissal and 'compensated no fault dismissal' for micro-businesses*, March 2012

<sup>7</sup> S.389 Fair Work Act 2009

<sup>8</sup> Paragraph 1.3

<sup>9</sup> Impact Assessment, Table 2

<b>Question 4</b>	<b>Will defining 'establishment' in a Code of Practice give sufficient clarity?</b>
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Until the government publishes the proposed definition this is impossible to comment upon. We repeat our observation that some employers simply fail to inform themselves properly or at all. For those, even the clearest definition will be of little use.

We also note that for so long as s.188(1) bears that phrase, and there is dispute over it, a non-binding definition in a Code of Practice is unlikely to resolve anything, especially where the government looks to "...encourage legal challenge"<sup>10</sup> in cases of alleged failure.

<b>Question 5</b>	<b>Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.</b>
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Thompsons does not see any justification for any 'legislative exemption' for fixed-term appointees. The Stirling case mentioned in paragraph 3.20 is subject to appeal and any Code of Practice should bear that in mind. We do not understand the assertion that reducing the period of consultation addresses the fixed-term appointee problems. It appears to have no logical basis, and it is notable that it is not explained in the consultation.

<b>Question 6</b>	<b>Have we got the balance right between what is for statute and what is contained in government guidance and a Code of Practice?</b>
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Until the government publishes the proposed definition it is impossible to comment fully. Thompsons considers that the matters in paragraph 3.24 should properly be in both statute and any Code of Practice. It is impossible for a Code of Practice to explain how to discharge an obligation if no such obligation exists. For the same reason any failure to observe a Code of Practice is with remedy in those circumstances.

<b>Question 7</b>	<b>What changes are needed to the existing government guidance?</b>
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Thompsons has not undertaken a review of current government guidance, but all guidance must be clear and simply put. Checklists are useful, as are examples and case studies.

<b>Question 8</b>	<b>How can we ensure the Code of Practice helps deliver the necessary culture change?</b>
-------------------	---

Until the government publishes the proposed definition it is impossible to comment fully. Culture change cannot be achieved unless the willing are helped, and the unwilling compelled. Moving away from obligations to non-binding Codes of Practice may assist the former but is unlikely to compel the latter. Yet, by doing so, the government risks undermining the ability of anyone affected to address that in litigation.

<sup>10</sup> Paragraph 3.13

<b>Question 9</b>	<b>Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.</b>
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There are plenty of sources of free information in existence already. What would help is not more material but an enhanced knowledge of it. Trade unions are aware of the various approaches and benefits to consultation and greater government encouragement to engage with, and recognise, trade unions would no doubt reap regards. We note that this is consistent with the government's stated aim in of having at the core of promoting improvements in the quality of consultation:

*A positive relationship between the employer and employees' representatives. Ongoing engagement and a positive working relationship between the employer and employees' representatives*<sup>11</sup>

<b>Question 10</b>	<b>Have we correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.</b>
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Thompsons does not propose to comment in detail. One of the stated purposes of consultation is to avoid redundancies entirely<sup>12</sup> and the assumption that savings can be made in wages assumes that redundancies are inevitable. This will be true on many occasions but Thompsons feels that inadequate account is taken of the possibility that all redundancies can be avoided. We have seen this particularly in recent years where consultations have resulted in agreements with staff to, for example, forgo wage increases and reduce hours.

<b>Question 11</b>	<b>If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?</b>
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No comment.

<b>Question 12</b>	<b>If you have carried out a collective redundancy consultation in the last five years, what</b>
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No comment.

**Further information:**  
**Thompsons Solicitors**  
**Congress House**  
**Great Russell Street**  
**London**  
**WC1B 3LW**  
**jenniewalsh@thompsons.law.co.uk**

<sup>11</sup> Paragraph 3.6

<sup>12</sup> S.188(2) *Trade Union and Labour Relations (Consolidation) Act 1992*



1. Your name:

**James Wardle**

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

None

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Legal representative

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

**1. Your name:**

**Acas - Ed Sweeney**

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

Acas

**3. E-mail address:**

GBOYCE@acas.org.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Legal representative

Government Agency

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

No Response

**6. Which of the two proposed options should replace the 90-day minimum period?**

No Response

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

No Response

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No Response

**12. Please provide comments to support your answer.**

No Response

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

No Response

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

**REPRO DTP**

**From:** George BOYCE [GBOYCE@acas.org.uk]  
**Sent:** 19 September 2012 12:04  
**To:** Collective Redundancies  
**Cc:** Dix Gill (); Susan Clews  
**Subject:** Acas response  
**Attachments:** Acas Collective Redundancies response.doc

I have pleasure in enclosing the Acas response to the government's recent consultation on changes to the rules on collective redundancies.

Regards

George Boyce  
Acas Strategy Unit

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**Private Office**

Acas National, 22<sup>nd</sup> Floor, Euston Tower, 286 Euston Road, London NW1 3JJ  
Tel: 020-7210 3670 Fax:020-7210 3691 Email:[esweeney@acas.org.uk](mailto:esweeney@acas.org.uk)

**Ed Sweeney  
Chair**

Carl Davies  
Department for Business, Innovation  
And Skills  
3<sup>rd</sup> Floor Abbey 2  
1, Victoria Street  
London  
SW1H 0ET

19 September 2012

**COLLECTIVE REDUNDANCIES: CONSULTATION ON CHANGES TO THE RULES**

Acas welcomes the opportunity of responding to the Government's consultation on changes to the rules relating to collective redundancies. As we pointed out in our response to the recent call for evidence on this topic, Acas has considerable experience of advising organisations on handling collective redundancies, particularly so in the last few years.

Whatever changes may be made to the legislative framework surrounding collective redundancies it is our belief that good quality guidance is vital in ensuring that all situations involving redundancies, including large scale, are handled as effectively and sensitively as possible. Our reply to your earlier call for evidence outlined some of the positive advantages of engaging in productive discussions regarding redundancy situations and to the fact that the length of the consultation period can vary considerably depending on the circumstances of the redundancy. We therefore welcome the Government's proposal to introduce a new detailed guidance on the subject. As you will know Acas already produces a range of guidance on redundancy handling and consultation.

The sorts of issues you see the code covering, as set out in the consultation document, all seem sensible and we feel that providing guidance on these would go a long way towards helping parties get a better understanding of how to deal with collective redundancies when they arise. We note that the consultation document refers to the new code being non statutory. The guidance in existing employment codes, such as the Acas code on discipline and grievance or the government's code on picketing, are admissible in relevant court or tribunal claims. If 'non statutory' indicates that the contents of the code on redundancies would not be so admissible then this would need to be very clearly spelt out or, alternatively, the word code should be replaced by some other term such as guide or guidance.

I hope you find these comments helpful.

