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ENTERPRISE AND REGULATORY REFORM BILL

WRITTEN EVIDENCE

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Written evidence

Memorandum submitted by Stop43 (ERR 02)

Copyright consists of human rights, moral rights and property rights. Exceptions to these rights should not be made by secondary legislation, but must have the full force of Parliamentary scrutiny, debate and amendment brought to bear upon them.

Does the fact that a provision exists within EU law exempt that provision from Parliamentary scrutiny, when it is being enacted in UK law?

"… copyright is the legal expression of intellectual property rights, and is not a regulation."
John Whittingdale OBE MP, Chairman, DCMS Select Committee[1]

The role of government begins and ends with protecting the rights of creators, rather than protecting any company or interest group's business model.
Helen Burrows and Kitty Ussher, *Risky Business,* page 90[2]

Human Rights

Authors' Moral Rights and Copyright are human rights, guaranteed by and enshrined in international, EU and UK laws including:

- The Universal Declaration of Human Rights, Article 27;[3]
- The International Covenant on Economic, Social and Cultural Rights, Article 15;[4]
- The Charter of Fundamental Rights of the European Union, Article 17;[5]
- Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1;[6]
- The European Convention on Human Rights, Article 1 of the First Protocol;[7] and
- Article 1 of the First Protocol of the Human Rights Act 1998.[8]

Human Rights obligations transcend economic policy: Reminds all Governments of the primacy of human rights obligations over economic policies and agreements.
United Nations Sub-Commission on Human Rights resolution 2000–07[9]

All existing UK legislation must as far as possible be read and given effect in a way which is compatible with human rights.[10]

The Human Rights Act 1998 restrains the Government from introducing legislation that is not compliant with human rights legislation.

Any exception to a human right must be limited, in the "general interest",[11] and proportionate.[12]

For an exception to be proportionate it must be established that: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.".[13]

Copyright

Copyright consists of human rights, moral rights, property rights and economic rights.

As well as being conferred by the human rights laws, charters and treaties mentioned above, Copyright and Moral Rights are granted automatically and without formality to authors by international, EU and UK laws including:

- The Berne Convention for the Protection of Literary and Artistic Works.[14]

1 http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120611/debtext/120611–0002.htm#12061114000001
2 http://www.demos.co.uk/files/Risky_business_-_web.pdf?1320841913
3 http://www.un.org/en/documents/udhr/index.shtml#a27
4 http://www2.ohchr.org/english/law/cescr.htm#art15
5 http://www.europarl.europa.eu/charter/pdf/text_en.pdf
6 http://conventions.coe.int/Treaty/en/Treaties/Html/009.htm
7 http://www.hri.org/docs/ECHR50.html#P1
8 http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1
9 http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument
10 http://www.legislation.gov.uk/ukpga/1998/42/section/3
11 http://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/II/chapter/1
12 http://regulatorylaw.co.uk/Proportionality.html
13 http://regulatorylaw.co.uk/Proportionality.html
14 http://www.wipo.int/treaties/en/ip/berne/

— WTO TRIPS.[15]
— The EU Copyright Directive 2001/29/EC.[16]
— The Copyright, Designs and Patents Act 1988.[17]

Any exceptions to copyright must pass the Three-Step Test[18] incorporated into the Berne Convention Article 9 and WTO TRIPS Article 13:(1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works (i) in certain special cases, (ii) provided that such reproduction does not conflict with a normal exploitation of the work and (iii) does not unreasonably prejudice the legitimate interests of the author.

The fundamental purpose of copyright is not, as some assert,[19] to incentivise the creator for the public good, or to "promote innovation". It is to protect the creator's human, moral, property and economic rights.[20]

It is in this form, and for this purpose, that Authors' Moral Rights and Copyright are established as universal, fundamental human rights and intellectual property rights by the treaties mentioned above, and which oblige their signatories to implement their provisions in domestic law.

It follows that any proposed change to exceptions to copyright fundamentally alters the citizen's human and property rights. Provisions within the European Communities Act 1972[21] notwithstanding, changes to rights of such a fundamental nature must be subject to the full force of Parliamentary scrutiny and amendment.

The Enterprise & Regulatory Reform Bill 2012–13 Clause 56

"Clause 56: Power to change exceptions: copyright and rights in performances—Chapter 3 of Part 1 of the CDPA deals with 'permitted acts', that is, those acts which can be performed without the consent of the copyright owner. For example, criticism, review and news reporting or anthologies for educational use. Clause 56 creates a power for the Secretary of State to add or remove from this list of copyright exceptions by means of secondary legislation. The Law Society considers that copyright exceptions are a sufficiently important issue, with ramifications across many sectors and industries, that changes to them should be subject to the full scrutiny of the primary legislative process. The Society therefore opposes the inclusion of this Clause."[22]

The Intellectual Property Office claims that the purpose of Clause 56 is extremely narrow and specific:[23] "to enable the Government to preserve the level of penalties which are set out in the substantive copyright legislation", the problem being "currently, when section 2(2)[24] of the European Communities Act 1972 is used to amend the exceptions to copyright and performance rights, this can cause difficulties as its use may require a downwards adjustment of criminal penalties in copyright legislation."

This would appear to mean that if existing copyright exceptions are narrowed, extending the number of people caught by a criminal offence, and if the Government amended them by secondary regulation using provisions within the European Communities Act 1972, the new penalties would be limited to a maximum of two years when existing penalties may be higher, and Clause 56 is intended to avoid the reduction of existing penalties in this way.

Based on the IPO's explanation, it is not actually clear how Clause 56 as currently drafted would deal with this problem. The IPO could be referring to the introduction of penalties for online offences under the 2003 Copyright and Related Rights Regulations,[25] but it is not clear what this has to do with exceptions to copyright. If an offence is dependent on infringement of copyright taking place or being authorised, and an act ceases to be an infringement of copyright because of a wider exception, it is not clear how this could still be an offence at all. It would be most peculiar to have an act which is not a civil infringement but is a criminal offence, where the basis of the offence is infringement of copyright.

Questions

Stop43 would be grateful if the Scrutiny Committee would seek satisfactory answers to the following questions, and if no satisfactory answer is forthcoming, then change the text of the Clause or remove it completely:

— There is no foreseeable need to change copyright exceptions to comply with EU law—all directives have been implemented, and no new EU copyright exceptions are proposed—so why is Clause 56 needed at all?

15 http://www.wto.org/english/tratop_e/trips_e/intel2_e.htm
16 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML
17 http://www.legislation.gov.uk/ukpga/1988/48/contents
18 http://en.wikipedia.org/wiki/Three-step_test
19 http://www.ipo.gov.uk/ipresponse-international.pdf
20 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML
21 http://www.legislation.gov.uk/ukpga/1972/68/contents
22 http://www.lawsociety.org.uk/search?query=briefing&searchname=search1
23 http://www.ipo.gov.uk/press-release-20120525.htm
24 http://www.legislation.gov.uk/ukpga/1972/68/section/4
25 http://www.legislation.gov.uk/uksi/2003/2498/contents/made

— If the purpose of Clause 56 is to maintain criminal sanction levels if copyright exceptions are amended, why does the text of Clause 56 not specifically refer to that, and limit itself to that purpose and no other?

— Why is an overarching Ministerial power to change copyright exceptions needed, rather than simply a power to adjust criminal penalties, given that the latter is the stated aim of the clause?

— Are we to believe that the IPO wishes to see enacted a law of very broad scope merely so that it can tinker with penalties for criminal breach of copyright, or does it have some other purpose or goal in mind?

— Does the Government intend to introduce further Clauses into this Bill, implementing more of the recommendations made by Professor Ian Hargreaves in his recent Review of Intellectual Property and Growth?[26]

— At what point did the UK Government cede such power and sovereignty to Brussels that the default legislative position became that of assuming that any and all provisions within EU law can and should be enacted in the UK by secondary legislation, by-passing Parliamentary scrutiny and debate, and leaving MPs with the power only to accept or reject entire legislative texts at face value, with no amendment?

— We are told that copyright law must be changed so as to afford "legal certainty" to those wishing to use intellectual property belonging to others, usually without the prior permission of or payment to its owners. What about the legal certainty of those whose businesses are built upon intellectual property ownership, and who could find ownership and control of their property removed from them without warning?

About Stop43

Stop43 is a self-funded group of professional freelance and micro-business image creators, between them members of *Artists' Bill of Rights*, *The Association of Illustrators*, *The Association of Photographers*, *The British Institute of Professional Photography*, *The British Press Photographers' Association*, *Copyright Action*, *EPUK*, *The National Union of Journalists*, and *Pro-Imaging*: professionals who were sufficiently concerned and motivated by the threat that Digital Economy Bill Clause 43 posed to our livelihoods that we took direct action. We had the support of the 16,000 members of the 10 organisations listed on our website, and that of thousands of photographers, as proven by their direct lobbying action that resulted in Clause 43 being removed from the Digital Economy Bill. Since then, professional illustrators and members of the cultural heritage sector who understand and support our position have joined us and contributed to this submission. Stop43 have a mandate to lobby for our eight tenets from the 2,100+ members of our *Facebook* Group.

June 2012

Memorandum submitted by TransformUK and ClientEarth (ERR 04)

PRIORITY AMENDMENTS TO THE ENTERPRISE AND REGULATORY REFORM BILL 2012 ESTABLISHING THE GREEN INVESTMENT BANK

Executive Summary

The amendments presented in this briefing represent the priority recommended amendments to Part 1 of the *Enterprise and Regulatory Reform Bill* establishing the Green Investment Bank (GIB/the Bank). While we have recommendations for additional amendments, the three presented here are the minimum changes to the legislation that are essential in order to safeguard the efficacy and credibility of the Bank.

The legal text suggested has been crafted by leading environmental law organisation ClientEarth, in collaboration with Transform UK, the independent NGO that founded and co-ordinates the national alliance campaign to set up the Green Investment Bank. In 2010–11 ClientEarth and Transform UK collaborated on demonstrating why it was essential to establish the GIB by legislation. Since that time, we have undertaken extensive legal policy work on the optimum statutory design for the GIB, culminating in a parliamentary launch of model legislation in late 2011.

For reasons of Parliamentary time it is important that the GIB amendments are debated together. For this reason we recommend that our amendments be introduced as amendments to existing clauses rather than by introducing any new clauses. The structure of the recommended legal text in this document follows this approach.

The first essential amendment is to introduce provisions that cement the commitment to allowing the Bank to borrow from the capital markets no later than June 2015, whilst taking the necessary steps under EU law to enable the possibility of earlier borrowing if the political decision was taken to utilise the GIB's massive potential to stimulate green growth. Without such an amendment, there is no reason to have any confidence that the Bank will ever be able to borrow in practice. A bank that cannot borrow from the capital markets cannot be described as a bank.

[26] http://www.ipo.gov.uk/ipreview-finalreport.pdf

The second essential amendment is to amend the purposes clause to ensure that the Bank's activities will be truly green. The purposes the Government has put forward have been drafted in such a way as to make them almost meaningless, providing no legal certainty that the Bank will be focussed on unlocking investments in transformational green technologies. If the purposes clause is not amended, the Bank would even have the ability to support high carbon technologies. This risks significantly undermining the environmental credibility of the Bank.

The third amendment is necessary to safeguard the accountability and transparency of the institution. Despite being a novel institution fulfilling a vital public purpose, the Government has not proposed any independent expert review into the performance of the Bank. It is also concerning that the GIB company constitution provides that the monitoring of the GIB's performance that the Department for Business will undertake as shareholder will occur behind closed doors, with no opportunities for public consultation, and no public facing assessments of how the Bank is fulfilling its purpose. Unless amended, these omissions represent barriers to broader stakeholder engagement in the future of the Bank, their ability to hold it to account, and the prospects of the GIB maximising its catalytic potential. As the Government shareholder will have the ability to amend the Bank's priority sectors at whim, independent expert review is also a critical component of independence.

1. *Borrowing from the capital markets*

The ability of the GIB to borrow is critical to its success. To be effective it must be allowed to borrow from the capital markets—otherwise it will be nothing more than a Government-run fund.

As a Companies Act company, the power for the GIB to borrow is theoretically "enabled," but this is not the same thing as being "allowed" to borrow in practice. The Government's update on the GIB from May 2011 stated that the GIB will not be allowed to borrow until 2015 and only once the UK's national debt is declining as a percentage of GDP. This is now not expected to happen until 2016, and if the European economic crisis deepens then it could be even longer before the GIB is allowed to borrow. There is a high level of concern however that this constraint has been imposed on the GIB by senior civil servants in the Treasury who do not ever want the GIB to borrow independently due to ideological opposition to public banks, and are implementing a classic delaying tactic. Additionally, the Government has not yet taken the necessary steps under European law (State aid notification) for the Bank to be allowed to borrow any time soon.

As it stands, the effect of the legislation and GIB company constitution is that the GIB will not be allowed to borrow from the capital markets on enactment, with no certainty that this will ever change in practice. There is a provision in the Bill to enable the GIB to borrow from the National Loans Fund but this is not the same as the GIB being allowed to borrow from the capital markets, which would mean borrowing independently and the ability to leverage far higher levels of private sector investment into the low carbon economy.

Amending the legislation establishing the GIB is the only way to overcome these barriers and provide certainty and visibility to investors and other stakeholders that borrowing from the capital markets will ever materialise in practice.

Allowing the GIB to borrow is critical to ensuring the Bank can fulfil its enormous potential. The UK is now in a double-dip recession which is mainly due to a lack of investment in the economy. Of the many billions that need to be invested in renewing the UK's infrastructure, analysis by E3G for Transform UK demonstrates that 70% of this is in green or green-enabling technologies. The GIB is critical to unlocking this investment and delivering growth. Investor confidence in the private banks is at an all-time low. The GIB could help "plug" this gap. Through issuing bonds the GIB can create a "linking institution" to draw down the vast pools of institutional investor capital held in the capital markets into UK infrastructure projects.

But the coalition Government has ruled out allowing the GIB to borrow in the foreseeable future. It has maintained this position even as Government borrowing costs have reached a record low. The main argument cited publicly for not allowing borrowing is its impact on Public Sector Net Debt. However, this constraint significantly limits the ability of the GIB to unlock significant investment in the UK economy and so help the UK to grow its way out of recession.[27]

By way of illustration, the GIB has currently been allocated £3 billion in start up funding. The Government has estimated this could unlock a further £15 billion in private sector co-investment.[28] However, this is a fraction of the £200 billion that needs to be invested in energy infrastructure alone out to 2020. Were the GIB to be allowed to borrow at a modest ratio of 1:6 in the first instance, this would boost its capital base to £18 billion. This could (according to the Government's own calculations) then unlock £90 billion in private sector co-investment—or nearly half of the capital needed to decarbonise the energy system by 2020.

Of the public banks established in other European countries, all are allowed to borrow independently from the capital markets. For example:

[27] To give some context as to how erroneous this argument is, a 2009 ONS Report lists the current Government off balance sheet liabilities could be reclassified as on balance sheet (and so impact Public Sector Net Debt) amount to upwards of £3.7 trillion. This includes £1 trillion–£1.5 trillion to underwrite Lloyds TSB and Royal Bank of Scotland liabilities. Lloyds TSB and Royal Bank of Scotland are currently classified as off balance sheet on the basis that they are temporary liabilities. It could equally be argued that the GIB is a temporary liability until such time as it builds a track record, acquires sufficient reserves and obtains a rating.

[28] Speech by Nick Clegg in April 2011. http://www.reuters.com/article/2012/04/12/idUSL6E8FC2E420120412

— KfW Bankengruppe in Germany leverages its equity by x28.

— Bank Nederlandse Gemeenten in the Netherlands leverages its equity by x59.

If the GIB is not allowed to borrow independently, the Government will leave the UK at a competitive disadvantage. Unlike public banks in other European countries, the GIB will have no opportunity to bolster its balance sheet through issuing GIB bonds and so scale up its investment in the UK economy. This situation can only be reversed by a legislative amendment similar to the one set out in this document.

The effect of that amendment is to require the Government to allow the GIB to borrow from the capital markets no later than June 2015, while leaving open the possibility of earlier borrowing if such a political decision to stimulate growth was made. As is proper for a Bank that may be classified as on the public balance sheet, the amendment preserves the ability for the Treasury to prescribe some limitations on the amounts the Bank may borrow. The amendment also requires the filing of State aid notification with the European Commission by a fixed date to enable borrowing to happen soon.

Amendment—*Borrowing from the Capital Markets*

In Clause 4 ("The UK Green Investment Bank: financial assistance") insert the following sub-clauses after sub-clause (6)—

"(7) Subject to approval by the European Commission of the State aid notification concerning the establishment of the Green Investment Bank, it is the duty of the Secretary of State to provide the European Commission with State aid notification concerning the intention to allow the Bank to borrow from the capital markets.

(8) The duty in subsection (7) must be fulfilled no later than 31st December 2013.

(9) In the event the European Commission approves the State aid notification concerning borrowing, it is the duty of the Treasury to permit the Green Investment Bank to begin borrowing from the capital markets no later than 30th June 2015, or, if State aid approval has not been received by that date, no later than 1 month from the date of approval.

(10) Nothing in this section shall be taken as depriving the Treasury from the ability to prescribe or amend limits or terms on which the Bank may borrow."

Explanatory note:

The amendment is required in order to provide certainty and predictability to investors and other stakeholders that the GIB will be permitted to borrow from the capital markets within the next few years. It is also required to commit the Government to taking the necessary steps to enabling the GIB to borrow by June 2015 at the latest, and become the significant engine for economic growth that is urgently needed.

The amendment is also required to commit the Government to taking steps to seek State aid clearance for borrowing on timescales that preserve the possibility of borrowing from 2015 or earlier. The timeframes established in this amendment provide adequate time for the Government to carefully develop detailed proposals for the borrowing mechanism, and to satisfy the requirements for State Aid notification flowing from the Treaty of the Functioning of the European Union. Until State aid clearance is received, the Bank cannot lawfully engage in any borrowing. The amendment does not presume any particular outcome of this notification, but commits the Government to moving forward and allowing the Bank to engage in at least some borrowing if State aid approval is received.

Subsection (10) is included to clarify that the amendment does not alter the ability for the Treasury from determining or amending the details of the borrowing mechanism, including setting maximum levels, provided that some borrowing is allowed by June 2015, or as soon as State aid approval is received.

2. *The green purposes*

A key test for the GIB is whether the legislation contains an appropriately defined mandate to ensure the Bank's activities will be truly green. The mandate is located in the purposes clause of the legislation, and supplemented by elements of the GIB company constitution. To be effective, we consider that the purposes clause should achieve two essential functions: (1) provide clear broad parameters for what types of investment the Bank may and may not fund, and (2) point the Bank towards high environmental benefit within these parameters.

As currently constructed, the purpose clause does not achieve either of these functions in any meaningful way. The construction is overly broad, to the extent that it means almost nothing and does not legally rule out the support of high carbon infrastructure projects provided that advances in resource efficiency are made.

Language such as "reduction of greenhouse gas emissions" and "promotion of environmental sustainability" are also highly ambiguous and achieve little or no legal certainty to ensure the Bank will fulfil the first bottom line (environmental benefit) with adequate ambition. Overall, the weakness of the purposes clause significantly undermines the environmental credibility of the Bank and would allow for dilution or perversion of the Bank's mandate in the future. It therefore requires amendment.

The amendment has the effect of strengthening the green mandate in three main ways. Firstly, a link with emissions reduction targets and carbon budgets under the Climate Change Act 2008 has been included to enshrine ambition and to help ensure that all the Bank's investments are in line with the achievement of these targets. Secondly, the purpose of "advancement in the efficiency in the use of natural resources" has been deleted and replaced with the purpose of accelerating improvements in energy savings and energy efficiency. If left to stand, "the efficient use of natural resources" purpose would invite a whole range of investment projects in sectors not normally regarded as green. Examples include high carbon infrastructure projects. Waste projects could be covered by the clause "protecting or enhancing the natural environment". Thirdly, an exclusionary clause has been introduced to explicitly prevent the Bank from ever funding high carbon infrastructure, such as high efficiency fossil fuel generation.

The Government may suggest that an alternative to amending the purposes clause in the legislation is to amend the objects clause in the GIB Company Constitution (Article 3 Articles of Association.) While it is true that the Bill provides for some entrenchment of the objects clause by requiring the passing of a statutory instrument (order) before it may be changed, this is not an adequate solution. Changes to the GIB's mandate effected by statutory instrument will not be subject to the same level of public or parliamentary scrutiny as primary legislation. Furthermore, relying on this constitutional change as a solution would result in a less readily enforceable mandate. This is the case because the Department will be the sole Shareholder of the Bank, and therefore the only party capable of enforcing the Company constitution. Finally, it is the legislation that provides the greatest visibility of the Bank's environmental credibility to investors across the world.

The purposes clause must strike a delicate balance between focus and flexibility. Legally, the objects clause in the GIB company constitution will always have to fit within the purpose clause in the legislation. Any activities the Bank funds that fell outside of these purposes would be *ultra vires* or "beyond power". For this reason it is important that any statutory tests or exclusions on the scope of the purposes clause are sufficiently realistic so as not to paralyse the activities or decisions of the Board. The amendment that follows satisfies this test.

Amendment—*The Green Purposes*

Clause 1 ("The Green Purposes") is amended as follows—

"The Green Purposes

(1) The green purposes are—

(a) The reduction of greenhouse gas emissions;

(b) Accelerating significant improvements in energy savings and energy efficiency;

(c) Protecting or enhancing the natural environment;

(d) Protecting or enhancing biodiversity; and

(e) Promoting environmental sustainability.

(2) The purposes in subsection (1) shall be pursued in line with the achievement of greenhouse gas reduction targets and carbon budgets under the Climate Change Act 2008.

(3) The purposes in subsection (1) shall not allow for the support of high carbon infrastructure projects, including any infrastructure projects likely to result in a significant increase of greenhouse gas emissions.

(4) In subsection (1), "greenhouse gas" has the meaning given by section 92(1) of the Climate Change Act 2008."

Explanatory note:

The amendment is necessary to safeguard the environmental credibility of the GIB. The first effect of the amendment is to introduce a link to the Climate Change Act to enshrine necessary ambition and help ensure that all the Bank's investments are undertaken in line with the achievement of carbon budgets and carbon targets.

The second effect of this amendment is to delete the purpose of "advancement in the efficiency of the use of natural resources". Retaining this purpose would have allowed the Bank to lawfully fund high carbon infrastructure projects simply where gains in the efficiency of inputs against outputs are made. This purpose has been replaced with the purpose of "accelerating significant improvements in energy savings and energy efficiency", reflecting the importance of this objective, and the fact that some of the measures captured by this category are motivated by a range of environmental concerns, not only merely greenhouse gas reduction.

The third effect is to introduce an exclusionary clause explicitly preventing the Bank from ever funding high carbon infrastructure projects, such as high efficiency fossil fuel generation or other non- green infrastructure projects that could otherwise be lawfully supported on the grounds of marginal improvements in emissions intensity. The exclusion clause is an absolutely essential amendment to provide the GIB with green credibility.

3. *Independent expert review*

In the wake of the banking crisis, another key test for the legislation establishing the GIB is whether it establishes the highest standards of transparency and accountability. As the UK's first ever public bank it should be a model of transparency and accountability.

While the legislation contains some positive elements in this regard, these are outweighed by some significant weaknesses that clearly require amendment. Contrary to the recommendations of several stakeholders including Transform UK, ClientEarth and the GIB Commission, the legislation contains no requirements for independent review of any sort. Additionally, the GIB company constitution provides that the monitoring of the Bank's performance that the Department for Business will undertake as sole shareholder will take place behind closed doors, without resulting in any public facing reports or reviews whatsoever. The GIB is not an ordinary company and it is entirely appropriate to subject it to independent expert review for the purposes of accountability and maximising the long term efficacy of the institution.

Another deficiency is the absence of any requirements for public and stakeholder consultation in either the legislation or the GIB company constitution. We consider that this represents a significant barrier to broader stakeholder and societal engagement with the trajectory of the Bank, and diminishes their ability to hold it to account. These omissions also risk diminishing cross Departmental advice and input on the performance and future directions of the Bank, and may serve to push out key departments such as the Department for Energy and Climate Change in the future.

Furthermore, it is not appropriate for the Department for Business to retain sole responsibility for the future of the Bank. In this regard, independent expert review should be seen as an important component of real and perceived independence for the GIB. This is particularly true in the scenario where the Department for Business is the sole shareholder of the Bank, and with the ability to amend the priority sectors or several other elements of the Company constitution at whim. The amendment that follows enhances, and does not detract from, the independence undertaking required by the Government in clause 2 (3) of the Bill.

The amendment requires the Secretary of State to arrange independent review on a periodic cycle, and sets out minimum content and publication requirements for the content of a review to help ensure balanced meaningful review. The Government may respond that there is no need for the legislation to secure review or public consultation because parliamentary committees are likely to conduct enquiries into the Bank anyway. This is an entirely inadequate response. Firstly, the ad-hoc work of parliamentary committees provides no certainty regarding if and when a review will occur. Secondly, while they fill a vital purpose, parliamentary committee members are not professional green investment experts.

We note that the amendment that follows is not the only desirable amendment to improve the transparency and accountability of the GIB, but it is the priority amendment for this theme. ClientEarth's model legislation contained in the report *Towards the Green Investment Bank Act* also recommended the application of the Freedom of Information Act, presumptions of general disclosure, and enhanced narrative reporting requirements for the Board.

Amendment—*Independent expert review, and consultation requirements*

In Clause 6 ("The UK Green Investment Bank: documents to be laid before Parliament"), insert the following sub-clauses after sub-clause (4)—

"(5) It is the duty of the Secretary of State to require independent expert review of the performance of the Bank including—

(a) A full review no less frequently than every five years, and

(b) An interim review no less frequently than every two and a half years.

(6) A review made pursuant to subsection (5) shall include at minimum:

(a) An assessment of the Bank's environmental performance in fulfilling the green purposes in section 1,

(b) Analysis of the main trends and factors likely to affect the future development, performance and position of the Bank,

(c) Economic analysis, and

(d) Recommendations to improve or maintain the Bank's impact in fulfilling the purposes in section 1.

(7) Prior to the commencement of a review pursuant to subsection (5), the Secretary of State must request the views of—

(a) The Secretary of State for Energy and Climate Change,

(b) The Secretary of State for Environment, Food and Rural Affairs,

(c) The Committee on Climate Change,

(d) The Scottish and Welsh Ministers, and the Ministers of Northern Ireland,

(e) Investors, market participants and other interested persons, and

(f) Members of the public,
and provide a copy of the results of this consultation to the person or body undertaking the independent review.

(8) The Secretary of State, in the capacity of shareholder, must provide such information as he considers reasonable to enable the person or body undertaking the review to fulfil the requirements of subsection (6).

(9) A review made pursuant to subsection (6) must be published and laid before Parliament. "

Explanatory note:

The amendment is necessary to improve the transparency and accountability of the GIB. The amendment strikes a balance between meaningful review and the need to preserve the operational independence of the GIB. The effect of the amendment is to require the Secretary of State to solicit independent expert review on a periodic cycle of five years for a full review, and every two and a half years for an interim review. The choice of person or body to fulfil this review is not specified in the amendment. However, the amendment sets out minimum requirements for the contents of a review to help ensure a balanced and meaningful assessment.

The amendment also introduces a legal requirement for the Secretary of State to undertake stakeholder and public consultation prior to the commencement of a review, and to provide the results of this consultation to the person or body undertaking the review. These consultation requirements will improve the accountability and level of engagement with the institution, whilst formalising the importance of cross departmental and stakeholder input.

Finally, to improve transparency of the Bank, the amendment requires the review to be published and laid before Parliament.

The amendment does not diminish or alter the contents of the Government's independence undertaking required pursuant to section 2(3) of the Bill. The practical effect of the review is twofold: firstly, it may influence the direction of the Bank to the extent the board choose to accept some of its recommendations or expert advice, or otherwise benefit from analysis or information contained in a review, and secondly, it may influence the Government shareholder to amend the Framework Document (parts of which comprise the company constitution), or Articles of Association so as to steer the Bank's high level objectives in a new direction.

June 2012

Memorandum submitted by Mr R Richards (ERR 05)

I am writing to you regarding the Enterprise and regulatory Reform Bill.

Maybe I am misunderstanding, if I am misunderstanding, I am sorry for wasting your time with my concerns.

Whistle blowing, in my opinion should be encouraged, not closed down, I understand that there will be a need to satisfy public interest inserted into any possible future whistle blowing, who will determine whether whatever whistle blowing is indeed in the public interest?

I would argue that all and any whistle blowing is in the public interest and helps and assists in any democracy.

It indeed hurts a democracy if there is any restraint on whistle blowing.

I am of the opinion that this should be removed from the bill, the idea that any whistle blowing need to be in the public interest. Nobody should decide what is and what is not in the public interest.

I am in the process of writing a book and will be including details about this and the outcome.

I thank you for your care and attention regarding this matter.

June 2012

Memorandum submitted by Aldersgate Group (ERR 07)

BACKGROUND

The UK is facing a time of considerable economic stress. Restoring growth and re-balancing the economy are urgent priorities. Focusing our recovery effort on low carbon growth can re-power the economy, increase our energy security and help tackle climate change.

Rapidly accelerating investment in low carbon and environmental technologies will also increase the competitiveness of Britain's businesses in the global market, protect consumers from fossil fuel price shocks and stimulate growth, especially in the regions. But fulfilling this low carbon vision for Britain will require financial as well as technological innovation.

For this reason, the Aldersgate Group fully support the Government's commitment to set up a Green Investment Bank (GIB). This crucial institution can help tackle the significant investment barriers standing in the way of delivering vital investment in our future. By directly reducing the risks to investors the cost of the energy transition will be significantly lowered for taxpayers and consumers.

Aldersgate Group

The Aldersgate Group is an alliance of leaders from business, politics and society that drives action for a sustainable economy. In partnership with Transform UK (an alliance that campaigns to accelerate investment into the low carbon economy), it has been one of the leading advocates for the creation of the GIB through engagement with investors, businesses, Government Ministers, MPs and others senior stakeholders.

The Aldersgate Group's *Financing the Transition* report (October 2009) found that the achievement of low carbon targets for 2020 and beyond presents a major financing challenge for the UK economy. It recommended the creation of a GIB that would seek to reduce political and regulatory risks for low carbon investments and mobilise capital from institutional investors at scale.

GIB Legislation

It is welcome that the Government will enshrine the GIB in the *Enterprise and Regulatory Reform Bill 2012*. The Aldersgate Group has argued previously that legislation is vital to establish a fully independent, accountable and enduring institution that will provide confidence to investors.

There are a number of positive elements in the *Enterprise and Regulatory Reform Bill 2012*. However, in conjunction with Transform UK and Client Earth (a leading European environmental law organisation), we have identified three areas that require amendments to ensure that the GIB maximises its potential to be both credible and effective. These are:

1. Mandate;
2. Enabling a real bank; and
3. Transparency and accountability.

1. *Mandate*

The GIB must have a clear mandate to leverage investment in low carbon and resource efficient technologies. Client Earth have recommended that the legislation provides a list of exclusions and legal prohibitions to ensure the Bank's activities are truly green, while retaining a necessary degree of flexibility to allow the Bank to respond to emerging technologies and environmental problems. Client Earth also calls for legislative enshrinement of a non-exhaustive list of priority sectors to minimise policy risk for investors.

Clause (1) of the legislation currently defines the "green purposes" of the GIB as follows:

(a) the reduction of greenhouse gas emissions;
(b) the advancement of efficiency in the use of natural resources;
(c) the protection or enhancement of the natural environment;
(d) the protection or enhancement of biodiversity; and
(e) the promotion of environmental sustainability.

This definition is overly broad. As only one of the "purposes" needs to be met, it is feasible that investments which might be considered as unsustainable or "not green" could meet this criteria (such as a highly efficient gas power station without carbon capture and storage). This would be inconsistent with the objective of the bank to promote green growth and that "the UK makes a successful transition to a low carbon economy".

As Climate Earth states "a list of priority sectors has not been included in the legislation, but does appear in the company constitution. While this focus for the Bank is positive, the decision to place it in the constitution alone means that in practice, it fails to provide investors with any certainty beyond electoral cycles. The next Government can amend the constitution to introduce an entirely new set of priority sectors, (provided they fit within the extremely broad purposes in Clause 1 of the legislation) and the Bank would be bound to adhere to such a change."

Recommendation:

Clause (1) of the legislation requires amendment. It must be tightened and/or coupled with legal exclusions ruling out the possibility of the Bank supporting high carbon projects or other environmentally harmful activities, while preserving enough flexibility to respond to emerging technologies and challenges.

2. *Enabling a real bank*

It is vital that the GIB is a bank and not a fund. According to a report by Ernst & Young, *Capitalising the Green Investment Bank* (2010), the UK needs £450 billion in energy investment by 2025 and the traditional sources of capital such as utility companies, project finance and infrastructure funds are only likely to provide

£50 to 80 billion. That means the UK is facing a huge low carbon energy finance gap of £370 to 400 billion. Ernst & Young conclude that this gap can only be bridged with the support of a Green Investment Bank with full borrowing powers.

According to Government proposals, the GIB will be given powers to borrow from April 2015 and subject to public sector net debt falling as a percentage of GDP. However, for the GIB to drive the economic recovery, it should have the power to raise funds from capital markets right away. Otherwise, it will not make a significant impact on the low carbon financing challenge. This view is shared by the CBI who state that "If investors are to have confidence in this important institution, it must have the powers to raise funds on the capital markets as soon as possible".

The draft Bill does contain enabling powers for state guarantee and this is welcome. The bank is also enabled to borrow as it is a Companies Act company. However, if the GIB is prevented from borrowing until 2016 or 2017, it severely undermines its ability to leverage in private capital to support the creation of green infrastructure. The borrowing conditions have cast strong doubt in the market place that the GIB will ever be allowed to borrow which would mean, in effect, that it is not a public bank but a fund. It is therefore vital that the legislation makes absolutely clear that the GIB is a proper public bank and that it will be allowed to borrow from the capital markets.

Recommendation:

A legislative amendment is needed to cement the commitment to borrowing as soon as possible, to provide a signal for investors and stimulate economic growth.

3. *Transparency and accountability*

Client Earth finds that the most significant weakness regarding accountability is that neither the legislation nor the GIB company constitution require any kind of formal or public facing review into the practices of the bank, or its progress in attaining its mission. Of course, this does not prevent the Department from running consultations or publishing review documents from time to time, but it is unacceptable that this has not been included.

It is vital that the review process is informed by public consultation requirements, as is appropriate for a publicly funded institution fulfilling a new and vital public purpose. In the current model, not only is there no independent review of the Bank, but even the monitoring that the Department (BIS) proposes to undertake will take place behind closed doors.

Recommendation:

The legislation requires amendment in the form of a new clause requiring periodic statutory review, informed by stakeholder and public consultation.

June 2012

Memorandum submitted by the TUC (ERR 08)

GREEN INVESTMENT BANK

The TUC welcomes the Green Investment Bank in principle.

