Public Consultation on Employment Law Review: Question and answer booklet

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Introduction

The Employment Lawyers Group (NI) ("ELG") has been in existence for 16 years. It is a group of 95 members comprising solicitors and barristers who are involved in employment law work including advising clients on employment law matters and, where required, providing representation at Industrial Tribunals and other legal fora. Our members provide legal services to both employers and employees. We are actively interested in the development of employment law and the related dispute resolution processes. We also attempt to provide an open and helpful network for the exchange of information and views and training through seminars pertinent to law and practice in the Industrial and Fair Employment Tribunals (OITFET).

The ELG welcomes an opportunity to respond to the 'Public Consultation on Employment Law Review' by the Department of Employment and Learning.

The ELG acknowledges that historically this jurisdiction has sought to mirror Great Britain with respect to employment law matters. The ELG welcomes the Minister's comments in paragraph 1.4 of the consultation that where it is in the best interests of Northern Ireland he is committed to taking the necessary steps to divert from the GB policy position and to develop local tailored solutions. The ELG would add that a divergence from GB policy should only happen where there is good reason for doing so.

The ELG recognises that, going forward, it is desirable for both employee and employer representative bodies to reach some common ground and agreement on aspects of the current employment law review. To the extent that representative bodies can be in agreement the ELG welcomes this.

Early Resolution of Workplace Disputes	
Question 1	**If early conciliation (EC) is implemented, should it include a provision to 'stop the clock', suspending the limitation period for lodging a tribunal claim? Please give reasons for your answer.**
Answer 1	The Employment Lawyers Group (ELG) agrees that EC may provide an opportunity to see if conciliation, arbitration or mediation could prevent claims proceedings straight to the OITFET and facilitate early resolution of disputes in this manner in order to promote good industrial relations and save legal costs. The ELG agrees that if EC is implemented it should include a provision to 'stop the clock'. The ELG believes the 'stop the clock' provision will provide breathing space for the parties and afford them an opportunity to try and resolve the dispute before the matter is referred to the Industrial Tribunal.
Question 2	**Your opinions are sought on:** • **unintended consequences that could arise if prospective claimants are required to give a brief description of the nature of the dispute(s) on the EC form; and** • **the other proposed contents of the EC form.**
Answer 2	The ELG does not believe Claimants should have to define too clearly what their claim is as this is too technical. The ELG considers that it may be helpful if a Claimant was required to give a general description of what they believe their claim is. The ELG anticipates the unintended consequences of requiring prospective claimants to give a description of the nature of the dispute(s) in the EC form to be satellite litigation involving technical arguments about the nature of the claim. Therefore the ELG welcomes the proposal from the Department that the form presented to the LRA by a prospective claimant is intended to have no bearing on any subsequent tribunal proceedings. The ELG believes that the proposals put forward by the LRA in paragraph 3.16 are sensible.

Question 3	**Are there other jurisdictions in relation to which EC would be inappropriate; in particular categories of claim unlikely to settle in a four week period (e.g. discrimination claims)? Please give reasons for your views.**
Answer 3	The ELG agrees that the list of jurisdictions contained in Annex A would appear to contain all those that are not appropriate for EC. The ELG considers there are numerous complaints that involve multi-jurisdictional claims and therefore any attempt to exclude any other categories of claim would undermine the EC process.
Question 4	**Please set out and explain your views on the proposed circumstances in which EC would not be appropriate.**
Answer 4	The ELG concurs that there are circumstances in which EC would not be appropriate. The ELG agrees that paragraph 3.23 would appear to contain the only circumstances in which EC would not be appropriate.
Question 5	**Should hard copy EC forms receive a written acknowledgement? Please explain.**
Answer 5	The ELG disagrees with the Departments proposal not to issue an acknowledgement of receipt for EC forms submitted in hard copy. As dates are very important in this jurisdiction, the ELG strongly supports the issue of an acknowledgment of receipt to ensure that all parties are clear about the date on which the 'clock' was 'stopped'.
Question 6	**What should be considered 'reasonable attempts' to contact the parties in the first instance, and should the same approach be taken for both prospective claimants and prospective respondents?**
Answer 6	The ELG believes that the determination of what should be considered 'reasonable attempts' to contact the parties in the first instance and the approach to be adopted for both prospective claimants and prospective respondents can be left to the discretion of the LRA.
Question 7	**What are your views on the proposed process for issuing EC certificates? Should different or additional information be included? Should a certificate be issued even where all matters have been conciliated?**