Yours sincerely

Ed Sweeney

1. Your name:

**Blue Triangle (Glasgow) Housing Association Limited  
- Rachel Owora**

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

Blue Triangle (Glasgow) Housing Association Limited

3. E-mail address:

rowora@btha.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Charity or social enterprise

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - a shorter timeframe runs the risk of inadequate consultation for some

Line2 - businesses may still have to operate during consultation therefore there needs to be flexibility in the timescale that 30 days may not allow

Line3 - quality of consultation is important and the longer timeframe provides greater scope for this

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - this will help multi-site organisations

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

Line1 - inconsistent with the fact that other facets of fixed term work is addressed in legislation

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

Not sure

14. What changes are needed to the existing Government guidance?

No Response

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

Line1 - a statutory code of practice would be preferable to a voluntary one

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Not sure

**17. If yes, please explain what other approaches you consider appropriate.**

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

Line1 - not applicable

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

Line1 - not applicable

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

Line1 - not applicable



1. Your name:

**h**

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Central government

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

19. If you have any evidence relating to possible impacts we would be happy to receive it.

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**East Kent Human Resources - Chris Swan**

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

East Kent Human Resources

3. E-mail address:

Chris.Swan@dover.gov.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Local government

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Revisions are necessary as current time scales can be too long and can impact on organisational

Line2 - efficiency and organisational morale

Line3 - In the case of consulting over 100 employees, particularly

Line4 - in large, multi site or complex organisations 30 days could prove too short, with the extra 15 days allowing for any problems with communications and/or consultations to be resolved.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - Given the differing nature of what constitutes an "establishment" it is probably best to avoid a

Line2 - legislative definition of the term at this time, although it is possible that a legal definition may be required at some stage in the future.

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

Not sure

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

Line1 - Defining the term within a Code of Practice will only be practical if the code is binding rather than voluntary..

Line2 - Using guidance and/or a Code of Practice to deal with fixed-term contracts will only be practical if the Code is binding rather than voluntary.

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

Not sure

**14. What changes are needed to the existing Government guidance?**

Line1 - Whilst more legislation can be seen as restrictive, it can lead to less arguments over the interpretation of terms and definitions pre and post consultation. It can therefore speed up the process and

Line2 - lead to more constructive consultations. However, there are occasions where the flexibility of issues not being constrained by legislation is a positive benefit when consulting over change.

Line3 - There is a need to tightened elements of guidance to avoid the possibility for disagreement over definitions and

Line4 - terms between employers and employees, and where possible, guidance should be binding and not voluntary.

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

Line1 - If the Code is voluntary, those employers who follow best practice will wish to use it: however, others will not, so as a tool it will only change culture if it is binding on all.

Line2 - Therefore, unless it is binding it will not bring about the necessary cultural change in those organisations who most need it.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

Line1 - There have been a number of consultations leading to restructuring and/or redundancies across several local authorities which Est Kent Human Resources supports

Line2 - The consultation periods have varied between 30 and 90 days according to size of the Department/function under review and have been concluded within that time scale.

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

Line1 - As change within local government has become endemic

Line2 - , managers and employees have become adept at coping with such issues. As such there was no noticeable reduction in productivity during the consultation period.

Line3 - However, on average each employee lost around

Line4 - 2 days of work due to consultations, meeting and one to one discussions over the redundancy situation.

**REPRO DTP**

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**From:** Chris Swan [Chris.Swan@dover.gov.uk]  
**Sent:** 12 September 2012 10:39  
**To:** Collective Redundancies  
**Subject:** Collective Redundancies Consultation  
**Attachments:** 12-808rf-collective-redundancies-consultation-form version 2.doc

Good Morning,

EK Human Resources supplies HR services, including advice and guidance on a wide range of HR issues to several councils and organisations around the East Kent Coast.

On this basis we have considered the proposals and have added our views on the proposed changes to the redundancy legislation/rules.

Hope you find these informative and helpful

Kind Regards

**Chris Swan MCIPD**  
**HR Advisor**



See EK Human Resources online at [www.ekhrp.org](http://www.ekhrp.org) for policies, guidance, support and much more.

Can't find what you're looking for or need to speak to an Advisor, phone 01304 872799.

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## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**

## Your details

Name: Chris Swan

Organisation (if applicable): East Kent Human Resources

Address: PO Box 453, Dover. CT16 9DQ

Telephone: 1304872799

Fax:

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)



**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

Revisions are necessary as current time scales can be too long and can impact on organisational efficiency and organisational morale.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

In the case of consulting over 100 employees, particularly in large, multi site or complex organisations 30 days could prove too short, with the extra 15 days allowing for any problems with communications and/or consultations to be resolved.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Given the differing nature of what constitutes an "establishment" it is probably best to avoid a legislative definition of the term at this time, although it is possible that a legal definition may be required at some stage in the future.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure

Defining the term within a Code of Practice will only be practical if the code is binding rather than voluntary..

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Using guidance and/or a Code of Practice to deal with fixed-term contracts will only be practical if the Code is binding rather than voluntary.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

Whilst more legislation can be seen as restrictive, it can lead to less arguments over the interpretation of terms and definitions pre and post consultation. It can therefore speed up the process and lead to more constructive consultations. However, there are occasions where the flexibility of issues not being constrained by legislation is a positive benefit when consulting over change.

**Question 7: What changes are needed to the existing Government guidance?**

There is a need to tightened elements of guidance to avoid the possibility for disagreement over definitions and terms between employers and employees, and where possible, guidance should be binding and not voluntary.

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

If the Code is voluntary, those employers who follow best practice will wish to use it: however, others will not, so as a tool it will only change culture if it is binding on all. Therefore, unless it is binding it will not bring about the necessary cultural change in those organisations who most need it.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

**If you have any evidence relating to possible impacts we would be happy to receive it.**

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

There have been a number of consultations leading to restructuring and/or redundancies across several local authorities which Est Kent Human Resources supports. The consultation periods have varied between 30 and 90 days according to size of the Department/function under review and have been concluded within that time scale.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

As change within local government has become endemic, managers and employees have become adept at coping with such issues. As such there was no noticeable reduction in productivity during the consultation period. However, on average each employee lost around 2 days of work due to consultations, meeting and one to one discussions over the redundancy situation.

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Any enquiries regarding this publication should be sent to:

Department for Business, Innovation and Skills  
1 Victoria Street  
London SW1H 0ET  
Tel: 020 7215 5000

If you require this publication in an alternative format, email [enquiries@bis.gsi.gov.uk](mailto:enquiries@bis.gsi.gov.uk), or call 020 7215 5000.

**URN 12/808**

1. Your name:

**HM Prison Service - Mr David Seargeant**

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

HM Prison Service

3. E-mail address:

david.seargeant@hmps.gsi.gov.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Central government

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - 30 days could force people to rush through collective

Line2 - redundancies, having a slightly greater stand off time will

Line3 - allow all parties to talk through the changes and the

Line4 - rationale for them, and making people redundant.

Line5 - My preference would have been 60 days.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

No Response

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Yes

12. Please provide comments to support your answer.

No Response

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

Yes

14. What changes are needed to the existing Government guidance?

No Response

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

Line1 - Once in place ensure it is monitored, certainly where

Line2 - businesses engage the process and use it.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Not sure

**17. If yes, please explain what other approaches you consider appropriate.**

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

Not sure

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**Kent County Council - Ian Allwright**

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

Kent County Council

3. E-mail address:

ian.Allwright@kent.gov.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Local government

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - This would provide employers and employees with a focused period of consultation that enables the business of working with employees and their representatives to be conducted over a period that

Line2 - doesn't become protracted and doesn't artificially extend the period of time actually required. This helps reduce the length of time employees face uncertainty over their future but it also helps

Line3 - employers manage, alongside notice periods, lead times for change over a shorter period which helps them plan changes into their operational cycle more effectively.

Line4 - An ability to extend, by agreement, the 30 days should remain if it is logistically difficult to fit consultation into a 30 day period.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - The definition is not very clearly articulated currently and the Council does not believe that legislating will help but a clearer definition of what constitutes an establishment in a Code of

Line2 - Practice will. The key point here will be what status the Code of Practice will have in law and how it will be used by the courts. Whether a Code is used, or legislation, the use of the word

Line3 - "establishment" can cause confusion and therefore any attempt to reframe how this is defined would be helpful.