Its combination of public funding unlocking private sector investment in environmentally transformational technologies could make a vital contribution to support our green economy and the wider growth agenda.

However, an immediate concern for the TUC relates to the massive scale of new investment required to meet our challenging climate targets. The investment demands arising from the Energy Bill are likely to mean doubling the rate of energy project investment achieved over the past decade. Yet the GIB will not be allowed to borrow from the capital markets; instead, the Government has provided up to £3 billion of initial public support, with further access to capital subject to national debt falling sufficiently at an unspecified date.

Some £200 billion is required to develop the UK's low carbon energy infrastructure in the next decade or so. Getting the legislation right is a critical test for the success of the GIB, and will affect the efficacy and credibility of the Bank long into the future.

At this stage, the TUC believes there are three main concerns:

Mandate

Legislative underpinning of the GIB's green mandate is welcome, but the mandate must be tightly drawn to promote low carbon technologies and avoid the possibility of lending either to high carbon or other general infrastructure. Clause (1)(1)c) challenges the environmental credibility of the Bank, in that it defines the green purpose of "advancement of efficiency in the use of natural resources." The Bank is only legally required to fulfil one or more of the purposes in clause 1 to satisfy the green test. Therefore, in its current form the

legislative mandate of the Bank could support of highest efficiency gas power generation without CCS component technology. Support of other general infrastructure projects or sectors not normally regarded as "green" would also be lawful provided the investment activity met new or best practice standards for resource efficiency. The TUC would therefore wish to see amendments to the Bill so that the purpose clauses to ensure that the Bank's activities genuinely address our climate change and low carbon energy challenges.

Borrowing powers

A key test for the legislation and company constitution will be whether it provides visibility and certainty to investors that the GIB will be able to borrow from the capital markets in the near future, and enjoy a State guarantee. The legislation does contain an enabling power for State guarantee and this is welcomed. However, it contains no indication that the Bank will be ever be allowed to borrow in practice. Each year, Germany's KfW state bank, the "equivalent" of our proposed Green Investment Bank (GIB), invests 25 times as much in green investments as the Treasury will allow the GIB. Today's draft GIB legislation reveals a gulf in ambition between ourselves and our competitors. The TUC therefore would wish to see amendments allowing the Bank to borrow from the capital markets at the earliest opportunity.

Public accountability and transparency

In the wake of the banking crisis, the GIB should be required to uphold the highest standards of public accountability and transparency. The legislation does not provide for a formal or public facing review of the progress of the Bank, and no requirements for stakeholder or public consultation.

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Memorandum submitted by Chartered Institute of Environmental Health (ERR 09)

1. Summary

The CIEH supports the operation of the Primary Authority Scheme and will support efforts to extend its operation. This paper asks some questions about how far the Bill actually goes in extending the scheme and seeks some commitment to consultation with professional bodies such as the CIEH and the Trading Standards Institute before the Minister issues additional guidance. The CIEH also suggests a specific policy area for additional inclusion within the scheme, namely scrap metal dealers. The CIEH is broadly content with the proposals in respect of inspection plans but warns against overly-prescriptive application of them—citing the outbreak of Legionnaire's Disease in Edinburgh as a timely reminder of the importance of inspection and the crucial role of competent professionals in protecting the public in ways that are proportionate to the risk identified.

2. About the CIEH

As a Chartered professional body, we set standards and accredit courses and qualifications for the education of our professional members and other environmental health practitioners.

As a knowledge centre, we provide information, evidence and policy advice to local and national government, environmental and public health practitioners, industry and other stakeholders. We publish books and magazines, run educational events and commission research.

As an awarding body, we provide qualifications, events, and trainer and candidate support materials on topics relevant to health, wellbeing and safety to develop workplace skills and best practice in volunteers, employees, business managers and business owners.

As a campaigning organisation, we work to push environmental health further up the public agenda and to promote improvements in environmental and public health policy.

We are a registered charity with over 10,500 members across England, Wales and Northern Ireland.

3. Clause 52—Primary Authority

As the Explanatory Notes to the Bill explain, the intention is to broaden eligibility to enable more organisations to participate in the Primary Authority Scheme. In its publication Government Response to the Consultation Transforming Regulatory Enforcement[29] the Department proposed to take three specific actions:

(1) Allow more organisations to participate in the Primary Authority Scheme.

(2) Include specific policy areas which are currently out of scope.

(3) Strengthen inspection plans.

Inspection plans are dealt with in Clause 53 and we shall come to those next.

[29] December 2011 http://tinyurl.com/74dkcft

As to (1) above, three examples were given by the Department, namely franchisees, company groups and members of trade associations. The Explanatory Notes illustrate the effect of this Clause solely by reference to the last of these three examples, namely members of trade associations. None of the three classes is referred to specifically in the wording of the Clause but presumably the wording is sufficient to allow participation from businesses within all three classes. It would be helpful for the Minister to confirm this.

Clause 52(5) adds a power for the Minister to issue guidance. Perhaps it is intended that guidance will specify which organisations may additionally participate. There is no apparent restriction on the manner of the Minister producing guidance nor its content. Apart from the question as to whether Parliament should have some involvement, the CIEH would urge that the Bill ought to require some consultation with interested parties, including professional bodies like the CIEH and the Trading Standards Institute before guidance is issued.

As to (2) above, the Department's original consultation document discussed additional policy areas, namely Part 1 Housing Act 2004, the Criminal Justice Act 1988, Offensive Weapons Act 1996, Licensing Act 2003 and Gambling Act 2005 in respect of under-age sales and Regulatory Reform (Fire Safety) Order 2005. Responding to the responses received[30] the Department postponed a decision regarding the Licensing Act and proposed pilots regarding the Fire Safety proposal. The Clause does not mention any of the other policy areas and it would be useful to know if these have been dropped or it is intended that the Primary Authority Scheme will be extended to all or any of them.

The CIEH would like to suggest an additional policy area for consideration for inclusion within the Primary Authority Scheme namely scrap metal dealers. Metal theft has assumed major significance economically, environmentally, socially and politically in recent years. The Government has recently legislated to prohibit cash payments for scrap metal[31] and a Private Member's Bill which seeks to replace the Scrap Metal Dealers Act 1964 with a new law imposing a licensing system on the trade has its Second Reading debate on 13 July.[32] It would certainly be a good example of "joined up Government" if Parliament were to legislate to allow scrap metal dealers to participate in the Primary Authority Scheme.

4. Clause 53—Inspection Plans

The Primary Authority Scheme has been operational for three years. The original legislation setting up the scheme permits primary authorities and their partner businesses to agree inspection plans and requires other local authorities, in their role as enforcing authorities, to have regard to their contents. Fewer than 10 inspection plans have been published so far.

For multi-site organisations which have to deal with several local authorities, it is helpful to have assured and tailored advice from a primary authority and not then have to adjust their safety systems at each site to satisfy a range of local interpretations. The inspection plan builds on this approach by setting out the matters to be targeted (and frequency of inspection).

This is a sensible approach provided that the inspection plan process does not become overly prescriptive, thus denying other regulators the freedom to exercise their professional judgement in matters that are relevant at a particular time or in a particular geographic location. For example, right now, it would not be at all appropriate for regulators to omit inspection of water systems and cooling towers for legionella simply because the risk of Legionnaire's Disease is not identified in an inspection plan.

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Memorandum submitted by UCATT (ERR 10)

1. Introduction

1.1 UCATT is the largest specialist union for construction workers in the UK and the Republic of Ireland, with members both in the public and private sectors. UCATT is the lead union among the signatories to the *National Working Rule Agreement of the Construction Industry Joint Council* and the *Joint Negotiating Committee for Local Authority Craft and Associated Employees*. UCATT is represented on a number of construction industry related bodies by the General Secretary including the *Strategic Forum for Construction*, the *Construction Industry Training Board* and the *Construction Skills Certification Scheme*.

1.2 UCATT's members in private companies are builders and craftspeople, refractory users, steeplejacks and lightning conductors and workers in the demolition industry. UCATT also represents workers in Local Government, the NHS, the Prison Service and the Ministry of Defence.

1.3 The construction industry has been badly affected by the recession and has seen a high level of redundancies in recent years: 112,000 in 2008, 166,000 in 2009, 92,000 in 2010 and 71,000 in 2011 according to national statistics.[33] Job creation and economic growth is therefore of the utmost importance to UCATT

[30] *Ibid.*

[31] Section 147 Legal Aid, Sentencing and Punishment Act 2012.

[32] Scrap Metal Dealers Bill, Richard Ottoway MP.

[33] http://www.ons.gov.uk/ons/rel/lms/labour-market-statistics/february-2012/table-red02.xls Redundancies by industry, age, sex and re-employment rates (not seasonally adjusted). This table is updated four times a year in February, May, August and November.

and its members. However, UCATT does not accept the assumption that current legislation to protect workers is a barrier to economic growth and we outline our key concerns overleaf.

2. *Part 2, section 7: Conciliation before institution of proceedings*

2.1 UCATT has concerns about the "requirement to contact ACAS before instituting proceedings". Conciliation can be a very useful tool in settling workplace disputes. However, UCATT is concerned about the element of compulsion. Conciliation may not always be appropriate, for example in some cases of discrimination or harassment.

2.2 In addition, this further stage places greater onus on the employee and creates an extra layer of administration. This will reduce the amount of claims submitted correctly and result in more claims being struck out on technicalities, regardless of their merit. This can only reduce access to justice.

3. *Part 2, section 11: Composition of Employment Appeal Tribunal*

3.1 UCATT opposes the proposal that "proceedings before the Appeal Tribunal are to be heard by a judge alone." UCATT believes that the use of panels and the inclusion of lay members is one of the strengths of the Employment Tribunal system.

3.2 Lay members contribute valuable knowledge of industrial relations and the workplace. The definition of "reasonableness" can be open to interpretation and is best determined by a panel with a range of backgrounds and experience.

4. *Part 2, section 12: Power by order to increase or decrease limit of compensatory award*

4.1 UCATT is also concerned by the power to decrease awards and a potential cap of 52 weeks' pay as this could reduce the current loss of earnings awards. Such a cap ignores the loss of pension contributions. If employees are bringing cases of unfair dismissal following sackings for trade union activities or raising health and safety issues, they could be faced with lengthy periods of unemployment as the construction industry is blighted by blacklisting. This means that unfairly dismissed workers would not be able to recover their full losses.

4.2 Of particular relevance to UCATT is the option to set different amounts for different types of employers, for example lower awards for workers in SME businesses. This would disproportionately affect construction workers as over 90% of construction companies (87.8% of civil engineering companies; 93.3% of specialised construction companies; 94.5% of building construction companies) employ fewer than 10 staff.[34]

5. *Part 2, section 13: Power of employment tribunal to impose financial penalty on employers*

5.1 UCATT believes that the proposed penalties of up to £5,000 for losing employers where there are aggravating features, are very low, especially for companies that have repeatedly flouted employment law. The provision that 50% of the penalty will be waived if payment is made within 21 days, means that larger companies with easier access to finance, may end up paying smaller fines than SMEs.

6. *Part 2, section 14: Disclosures not protected unless believed to be made in the public interest*

6.1 UCATT vehemently opposes this proposal as it makes it much more onerous to qualify for protection, as the whistleblower needs to comply with "in the public interest" AND at least one of six other criteria.

6.2 Whilst understanding that the amendment is intended to prevent workers using whistleblowing protection for breaches of their own contracts, UCATT believes that this will have many unintended consequences and will act as a deterrent to genuine whistleblowers.

6.3 UCATT foresees serious problems in the construction industry as blacklisting is a genuine threat. Workers with legitimate concerns about health and safety may find that they are unable to gain employment again after raising their issues if they are not offered adequate protection against reprisals.

7. *Part 5, section 54: Unnecessary regulation: miscellaneous*

7.1 UCATT is concerned about building sunset clauses into new regulations and including a presumption that laws will be scrapped unless a Government department objects. UCATT opposes any measures that could have the effect of reducing the number of inspections in health and safety when 50 construction workers died in 2010–11.[35]

[34] http://www.ons.gov.uk/ons/rel/bus-register/uk-business/2011/index.html, table B4.1.
[35] http://www.hse.gov.uk/statistics/fatals.htm

7.2 UCATT believes that the proposed amendments of the Regulatory Enforcement and Sanctions Act 2008 could lessen the number of health and safety inspections at a time when inspections are being reduced because of cuts to the budget of the Health & Safety Executive.

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Memorandum submitted by Manifest Information Services Ltd and MM&K Ltd (ERR 11)

1. Introduction

Manifest is an independent proxy advisor which provides objective research and information services to institutional investors which enable them to make informed voting decisions at shareholder meetings.

Manifest was formed in 1995 and operates independently of any trade association or special interest group. It is an owner-managed business which employs 50 staff and is based in Essex. Manifest's clients are mostly based in the UK but in addition we supply services to investors based in continental Europe and the USA. In total our clients have assets under management in the region of £3 trillion.

2. AGM Resolution Analysis

Over 60% of Manifest's workload is directed towards analysing what is collectively known as "say on pay" resolutions at annual general meetings ie those resolutions which impact directors' pay. In particular these are the resolutions to introduce new share plans, which are binding votes, together with the current non-binding votes on policy. As part of our work we analyse executive pay in what would be best described as "granular detail". In addition to our work as a proxy advisor we also issue an authoritative report on the state of executive pay produced with an independent remuneration consultancy firm M M & MM&K Limited. Our survey was used by the team at BIS as part of its background research into the state of executive pay.

In addition to our analysis of executive pay trends, Manifest has unparalleled evidence of trends in how shareholders actually vote at AGMs. This data stretches back to before the introduction of the current Directors' Remuneration Report Regulations and graphically demonstrates the levels of shareholder dissent, or otherwise at these meetings.

3. Directors' Remuneration Regulations

The new binding vote proposals are a welcome step forward in corporate accountability. There are, however, potential implementation problems that we can foresee which are worthy of the Committee's consideration:

3.1.1 *The Single Figure*

The role of the single figure has, with respect, been over-played. This is because institutional investors already have a detailed understanding of the costs of the executive pay plans they are asked to endorse. It has been the retail shareholders and media who have tended to struggle and so the single figure has become more of a PR objective than a robust statistical tool.

That is not to say that disclosures could not be improved, however, we are concerned that any proposals to put the single figure at the heart of disclosures will lead to reduced disclosure. By that we mean that if only a single figure is presented then it could be determined that no other data would be required. This would be unacceptable as shareholders and other stakeholders need to be able to see not just amounts earned in the year, performance pay earned for previous year's performance, but performance pay that may be earned for future years' performance.

The Committee will no doubt be familiar with the concept of, "lies, damned lies and statistics". Here is a worked example of how the selective use and presentation of data can mislead:

New CEO Mrs X is appointed on the following terms:

- Salary £1 million pa.
- Bonus £1 million pa.
- Share award of £10 million of shares which vest in five years.
- Disclosed Total Remuneration:
  - Year 1 = £2 million.
  - Year 2 = £2 million.
  - Year 3 = £2 million.
  - Year 4 = £2 million.

— Year 5 = £12 million.[36]

— Mrs X's Average Total Remuneration per year = £4 million.

The Single Figure approach could therefore mean that it is not until many years down the line that it can be seen how much the package has yielded.

The forward looking nature of detailed disclosure helps investors see the potential future rewards and model that against their investment projections.

The proposals for pensions must also ensure that they use the increase in transfer value of accrued pension.

4. Chart comparing Company Performance and CEO Pay

The proposals in Table B require a chart comparing performance and CEO pay. There is already a requirement for a TSR chart over five years, and it is important that CEO pay should be compared over a period of (at least) five years.

It is worth noting that in the case of WPP and analysis of CEO pay over five years is not sufficient, as Sir Martin Sorrell received total remuneration of £50 million in 2004, according to a recent article in the *Guardian*.

CEO pay should ideally be shown for both total remuneration realised (ie, the single figure) and total remuneration awarded (ie including the expected value of deferred bonuses and long-term incentives rather than the actual outcome). Sophisticated investors need to be able to see both of these figures.

In addition to TSR, which should be shown in both absolute and relative terms, companies should show profits and dividends (which are required in the new table A) and other key performance indicators, which will be required to be disclosed under the new narrative reporting.

5. Information about who has Advised the Remuneration Committee

Fees for consultants who advise the remuneration committee should be disclosed and these should be split down between fees for advice to the remuneration committee and advice for other services to the company and its pension funds.

Companies will be required to explain how they deal with the conflicts of interest. This enhanced disclosure of fees will enable shareholders to see the scope of the potential conflicts.

In the US, enhanced scrutiny of remuneration consultants has led to many of the larger firms spinning off their specialist executive compensation arms into separate independent firms. The Committee should be made aware of these conflicts and the potential benefits of greater independence in advisers.

6. Binding versus Non-binding Votes

The Committee will be interested to know that while the votes on the share-related pay have always been binding they have, according to the data, not been used to the same extent as the advisory vote. By this we mean that the data shows a reluctance to use binding measures to moderate potential rewards. This is important because shareholders have had the ability to prevent excessive payouts from share plans but appeared to prefer to use a softer signalling mechanism. This behaviour should be explored otherwise it has potential consequences the for new binding policy vote.

7. Investor Disclosure

As much as the quality and rigour of the regulatory environment, the quality of engagement and dialogue between companies and their owners lies at the heart of the success of the proposed laws. Shareholder registers are more diverse than ever before and it is no longer the case that companies can resolve their AGM issues through selective briefings with a few City firms or their trade associations. The globalised nature of investing brings a new dynamic and requires new skills and competencies. Companies need to be able to understand their shareholders as much as fund managers' clients need to be able to understand how their money has been invested. The proposed regulations on directors' pay are silent on how investors should discharge their stewardship responsibilities and there are unanswered questions about fund manager disclosure of their voting activities and the nature of their decision-making processes.

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[36] This assumes the share price is the same after five years as at the appointment date. If the share price doubles the award would be worth £20 million when it vests and so the Year 5 total remuneration single figure would be £22 million. On the other hand if the share price halves then the award would be worth £5 million when it vests and so the Year 5 total remuneration single figure would be £7 million.

Memorandum submitted by ShareSoc (ERR 12)

Summary

1. This submission is on behalf of the UK Individual Shareholders Society ("ShareSoc"), representing over 2,000 private investors.

2. It addresses solely provisions to be introduced into the Enterprise and Regulatory Reform Bill ("the Bill") that relate to company director pay.

3. This evidence relates to six key matters:

— when shareholders are first allowed to vote on pay policy;
— consultation regarding contents of the pay policy and implementation reports;
— availability of information and voting rights to private investors;
— applicability of the legislation to traded, as well as to listed companies;
— voting on exit payments; and
— cross-directorships.

About ShareSoc

4. ShareSoc represents and supports private investors who invest in the UK stock markets. We are the largest such UK organisation with over 2,000 members. We are a mutual association controlled by our members with "not-for-profit" articles and incorporated as a company limited by guarantee. The organisation is financed by member subscriptions, donations from supporters and by the services we provide to members. More information on ShareSoc can be obtained from our web site at www.sharesoc.org (our objects are fully defined on this page: www.sharesoc.org/objects.html).

About this Submission

5. This submission relates to the "Guide to Government reforms" published by the BIS on 20 June (http://www.bis.gov.uk/assets/biscore/business-law/docs/d/12–900-directors-pay-guide-to-reforms.pdf, "the Guide"), which states that the reforms described in that document will be introduced as amendments to the Bill.

Timing of Initial Vote

6. The Guide states that a vote on companies' pay policy will be required annually unless companies choose to leave their pay policy unchanged, in which case the vote will happen at a minimum every three years.

7. ShareSoc supports this proposal, but it is not stated when the first such vote must take place, following passage of the Bill. We advocate that such a vote should be required at the first annual general meeting of each company, as soon as is reasonably practical following passage of the Bill, so as to ensure that implementation of the stated policy is not unduly delayed.

Consultation regarding Content of Pay Reports

8. The Guide, in Tables A and B, specifies outlines for content of pay policy and implementation reports ("the Reports").

9. We anticipate that the detailed content of the Reports will be specified in codes of practice or regulations ("Regulations") that are ancillary to and referenced in the Bill.

10. In the opinion of ShareSoc's members, it is essential that the information presented in those reports is precise, clear and concise, in order that shareholders will be able to base their votes on sound information.

11. We note that it has been suggested that pay policy, which is subject to a binding vote, should be principles based, rather than based on specifics of pay packages. Experience has shown that such a vote would be utterly ineffectual and would not fulfil the intention outlined in the Guide. There is ample evidence to show that where directors alone are allowed to define the details of pay packages, the results are unacceptable, both to shareholders and to wider society. If the pay policy is allowed to be defined in "principles only" terms, then it is easy for directors to define that policy to allow sufficient latitude to circumvent the aims of the Bill.

12. Giving shareholders the power to vote on pay packages has nothing to do with "micromanagement". Boards have repeatedly shown themselves to be incapable of acting responsibly in the very specific area of director pay. If the Bill is to be effective in this area, shareholders must be given the power to vote on the actual pay awards proposed.

13. ShareSoc has already been involved in consultations on these matters with the Financial Reporting Council ("the FRC") and with the BIS.

14. We request that bodies representative of private investors, such as ShareSoc, continue to be included in consultations relating to Regulations governing the content of the Reports. This will help to ensure that the Reports are fit for the purposes of private as well as of institutional investors.

Rights of Private Investors

15. Private investors can play an important role in ensuring that the Bill achieves the aim stated in the Guide of challenging excessive pay, for the following reasons:

(a) Most private investors are genuinely independent of the directors whose pay is to be determined.

(b) In ShareSoc's experience, many private investors in British companies are themselves experienced business people.

(c) It is not in private investors' best interests to either permit excessive pay, or to suppress pay to such a level that firms are unable to attract the best candidates for senior roles.

(d) Unlike some other shareholders, private investors are under no pressure to conform with peers or to gloss over this issue to avoid the spotlight being turned onto their own remuneration.

(e) A significant proportion of shares in British companies are in private investors' hands. Therefore, if private investors are able to vote, they can, collectively, influence the outcome of binding votes. Organisations such as ShareSoc can represent them in negotiations with Boards on remuneration matters.

16. However, without specific legislative changes, many private investors will not be able to fulfil the role described above. That is because many private investors' shareholdings are held by their brokers in nominee accounts. Indeed, shareholdings held in ISAs and SIPPs are required to be held in nominee accounts. In theory, those whose shares are held in nominee accounts can enjoy the same rights as direct shareholders. In practice, however, whether they enjoy such rights is at the discretion of the brokers that operate the accounts. Most brokers either do not make information and voting rights available, make an extra charge for doing so, or make it onerous for shareholders to obtain their rights. In our experience, the vast majority of private investors whose shareholdings are held in nominee accounts find it difficult (or impossible) to exercise their information and voting rights.

17. Therefore, for the Guide's aims to be fulfilled by the Bill, it is necessary to ensure that private investors are able to exercise their rights, even if their shareholdings (beneficial shareholdings) are held in nominee accounts. Hence ShareSoc strongly feels that it is necessary for the Bill to include legislation imposing certain requirements on nominee account operators. The requirements that we believe are necessary are:

(a) All information that companies are required to distribute to registered shareholders must also be distributed to beneficial shareholders by nominee account operators in whose name the shares are registered ("Custodians").

(b) Custodians must provide a mechanism for beneficial shareholders to be able to vote their shares on any resolution that registered shareholders are permitted to vote on, that is no more complex than the direct and proxy voting facilities made available to registered shareholders.

(c) Custodians must provide the necessary documentation to share registrars to ensure that beneficial shareholders can attend shareholder meetings, speak, ask questions and vote in precisely the same manner as if the beneficial shareholding was registered in the beneficial shareholders' own name.

(d) Custodians must provide this documentation automatically and not require beneficial shareholders to request it in advance of attending meetings.

(e) Custodians must maintain a register of beneficial shareholders, in an analogous manner to the register of members defined in s 113 of the Companies Act 2006 ("the Companies Act").

(f) Persons requesting to inspect or receive a copy of a company's register of members, for a proper purpose, as defined in s 116 of the Companies Act, shall be able to request registers of beneficial shareholders from Custodians in a similar manner.

(g) Custodians must not make explicit charges to beneficial shareholders, in order to provide them with the rights conferred by subparagraphs a-d above. This implies that administrative costs of providing these rights will need to be recouped from other fees that Custodians charge beneficial shareholders (eg account maintenance fees). Without such a ban on explicit fees, shareholders whose holdings are held in nominee accounts will be deterred from exercising their rights by the fees.

18. The reason for registers of beneficial holders to be maintained and made available, as identified in subparagraphs e and f above, is to ensure that those that wish to communicate with shareholders for a proper purpose are able to do so with ALL shareholders, including the many private investors whose shareholdings are held in nominee accounts. This is particularly pertinent to control of excessive director pay, which the Bill intends to address. When ShareSoc members bring an instance of excessive pay to our attention we, in turn, may wish to draw it to the attention of other shareholders. Whilst, under current legislation we can do so for registered shareholders, it is impossible for us to communicate with the many private investors whose shareholdings are held in nominee accounts.

Applicability of the Legislation

19. ShareSoc strongly feels that it is important that legislation regarding director pay is extended to smaller companies whose shares are traded on public markets such as the AIM market. Such companies are identified as "traded companies" in the Companies Act.

20. Our members have frequently encountered excessive pay arrangements in such companies and director pay can sometimes constitute a significant proportion of company profits in such companies.

21. Under current legislation and regulations there is no requirement for traded companies to publish remuneration reports nor for shareholders to be offered a vote on those reports. Hence, holders of shares in traded companies have no practical mechanism to control excessive pay awards.

22. It may be argued that smaller companies cannot afford the administrative burden of producing the Reports. However, this burden will not be large unless pay arrangements are complex, requiring lengthy explanation. In our opinion, it is desirable that companies are deterred from introducing complex, opaque pay schemes, hence we do not accept that argument.

Voting on Exit Payments

23. ShareSoc applauds the proposals regarding exit payments made in the Guide. Incorporating the policy regarding such payments into the Pay Policy binding vote and making the payments themselves subject to an advisory vote will be effective. Similarly, a requirement to publish decisions regarding actual exit payments promptly is highly desirable.

24. Any concerns regarding delays to the removal of directors, as a result of the need for a vote should be addressed through amendments to service contracts, where necessary. Exit payments stipulated within a service contract should be expressed as being subject to shareholder agreement.

Cross-Directorships

25. Our evidence is that many remuneration committees have proved ineffective in setting sensible levels of pay. Instead, they have rubber-stamped excessive awards.

26. The vast majority of pay policies published in current remuneration reports state that levels of basic pay and performance awards are set by comparison with "peer group" companies. Where a director of one company sits on the remuneration committee of another, it is often in their financial interest to favour increases, which might be reflected in a peer group comparison and thus lead to the "ratcheting up" that has been observed.

27. Hence ShareSoc strongly favours a ban on current executives sitting on the remuneration committees of other companies.

June 2012

Memorandum submitted by million+ (ERR 13)

COMPOSITION OF THE EMPLOYMENT APPEAL TRIBUNAL: *JUDGES SITTING ALONE*

Summary

Clause 11 purports to deal with a problem which does not exist. There are no delays at the EAT and the vast majority of cases are already sifted out before the full hearing with lay members stage. The EAT does not offer the opportunity for a full re-hearing with appeals limited to points of law, time-limits set for hearings and procedural points already heard by EAT judges sitting alone. Appeals on employment law are set in the context of employment practice and lay members bring a practitioner expertise which judges lack. Without the HR directors, board members and CIPD Fellows who, for forty years, have ensured that the guidance and Judgments issued by the EAT are also considered in the context of the experience of the workplace, employers are unlikely to achieve the benefits from judges sitting alone that have been claimed.

Bearing in mind the current composition of the judiciary and the pace of change in respect of the latter, Clause 11 will effectively deliver an EAT which is predominantly judge-led and in which an all-white, principally male judiciary will preside. This has important implications for perceptions of equality among appellants and respondents which is not remedied by the limited proposal to provide for some lay member involvement in discrimination cases. It is the inclusion of the lay EAT members which principally ensures that cases are heard by women, black and ethnic minority and disabled lay judges with experience of the workplace.

The rationale for the proposal is primarily one linked to cost with savings anticipated to be no more than £300,000 per annum. However, there is a clear risk that more cases will be taken to the Court of Appeal and the anticipated savings of no more than £300K per annum which appears to be the main rationale for the proposal, will not be realised.

1. *Introduction*

Clause 11 of the *Enterprise and Regulatory Reform Bill 2012* proposes that, as the default position, proceedings before the Employment Appeal Tribunal (EAT) are to be heard by a judge alone. The EAT lay members—HR directors, union officials and others highly experienced in employment relations—submitted a detailed, reasoned response to the Government's *Resolving Workplace Disputes* consultation. This individual

submission by one lay member who has served on the EAT from 2002 to date does not repeat that submission but focuses on the remaining dangers posed by the current Clause 11 proposal.

2. *Are lay members unnecessary because appeals are on a point of law?*

> *There is a tendency to regard the lay members as mere window dressing in a tribunal whose jurisdiction is limited to appeals on points of law. Nothing could be further from the truth. Their role has been, and still is, crucial because the presiding judge knows nothing of the practicalities of industrial relations. Even on a pure point of law, when it is uncertain what the law is, it is the lay members who can give guidance on the practical repercussions of any particular decision. On matters of good industrial practice… the contribution of the lay members is much greater and often decisive.*
>
> Mr Justice Browne-Wilkinson, then President of the EAT, address to the Industrial Law Society, 1982.

3. *There is no problem of delays or excessive use of lay members*

There is *simply no problem* of delays at the EAT and a very rigorous sifting of cases by judges means that, already, only about 20% of cases need to go to a full hearing. The use of lay members is already efficient, making good use of their expertise. The change purports to solve a problem which does not exist.

4. *Appeals on employment law are set firmly in the context of employment practice*

What the wider community of employers and employees consider to be good practice, or within the band of reasonable practice, is often critical. Lay members with their specialist experience of the world of work make an invaluable and irreplaceable contribution. Judges know about the law but may know little of working life in factory, hospital, distribution centre, the service industries or SMEs.

5. *The loss of practitioner expertise to inform guidance binding on the whole employer community*

Lay members bring an expertise in good practice in HR and employment practice which informs the quality of the judicial *guidance* to the wider body of employers, contained in EAT judgments. EAT, as an appeal court, sets binding precedents and often issues judgments which have to be adopted by employers, on the advice of their HR Directors and legal advisers. As things stand, employers can have confidence that this guidance is informed by experts from their own community—including many with Board level experience and CIPD qualifications. These expert practitioners, alongside those with a similar level of expertise from the union perspective, can remind the judge of the practical impact of EAT rulings on the workplace. This makes for better law and better employment practice. Employers and claimants understand and can be confident that their case has been heard by lay judges who have significant knowledge and experience of the workplace.

5. *The loss of respect of the appellate tribunal*

The EAT has the longstanding respect of employers and unions who generally adopt and abide by its decisions. The predecessor to the tribunal system, the National Industrial Relations Court, was abolished in 1974 because it had lost credibility. There has been no serious suggestion that the EAT as currently composed lacks credibility or authority—in fact the opposite is the case.

6. *The thin rationale for Clause 11*

In November 2011 the Government Response to the Consultation was issued. The Government acknowledged that many stakeholders were opposed to judges sitting alone at EAT but detected the support of a "slim" majority of consultees. Counting the numbers is less significant than considering whether, in the light of submissions, the rationale for change remains persuasive.

The main argument put forward for pressing ahead with the change was that:

Lay members cost the EAT around £300K a year, and this proposal is likely to save the majority of that…

For reasons outlined this fails to consider the possibility that more cases would be subject to appeal beyond the EAT to the Court of Appeal where there is a backlog and which involves three members of the judiciary.

7. *Why is it essential to reconsider the proposal?*

Clause 11 would mean that judges, with no necessary experience of the world of work, would be making decisions alone on the full range of employment claims without the benefit of the experience of HR directors, board members, CIPD Fellows and employee representatives who have wide-ranging experience of managing industrial relations in the workplace, representing employers and employees/workers. The benefits of this experience will be stripped away and employment law will be left to judges sitting alone. Moreover, it is often not appreciated that the majority of judges who sit in the EAT do not sit full-time and come in from "the circuit" and that there are only two full-time EAT judges at any one time including the EAT President.

8. *Will the* de minimis *financial saving even be realised?*

No assessment has been made of the risks that judgments of a single judge sitting alone may be more vulnerable to appeal. Parties may be more inclined to take their cases to the Court of Appeal, where three judges will then be asked to consider and potentially overturn the view of one judge at the EAT. The Court of Appeal will not have to consider that EAT judgments have been reached following a hearing in which an experienced industrial jury has assessed the case. The Court of Appeal's respect for the role of lay members in the EAT is a matter of record.

June 2012

Memorandum submitted by David Bleiman (ERR 14)

COMPOSITION OF THE EMPLOYMENT APPEAL TRIBUNAL:
HOW JUDGES SITTING ALONE WOULD BE A DISASTER FOR EMPLOYERS AND EMPLOYEES ALIKE

SUMMARY

Clause 11 purports to deal with a problem which does not exist. There are no delays at the EAT and the vast majority of cases are already sifted out before the full hearing with lay members stage. Appeals on employment law are set in the context of employment practice. Lay members bring a practitioner expertise which judges lack. Without the HR directors, board members and CIPD Fellows who, for 40 years, have ensured that the guidance issued by the EAT, which is binding on the whole employer community, is checked for its practical impact, employers will find that judges sitting alone will be telling them how to run the people management side of their business. Sooner rather than later, the EAT will lose the respect of the communities of employers and their employees. More cases will be taken to the Court of Appeal. The laughable prospective saving of no more than £300K per annum which is the main rationale for persisting with the proposal, will not be realised.

1. *Introduction*

Clause 11 of the *Enterprise and Regulatory Reform Bill 2012* proposes that, as the default position, proceedings before the Employment Appeal Tribunal (EAT) are to be heard by a judge alone. The EAT lay members—HR directors, union officials and others highly experienced in employment relations—submitted a detailed, reasoned response to the Government's *Resolving Workplace Disputes* consultation. This individual submission by one lay member who has served on the EAT from 2002 to date does not repeat that submission but focuses on the remaining dangers posed by the current Clause 11 proposal.

2. *Are lay members unnecessary because appeals are on a point of law?*

> *There is a tendency to regard the lay members as mere window dressing in a tribunal whose jurisdiction is limited to appeals on points of law. Nothing could be further from the truth. Their role has been, and still is, crucial because the presiding judge knows nothing of the practicalities of industrial relations. Even on a pure point of law, when it is uncertain what the law is, it is the lay members who can give guidance on the practical repercussions of any particular decision. On matters of good industrial practice… the contribution of the lay members is much greater and often decisive.*
>
> (Mr Justice Browne-Wilkinson, then President of the EAT, address to the Industrial Law Society, 1982).