Answer 7	The ELG believes that the EC certificate should only state that the EC process has been complied with. The ELG believes there should be no reference in the EC certificate regarding whether or not the EC process has been completed. The ELG believes there should be a clear demarcation between the EC process of dispute resolution and the legal process in the tribunal. The ELG considers the legal process should start afresh and therefore there should be no additional information contained in the EC certificate other than what is proposed above.
Question 8	**How should evidence of having completed EC be provided to OITFET and what form should it take?**
Answer 8	The ELG would reiterate what is contained in the answer 7 above. The evidence of having completed EC should be provided to OITFET in the form of a certificate which should only state that the EC process has been completed.
Question 9	**Is the proposed approach to handling EC requests from prospective respondents appropriate? Should respondents be permitted to provide information by other means e.g. telephone?**
Answer 9	The ELG believes this can be left to the discretion of the LRA but would suggest that communication via email would be the most appropriate and constructive way in which respondents could provide information.
Question 10	**Please give your views on the proposed EC process as a whole. If any, what alternatives should the Department consider?**
Answer 10	The ELG considers the suggested EC process to be a constructive proposal and does not propose any alternatives.
Question 11	**Should neutral assessment only be available where the LRA believes that the requesting parties have already made good faith efforts to resolve their dispute?**

Answer 11	There is no agreed view among the ELG about neutral assessment. Some members believe that neutral assessment is a hybrid situation between EC and the legal tribunal process and that it is another layer for employers to go through that will not be welcomed by them. Other members suggest that while neutral assessment may be useful in less complex cases such as those which involve calculations of specific figures there are concerns about its utility in more complex cases. Some members believe that there is merit in neutral assessment for non-represented parties. One member suggests that neutral assessment should be made compulsory for non-represented parties. Other members believe that neutral assessment may be useful as an option that some people may take up.
Question 12	**Should neutral assessment in writing be available as an option?**
Answer 12	The ELG agrees that neutral assessment in writing should be available as an option to parties.
Question 13	**What are your views on the proposed focus and content of the neutral assessment process?**
Answer 13	The ELG has no comment to make in relation to this question.
Question 14	**The Department would welcome views on whether and to what extent neutral assessment should be in confidence.**
Answer 14	The ELG believes that neutral assessment should be a confidential, without prejudice process.
Question 15	**The Department is inviting views on the proposed neutral assessment model which, like the LRA's arbitration arrangements, would be unique to Northern Ireland. What advantages and disadvantages does the proposal have, and how could it be improved?**
Answer 15	The ELG has no comment to make in relation to this question.
Question 16	**If introduced, what form should a subsidy scheme take and how should it be targeted?**
Answer 16	The ELG is concerned about the introduction of a subsidy scheme as it believes that it would take money from the LRA. The ELG believes that the LRA can provide some services to SMEs of this nature and this is sufficient. The ELG wishes to applaud the LRA for providing training, raising awareness and promoting good practice.

Question 17	**The Department would welcome practical suggestions on how information can be more effectively communicated to small employers so that they better understand the options open to them in dealing with employment rights/relations issues.**
Answer 17	The ELG has no comment to make in relation to this question.
Question 18	**If subsidised mediation is trialled, how might be best be targeted to maximise coverage and effectiveness?**
Answer 18	The ELG is supportive of this idea if it was to happen but would have no particular ideas on how it should operate in practice.
Question 19	**Should the LRA proactively offer its services to respondents who have lost a tribunal case? If so, given the likely sensitivities, what approach should the Agency adopt?**
Answer 19	The ELG do not agree that the LRA should proactively offer its services to respondents who have lost a tribunal case. Instead the ELG believes that the LRA should concentrate their resources on other things.