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Yes

**12. Please provide comments to support your answer.**

Line1 - any attempt to clarify and firmly establish the principles would be helpful.

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

Yes

**14. What changes are needed to the existing Government guidance?**

Line1 - if the Code is used to build on and clarify how the legislation should be put into practice.

Line2 - More detail on how the legislation is managed in practice. The current guidance only reiterates what the legislation says.

Line3 - Any Code of Practice needs to get under the legislation and make the law's application more practical.

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

Line1 - By being unambiguous and by establishing the Code as a framework that Tribunals will have to use to underpin how the law has been applied.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No

**17. If yes, please explain what other approaches you consider appropriate.**

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

Line1 - Never – whilst the Council endeavours to achieve this it invariably works with the unions and staff along side consideration of the consultation

Line2 - returns to find a way forward whilst accepting that there are areas of the change that we have not necessarily achieved agreement on.

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

Line1 - There have been varying impacts depending on the length of time it takes. This can range from minor level of employee relations issues

Line2 - (such as capability, grievances etc.) to losing people when they get other jobs which may leave gaps in the service that is being delivered.



**REPRO DTP**

---

**From:** Ian.Allwright@kent.gov.uk  
**Sent:** 17 September 2012 16:19  
**To:** Collective Redundancies  
**Subject:** Collective Redundancy Consultation  
**Attachments:** Annex C.doc

Please find attached Kent County Council's response to BIS's consultation on Collective Redundancies.

Regards

Ian Allwright  
**Employment Policy Manager**  
**HR Division**  
**Kent County Council**  
**01622 694418**

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

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

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

Name: **Ian Allwright**

Organisation (if applicable): **Kent County Council**

Address: **Sessions House, County Hall, Maidstone, Kent. ME14 1XQ**

Please return completed forms to:

Carl Davies,

3rd Floor Abbey 2, 1 Victoria Street

London SW1 H 0ET

Telephone: 020 7215 6220 Fax: 020 7215 6414 email:

collectiveredundancies@bis.gsi.gov.uk

If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group from the list below. Business representative organisation/trade body	
Central government	
Charity or social enterprise	
Individual	
Large business (over 250 staff)	
Legal representative	
Local Government	<b>x</b>
Medium business (50 to 250 staff)	
Micro business (up to 9 staff)	
Small business (10 to 49 staff)	
Trade union or staff association	
Other (please describe)	

### **Question 1**

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

**Yes**

Comments:

### **Question 2**

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

**30** ~~45 Not sure~~

Comments:

This would provide employers and employees with a focused period of consultation that enables the business of working with employees and their representatives to be conducted over a period that doesn't become protracted and doesn't artificially extend the period of time actually required. This helps reduce the length of time employees face uncertainty over their future but it also helps employers manage, alongside notice periods, lead times for change over a shorter period which helps them plan changes into their operational cycle more effectively.

An ability to extend, by agreement, the 30 days should remain if it is logistically difficult to fit consultation into a 30 day period.

### **Question 3**

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

**Yes**

Comments:

The definition is not very clearly articulated currently and the Council does not believe that legislating will help but a clearer definition of what constitutes an establishment in a Code of Practice will. The key point here will be what status the Code of Practice will have in law and how it will be used by the courts. Whether a Code is used, or legislation, the use of the word "establishment" can cause confusion and therefore any attempt to reframe how this is defined would be helpful.

### **Question 4**

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

**Yes – see Question 3**

Comments:

### **Question 5**

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

**Yes – any attempt to clarify and firmly establish the principles would be helpful.**

Comments:

### **Question 6**

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

**Yes – if the Code is used to build on and clarify how the legislation should be put into practice.**

Comments:

### **Question 7**

What changes are needed to the existing Government guidance?

**More detail on how the legislation is managed in practice. The current guidance only reiterates what the legislation says. Any Code of Practice needs to get under the legislation and make the law's application more practical.**

### **Question 8**

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

**By being unambiguous and by establishing the Code as a framework that Tribunals will have to use to underpin how the law has been applied.**

### **Question 9**

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

**No**

Comments:

### **Question 10**

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

**Yes**

Comments:

### **Question 11**

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

**Never – whilst the Council endeavours to achieve this it invariably works with the unions and staff along side consideration of the consultation returns to find a way forward whilst accepting that there are areas of the change that we have not necessarily achieved agreement on.**

### **Question 12**

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

**There have been varying impacts depending on the length of time it takes. This can range from minor level of employee relations issues (such as capability, grievances etc.) to losing people when they get other jobs which may leave gaps in the service that is being delivered.**

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

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

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

Please acknowledge this reply

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

**Yes**



1. Your name:

**Local Government Association - Samantha Lawrence**

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

Local Government Association

3. E-mail address:

samantha.lawrence@local.gov.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Local government

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - It is accepted that there would be particular difficulty in defining 'establishment' given the variety of structures and working arrangements that make up modern organisations.

Line2 - The Code of Practice is a good opportunity to provide comprehensive guidance to help organisations determine what an establishment is in their circumstances. It will be necessary to consider the many

Line3 - different types of arrangement, as discussed in the consultation document, and provide clear examples of how the term 'establishment' would apply in each case.

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

Line1 - It is probably true to say that in many cases it is not the obligations themselves imposed on employers that cause the most difficulty in employing a workforce, but uncertainty in how or whether an

Line2 - obligation applies in the first place. The current situation that exists, following the case of University of Stirling v University and College Union in relation to how fixed-term employees are to be

Line3 - treated in collective redundancy situations is a case in point. There needs to be clarity therefore over this point, which could be achieved by applying the exemption in the Directive, which

Line4 - presumably at least some other European countries have utilised and which still applies despite the subsequent Fixed-term Work Directive. Alternatively, the difficulties and concerns arising out of

Line5 - the Stirling case need careful consideration and a clear steer needs to be provided in any guidance issued

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

**No Response**

**14. What changes are needed to the existing Government guidance?**

**No Response**

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

**No Response**

**16. Are there other non-legislative approaches that could assist – e.g. training?**

**No Response**

**17. If yes, please explain what other approaches you consider appropriate.**

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

**REPRO DTP**

---

**From:** Samantha Lawrence [Samantha.Lawrence@local.gov.uk]  
**Sent:** 14 September 2012 15:38  
**To:** Collective Redundancies  
**Subject:** Fw: LGA response  
**Attachments:** Collective redundancies final Sept 12.doc

Dear Mr Davies

Please find attached the LGA's response to the above consultation.

Regards

Samantha

Samantha Lawrence  
Employment Adviser  
Local Government Association

Phone: 020 7187 7323  
Blackberry: 07767 763052

Sent from BlackBerry

---

**From:** Kelvin Scorer  
**Sent:** Friday, September 14, 2012 03:33 PM  
**To:** Samantha Lawrence  
**Subject:**

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Department for Business, Innovation and Skills  
Carl Davies  
3<sup>rd</sup> Floor Abbey 2,  
1 Victoria Street  
London  
SW1H 0ET

By email: [collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

14 September 2012

Dear Mr Davies,

### **Collective redundancies: Consultation on changes to the rules**

Please find below a response to the above consultation, submitted by the Workforce Team of the Local Government Association (the LGA) on behalf of local authorities.