3. *There is no problem of delays or excessive use of lay members*

There is simply no problem of delays at the EAT and a very rigorous sifting of cases by judges means that, already, only about 20% of cases need to go to a full hearing. The use of lay members is already efficient, making good use of their expertise. The change purports to solve a problem which does not exist.

4. *Appeals on employment law are set firmly in the context of employment practice*

What the wider community of employers and employees consider to be good practice, or within the band of reasonable practice, is often critical. Lay members with their specialist experience of the world of work make an invaluable and irreplaceable contribution. Judges know about the law but may know little of working life in office, factory or shop.

5. *The loss of practitioner expertise to inform guidance binding on the whole employer community*

Lay members bring an expertise in good practice in HR and employment practice which informs the quality of the judicial guidance to the wider body of employers, contained in EAT judgments. EAT, as an appeal court, sets binding precedents and often issues judgments which have to be adopted by employers, on the advice of their HR directors and legal advisers, like it or lump it. As things stand, employers can have confidence that this guidance is informed by experts from their own community—including many with Board level experience and CIPD qualifications. These expert practitioners, alongside those with a similar level of expertise from the

union perspective, can remind the judge of the practical impact of EAT rulings on the workplace. This makes for better law and better employment practice. Without lay members there will be a loss of confidence—especially, perhaps, among employers—when they realise what they have lost.

6. *The loss of respect of the appellate tribunal*

The EAT has the longstanding respect of employers and unions who generally adopt and abide by its decisions. A court that loses the respect of society becomes a fiasco—like the predecessor National Industrial Relations Court which had to be abolished in 1974. What would be the fate of a "judge alone" EAT? Would it be a proper Tribunal? Would it be a proper appeal court? Would the decisions of a single lawyer on complex matters of employment practice, carry respect or would everything be appealed upwards to a panel of judges at the Court of Appeal?

7. *The thin rationale for Clause 11*

In November 2011 the Government Response to the Consultation was issued. The Government acknowledged that many stakeholders were opposed to judges sitting alone at EAT but detected the support of a "slim" majority of consultees. I suggest that counting the numbers is less significant than considering whether, in the light of submissions, the rationale for change remains persuasive.

The main argument put forward for pressing ahead with the change was that:

> *Lay members cost the EAT around £300K a year, and this proposal is likely to save the majority of that…*

No, this is not a typo. The saving is estimated at less than £300K a year! Something above £150K. Probably. For reasons explained below it is actually more likely to end up costing money.

8. *Why is it essential to reconsider the proposal?*

Although some employers may not yet have grasped what Clause 11 would do, it is not the case that employers really want judges, with no necessary experience of the world of work, to be telling them how to run every aspect of the employment side of their business—what is fair and unfair, what is and is not discrimination, what is adequate redundancy consultation and so on.

Yet that is what judge alone means! The experienced HR directors, board members, CIPD Fellows who have, for forty years, explicitly brought their experience of representing employers to bear in making good case law, will simply be ditched. The EAT will be pure and simple law, like any traditional court where a judge sits (without a jury). The benefits of industrial experience will be stripped away and employment law will be imposed in a nakedly legal way.

9. *Will the* de minimis *financial saving even be realised?*

Will there really be a saving? It looks extremely unlikely. Judgments of a single judge sitting alone will be much more vulnerable to appeal than judgments of a panel of three, including experienced lay members. Many parties will be more inclined to take their chances at the Court of Appeal, where three judges can be asked to overturn the view of one at the EAT below. The Court of Appeal will indeed be more likely to overturn EAT Judgments as they will be freed of their current reluctance to second guess the experienced assessment of an industrial jury. The Court of Appeal's respect for the role of lay members is a matter of record. Senior Judges are somewhat less reluctant to find that their colleagues in the courts and tribunals below have fallen into error.

David Bleiman
Lay member, Employment Appeal Tribunal

June 2012

Memorandum submitted by Citizens Advice (ERR 15)

SUMMARY

1. This memorandum sets out the views of Citizens Advice on Part 2 of the Enterprise and Regulatory Reform Bill.

2. Citizens Advice is the national body for the 400 independent advice centres that constitute the CAB service in England & Wales. In 2011–12, these Citizens Advice Bureaux dealt with some 6.9 million problems brought by some two million people, including 523,500 employment-related problems.

3. Citizens Advice broadly welcomes and supports the key provisions of Part 2 of the Bill, subject to some provisos which are described below.

Background and General Comments

4. Part 2 of the Bill implements some of a package of reforms to the employment tribunal (ET) system on which the Government consulted in early 2011. Other elements of the package were implemented by Regulations that came into force in April 2012. Part 2 of the Bill must also be viewed in the context of the Government's current proposals in respect of substantial fees for ET claimants. Citizens Advice strongly opposes those proposals, as we believe they would create a substantial barrier to justice and seriously damage alternative forms of dispute resolution (such as conciliation by Acas). We have proposed an alternative fees regime based on a nominal, flat-rate claimant fee.

5. In seeking to justify this package of reforms, the Government has stated, for example, that "[ET] claims rose to 236,000 [in 2009–10], a record figure and a rise of 56% on [2008–09]", and that "there were 218,100 claims in 2010–11, a 44% increase on 2008–09". In fact, the number of ET claims fell in 2010–11. Furthermore, the headline figure (eg of 236,000 claims in 2009–10) used by ministers and others gives a highly misleading impression of the actual workload of the ET system.

6. The headline figure includes both the number of claims by individual workers ("single claims"), and the total number of worker claimants covered by "multiple claim" cases, in which two or more workers claim against the same employer on the same (or very similar) grounds. Such multiple claim cases can and often do involve hundreds or even thousands of workers, each one counted as a multiple claim in the headline figure, but the ET system may need to determine only one "lead" case.

7. In 2008–09, for example, the headline figure of 151,000 claims was made up of 63,000 single claims and 88,000 multiple claims, but those 88,000 multiple claims equated to just 7,400 multiple claim cases. Adding the latter figure to the number of single claims/cases gives a far more meaningful measure of the ET system's workload: a total of 70,400.[37] (We note that Acas follows such an approach in its own casework statistics).

8. In 2009–10, when the headline figure rose by 56%, from 151,000 to 236,000, the number of multiple claim cases was exactly the same as the year before: 7,400. There were just many more workers (164,800) covered by those 7,400 multiple claim cases than there were in 2008–09 (88,000). And the combined number of single claims and multiple claim cases rose by just 12%, from 70,400 to 78,700. Such a relatively modest increase is hardly surprising, given the then state of the UK economy and the associated increase in business failures and redundancies.

9. In 2010–11, the combined number of single claims and multiple claim cases fell by 15%, to 66,500—lower than in each of the two preceding years and only marginally higher than in each of the two years before that. It was also significantly lower than a decade ago, and slightly lower than the average over the years since (69,040). In short, we see no reason to be alarmed by the ET statistics.

10. None of which is to say that more could not be done to help workers and employers resolve workplace disputes without recourse to the ET system. Nor is it to say that there are not cases of weak or legally misguided ET claims in which the interests of not only the respondent employer but also those of the claimant might well have been better served by resolution of the matter by other means. We therefore welcome, subject to adequate resourcing of Acas, the Bill's provisions for a specified period for Acas to offer early conciliation before any claim fully enters the ET system.

11. We also welcome and strongly support the statements by the Secretary of State, Vince Cable MP, during the Bill's second reading on 11 June, that the Bill is "not about removing individual employment rights", that he has "no truck with the idea of a free-for-all-and-fire culture", and that the Government "will most definitely not be proceeding in the way that [Beecroft] outlines".

Pre-claim conciliation by Acas (Clauses 7–9, and Schedule 2)

12. Clauses 7–9 and Schedule 2 create a mandatory period for conciliation by Acas of all new ET claims. In effect, whilst both the claimant and the respondent employer will each retain the right to decline the offer of conciliation, Acas will become the "gateway" to the ET system.

13. To our mind, an ET claim should always be an act of last resort. We therefore welcome and support the greater role for early conciliation of ET claims by Acas, subject to Acas being adequately resourced for the task. The "gateway" must not become a log jam.

Rapid resolution of simple, fact-based ET claims (Clause 10)

14. Clause 10 creates an enabling power for the Secretary of State to create a Rapid Resolution regime for the determination of simple, fact-based ET claims by "legal officers" rather than employment judges.

15. This is an idea that Citizens Advice first proposed to Michael Gibbons during his major review of the ET system in 2006–07, and which was taken up by Mr Gibbons in his final report but not by the then Labour Government.[38] We floated it again in our April 2011 report *Give us a break*, on denial of paid holiday and/or owed holiday pay, and also in our response to last year's BIS/Tribunals Service consultation on *Resolving*

[37] Source: *Hansard*, House of Commons, 29 February 2012, col 369–70W.
[38] Paragraphs 3.22–3.24 of *Better Dispute Resolution*, BIS, March 2007.

Workplace Disputes, submitted the same month. Announcing the outcome of that consultation in November, the Secretary of State, Vince Cable MP, indicated that Coalition Ministers were interested in the idea, and that BIS would do some "more work" on it before issuing a consultation sometime this year.

16. As Michael Gibbons noted in his 2007 report, "There are several types of ET claims, ie those involving determinations of fact in monetary disputes, such as unlawful deductions of wages, holiday pay, breach of contract and redundancy pay, which could in most cases be settled quickly without the need for a tribunal hearing. What is required is a quick, expert view on the legal position, and on the appropriate next steps (eg payment of an amount due to the claimant, or the withdrawal of the claim), coupled if necessary with some kind of enforcement order".

17. Mr Gibbons concluded that "a new process of this sort would offer significant benefits. It would make it easier for employees to obtain monies legally due to them, and would be particularly helpful for vulnerable workers, especially those without access to advice or support, who currently find it difficult to enforce their rights. It would enable employers to defend unfounded claims quickly and inexpensively. It would allow the State to resolve these cases more quickly and at lower cost than at present, and to concentrate the resources of the employment tribunal system on more complex cases. The Review understands that at least 10% of all ET claims are simple claims which could be handled without a hearing, so the saving to the taxpayer would be significant".

18. We therefore welcome and support Clause 10 of the Bill, and look forward to working with BIS and the Ministry of Justice to develop the details of a workable Rapid Resolution regime. It is of course imperative that the proposed "legal officers" are sufficiently qualified, resourced and empowered to be able to make a swift and sustainable determination of claims. Given the kind of (rogue) employer likely to be involved in many such cases, we are not convinced that it is either necessary or sensible to include, as Clause 10 does, a requirement that both parties "consent in writing" to the claim being determined by a legal officer under the Rapid Resolution process, rather than by an employment judge. For rogue employers would simply exploit any such provision to delay and frustrate determination of the claim, to the detriment of both the claimant and the efficiency of the ET system.

19. We await with interest further information on the Government's intended approach to enforcement in those cases where the respondent employer does not comply with the legal officer's determination. Given the kind of (rogue) employer likely to be involved in many of the cases dealt with under the proposed Rapid Resolution regime, it is likely that a significant proportion of legal officers' determinations will simply not be complied with. And, as described in paragraphs 30–36, below, we consider existing provision for the enforcement of unpaid ET awards to be grossly inadequate.

Capping unfair dismissal compensatory awards (Clause 12)

20. Unfair dismissal awards include two elements: the basic award (equivalent to redundancy pay); and the compensatory award (based on actual loss of earnings). The latter is currently capped at £72,300, having been raised from £12,000 to £50,000 in 1999, and then index-linked. Clause 12(2) provides for the compensatory award to be capped at: "(a) a specified amount of between one and three times median annual earnings [ie between £26,000 and £78,000], or (b) a specified number of weeks' pay (but not less than 52), or the lower of the two."

21. The aim of this provision is not clear, and the impact (at least initially) could well be minimal: in 2010–11, the median unfair dismissal award was just £4,591, some 90% of such awards were for less than £20,000, and all but 2% were for less than £50,000.[39]

22. Clause 12(3) provides for the cap on the compensatory award to vary "in relation to employers of different descriptions". Again, the aim of this provision is not clear, but to our mind the amount of the compensatory award should be determined solely by the individual circumstances of the claim.

Financial penalties on losing respondent employers (Clause 13)

23. Clause 13 provides for financial penalties of up to £5,000 to be imposed (in addition to an award) on losing respondent employers in cases where there are (yet to be defined) "aggravating features". The penalty will be set at 50% of the value of the award, up to the maximum of £5,000, and will be reduced by 50% for prompt payment. Penalties will be paid to the State.

24. We welcome and strongly support Clause 13. In last year's *Resolving Workplace Disputes* consultation, it was initially proposed that a penalty would be applied in every case in which an employer is found to have breached the claimant's rights. In our response to the consultation, we suggested that that would be unreasonable, and that the measure should instead be confined to eg cases involving "repeat offenders" and/or rogue employers who fail to engage with the ET process. The Government appears to have accepted this suggestion.

25. We are therefore somewhat surprised by the opposition to Clause 13 expressed recently by employers' bodies such as the British Chambers of Commerce and Federation of Small Businesses. For the law-abiding

[39] Table 5 in: *Employment Tribunals and EAT statistics, 2010–11*, HM Courts & Tribunals Service, September 2011.

members of such bodies have nothing to fear from these provisions, which will impact only on rogue and exploitative employers. Indeed, to our mind the employers' bodies should be supporting Clause 13, as its provisions will help ensure a level playing field for business by tackling those rogue employers who seek to gain an unfair competitive advantage by exploiting their workforce.

26. We await with interest further information on the Government's intended approach to the enforcement of unpaid financial penalties. Given the nature of the (rogue) employers at which the penalties are aimed, it is sadly inevitable that a significant proportion of penalties—and quite possibly the great majority—will simply go unpaid.

Encouraging use of settlement agreements (new Clause)

27. During the Bill's Second Reading on 11 June, the Secretary of State, Vince Cable MP, announced the Government's intention to introduce a new clause intended to "encourage greater use of settlement agreements and make it easier and quicker for employers—including [small businesses]—and employees to end the employment relationship by mutual agreement in a way that protects workers rights but helps businesses remain flexible".

28. The new clause, which inserts a new section 111A into the Employment Rights Act 1996, was tabled by the Government on 19 June. According to the accompanying Explanatory Notes, the purpose of the clause is to "provide a means for employers and employees to discuss settlement before any dispute has actually arisen, with certainty that the offer and any discussions about it cannot be used as evidence against them in a subsequent unfair dismissal [*sic*] claim". (Since 11 June, BIS officials have confirmed to Citizens Advice that the proposed limitation on citing a settlement offer in any subsequent tribunal claim will apply only to unfair dismissal claims—so it would remain possible, for example, for a worker to cite the settlement offer in a discrimination-based claim).

29. Subsection (3) of the new section 111A provides that "where the employer or employee behaved improperly in making or negotiating the offer the tribunal may consider this as evidence in an unfair dismissal claim. So, repeated settlement offers intended to harass an unwanted worker into signing an agreement, for example, would not be covered by the proposed limitation on citing the settlement offer in an unfair dismissal claim. This is reassuring, but still leaves open the possibility of the measure being abused by rogue employers against vulnerable workers unsure of their legal rights.

Enforcement of unpaid ET awards and Acas settlements (not in Bill)

30. Every year, some 15,000 ET claims conclude with a judgment in favour of the claimant, and a monetary award of hundreds, thousands or even tens of thousands of pounds. But in our October 2008 report *Justice denied*, we suggested that, for as many as one in ten of these claimants, this apparent success in the tribunal soon proves to be a hollow victory, when the employer simply fails to pay up. For these workers, the ET system has delivered empty justice.

31. Employment tribunals have no power to enforce their own awards, which—until April 2010—could only be enforced by means of bewilderingly complex, time consuming and costly legal action, by the claimant themselves, in the County Court system. However, *Justice denied* demonstrated that rogue employers could easily drag out and obstruct such enforcement action, causing many claimants to give up in frustration.

32. In response to *Justice denied*, in 2009 the Ministry of Justice undertook its own research on the issue, and this showed the true situation to be even worse: a shocking one in *four* of all ET awards were—and, as far as anyone knows, are still—going unpaid by employers. As a result, in April 2010 the then Labour Government established the so-called ET & Acas Fast Track enforcement regime for unpaid ET awards and Acas settlements. Under this regime, workers can pay a fee of £60 to have their unpaid award or settlement enforced by one of the various firms of High Court Enforcement Officers (HCEOs).

33. However, figures recently released by the Ministry of Justice show this all-too-rare "policy win" to be, like all-too-many ET awards and settlements, something of a hollow victory.

34. In the Fast Track regime's first year of operation (ie financial year 2010–11), some 1,500 workers paid the then fee of £50 to access the regime. And, of the 1,295 completed cases for which the information is available, the award or settlement was fully or partially enforced in just 533 cases (41%). In the other 762 cases (59%), the award or settlement was deemed to be unenforceable, and the individual paid the then £50 Fast Track fee to no end.[40]

35. In the Fast Track regime's second year of operation (ie financial year 2011–12), some 1,620 workers paid the increased fee of £60 to access the regime. And, of the 1,022 completed cases for which the information is available, the award or settlement was fully or partially enforced in just 515 cases (50%). In the other 507

[40] Source: *Hansard*, House of Commons, 27 March, 2012, col 1073W. As of 27 March, in 49 cases enforcement action was ongoing, and in a further 155 cases the Ministry of Justice and the HCEO Association were still validating the data.

cases (50%), the award or settlement was deemed to be unenforceable, and the individual paid the £60 Fast Track fee to no end.[41]

36. Whilst, clearly, an effective enforcement rate of 50% is somewhat better than 41%, to our mind it is simply nowhere near good enough. The Government's stated aim for Part 2 of the Bill is to "improve the employment tribunal system". We suggest that one very good way to improve the ET system, and enhance its credibility with both workers and employers, would be to close a loophole that allows some rogue employers to profit from exploitation with impunity. A loophole that is grossly unfair not only to those workers who do not receive the compensation due to them, and to the taxpayers whose taxes have paid for employment judges to determine the claim to no end, but also to the vast majority of law-abiding employers.

37. We therefore urge the addition to the Bill of provisions to ensure more effective enforcement of unpaid ET awards and Acas settlements. We suggest that the cost of any new enforcement measures could be covered by the new revenue stream generated by the Government's proposed fees for ET claimants. Indeed, to our mind the introduction of (possibly substantial) claimant fees imposes an obligation on the Government to greatly improve employer compliance with ET awards and Acas settlements.

25 June 2012

Memorandum submitted by EEF (ERR 16)

EEF, the manufacturers' organisation, is the voice of manufacturing in the UK, representing all aspects of the manufacturing sector including engineering, aviation, defence, oil and gas, food and chemicals. With 6,000 members employing almost one million workers, EEF members operate in the UK, Europe and throughout the world in a dynamic and highly competitive environment.

EEF has the following observations upon the Bill:

Clause 7: *Conciliation before the institution of proceedings*

EEF is broadly supportive of requiring most potential claimants to provide Acas with information regarding their dispute before they submit a claim to an employment tribunal, subject to Acas being provided with sufficient resources to discharge their new duty. There are, however, a number of issues which require clarification:

(a) Where a prospective claimant submits the required information to Acas outside the time permitted, their subsequent ability to commence proceedings requires clarification.

(b) We are concerned that Clause 9(b) places emphasis on compensation being paid, and suggest that the clause would be better worded neutrally.

(c) Multiple cases, which are those envisaged in the proposed new section 18A(7)(a), should always be required to be referred to Acas. They are frequently the most time consuming and costly and are likely to benefit from pre-claim intervention.

Clause 10: *Decisions by legal officers*

EEF supports the introduction of rapid resolution in cases where the dispute is both straightforward and of a low monetary value. Whilst we understand why the consent of the parties may be appropriate in most cases, we believe that should one party unreasonably refuse to consent to a determination by an appointed legal officer, then this should be a specific matter which the Tribunal determining the claim should be required to take into account when considering an application for costs and that Tribunals should be empowered to award costs and expenses which may have been unnecessarily incurred. In this way, the parties will carefully consider whether the expense of an oral hearing before a Tribunal judge is required.

Clause11: *Composition of the Employment Appeal Tribunal*

EEF supports the clause without amendment.

Clause 12: *Unfair Dismissal*

Subject to further clarification on the meaning of the clause, EEF supports the intention behind the provision. The reference in Clause 12(2)(b) to earnings should make it clear that it is referring to actual weekly earnings, which are uncapped. It should also be made clearer that the amount specified in Clauses 12(2)(b) and 12(5), (that is the limit which is an amount that is at least 52 weeks actual earnings), is itself subject to the overall limit of Clause 12(4)(b) (three times median annual earnings).

[41] Source: *Hansard*, House of Commons, 11 June, 2012, col 349W. As of 11 June, in 553 cases enforcement action was ongoing, and in 18 cases the Ministry of Justice and the HCEO Association were still validating the data.

Clause 13: *Financial Penalties*

EEF does not consider that this clause will encourage greater employer compliance with their employment obligations and is likely to be a disincentive to successful pre-claim conciliation. Potential claimants may feel that the prospect of a fine being ordered will increase their negotiating position and so be less likely to settle early, instead waiting for the hearing before attempting settlement.

The lack of detail as to when such penalties will be ordered creates uncertainty which will again militate against early settlement as the parties will be unable to accurately assess the likely approach of the Tribunal.

The provisions in the clause may increase the length and complexity of litigation as claimants are encouraged to include as many heads of claim as possible, as additional heads raise the prospect of an award, a fine, and thus enhance the litigants' negotiating position.

EEF suggests that the Bill be amended by the deletion of the clause.

Clause 14: *Disclosures not protected unless believed to be made in the public interest*

EEF does not believe that this clause will achieve its aim, which is to ensure that individuals who make disclosures in the public interest are safeguarded from adverse treatment from their employer following their disclosure.

The amended provision in the Employment Rights Act must clearly state that disclosure must be necessary to protect members of the public. The amendment which would be affected by the clause would not, for example, exclude from the protection of the Act an individual who made a disclosure based on their own health and safety. This could include a complaint that an employer has failed to conduct a visual display unit assessment, which is very unlikely to be a matter of public interest.

EEF therefore proposes the following amendment, under which Section 43B of the Employment Rights Act 1996 would now read as follows:

(1) In this part a "qualifying disclosure" means any disclosure of information in the public interest which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following:

  (a) that a criminal offence has been committed, is being committed or is likely to be committed;

  (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject other than one arising out of or in connection with a contract of employment or contract for services;

  (c) that the health or safety of any individual has been, is being or is likely to be endangered other than one arising out of or in connection with a contract of employment or contract for services; and

  (d) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Clause 16: *Renaming of "compromise agreements", "compromise contracts" and "compromises"*

EEF warmly welcomes this clause which requires additional architecture to enable the change to provide an effective and swift means to resolve workplace disputes.

Settlement agreements are the conclusion of a successful process whereby disputes are settled without the need for external adjudication by a Tribunal. They are therefore to be welcomed and have advantages of speed, certainty for both parties, and do not place any burden on the state. Reaching such agreements may obviate the need for pre-claim conciliation and are likely to reduce the anxiety of claimants and reduce the burden on employers in defending claims.

Settlement agreements are, however, the successful conclusion of a process, which invariably requires a dialogue between the parties. We therefore wish to see the opportunity for successful dialogue enhanced and extend to situations where employment can continue afterwards. Currently employers may be reluctant to engage in timely discussions with employees fearing that this will increase the prospect of subsequent claims. Providing employers with the certainty that sensitive conversations can be held without increasing the risk of subsequent litigation will increase the prospects of early dispute resolution and may result in employment continuing where it might otherwise have ended.

We have seen the proposed amendment moved by Minister for Employment Relations, Consumer and Postal Affairs, and have the following observations.

The conversations which the amendment relates to should not necessarily be with a view to the termination of employment. To limit the provision to such situations creates an unnecessarily negative impression and will in practice greatly limit the usefulness of the clause. We would wish to see the amendment enlarged to cover discussions between employees and employers more generally. There are already fair and reasonable frameworks in place for workplace discussions, (for example the Acas code on discipline and grievance), which may provide the basis for such conversations.

The amendment referred to above, inserting a new section 111A into the Employment Rights Act 1996, extends to unfair dismissal claims alone and is unlikely to be sufficient to encourage early dialogue and settlement. We see no reason why, if sufficient safeguards can be put in place to ensure fairness in the context of unfair dismissal, that this should not extend to all heads of claim. Most notable would be those claims based on discrimination, for breach of contract and situations where the current law regards the reasons for dismissal as automatically unfair.

Restricting the application of the new provision will create further dispute. If for example the conversation protected under the new section 111A then gives rise to a grievance, would for example the evidence relating to the grievance (which may by implication refer to the conversation which is protected) be admissible subsequently in a claim?

We are also of the view that creating the exception to the general rule in cases which the Tribunal regards as "improper" is insufficiently precise and likely to lead to considerable legal argument.

We therefore propose that the amendment referred to above is widened so that:

(i) It applies generally to all types of claim based on a contract of employment, and not only to claims for unfair dismissal.

(ii) It does not require a discussion with a view to the termination of employment.

(iii) It is underpinned by a code of practice or guidance, similar to that already provided by Acas in other circumstances, to ensure the fairness of the discussions.

June 2012

Memorandum submitted by Hambleton District Council, North Yorkshire (ERR 17)

1. Hambleton is a rural authority with nearly 2,000 Listed Buildings and 48 Conservation Areas. The Council's annual advertising costs for planning applications within a Conservation Area or for Listed Building Consent amounts to circa £23,000.

2. Hambleton District Council supports the proposal within the Bill to merge Conservation Area Consent with Planning Permission.

3. Commonly, CAC applications are submitted in parallel with applications for Planning Permission and it is considered that Conservation Area matters can be dealt with in combination with the application for Planning Permission. Dealing with the two together can bring efficiencies for the authority and applicants with no diminution of the consideration of conservation aspects.

Planning Policy & Conservation Officer
On behalf of Hambleton District Council

June 2012

Memorandum submitted by Association of Business Recovery Professionals (R3) with Annexes A and B (ERR 18)

INTRODUCTION

1. R3 represents 97% of UK Insolvency Practitioners (IPs)—the only professionals authorised to take insolvency cases. From senior partners at the "Big Four" accountancy firms to practitioners who run their own micro-businesses, our members have extensive experience of both corporate and personal insolvency.

EXECUTIVE SUMMARY

2. R3 has two principal concerns regarding the Enterprise and Regulatory Reform Bill. Firstly, we do not believe that the special circumstance of a company's insolvency has been adequately taken into account, particularly with regard to the provisions of Part 2 relating to employment tribunals. Secondly, we view the Bill as a missed opportunity to bolster the UK business rescue culture and help to protect the UK economy from the actions of unfit company directors. Addressing these two issues would play a crucial part in delivering a key aim of the Bill—encouraging long-term growth.

3. Many of the claims brought before employment tribunals relating to an insolvent company continue to be for a failure to consult adequately prior to making redundancies. This duty to consult fails to recognise the constraints that exist in an insolvency situation which often make consultation impossible. This is due not only to the limited resources available to the office holder, but also to their statutory duty to maximise returns to all creditors (including employees). Continuing to trade whilst the company's already dire financial position further deteriorates, in order to meet redundancy consultation requirements, would put them in breach of this duty.

4. R3 strongly supports engagement with employees at the earliest possible stage in these often extremely difficult circumstances. We initiated a Memorandum of Understanding with the Insolvency Service and

Jobcentre Plus to encourage IPs to inform Jobcentre Plus as soon as they know redundancies are to be made, and nearly 80,000 individuals have been supported by this initiative since it began in October 2009. Nevertheless, it is vital that the special circumstance of insolvency is recognised with regard to the duty to consult prior to making redundancies, and that this conflict between insolvency law and employment law is resolved. R3 believes that this Bill provides an appropriate vehicle to make the necessary legislative change.

5. R3 has serious concerns regarding Clause 13 and its potential impact on insolvent companies. The aim of issuing a financial penalty would seem to be to act as an additional deterrent to a company from repeating such a breach of employment law. When a company enters a formal insolvency procedure, the management is no longer in place and the cost of any financial penalty would be borne by the Estate—in effect, the creditors, including the Crown and employees in most cases. R3 therefore believes that a specific exemption should be introduced in Clause 13 for companies in formal insolvency procedures other than Company Voluntary Arrangements.

6. R3 supports the move in Schedule 17, Part 3 (enacted by Clause 54) to abolish the procedure for early discharge. This would provide further clarity for all parties over the exact term of an individual's bankruptcy, giving a fixed deadline by which Income Payments Agreements or Orders (IPA/Os) and Bankruptcy Restrictions Orders or Undertakings (BRO/Us) must be obtained. This is likely to result in increased returns for creditors, as well as increased protection for the public.

7. R3 believes that a further amendment to this Bill could bolster the rescue culture in the UK, which is key to achieving the draft legislation's stated aim of encouraging long-term growth, by addressing the issue of the behaviour of some suppliers towards insolvent companies. Continued supply on reasonable terms is vital for the rescue of a potentially viable business. The current situation, in which suppliers can, in the event of insolvency, charge extortionate ransom payments, move the company onto a higher tariff or withdraw supply altogether means that businesses that could otherwise be rescued in whole or in part are being liquidated. We estimate that addressing this situation by amending Section 233 of the Insolvency Act 1986 could save as many as 2,000 businesses each year.

8. R3 also believes that the Bill represents an opportunity to make the necessary changes to the Insolvent Companies (Reports on Conduct of Directors) Rules 1996, which would allow for the introduction of an electronic D1 report—a form that must be submitted by an IP in a company's insolvency where they believe that a Director is unsuitable to be concerned in the management of a company. Moving to an electronic form would reduce the administrative burden on both IPs and the Insolvency Service (IS). It would also allow for more information to be included in the report, which would in turn allow the IS to re-allocate resource from "review" to "investigation". This could increase the number of unfit directors disqualified, having stagnated in recent years due to a lack of resource in the IS, at an estimated benefit to the economy of £88,000 for each disqualification.

Employment Tribunals (Part 2)

Redundancy consultation period in insolvency

9. In relation to Part 2 of the Bill, R3 feels it is important to highlight an issue which leads to many of the claims brought before employment tribunals by employees made redundant following a company's insolvency. We have raised this issue previously in response to the Government's consultation in November on the collective redundancy consultation rules, but see it as wholly relevant to the provisions in this Bill, as they relate to an insolvent company. We give a short summary of the issue here, but provide a copy of our submission to the Government's consultation, for the Committee's attention, at Annex A.

10. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) requires an employer who is proposing to make mass redundancies within 90 days or less to consult about the redundancies with appropriate employees' representatives. The provisions apply where it is proposed to dismiss 20 or more employees. Where it is proposed to dismiss 100 or more employees, consultation must begin at least 90 days before the first dismissal. In other cases it must begin at least 30 days before the first dismissal. Failure to consult within the prescribed time limits can lead to a protective award being made against the employer. Section 188(7) provides that where there are exceptional circumstances making it impossible to comply, the employer shall take all such steps towards compliance as are practicable in the circumstances.

11. In an insolvency situation, by the time an IP is appointed administrator to a company, it will be in extreme financial difficulty with, by definition, little or no funds available. The administrator will make a commercial judgement over whether to continue to trade, in the hope of selling the business as a going concern. This can, of course, only be done within the available resources and it is thus likely that trading will continue for only a short time, and possibly only in the more viable parts of the business. Often, the dire financial situation of the business at the time of an IP's appointment makes continuing to trade impossible.

12. An IP has a statutory duty to act in the interests of creditors as a whole. Were they to continue to trade a business in the knowledge that to do so would diminish the return for creditors, they would be in breach of this duty. Even any delay in action on the part of the IP in these circumstances would have a large material effect on returns to creditors. The circumstances in which an IP is usually appointed, together with this duty to act in the interests of all creditors, makes it impossible for them to comply with statutory consultation

requirements. Were they to do so, it would result in dramatically reduced returns for creditors, undermining both the rescue culture and the lending environment in the UK.

13. This tension between insolvency law and employment law can be resolved by defining formal insolvency proceedings as "special circumstances" under Section 188 of the TULRCA 1992. R3 believes that this Bill presents an ideal opportunity to make the necessary change.

14. IPs are keenly aware of the effects which their actions will have on employees, and endeavour to keep the workforce informed of developments and comply with consultation requirements as far as possible in the circumstances of the case. In most insolvency assignments there will be a dedicated team of staff from the IP's office dealing with the employees, and helping them submit their claims for their statutory entitlements. R3 has initiated a Memorandum of Understanding with Jobcentre Plus and the Insolvency Service with the aim of encouraging IPs to inform Jobcentre Plus as soon as they know that redundancies are to be made, with nearly 80,000 individuals supported by this initiative since it began in October 2009.

Financial penalties

15. R3 has serious concerns about the implications of Clause 13 in the case of insolvent companies. The intention behind the granting of this power to employment tribunals appears to be for such penalties to act as an additional deterrent to the employers concerned from repeating a similar breach.

16. In the case of a company in formal insolvency, with the exception of Company Voluntary Arrangements, the company management is no longer in place. The cost of any financial penalty would instead be borne, effectively, by the company's creditors including the Crown and, in the majority of cases, employees. This would have no effect on compliance with employment regulations and would seem entirely to contravene the intention behind the financial penalty.

17. R3 therefore believes that Clause 13 should contain an exemption for companies in insolvency proceedings, other than Company Voluntary Arrangements. Granting employment tribunals the power to issue financial penalties against insolvent companies where the management is no longer in place would harm returns to creditors, including employees, whilst having no effect at all on compliance with employment regulations.

Schedule 17, Part 3: Early Discharge from Bankruptcy

18. Schedule 17, Part 3—enacted by Clause 54 of the Bill—amends the Insolvency Act 1986 to abolish the procedure for early discharge from bankruptcy. R3 strongly supports this provision, due to the clarity it provides over the duration of each bankruptcy case.

19. During the term of bankruptcy, the Trustee in bankruptcy has the ability to apply for an IPA/O, which ensures that a bankrupt individual makes a contribution to their creditors from their surplus income, both during the term of their bankruptcy and for a number of years afterwards. The IPA/O must, however, be obtained prior to the individual's discharge from bankruptcy.

20. It is not always immediately apparent, on the commencement of the bankruptcy, whether a bankrupt has sufficient surplus income to support an IPA/O. Equally, it may be clear that an IPA/O is not possible at the outset, but a change in circumstances over the course of the term of bankruptcy could make it so.

21. The current situation, in which a bankrupt can be discharged early if the Official Receiver (OR) takes the decision to close their file, causes a lack of clarity over the deadline by which the Trustee must have applied for an IPA/O. This inevitably leads to cases where an individual would have been capable of making further contributions to their creditors, but are not required to do so because they have been discharged prior to an IPA/O being obtained.

22. Abolishing the process for early discharge from bankruptcy ensures clarity over the deadline to which all parties must work, resulting, we would expect, in more IPA/Os and thus higher returns to creditors.