Unfair Dismissal Qualifying Period	
Question 20	**Northern Ireland has, for the most part, maintained the same unfair dismissal qualifying period as Great Britain. Do you consider that retaining parity in this area is desirable, considering that employment law is devolved to the Northern Ireland Assembly? Please give reasons for your answer.**
Answer 20	The ELG takes the general view that there is no need and no evidential basis for increasing the unfair dismissal qualifying period from one year to two years. The ELG believes that one year is sufficient for an employer to assess the capability and performance of its employees and that an employer should have the right systems in place to deal with capability and performance issues if they arise.
Question 21	**Do you have any comments on the Department's labour market analysis?**
Answer 21	The ELG has no comment to make in relation to this question.
Question 22	**Do you have any alternative sources of quantitative data which could be considered by the Department?**
Answer 22	The ELG has no comment to make in relation to this question.
Question 23	**Do you have any comments on the Department's finding that it is very difficult to estimate the contribution of the unfair dismissal qualifying period on employment growth?**
Answer 23	The ELG has no comment to make in relation to this question.
Question 24	**Do you have any further quantitative information to prove a causal link between the unfair dismissal qualifying period and employment growth?**
Answer 24	The ELG has no comment to make in relation to this question.
Question 25	**Do you have any comments on the Department's analysis regarding the contribution of the unfair dismissal qualifying period on inward investment?**
Answer 25	The ELG has no comment to make in relation to this question.
Question 26	**Do you have any further quantitative information to prove a causal link between the unfair dismissal qualifying period and levels of inward investment?**
Answer 26	The ELG has no comment to make in relation to this question.

Question 27	**Do you have any comments on the Department's finding that it is very difficult to estimate the contribution of the unfair dismissal qualifying period on claims to tribunal?**
Answer 27	The ELG has no comment to make in relation to this question.
Question 28	**Do you have any further quantitative information to prove a causal link between the unfair dismissal qualifying period and claims to tribunal?**
Answer 28	The ELG has no comment to make in relation to this question.
Question 29	**Should the unfair dismissal qualifying period remain at one year? Please provide reasons for your response.**
Answer 29	The ELG believes the qualifying period for unfair dismissal should remain at one year.
Question 30	**Should the unfair dismissal qualifying period be increased to two years? Please provide reasons for your response.**
Answer 30	The ELG believes the unfair dismissal qualifying period should not be increased to two years.
Question 31	**Should the unfair dismissal qualifying period be increased to two years for employees in SMEs? Please provide reasons for your response.**
Answer 31	The ELG believes the qualifying period for unfair dismissal should remain at one year for employees in SMEs.
Question 32	**If you support his option, how should 'SME' be defined in legislation?**
Answer 32	The ELG has no comment to make in relation to this question.
Question 33	**Should the unfair dismissal qualifying period be increased to two years for new start employees? Please provide reasons for your response.**
Answer 33	The ELG believes the qualifying period for unfair dismissal should remain at one year for new start employees.
Question 34	**Should the unfair dismissal qualifying period be increased to two years for employees in inward investor companies? Please provide reasons for your response.**
Answer 34	The ELG believes the qualifying period for unfair dismissal should remain at one year for employees in inward investor companies.
Question 35	**If you support this option, how should 'inward investor companies' be defined in legislation?**
Answer 35	The ELG has no comment to make in relation to this question.

Question 36	**Should the unfair dismissal qualifying period be increased to two years for employees in start-up businesses? Please provide reasons for your response.**
Answer 36	The ELG believes the qualifying period for unfair dismissal should remain at one year for employees in start-up businesses.
Question 37	**If you support this option, how should 'start-up business' be defined in legislation?**
Answer 37	The ELG has no comment to make in relation to this question.
Question 38	**Should the unfair dismissal qualifying period remain at one year for all potentially unfair dismissal reasons, with the exception of redundancy, which could be extended to two years? Please provide reasons for your response.**
Answer 38	The ELG believes the qualifying period for all potentially unfair dismissal reasons including redundancy should remain at one year.
Question 39	**What is your favoured option from the list provided?**
Answer 39	In light of the ELG responses to questions 29 to 38, the ELG has no comment to make in relation to this question.
Question 40	**Do you have any alternative options for consideration? Please support any new options with available quantitative evidence.**
Answer 40	The ELG has no comment to make in relation to this question.
Question 41	**Is there evidence of unrealistic expectations about tribunal awards in unfair dismissal cases and, if so, how can these be addressed?**
Answer 41	The ELG agrees that there is evidence of unrealistic expectations about tribunal awards in unfair dismissal cases. The ELG believes that this is an area in which there is greater role for the OITFET and LRA to play in the management of potential claimants expectations. The ELG suggests this can be addressed by the OITFET and LRA in a neutral way through literature and material which should highlight to potential claimants the median awards awarded in successful claims. The ELG refers to literature available from HM Courts and Tribunals Service in England and Wales which highlights the average awards for discrimination and unfair dismissal claims across all the types of claims to potential claimants in this regard and believes this could provide a template for similar material in Northern Ireland.