#### About the LGA and the Workforce Team

The LGA's role is to support, promote and improve local government and to speak with one voice on behalf of local government. The LGA covers every part of England and Wales and includes county and district councils, metropolitan and unitary councils, London boroughs, Welsh unitary councils, fire, police, national park and passenger transport authorities. The Workforce Team of the LGA offers advice on employment issues and represents local government employer interests to central government, government agencies, trades unions and European institutions.

#### The response

Some of the issues and questions in the consultation document concern individual employers' experiences. As a representative body of a large number of separate employers, we consulted our members on the basis of the key issues that affect every authority and will not be providing a response to every question. To assist you, our comments below are provided with reference to the appropriate question in the consultation document.

**Question 2: Which of the two proposed options should replace the 90-day minimum period? Please explain why you think your choice would better deliver the Government's aims than the alternative approach.**

Given that there is marginal difference between 30 days and 45 days and the Government's aim is to simplify the framework, it would seem most appropriate to reduce the minimum consultation period to 30 days. This would mean that there were no different time periods according to the number of redundancies involved, which makes the framework easier for all to understand, to some extent.

The main issue is of course that effective consultation must be carried out, which addresses the issues of avoiding dismissals and mitigating the effects where they do occur. The somewhat arbitrary length of the consultation period can be a distraction to this process. This should be removed with a minimum period of 30 days, as it is likely that a thorough consultation process would exceed this anyway in the case of large scale redundancies. The important points to keep in mind are that consultation should continue for as long as there are viable issues to explore and notices of dismissal cannot be given until this process is concluded (even if the 30-day period has already expired).

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'? Please provide comments to support your answer.**

It is accepted that there would be particular difficulty in defining 'establishment' given the variety of structures and working arrangements that make up modern organisations.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

The Code of Practice is a good opportunity to provide comprehensive guidance to help organisations determine what an establishment is in their circumstances. It will be necessary to consider the many different types of arrangement, as discussed in the consultation document, and provide clear examples of how the term 'establishment' would apply in each case.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation? Please provide comments to support your answer.**

It is probably true to say that in many cases it is not the obligations themselves imposed on employers that cause the most difficulty in employing a workforce, but uncertainty in how or whether an obligation applies in the first place. The current situation that exists, following the case of *University of Stirling v University and College Union* in relation to how fixed-term employees are to be treated in collective redundancy situations is a case in point. There needs to be clarity therefore over this point, which could be achieved by applying the exemption in the Directive, which presumably at least some other European countries have utilised and which still applies despite the subsequent Fixed-term Work Directive. Alternatively, the difficulties and concerns arising out of the *Stirling* case need careful consideration and a clear steer needs to be provided in any guidance issued.

**Question 7: What changes are needed to the existing Government guidance?**

Employers need comprehensive advice on the requirements of employment legislation to ease and facilitate compliance. Access to advice that addresses all the issues an employer needs to consider improves the ability of organisations to fulfil their obligations and reduces the likelihood of issues being taken to employment tribunal by employees who believe their rights have not been complied with.

The 'business' department in its former incarnations – e.g. DTI and BERR – produced detailed guidance that was easily available on the internet to download and use to work through the legal requirements of any process that an organisation was undertaking. The more recent drive to cut down information has not been helpful. It is a given that employment law is not simple; to only provide basic information such as that on Business Link is misleading and counter-productive. The advice links to Acas guidance, but again, this is not as detailed as information previously available and can be unhelpful in places where statements are made, but no source for the information is provided.

We understand that BIS aims to assist a very wide range of employers, but it should not aim its guidance at those who have very limited knowledge as this is of no assistance to a large number of organisations. It is also important to include all the information available in one place. For example, there is information on the BIS website that is referred to in the Acas guidance, but is not linked to on Business Link.

What would probably help the whole range of employers is if two versions of guidance were produced. One aimed at those with very little knowledge, who are seeking to work out what their obligations are. The other aimed at employers with a good understanding of their obligations, but who need up-to-date information to ensure that they approach the organisational changes they are making in a correct manner, as far as possible. The level of detail in the Collective Redundancies consultation about such issues as the meaning of establishment and the problems caused by fixed-term contracts is what is needed. The guidance should include all the information required so that employers do not have to duplicate efforts reading other guidance containing other very similar information but with additional points or making time-consuming searches for referred to, but not directly linked, publications.

Thank you for the opportunity to provide input into this Consultation. If you have any queries, please contact me on 020 7187 7323 or by email at [samantha.lawrence@local.gov.uk](mailto:samantha.lawrence@local.gov.uk). We would be grateful if you could acknowledge receipt of this response.

Yours sincerely

SLawrence

Samantha Lawrence  
Employment Adviser  
Local Government Association

**1. Your name:**

**Mind - Nat Miles**

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

Mind

**3. E-mail address:**

n.miles@mind.org.uk

**4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal**

Charity or social enterprise

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

No

**6. Which of the two proposed options should replace the 90-day minimum period?**

No Response

**7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

No Response

**8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

No Response

**9. Please provide comments to support your answer.**

No Response

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

No Response

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No Response

**12. Please provide comments to support your answer.**

No Response

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



No Response

**14. What changes are needed to the existing Government guidance?**

No Response

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

No Response

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No Response

**17. If yes, please explain what other approaches you consider appropriate.**

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

No Response

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

No Response

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

No Response

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

No Response

**REPRO DTP**

---

**From:** n.miles@mind.org.uk  
**Sent:** 19 September 2012 11:17  
**To:** Collective Redundancies  
**Subject:** Response from Mind, the mental health charity  
**Attachments:** BIS collective redundancies response from Mind FINAL.doc

Dear Carl,

Please find attached Mind's response to the consultation on collective redundancies. I hope you find our response useful.

We've been having some problems with our emails this week so I'd be grateful if you could please reply to confirm receipt of our response?

Many thanks,

Nat Miles  
Policy & Campaigns Officer  
020 8215 2244  
n.miles@mind.org.uk

**Mind**  
15-19 Broadway, Stratford, London E15 4BQ  
t: 020 8519 2122  
w: [www.mind.org.uk](http://www.mind.org.uk)

Registered charity number 219830. Registered company in England number 424348.

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For better  
mental health

## **Department for Business Innovation & Skills: *Collective Redundancies: Consultation on changes to the rules***

### **Response from Mind**

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#### **Who we are**

Mind is the leading mental health charity in England and Wales.

We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

We work in partnership with over 160 independent local Minds to provide a range of services tailored to the needs of their local community. Services on offer include supported housing, crisis help lines, drop-in centres, counselling, befriending, advocacy, and employment and training schemes. Last year our network provided direct support to over 285,000 people.

Mind wants to ensure that people with mental health problems have their voices heard, and are treated fairly, positively and with respect.

---

#### **Introduction**

Mind welcomes the opportunity to respond to this consultation as it covers important issues that impact on the lived experience of the people we represent - anyone experiencing a mental health problem.

We will first make some general observations to contextualize the proposals and to explain how the key issues for consideration are relevant for people with mental health problems. We will then make some more specific comments about those proposals that we feel are relevant.

As the leading mental health charity in England and Wales, Mind represents thousands of people with mental health problems (both in and out of work) and provides a range of support services – including back to work, job retention and mediation support – through our over 160 local Mind groups.

Mind also runs a Legal Advice Service via telephone and email for people based in England and Wales, which processes around 5,000 enquiries about legal rights each year on a range of issues, including employment and discrimination.

We regularly hear from people who have been bullied, demoted, or dismissed from the workplace because of mental health problems. People tell us that they feel more stressed at work than ever before. Since the start of the recession, Mind's Infoline<sup>1</sup> advisors have seen an increase of 100 per cent in calls about both personal finances and employment.