Supporting Business Rescue

23. A key stated aim of the Bill, presented in the Explanatory Notes which accompany it, is to encourage long-term growth. R3 believes that long-term growth depends as much, if not more, on rescuing existing businesses as it does on new business start-ups. We view the Bill, if left unamended, as a missed opportunity to bolster the UK's business rescue culture, which could be achieved through minor amendments to the Insolvency Act 1986.

24. R3 believes the Bill provides a timely opportunity to address an issue over the behaviour of suppliers towards insolvent companies. This could make a real difference to the UK rescue culture—preventing unnecessary liquidations and their attendant job losses.

25. Suppliers are a company's lifeblood, without whom they simply cannot continue to operate. Under existing legislation, however, suppliers can currently take a number of unreasonable actions when a business becomes insolvent, including demanding extortionate ransom payments prior to continuing supply, moving the company onto a more expensive tariff or, for suppliers not listed in the Insolvency Act 1986, withdrawing their services altogether.

26. Trading a business in administration is only possible where key supplies are maintained and where resources allow. If the cost of supply increases in the event of insolvency, or supply is withdrawn altogether, it becomes more difficult and often impossible to rescue or retain value in a business through trading in administration. As a result of this situation, struggling companies that would otherwise have gone down this route are currently being forced into liquidation.

27. There is also little reason for suppliers to take such action as any charges for supply during administration are paid as a priority, and suppliers have the right to require a personal guarantee from the administrator. There is thus little risk to continuing supply during an administration—in fact, by helping to rescue the business, suppliers are increasing the possibility that it will be retained as a customer.

28. A survey of R3 members suggests that as many as 14% of businesses that are currently liquidated could be traded in administration if suppliers continued to supply on the same tariffs as they did prior to insolvency. With 16,886 liquidations in the UK last year, tackling this issue could mean that a further 2,364 companies could be traded in administration, rather than facing liquidation, each year. Not only would this increase returns to creditors in these cases, it is also likely to result in jobs saved as companies are rescued—either in whole or in part.

29. This could be achieved through amending Section 233 of the Insolvency Act 1986 preventing insolvency being used by suppliers as a sole reason for the termination of supply or increase in tariff. Suppliers would, of course, retain the right to require a personal guarantee, as well as being able to withdraw supply should payments cease.

Disqualification of Unfit Directors

30. When an IP is appointed as administrator or liquidator to a company, they have a statutory duty, as set out in Section 7(3) of the Company Directors Disqualification Act 1986, to make a report to the Secretary of State if they believe that the conduct of a director of that company makes them unfit to be concerned in the management of a company. How that report is to be made is set out in Rule 3 of the Insolvent Companies (Reports on Conduct of Directors) Rules 1996, including specifying in the Schedules the form that should be used to make the report (form D1).

31. Disqualifying those who are unfit to be company directors is absolutely essential to the health of our economy. The Insolvency Service (IS) estimates that for every unfit director disqualified, the economy benefits by £88,000 through avoiding the economic damage that would otherwise have been caused.

32. In recent years, the percentage of D1 reports submitted by IPs taken forward by the IS for disqualification proceedings has declined substantially, from 45% in 2002 to 27% in the last available year. In terms of the actual number of reports, the volume submitted by IPs has increased markedly from 2002, but the number taken forward has remained essentially stable. This indicates, and this is confirmed by IS, a capacity constraint both in the investigations department of the IS and in the legal department of the Department for Business, Innovation and Skills (BIS).

33. R3 understands the constraints on the resources of both BIS and the IS. Though we believe that a strong argument can be made for increased resource in this area due to the economic benefits derived from it, we are also of the view that more can be done within existing capacity if certain changes are made.

34. R3 is currently working with the IS with a view to updating the current D1 form, set out in the Schedules to the Insolvent Companies (Reports on Conduct of Directors) Rules 1996. The outcome of this work will be the issuing of new guidance from the Insolvency Service on the information required in a D1 form. We do not believe that these changes go far enough and would argue that the introduction of an electronic D1 form would be less onerous for IPs to complete—as company information could be copied across directly from Information Management Systems—and that it would also result in administrative cost savings for the IS, who would no longer have to distribute paper copies of reports by post. Crucially, as filling out the D1 form would become more efficient, it would allow IPs to input more information which would make it clearer to the IS which cases merited further action. This would allow resources within the IS to be shifted from "review" to "investigation", increasing capacity in this area, allowing more cases to be taken forward.

35. Changes to the content and format of the D1 form necessitate amending the Insolvent Companies (Reports on Conduct of Directors) Rules 1996. R3 believes that this Bill is an appropriate vehicle to make this change.

Annex A

COLLECTIVE REDUNDANCY CONSULTATION RULES

Submission by the Association of Business Recovery Professionals ("R3") in response to the calls for evidence issued by the Department for Business Innovation and Skills in November 2011

Introduction

1. This submission is made by the Association of Business Recovery Professionals ("R3") in response to the calls for evidence on the collective redundancy consultation rules. We have also responded separately to the call for evidence on the effectiveness of the TUPE Regulations.

2. R3's membership comprises licensed insolvency practitioners, lawyers and other professionals involved in the insolvency and turnaround industries. Over 97% of insolvency practitioners are members of R3.

3. Our response is concerned primarily with the effects of the collective redundancy consultation rules in formal insolvency procedures, and in particular the impediments which the rules present to the efficient administration of insolvent estates for the benefit of creditors.

4. The call for evidence on TUPE, issued in tandem with the present call for evidence, acknowledges that the present exercise is constrained by the need to implement the Acquired Rights Directive. This is also true of the collective redundancy consultation rules, which also give effect to an EC Directive. However, we believe that even within the constraints presented by the Directive there is scope for the UK Government to make amendments to the law which could go some way to ameliorate some of these problems.

5. Although the call for evidence is framed in terms of specific questions, it is necessary to set out in some detail the reasons why these provisions have caused problems in practice, and the extent to which it may be possible to ameliorate them within the limits imposed by the relevant legislation.

6. This paper is essentially an extended answer to Question 24 in the call for evidence, "What special considerations relating to collective redundancy consultations arise from insolvencies?"

Summary

7. In this submission we set out the reasons why the collective redundancy consultation rules have caused difficulties and uncertainties in the context of formal insolvency proceedings, and we argue that:

- Consideration should be given to providing by statute that formal insolvency proceedings constitute "special circumstances" for the purposes of the Trade Union and Labour Relations (Consolidation) Act 1992. (Question 24)
- The UK should take advantage of a possible derogation available under the underlying Directive. (Question 24)
- Consideration should be given to taking the special circumstances of insolvency up at an EU level. (Question 24)
- The Court of Appeal decision that a protective award does not rank as an expense of the insolvency proceedings should be put on a statutory footing.

The Problems in Brief

8.

- Where collective redundancies are contemplated, consultation must take place with employees within certain specified time limits, unless there are special circumstances which make it impracticable. Insolvency is not a special circumstance for these purposes.
- Failure to comply with the consultation requirements can result in a protective award being made against the employer.
- In a formal insolvency it is usually not possible to comply with the consultation requirements, because of the very tight financial and time constraints within which insolvency practitioners have to operate.
- Case law has found that consultation must be "meaningful" which in a formal insolvency is often impossible; there is no realistic alternative.
- The consequence is that protective awards are frequently made as a result of redundancies made by insolvency office holders. In an insolvency, the protective award will usually be paid by the Government out of the National Insurance Fund, and will rank as a preferential claim in the proceedings.
- This is a drain on public funds, and reduces the amount available for the general body of creditors.
- The problem might be ameliorated by specifically making insolvency a special circumstance, or by taking advantage of a possible derogation available under the relevant underlying Directive.

The Statutory Provisions

9. Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) requires an employer who is proposing to make mass redundancies within 90 days or less to consult about the redundancies with appropriate employees' representatives. The provisions apply where it is proposed to dismiss 20 or more employees. Where it is proposed to dismiss 100 or more employees, consultation must begin at least 90 days before the first dismissal. In other cases it must begin at least 30 days before the first dismissal.

Failure to consult within the prescribed time limits can lead to a protective award being made against the employer. Section 188(7) provides that where there are exceptional circumstances making it impossible to comply, the employer shall take all such steps towards compliance as are practicable in the circumstances.

10. These provisions were implemented to give effect to Council Directive 98/59/EC on the approximation of the laws of member states relating to collective redundancies ("the Collective Redundancies Directive"). They also address the complaints made by the European Commission that the UK had failed properly to implement an earlier version of the Directive. Neither the Directive, nor TULRCA 1992 make any provision for the circumstances of insolvency. UK case law has determined that insolvency is not on its own a special circumstance.

The Situation in Insolvency

11. There are a number of problems which insolvency practitioners have to face when appointed to an insolvent business, and which affect the options available to them in dealing with employees and others affected by the insolvency.

12. When an administrator (or other insolvency office holder) is appointed to a company, it will be because the business is already in serious financial difficulty. In many cases it will have run out of cash, or be in imminent danger of doing so. The insolvency practitioner must assess the situation and decide on the best strategy for dealing with the business within very tight time constraints. In many cases there will be some uncertainty whether a going concern sale is possible, and it is not unusual for the insolvency practitioner to keep trading to maximise the chances of this. This will be a commercial judgment which involves weighing the amount of assets being risked against the prospects and benefits of a going concern sale. In these circumstances this strategy will usually be shared with the employees.

13. However, if the insolvency practitioner does decide to continue trading, he can only do so using the resources available within the business. In many cases this means that any ongoing trading can only continue for a short period of time. In some cases it may be necessary to close down parts of the business at an early stage in order to help preserve any viable parts. Frequently, the situation will be found to be so bad that continued trading will simply not be possible. It is important to bear in mind that this situation will have arisen before the insolvency practitioner is appointed.

14. An administrator has a duty to carry out his functions in the interests of the creditors as a whole. If he were to continue to trade the business without good reason in a manner which diminishes the likely return to creditors he would be at risk of being in breach of this duty. This means that it is often simply not possible to continue the business for the period of time required to comply with the statutory consultation requirements. However, this is a consequence of the circumstances in which insolvency practitioners are usually appointed: it does not mean that practitioners are acting out of wilful neglect.

15. Recent case law has merely emphasised the unsatisfactory nature of the current position. In the case of *Mr CJ Byrne v Nortel UK Limited* (in Administration) the Employment Tribunal made it clear that consultation should be a process of ascertaining views possibly resulting in a change of plans. At para 28 of the judgement:

> *"At the employee forum meeting of 18 June 2008 the purpose of the meeting was to allow the joint administrator to present and discuss the actions to be taken and to provide the employee representatives with an opportunity to raise questions. The Tribunal takes the view that this was not meaningful consultation but it was an attempt to give information to the employees through the representatives about the redundancies. This was no consultation in the sense that it had any chance [of] altering the path which the administrators had set upon."*

16. A similar line was taken by the Employment Tribunal in the recent case of *USDAW and others v WW Realisation 1 Limited* (in liquidation) *and another.* Despite the fact that the administrators had provided the written information required under section 188 of TULRCA 1992, had taken steps to hold a meeting to explain the situation and receive views, and had invited employees to come forward with any further proposals of their own, the Tribunal held that there had been no genuine and meaningful consultation.

17. In some cases it is possible to imagine that the administrator might be able to consult properly but in the majority of cases funds are likely to be limited and "meaningful consultation" impossible. Although case law has determined that "the likely futility of consultation [was] not a special circumstance" *(Iron and Steel Trades Confederation v ASW Holdings PLC* (in administrative receivership), no consideration seems to have been given to the impossibility of consulting.

18. Insolvency practitioners are keenly aware of the effects which their actions will have on employees, and will try to keep the workforce informed of developments and comply with consultation requirements as far as possible in the circumstances of the case. In most insolvency assignments there will be a dedicated team of staff from the insolvency practitioner's office dealing with the employees, and helping them submit their claims for their statutory entitlements. R3 has signed a memorandum of understanding with Jobcentre Plus and the Insolvency Service with the aim of encouraging insolvency practitioners to inform Jobcentre Plus as soon as they know that redundancies are to be made.

19. However, there remains an unsatisfactory tension between insolvency law and employment law, which ministers appear to recognise, but which it is difficult to resolve. In a letter to R3 in March 2009 the Minister for Employee Relations and Postal Affairs said:

> *"Although I recognise that it will not always be practicable to consult in line with the statutory obligations where a company has entered an insolvency procedure, I would ask that you engage employees and their representatives as soon as is practicable in any process that is likely to result in redundancies with a view to minimising the impact on those individuals concerned. Even where it is not possible to consult in line with the statutory obligations, I would expect you to keep employees and their representatives informed of the situation regarding their employment as soon as is reasonably possible and on a regular basis thereafter."*

20. We believe that most insolvency practitioners act in the spirit of this guidance, but it would be more satisfactory if the problem could be resolved by legislative means.

21. The Court of Appeal has held that where a protective award is made against the employer as a result of dismissals made during the course of an administration, liability under the award does not rank as an expense of the proceedings. The Court was fortified in its conclusions by policy considerations. See *Huddersfield Fine Worsteds Limited*, *Ferrotech Limited* and *Granville Technology Group Limited* ([2005] EWCA Civ 1072) and *Day v Haine* [2008] EWCA Civ 626.

Recent Experiences of R3 Members

22. A survey of 379 R3 members was conducted by ComRes between 5 and 21 December 2011. A number of respondents commented on the unworkability of the consultation requirements in a formal insolvency situation, and pointed out that substantial protective awards dilute the assets available for the ordinary unsecured creditors. A number commented that the requirement to consult can conflict with a director's duty to act quickly to minimise potential losses to creditors. A number of respondents suggested that formal insolvency should be treated as a "special circumstance" for the purposes of TULRCA 1992—see further paragraph 24 below.

Possible Solutions

23. As noted above, the law on consultation derives from Council Directive 98/59/EC on the approximation of the laws of member states relating to collective redundancies. Article 3.1 of the Directive allows member states a limited derogation where the redundancies arise "from termination of the establishment's activities as a result of a judicial decision". The UK has not taken advantage of this derogation. It is arguable that, on the analogy of the wording used in the EC Regulation on Insolvency Proceedings, it could apply to insolvency proceedings. However, this argument might meet some resistance in the light of the recent decision of the European Court of Justice in the cases of *Claes* and *Rémy* (Cases C-235/10 to C-239/10), in which it was held that the consultation requirements of the Directive must be complied with even during the course of a liquidation, even though the relevant national legislation provided for automatic termination of employment contracts in such circumstances.

24. An alternative approach might be to provide by statute that formal insolvency proceedings (which could be easily defined by reference to relevant sections of the Insolvency Act 1986) constitute "special circumstances" for the purposes of Section 188 of TULRCA 1992. The "special circumstances" defence was introduced by UK law, and does not appear in the Directive, but it appears to have been accepted by the EU. It has not been the subject of a case before the European Court of Justice, and was not mentioned among the complaints made by the Commission about the UK's failure to implement the earlier version of the Directive mentioned above (see Case C-383/92). It would therefore appear that there is sufficient flexibility for the UK to implement such a change without contravening the terms of the Directive itself.

25. The tension between insolvency and employment law noted above exists not only at a UK level, but also potentially at an EU level. While the obligation to consult arises by virtue of the Collective Redundancy Directive, the European Commission at the same time wants to encourage the rescue of viable businesses. See, for example, the Commission paper of October 2007 entitled *Overcoming the Stigma of Business Failure—for a Second Chance Policy.* More recently, DG Enterprise has been conducting a research project on rescue procedures as part of an EU project on financial restructuring of financially distressed firms. There are signs that the Commission is prepared to take note of issues which act as an impediment to business rescue: witness the amendments made to the Acquired Rights Directive discussed above, albeit inaccurately transposed into UK law. Consideration might be given to raising the conflicts caused by the consultation requirements at an EU level.

26. Although the Court of Appeal has held that a protective award made during the course of an administration does not rank as an expense of the proceedings, it would be helpful, in order to avoid possible doubt in other cases, if this were put on a statutory footing for all types of insolvency proceedings, given the doubts arising from the Court of Appeal's decision in *Re Nortel* [2011] EWCA Civ 1124.

We should be happy to discuss any of the points raised in this submission in greater detail.

Annex B

SUGGESTED AMENDMENTS TO THE BILL

Amendments to Part 2

**Insert new clause following Clause 16 (page 12, line 17)*

17. Recognising insolvency as a special circumstance for the purposes of consultation prior to redundancies

(1) The Trade Union and Labour Relations (Consolidation) Act 1992 is amended as set out in subsection (2);

(2) In Section 188, following subsection 7(B) insert—

"For the purposes of subsection 188(7) "special circumstances" shall be taken to exist where an insolvency practitioner is appointed to a company in any of the capacities specified in section 388(1) of the Insolvency Act 1986"

* *Clause 13 (1), page 9, line 26,* insert "and" following "features,"

* *Clause 13 (1), page 9, line 27, insert—*

12A (c) Unless an insolvency office holder has been appointed to the employer company in any of the capacities specified in Section 388(1)(a) of the Insolvency Act 1986.

Amendment to Part 6

** Insert new clause following Clause 57, page 47, line 1*

58. Relationship between an insolvent company and its suppliers

(1) Section 233 of the Insolvency Act 1986 is amended as set out in subsection (2);

(2) In Section 233(3)(a) after "1986" insert "or other supplier";

(3) In section 233(3)(b) after "1989" insert "or other supplier";

(4) In section 233(3)(d) after "service" insert "or other supplier";

(5) After section 233(d) insert:

"(e) a supply of computer hardware or software or infrastructure permitting electronic communications."

(6) After section 233(3) insert:

"Any provision in a contract between a company and a supplier of goods or services that purports to terminate the agreement, or alter the terms of the contract, on the happening of any of the events specified in section 233(1) is void."

June 2012

Memorandum submitted by the British Institute of Organ Studies (BIOS) (ERR 19)

1. Summary

As subsection (5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 is to be amended The British Institute of Organ Studies would like to propose one further small change to (5)(a) to read "any object or structure fixed to the building *or fixed by virtue of its own weight*".

2. Introduction

The *British Institute of Organ Studies* ("BIOS") exists to encourage and promote the study of the pipe organ, its history and design, and to increase appreciation and understanding of its music by both organists and the general public. The Institute, working for the preservation, and, where necessary, the faithful restoration of historic organs in Britain, was founded in 1975 because of concern about how many pipe organs were being altered without thought of their historical value. Organs owned by the church are generally protected by Ecclesiastical Exemption, but the situation with secular organs is very variable and the amount of protection is sometimes dependent on interpretation of the law. [For clarification, the word "organ" in this submission is intended to mean a "pipe organ", and not to any other form of organ, such as an electronic or digital organ.] Other aims of BIOS are to conserve the sources and materials for the history of the organ in Britain, to make them accessible to scholars and to encourage an exchange of scholarship with similar bodies and individuals abroad, and to promote, in Britain, a greater appreciation of historical overseas schools of organ-building.

3. Proposal

It is proposed to add a new subsection (5A) (a) to Section 1(5)(a) of the Planning (Listed Buildings and Conservation Areas) Act 1990, by adding certain extra words. In these circumstances, BIOS proposes that Section 1(5)(a) of the Act is further amended by inserting, after the words "any object or structure fixed to the

building", but before the following full stop, a comma, and then the following words [set out here in italics]: *"or deemed to be fixed to the building by virtue of its own weight."*

4. Reasons for this Proposal

(1) Whether or not an object or structure should be regarded as fixed to a building for this purpose has to be decided on a case by case basis. The accepted test is one of annexation, with particular reference both to the degree and the purpose of annexation.

(2) In the past, however, application of this test has not always proved easy in such cases. A well known example was the controversial case of Canova's statue of The Three Graces, where a statue had stood in a listed building since 1816. It was on a plinth, which although fixed to the floor could easily be removed. In that case, after much legal argument, the Secretary of State eventually decided that the statue did not form part of the listed building, because it was not a "fixture" under the legal definition.

(3) More recent case law has clarified that an object resting solely by its own weight on the land or building in question, ie, free-standing, may nonetheless be regarded as a fixture if there is evidence on an objective test that it was intended when placed to be a fixture, ie, part and parcel of the land or building in question, and not a chattel. This was established by the leading case of *Elitestone Ltd vs Morris and Another* [1997] 1 WLR 687, where the House of Lords unanimously held that a wooden chalet bungalow assembled and placed on land without any foundations was a fixture because on a proper application of the twin tests of the degree and purpose of annexation despite its lack of physical attachment to the land it should nonetheless be regarded as part and parcel of the land. Similar reasoning has been applied to objects in a listed building—see the decision of the High Court in *Kennedy v SoS for Wales and Another* [1996] EGCS 17, where a free standing clock on the second floor of a tower was held to be a fixture.

(4) Similar considerations may also apply to other objects or structures in churches, such as church bells, turret clocks, fonts, pulpits, and organs. Although these churches are covered by the Ecclesiastical Exemption, diocesan chancellors (who decide cases involving listed building consent in ecclesiastical buildings) look to secular case law for interpretation and guidance.

(5) In practice most church organs are not physically fixed to the church floor, but simply attached to it by the weight of the organ. This because there is no need in the ordinary way when installing an organ to fix it to the floor, since most organs, unless very small, are constructed on a heavy building frame of substantial timbers or steel, which means that the organ cannot be moved easily from its position, and certainly not without it being dismantled.

(6) For some time now BIOS has been pressing for greater clarity about where church organs fall within listed building law protection. In this context it is interesting to note that Historic Scotland, although administering a parallel Act, The Planning (Listed Buildings and Conservation Areas (Scotland) Act 1997, and while using exactly the same wording as England to define a fixture, interprets the matter of whether or not an organ is regarded as a fixture in a written statement to me in 1999 as follows:

> *"We consider any musical organ fixed to a building is fully covered and eligible for full protection in terms of proposed alterations affecting their character", and also "Free-standing, moveable electric organs (interpreted to mean electronic or digital organs) would not fall to the definition, but I cannot think of any other type of organ housed in historic properties which could fail to meet the definition of a fixture. They are fixed by their own weight, quite apart from being integrated in design terms to a wider decorative and operational scheme".*

(7) It is also interesting to note that another neighbouring English-speaking common law jurisdiction, Ireland, in The Eire "Planning and Development Act 2000", while taking much guidance from previous English legislation, has in the matter of fixtures and fittings gone far to remove this lack of clarity by including within a "protected structure" the following words [set out here in italics] *"all fixtures and features which form part of the interior or exterior of any structure or structures".*

(8) BIOS therefore requests that, as Section 1(5) (a) of the current 1990 Act is being amended by additional wording, for the sake of clarity of the meaning of the words "fixed to the building", this section should be extended by the addition of the words referred to in paragraph 3 above.

June 2012

Supplementary memorandum submitted by Public Concern at Work (ERR 20)

Supplementary Evidence from Public Concern at Work

Further to the statement submitted to the Scrutiny Committee on 18 June 2012, we thought it might help if we provided a supplementary note with some of the statistics we have gathered relating to claims and cases arising out of the Public Interest Disclosure Act 1998 (PIDA). As part of our public policy objectives, we track PIDA judgments which involves reading all of the judgments produced by the Employment Tribunals (ET) in which PIDA has featured. However, we are reliant on the ET providing copies to us every six months. Our

analysis of these judgments to the end of 2010 is set out below (at present our legal team are analysing the cases to end 2011).

We also review the statistics produced by DBIS relating to claims under PIDA. We have not yet received the figures for 2010–11 and thus we can only provide breakdowns up to and including 2009–10. The table below shows the number of applications made to an Employment Tribunal under the Public Interest Disclosure Act since the Act came into force. In 2009–10 the total number of PIDA claims was 2,000, which amounts to less than 1% of all ET claims.

Year	*Number of PIDA Applications*
1999–2000	157
2000–01	416
2001–02	528
2002–03	661
2003–04	756
2004–05	869
2005–06	1,034
2006–07	1,356
2007–08	1,497
2008–09	1,761
2009–10	2,000

The table below shows the outcomes of applications to Employment Tribunals under PIDA, by year. The source is the Employment Tribunal Service and DBIS. Please note totals in the table below refer to applications disposed of by year which is why they differ from the totals in the table above.

	1999–2000	*2000–01*	*2001–02*	*2002–03*	*2003–04*	*2004–05*	*2005–06*	*2006–07*	*2008–09*	*2009–10*	*2010–11*
ACAS conciliated settlement	11	67	90	149	166	277	345	464	686	680	440
Withdrawn or privately settled	15	59	100	132	198	218	337	481	462	500	350
Successful at hearing	1	11	18	27	20	45	86	59	75	85	30
Unsuccessful at hearing	7	26	49	74	89	111	178	188	163	190	93
Dismissed at hearing—out of scope/at preliminary hearing	0	4	10	9	16	12	19	32	31	34	33
Disposed of—other reasons/struck out not at a hearing	1	4	14	16	23	33	50	54	78	74	47
Default judgment	—	—	—	—	—	—	—	9	7	18	18
Total Disposed	**35**	**171**	**281**	**407**	**512**	**696**	**1,015**	**1,287**	**1,502**	**1,600**	**1,000**

There were 2,000 PIDA claims between 1 April 2009 and 31 March 2010. 1,600 of those claims were disposed of with 74% withdrawn, settled by ACAS or by the parties. The remaining 26% proceeded to a hearing at which 20% (or 85 cases) were successful.

We reviewed a total of 884 judgments for 2009 and 2010, which covered both full and interim rulings.

464 of these were final judgments following a substantive hearing. Of these, only 10% of cases were successful on PIDA grounds, 31% were won on other grounds, and the remainder were lost or struck out. The categories of wrongdoing raised in PIDA claims is wide and ranged from security breaches in Afghan military bases, fake invoicing, bid-rigging, restructuring of health services and breach of private employment rights. This latter category is particularly relevant to the amendment proposed in the ERRB, and in our analysis appears in approximately 10% of judgments. Therefore there were 46 cases in total that were classified as a breach of the Claimant's employment rights in 2009–10. When this is compared to the 112,400 cases disposed of by the ET in the same year, this does not represent a large volume of cases turning on the findings in the *Parkin v Sodexho* case.

June 2012

Supplementary memorandum submitted by EEF (ERR 21)

ENTERPRISE AND REGULATORY REFORM BILL COMMITTEE

EEF, the manufacturers' organisation, is the voice of manufacturing in the UK, representing all aspects of the manufacturing sector including engineering, aviation, defence, oil and gas, food and chemicals. With 6,000

members employing almost one million workers, EEF members operate in the UK, Europe and throughout the world in a dynamic and highly competitive environment.

EEF has the following observations upon Parts 1 and 5 of the Bill:

Clause 1: *The Green Causes*

EEF supports the idea behind the Green Investment Bank (GIB)—the need to attract more capital, more quickly, into the UK's emerging green economy. The GIB is designed to act as catalyst to expand the pool of private investors and capital available to fund the nation's transition to a greener economy.

However, given that the GIB is being capitalised with tax payers' money and is explicitly designed to support the greening of the nation's economy, it is essential that its activities are focused supporting projects which directly benefit the UK. For the purposes of the Bill, this means specifying in Subsection (1) of Clause 1 that each of the "Green Purposes" that direct its activities relate to improving the UK environment—ie:

(1) The green purposes are—

(a) the reduction of greenhouse gas emissions in the UK;

(b) the advancement of efficiency in the use of natural resources in the UK;

(c) the protection or enhancement of the natural environment in the UK;

(d) the protection or enhancement of biodiversity in the UK; and

(e) the promotion of environmental sustainability in the UK.

As currently drafted, the GIB could focus its efforts entirely on projects that support cutting greenhouse emissions and improving the natural environment overseas.

Schedule 17—*Unnecessary regulation: miscellaneous*

This schedule of the Bill, which repeals a small number of redundant regulations, reflects the limited achievements to date of Government initiatives such as the Red Tape Challenge (RTC).

EEF appreciates that potentially significant employment law reforms, such as some of those in the Bill, are in the pipeline. However, the general perception amongst manufacturers is that the RTC has delivered little of practical value to date despite seeming to consume significant resource for over a year, and counting, within Government.

A key reason for this perception is that the issues that matter to manufacturers, as reported in our submission to the RTC based on a wide-ranging member engagement exercise, were deemed out of scope for a variety of reasons, for example the regulations were part of the commitments in the coalition agreement and/or European in origin.

Altering this perception requires a significant "out" that affects the majority of businesses (eg employment law) rather than minor changes on niche issues.

The Government should focus its efforts on tackling the stock of existing regulation and implementing the best ideas emerging from the RTC, rather than rerunning the exercise. The likelihood is that a second iteration of the exercise will deliver ever diminishing returns.

June 2012

Memorandum submitted by The Alliance Against IP Theft ("the Alliance") (ERR 22)

ABOUT THE ALLIANCE

The Alliance Against IP Theft ("the Alliance") represents UK-based trade associations who have an interest in ensuring that the contribution IP rights make to the UK economy and society is understood and that these rights can be properly protected. With a combined turnover in excess of £250 billion, our members include representatives of the audiovisual, music, video games, software, and sports industries, branded manufactured goods, publishers, retailers and small designers.

THE ENTERPRISE AND REGULATORY REFORM (ERR) BILL AND INTELLECTUAL PROPERTY

The ERR Bill contains two clauses which will change intellectual property law.

1. *Clause 55*

Clause 55 amends Section 52 of the Copyright, Designs and Patents Act (CDPA) by extending the protection of artistic craftsmanship in classic designs from the current period of 25 years to the life of the originator plus 70.

The Alliance supports this change as a positive step for those designers and designs but also seeks clarification of the application of Section 51 CDPA to "works of artistic craftsmanship" and other designs of a literary or artistic character, such as sets, props and costumes for stage and film. In addition, to date "works of artistic craftsmanship" has not been legally defined. For example, the Government may need to introduce a provision which allows for the exclusion of designs for certain articles from the effect of Section 51 (as under the pre-1988 regime). This is because Section 51 was intended to address functional articles such as exhaust pipes, not works which derive their value from their creative nature. Without such a provision, the repeal of Section 52 will have limited benefits for classic designs.

This improvement must not be confused with unregistered design rights (UDR) protection which still only lasts for three years under EU law and for 15 in the UK (or five before a license of rights can be applied for and granted). So whilst we all welcome these proposals, they can't be seen as a substitute to ensuring that three-dimensional designs are given full parity of rights with the drawings and documents from which they are created.

This is because Clause 55 does not deal with the wider disparity in the level of protection afforded to UDR. This lack of parity between design rights and other intellectual property rights, such as copyright, means that designers are unable to rely on criminal sanctions for deliberate infringement.

The IPO is currently looking at this issue in more detail and therefore a debate around Clause 55 would be a useful moment to highlight the inequality in protection afforded to designers.

What is needed?

— Clarification as to what is a "work of artistic craftsmanship" leading to a legal definition.

— Acknowledgement from the Minister that this Clause has limited benefit to UK designers, the majority of whom have created new designs since 1988.

— Assurances that the lack of legal protection afforded to designers will be addressed in a separate piece of legislation.

2. *Clause 56*

According to the Intellectual Property Office, Clause 56 has been included to allow the Government to ensure existing penalties for copyright offences are maintained when amending existing exceptions. At present, if a new exception to copyright is being introduced or an existing exception widened (both of which being subject to the exhaustive list contained in the Copyright Directive) then they can be introduced through Secondary Legislation via the European Communities Act. However, if they wish to narrow or remove an exception this procedure may not be available. Narrowing or removing an exception could result in a new criminal offence being introduced or the number of people caught by an existing offence being widened; if that offence carries a maximum penalty of more than two years in prison, then the EC Act cannot be used as criminal penalties for breaching exceptions, when varied through Secondary Legislation under the EC Act are limited to two years. Theoretically, therefore, the passing of Clause 56 means that, in the future, in cases where such penalties need to be maintained this could now occur.

If this is the genuine intention behind Clause 56 then it has the support of the Alliance. However, we are extremely concerned that, leaving aside the assurances we have received from the IPO as to its purposes, it is very broadly drafted making its actual application unknown; we question why it has been felt necessary to use such generalised, loose language to address a very specific legal flaw.

We are also very concerned that such a move may encourage the Government to "bundle" reform of a number of exceptions, leading to a single SI bringing in a number of different changes and amendments to UK Copyright Law.

Such a move would have a serious impact on Parliament's ability to scrutinise legislation properly given SIs cannot be amended and must be either accepted or rejected in their entirety. Any changes to copyright exceptions must not be "bundled" in this manner as they are by nature each very distinct, have differing impacts on different industries and do not have the same objectives—for example some are designed to narrow an exception while others to widen.

These differences are currently evidenced by the fact that those reforms proposed in the recent Copyright Consultation have each required separate impact assessments and we anticipate any further reforms similarly requiring separate IAs.

What is needed?

— Clause 56 to be amended in order for the intent of the clause to be more accurately reflected in the language of the Bill.

— A Ministerial Undertaking as to how the clause will be used specifically to reassure Parliament that the Government will not attempt to change copyright law by bundling proposed reforms into a single SI.

June 2012

Memorandum submitted by the British Retail Consortium (BRC) (ERR 23)

1. The British Retail Consortium (BRC) is the lead trade association for the retail sector, representing over 80% of the retail industry. The BRC is the authoritative voice of retail, representing small, independent and large multiple retailers; food and non-food; on high streets, out of town, community and rural stores and online.

Introduction

2. Retailing is touched by these proposals perhaps more than any other sector. Firstly, we are the largest private sector employer, with three million people working in retail. We are present in every community of any size and so deal with every local authority in the UK, and we trade in a very wide range of products and services. As a result we are touched by an enormous range of legislation, from consumer protection to competition law, financial services regulation to food hygiene, emissions control and energy savings to employment law.

3. As employers of 10.5% of the UK workforce, and in particular one million young people making their first steps on their careers, it is vital that retailers can operate without undue administrative burdens. This will assist in business expansion and jobs growth as management time, talent and financial resources can be targeted on pursuing commercial opportunities rather than being tied up with red tape.

Employment Issues

4. As the UK's largest private sector employer, retailing is committed to providing good jobs that develop people and talent. We want to treat people well. Unfortunately from time to time there are employment disputes which cannot be resolved through internal company processes. We welcome the move to statutory arbitration as the first step involving external parties. We believe that many disputes can be settled through this common sense and conciliatory approach, to the benefit of both parties—and to the wider workforce and business. Pre-claim conciliation currently resolves 70% of voluntary cases and the Government's impact assessment implies 14,500 tribunal cases could be avoided each year, also avoiding the attendant stress and costs for both parties.

5. We also support streamlining and simplifying processes, including the use of legal officers in determining low value, straightforward claims, and of judges sitting alone in determining points of law under Employment Appeal Tribunal procedures.

6. We would not support the introduction of a two tier system of employment rights. It would not be good for businesses and it would not be good for employees. The emphasis should always be on proportionate and outcome focused legislation, providing a clear framework for all businesses, regardless of size, and their employees.

7. In line with this, we oppose the introduction of penalties over and above the damages found by Employment Tribunals to be due to complainants. This is double punishment. The inclusion of the existence of a dedicated HR team as a test sufficient to warrant "aggravated" status for a case means that no medium or larger employer would have a defence against this charge. It would simply be a tax in disguise, not a measure to encourage compliance.