Question 42	**What are the potential benefits and drawbacks of introducing a 12 month pay cap on the compensatory award for unfair dismissal?**
Answer 42	The potential benefits of introducing such a cap are that: - • It will help promote more realistic expectations among claimants; and • It could reduce the current level of risk for employer's, particularly in SMEs, who are considering the dismissal of an employee and are concerned about the implications of making the wrong decision. The potential drawbacks of introducing such a cap are that: - • It may act as a precipitator for potential claimants to include unmeritorious claims for discrimination to increase their potential award; • It could create unfairness for higher paid claimants whose potential monetary award for unfair dismissal is capped at a very low level when compared with their annual salary if the cap is based on median pay as opposed to individual pay; • Some claimants who were part of their employers final salary pension scheme will experience enormous pension loss which cannot be recouped because of the cap
Question 43	**Should the overall cap on unfair dismissal (currently £74,200) be reviewed? Why?**
Answer 43	ELG opinion is divided on whether or not the cap should stay the same, be reduced or be removed completely. The ELG believes that the overall cap on unfair dismissal should be reviewed in the future. The ELG considered that it would be appropriate to review the cap in three to five years when the other efforts to streamline OITFET put forward in this consultation have been implemented and their effect can be assessed.
Question 44	**Should the Department consider any other possibilities in relation to unfair dismissal awards?**

Answer 44

The ELG believes that the proposal to consider any other possibilities in relation to unfair dismissal awards should be reviewed in the future. The ELG suggests monitoring the position in England to see whether or not the UK Government decides to utilise the powers included in the Enterprise and Regulatory Reform Act 2013 before reviewing the position in Northern Ireland.

Consultation Periods for Collective Redundancies	
Question 45	**Do you agree with DEL's overall approach to the rules on Collective Redundancy consultation?**
Answer 45	There is a difference between Question 45 contained in the consultation document and Question 45 contained in this Question and Answer booklet. Question 45 in the consultation paper is, "Do you feel that the current arrangements are sufficient to meet the needs of business and employees in redundancy situations?" In response to Question 45 posed in the consultation paper, the majority view of the ELG is no, the current arrangements are not sufficient to meet the needs of business and employees in redundancy situations. The majority view of the ELG is that the consultation period should be reduced to 45 days but this is not unanimous view.
Question 46	**If the 90-day minimum period is to be replaced, then which of the proposed options should replace it? Are there any other options which the Department should consider? Please explain why you think your choice would better deliver DEL's aims than the alternative option.**
Answer 46	The majority view of the ELG is that the 90-day minimum period should be reduced to a 45-day period. It is believed that the regulation of the consultation period across England and Northern Ireland will remove difficulties for employers in Northern Ireland who at present have to deal with different geographical time limits in NI, England & Wales and the Republic of Ireland. The majority view of the ELG is that the particular requirements regarding consultation can be achieved by employers within a 45-day period. The minority of the ELG believes that the 90-day period should be retained in large redundancy situations to provide time for appropriate consultation.
Question 47	**Do you agree with the Department's proposals to address issues regarding the meaning of 'establishment' in guidance? Please provide comments to support your answer.**
Answer 47	The ELG believes that it would be futile to try and produce any guidance until the case of Lyttle & Others – v – Bluebird UK Bidco 2 Limited (Case C-182/13) is decided.