From this wide-ranging engagement and support we know that workplace conflict is all too often the reality for many people with mental health problems in employment. Largely, this is driven by stigma and misunderstanding about the nature of mental ill health and its impact on performance.

Given fewer than four in ten employers would knowingly employ someone with a mental health problem<sup>2</sup> and 40 per cent view workers with mental health problems as a 'significant risk'<sup>3</sup>, it is no wonder that Mind hears regularly of people experiencing conflict – often once their mental health problems have come to light at work.

Indeed, the World Health Organisation found that mental ill health attracts the strongest prejudice from employers, leading to fewer opportunities to access and advance in employment.<sup>4</sup>

These damaging employer attitudes mean that people with mental health problems have the lowest employment rate among disabled people, at 14 per cent compared to 46 per cent for disabled people as a whole.<sup>5</sup> And yet most really want to work – indeed people with mental health problems have the highest 'want to work' rate among benefit claimants.<sup>6</sup>

The consultation proposes a package of reforms based around three key areas:

1. Reducing the 90-day minimum period for large redundancies.
2. Issuing a new, non-statutory, Code of Practice which will address a number of key issues affecting redundancy consultations.
3. Improving guidance for employers and employees on the support on offer from government.

Current processes around redundancy are designed so that alternative proposals may be put forward and considered to find ways to avoid or reduce the need for dismissals, if at all possible, and to mitigate the consequences of any dismissals that are unavoidable. We believe that reducing the 90-day minimum period moves away from this fundamental purpose.

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<sup>1</sup> The Mind Infoline received 40,000 calls in 2011-12.

<sup>2</sup> DWP (2001) *One Evaluation*.

<sup>3</sup> Shaw Trust (2010) *Mental Health: Still the Last Workplace Taboo?*

<sup>4</sup> World Health Organization (2011) *World Report on Disability*, retrieved from [http://www.who.int/disabilities/world\\_report/2011/report/en/](http://www.who.int/disabilities/world_report/2011/report/en/)

<sup>5</sup> People with disabilities in the labour market - 2011: supporting data, (December 2011), ONS, retrieved from <http://www.ons.gov.uk/ons/rel/lmac/people-with-disabilities-in-the-labour-market/2011/people-with-disabilities-in-the-labour-market--supporting-data.xls>

<sup>6</sup> Perkins R, Farmer P, Litchfield P (2009). *Realising ambitions: better employment support for people with a mental health condition*. London: Department for Work and Pensions.

Mind is deeply concerned that this proposal, like many other current proposals for employment law reform, is essentially designed to make it easier, quicker and cheaper for employers to lay off staff.

We believe that these types of reform would have a disproportionate impact on stigmatised, unpopular and misunderstood groups – including people with mental health problems.

Indeed, given the overwhelming evidence of discrimination still faced by people with mental health problems in the workplace, it is highly likely that any weakening of existing employment protections would impact disproportionately on this group.

Reducing the 90-day minimum consultation period is also likely to seriously dilute employee's influence on the redundancy process and send a signal to employers that they need not prioritise exploring ways of saving jobs. The likely impact will be that realistic alternatives to redundancy will no longer have a chance to be properly considered.

The consultation document itself states that "The Government acknowledges that there is a risk that a shorter minimum period could lead to superficial consultations which are closed at the end of the minimum period even if they are not complete." (p.17)

We believe that significantly reducing the minimum consultation period would lead to increased unemployment, increased reliance on the welfare system and a detrimental impact on local economies and communities. We therefore believe that any perceived economic advantage for employers must be carefully balanced against the impact on the workforce and the economy.

### **Specific comments**

In summary, our key concerns and comments about the proposed changes are as follows:

- 90 days allows for meaningful engagement. In a shorter period we believe realistic alternatives to redundancy would not have a chance to be properly considered.
- Reducing minimum periods will likely place undue pressure on everyone involved in the process, with a detrimental impact both on workplace relations and on the mental health and wellbeing of all staff.
- The proposals would seriously dilute employee's influence on the redundancy process. If they feel unable to shape this process, the morale of those staff that remain may be permanently damaged. On the other hand, if they feel a redundancy process has been meaningful and robust, employees are much less likely to feel demoralised and stressed.
- It is important to recognise that restructuring and redundancy processes affect the health and mental wellbeing of both those that lose and those that keep their jobs.
- If the employees that survive the process suffer poor health as a result, this will have a significant impact on an organisation's performance and productivity through increased absence, presenteeism and lasting damage to employee's motivation and commitment.
- We therefore believe that the proposed reduction would be a false economy, with the damage to morale and the increase in stress and mental health problems offsetting any cost savings likely to be achieved in many businesses.

- Furthermore, if employers are seen to be simply 'going through the motions' during the collective redundancy process, this will be incredibly damaging to industrial relations and to the motivation and wellbeing of those staff that survive redundancy.

### **90 days allows for meaningful engagement**

- Any redundancy exercise involving 100 or more employees is likely to generate a range of complex issues which will take time to resolve.
- The current consultation period allows time for staff to suggest alternatives to redundancy that can reduce costs and increase revenue without having to cut jobs.
- This process requires time, firstly for employees to research and produce a viable alternative proposal, and secondly for the employer to analyse, cost and compare that proposal against the initial plan. In some cases even the current 90 days is insufficient for this process.
- The current time-frame also allows equality issues to be properly considered by allowing time for an equality impact assessment to be carried out and properly scrutinised.
- Assessing the effects of the redundancies on the remaining workforce, including the likely impact of increased workloads, overtime costs, effects on morale and staff health and well-being and the effect on staff turnover is also vital.
- We believe properly conducting this process will be practically impossible with a reduced time-frame. We therefore believe that a likely unintended outcome will be a considerable negative impact on the mental health of employees.
- At this point it is important to note that the document suggests, "Many arguments in favour of keeping the 90-day period are based on concerns that it is currently regarded as a maximum rather than a minimum period by employers and that any reduction would automatically mean a reduction in the time taken for consultation." We firmly believe that, given that employers currently often treat the 90-day period as the 'maximum' period for consultation, if this period is reduced, employers will simply treat the new, shorter, period in just the same way – as an even shorter 'maximum' period. There is nothing in the consultation to suggest otherwise.

### **A reduced time period will place undue pressure on those involved**

We strongly believe that any alleged economic advantage to the employer must be balanced against the impact on the workforce. The stress and possible health consequences of the inevitable pressure brought to bear on the employee by a reduced time period must be taken into account.

- There is widespread evidence that the threat of redundancies and restructuring exercises have a detrimental impact on the well-being of staff made redundant. They also have a negative effect on the sense of job security and health and well-being of staff that remain in employment.
- Findings from a CIPD survey in 2009 revealed that seven out of ten of employees whose organisations have made redundancies report that job cuts have damaged morale, with more than a fifth (22per cent) of employees so unhappy as a result of how redundancies are being handled that they are looking to change jobs as soon as the labour market improves.<sup>7</sup>

<sup>7</sup> *Employee Outlook: Job seeking in a recession* CIPD Quarterly Survey Report Summer 2009.

- There are also strong links between job security and stress levels, with employers that are planning redundancies most likely to see a rise in mental health problems among staff. According to CIPD research, worries about job losses have helped stress to become the most common cause of long-term sick leave in Britain.<sup>8</sup>
- A minimum 90 day period allows individuals to prepare for possible redundancy both psychologically and practically in terms of restructuring finances and considering alternative work opportunities. Moving to a shorter period would risk increasing stress levels among all staff and is likely to increase the incidences of ill-health related absence from work. It may also impact on people's ability to obtain new employment.
- There is also a significant risk of poorer quality decisions being reached due to the increased pressure on everyone involved in the process, with resulting health implications and damage to workplace relations.