Primary Authorities

8. Retailers provide vital services to millions of customers, every day. They stand or fall by their ability to satisfy those customers in every store, in every community they serve. It is in their interests to be compliant with consumer protection regulations.

9. We endorse the Hampton principles on enforcement activity. Well managed and compliant retailers should be left largely to continue running their businesses to the satisfaction of their customers. Enforcement activity should be focused on rogue traders and those who persistently fail to comply with statutory obligations.

10. We believe that the Primary Authority Scheme delivers many benefits in providing customers with assurance their protection is not subject to a postcode lottery, in reducing costs to business, and in releasing resources in local authorities to focus on rogue traders and complaint-driven inspections, rather than on compliant businesses. It is important that inspection plans are complied with, and that the Primary Authority is given the opportunity to object to any deviation from it. A notice period of five days must be regarded as the absolute practical minimum for response.

11. We welcome any measures to strengthen, extend and promote Primary Authority and other pan-jurisdiction measures. Many of our members operate across the UK and would like enforcement arrangements on that basis—ie to suit business, not bureaucratic, needs.

Deregulatory Measures

12. We welcome the intention of the introduction of sunset clauses and other deregulatory measures in the Bill, such as those on tv licence administration. However, we are not optimistic that these will all deliver their potential, given our experience with the Red Tape Challenge and One in, One out. We need to see genuine sunset reviews when the term is up, with a formal role for stakeholders.

13. We would like to see much greater scrutiny and enforcement of these requirements by the Better Regulation bodies. We are not interested in departmental regulatory budgets but, rather, the impact on businesses, sector by sector. When new obligations are imposed on retail we want to see others of equal impact removed for retail. Where on Whitehall this deregulation occurs is not the point. A case in point is the introduction of the Grocery Code Adjudicator, and the establishment of a new quango, where the "out" relates to estate agents rather than retail.

Advice to Businesses and Consumers

14. We welcome moves to strengthen the regional and national perspectives of Trading Standards, given that many scams are perpetrated by organised criminals for whom jurisdictions and boundaries are meaningless. We sincerely hope that both the National Trading Standards Board and Citizens Advice are adequately resourced and appropriately skilled to achieve these aims.

Competition and Market Authority

15. We are keen to see the Competition and Market Authority function effectively in the consumers' interest. It must not lose the OFT's current advantage over its international equivalents in combining consumer interest with competition concerns.

16. In its operations the CMA too must take account of the costs on business from its activities. Consequently we do not think it is right to require the provision of information before it has even been established that a market investigation is warranted. Fishing trips would come at great cost to law-abiding businesses inadvertently caught up before a clear view on the need for investigation has been formed.

17. Neither do we agree that civil sanctions are appropriate for failure to provide information once an investigation is in train. This would lower the test and burden of proof required of the CMA before action is taken and could encourage over-use of what would become an over-bearing and draconian regime.

Conclusion

18. The BRC applauds the streamlining and de-regulatory provisions of this Bill; we welcome the opportunities to resolve employment disputes in a more conciliatory manner and to focus enforcement on rogue traders; but, as ever, there are devils in the detail which need addressing as the Bill proceeds.

June 2012

Memorandum submitted by The Heritage Alliance (ERR 24)

About The Heritage Alliance

1. The Heritage Alliance is the largest coalition of heritage interests in England. Together its members own, manage and care for the vast majority of England's historic environment. Established in 2002 as Heritage Link, the Alliance aims to promote the central role of the non-Government movement in the heritage sector.

2. The Heritage Alliance represents over 90 Members—major national and regional non-Government organisations, from larger bodies such as the National Trust, to many smaller organisations such as the Association of Building Preservation Trusts—which are in turn supported by over five million members, thousands of local groups and over 450,000 volunteers.

3. Alliance Members range from specialist advisers, practitioners and managers, volunteers and owners, to national funding bodies and organisations leading regeneration and access projects. Their specialist knowledge and expertise across a huge range of issues—including planning, regeneration and place-making—is a highly valuable national resource, much of which is contributed on a voluntary basis for public benefit.

4. This submission has been prepared following consultation with Alliance Members through the Spatial Planning Advocacy Group.

Summary

5. Overall, The Heritage Alliance welcomes the measures relating to the historic environment contained within the *Enterprise and Regulatory Reform Bill* as a recognition of the fact that heritage assets are an important driver of economic growth. The Alliance feels these measures will streamline heritage protection processes thus making it easier for historic assets to continue to "earn their keep" and take on viable uses in the 21st century, without diluting heritage protection.

6. However, a crucial *caveat* to our support is that these reforms can only work as efficiently as Government intends if underpinned by adequate levels of conservation skills, resources and expertise in Local Planning Authorities. The Alliance and its Members have long campaigned for sufficient resources at Local Planning Authority level as the key to successful implementation of these and other reforms; the worrying cut-backs in the local authority conservation staff responsible for managing our valuable heritage—down nearly a quarter in just over five years—represents a major challenge facing implementation of these and other planning reforms.

7. Following consultation with members of our Spatial Planning Advocacy Group, The Alliance has identified several specific concerns (please see below).

Comments on Clause 50 and Schedule 16: Heritage Planning Regulation

8. The Heritage Alliance's comments relate to the sections of the Bill affecting the historic environment, specifically the reforms brought in by Clause 50 and Schedule 16. There are four key changes as follows:

- The merging of conservation area consent for demolition into planning permission.
- The power to define the limit of listing.
- Allowing certificates of immunity from listing to be applied for at any time.
- Giving statutory backing to heritage partnership agreements.

The merging of conservation area consent in England into planning permission (paragraph 5 of Schedule 16)

9. Instead of having a separate system of conservation area consent, this proposal means applications to demolish certain buildings in a conservation area would be considered by the local planning authority as part of the application for planning permission.

10. Overall the Alliance welcomes this measure. We believe merging conservation area consent into planning permission will streamline the process without diluting heritage protection. We particularly welcome the incorporation into the Bill of the continued criminal penalty for contravention.

The power to define the limit of listing (paragraphs 6 and 7 of Schedule 16)

11. The amendments in the Bill will allow future new list entries and list amendments to declare that structures or buildings attached to or within the curtilage of the principal listed building are not protected. It will also allow for a part or feature of the principal listed building to be declared definitively as not of special interest. It will not apply retrospectively, so existing list entries will have to be amended.

12. The Alliance cautiously welcomes this proposal; there are several areas of concern which must be monitored closely (see below) but where sufficient resources and skills are available to determine the special interest in listed heritage, this proposal should afford managers, owners and other interested parties more certainty over whether proposed works will require listed building consent.

The Alliance's concerns

13. The Alliance believes this proposal may on occasion impact negatively on the settings of listed buildings. For example, a listed building with a garden wall which is clearly not of listable quality may under the new proposal have its garden wall demolished without permission and replaced without permission as long as it falls within the limits of the General Development Order. The new wall could well be something that is not appropriate for the setting of the listed building.

14. The Alliance is also concerned that sometimes the relatively ordinary structure or building attached to or within the curtilage of the principal listed building—such as the garden wall in this example or a modern extension—could develop importance and significance in the future. It would be concerning to see potentially important historic features such as this lost due to lack of foresight.

15. Defining what is and what is not of "special architectural or historic interest" is a complex process, which now requires an assessment of significance. When there is such a backlog of long-standing entries, this is a huge challenge. We believe that the time and place for considering the relative values of elements of the listing is when a proposal for change is made in an application for planning permission or listed building consent.

Allowing certificates of immunity from listing to be applied for at any time (paragraph 5 of Schedule 16)

16. Currently a certificate of immunity from listing, which lasts for five years, can only be sought if a planning application has been made relating to the building. The change in the Bill will allow certificates of immunity from listing to be applied for at any time.

17. The Alliance welcomes this proposal, believing it would provide clarity over the status of a building at the earliest stage in planning for a project. However, this should be accompanied by powers of interim protection whilst appropriate evaluation of the heritage asset takes place.

Giving statutory backing to heritage partnership agreements (paragraph 9 of Schedule 16)

18. This new concept will provide a local planning authority and an owner with a means of agreeing various matters concerning the management of a listed building. Their most important function will be in agreeing what works of alteration are to be given listed building consent. They cannot cover works of demolition.

19. The Heritage Alliance welcomes this proposal. We are pleased to see Heritage Partnership Agreements (HPAs) will have substantial statutory backing, as they should encourage a proper level of expert input throughout the management process. However, concerns remain over the capacity of Local Planning Authorities to evaluate and operationalise HPAs, given the substantial cutbacks many conservation teams have faced.

June 2012

Memorandum submitted by The Authors' Licensing and Collecting Society Limited (ALCS) (ERR 25)

BACKGROUND TO ALCS

The Authors' Licensing and Collecting Society Limited (ALCS) is the UK collective management organisation for writers. Established in 1977 and wholly owned and governed by the writers it represents (of whom there are currently over 85,000) ALCS is a not-for-profit, non-union organisation. ALCS exists to ensure that writers receive a fair reward when their works are used in situations in which it would be impossible or impractical to offer licences on an individual basis.

Clause 56: Copyright Exceptions

1. Clause 56 (as introduced) establishes a general power for the Secretary of State to expand or reduce the acts permitted in relation to copyright works by means of secondary legislation.

2. The exceptions to copyright set out in Chapter III of the Copyright, Designs and Patents Act (1988) are numerous and varied, governing an enormously diverse range of activities in relation to an author's work.

3. Exceptions provide the fulcrum in the balance between rights of access and rights of authors; as such their operation carries significant social, cultural and economic implications.

4. The Government is in the process of developing proposals for amending copyright exceptions based on the recommendations of the Hargreaves review. The review supported widening UK exceptions to the full extent permitted within the European legal framework.

5. Hargreaves stressed the importance of evidence-based policy-making and there are a number of areas in which the current evidence-base in support of expanded UK exceptions has been challenged or shown to be limited or incomplete.

6. ALCS understands that policy proposals regarding copyright exceptions will be published later this year. These proposals should take full account of the available evidence and reflect the parameters governing copyright exceptions established by the Berne Convention and EU Copyright Directive.

7. We understand from the IPO that Clause 56 of the Bill has not been introduced for the purposes of implementing "Hargreaves exceptions". This is supported by the reference to the preservation of current criminal penalties for copyright infringement in the IPO Information Notice, which is relevant only in the context of limiting activities permitted by exceptions.

8. In the interests of greater clarity and certainty, Clause 56 of the Bill should therefore be amended to provide that the powers it confers on the Secretary of State apply solely in the context of restricting the operation of copyright exceptions.

July 2012

Memorandum submitted by the Institute of Directors' (IoD) (ERR 26)

Dear Mr Brady

Firstly, thank you for your time yesterday at the Bill Committee session. I wanted to come back to you as promised on your request for further information.

Regulation has long been a top three concern for the Institute of Directors' (IoD) members. Indeed, in our latest survey, regulation was the second most-significant issue. Economic conditions were unsurprisingly top of member concerns, followed by regulation and then issues of cash flow, tax burden and competition in the marketplace.

The specific question was:

"Which of the following factors (if any) are having a negative impact on your organisation?"

1. 62% Economic Conditions.

2. *47% Government Regulation.*
3. 37% Cash Flow.
4. 35% Tax Burden.
5. 34% Competition in the Marketplace.

When asked about the areas of regulation that members felt most burdened by, we found that employment law requirements dwarfed health and safety, reporting and statistical requirements, environmental requirements and a range of other concerns. 70% of those citing regulation as a burden on their business believed that employment law had the most significant adverse affect on their organisation.

The specific question was:

"Consider the following list of regulatory areas, and select all those which have an adverse effect on your organisation."

1. *70% Employment.*
2. 60% Health and Safety.
3. 49% Reporting and Statistics.
4. 45% Financial/Fraud.
5. 34% Environmental.
6. 18% Product Safety Approval.

As I stated to the Committee yesterday, when asked about Compensated No-Fault Dismissal, 70% of our members said it would ease the burden on their business, and 36% (separately) said that such a change would increase the likelihood of their taking on additional staff. Similarly, settlement agreements resulted in 60% of IoD members saying that such a change would reduce burdens on their business and 25% (separately) said they would be more likely to take on staff.

All the above research findings were derived from the IoD's Policy Voice panel. Policy Voice is a representative panel of IoD members and all surveys receive over 1,000 responses from all sizes, sectors and broad demographics of the IoD membership profile.

July 2012

Memorandum submitted by English Heritage (ERR 27)

1. SUMMARY

1.1 The Enterprise and Regulatory Reform Bill contains a number of provisions relating to heritage planning which are intended to reduce regulatory burdens whilst not affecting the protection of our heritage. These are:

— The power for owners and local planning authorities to make heritage partnership agreements which can give advance consent for minor, routine or repetitive works, reducing consent applications.

— The removal of the requirement for conservation area consent (currently required for demolition in a conservation area) and replacing this with a requirement for planning permission, to reduce duplication of consents.

— The ability to specifically exclude certain features, structures or ancillary buildings from list descriptions meaning, for example, that everything within the curtilage of a listed building is no longer considered automatically protected, and unnecessary applications need not be made.

— The ability to apply for certificates of immunity from listing at any time which means that an owner (or a third party) can obtain an assurance of the status of a building at an early stage without having to apply for planning application.

1.2 These heritage provisions are a small part of the Bill, but together present a sensible package of reforms. They will make it more straightforward to gain heritage consents, while retaining the safeguards that ensure that what is special and important remains protected.

1.3 English Heritage has been working for some years, in partnership with the heritage sector and developers, to secure change to often complicated and unclear processes, which have been developed piecemeal over a long period. This process of heritage protection reform has acted as a focus for dialogue and development of consensus throughout the heritage sector, which is broadly supportive of both of the process of reform, and, as part of that, the heritage reforms set out in the Enterprise and Regulatory Reform Bill (ERR Bill). These reforms were in their essence included in the draft Heritage Protection Bill of 2008, which did not find Parliamentary time, and in that context have been the subject of wide discussion and consultation.

1.4 EH is keen to see these reforms going forward to legislation. Heritage conservation is an objective of the Government's definition of sustainable development (see the National Planning Policy Framework). It is rooted in communities and provides lasting benefits in terms of community cohesion, environmental quality and economic opportunity. A sound and efficient protection system underpins that objective. We acknowledge

the flaws in the current system, which we have been working to address, and welcome this opportunity to make improvements.

2. Background

2.1 The key elements of the statutory heritage protection system for terrestrial heritage assets in England are set out in:

- the *Ancient Monuments and Archaeological Areas Act 1979,* which provides for the designation of nationally important archaeological and historical sites and monuments as Scheduled Monuments and establishes the Scheduled Monument Consent (SMC) regime to control works to them; and
- the *Planning (Listed Buildings and Conservation Areas) Act 1990,* (the 1990 Act) which provides for the designation of buildings of special architectural or historic interest as Listed Buildings; establishes the Listed Building Consent (LBC) regime to control works to them; and, establishes the system for the identification and designation of conservation areas by local planning authorities, and control of demolition of unlisted buildings in conservation areas through Conservation Area Consent (CAC).

Listing buildings

2.3 A "listed building" is a building, structure or erection that has been judged by the Secretary of State for Culture Media and Sport to be of special architectural or historic interest. The up-to-date list is available as part of the National Heritage List for England. The list includes a wide variety of structures, from castles and cathedrals to milestones and village pumps. When a building is listed, it is listed in its entirety, which means that both the exterior and the interior are protected. In addition, by law any object or structure fixed to the building, and any object or structure within the curtilage of the building, which although not fixed to the building, forms part of the land and has done so since before 1 July 1948, is to be treated as part of the listed building. This extension of protection applies whether that further building, structure or object (alone or in conjunction with the principal building) holds any special architectural or historic interest or not.

2.4 Listed building consent is a type of planning control that applies in addition to any planning permission requirements that would normally apply. The controls apply to any works for the demolition of a listed building, or for its alteration or extension, in any way which is likely to affect its character as a building of special architectural or historical interest.

2.5 There are currently c 375,000 listed building entries equating to c 500,000 individual listed buildings and c 20,000 scheduled monuments in England.

2.6 Demolition of an unlisted building in a conservation area currently attracts an additional consent requirement under the provisions of the 1990 Act: conservation area consent. Applications for these consents are frequently decided alongside an application for planning permission for redevelopment of the site.

3. Better Heritage Regulation under the Enterprise and Regulatory Reform Bill

3.1 The proposed changes to the legal framework protecting heritage in England in the Enterprise and Regulatory Reform Bill have their roots in the draft Heritage Protection Bill 2008. This in turn was the product of an overall reform process—"heritage protection reform"—that English Heritage has been leading and implementing over the past twelve years, intended to make the systems we have for the protection and management of heritage fit for purpose for the 21st Century. These legal systems and processes have grown up incrementally over many years. This has created some complexity, doubt and inefficiency in their application.

3.2 The heritage protection reform process has been based on a culture of engagement and partnership across the heritage sector, and an acknowledgement that in this well established system all those who play a part in it, including consultants and owners, amenity societies and voluntary groups as well as local planning authorities and English Heritage, normally do so responsibly and knowledgably.

3.3 After the Heritage Protection Bill failed to get Parliamentary time in 2008, reform has continued in non-legislative areas, for instance through updating and streamlining planning policy in Planning Policy Statement 5, "Planning and the Historic Environment", and subsequently in the heritage aspects of the National Planning Policy Framework, and in relevant practice guidance produced on behalf of the heritage sector by English Heritage. The National Heritage List for England in 2011 published all designated heritage assets, for the first time side-by-side in a searchable form online, and including a plan. This has been a great step in achieving transparency and accessibility about what is protected and why. However, legislative change is needed to take the reform process further, and momentum for reform continues under the banner of "Better Heritage Protection".

3.4 The proposals in the Enterprise and Regulatory Reform Bill are:

- Heritage partnership agreements (also known as statutory management agreements).
- The removal of the requirement for Conservation Area Consent.

— The ability to specifically exclude certain features, structures or ancillary buildings from list descriptions.

— The ability to apply for certificates of immunity from listing at any time.

3.5 These are proposals that were contained in the draft Heritage Protection Bill, and are discrete changes that can be implemented outside the thoroughgoing reform that that Bill contained while still being of value in achieving improvements. They were picked up as recommendations of the Penfold Review carried out by the Department for Business, Innovation and Schools, details of which can be found at http://www.bis.gov.uk/penfold.

3.6 The reforms are brought in by Clause 50 and schedule 16 of the Bill as introduced.

4. Heritage Partnership Agreements (HPAs)

4.1 Known also as statutory management agreements, these new arrangements will provide a local planning authority (LPA) and an owner with a means of agreeing various matters concerning the management of a listed building, or group or complex of listed buildings. Their most important function will be in agreeing in advance what works of alteration or extension are to be given listed building consent. They cannot cover works of demolition. Since they can, by mutual agreement, last many years, they are an efficient means of giving listed building consent for works of a minor routine or repetitive nature.

4.2 Non-statutory HPAs have been piloted and rolled out by English Heritage over the past eight years. These pilots have demonstrated benefits for the partners to HPAs of medium term clarity, mutual understanding and consistency of approach, and savings[42] stemming from these improvements. There was subsequently provision for statutory management agreements in the draft Heritage Protection Bill of 2008. Since then English Heritage has continued to promote the use of non-statutory HPAs on those sites that are subject to multiple applications for consent for minor works on a regular basis. Over the last four years non-statutory HPAs have continued to be developed at a number of sites, led by enthusiastic partner organisations such as British Waterways (soon to become Canal and Rivers Trust), where their long term benefits have been recognised. Anecdotal evidence suggests that there are further owners of major heritage assets who are prepared to step forward and sign up to an HPA if statutory status is achieved, and any up-front investment of time to set it up will be offset by the clear savings that avoiding repeat listed building consent applications will bring.

4.3 The attached list of active and prospective HPA projects shows the range of situations where they are considered by owners and managers to be useful. Canal structures have been mentioned. Following the success of the Cornish Bridges and wayside crosses pilot, an HPA for bridges in Devon is also being developed. Large 20th Century buildings such as the Barbican Centre, or Lloyds of London also lend themselves to this approach, as their special interest often resides in communal or formal spaces such as lobbies or boardrooms. Much of the interior is otherwise uniform and undistinguished and able readily be adapted to new configurations and uses. This can be facilitated by the clarity that an HPA can bring. The University of East Anglia pilot indicated that quite substantial savings could be made in the context of a large complex of highly-graded listed buildings, subject to constant maintenance and repair demands. The University has also supplied figures for savings they have already realised by clarifying the need for LBC, as follows:

Year	*Number of projects*	*Construction value £m*	*Formal Application (some PP but mostly LBC)*	*HPA*	*Potential saving £*
2010	4	0.6	1	3	3,600
2009	9	1.5	1	8	9,600
2008	44	1.99	4	40	48,000
2007	26	1.98	3	23	27,600
2006	26	3.78	3	23	27,600
2005	19	14.6	5	14	16,800
2004	29	3.4	3	26	31,200

4.4 Some concerns were raised during the consultation on the draft Heritage Protection Bill about potential impact of HPAs on special interest, about the scrutiny in the process of agreeing them and about their enforcement. These are understandable concerns. They are addressed in the current proposals as follows:

— The statutory duty to have special regard to the desirability of preserving the listed building that applies to all listed building consent applications will still apply to the consideration of consents to be given by these agreements.

— National policy in the National Planning Policy Framework (NPPF) with its sustainable development objective of conservation of listed buildings will also be a material consideration to which "great weight" should be given.

[42] The savings derived from the Cornish Bridges and Wayside Crosses pilot are set out in the Impact Assessment to this Bill as an indication of the benefits that might be derived; exact monetisation of potential HPAs is hard as they will vary between assets.

— The Secretary of State has the power to regulate as to how HPAs will be consulted upon before being signed and what proposed agreements may need to be referred to him for his decision instead of the local authority. In that way the power exists to make the process of creating them subject to the same engagement and transparency as applies to mainstream listed building consent applications.

— Regulation can also stipulate the maximum period of an agreement before an agreement has to be reviewed and resubmitted for scrutiny. A long-stop date provides a means of checking that longstanding permissions are still appropriate.

— The consent given by an agreement may be subject to conditions and any breach of its terms can be enforced in the same manner as any breach of current listed building consent requirements.

4.5 It is important to bear in mind that there will be no obligation on a local planning authority or owner to enter into such an agreement. The motivation to do so will lie in the potential savings to both. Savings will come from the listed building consents contained within the agreement that will remove the requirement for repeated applications for LBC over the life of the agreement, and will also enable efficient use of the building in a manner consistent with its conservation.

4.6 English Heritage believes there will be considerable benefit to the management of the historic environment by the provision for HPAs. For owners and managers there are clearly savings to be had through the reduction of bureaucratic processes and the provision of a degree of certainty and consistency in the medium to long term. LPAs will benefit from the reduction in administrative processes and will be able to promote the development of a strategic and sustainable approach to the management of heritage assets in their area; a proactive rather than a reactive approach. At present there is a steady uptake of non-statutory HPAs and the ability to make these agreements statutory will give this process a boost by bringing forward potential candidates and allowing the full benefits of a statutory agreement to be realised.

5. Conservation Area Consent replaced with requirement for Planning Permission

5.1 Demolition of a building in a conservation area currently requires separate conservation area consent. There are some 9,800 conservation areas in England (Heritage Counts 2011). Figures for the numbers of conservation area consent applications decided by planning authorities, collated by the Department for Communities and Local Government show that the numbers for these hover somewhere between 3,000 and 3,500 per annum. Figures also suggest that around two thirds of CAC applications are accompanied by an application for planning permission for a replacement structure. The proposal is simply to remove the requirement for conservation area consent and replace it with a requirement for planning permission for entirely the same circumstances to create a more efficient, combined process.

5.2 Concerns voiced at the time of the draft Heritage Protection Bill were addressed in the provisions of that Bill, retained in the ERR Bill, which creates a new crime of failing to apply for planning permission for demolition of a conservation area building. Failure to apply for conservation area consent is currently a criminal offence and since the effect of demolition is hard if not impossible to properly reverse by enforcement notice, it is important the deterrent effect of a criminal offence is retained.

5.3 The new requirement for planning permission can be achieved by amendment of regulations so does not appear on the face of the Bill. The new planning permission will be decided in accordance with the same policy considerations as apply to conservation area consent (principally the NPPF) and will be subject to the statutory duty to pay special attention to the desirability of preserving or enhancing the character and appearance of the conservation area. The justification for and process of conservation area designation is unaffected.

6. Enabling the Exclusion of certain Features, Structures or Ancillary Buildings from List Descriptions

6.1 Currently when a building is listed, structures and other buildings that are attached to it or in its curtilage can be become protected as well, whether the Secretary of State thought they were worthy of protection or not. List entries will sometimes say that a particular feature is not of special interest, but this is currently not definitive. This can lead to considerable debate and confusion as to the extent of listing protection and unnecessary listed building consent applications made out of caution, given the potential criminal consequences of failing to apply.

6.2 The degree of confusion as to what is protected and the economic inefficiency that results is evidenced by a search of case law. A very small percentage of disputes end up with court proceedings and even fewer end up in reported court decisions, yet a search of the English law reports shows over 100 cases involving the curtilage of listed buildings. That is aside from disputes that arise concerning attached structures.

6.3 The amendments in the Bill will allow future new list entries and list amendments to declare that structures or buildings attached to or within the curtilage of the principal listed building are not protected. It will also allow for a part or feature of the principal listed building to be declared definitively as not of special interest. This will allow the Secretary of State to keep the extent of listing protection to that intended at the time of designation. It will not apply retrospectively, so existing list entries will have to be amended to take advantage of the new provisions.

6.4 Both owners and local planning authorities will benefit from clarity as to exactly what is listed, as will the listing system itself by more accurately targeting listing at what really merits protection by specifying the extent of special interest when a building is listed. The extra responsibility for doing so would fall on English Heritage, as the body which administers the listing system and advises the Secretary of State on additions or amendments to the list.

6.5 Concerns have been expressed that this will create an unsustainably large programme of work for English Heritage. Indeed, the number of entries on the statutory list is considerable—some 375,000 listings. It is not possible to estimate the exact number of attached or curtilage listed structures as no surveys have been undertaken of this category of building. This provision will indeed move some burden from the LPA and EH National Planning staff, who currently provide advice to owners on interpretation of the list, to EH Designation staff.

6.6 It is easy to identify categories of structure, such as milestones, street furniture, statues, tombs etc. which are very numerous, but have no curtilage. We can also identify and prioritise the types of buildings which are most likely to generate queries over curtilage structures, where the extent of the curtilage and the number of buildings within it is often a matter of considerable doubt. Examples include:

- Listed houses in towns or villages, including terraced houses (and also house converted, for example, to office or hotel use) with curtilage perhaps including garden walls, garden pavilion and mews buildings, etc.
- Listed country houses (including farm house or country houses converted to office or hotel use) with curtilage including stable blocks, kitchen garden walls, garden pavilions and statuary, barns and outhouses etc.
- Listed shops/office buildings in a town centre with ancillary buildings in back yard.
- Large publicly owned buildings (school, hospital, town hall, defence complexes, universities etc) with dependent structures, both attached and unattached.
- Factory or other industrial building with ancillary structures, both attached and unattached.

6.7 English Heritage has set out a programme for the next four years to prioritise upgrades to the statutory list to address these categories of building, and will be supported in this by the deployment of resources under the National Heritage Protection Plan (http://www.english-heritage.org.uk/professional/protection/national-heritage-protection-plan/)

7. Enabling Certificates of Immunity from Listing to be sought at any Time

7.1 Currently a certificate of immunity from listing (COI), which lasts for five years, can only be sought if a planning application has been made relating to the building. Applications for COIs are small in number—around 20 per annum. A prospective developer is able to submit a planning application for a building prior to acquisition, and many currently make small-scale planning applications for the site in question, often for a flagpole, to allow them to submit a COI.

7.2 The change in the ERR Bill will simply allow certificates of immunity from listing to be applied for at any time, thus removing an unhelpful bureaucratic barrier to gaining clarity over the status of the building.

7.3 While monetary savings are likely to be small in scale, there will be other benefits, such as the scheme going ahead to time and budget, due to increased certainty, and encouraging a culture of open discussions on heritage considerations at the early stages of planning a development.

7.4 The Secretary of State will retain discretion in whether to grant such a certificate. If the application does not show clearly that the building is not of special interest, he may decline the application. This will safeguard against loss of potentially listable buildings due to insufficient understanding.

July 2012

Memorandum submitted by Verina Glaessner (ERR 28)

This response, while welcoming the aim of reducing regulation, especially the duplication of regulation, across a number of primarily commercial sectors, specifically addresses issues arising from Clause 50 and Schedule 16 Heritage Planning Regulation. It is written with the advantage of ownership of a listed building in an urban (London) setting and hence brings with it a degree of practical hands on experience over several decades.

Summary

1. Not enough care is taken in Schedule 16 to delineate in detail, and therefore adequately to recognise and make provision for, the range of benefits which are inherent in, and which follow from, listed status or indeed from local recognition of aspects of the built environment. Nor are the benefits to be derived from the historic built environment itself sufficiently recognised within the Bill.

2. In the light of the above, the expectations regarding the benefits which may follow from development cannot but be unrealistic.

3. The Bill is imprecise in its wording especially in the paragraphs relating to Heritage Partnerships .Recourse to the courts will ensue over what should be matters of reasonable interpretation. Clarity will avoid unnecessary delay and uncertainty for all parties.

Overview

In this Bill the heritage sector sits in a context which includes, Competition Reform, Mergers and Anti-Trust legislation. The Explanatory Notes published alongside the Bill, while not part of the legislation, state the changes and expected outcomes.

The very specific, and indeed very diverse, nature of the heritage sector and the specific kinds of social as well as economic benefits which this sector delivers across time, to the present generation, of course, but also its potential for delivering those and other benefits to, hopefully, many future generations however, raise quite other issues and expectations than those accruing to the business and financial sector.

Legislation involving nationally and locally important heritage sites is required to respond to their specific potentials in order to ensure that these social goods are not lost but are safely, and indeed economically, delivered.

However, paragraph 377 of the Explanatory Notes, which addresses Paragraph 8 of Schedule 16 concerning the system of Certificates of Immunity from Listing, states that the CILs "give certainty to developers and owners by removing the risk of a building being listed at a late stage… thereby causing delay or even the abandonment of redevelopment schemes." Would owners inevitably in every, or even, in most cases see listed status as simply and inevitably "a risk"?

The use of the word risk is highly contentious implying that the recognition given a building or group of buildings through the listing process is inevitably, and without question, a danger to the achievement of economic and social benefit. The use of the word "abandonment" is inappropriately emotive in this context.

The multiple benefits, and indeed security, given by listed building status is disregarded. Regulation is surely required to be impartial and to recognise that well-being implies availability of a whole range of benefits for the present, and also for future, generations (see NPPF). The specificity of the benefits yielded by those features of the built environment, designated or undesignated, which fall within the category of heritage must be clearly recognised in legislation. Only when these are recognised can those calculations of benefits arising from development be adequately or accurately weighed against the benefits derived, or potentially able to be derived, from the existing buildings.

Certificate of Immunity from Listing

These paragraphs likewise fail to acknowledge the existence of any of the benefits derived from listed status. This blindness results in a Bill which, in these sections, is insufficiently inclusive of all interests involved and insufficiently impartial. A serious flaw. Furthermore, the removal of any restriction on when a COI may be applied for, leaves the role of the community unclear. This sits uncomfortably alongside the recognition given by the Localism Act to community rights in regard to locally important buildings and other aspects of the local environment.

Heritage Partnership Agreements

The Bill appears to have conceived Heritage Partnership Agreements primarily in relation to major developments. However, it is also, as drafted, applicable piecemeal to the large number of modest usually grade II listed properties, and in this respect it is particularly ill-thought out. A clearer and more tightly worded version could prove a useful tool in making optimum use of such properties while retaining their historic architectural and social integrity.

The complex of differing forms of ownership, with freeholders, lease-holders, sub-lease holders and tenants all having tenures of a kind, necessitates clarity in defining partnership eligibility, obligations and responsibilities. The Bill lists possible parties to the Agreement .The wording refers to "an owner" and the relevant planning authority' and states that "any of the following may" also be party to the Agreement. A list of seven categories of person follows at 9A including "any person who is involved in the management of the listed building." The "person… involved… in… management" of the building has presumably been delegated that duty by an owner and therefore only the principal subject should here be recognised, by way of protecting the legitimate interests of long term residents. The term person should be replaced by person or entity, so that small companies set up by long term residents to manage single buildings are not excluded.

The benefits of long term residents and home ownership to the local and national economy are well recognised. The Bill has the opportunity to be quite precise in recognising those benefits. They entail a willingness to invest in long term improvements to the built environment. Parties to the Agreement should include those for whom as tenants or freeholders the listed building, whole or part, has provided for a significant length of time, and continues to provide, the sole and only place of residence. This should apply whether

that ownership or occupation resides in a person or a company comprised solely of resident directors, as suggested above.

Fully qualified opinion should be required especially in the case of Page 214 (5) (a) specifying works that would or would not… affect the character of the listed building as a building of special architectural or historic interest "and also in relation to knowledge of the structure and building technologies employed. A series of *ad hoc* agreements could undermine not only the structural viability of the listed building or buildings but also the architectural, and social interest and integrity of the area.

Reasons for termination of the agreement and qualifications for Partnership membership must be clearly laid down in legislation, as must be the requirement to consult.

Listed Building Consent to form part of Planning Permission

The incorporation of Listed Building Consent within Planning Permission seems workable but implies charging for a hitherto free service: a possible disincentive.

Amending Section 1(5) of the P (LBCA)A 1990 "A Listed Building includes any Object or Structure fixed to…"

The Bill could make a distinction between historically valuable examples of building technology and post 1945 garden sheds, remembering the reasons for the Act's caution in this area.

Why include Heritage in this Bill?

The wider question is whether Section 50 and Schedule 16 regarding Heritage Planning Regulation are required at all in this Bill. Is there a business case for a further deregulation of demolition? Does not the case of Liverpool, where demolition proceeds apace within the context of current legislation, prove the point? Has that city provided evidence for a necessary connection between the removal of the "obstacle" of Heritage protection and economic success?

July 2012

Memorandum submitted by bluesuntree limited (ERR 29)

I have been involved in furniture for most of my working life and I am passionate about good design, which is why I chose to start the business. We have a turnover of nearly £6 million and employ 20 staff.

This submission concerns Clause 55 of the Enterprise and Regulatory Reform Bill (the repeal of section 52 of the Copyright, Designs and Patents Act 1988) and the effect it will have on businesses such as bluesuntree, which manufacture and sell classic furniture designs which are outside the current 25 year protection period but (following the repeal of section 52) will fall into the extended copyright protection period of artist's life plus 70 years and therefore become unlawful.

We would like Parliament to ensure that an adequate transitional period is introduced to ensure that furniture retailers such as bluesuntree are given an opportunity both to adapt their business models and to clear existing stock.