Question 48	**Do you consider that the inclusion of fixed term employees in collective redundancy consultations represents 'gold plating' of the Directive?**
Answer 48	The ELG recognises that there are advantages to including fixed term employees in collective redundancy consultations if these numbers are required to trigger collective redundancy consultations. The ELG suggests that the reasons not to change the current law on the inclusion of fixed term employees in collective redundancy situations are somewhat unclear. The majority of the ELG believe that the decision to exclude fixed term contracts from the requirements of collective redundancy consultations to be a rational one. The ELG suggests this is because there is an expected redundancy clause built into a fixed term contract i.e. the specific purpose for which the fixed term contract was adopted has ceased to be applicable. The ELG also acknowledges that the difference in approach between England & Wales and Northern Ireland causes real problems for employers.
Question 49	**Do you believe that a legislative amendment in a similar vein to Great Britain, should be taken forward to address issues around fixed term employees or can the issue be addressed in guidance?**
Answer 49	The ELG believes that this issue cannot be addressed by guidance but must be achieved by a legislative amendment.
Question 50	**Have we got the balance right between what is for statute, and what is contained in Departmental guidance and a Code of Practice?**
Answer 50	The ELG agrees that Departmental guidance is necessary in this area. However there is no agreed view in relation to a Code of Practice. The majority of the ELG are not in favour of a Code of Practice as they consider that it will be another set of guidance for the tribunal to consider which is unnecessary. The minority of the ELG believe that a Code of Practice would provide useful assistance.
Question 51	**Do you consider that a Northern Ireland version of the Great Britain Code of Practice will be adequate for Northern Ireland purposes? How can we ensure the Code of Practice helps deliver the necessary culture change?**
Answer 51	The ELG has no comment to make in relation to this question.
Question 52	**Are there other non-legislative approaches that could assist – e.g. training? If yes, please explain what other approaches you consider appropriate.**

Answer 52	The ELG has no comment to make in relation to this question.
Question 53	**Has DEL correctly identified the impacts of the proposed policies? If you have any evidence relating to possible impacts we would be happy to receive it.**
Answer 53	The ELG has no comment to make in relation to this question.
Question 54	**If you have been involved in a Collective Redundancy consultation in the last five years, how long did it take to reach agreement?**
Answer 54	The ELG has no comment to make in relation to this question.
Question 55	**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?**
Answer 55	The ELG has no comment to make in relation to this question.

Review of compromise agreements and possible introduction of a system of protected conversations	
Question 56	**Do compromise agreements currently work in practice in Northern Ireland?**
Answer 56	The ELG considers that compromise agreements do currently work in practice in Northern Ireland.
Question 57	**Are compromise agreements widely used in Northern Ireland?**
Answer 57	The ELG considers that compromise agreements are widely used in Northern Ireland.
Question 58	**Should any change be made to the process/conditions of compromise agreements as currently used?**
Answer 58	The ELG does not consider that there is a requirement for any change to be made to the process/conditions of compromise agreements as currently used.
Question 59	**Should compromise agreements be allowed to contain 'non-compete' and confidentiality clauses?**
Answer 59	The ELG believes that compromise agreements should be allowed to contain 'non-compete' and confidentiality clauses where all parties are in agreement.
Question 60	**Should the term 'compromise agreement' be changed, perhaps to 'settlement agreement'?**
Answer 60	The ELG believes that the general understanding about these agreements are that they are settlement agreements and therefore, on balance, the term 'compromise agreement' should be changed to 'settlement agreement' to achieve harmonisation of the name across Northern Ireland and Great Britain.
Question 61	**Should Northern Ireland simply maintain parity with Great Britain?**
Answer 61	The ELG has no comment to make in relation to this question.
Question 62	**Should an employer be able to make an offer to terminate an employee's contract in the absence of a formal dispute?**
Answer 62	The ELG does not support the proposal in relation to protected conversations. However, it does support an extension to the scope of the use of 'without prejudice' discussions as set out in the answer to question 64 below.