### **False economy?**

- There is substantial evidence that ineffective or inadequate consultation and communication around redundancies can be a false economy for employers as the knock on effects in terms of morale and detriment to workers health means that the cost savings and productivity gains hoped for are often not fully realised.
- Restructuring affects the health of both 'victims', those who lose their jobs, and the 'survivors', those who remain with the employer. If survivors suffer poor health, this is likely to impact directly on the performance of the organisation through increased absence, and it may well also damage their motivation and commitment.

### **Engaging for Success:**

- Evidence of negative correlation between employee confidence / motivation and productivity levels can be found in a large amount of literature. A good example of current thinking on this subject is found in BIS's own *Engaging for Success: Enhancing performance through employee engagement*.<sup>9</sup> A report to Government by David MacLeod and Nita Clarke.
- MacLeod includes clear evidence of the positive correlation between an engaged workforce and improving performance. The report is clear that a key driver of this is the existence of a strong relationship, shared values and a sense of trust between employer and employee.
- We believe that seriously reducing the minimum consultation period for collective redundancies is in direct opposition and contradiction of this type of relationship and way of working. The model of power dynamics that could result from adoption of the proposal would likely seriously undermine employee relations and act against this type of vital engagement.
- Interestingly, MacLeod suggests a very different model to help businesses face the current economic challenges. The report suggests that engagement can help companies and organisations to deal with the challenges of recession because by establishing trust, they can unlock more of the knowledge and commitment of

<sup>8</sup> CIPD 2011 *Absence Management Survey Report* <http://www.cipd.co.uk/hr-resources/survey-reports/absence-management-2011.aspx>

<sup>9</sup> *Engaging for Success: Enhancing performance through employee engagement. A report to Government* (2009) David MacLeod and Nita Clarke, Department for Business, Innovation and Skills.

individual employees, e.g. in developing ways of performing tasks more effectively and efficiently.

- A good example of this type of working comes from **Expedition Engineering**, a cutting-edge engineering and design consultancy. Their multi-award winning success is built on a strong commitment to the wellbeing of their 40 members of staff. Staff are involved in company decision-making, encouraged to manage their own workload, work from home and dream up new ideas for the company in dedicated 'free thinking' space. Staff are offered a menu of benefits to choose from to suit their needs. Options include travel-card loans, bicycle loans, private health insurance and gym membership. They have also introduced a 'Tenth Day' scheme where staff have every tenth working day off. A welfare policy, stress policy and parental policy embed these practical benefits in the business strategy of the company. The company enjoys minimal staff turnover and strong loyalty from customers who return again and again because they love working with Expedition staff. For Expedition the business benefits of a commitment to staff wellbeing could not be clearer.
- MacLeod also makes the point that the new ways of working – team working, collaboration, joint problem solving – which business and services increasingly demand, cannot thrive in an environment where staff's abilities are not valued or trusted, particularly since many of new approaches depend on the enthusiasm, engagement and commitment of the employee.
- Clearly these proposals could damage employee relations and undermine many of the most important values and approaches that MacLeod and many others have identified as essential to helping business get through current challenges.

## Conclusion

In conclusion, Mind does not support the proposal to reduce the minimum consultation period. We do not believe it would promote economic growth. In fact we believe it would be counterproductive and would negatively affect the economy for a number of reasons outlined in the response.

Furthermore we are also deeply concerned that, given the clear evidence of stigma from employers, proposals such as these which make it easier to let go of staff would have a disproportionate negative impact on people with mental health problems.

We are concerned that across the piece Government is taking steps to weaken employee rights and to dismantle vital protections. We believe that many of the Government's proposed changes, including this one, will irrevocably damage the relationship between employers and employees.

We believe there is a lack of cohesiveness across current employment policy: While BIS's approach to Resolving Workplace Disputes is to push for greater mediation and to maintain the employee / employer relationship, other proposals promote increased stigmatisation of people with mental health problems and will make workplaces less supportive.

We believe the way to tackle current challenges is to promote employee wellbeing and to address the workplace causes of stress rather than to drive a wedge between employers and employees, as many of the proposed reforms would likely do.



We therefore strongly urge the government to seek solutions in more positive areas of the relationship between employees and employers, such as engagement, as has been done in other areas of employment policy such as Resolving Workplace Disputes.

We sincerely hope this response proves useful. Please contact us if you have any further questions.

Nat Miles, Policy and Campaigns Officer, [n.miles@mind.org.uk](mailto:n.miles@mind.org.uk)

**Mind**

September 2012

1. Your name:

**Diane Jones**

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

NHS

3. E-mail address:

diane.jones14@nhs.net

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business ( over 250 staff)

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?

**No Response**

19. If you have any evidence relating to possible impacts we would be happy to receive it.

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**Royal Mencap Society - Carole Godding**

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

Royal Mencap Society

3. E-mail address:

carole.godding@mencap.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business ( over 250 staff)

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Reduced anxiety for affected staff

Line2 - Advantageous to business due to faster paced outcome

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - Further clarity is required

Line2 - More description around characteristics of establishment

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Yes

12. Please provide comments to support your answer.

Line1 - Sufficient employment legislation

Line2 - Places sufficient burden to review against Code

Line3 - Can focus on culture which legislation cannot

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

Yes

14. What changes are needed to the existing Government guidance?

Line1 - Establishment criteria

Line2 - Workers included or excluded

Line3 - Aligning consultation lengths in other associated

Line4 - legislation and guidance, example for TUPE

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

Line1 - Providing more clarity on the behaviours to be adopted

Line2 - Not merely a how to guide to process, but behaviours too

Line3 - Survivorship guidance

Line4 - Tools to support those managing and affected staff

Line5 - Sources of external support - links

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - training, e-learning through ACAS for instance

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

Line1 - Most consultations are less than 20 individuals

Line2 - For those nationally undertaken collective redundancy

Line3 - the length of period has meant we lost valuable staff

Line4 - during the consultation that would possibly have been

Line5 - likely to retain their employment.

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

Line1 - 90 days but in most cases the proposal was going ahead

Line2 - regardless of reaching agreement or not

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

Line1 - Moral dropped overnight

Line2 - Productivity was dramatically reduced

Line3 - Growth to the business ceased or diminished

Line4 - There was generally less effectivity throughout business

1. Your name:

**Royal Mencap Society - Carole Godding**

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

Royal Mencap Society

3. E-mail address:

carole.godding@mencap.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Charity or social enterprise

Large business ( over 250 staff)

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

**18. Have we correctly identified the impacts of the proposed policies?**

**No Response**

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**Surrey Police - Andea Cooper**

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

Surrey Police

3. E-mail address:

cooper11200@surrey.pnn.police.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Local government

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

No Response

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

No Response

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No Response

9. Please provide comments to support your answer.

No Response

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

No Response

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No Response

12. Please provide comments to support your answer.

No Response

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

No Response

14. What changes are needed to the existing Government guidance?

No Response

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

No Response

16. Are there other non-legislative approaches that could assist – e.g. training?

No Response

17. If yes, please explain what other approaches you consider appropriate.

No Response

18. Have we correctly identified the impacts of the proposed policies?



**No Response**

19. If you have any evidence relating to possible impacts we would be happy to receive it.

**No Response**

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

**No Response**

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

**No Response**

1. Your name:

**Transport for London - Patricia Obinna**

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

Transport for London

3. E-mail address:

katehoman@tfl.gov.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Large business ( over 250 staff)

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

Not sure

6. Which of the two proposed options should replace the 90-day minimum period?

45 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - See word form for comments

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - Due to the fact that the definition of 'establishment' is founded on European legislation, and is still being defined in case law, we believe that it would be more appropriate for the Government to

Line2 - address this in guidance and a Code of Practice rather than in legislation.