If businesses aren't given sufficient time to clear their stocks, those stocks would have to be destroyed which would of course have a devastating effect on those businesses.

Furthermore, if businesses aren't given sufficient time to adapt their business models they will most likely fold, with the consequent effect on local economies through the UK. In our own case, without our classic ranges (which account for over 80% of our sales) we could not continue if the law came in without an adequate transitional period allowing us to change our business and create new designs.

This document outlines the issues we have in changing our business model and sets out our case for an adequate transitional period.

So the problem we have is we have to change what we sell, but what does that involve?

1. New Suppliers

Our current suppliers make designer classics, so we have to find new suppliers, this will involve extensive research into what products we can and cannot sell, finding new suppliers, travelling around the world, all time and expense. We will need to visit trade fairs, visit factories and carry out manufacturing and environmental audits to ensure they can make the items in a consistent quality and have measures in place to ensure this.

Things we have to look for:

- Do they inspect the raw materials before starting?
- Are they tested for the correct moisture content?

— Is the wood kiln dried?

— Are there sufficient controls over the process through production to ensure the components are being manufactured to the correct tolerances?

— Is the final inspection against a signed off sample and do they inspect the packaging to ensure it's labelled correctly?

That's just product, we also have to ensure there are no ethical reasons for not working with the factory. Records need to be inspected to ensure that there is no forced or under age labour used, does all machinery have sufficient guards in place, is the correct protective wear available etc etc.

2. New Products

If we take the likes of the highly popular plastic chairs and look at making a new version of these chairs, they will require a significant investment on our behalf to firstly:

— Have a designer come up with a new design;

— We then pay to have that modelled in auto cad, at least £5,000; and

— Pay for expensive moulds to be made at least £10,000.

The products will then need to be tested for strength and stability and any fabrics are tested for UK fire regulations, another £5,000.

If everything passes, then we buy and ship the stock, a further £30,000 (based on just one container load).

Then we have to market the chairs, photograph them, Google adverts placed, website developed for the item, trade fairs paid for, magazine adverts, samples given to all dealers, blogs etc, another £40,000+.

Already we have spent a minimum of £100,000 and this is based on the best case scenario that people love the new chair and it sells quickly, if it doesn't as some will not, we start all over again, money and time permitting.

3. A New Product is Born

Many of our products are large items of furniture and in most cases are well considered purchases.

Not everyone will require a new sofa as soon as we release our latest model, and it will take time to realise sales from new products as people become aware of them.

So the life span of a product can be up to one to two years to develop test and ship, we need to photograph, market the items and people need to weigh up if it's for them.

So in my opinion it takes at least three to four years for new lines to go from drawing board to any sales of profitable quantities, if indeed they get that far, not every product sells.

It's only after four or five years that we will then be associated over a large audience for this item of furniture and people will actively start to search over the internet for the name of this item, if we are lucky enough to come up with the winning design that is?

4. Google

Around 80–90% and in some cases 100% of the businesses receive their sales via the internet, and if the sale was in the showroom, it's more than likely it was internet driven before they came to the showroom.

How does that work?

Quite simply at the moment if you want to buy an item you type into Google "Barcelona chair", then our adverts will appear, you click on them and we get a sale.

Going forward we will not have any well-known names for people to search for these items, unless we have the time to develop and market them for a sufficient period.

In short, we will be left with putting money on campaigns for words like dining chair, sofa, pendant light etc. and the competition in this area is immense.

We will have to try and outbid adverts from major high street stores that quite simply we can't afford to do as our turn over is now much lower than before.

5. So What do we Do with all of our Stock?

Why don't we have a Mega sale?

Most of us are holding quite substantial stocks and have many orders already in place with our suppliers, in my case as of this moment, we are holding around £1.5 million in stock and a further £1.5 million in orders that are either in production or made and in transit to ourselves.

If we were not given sufficient time ie we are asked to sell this within 12 months, that will have the effect of flooding the market with extremely cheap reproductions as we all try and beat each other's prices to ensure we call sell the stock off.

In my opinion we would very quickly all start selling the products for less than what we paid for them just to recoup as much money back as possible.

This will also have a knock on effect of how our customers and the banks perceive our businesses,

— Are they closing down?

— Can I get all of their other products at a huge discount now?

— Will they honour our warranty period?

Quickly faith in our brand will be diminished and everything we have worked for over the last six or seven years will be gone.

If there is any stock left after the sale and after the transition period is up, this will have to be written off, when the bank sees this on our balance sheet it is going to be reluctant to lend any further money and may require assurances for the loans we already have.

It is imperative that we are allowed to sell off the stocks naturally, so maintaining the brand through keeping the market price where it should be, allowing all of us to concentrate on new products and bringing in new designs whilst selling the designer classics stocks we have.

I believe that if we were given five years to allow us to continue to import the products, at which point all designer classic imports should cease.

Then we are allowed to naturally sell off the products we are holding, that will give us sufficient time to continue the business at the same levels whilst investing in new items and bringing them to the market place to replace the classics we a holding.

This will ensure that traffic driven to site remains healthy whilst we showcase our new products over a sufficient amount of time to allow the public to take to them, and dealers to start pushing them through their channels.

6. Time to Change

One issue we have is length of leases and cost of rent, with a smaller turn over we could not afford the rents we are paying for the large premises that we will no longer need.

If we are given the five plus years to sell off any stocks, hopefully all of us can honour our contracts, rental agreements etc, and over the period we will see how the new style business is working and at the time those contracts expire we will have sufficient knowledge of the new product sales and are able to cut our cloths accordingly.

July 2012

Memorandum submitted by Unite (ERR30)

This evidence is submitted by Unite the Union. Unite is the UK's largest trade union with 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors.

Executive Summary

— Unite is particularly concerned about Part 2 of the Bill that covers employment issues.

— None of these changes will do anything to improve the economy and will have far reaching and detrimental impacts on the poorest and most vulnerable people in our society.

— Unite is also concerned about the changes to the EHRC and the introduction of sunset clauses.

1. *Introduction*

1.1 While some elements in the Bill such as the Green Investment Bank and changes to rules on Directors' Remuneration are somewhat welcome they do not nearly go far enough. Others such as the ideological attacks on employment rights and the Equality and Human Rights Commission are likely to do the British economy damage, creating greater insecurity, inequality and discrimination.

1.2 This submission is divided into two parts. Part 1 will deal with the broad context of this Bill, considering the argument used to justify changes and their broad implications. Part 2 of the submission will deal with Unite's concerns clause by clause.

Part 1—Context and Background

2. *Government policy*

2.1 The Enterprise and Regulatory Reform Bill (2012) was launched with the express aim of building "a lasting recovery has to be built on the back of sustainable sources of demand and, above all, exports and stronger business investment" and scrapping "unnecessary bureaucracy that is holding back companies, overhaul the competition framework, and boost business and consumer confidence".[43]

2.2 Unite has consistently argued that the Government's economic strategy is wrong headed, based predominantly on hear-say, anecdote and a strong ideological belief system that has no bearing on what sensible businesses or economists are saying. These reckless policies have already driven the UK back into recession and Unite is extremely concerned that the long-term result will be devastating for the majority of British people for decades to come.

2.3 This Bill does nothing to alter that view, doing little to improve economic demand or create jobs in the economy. There is no evidence that any of these measures—which will undermine job security for working people—will benefit the economy or raise employment levels.

2.4 Viewed alongside the raft of other changes in employment law currently being introduced, the proposals in this Bill constitute an enormous attack on people's human rights at work. This assault ranges from raising the qualifying period for Unfair Dismissal to two years, introducing fees for tribunal cases and requiring parties to pay for witness expenses for tribunal hearings, to allowing Employment Tribunal Judges sitting alone in unfair dismissal cases.

2.5 In addition there have been "Calls for Evidence" and Consultations on ET fees, TUPE, collective redundancy consultation periods and "no fault compensated dismissals" and more are threatened, included on "protected conversations". But it seems now that the provisions in the ERR Bill might well be used to provide for something similar.

2.6 The evidence from employers does not support Government claims. A business perceptions survey that BIS commissioned[44] undermines the Government case. Of all the businesses surveyed the majority (60%) do not think employment regulation dissuade them from employing more staff. Of all the different sized business only a majority of sole traders did not agree that employment regulation is fair and proportionate—ie people who do not actually employ anyone. Of the 40% that did think employment regulation was a burden, only 1% thought that dismissal/disciplinary action is the thing that most puts them off employing staff—that is only 0.04% of all those surveyed. This was not even in the top 10 issues bothering businesses.

2.7 Unite has no doubt that many of these changes suggested in this call for evidence will predominately hit the poorest and most vulnerable workers in the economy.

3. *The importance of employment law*

3.1 Unite strongly asserts the need for fair employment rights in an economy and does not share the current Government's view that labour market regulations, be it in law or through collective bargaining arrangements, are obstacles to an efficient labour market and a functioning market economy. This view can be seen across Government policy including in the recent attacks on employment rights and opposition to union facility time. The Government's simplistic and ideologically dogmatic view of the labour market fails to grasp the extreme imbalance of power between employers and employees within it. This imbalance is what regulation is there to address.

3.2 Employment law is enshrined in many international conventions and charters. For example they are underpinned by Article 11—freedom of association—of the European Convention on Human Rights and Fundamental Freedoms (ECHR). Litigation on behalf of trade union members also raises issues under Articles 6 (Right to a Fair Trial) and 8 (Respect for Private Life) of the ECHR.

3.3 Similarly they are protected by Article 31 (Fair and Just Working Conditions) of the Charter of Fundamental Rights of the European Union 2006. Article 30 of the Charter of Fundamental Rights of the European Union "every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices". According to Article 4 of ILO Convention No 158 on Termination of Employment of 1982 "the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".

3.4 The Government's proposals—particularly in the context of other reforms—are undermining such fundamental and basic human rights.

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[43] Vince Cable, The Secretary of State for Business, Innovation and Skills, *Hansard:* 11 June 2012: Column 64. http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120611/debtext/120611–0002.htm#12061114000001

[44] http://www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12–626-dismissal-for-micro-businesses-call.pdf

4. *The employment relationship*

4.1 Employees are in a unique position of inequality as regards the conduct of civil claims against their employer arising out of the employment relationship.

4.2 In the employment context the "relationship of subordination" and "innate inequality" is well recognised. In her book *Data Protection in the Financial Services Industry* (2006 ISBN 0 556 08662 X Page 25), Mandy Webster expresses it this way: "There is unequal bargaining power between an individual and an organisation… Nowhere else is this so evident than in the relationship between employer and employee… The view has been expressed that in the relationship between employer and employee, the employee is at such a disadvantage in terms of bargaining power, that they cannot ever give consent freely and without undue influence from the employer, simply by virtue of the fact that this is the employer. The Information Commissioner indicated agreement with this view."

4.3 Unite is a member of nearly all the global and European union federations. Through these and other bodies, such as European works councils, Unite works closely with other trade unions across the continent and world. It is widely recognised that the UK has one of the most decentralised and deregulated labour markets in the EU and OECD.[45] Empirical research has shown that there is absolutely no evidence that labour market deregulation improves the economic performance of a country.[46]

4.4 As John Philpott, the chief economist for the Chartered Institute of Personnel and Development put it: "The vast weight of evidence on the effects of employment protection legislation suggests that while less job protection encourages increased hiring during economic recoveries it also results in increased firing during downturns. The overall effect is thus simply to make employment less stable over the economic cycle, with little significant impact one way or the other on structural rates of employment or unemployment."[47]

4.5 Undermining employments rights encourages disharmony in industrial relations and this will have a major detrimental effect on society and the economy. According to Mamphela Ramphele, former Managing Director at the World Bank "sound industrial relations can lead to a stable economy and prevent disruption to national life". While "coordination among social partners can promote better investment climates while also fostering a fairer distribution of output" (*World Bank Report, 2002*[48]).

Part 2—Unite Comments on Specific Clauses in the Bill

5. *Employment*

5.1 Unite's main concerns with the Bill relate to the employment rights issues covered in Part 2. The consultation will deal with these first before returning to other elements of the Bill at the end.

5.2 Unite sees no justification for these arbitrary changes that are being proposed. Such proposals will fundamentally weaken the opportunity for workers to access justice in employment disputes while doing nothing to increased employment or stimulating the economy. What follows is a clause by clause explanation of these concerns.

6. *Dispute resolution and ACAS conciliation*

- *Clause 7: Conciliation before institution of proceedings.*
- *Clause 8: Extension of limitation periods to allow for conciliation.*
- *Clause 9: Extended power to define "relevant proceedings" for conciliation purposes.*

6.1 Unite the Union is always happy to involve Acas in appropriate cases. Unite tries to conduct disputes with employers in a responsible manner and believes that conciliation is invaluable when used in the right situation.

6.2 Unite is, however, concerned that Acas will be set targets and otherwise be encouraged to settle claims which are not in the best interests of claimants. This includes those cases involving stress or other injury. Acas staff are not qualified and do not understand such issues.

6.3 Unite is also concerned that these changes will increase the time before resolution in a contested and irreconcilable case. Unite envisages practical difficulties in relation to obtaining a certificate as well as delay, additional expense for both employees and employers. Unite sees a danger that the Acas conciliation process will grow into a quasi-Tribunal process, but without safeguards. As a consequence potentially complex legal challenges to decisions at Acas will almost inevitably arise which could freeze the whole process pending legal clarification of points under challenge.

6.4 It is likely that these proposals will lead to further court action on procedural grounds, such as problems in the conciliation process or the granting of a certificate. Unite is particularly worried about the impact of the

[45] OECD statistics: http://www.oecd.org/document/22/0,3746,en_2649_33927_43221014_1_1_1_1,00.html
[46] http://www.tuc.org.uk/extras/flexiblewiththetruth.pdf
[47] http://www.cipd.co.uk/pressoffice/press-releases/questionable-merit-watering.aspx
[48] https://extranet.unitetheunion.org/external/default/WDSContentServer/WDSP/IB/2002/09/13/000094946_02083104140023/Rendered/PDF/,DanaInfo=www-wds.worldbank.org+multi0page.pdf

obligation to provide information to ACAS. This should not be used to prejudice a claimant's case in a tribunal and all information must remain confidential.

7. *Employment Tribunal Reform*

— *Clause 10: Decisions by legal officers.*

7.1 Unite is concerned that these new legal officers will not be trained to a high enough standard and will not be employment law specialists. Clause 10 implies that decisions made by a legal officer would have the same status as an employment tribunal decision and could only be appealed to the Employment Appeal Tribunal. Such appeals are complex and costly and the EAT cannot consider the merits of any case, only points of law.

7.2 Unite believes if legal officers are to determine some basic cases, it is essential that any decision can be reviewed by an employment judge or appealed to an employment tribunal. Even jurisdiction issues can be complex and require argument and evidence.

— *Clause 11: Composition of Employment Appeal Tribunal.*

7.3 This is a further rolling back of the principle of the tribunal system, which is intended to rely on the practical industrial relations experience of the employee and employer "wing members". It is hard to see how this move away from the "industrial jury" model will assist with robust and commonsense interpretations of reasonableness, particularly in unfair dismissal cases.

8. *Unfair dismissal awards*

— *Clause 12: Power by order to increase or decrease limit of compensatory award.*

8.1 These changes have not been subject to public consultation. They were also not included in the Government's response to the *Resolving workplace disputes* consultation. Unite suspects that the Secretary of State intends to set the cap at the minimum despite powers to do otherwise.

8.2 Unite is strongly opposed to this change because in practice this amounts to the discredited "no-fault dismissal" idea in all but name, For example, if an employer buys out a business and for no good reason wants to sack a 55 year old worker on £39,000 a year with 30 years service and entitlement to six month's notice, the employer will simply be able to hand over eight months pay as a compensatory award. The worker will have no legal right to challenge. If the worker was on minimum wage, the employer would only have to pay £13,000. As 24.2%[49] of all periods of unemployment exceed 12 months this means a significant blow to a significant number of successful claimants.

8.3 Tribunals will be unable to award more compensation even when the circumstances of the case would justify greater compensation. Pension loss is not included therefore if there was a significant claim for pension loss no compensation could be given.

8.4 Unite is shocked by such proposals. Even Adrian Beecroft said that "…the rules setting out the level of compensation for unfair dismissal seem reasonable."[50]

8.5 The proposals significantly undermine the concept of "polluter pays" whereby an aggrieved party in a contract is reimbursed for the full loss of earning associated with the illegal activity. For example, when there is a dispute about a contract for supply of goods, where the employer has supplied inferior quality of goods to that specified in a contract, the financial award is unlimited and is equal to the loss suffered by the customer. In contrast when a human being is treated unlawfully by an employer who breaches their contract, the proposals limit damages to £26,000 or less in many cases rather than the actual loss to the employee.

8.6 Lastly this proposal would open up major loopholes for employers to avoid payments, such as by setting up separate businesses to exploit these measures. Such loopholes will inevitably lead to satellite litigation based on for example the definition of type of business adding greater costs to all involved.

8.7 Unite would strongly argue for the removal of this clause.

9. *Financial penalties*

— *Clause 13: Power of employment tribunal to impose financial penalty on employers etc.*

9.1 Unite believes that this clause misses the main problem with employment tribunals, that is many rogue employers do not obey the rulings of employment tribunals and refuse to pay workers arrears and costs that they are owed. According to the CAB, this problem affects as many as one in 10 claimants.[51]

9.2 Rogue employers will not be deterred by the risk of such a limited financial penalty. £5,000—or £2,500 with the early payment deduction—is a small price to pay for getting rid an employee they do not want. In fact the penalty may simply encourage them not to pay the penalty while refusing to pay the compensation to

[49] Office for National Statistics Labour Market Statistics CLA02: Claimant count by age and duration (last updated May 2012). http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77–230793

[50] http://news.bis.gov.uk/imagelibrary/downloadmedia.ashx?MediaDetailsID=5551

[51] Citizen's Advice Bureaux, Justice Denied, 2008, http://www.citizensadvice.org.uk/justice_denied.htm

the employee. Unite believes this issue would therefore be better dealt with by dealing with this non-compliance issue. Proper enforcement of employment tribunal rulings would serve as a much more powerful disincentive to employers to abuse workers.

9.3 The business lobby is demanding that clause 13 is removed from the Bill but the reality is that it will be little used by tribunals. Few ET Judges will be prepared to say that a breach had aggravating features. Today, in those relatively few claims that do not settle, it is rare for a judge to make recommendations (such as that a manager undertakes discrimination training) alongside an award.

9.4 Unite understands that the Government is proposing to remove this provision in the Equality Act 2010 that gives employment tribunals the power to make wide recommendations about the employer's workplace or in relation to their behaviour in successful discrimination claims. This makes no sense. Well constructed recommendations designed to prevent recurrence of a discriminatory act in future can be and have been very effective avoiding discrimination. The workers are not exposed to discrimination, the employers do not expend resources and pay damages and costs and the tribunal is less troubled by claims as a result.[52]

10. *Whistle-blowing*

— *Clause 14: Disclosures not protected unless believed to be made in the public interest.*

10.1 This clause restricts the definition of "qualifying disclosure" in whistle-blowing legislation to "in the public interest", which has not been defined.

10.2 Unite is concerned that this would deny protection if an employee complains that their own, or colleagues, contracts of employment that has been breached by the employer.

11. *Statutory redundancy pay increases/decreases*

— *Clause 15: Indexation of amounts: timing and rounding.*

11.1 Unite opposes this as over the long term this will mean that a "weeks pay" will lose value compared to real wages. This will effect payments such as Statutory Redundancy Pay. Unite also believes that a "week's pay" is far too low.

12. *Compromise Agreements*

— *Clause 16: Renaming of "compromise agreements", "compromise contracts" and "compromises".*

12.1 Unite is concerned by this change in the context of amendments from BIS to introduce into the ERR Bill provisions for settlement offer to be made which cannot be revealed in proceedings.

12.2 Unite also understands that BIS plan to consult in the near future on ways of encouraging the use of compromise agreements. Unite will monitor this consultation closely to ensure that it does not lead to a diminution of employees' rights.

13. *Other areas of the Bill*

— *Clause 1: The green purposes.*

— *Clause 2: Designation of the UK Green Investment Bank plc.*

— *Clause 3: Alteration of the objects of the UK Green Investment Bank plc.*

— *Clause 4: The UK Green Investment Bank plc: financial assistance.*

— *Clause 5: The UK Green investment Bank plc: accounts and reports.*

— *Clause 6: The UK Green Investment Bank plc: documents to be laid before Parliament.*

13.1 Unite has been a strong supporter of the principle of a state investment bank including using the existing Government holdings in the banking industry as a vehicle for this. Whilst the proposed Green Investment Bank is a partial step in this direction its remit is limited. Unite is concerned that it will not have enough finances, and there are real question marks about whether it will deliver either genuinely green investment or vital investment in employment that is urgently needed.

13.2 The stronger case for the UK to adopt the state investment bank model is based on the need to leverage additional investment in a wider range of sectors and to help reduce its dependence on property and finance. Such a bank would have the capacity to raise large amounts of funds on the commercial markets, backed by a smaller capital base provided by the state. A state investment bank could be set up on a commercial basis to be run by an independent board, with all stakeholders represented, subject to a remit to generate a long-term return based on investment in British business in a diverse spread of sectors and in infrastructure.

13.3 This model has been used by successful state banks in other European countries and around the world.

— *Clause 49: Sunset and review provisions.*

[52] http://www.personneltoday.com/articles/2012/06/18/58594/equality-act-2010-what-recommendations-do-tribunals-make-to-employers-that-discriminate.html

13.4 Unite opposes this as it believes that this change is likely to have wide ranging implications if used as a matter of course and could be a way to further undermine hard won rights and legislation such as employment rights.

— *Clause 51: Commission for Equality and Human Rights.*

13.5 This clause significantly waters down and reduces the role and operation of the EHRC. The Government is currently engaged in a massive assault on the roles and powers of the EHRC. It has already experienced massive cuts to resourcing and grant making powers, along with outsourcing of the EHRC helpline. Unite believes that this signals the abolition of the EHRC as an organisation that works to promote equality, and eradicate discrimination.

13.6 Unite is strongly opposed to these changes and sees this as further evidence of the Coalitions lack of commitment to tackling discrimination and promoting equality.

— *Clause 57: Directors' remunerations: effect of remuneration report.*

13.7 Unite believes that this is a step in the right direction, but doesn't go far enough as firstly the vote is likely to take place after the remuneration has already been received and secondly the directors will still be able to sue the company for breach of contract.

— *Other clauses.*

13.8 Unite is still monitoring the changes to market regulation, merger and competition law covered in this Bill.

July 2012

Memorandum submitted by The City of London Law Society's Competition Law Committee (ERR 31)

SUMMARY

1. The City of London Law Society Competition Law Committee broadly supports the proposed legislative reforms in Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, subject a number of reservations (summarised in paragraphs 3 and 4 below).

2. In particular, we are supportive of:

— the new unified competition authority, the CMA, having separate personnel for the different phases of merger and market investigations—Clause 18, and Schedule 4 paragraphs 73, 87 and 165;

— the decision, following consultation, not to introduce mandatory pre-notification in UK merger control—for which we understand that the tougher interim measures in Clause 22 are a reasonable *quid pro quo;* and

— the provisions enabling a separation of powers between the investigative and decision-making function of the CMA in "anti-trust" cases (ie investigations into alleged anti-competitive agreements or abuses of dominance), in Clause 34(4)—which we think will enhance procedural protections, fairness and the perception of fairness.

3. We are very concerned that the proposals to amend the cartel offence, taking away the *mens rea* of "dishonesty", are premature, unfair and potentially chaotic (Clause 39).

4. We are also concerned that:

(a) the new powers of the Secretary of State as regards public interest (rather than competition) issues in market investigations risk re-politicising the UK competition regime (Clause 27); and

(b) the proposed new time limits in merger control will prolong the competition process in M&A transactions, putting the UK regime on a worse footing than international best practice (Clause 24(2) and Schedule 8 paragraph 4).

THE CITY OF LONDON LAW SOCIETY COMPETITION LAW COMMITTEE

5. The City of London Law Society represents approximately 14,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world.

6. The Society's Competition Law Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

7. The authors of this response are:

Robert Bell, *Speechly Bircham LLP* (Chairman, Competition Law Committee).

Michael Grenfell, *Norton Rose LLP* (Chairman, Working Group on the Enterprise and Regulatory Reform Bill).

Becket McGrath, *Edwards Wildman Palmer LLP.*

Samantha Mobley, *Baker & McKenzie LLP.*

Margaret Moore, *Travers Smith LLP* (Deputy Chairman, Competition Law Committee).

8. The Committee took an active part in the Government's consultation on the competition law reform proposals that underlie Parts 3 and 4 of the Bill, liaising both formally and informally with the Department of Business, Innovation and Skills and with the competition authorities, including by way of a formal written consultation response that was submitted to the Department on 8 June 2011.

The Competition and Markets Authority

9. We understand the Government's desire to amalgamate the two UK competition authorities into a single authority, the proposed Competition and Markets Authority (CMA)—with a view to creating a unified body that will be a stronger advocate for competition law and policy, both domestically and on the international stage, and also possibly to eliminate a degree of duplication of costs and administration.

10. While we have had no particularly strong views as to whether there should be two authorities, as at present, or a single unified authority, we have been very strongly of the view that, if there is to be a single CMA, this should not be at the expense of effective "checks and balances" to guarantee procedural fairness in merger investigations and market investigations.

- At present, there is an effective separation of powers in merger and market investigations, with the Office of Fair Trading (OFT) conducting an initial "first-phase" examination and, to the extent that the OFT identifies a concern, a separate body, the Competition Commission, conducting the more detailed "second-phase" inquiry.
- This separation of powers ensures that, if there is to be a second phase, the matter is looked at by a "fresh pair of eyes" before any regulatory intervention, thereby reducing the risk (and the perception) of "confirmation bias".
- We were concerned that the amalgamation of the OFT and Competition Commission into a single body would eliminate these safeguards, and in the consultation last year we pressed the Government to retain the "fresh pair of eyes" principle, with a separate group of people in the CMA handling the second phase.
- We therefore very much welcome the proposals for a separate panel within the CMA to conduct the second phase of merger and market investigations, as provided for in the Bill in Clause 18, read with Schedule 4, paragraphs 73, 87 and 165.

11. We hope and expect that the panels will be constituted of senior, experienced people from the worlds of business, law and economics, with most having a good understanding of competition principles—as is at present the case with the Competition Commission members who make the second-phase decisions in merger and market investigations.

Mergers

Stronger interim measures—Clause 22

12. We recognise the need for stronger interim measures in merger control investigations—ie to prevent the parties integrating their businesses and pre-empting the outcome of a competition investigation into the merger. We acknowledge this to be a *quid pro quo* for the Government's abandonment of earlier proposals to introduce compulsory merger notification—proposals which would have imposed an unnecessary bureaucratic burden on businesses and an unnecessary cost on competition authorities.

- A reason for the Government initially contemplating a compulsory merger notification system (whereby M&A transactions could not be completed until the competition authorities have examined and cleared the transaction) had been that, otherwise, there is the danger that parties will complete mergers that do have serious anti-competitive effects, and then integrate the merging businesses, all before the authorities have a chance to investigate—so that, if the authorities eventually decide that the transaction should not be allowed (being seriously anti-competitive), the businesses are by then so fully integrated that it is difficult to "unscramble" the merger.
- Since there will not now be compulsory notification, the *quid pro quo* is that—to solve this "unscrambling" problem—Clause 22 of the Bill proposes tougher "interim measures", allowing the CMA to stop, or if necessary reverse, action (such as business integration) which is "pre-emptive", ie which might prejudice the outcome of a CMA investigation into whether or not the transaction is anti-competitive.

13. The proposals in Clause 22 are consistent with our recommendation, during the Government's consultation last year, that the suspension of transactions pending investigation (to avoid "pre-emptive action") should be at the CMA's discretion, rather than automatic in every case, and we welcome this.

14. We have no objection to the measures in Clause 22 to extend the power to suspend to anticipated, as well as completed, merger transactions (Clause 22(3)), and to allow measures to undo integration steps (Clause 22(5)).

15. We have just two suggestions:

(a) In Clause 22(5), the proposed section 72(3B)(b) widens the scope of the measures that the CMA may take to prevent pre-emptive action, including the power to impose "such other obligations, prohibitions or restrictions as it considers appropriate for that purpose". This seems very wide indeed, and we would urge that the word "appropriate" be replaced by "necessary" so that the powers are only to impose obligations etc necessary to undo or mitigate pre-emptive action.

(b) In line with our submission to the Government, while we accept that the CMA should have discretion, we think it important that there be some guidance to the public on how the discretion is to be exercised. We therefore recommend that a provision be inserted, possibly in Clause 22 of the Bill, requiring the CMA to issue guidelines on how it will exercise the powers in section 72(2) and (3B).

Time limits for "first-phase" process—Clause 24(2)

16. We note that Clause 24(2) of the Bill, read with Schedule 8 paragraphs 4 and 9, has the effect of extending the period for "first-phase" consideration of mergers (ie the period before the authority to decide whether to clear the transaction, or launch a full "second-phase" investigation lasting several months):

— Currently, under the UK merger regime, the submission of a prescribed "merger notice" results in a first-phase decision within just 20 working days, extendable to 30 working days. As an alternative to a "merger notice", the parties can choose to notify with a submission in a form of their own choosing, in which case there is a non-binding target for a decision within 40 working days.

— Under the proposal, there would be a period of 40 working days, beginning not on the parties submitting of the merger notice, but on the CMA notifying the parties that it is satisfied that the merger notice contains sufficient information. (Conditional clearance would extends the period to at least 50 working days, by virtue of the proposed section 73A(3) and (4) in Schedule 8 paragraph 7.)

17. As a general point, this is clearly a retrograde step—extending the period in which parties have to wait before they know they have clearance. It also puts the UK out of line with international norms for the period from notification to a "first-phase" decision:

— under the EU Merger Regulation, it is 25 working days (extendable to 35 working days for conditional clearance);

— in Germany, it is one month, ie less than half of the proposed UK period; and

— in France, it is 25 working days (extendable to 40 working days for conditional clearance).

We would propose 30 working days for the UK, moving the UK nearer to international norms.

18. Subject to this overriding point, we have a couple of specific points on the time limit, as follows.

19. First, as the Bill is currently drafted, the time period (40 working days, extendable in the case of conditional clearance) would start to run only from the time when the CMA gave notice the parties that their merger notification was adequate (Schedule 8, paragraph 8(4)). Absurdly, there is no time limit on the CMA for giving such notice to the parties, and it is quite possible that the CMA could take many days (or even longer) from the parties' original notification to give the parties this notice. The effect of this is, literally, that there is no guaranteed time limit for the parties from their giving a complete notification to the CMA's first-phase decision; it is indefinite. This urgently needs to be remedied. We would propose a mechanism under which the CMA must respond within a certain number of days to state whether the parties' merger notification (or amended merger notification) is adequate—ie "meets the requirements of subsection (2)" of s96 of the Enterprise Act—and that, if the CMA has not objected within that period, the parties' merger notice is deemed to be adequate and the 40 working day time period begins from that date.

20. Our second concern is that the CMA should not get into the habit (which, unfortunately, has recently been the European Commission's practice) of requiring draft merger notifications, which it considers for many weeks, before asking for the merger notification to be formally submitted, the event which triggers the statutory time period. That practice has the effect, in reality, of very considerably prolonging the time to the first-phase decision. To address this, we would suggest a provision empowering the Secretary of State to give directions to the CMA on the procedure for handling merger notices, and the Government should make clear that such a "pre-notification" process, prolonging the first-phase examination, will not be acceptable.

MARKET INVESTIGATIONS

21. Under the Enterprise Act 2002, political considerations were taken out of competition policy, so that the sole criterion for decisions in merger and market investigations became the effect on competition in UK markets. There were, and are, only very limited exceptions to this: certain public interest grounds within the merger regime; and also the ability to intervene on public interest grounds (currently only national security grounds) under the market regime (sections 139 and 153). The latter power has not, however, been used to date.

22. The Bill (Clause 27) sets out new procedures for the serving of intervention notices to allow public interest issues to be considered in market investigations. It was envisaged in the Government's March 2011 consultation paper that potentially greater use would be made of these existing powers. It is also possible that

new public interest criteria for intervention under the existing section 153(3) of the Enterprise Act could be added to allow the Secretary of State to ask the CMA to consider and report on a number of public interest issues, as well as competition issues, in the context of a market investigation.

23. We are, however, concerned about the Secretary of State being given the power to issue an intervention notice in market investigations on wider public interests grounds . We take the view that there are substantial risks in mandating the CMA to look at public interest issues even where they are closely allied to a market investigation.

— Issues of public interest in markets are for Ministers and Parliament, not for competition authorities. We think the proposal is a slippery slope which could result in public interest issues dominating future market investigations which should be primarily competition-based.

— The CMA does not have the required expertise or experience to opine on public interest issues. Adding appropriately qualified independent individuals to the market investigation panel would further increase costs and put pressure on scarce financial resources.

— It would compromise the focus of the CMA as a centre of competition excellence.

— It seems to us wrong that within the context of a competition law based system unelected officials will be mandated to opine/report on what is essentially public policy, indeed political, issues. This is so even if the panel members are empowered only to make recommendations with the Minister taking the final decision. Therefore we would suggest that these powers, if they are extended, should be limited to the areas such as media plurality and financial stability in addition to national security which is already been included in section 151—this is similar to the current merger control regime. Accordingly we would recommend that section 153(3) of the Enterprise Act 2002 should be amended as follows:

"(3) The Secretary of State may by order modify this section for the purpose of specifying media plurality or financial stability to be specified considerations in this section".

24. However, if these new powers for the Secretary of State are to stay in the Bill, we think it is important that the members of the CMA panel considering competition matters should do so independently of those considering the public interest issues. The Bill contemplates in Clause 27(7) and (11) that the Secretary of State "may" appoint a public interest expert to opine on full public interest issues. We think that, if the Secretary of State does issue an intervention notice, any public interest issues must be considered by public interest experts alone, and that they should report separately to the Secretary of State on public interest issues. Therefore we would suggest that, in Clause 27(8) of the Bill, section 140A(7) should read:

"(7) Where the Secretary of State makes a full PI reference under subsection (5) the Secretary of State must appoint a public interest expert under section 141B"

and that, in Clause 27(9), section 141B(2) should be amended as follows:

"(2) The Secretary of State shall appoint one or more persons to report to the Secretary of State on the questions mentioned in subsections (4) and (5) of section 141A and those persons so appointed shall report directly to the Secretary of State on public interest issues independently of the CMA panel report on any relevant competition considerations."

Anti-trust (The Prohibitions on Anti-competitive Agreements and Abuse of Dominance)

25. Clause 34(4) provides that the CMA rules may provide for the exercise of the CMA's powers under Part 1 of the Competition Act 1998 (ie in respect of "anti-trust", being the prohibitions on anti-competitive agreements and abuses of dominance) by different groups within the CMA, including by members of the CMA panel.