Question 63	**In what circumstances should it be possible for an employer to make an offer of settlement to an employee to end the employment relationship? Examples could include attendance, conduct, performance, retirement, workforce planning, etc.**
Answer 63	There is no agreed position among the ELG in relation to this question.
Question 64	**Should the inadmissibility principle be extended to negotiations leading to termination of employment where no dispute exists?**
Answer 64	Currently what is commonly called the "without prejudice" rule applies to a situation where there is a real dispute, "which is capable of settlement in the sense of compromise (rather than in the sense of simply payment or satisfaction)" Bradford & Bingley Plc v Rashid [2006] 1 WLR 2066. There are a range of circumstances in employment where there is no dispute as such, but where either the employer or the employee may not be happy and would wish to have a conversation with a view to agreeing a settlement/compromise involving payment and departure from employment. A common example is where an employer is moving to a new location. The employee may accept that the move is a sensible business decision, so that there is no dispute, while still deciding that for personal reasons he/she does not wish to undertake the daily commute to the new premises. It is clearly sensible that in these circumstances the employee and employer should be able to have a without prejudice discussion to explore the options for an agreed parting of the ways, rather than letting the situation fester until discipline or some other dispute arises. As matters stand one party has to "engineer" an artificial dispute in order to have a 'without prejudice' conversation. Some ELG members have advised on just that. The ELG supports an extension of the without prejudice rule to cover employment situations where there is no dispute, but where one party wants to raise an issue with a view to compromise.
Question 65	**Should the protection apply in respect of potential unfair dismissal claims only, or in other circumstances?**

Answer 65	The ELG believes that 'without prejudice' protection could be extended as set out in the answer to question 64 above.
Question 66	**What are the equality/discrimination risks in creating a system of inadmissible offers of settlement?**
Answer 66	The ELG has no comment to make in relation to this question.
Question 67	**BIS has stated that if an employer wants information about an individual's plans for workforce planning purposes (e.g. retirement), they are already able to ask in an open and trusting management conversation. Is this your understanding of the law after the abolition of the default retirement age?**
Answer 67	Yes. Our understanding of the law is that employers are able to ask questions regarding an individual's future plans which can include retirement. These conversations have to be undertaken carefully and sensitively. It is not only good practice but also sensible in terms of reducing the risk of such conversations being perceived as age discriminatory for employers to ask such questions of all employees regardless of age.
Question 68	**If such a system was to be introduced, should it be underpinned by legislation, or a Code of Practice, or by guidance, or a combination of these?**
Answer 68	The ELG has no comment to make in relation to this question.
Question 69	**What safeguards should be enacted to ensure that the rights of parties to these negotiations are protected? (An example may include withdrawing inadmissibility on grounds of improper behaviour. Please provide suggestions on any definitions required).**
Answer 69	The ELG has no comment to make in relation to this question.
Question 70	**How do we ensure that there is an equal balance of power between employers and employees in settlement negotiations?**
Answer 70	The ELG has no comment to make in relation to this question.
Question 71	**How do we avoid satellite litigation?**
Answer 71	The ELG has no comment to make in relation to this question.

Public Interest Disclosure	
Question 72	**Do you agree that *Parkins -v- Sodexho* created a loophole in the law on Public Interest Disclosure, to the effect that a worker could make a protected disclosure on matters related to his/her <u>personal</u> work contract?**
Answer 72	The ELG agrees that the *Parkins – v – Sodexho* case highlights an issue as to the extent, if any, to which a worker should be able to make a protected disclosure on matters related to his personal contract.
Question 73	**If you consider that a loophole exists, do you agree that it should be closed in Northern Ireland, by means of amendment to the Public Interest Disclosure (Northern Ireland) Order 1998?**
Answer 73	There is no shared position among the ELG on this issue. One view is that Northern Ireland should mirror the GB position. However, other members believe that a better and more focussed solution to this issue would be to amend Article 67B(1) (b) of the Employment Rights (NI) Order 1996 to read (proposed amendment in **bold**): *"that a person has failed , is failing, or is likely to comply with any legal obligation to which that person is subject* ***other than a private contractual obligation which is owed solely to that worker".***
Question 74	**Do you consider that a reasonable worker could determine what might be in the public interest for disclosure purposes?**
Answer 74	There is no shared position among the ELG on this issue. One view, among those who believe that Northern Ireland should mirror GB, is that it is not an unfairly high hurdle for a reasonable worker to determine what might be in the public interest for disclosure purposes. Other members of the ELG believe that the amendment proposed at answer 73 above would mean that this would be a more straightforward matter for a worker rather than a worker having to consider exactly what is in the public interest.
Question 75	**Do you consider that closing the loophole could inhibit employees from making important disclosures about wrongdoing?**