Line3 - We would appreciate clarification in particular on the correct approach to be taken to establishment in large businesses where there may be a number of unconnected restructures happening concurrently.

Line4 - It is difficult to say with certainty whether the proposed definition in the Code of Practice would provide sufficient clarity, without having seen the draft wording, but in principle we believe that

Line5 - It is difficult to say with certainty whether the proposed definition in the Code of Practice would provide sufficient clarity, without having seen the draft wording, but in principle we believe that

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Yes

12. Please provide comments to support your answer.

Line1 - Given that recent decisions in the Employment Appeal Tribunal have

highlighted that the law is still developing on managing fixed-term employees in the context of collective redundancies, it would

Line2 - seem more appropriate to address the issue in guidance and Code of Practice than in legislation. This will allow for more timely and straightforward amendment in the future, should the need arise,

Line3 - than would be possible with legislation.

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

Yes

**14. What changes are needed to the existing Government guidance?**

Line1 - We believe that the balance is right at present. However, should the legal position on 'establishment' and the correct approach to fixed-term employees

Line2 - be clarified through case law in the next few years, at that stage it could be appropriate to reflect the position in the legislation rather than only in the Code of Practice.

Line3 - It would be helpful to have more detailed guidance on the implementation of the legislation in practice, particularly where case law has left employers unclear as to the correct interpretation of the

Line4 - law. We believe that this could be achieved by producing a Code of Practice and Guidance on collective redundancies of similar standing to the

Line5 - Acas Code of Practice and Guidance on Discipline and Grievances.

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

Line1 - It will be important that it is highly visible and accessible, in a similar way to the Acas Code on Discipline and Grievances. The Code should be worded in such a way that its spirit and aims are

Line2 - clear, and can therefore be applied to different workplaces and situations. Inevitably, the diversity of employers in the UK means that no guidance can possibly cover every situation and therefore

Line3 - employers need to be clear on the principles to apply to their particular circumstances.

**16. Are there other non-legislative approaches that could assist – e.g. training?**

No

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - We believe that the Government's main priority should be to produce a Code of Practice which is clear, practical and accessible.

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

**No Response**

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

**No Response**

**REPRO DTP**

**From:** Homan Kate [KateHoman@tfl.gov.uk]  
**Sent:** 18 September 2012 19:59  
**To:** Collective Redundancies  
**Cc:** Obinna Patricia  
**Subject:** Response to Consultation on Collective Redundancies Rules - TfL Restricted  
**Attachments:** FinalresponsecollectiveredundanciesconsultationSept2012doc-V1.doc

Dear Sirs,

Please find attached a Response to the above consultation on behalf of Transport for London.

Yours faithfully

TfL Legal

**Kate Homan** | Principal Lawyer - Employment Law Team | Legal  
**Transport for London** | 7th Floor, Windsor House | 42-50 Victoria Street, London | SW1H 0TL  
katehoman@tfl.gov.uk | Tel: 020 7126 3520 (ext. 63520) | Fax: 020 7126 4598 (ext. 64598)

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## **Collective Redundancies: Consultation on changes to the rules : Response form**

A copy of the consultation on **Collective Redundancies: Consultation on changes to the rules** can be found at:

<http://www.bis.gov.uk/consultations>

You can complete your response online through Survey Monkey :  
(<https://www.surveymonkey.com/s/36S3QYT>)

Alternatively, you can email, post or fax this completed response form to

**Email:**

[collectiveredundancies@bis.gsi.gov.uk](mailto:collectiveredundancies@bis.gsi.gov.uk)

**Postal address:**

Carl Davies  
Department for Business, Innovation and Skills (BIS)  
3 Abbey 2  
1 Victoria Street  
London SW1H 0ET

**Fax:** 0207-215 6414

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

The closing date for this consultation is: **19 September 2012**

## Your details

Name:

Patricia Obinna

Organisation (if applicable): Transport for London

Address: Windsor House, 42-50 Victoria Street, London SW1H 0TL

Telephone: 2071263520

Fax:

Please tick the boxes below that best describe you as a respondent to this

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business ( over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

**Question 1: Do you agree with the Government's overall approach to the rules on collective redundancy consultation?**

Yes  No  Not sure

We agree that it would be helpful to clarify the definition of an 'establishment' and the correct treatment of fixed-term employees in the context of collective redundancies. As stated in our Response to the Call for Evidence earlier this year, we do not believe it is necessary to reduce the 90-day minimum period for consultation to 45 or 30 days.

Our organisation currently has an agreement with our trades unions to consult for 90 days on all redundancies, and therefore the proposed change would not have any immediate effect upon our own approach to consultation. However, it is possible that in time our agreement with the unions on consultation for collective redundancies could be amended to reflect any revisions to the statutory minimum consultation period should all parties be in agreement.

**Question 2: Which of the two proposed options should replace the 90-day minimum period?**

30 days  45 days  Not sure

**Please explain why you think your choice would better deliver the Government's aims than the alternative option.**

We believe that it is unnecessary to replace the 90-day minimum consultation period. However, if the period were to be reduced to either 45 or 30 days, in our view, 45 days is the minimum period for which collective consultation on 100 or more redundancies could possibly take place. It would be difficult to engage in meaningful and effective consultation with the unions over such a large project in a period of only 30 days.

A longer consultation period allows the business genuinely to consult with employee representatives and, if appropriate, to amend its proposals in light of the consultation before commencing their implementation.

**Question 3: Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Due to the fact that the definition of 'establishment' is founded on European legislation, and is still being defined in case law, we believe that it would be more appropriate for the Government to address this in guidance and a Code of Practice rather than in legislation.

We would appreciate clarification in particular on the correct approach to be taken to 'establishment' in large businesses where there may be a number of unconnected restructures happening concurrently.

**Question 4: Will defining 'establishment' in a Code of Practice give sufficient clarity?**

Yes  No  Not sure



It is difficult to say with certainty whether the proposed definition in the Code of Practice would provide sufficient clarity, without having seen the draft wording, but in principle we believe that having a definition in a Code of Practice could assist in enabling employers and employee representatives to reach a consensus on the appropriate definition of 'establishment'.

We are aware that any definition will need to allow for future changes in working practices and business organisation, and for further developments in case law.

**Question 5: Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

Yes  No  Not sure

**Please provide comments to support your answer.**

Given that recent decisions in the Employment Appeal Tribunal have highlighted that the law is still developing on managing fixed-term employees in the context of collective redundancies, it would seem more appropriate to address the issue in guidance and Code of Practice than in legislation. This will allow for more timely and straightforward amendment in the future, should the need arise, than would be possible with legislation.

**Question 6: Have we got the balance right between what is for statute and what is contained in Government guidance and a Code of Practice?**

Yes  No  Not sure

We believe that the balance is right at present. However, should the legal position on 'establishment' and the correct approach to fixed-term employees be clarified through case law in the next few years, at that stage it could be appropriate to reflect the position in the legislation rather than only in the Code of Practice.