26. We read this, consistently with the Government's March 2012 policy document,[53] as providing for the separation of investigation and decision-making within the CMA, so as to reduce the risk of confirmation bias.

27. The point here is that, currently, the OFT in anti-trust investigations is "prosecutor, investigator, judge and jury", and this has led to concerns about confirmation bias, concerns which have apparently been realised in a number of cases, such as most recently that on tobacco pricing.[54] Because of these concerns, we very strongly advocated such a separation of powers within the CMA for anti-trust matters—with the first phase being undertaken by an investigatory team, and the second phase by a panel of senior decision-makers (not unlike the current panel of Competition Commission members, and the proposed CMA groups under the Bill, which make the second-phase decisions in merger and market investigations).

28. Accordingly, we welcome Clause 34(4) of the Bill.

[53] Department for Business, Innovation and Skills, *Growth, competition and the competition regime—Government response to consultation*, March 2012, paragraph 6.26.

[54] CAT judgment in Cases 1160—165/1/10 of 12 December 2011. See especially paragraph 85 of the judgment, which says "If the OFT had tested the evidence more stringently, for example if Ms Bayley had updated her witness statement for the purpose of the appeals, it might have become clear sooner that her evidence as to how the agreement between Sainsbury and Imperial worked did not appear to be consistent with the OFT's findings in the Decision. The OFT might have been able at that point to consider the implications of her evidence for the strength of its case".

29. However, Clause 34(4) is only an enabling power as regards the CMA's rules. It does not actually prescribe the separation of powers which is needed to reduce the risk of confirmation bias. We therefore urge that this part of the Bill be amended to provide explicitly for a panel within the CMA to make decisions on anti-trust cases, separately from the CMA investigatory team on those cases; the relevant provisions of Schedule 4 as regards CMA panels in market and merger investigations, provide a template for this.

Cartel Offence

30. Our greatest concern about the Bill is the proposal, in Clause 39, to remove the "dishonesty" criterion in the cartel offence with the effect that individuals can be personally fined and/or imprisoned for involvement in certain anti-competitive agreements, whether or not their involvement was with a dishonest mind (indeed, under the proposal, no mental state, or *mens rea*, is to be specified for this criminal offence).

31. In our submissions to the Government we opposed this proposal. We pointed out that, in any event, it is premature, since only two prosecutions had been brought since the cartel offence came into force nine years ago, and in neither case is there evidence that the "dishonesty" requirement prevented successful prosecution.

32. We regard it as extraordinary that such serious penalties should attach to business people in the course of doing their jobs, without any requirement of a dishonest (or indeed any other) material intent. In addition the proposals will lead to a substantial increase in red tape and costs for businesses.

33. It is asserted, in defence of this proposal, that prosecutions under the cartel offence have been inhibited by the existence of the "dishonesty" criterion. But the prosecution which failed, of four former British Airways executives accused of illegal price-fixing, collapsed in the course of the trial at Southwark Crown Court because of procedural irregularities by the OFT (which was bringing the prosecution)—namely, its failure to disclose key documents to the defence. If "dishonesty" had been such an impediment to prosecution as is claimed, the case would not have gone so far as getting to court.

34. As it stands, even with the "relevant information" defence, perfectly legitimate activities could incur these severe criminal penalties—for example, common and beneficial risk-sharing arrangements such as syndicated lending, co-insurance and re-insurance and co-underwriting.

35. Moreover, unlike dishonesty, the provision to customers of relevant information is not in the control of the people who would be prosecuted—it is a matter for the companies, not the individuals.

36. We have heard apologists for this proposal arguing that it is unlikely that such innocuous cases would be prosecuted in practice, because prosecutors would be sensible in exercising their discretion. The Bill Committee will appreciate how unsatisfactory it is to expect people to pin their hopes on that, and as legal advisers we would feel obliged to point out to clients the severe personal risks they would be taking in entering perfectly innocuous agreements. Moreover, even if such innocuous cases were not prosecuted, the relevant agreements could be rendered void or unenforceable by the criminalisation (so leading to inability to recover loans, enforce contracts of insurance etc). We cannot believe that this is an outcome that Parliament seeks.

37. We therefore urge the Bill Committee either to restore the "dishonesty" criterion (by excluding Clause 39 from the legislation).

38. If, however, the Government is determined to remove the "dishonesty" criterion, we urge the Bill Committee to propose an amendment with a suitable alternative *mens rea* that removes the supposed problems with the "dishonesty" criterion but nonetheless avoids the fresh problems (described above) that flow from the outright abolition of the "dishonesty" criterion. An alternative *mens rea* which seems to us a sensible compromise would be:

> "intention to subvert the competitive process"

It seems to us that this would sufficiently limit the scope of the offence in order to capture individuals who truly deserve criminal punishment, focusing on the mental state of the individual at the time of entering into the agreement that bears a real relation to the mischief that is sought to be avoided.

July 2012

Memorandum submitted by UK Music (ERR 32)

About UK Music

UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.

UK Music exists to represent the UK's commercial music sector in order to help drive economic growth and to promote the benefits of music on British society. The members of UK Music are listed as an annex.

The Enterprise and Regulatory Reform Bill and Copyright Reform

1. The Enterprise and Regulatory Reform Bill currently contains two clauses which relate to copyright. Our interest in this Bill relates to copyright provision and so we restrict our comments to this issue.

2. The inclusion of copyright clauses in this Bill came as a surprise to many copyright stakeholders. We widely anticipated copyright legislation, but we did not anticipate that the copyright legislation would be attached to this particular bill. This "surprise" generated a degree of confusion and alarm amongst our community. This was needless. Better communication between the Government and its key stakeholders would have prevented this.

Clause 56

3. UK Music supports Clause 56 providing that additional safeguards are added to ensure that this potentially broad power conferred on the Secretary of State does not have unintended consequences.

4. UK Music calls on the Government to amend section 56 so as to ensure that the scope of the power is sufficiently narrowed to cover only exceptions to rights harmonised by the relevant EU Directives.

Other Provision relating to Copyright

5. The text of the Enterprise & Regulatory Reform Bill as laid in Parliament *currently* includes only two clauses relating to copyright (C. 55 and 56).

6. During the Second Reading of the Bill, the Secretary of State announced that Government may use the Enterprise and Regulatory Reform Bill as the vehicle for a raft of new reforms relating to copyright. (Ref: *Hansard,* 11 June, column 74.) In particular, the Secretary of State referred to proposals for extended collective licensing, orphan works, and a code of conduct for copyright collecting societies.

7. Baroness Wilcox's written statement on 2 July 2012 (Lords *Hansard,* 2 July 2012, WS30) has since reinforced that the Committee Stage of the Enterprise and Regulatory Reform Bill will be used to bring forward these additional measures as amendments to the Bill, as well as a further provision to allow the Government to implement the EU Directive 2011/77/EU on the term of protection for sound recordings and works of co-authorship whilst maintaining the current level and scale of criminal penalties for infringement activity applicable under UK law. Enabling clauses to this effect have now been tabled by the Government (NC11, NC12 and NC13).

8. We support that the long title of the Bill presents an opportunity to bring forward these measures, but we are disappointed that a piecemeal approach to legislating on copyright is being taken by Government in order to achieve reform. There is a danger that the Enterprise and Regulatory Reform Bill could now become a "Christmas tree" Bill, attracting unanticipated amendments on wider copyright related issues.

9. Government consulted on proposals relating to these specific issues in the recent Copyright Consultation. The proposals were wide-ranging and potentially contentious, posing many questions as to how the reforms should be worded and what safeguards were needed.

10. As the Government are now minded to use the Enterprise and Regulatory Reform Bill as a vehicle for primary legislation relating to wide-ranging and potentially contentious copyright reform, it should have alerted key stakeholders in advance, included the clauses in the text of the Bill at the outset when it was first laid, and invited stakeholders to study the text carefully and communicate with Parliamentarians engaged in scrutiny.

11. It had been our understanding that Government would consult further on the proposals in the copyright consultation, once proposals were more advanced. The Foreword to the Copyright Consultation states that "Government's intention is to respond to this consultation and make formal proposals for legislation or other action in an IP and Growth White Paper in Spring 2012." No such White Paper has been published.

12. NC11, NC12 and NC13 as tabled to the Commons committee stage are enabling clauses and so create a requirement for secondary legislation. UK Music asks Government to provide drafts of the secondary legislation to be made available to Parliamentarians, as well as sectors and interest groups with an interest in copyright, before the Bill completes its passage through Parliament.

13. Such drafts would enable Parliamentarians, as well as sectors and interest groups with an interest in copyright, to have an understanding of how the Government plans to use the reserve power for secondary legislation and whether the level of Parliamentary scrutiny any secondary legislation may have is set at an appropriate level.

Annex

UK Music's membership comprises of:

— AIM—Association of Independent Music—representing over 850 small and medium sized independent music companies.

— BASCA—British Academy of Songwriters, Composers and Authors—with over 2,000 members, BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing.

— The BPI representing over 440 record company members.

— MMF—Music Managers Forum—representing 425 managers throughout the music industry.

— MPG—Music Producers Guild—representing and promoting the interests of all those involved in the production of recorded music—including producers, engineers, mixers, re-mixers, programmers and mastering engineers.

— MPA—Music Publishers Association—with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.

— Musicians' Union representing 30,000 musicians.

— PPL is the music licensing company which, on behalf of 50,000 performers and 6,500 record companies, licences the use of recorded music in the UK.

— PRS for Music is responsible for the collective licensing of rights in the musical works of 85,000 composers, songwriters and publishers and an international repertoire of 10 million songs.

— UK Live Music Group, representing the main trade associations and representative bodies of the live music sector.

July 2012

Memorandum submitted by the Publishers Content Forum (ERR 33)

INTRODUCTION

1. Publishing in the UK is the largest media sector, and the biggest creative industry. The Publishers Content Forum (PCF) is an informal alliance of some of the major publishers and publishing industry associations within both the UK and the EU. It was formed in March 2009 to give a collective and representative voice to the publishing industry on a broad range of regulatory and legislative issues affecting the future of print and digital content including issues such as intellectual property and digital standards.

2. PCF's members include the Publishers Association, the Professional Publishers Association, the Data Publishers Association, the Association of Learned and Professional Society Publishers, the European Publishers Council, the Newspaper Society, the Publishers Licensing Society, the British Association of Picture Libraries and Agencies and the Music Publishers Association. PCF also includes representation from individual publishers.

3. PCF welcomes this opportunity to contribute to scrutiny of Clause 56 of the Bill, the enactment of which could have major ramifications for the publishing and broader content industries. In doing so we reserve our position in relation to other amendments which have been tabled to the Bill proposing further changes to the copyright framework.

CLAUSE 56

4. The Intellectual Property Office has stated that the primary purpose of Clause 56 of the Bill is to prevent possible downward adjustment of criminal penalties should existing exceptions to copyright be amended via secondary legislation. Without this, the effect of the European Communities Act would be to limit penalties to a maximum of two years.

5. Whilst we would support Government's efforts to ensure existing penalties for copyright offences are maintained wherever possible and not reduced, we are concerned to note that the IPO's stated intention is not reflected in the accompanying explanatory notes to the Bill. Additionally, as currently drafted, Clause 56 appears to equip Government with wide-ranging and far-reaching powers to amend, remove or introduce exceptions to copyright via secondary legislation. As a solution supposedly designed to meet a specific and technical need, the language and scope of the proposed Clause seems entirely at odds with the problem it is intended to address.

6. Taken at face value therefore, a Clause which bestows such wide-ranging powers is extremely concerning, and raises questions about what Government regards as necessary and sufficient for the policy-making and legislative process around changes to the copyright framework.

7. Whilst primary legislation is generally subject to extensive pre-legislative scrutiny, debate and approval by both Houses of Parliament, secondary legislation can be introduced without an equivalent level of oversight (as Parliament is denied the opportunity to debate or amend statutory instruments, and may only approve or reject them as drafted). This is inherently problematic in the context of complex policy-making, and fundamentally undermines a process which should be not only rigorous, but transparent.

8. We strongly believe that proper Parliamentary scrutiny should be applied in considering measures that, at the extreme, could potentially cause irreparable damage to vibrant, enterprising, competitive and world-leading free-market sectors.

9. The existing copyright framework in the UK is finely balanced, and the product of ongoing debate and re-evaluation, particularly in an increasingly dynamic marketplace. Seemingly minor amendments related to changes in the scope of exceptions can prove extremely consequential in the purest commercial sense for organisations that invest in content creation and preservation.

10. It is particularly surprising, therefore, that Clause 56 is the only part of the Bill without an Impact Assessment, even though it could allow the passing into law of contentious and complex proposals currently being considered by the Intellectual Property Office, as well as on other related matters arising in the future.

11. The Government was unable, during the debate at Second Reading, to clarify how the Bill will be used to enact any of the recommendations under consideration in the wake of the Hargreaves Review. This further clouds the aspirations claimed to be behind the drafting of the Clause, and has created concern that changes to exceptions may be bundled into a single SI, further limiting Parliament's ability to subject any changes to proper scrutiny.

12. We recognise that in practice the EU framework circumscribes, to a certain extent, what changes the UK Government can introduce to the UK copyright framework, and that the three-step test in the Berne Convention imposes certain *de minimis* constraints on all limitations and exceptions to copyright. Nevertheless it does not appear, in summary, that the current wording of Clause 56 is either necessary or desirable.

SOLUTION

13. We therefore call on Government to take the following steps before PCF can offer its support for Clause 56:

(a) Clause 56 should be amended to more accurately reflect the stated intention of the IPO in bringing it forward, and we support any amendments that seek to narrow and clarify the intention of Clause 56 in line with the Government's stated aims;

(b) A full Impact Assessment should be introduced;

(c) The explanatory notes to the Bill should clarify and reinforce Government's intentions behind introducing the Clause; and

(d) Government should bring forward a comprehensive proposal for how the Bill will be used to enact recommendations arising from the Hargreaves Review.

July 2012

Memorandum submitted by Edwardes Square Scarsdale and Abingdon Association (ESSA) (ERR 34)

I am writing on behalf of the Edwardes Square Scarsdale and Abingdon Association (ESSA) and as an architect accredited in building conservation to comment on Schedule 16 Heritage Planning of the Enterprise and Regulatory Reform Bill.

Paragraph 7. We are concerned that there is no requirement for the Secretary of State to consult with either specialist organisations such as the Georgian Group or with the local community in the form of the local planning authority. We support the idea of the SoS being able to define elements of a building which are not of special architectural or historic interest but particularly with more recent examples the understanding of what is significant or of special interest is constantly evolving and there needs to be a provision for the SoS to review that decision if evidence emerges to support the assessment of special interest.

Paragraph 9. Heritage Partnership Agreements. We note the provision in 9B (2) for the SoS to make regulations for consultation and publicity. We consider that this should be a prerequisite and not discretionary. It is essential that affected groups including specialist societies, local planning authorities and local amenity groups should be consulted and able to submit their views on any heritage partnership agreement in their area or their specialist period.

July 2012

Memorandum submitted by Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law (JWP) (ERR 35)

We are writing to the Committee on behalf of the Joint Working Party of the Bars and Law Societies of the United Kingdom on Competition Law ("the JWP"), which submitted Comments on BIS's consultation in June 2011. The JWP is a long-established body comprising senior specialist competition practitioners from both sides of the UK legal profession.

The JWP wrote to the President of the Board of Trade, Dr Cable, on 27 April 2012 expressing our serious concerns as to the proposed amendment to the "cartel offence", to withdraw the requirement of dishonesty without replacing it with any other positive *mens rea* requirement.

As we understand it, both the OFT and the department advocate the removal of the dishonesty requirement on the basis that it has in practice rendered the offence impossible to prosecute. The JWP is not party to the evidence that is relied on to support these assertions but it has considerable reservations as to whether the case for amendment has been made out. Only two cases have been brought in 10 years. Of those cases, only one involved a full trial and neither failed on the basis of the dishonesty requirement.

However, our main concern is with the position that would prevail if the current amendments are made. In our view, the proposal, if adopted in its current form, would criminalise the participation of individuals in agreements to engage in a wide range of otherwise lawful commercial conduct, including agreements that do not infringe the Chapter I prohibition of the Competition Act 1998 or Article 101 TFEU. We do not consider that it is a sufficient answer to rely on a defence of disclosure to the public and prosecutorial discretion to keep the offence within reasonable bounds. It seems to us that a serious criminal offence of this kind should include an appropriate subjective element, assessed by reference to the state of mind of the individual(s) participating in the conduct concerned.

When the cartel offence was first introduced back in 2002, dishonesty was identified as the most appropriate test for this element. We do not currently see that the need to change that assessment has been made out. However, if dishonesty is to be removed as a substantive requirement of the offence, it appears to us that it needs to be replaced by one of the following alternatives:

- intention or recklessness as to the adverse impact of the agreed conduct on competition within the United Kingdom—this would appear to us to be the most obvious alternative, introducing a subjective element that reflected the intended target of the offence, ie deliberate or reckless participation in hard core infringements of the competition rules; or
- wilful concealment or deliberate intention to deceive—this would reflect the fact that the serious cartel activity that is the intended focus of the offence is invariably accompanied by deliberate secrecy; it also appears to the JWP that it would be less difficult for a prosecution to demonstrate the factual basis for such an allegation than to pass the double *Ghosh* test for dishonesty.

We consider that both of these alternatives are potentially workable and would represent a far better alternative than the current proposal just to remove the dishonesty requirement. As we indicate in more detail in our note, there seem to us to be at least four serious defects in the current proposal:

- The new offence would be a highly undesirable anomaly in the English criminal law, creating the possibility of an offence constituted by a conspiracy to perform a lawful act.
- It would undermine rather than complement changes to the civil enforcement regime over the past 10 years.
- It would lead to a significant additional regulatory burden for UK businesses and their advisers, without producing sufficient countervailing benefits.
- It would significantly devalue the offence if it could be committed by persons agreeing to act in a way that was lawful and/or trivial, with no *mens rea* requirement.

July 2012

Memorandum submitted by Country Land & Business Association (ERR 36)

HERITAGE ASPECTS

SUMMARY

1. This evidence covers the heritage aspects of this Bill (essentially Schedule 16). The CLA is a key stakeholder in this area. However, we think that the Bill should be more ambitious in its selection of aspects of the deregulation policy agenda.

2. The CLA welcomes the heritage content of the Bill in Schedule 16, as far as it goes. These initial proposals are useful though modest amendments to existing heritage legislation which will be of benefit in a minority of cases, and they should definitely be taken forward into law.

3. However, nobody should be under the illusion either that these will implement more than minor parts of the Penfold Review's heritage recommendations, or that they will make any real contribution to solving the most fundamental problem in the fast-deteriorating heritage protection system, which is that local authorities do not have the staff and skills required to operate it.

4. It is therefore of paramount importance that the heritage elements of this Bill are supplemented as quickly as possible by further legislation. While some of the further measures required have already been consulted on, the most important areas require consultation and will therefore need to be incorporated into subsequent

legislation, probably within a deregulation or planning Bill, as soon as that consultation process (already underway) has been completed.

The CLA and the long-term protection of Heritage

5. The CLA's 34,000 members manage and/or own at least a quarter of all heritage. We are by far the biggest stakeholder group of those who look after heritage.

6. Nonetheless, we think that the Bill should be more ambitious in its selection of aspects of the deregulation policy agenda. These include changes to the planning system and the natural environment.

7. The CLA believes strongly in effective and proportionate heritage protection. This must include legislative controls, but legislation and policy which merely sought to "preserve" heritage from change would be self-defeating, and indeed actively dangerous because its maintenance and management costs are so high. If protection is to have more than partial and short-term effectiveness, legislation and policy must seek primarily to encourage heritage to be maintained and to be changed in sympathetic ways, so that it remains used and valued and relevant to the future of which we want it to be a part, maximising its chances of being maintained in the long term.

8. This approach is of course not particular to the CLA; it is accepted best practice, it is English Heritage policy as set out in its Corporate Plan and its "Constructive Conservation" approach, and it is Government policy as set out in the NPPF and elsewhere.

The Heritage content of this Bill

9. We welcome the heritage content of the Bill, and believe it should be taken forward into law.

The effectiveness of these measures

10. The fundamental problem with the current heritage protection system is that it assumes that any change to heritage (large or small, good or bad) requires detailed expert scrutiny. That might be fine in a world of unlimited resources, but in practice—unsurprisingly—the local authorities which operate it have never resourced it properly, resourcing has been cut by a third since 2006,[55] and is now falling rapidly. Many local authorities now have no skilled advice at all, and the system is facing progressive collapse. Local authority staff are usually unskilled, and unable to cope with the workload the legislation imposes.

11. There is a strong perception among users that the sympathetic change heritage needs is difficult if not impossible to achieve. This discourages an unknown but large number of beneficial proposals which would have made listed buildings more useful and appreciated, or rescued heritage at risk. This perception also deters people from owning heritage at all, which is very damaging to its long-term health. Moreover, the perception that securing consent is difficult or impossible also leads to widespread evasion, and enforcement is rare, and poorly-targeted.[56]

12. While (as above) we support the heritage parts of this Bill and believe they should be taken forward into law, they will have only a very limited impact on these fundamental problems. For example:

(a) We welcome the ability to improve list descriptions (Schedule 16 Clause 7), which is obvious good practice, but there are already almost 400,000 list descriptions, and it will clearly be years before even 1% of all list descriptions reflect the new approach.

(b) Similarly, while the abolition of the separate Conservation Area Consent (Clause 5) is a useful simplification, a planning application will of course be required which will usually involve as much work as the two usually-identical applications now used, so the actual resource savings for the applicant and local authority will inevitably be limited.

(c) While putting Heritage Partnership Agreements onto a statutory basis (Clause 9) will undoubtedly be helpful for some users, they are not suited to one-off changes, which make up the majority of applications, and they are very expensive to create. They may be useful for some mainly commercial users who carry out frequent low-impact changes, but these are only a small proportion of all users.

13. If or when the measures in the current Bill pass into law, therefore, only a very small part of the job—perhaps 3% of it—will have been done. Further legislation is essential.

The need for further legislation

14. BIS's Penfold Review of non-planning consents from the start identified heritage (with highways and environmental consents) as one of the three consent areas which cause the greatest problems and are most in need of reform.

[55] See the reports on Local Authority Conservation Resourcing published roughly annually by English Heritage, the Institute of Historic Building Conservation and Association of Local Government Archaeological Officers.

[56] For a more detailed discussion of these problems see the CLA publication *Averting crisis in heritage,* and the CLA consultation response *Implementation of the Penfold Review heritage proposals*, both available on the CLA website www.cla.org.uk.

15. The Penfold Review's heritage recommendations can be split into two groups. Firstly, there are some which were carried forward from the abandoned 2008 Heritage Protection Bill, which were consulted on in and before 2008. These are the measures in the current Bill.

16. Secondly, however, the remaining (and much more important) Penfold Review recommendations do directly address the local authority resourcing problem. They do this by creating a streamlined system for the very large number of no-harm proposals, and focusing resources instead on the potentially-harmful cases, by encouraging local authorities to meet acceptable service levels, and by encouraging enforcement to discourage evasion.

17. These are of course tools already widely used in other systems of regulation, and recommended not only by Penfold but also by Hampton, Macrory, Barker, Killian-Pretty, and others.

18. A consultation by the Department for Culture, Media and Sport on the implementation of these further Penfold proposals is already under way, with a public consultation on (we hope) effective proposals beginning this summer.

19. This next stage is much more important than the current stage. It is vital to the future of our heritage that effective proposals are put together, put through a consultation process, and then incorporated into further legislation as quickly as possible.

July 2012

Memorandum submitted by British Association of Picture Libraries and Agencies (BALPA) (ERR 37)

British Association of Picture Libraries and Agencies—BAPLA is the trade association representing photographers, commercial companies, and cultural heritage organisations in the image licensing sector.

BAPLA is supportive of the position of the Alliance, that Clause 56 be amended in order for the intent of the clause to be more accurately reflected in the language of the Bill.

BAPLA is supportive of the move to limit Orphan Works legislation to analogue photographs only (not including digital). This will allay many of the concerns raised by BAPLA members.

BAPLA would be supportive of any such narrowing of a UK OW scheme specifically for photographs, to bring this in line with the European Union[57]—Digital Agenda for Europe.

In particular that use of Orphan Works photographs be limited to the Works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums in order to achieve aims related to the public interest mission of the specified users, notably preservation, restoration and the provision of cultural and educational access to works and phonograms contained in their collection and such reform excludes stand alone images.

We are supportive of the position of the European Union that uniformity of the rules governing the use of orphan works be better achieved at Union level.

July 2012

Memorandum submitted by the British Library (ERR 38)

INTRODUCTION

Cultural institutions like the British Library, BBC, British Film Institute and the national museums hold many millions of collection items which can be digitised to support research, innovation and economic growth. However, a lack of appropriate mechanisms to clear the rights of in-copyright works on mass hampers efforts to make such material available. We therefore face a "digital blackhole of the 20th century" in the UK whereby much material is not made available online due to an inability to clear copyright in works stretching back as far as the 1870s.[58]

AMENDMENTS TO COPYRIGHT LAW

The British Library supports both the orphan works and extended collective licensing amendments to UK copyright law as we believe the mass digitisation of in-copyright material will have many benefits. The digitisation of 20th century content that is currently unavailable in digital form will lead to a much richer research environment. Researchers and students will literally have access to material that was largely unavailable to them before. This will lead to more use of the content, new discoveries and a more vibrant educational environment.

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[57] Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works —Approval of the final compromise text http://register.consilium.europa.eu/pdf/en/12/st10/st10953.en12.pdf

[58] Conversely in the United States the duration of copyright is much shorter, so no rights need to be cleared in material published before 1923.

In addition to this, we believe that new and innovative uses of historical content by private companies will bring with it many economic benefits. This is particularly the case given the demand for English language content internationally. The reissuing of material long out of print in traditional publishing markets, through to the innovative use of content in technology markets, will help drive commerce in British copyright works both here and abroad.

Current Challenges

Clearing rights on an item by item basis for thousands of published works is extremely time consuming and expensive. An ARROW[59] study shows that with an average of four hours per book, it would take a digitisation project of 500,000 items over two hundred years of rights clearance work.[60] Even then, significant numbers of untraceable works would remain, including an estimated 43% orphan works. This is all in spite of the fact that only a minority of written works published in the 20th century are commercially available.

International Context

Many countries already have solutions for orphan works ranging from Canada, India and Japan, through to Scandinavian countries. As a result of the Orphan Works Directive all European member states will have to implement a solution for orphan works but the only beneficiaries of the Directive will be cultural institutions. The key difference between the EU Directive and the UK Government's proposal is that the UK proposal allows for commercial use of orphan works in order to stimulate economic growth, and permits private companies to also benefit from the orphan works licensing scheme.

Extended collective licensing, which allows in certain special circumstances for collecting societies to represent non-members too, has existed in the Nordic countries since the 1960s. It is used in instances of market failure, where a wide range of copyright works are to be used, and individual clearance of them is impractical. The extended collective licences do not replace direct licences with rightsholders and are closely managed through copyright regulations. Essentially, without this form of licensing the copyright works would otherwise not be used. This type of licensing as practised therefore serves to not only remunerate rightsholders, but also facilitate societally valuable uses of copyright works such as mass digitisation or use of copyright material in schools, colleges and universities.

In 2012, France passed legislation that will facilitate the mass digitisation of books also. It is estimated that in France 57%[61] of in-copyright books are either out-of-print or are orphan works. In order to invigorate the e-book market, changes to copyright law were needed to facilitate the digitisation and commercialisation of books that were otherwise only available in paper form on the shelves of libraries.

Protecting the Interests of Rightsholders

In the case of the Orphan Works licensing scheme, the party wishing to use the work will have to prove to an independent licensing body that it has undertaken a diligent search. Any reappearing rightsholder will also be able to claim royalties owing and request that their work is no longer used. It is also proposed that a list of orphan works granted under the scheme is kept up-to-date and searchable on the web.

Extended collective licensing protects the interests of rightsholders in a number of ways. Only a collecting society that is deemed by Government to be sufficiently representative of its class of rightsholder can operate the system. In order to offer an extended licence, the collecting society will have to consult widely within its community, and if the community as a whole agrees to the licence any individual rightsholder that does not want their work to be used can opt out. If a rightsholder, irrespective of whether they are a member of the collecting society or not, finds their work has been used without their knowledge (as is the case with the orphan works licensing scheme) a rightsholder will be paid the appropriate royalty for the use of their work and they can request that their work is no longer used.

July 2012

Memorandum submitted by the Public and Commercial Services Union (ERR 39)

Introduction

1. The Public and Commercial Services Union (PCS) represents over 270,000 members working in Government departments, agencies, public bodies and on privatised Government contracts. This includes staff at the Equality and Human Rights Commission, Office of Fair Trading, Competition Commission, Ministry of Justice and ACAS.

2. Our members will be directly impacted by this Bill as they are responsible for developing and implementing the policies covered in it. As a result, not only will the Bill affect their roles, but also cut their jobs. Elements of the Bill would also affect our members' rights in the workplace.

[59] ARROW stands for Accessible Registries of Rights Information and Orphan Works towards Europeana http://www.arrow-net.eu/
[60] http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf
[61] http://www.senat.fr/rap/l11–151/l11–1511.pdf

3. We welcome the opportunity to submit written evidence to the Bill Committee and would be happy to supplement this with further written evidence.

4. This submission covers Clauses 7–9: Early conciliation; Clause 10: Procedures for tribunal cases; Clause 12: Unfair dismissal; Clause 13: Financial penalties; Clauses 18–20 and 21–46: Competition reform; Clause 51: Reduction of legislative burden and impact on the EHRC; Clause 58: wide-ranging powers given to the Secretary of State; and what we consider to be an inadequate impact assessment.

Clauses 7–9: Early conciliation

5. The Public Bodies Review abolished the Civil Service Appeals Board (CSAB) against advice from PCS and experts in the field. The CSAB provided a less costly, less formal and less administratively burdensome alternative to ETs, particularly in respect of unfair dismissals. At a time of ongoing civil service dismissals and the Government wanting to implement efficiency savings, the decision was short-sighted and counter-productive. The CSAB stopped taking new dismissals cases that occurred after 30 November 2010 and the Board ceased to deal with dismissals on 31 December 2011.

6. We understand that in the short term the Government's aim in introducing early conciliation is to reduce backlogs in the system. However, we believe the long term effect will be to reduce access to justice, thereby cutting the number of tribunals and cutting the jobs of our members. PCS therefore has several concerns about these clauses.

7. On a practical level, we question how the proposed system will work with cases where the only need to lodge a claim in the Employment Tribunal (ET) is to protect the position of an employee going through internal grievance. Many of our members' employers seem incapable of resolving internal grievances within much less than 6–9 months. We recognise that complex cases take longer, but we are concerned that there are many cases that are subject to delays for no good reason. At present, employees have to lodge a claim with the ET in order to protect their right to go to ET if the internal process does not resolve the grievance to their satisfaction.

8. Employer involvement in the proposed process is a must. Yet we see employers refusing to deal with grievances appropriately and fairly, refusing to talk about settlement through ACAS, either at all or until the very last minute. We also see threatening letters relating to costs sent to claimants. The approach is designed to try to frighten off or frustrate potential claimants. Very few invitations to participate in judicial mediation are taken up by our members' employers. Therefore we firmly believe that employers will need to be incentivised to participate.

9. In future, there is likely to be an additional hurdle—a fee or a series of fees that will have to be paid in order to progress an ET application. Additionally, the level of costs that can be awarded by ETs has recently been increased.

10. All this gives employers no reason to engage meaningfully in such a scheme—we believe they would rather frustrate the process and force the employee to step into the uncertain and potentially costly arena of the ET.

11. PCS believes that there needs to be a limit—or even a ban—on costs applications from employers who have failed to engage meaningfully in the pre-proceedings conciliation, if there is to be any worth to it at all.

12. We strongly believe the extension to time limits is insufficient. It can take almost three months for someone to find out their legal rights (most employees do not know these), write the necessary documents and seek assistance and advice. If the process is going to be fair, the overall time limits need to be increased, perhaps to six months.

Clauses 10–11: Procedure for deciding tribunal cases.

13. Clarity is needed on the input and status of the decision of legal officers in a tribunal case, as well as the process of appeal following a decision made by a legal officer.

14. PCS is more comfortable with an employment judge sitting alone in an EAT hearing but would want to see the full composition of the ET retained to ensure that the worker's case is comprehensively heard.

Clause 12: New powers to limit or increase compensation awards in unfair dismissal cases

15. The cap on the compensatory award for unfair dismissal is already, to an extent, unfair, as it compensates those with poor terms and conditions better than it does those with moderate terms. We use the term "moderate" carefully—many of our members find that issues such as a loss of pension mean that they end up having compensation restricted by the cap (currently £72,300).

16. The less an employer has to pay to unfairly dismiss a worker, the more likely they are to do so. When it is cheaper for an employer to get rid of an employee unfairly than pay them what is due in redundancy, there is no protection against unfair dismissal.

Clause 13: Financial penalties

17. PCS agrees with the general idea, but we believe that the worker should get the money (as the party that has suffered), rather than the Government, and we would suggest the limit is raised beyond £5,000.

18. We think employers should face this penalty regime for any breach of employment rights, not just those with "aggravating factors" (however this term is defined). Indeed, we ask that the Government defines what it means by "aggravating factors" as a matter of urgency.

19. There could also be an issue of compliance with this proposal for some employers. Those within the private sector, particularly smaller organisations, might see financial penalties as an incentive to comply with employment laws. However for large wealthy employers and those, such as the public sector, where the money paid will not impact profit lines, the incentive is less clear.

Clause 18–19: Closure of the Competition Commission and Office of Fair Trading and setting up of the Competition and Markets Authority (CMA)

20. PCS represents members in both the OFT and the CC. We believe that the proposals in the Bill represent a damaging cut dressed up as a reform. The cut jeopardises the important work undertaken by both organisations and the significant savings they make for consumers. The CC and OFT between them create an estimated £465 million saving for British consumers and a further £127 million for consumers through merger control.

21. According to a recent National Audit Office report the return on investment for spending on consumer protection is 6:1 and PCS believes even current levels of spending on consumer protection are not adequate when compared to consumer detriment.

Office of Fair Trading (OFT)

22. The OFT has responsibility for consumer issues at a national level. It takes up important cases such as their current investigation into airline price fixing and previous work on bank charges that lead to changes in practice. This work isn't done anywhere else, but changes in the Bill would result in money being refocused on local trading standards and merging functions in a way that will not leave clear lines of responsibility for work areas.

23. With the economy in its current state there is a risk that consumers seeking better deals will suffer at the hands of unscrupulous traders. As a single consumer body working at a national level, the OFT is best placed to address this issue as well as modern matters such as consumer protection related to internet transactions.

Competition Commission (CC)

24. The CC is a high performing and efficient organisation that often undertakes complex cases requiring sufficient time and resources to reach fair and considered judgments. The risk with this cost cutting and short sighted merger is that there is no guarantee that this high level of performance will continue with a different management structure. There are also questions about whether sufficient resources will be made available for it to meet the demands put upon it.