	There is no shared view among the ELG in relation to this issue.
Answer 75	Those members, who believe that Northern Ireland should mirror GB, consider that closing the loophole could have the described effect. However other members, who propose the amendment at answer 73 above, believe that it would make this unlikely.
Question 76	**Do you agree that Northern Ireland Public Interest Disclosure legislation should be amended to allow protected disclosures to be made otherwise than 'in good faith'? Please provide reasons for your answer.**
Answer 76	The ELG agrees that given the requirement of a genuine public interest, the matter of good faith should not arise other than as dealt with by Question 77.
Question 77	**If you agree with allowing for protected disclosures to be made otherwise than 'in good faith', should an industrial tribunal be empowered to reduce the level of compensation awarded to the whistleblower? What sort of limit should apply to the reduction?**
Answer 77	There is no shared view among the ELG on this issue. One view is that a Tribunal should have the power to reduce compensation by up to 25% where the disclosure is made other than in good faith. The other view is that the Tribunal should have discretion to reduce compensation by a greater amount than 25%.
Question 78	**Do you agree that the definition of 'worker' should be amended in Northern Ireland (for whistleblowing purposes only), to ensure that various NHS workers who were inadvertently excluded from the scope of the legislation are covered? Please provide reasons for your answer.**
Answer 78	The ELG believes that the definition of worker should be widened as proposed given the public interest in the need for protection of whistleblowers in the NHS.
Question 79	**Do you agree that the Department for Employment and Learning should have the power to make subordinate legislation to amend the definition of 'worker' for whistleblowing purposes?**
Answer 79	The ELG agrees that the Department should have the power to make subordinate legislation to amend the definition of 'worker' for whistleblowing purposes.

Question 80	**Should Northern Ireland employers be vicariously liable for detriment caused to a whistleblower by co-workers?**
Answer 80	The ELG believes that there should be vicarious liability on the same basis as in the discrimination legislation i.e. subject to an employer defence that all reasonable steps have been taken to seek to prevent detrimental treatment.
Question 81	**Do you have any comments on the operation of Public Interest Disclosure law generally in Northern Ireland? Please provide reasons and any supporting evidence for your answer.**
Answer 81	The ELG has no comment to make in relation to this question.
Question 82	**Do you consider that any further changes are required to be made to the 1998 Order? Please provide reasons and any supporting evidence for your answer.**
Answer 82	The ELG has no comment to make in relation to this question.

The ELG welcomes the Department's comments in paragraph 4.10 of the consultation document inviting submissions on issues that consultees believe the Department should explore as part of the later consultation. The ELG believes the issue of the establishment of an Employment Appeals Tribunal in Northern Ireland is an important issue that should be explored.

The ELG believes that there should be established an Employment Appeals Tribunal in Northern Ireland comparable to that which exist in Great Britain. We believe that there is no good reason for any difference between Northern Ireland and GB in this respect.

The main arguments for an EAT have been set out previously by the Department in their 'Dispute in the workplace: a systems review - Report on the public consultation' and include in particular the considerable gap between the Tribunal and the Court of Appeal and the deterrent effect of the high level of costs.

The above factors should not be underestimated as, in our experience, this is a very real issue for employers and employees.

Over and above these factors, we believe that an EAT is necessary for the orderly development of employment law in Northern Ireland. A specialised appellate body will provide guidance to the Tribunals and help ensure consistency. Critically, it would also help ensure the development of a Northern Ireland employment law jurisprudence which is particularly important given the ever increasing differences in Employment law between Northern Ireland and GB.

While we appreciate that the establishment of an EAT could be seen as costly, we believe that the current system whereby all cases are heard by three Judges in the Court of Appeal can hardly be considered as cost effective. We believe that a structure could be developed to ensure that an EAT was organised on a cost effective basis e.g. as a division of the High Court with one dedicated judge sitting for a number of days each month as required. Such a structure could be integrated into the NI Courts Service without the need for separate administrative arrangements.