**Question 7: What changes are needed to the existing Government guidance?**

It would be helpful to have more detailed guidance on the implementation of the legislation in practice, particularly where case law has left employers unclear as to the correct interpretation of the law. We believe that this could be achieved by producing a Code of Practice and Guidance on collective redundancies of similar standing to the Acas Code of Practice and Guidance on Discipline and Grievances.

**Question 8: How can we ensure the Code of Practice helps deliver the necessary culture change?**

It will be important that it is highly visible and accessible, in a similar way to the Acas Code on Discipline and Grievances. The Code should be worded in such a way that its spirit and aims are clear, and can therefore be applied to different workplaces and situations. Inevitably, the diversity of employers in the UK means that no guidance can possibly cover every situation and therefore employers need to be clear on the principles to apply to their particular circumstances.

**Question 9: Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Yes  No  Not sure

We believe that the Government's main priority should be to produce a Code of Practice which is clear, practical and accessible.

**Question 10: Have we correctly identified the impacts of the proposed policies?**

Yes  No  Not sure

If you have any evidence relating to possible impacts we would be happy to receive it.

**Question 11: If you have been involved in a collective redundancy consultation in the last five years, how long did it take to reach agreement?**

Intentionally blank.

**Question 12: If you have carried out a collective redundancy consultation in the last five years, what effect, if any, did it have on your regular business during this time?**

Intentionally blank.

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**URN 12/808**

1. Your name:

**Amanda Elkin**

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

none

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Local government

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - its a minimum, not a strict limit

Line2 - allows for meaningful quick consultation, rather than drawing something out for the sake of it

Line3 - stops delaying tactics from unions, who sometimes delay purely for the sake of it

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Yes

9. Please provide comments to support your answer.

Line1 - putting everything together makes sense

Line2 - means everyone on the same page

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

Yes

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

No

12. Please provide comments to support your answer.

Line1 - this will merely lead to EAT cases where people fight this out as guidance rather than compliance with law

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

Not sure

14. What changes are needed to the existing Government guidance?

Line1 - more info on 'establishment' and also a 'service' as sometimes people are geographically disparate but performing the same function

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

Line1 - include communication guidance / engagement info

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - guidance on communication strategies and engagement issues

Line2 - info on training for those undertaking the work

Line3 - what support to offer employees

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

Line1 - 2 years

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

Line1 - reduced employee engagement

Line2 - people required to do more for less

Line3 - slightly increased turnover

Line4 - management wanting to show they care about employees more, especially as team dynamics have changed

1. Your name:

**Linda Hill**

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

No Response

3. E-mail address:

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Local government

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

Yes

6. Which of the two proposed options should replace the 90-day minimum period?

30 days

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Reduce the financial burden on business who needs to shed employees quickly

Line2 - Employees want to know the outcome of where they stand sooner than the 90 days

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

Not sure

9. Please provide comments to support your answer.

No Response

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

No

11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?

Yes

12. Please provide comments to support your answer.

Line1 - Too many people are now employed on FTC

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

No

14. What changes are needed to the existing Government guidance?

Line1 - It is still ambiguous

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

Line1 - Have more defined legislation that is less open to debate by lawyers

16. Are there other non-legislative approaches that could assist – e.g. training?

No

17. If yes, please explain what other approaches you consider appropriate.

**No Response**

**18. Have we correctly identified the impacts of the proposed policies?**

Yes

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

**No Response**

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

Line1 - 120 days

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

Line1 - A real burden, labour intensive and time consuming

Line2 - Addition costs associated with the consultation

Line3 - High amounts of sickness

Line4 - Reduction of quality, people had already left the organisation mentally

Line5 - Good staff found alternative employment quickly therefore having a real down turn in quality remaining to apply for those jobs available

1. Your name:

**Alliance for Finance - Secretary, Gwyn Bates,**

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

Alliance for Finance

3. E-mail address:

gwyn.bates@alliance4finance.org.uk

4. Please tick the boxes below that best describe you as a respondent to this call for evidence – No fault dismissal

Trade union or staff association

Alliance of staff rep bodies

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

No

6. Which of the two proposed options should replace the 90-day minimum period?

No Response

7. Please explain why you think your choice would better deliver the Government's aims than the alternative option.

Line1 - Reducing the consultation period for larger scale redundancy situations gives the green light for less scrupulous employers to rush through their obligations to mitigate the effects of redundancies

Line2 - through redeployment, retraining, voluntary redundancy exercises etc. Ultimately this would lead to more workers facing compulsory redundancy placing an increased financial burden on the state.

Line3 - The proposed reduction will also undermine the important role played by staff representative bodies and have detrimental impact on collective bargaining.

Line4 - Neither option is reasonable. We believe "good" employers will continue to consult for longer to ensure good support to those affected whilst "bad" employers will benefit from these changes.

Line5 - Ultimately, bad practice places a greater burden on the state.

8. Do you agree with the Government's assessment of the risks of taking a legislative route on the issue of 'establishment'?

No

9. Please provide comments to support your answer.



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Line1 - The use of the term "establishment" has enabled some employers to evade due consultation where large numbers of workers engaged in the same activities, albeit based in small geographically spread

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Line2 - units with less than 20 workers, face redundancy for the same reason at the same time. For example the closure of a number of banking branches

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Line3 - The term "establishment" should be more clearly defined in line with recent ECJ judgements.

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Line5 - The Code needs to have legally binding status.

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

No

---

**11. Is the Government right to address the fixed-term contract issue in guidance and the proposed Code of Practice rather than in legislation?**

No

---

**12. Please provide comments to support your answer.**

---

Line1 - Fixed Term workers are entitled to equal treatment on redundancy pay and right to redeployment consideration and therefore it makes no sense to leave the need for them to be included in

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Line2 - consultations a matter of following a code of practice. Issues relating to fixed term contract employees should be a matter of the wider consultation arrangements.

---

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

No

---

**14. What changes are needed to the existing Government guidance?**

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Line1 - Non-statutory Codes of practice will not have enough impact on unscrupulous employers.

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Line2 - See the answer to Q 8

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

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Line1 - Only by making adherence to the code a legal obligation.

---

**16. Are there other non-legislative approaches that could assist – e.g. training?**

Yes

---

**17. If yes, please explain what other approaches you consider appropriate.**

Line1 - The Government should support collective bargaining in line with its stated aim of having "a positive relationship between the employer and employees' representatives".

---

Line2 - The Government should more strongly encourage employers to ensure they provide training in employment law matters to staff consultative forums

---

Line3 - where these exist in the absence of collective bargaining agreements.

**18. Have we correctly identified the impacts of the proposed policies?**

---

Not sure

**19. If you have any evidence relating to possible impacts we would be happy to receive it.**

---

Line1 - The issues covered in points 100-104 in the impact assessment have been inadequately considered. We believe these are serious risks not to be dismissed lightly.

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

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Line1 - Our partner organisations have numerous examples of where adequate responsible consultation has resulted in better outcomes for those affected.

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Line2 - many of these have been reported in other union's and organisations' direct submissions.

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

---

No Response

**REPRO DTP**

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**From:** gwyn.bates@alliance4finance.org.uk  
**Sent:** 19 September 2012 15:33  
**To:** Collective Redundancies  
**Subject:** Submission  
**Attachments:** AFF BIS collective-redundancies-consultation-form.doc

Dear Sir  
Please see attached a response by the Alliance for Finance to the call for submissions concerning the Collective Redundancies proposed legislative changes.

Gwyn Bates  
Secretary  
Alliance for Finance

tel 07802 845918

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