25. Recent events with BSykB highlight the importance of having a properly resourced CC that has public confidence as an independent arbiter in a sometimes politically sensitive environment.

Clause 20: Competition and Market Authority and TUPE

26. Both the OFT and CC have clearly defined governance arrangements and we would be keen to ensure that any new body has in its founding principles clearly defined governance arrangements that include regular reporting to Parliament.

27. PCS is gravely concerned about closing the OFT and CC and merging them into a new body because as the Bill stands, it does not offer enough protection for the workers being transferred into the new body. It is important that if this change is made, the Bill must clearly stipulate that Transfer of Understandings Protection of Employment (TUPE) applies to the staff that will be transferred. Importantly, decisions need to be taken in time for unions to be adequately consulted and staff to make decisions—for some functions, the potential transfer date is now less than nine months away. This is unacceptable.

28. TUPE legislation is the protection of rights of staff employed when they move from one organisation to another. This applies in transfers between private sector organisations and from public sector organisations to private and charity organisations, but it is not guaranteed to cover transfers within the public sector unless specified by legislation. For public transfers the Cabinet Office Statement of Protocols recommends that TUPE be on the face of the Bill.

29. As it stands the Bill refers to "TUPE like" arrangements but does not stipulate full TUPE rights. This must be rectified, otherwise workers for both organisations are at risk of losing rights and entitlements built up

over years, in a way those moved into the private sector would not. This is especially true for pension rights, and even more so where work is transferring to non-civil service or public sector bodies.

Clause 51: Equality and Human Rights Commission (EHRC)

30. Cutting the powers and duties of the EHRC by amending sections of the Equality Act 2006, under which it was established, does not reduce any "legislative burden". Instead it is a retrograde move that removes the foundation stone of the only independent equality and human rights body in Britain. The clause undermines the effectiveness and independence of the EHRC and its status as a UN "A" rated national human rights institution is jeopardised.

31. The changes apply to sections of the Equality Act that received cross party support when they were passed in 2006. PCS opposes the Government's proposals to reform the EHRC's statutory remit, contract out its helpline, stop its grants programme (which funds support services to victims of discrimination), and slash its budget by 62% by 2015.

32. By tabling Clause 51, the Government is ignoring the results of its own consultation "Building a fairer Britain: Reform of the Equality and Human Rights Commission", which highlighted overwhelming opposition from the public and expert organisations, to the proposed changes.

Repealing Section 3—General Equality Duty

33. The general duty works as a purposive clause that provides a framework for the EHRC to exercise its powers. Removal of this duty will result in uncertainty and inconsistencies and destabalise general equality principles.

34. The ratio of respondents to the Government consultation that were against the repeal of section 3 was nearly 6:1.

35. PCS agrees with the recent report from the European Commission on national equality bodies when it states that: "In order to fully realise their potential in promoting equal treatment for all, equality bodies should develop a vision of their role within the administrative culture and society."[62]

36. At a Justice conference in June, Sir Bob Hepple QC challenged the Government assertion in their consultation response that Section 3 "has no specific legal function" and "creates unrealistic expectations" about what the EHRC can achieve' and the Secretary of State in saying that to repeal it is simply "legislative tidying up" and removal of "gold-plating" (*Hansard,* 11 June 2012,cols 75, 76). *"This overlooks the functions of section 3 in providing a link between the aims of promoting equality and human rights and good relations between groups. Its repeal will deprive those applying the law of interpretative principles and will leave equality law rudderless".*

Repealing Duties in Sections 10 and 19 to Promote Good Relations between Groups

37. The EHRC is Britain's specialist equality and diversity institution and it is to this body that third parties look for examples. The good relations duty is a very important function, particularly for organisations concerned with race, religion and belief, as well as hate crimes and violence against women.

38. The ratio of respondents to the Government consultation that opposed this proposal was 7:1.

39. To understand the importance of the good relations duty, it is necessary to look at the work that the former Commission for Racial Equality (CRE) undertook when exercising it. The CRE was the only commission in Britain that had this duty.

40. The CRE used the duty to help set standards for public authorities, for example, to tackle extremism. This included practical guidance for local councils on elections when the far right started to achieve success at the ballot box in the 2000s. It was used again after the civil unrest in 2001 in the northern regions to try to break down the parallel societies and lives experienced by Asian and white communities who lived side by side but rarely integrated at any level.

41. The duty is relevant to a variety of situations. For example, addressing harassment and violence outside the workplace, tackling disability hate crime (into which the EHRC recently had an inquiry), improving civic participation and combating social exclusion and deprivation.

42. It is assumed that organisations such as the Runnymede Trust or Fawcett Society will take over the good relations duty, however they are dependent on grants. With the EHRC's grant giving function ended, it is questionable how the organisations will have the capacity for such work.

Repealing Section 12 Monitoring Frequency

43. At a time of increasing inequality, reducing the frequency with which the EHRC monitors progress against identified equality and human rights indicators from every three years to every five years, makes no

[62] Study on Equality Bodies set up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC published October 2007.

sense. The point was effectively made by conservative MPs, particularly Henry Bellingham MP (then conservative Whip), during debate on the then Equality Bill when he pointed out that reporting every three years was effectively just once in the life time of a parliament.[63]

44. The ratio of respondents to the Government consultation that opposed this proposal was 5:1.

45. PCS opposes the move to repeal section 12 as monitoring at least every three years is needed to keep track of changes so that any necessary action can be taken in a timely fashion. The current triennial review also makes it easier to identify relationships between progress on equality and economic trends and legislative changes.

Repealing Section 27 Powers to provide Conciliation Services to Resolve Disputes involving Alleged Discrimination in the Provision of Goods and Services

46. Conciliation is a less expensive way of resolving disputes than going through the court system. The EHRC has experience and expertise in discrimination rights, for example, reasonable adjustments and disability access. At a time of stretched resources and increasing problems of "advice deserts", no other organisation is so well placed to provide this service.

47. The ratio of respondents to the Government consultation that were against the repeal of this section was more than 3:1.

48. The withdrawal of a conciliation service from the EHRC would have a disproportionate impact on disabled people. This is because the conciliation service is primarily used in relation to the provision of goods and services, education cases and air regulations, all of which are areas where disabled people are more likely to face discrimination.

49. Outcomes that can be achieved through conciliation are wider than those achieved through the courts and it can provide a means of bringing about systematic change for minimum cost.

50. The EHRC has not publicised its helpline and as a result there has been a drop in referrals to the conciliation service. However the Disability Rights Commission (DRC) utilised the conciliation service to a greater extent because they widely advertised their helpline. The EHRC's conciliation service is valuable and while other organisations carry out the function, they do not collect the evidence with a view to developing and informing national policy. The EHRC does and must continue to do this for the future.

Clause 58: Powers to the Secretary of State

51. The Government tried to introduce a "Henry VIII" clause to the Public Bodies Act 2011 and has again tabled a clause in the ERR Bill that would give ministers, particularly the Secretary of State, wide-ranging powers to amend or repeal primary legislation without further parliamentary scrutiny. The constitutionality of such sweeping powers rightly caused consternation in both Houses and was condemned by the Lord Chief Justice in 2010.

52. PCS believes that there has been an inadequate impact assessment of this Bill given the clause that would repeal fundamental parts of equality legislation. We question the statement made in the impact assessment of the Bill that there would be "no major impact" on our country's diverse communities.

For more information please contact Natasha Burgess, PCS Campaigns Officer on 020 7801 2820 or natasha@pcs.org.uk

11 July 2012

Memorandum submitted by the Society of London Theatre and the Theatrical Management Association (ERR 40)

Summary

1. This is a joint submission from the Society of London Theatre ("SOLT") and the Theatrical Management Association ("TMA") in respect of Clause 55 of the Enterprise and Regulatory Reform Bill (the "Bill"), which proposes to repeal section 52 of the Copyright Designs & Patent Act 1988 (the "Act").

2. SOLT and TMA believe that, due to the operation of section 51 of the Act and the 2011 decision of the UK Supreme Court in *Lucasfilm v Ainsworth*, repealing section 52 alone is unlikely to achieve the intended improvement in the protection of designers and the creative industries, particularly in relation to theatre sets, props and costumes. SOLT and TMA ask the Committee to address this in the Bill.

[63] http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo051121/debtext/51121–20.htm

Background

3. SOLT and TMA are the trade associations representing the interests of those engaged in the production and presentation of medium to large-scale dramatic and lyric theatre in Central London and elsewhere in the UK respectively.

4. SOLT provides services, such as advice on legal matters and industrial relations, campaign management and audience development programmes to its London based membership (numbering around 180 members and covering producers, theatre owners and managers) drawn from both commercial and subsidised theatre.

5. The TMA provides services, such as advice on legal matters and industrial relations, training courses, representation and a professional support network for the performing arts industry throughout the UK. Its membership is drawn from both subsidised and commercial theatre and include repertory and producing theatres, arts centres and touring venues, major national companies and independent producers, opera and dance companies and associated individuals and businesses. Its members number around 315.

6. Members of SOLT and/or TMA who are involved in the production of plays, musicals, ballet or opera include the following:

- the London commercial producers of a wide range of shows such as *The Phantom of the Opera, Billy Elliot, Jersey Boys, Wicked, Shrek, Ghost, Les Misérables* and *Blood Brothers*;
- the producers of national touring productions of such shows and similar works;
- the major subsidised theatrical organisations in London, including English National Opera, the Royal National Theatre, the Royal Opera House and the Royal Shakespeare Company;
- subsidised producing theatres all over the UK, for example, the Royal Exchange Theatre Manchester, the Sheffield Crucible and the Citizens Theatre Glasgow; and
- subsidised opera and ballet companies throughout the UK, such as Welsh National Opera and Birmingham Royal Ballet.

The Submission

7. The stated intention of the Government in repealing section 52 is to assist designers including "manufacturers and distributors of classic designer furniture or homewares such as lamps" and generally to "make the most of our creative industries" (Norman Lamb MP).

8. The skills for producing creative and imaginative set designs, prop designs and costume designs are an important part of the UK's creative industries and such designs should be protected by copyright just as strongly as the work of designers of lamps and furniture. In the theatre world, sets, props and costumes are regarded as artistic works and the people who have created them as artists. However, we are concerned that repealing section 52 alone is unlikely to achieve the intended improvement in protection.

9. This is because section 51 of the Act will still deny copyright protection for any work not held to be artistic. The 2011 decision of the UK Supreme Court in *Lucasfilm v Ainsworth*, in applying section 51, suggests that sets, costumes and props are not artistic works because they have a function, in the sense that they are for use in a film or a play. This seems to be entirely wrong. It also suggests that one production can simply copy such works from another production without infringing the copyright in it. That must also be wrong.

10. The Supreme Court's decision is of significance to the memberships of SOLT and TMA because it challenges the widely accepted notion throughout the theatre industry that these works may be protected by copyright. Many of the agreements which are standard in the creation of theatrical productions, such as with set designers, assume that there is copyright in the three-dimensional articles they design. If, as suggested by the Supreme Court, such materials are not artistic works and therefore not protected by copyright, this will be disruptive to the way the theatre world works and damaging to its finances. This would serve no useful purpose.

11. The matter is also important to our members because of the great dependency now placed by theatre productions on the sale of merchandise related to those productions. If such merchandise is not protected by copyright, then the value of it to our members will decline.

Conclusion

12. Unless further amendments are made to the Act, the repeal of section 52 risks doing nothing to solve the problems that it is intended to address. In our view it makes little sense to consider the repeal of section 52 without also considering the effect of section 51, which is the statutory provision which means that the works described above are not protectable by copyright. While there may be a way to achieve protection for such articles without repealing section 51 (such as by making an exception for such works from section 51 or by amending the definition of "works of artistic craftsmanship" to make it clear that it applies to such works), this needs to be addressed and this Bill is the opportunity to do so.

July 2012

Memorandum submitted by the British Chambers of Commerce (ERR 41)

SUMMARY OF BRITISH CHAMBERS OF COMMERCE'S (BCC) POSITION

The BCC welcomes the opportunity to submit evidence to the Enterprise and Regulatory Reform Bill Committee. The BCC supports the thrust of this Bill. BCC welcomes measures to legislate on the establishment of the Green Investment Bank and to make changes to the employment tribunal process. The BCC supports measures to reduce unnecessary legislative burdens on companies, however questions the degree to which the extension of the Primary Authority Scheme will reduce the regulatory burden on small and medium-sized businesses.

Part 1: Green Investment Bank

The bank will help unlock the huge potential of clean energy and create much needed employment. It should focus on areas that offer the best level of return, such as energy efficiency. For the Green Investment Bank to be effective, it is important that it is able to act independently of the Treasury and this requires it to be enshrined in law. BCC therefore welcomes the decision to legislate for the establishment of the bank in the Enterprise and Regulatory Reform Bill.

BCC acknowledges that there is an argument to be made for not allowing the bank to borrow from the financial markets until 2015. However, it is clear that the bank's ability to meet its objectives will be limited until that point. The BCC would like to see its powers to borrow be brought forward.

The bank should have flexibility to change its lending priorities as the needs of the UK change. It is unclear if the legislation gives it this flexibility and the BCC would like this clarified by the Government. The BCC agrees that among the bank's priorities should be energy efficiency, the most cost effective climate change mitigation policy. The BCC would like clarification from the Government on how the bank can help deliver the flagship energy efficiency scheme, the Green Deal, and especially how it will deliver for businesses. The BCC also like to measures to put in place to ensure that small and medium-sized businesses can benefit from the green investment bank.

Part 2: Employment

Employment tribunals: Employment tribunals are an undesirable way to resolve workplace disputes and cost employees and employers time, money and stress. ACAS Pre-Claim Conciliation (PCC) offers the opportunity for resolution with minimal formality allowing both parties swiftly to draw a line under the dispute. The current system distracts employers from their core economic activity, and adds considerably to the burden of employment legislation, therefore reducing job creation.

Introducing a mandatory process with the option for participants to opt-out will reduce the number of costly and time-consuming employment tribunals, as well as helping to clear the backlog in the tribunal system. In addition to increasing the chances of conciliation, this additional step also provides the opportunity for professional advice that may identify claims made with no legal basis which would otherwise have wasted the time of the tribunal, the employer and the employee.

Research by the Institute for Employment Studies (Pre-Claim Conciliation research paper 2009) shows that many PCC cases are resolved in a timely fashion to the mutual satisfaction of both parties. Of those employees who had settled their dispute, two-thirds said that this settlement would have been very unlikely without ACAS—thus clearly showing that PCC has successfully reduced the number of costly and burdensome employment tribunals. Users of the service typically had low awareness and understanding of the service prior to becoming involved, and so the best way to ensure that all those who could benefit from PCC are aware of it is to make it mandatory.

The IES study also shows that one of the major enabling factors to successful PCC is the investment of significant time on the part of helpline staff. Therefore, we expect that extra resources for ACAS to cope with this increased workload will be crucial to the success of this proposal. Reducing the number of cases that proceed to tribunal should also reduce the burden on tribunal offices allowing them to process the case administration including case notes and letters to each party more quickly. Ideally there should be a requirement for this to be done within a set period of time, though this is not included in the Bill.

According to BCC research, one in five businesses has been threatened with a tribunal in the last three years. Three-fifths of claims are settled due to cost and uncertainty (the average cost to defend is £8.5k; the average settlement is £5.4k). In 2010 the BCC recommended (*Employment Law: Up to the Job?* BCC, March 2010) that lay members be removed from the tribunal system, and that the money saved could be better used by supporting ACAS in working with claimants earlier in the process.

We are concerned about a clause in the Equality Act 2010 which gives new powers to make recommendations that the employer should take steps for the benefit of the employer's workforce generally "for the purpose of obviating or reducing the adverse effect of any matter to which the proceedings relate", separately from or as well as making recommendations for the benefit of the individual complainant. The BCC does not believe that tribunal judges, nor lay members, will really have the experience to make such broad recommendations about a respondent's business.

However, in such cases where a recommendation is made, it should only be made in cases with a panel. We would encourage the Government to use these changes to the tribunal system as an opportunity to remove this provision, which we believe tribunals are ill-equipped to use.

Unfair Dismissal: The BCC welcomes the replacement of rounding-up with a mechanism that allows the Secretary of State to reduce the upper limit instead of always increasing it. Few claimants achieve the maximum award, but the upper limit contributes to employer fears of tribunals and encourages vexatious claims.

However, the BCC is more concerned that the level of median awards in employment tribunals for unfair dismissal has been rising at a much higher rate than inflation. The Government should focus urgently on why the median level has been rising, rather than concentrating on the top level, which very few claimants achieve. One option would be making more use of Presidential Directions to ensure tribunal judges are offering appropriate levels of awards. Better use of the statement of loss would also help and we look forward to reading the results of Justice Underhill's Fundamental Review of employment tribunal procedures.

Power to employment tribunals to impose financial penalties on employers: The BCC is very concerned about the proposed financial penalties, and disagrees with the stated reasoning behind them. Financial penalties will not encourage compliance, just early financial settlements even where the case against them is weak. Penalties will not change the behaviour of employers who are already prepared to defend a claim and be faced with unlimited costs. The proposal to fine employers who lose tribunal claims is a fundamentally anti-growth measure that will have perverse consequences, and it should be removed from the Bill. If the proposal to introduce a claimant fee prior to bringing a claim to an employment tribunal goes ahead it would also make sense to fine non-compliant employers an automatic small administration fee, aligned with the proposed employee fee.

The Impact Assessment states "the policy aim is to deter non-compliance," but in this context penalties will not act to deter non-compliance, but actually act as a disincentive for employers to fight weak and spurious cases. Employers defending tribunal claims already face a large Bill for legal costs—78% of employers require outside help defending a claim. This advice is very expensive for employers; in 2008, the mean amount paid for legal and professional fees was £8,000 for employers and the median amount was £2,500. However, discrimination cases are consistently more expensive in terms of legal costs. BIS evidence shows that these additional costs, combined with high compensation awards, encourage businesses to settle outside tribunals, rather than having any effect on compliance. Rather than fearing losing the claim, the main reasons employers sought to settle were to keep costs down (51%) and because it was convenient to do so (25%). The BCC believes that this penalty will force more employers down this route.

For those employers that do defend themselves, the situation is different, as by their nature, they were not discouraged from going to tribunal by the aforementioned costs. If "the policy aim is to deter non-compliance," it is unlikely that an extra £5,000 would change employer behaviour, if they are already facing paying out uncapped compensation in a discrimination claim. Any system of disincentive entirely breaks down here and this effect is not just limited to discrimination cases. In April 2010–March 2011, 26% of employment tribunal cases won by a claimant for unfair dismissal were granted awards of over £10,000, with 10% being awarded over £20,000. Given the high legal costs these employers were also paying to fight the claim, the BCC does not believe that a £5,000 fine would encourage compliance. Instead it will just hurt well-meaning SMEs defending themselves against what they consider to be an unmeritorious claim.

However, we do accept that if an employee will have to lodge a fee to use the tribunal system, then it is also fair for a losing employer to pay an analogous administration fee to the Treasury. We do not accept the use of employers, already facing substantial legal bills, to raise further revenue. The Impact Assessment states these fines will raise £5.5 million per year but the amounts would be very uneven, depending on the case. For a small business facing an unfair dismissal claim that they believe is unmeritorious and is tempted to defend themselves, an average fine of £2,500 (according to the IA) could be enough to put them off fighting altogether and encourage them to settle the claim. This is not in the interests of justice, nor does it promote job creation and economic growth.

The BCC believes this proposal should be drastically scaled back, so that judges only automatically fine employers a small administration fee, aligned with the employee fee. A penalty will not encourage employment law compliance. It will however make it even less likely that businesses, particularly small businesses, will defend themselves against weak and groundless claims—and could result in a more risk-averse attitude to employing people altogether, particularly amongst SMEs.

Part 3: Reduction of Legislative Burdens

The Primary Authority Scheme (PAS) and inspection plans: The BCC welcomes the commitment to reduce regulatory burdens on business, and to ensure that the number of inspections businesses face is fair and proportionate. Firms value positive, constructive interaction with regulators, but not un-coordinated inspections and punitive enforcement. If these proposals remove red tape and lessen the amount of time businesses spend on compliance, they will be welcomed by companies. The BCC welcomes the extension of PAS as this should reduce regulatory burdens on businesses which are not currently eligible to take part in the PAS. However, the BCC believes that because of the size and nature of many of the BCC's members, they will not take up this

scheme. The BCC believes that this scheme will be of more benefit to businesses that are members of specific trade organisations relating to specific industries, as opposed to general business organisation such as the BCC.

Sunsetting policy: The BCC welcomes the provisions being made that will put the question of legal powers beyond doubt, simplifying implementation of the sunsetting policy, and removing the risk of legal challenge.

Heritage planning regulation (Conservation area consent in England): The BCC welcomes any moves to improve the operation of the consent regime. The BCC has long called for the non-planning consent landscape to be simplified and all unnecessary consents to be scrapped.

Part 4: Directors' remuneration

Businesses must be able to reward good performance. Conversely, there should be no rewards for poor performance. However, these responsibilities should be exercised by companies' non-executive directors and remuneration committees, in the interests of shareholders. Shareholders themselves must also hold boards to account.

The BCC is not in favour of the Government taking steps to either directly or indirectly regulate directors' pay, as this is a matter for self-regulation by the businesses themselves. However, the BCC has no objection to the proposed amendment requiring a binding shareholder vote on pay policy every three years provided that pay policy remains unchanged. But legislation on this issue must end here as further political intervention in company matters could have perverse consequences for investment, listings and headquartering decisions. The Government must also not move beyond the existing definition of quoted companies as defined in the 2006 Companies Act.

July 2012

Memorandum submitted by the Chair of the Creators' Rights Alliance (ERR 42)

1. The Creators' Rights Alliance is an affiliation of organisations representing the interests of over 100,000 original creators in a wide range of fields—including music, illustration, journalism, photography and writing. Most of the 100,000 creators we represent make their living by licensing copyright and performers' rights in their work.

2. We restrict our comments to the proposals in the ERR Bill concerning copyright.

3. The creative industries are a key driver for growth in the economy and a foundation-stone of hopes for economic recovery—the Government recognises this. And the great majority of what the creative industries distribute originates with individuals, like most of those the CRA represents, operating as sole traders or small businesses.

4. Growth can only be sustainable if we individual creators—the bedrock of Britain's creativity—can sustain ourselves by earning enough to be full-time, dedicated professionals.

5. In the age of the internet, copyright and creators' rights are not only the special interest of authors, musicians and so on, if the ever were. Everyone can now easily be a published or broadcast author or performer. Every citizen therefore clearly has an essential interest in being able to deal with cases where work that they post to *Facebook* or similar websites is be abused, for profit or in a manner prejudicial to their reputation.

6. We share the concerns expressed to your Committee by stakeholders such as UK Music[64] about the way in which these measures have been introduced at a late stage. It was our understanding also that Government would consult further on the proposals in the copyright consultation, once proposals were more advanced. The Foreword to the Copyright Consultation states that *"Government's intention is to respond to this consultation and make formal proposals for legislation or other action in an IP and Growth White Paper in Spring 2012."*[65] No such White Paper has been published.

7. We do not want to see a repeat of the legislative mess that was the Digital Economy Bill. It remains the case, now as in late 2009 and early 2010, that the proposed measures are acceptable to creators only if they are accompanied by these essential safeguards for us as the individuals on whom the creative economy is founded. Specifically:

8. *Clause 56:* Despite the Intellectual Property Office's covering material, the purpose of inserting this provision into the Copyright, Designs and Patents Act remains obscure. Its obscurity deepened when, responding to a probing amendment to restrict the Minister's power to alter the exceptions to copyright to those permissible under European law, Norman Lamb spoke of a power "to change exceptions in response to domestic legal judgements on those parts of our law—the non-harmonised parts—that are not subject to control from Brussels".[66] What are these?

[64] Memorandum to this Committee: http://www.publications.parliament.uk/pa/cm201213/cmpublic/enterprise/memo/err32.htm accessed 14/07/12

[65] Consultation document at http://www.ipo.gov.uk/consult-2011-copyright.pdf accessed 14/07/12

[66] Commons *Hansard,* Thursday 12 July 2012, column 631.

9. *Amendment NC11—reducing duration of copyright by Regulation:* We appreciate that anomalies may need to be rectified: but not at the expense of granting the Minister over-broad powers. As the amendment stands, it would permit the Minister to make Regulations extinguishing your copyright in the photographs still in your camera, or the notes still on your pad, because they are unpublished. While we are fairly sure this is not the intention, public and in particular creators' confidence would be significantly increased if the measure said what is intended: for example to append after the words "or pseudonymous" the words "to a duration not less than 70 years after their creation."

10. *Amendment NC13—orphan works and extended collective licensing:* this would provide for Regulations—as yet ill-defined—creating schemes for "extended collective licensing". These would allow mass licensing of works without permission or precise knowledge of who the creators are, for example by libraries and TV archives. Further measures would allow licensing of "orphan works"—those whose creators cannot be located.

11. These provisions are remarkably similar to those for the same purposes introduced into the Digital Economy Bill by the previous Government in late 2009. That measure suffered from an attempt at rushed procedure and a consequent loss of trust by large groups of creators. They further suffered—as to Clause 56 and Amendment NC13 to this ERR Bill—from an excessive reliance on Regulations and a reluctance to spell out the necessary safeguards on the face of legislation subject to full Parliamentary scrutiny.

12. We do appreciate the three clarifications compared to the DEB measure as introduced: the specification that bodies shall not issue themselves with licenses to use works without permission of creators; recognition of the need to provide for the case in which a work ceases to qualify as an orphan work; and recognition of the need to ensure identification of authors and performers, even where they are not traced. We observe, however, that the previous Government felt the need to amend its own proposal with significant further clarifications on the face of the Bill, before abandoning the proposal.

13. One clarification required to ensure that licensing of orphan works does not distort the market in which works by known creators are licensed is to specify, on the face of the Bill, that licenses for use of orphan works shall attract a fee, payable in advance of use, reflecting the prevailing rate for a licence to use a similar work by a known creator. A step toward this clarification would be to delete the word "any" from the phrase "treatment of any royalties" in the proposed Section 116C(4).[67]

14. Other necessary measures require additional changes alongside those proposed here, without which the current proposals are unacceptable to a great many creators.

15. In general we observe that the British Library argues in support of Extended Collective Licensing that is "has existed in the Nordic countries since the 1960s".[68] This is true: but in those countries it exists against a background of Authors' Rights legislation—as distinct from copyright. This treats the rights of creators—to be identified as author, to defend the integrity of their work, to authorise its use and to fair remuneration—as in principle inalienable. Under the copyright system, publishers, broadcasters and online service providers frequently force creators to waive these rights, because they can.

16. In particular, creator's rights to be identified and to defend the integrity of their work are important both to citizens as creators and to citizens as users of creators' work. As creators, we all need the right to be identified as authors and performers of our actual, un-distorted works. As professional creators, we need this in order to build a career. As users, we need the guarantee they represent that the creator takes responsibility for their work. Most pragmatically, consideration of any measure to permit the use of "orphan" works must not be restricted to the historical record; it must be accompanied by measures to prevent future works being "orphaned", which means guaranteeing that creators are identified and stay identified.

17. As Viscount Bridgeman observed in the DEB debate, in a phrase much quoted since: "It is a logical and legal absurdity to talk of licensing works whose authors cannot be identified while there are still significant groups of authors who do not have the right to be identified."[69]

18. The Creators' Rights Alliance therefore recommends that at the same time as clarifying the measures proposed in Amendment NC13, additional measures are needed to ensure that:

(a) The moral rights shall be unwaivable;

(b) The creator may exercise the moral right of identification (CDPA section 77) by, at their initiative, proposing that a pseudonym be used; absent such proposal they shall be identified by their real name; and

(c) Waivers for "works generally" made under CDPA section 87(3)a before the coming into force of this section shall cease to have effect for works first made or published after.

(d) The exclusion of journalists from the protection of the moral rights should be ended.

[67] Amendments as at 10 July 2012; at http://www.publications.parliament.uk/pa/bills/cbill/2012–2013/0007/amend/pbc0071007m.145–151.html accessed 15 July 2013.

[68] Memorandum to this Committee: http://www.publications.parliament.uk/pa/cm201213/cmpublic/enterprise/memo/err38.htm accessed 14 July 2012

[69] Lords *Hansard*, 8 February 2010, column 594.

(e) The requirement that the right of identification be "asserted" should be removed.

July 2012

Memorandum submitted by Professor Catherine Waddams, University of East Anglia (ERR 43)

THE ENTERPRISE AND REGULATORY REFORM BILL—TWO SPECIFIC SUGGESTIONS

Catherine Waddams (formerly Price) is an economist based at the ESRC Centre for Competition Policy at UEA (CCP). CCP is funded by the Economic and Social Research Council to undertake independent interdisciplinary research into competition policy and market regulation, combining real-world policy relevance with academic rigour. Catherine has published widely on privatisation, regulation and the introduction of competition, especially in energy markets, and is particularly interested in the distributional impact of regulatory reform, and consumer choice in newly opened markets; she was a part time reporting member of the UK Competition Commission from 2001–09.

Additional specific comments following oral evidence:

On objectives of the CMA: Part 3 Section 18 (3)—page 12

At present this presumes that promoting competition is necessarily for the benefit of consumers. Given the potential Public Interest issues and other circumstances where competition may not benefit consumers (for example where there are natural monopolies), a better wording might be "The CMA must seek to promote competition, both within and outside the United Kingdom, wherever this would benefit consumers". This would have the merit of reflecting the wording of the sector regulator duties, but in reverse order to indicate the primary duty of the CMA towards the competitive process.

On concurrency: Part 4 Chapter 5 Section 43(2) and (3)

I am unclear about who is determinative with respect to exercising Part 1 functions. In 43(2) it appears that the CMA may decide. But in 43(3) it seems that they may do so only with the consent of the sector regulator. Does this require clarification? It is clearly an important practical point if a sector regulator is reluctant to allow a competition based enquiry, perhaps because of conflicting non competition objectives (for example social or environmental concerns which are properly the concern of the sector regulators but not of the CMA). As I noted in my oral evidence (and evidenced by the comments on the objectives of the CMA above), sector regulators have a different balance of objectives than does the CMA, and so the outcome for markets and consumers may depend on this precedence.

July 2012

Memorandum submitted by the Employment Lawyers Association (ERR 45)

WORKING PARTY RESPONSE

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/Defendants 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 than 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, chaired by Paul McFarlane and David Widdowson, was set up by the Legislative and Policy Committee of ELA, to respond to the call for evidence to the Public Scrutiny Committee considering the Enterprise and Regulatory Reform Bill 2012–13. Its report is set out below.

A. CLAUSES 7–9—CONCILIATION

General comments

1. In principle we consider this to be a positive step towards swifter resolution of employment disputes and reducing the burden on Employment Tribunals. We do, however, have some reservations as to how this may be achieved in practice.

2. We are unsure how many claims would actually settle using this process. In our members' experience, alternative dispute resolution, works best when both sides voluntarily engage in the process with the genuine desire to resolve the dispute. By compelling the parties to take part in pre- claim conciliation, it may result in this process being seen simply as another necessary hurdle that Claimant has to go through in order to present their claim at an Employment Tribunal. Some of our members have observed that some Respondents prefer to have a complete picture of the case (including documents and witness evidence) before engaging in settlement

discussions and test the Claimant's resolve. Similarly, from a Claimant point of view, employment issues are matters that affect them personally. It can often be the case that Claimants want "their day in court" and imposed conciliation will not dissuade them from this course of action.

3. ACAS has a long history assisting parties to resolve workplace disputes and involving them at an early stage, before a case potentially goes to an Employment Tribunal, should be encouraged. It may result in the matter being resolved without having to use the valuable resources of an Employment Tribunal. The introduction of a mandatory conciliation process before a claim may be presented to an Employment Tribunal, however, will have significant implications for its resourcing. We say this for the following reasons:

(a) ACAS is currently under a duty to conciliate Employment Tribunal claims listed in section 18 (1) of the Employment Tribunals Act 1996 ("the Act"). There is no suggestion in the Bill that this will not continue.

(b) At present only a fifth of Claimants seek advice from ACAS before submitting their claims. The proposals in the Bill will in future require prospective Claimants in "relevant proceedings" to contact ACAS as a necessary pre-condition of presenting a claim. ACAS will then be required to conciliate (new section 18A of the Act).

(c) Inevitably this will increase the existing workload of ACAS and its officers. Our experience suggests that its resources are already stretched and, if the proposed scheme is to work effectively, those will need to be increased.

(d) The Explanatory Notes released with the Bill do not address this issue. The Final Impact Assessment published in relation to the "Resolving Workplace Disputes" identifies only savings which would arise from the reduced burden on Employment tribunals. We note that, during the second reading of the Bill, John Healey MP, asked the Secretary of State:

"…what increase in resources will he make available to the [ACAS] if everyone who wants to put a claim to a tribunal must first put it to ACAS first?"

The response to this was *"We will indeed rely heavily on ACAS and it is important that it is properly resourced, so we will obviously have to look at that, but we have had no warnings that it cannot handle the processes that we propose to introduce…"*

In light of our comments above we strongly believe that the issue of ACAS resourcing should be proactively reviewed.

4. As stated above, whilst in principle this proposal is welcomed, as the Bill currently stands, it lacks clarity in a number of key respects which could result in unnecessary satellite litigation if introduced in its current form some of which echo the former unsuccessful statutory disputes procedure. We have the following comments:

Conciliation Officer's certificate

5. In the event that Conciliation Officer considers that settlement is not possible we would suggest that the Conciliation Officer be required to set out clearly in the certificate the "relevant proceedings" that have not been successfully conciliated.

6. As a consequence, the Conciliation Officer will need to be able to identify "the relevant proceedings", which may entail some additional legal training for conciliation officers. This, we consider, ought to minimise the possibility of disputes at the Employment Tribunal concerning what "relevant proceedings" were the subject matter of the Conciliation Officer's certificate.

7. The Bill states that if the Conciliation Officer considers that settlement is not possible or the "prescribed period" has expired then s/he must issue a certificate to that effect, in the "prescribed manner", to the prospective Claimant (the draft section 18A (4)). However, the Bill does not currently state what information will be contained in the Conciliation Officer's certificate. We have commented above on the issue of "relevant proceedings".

8. We therefore consider that the Bill and/or the accompanying regulations needs to include a process whereby at the end of the obligatory conciliation process the Conciliation Officer clearly understands what is required to be in the certificate and parties at least know which "relevant proceedings" have been the subject matter of pre-claim conciliation, such that those matters can proceed to a claim before an Employment Tribunal. This could avoid unnecessary satellite litigation similar to which, for example, followed the implementation of the statutory grievance procedure on the issue what is a "grievance" for the purposes of the procedure.

Claimant information

9. The fundamental point behind these proposals is to prevent prospective claimants pursuing claims before an Employment Tribunals before using ACAS. The Bill contains provisions requiring prospective claimants to provide "prescribed information" in a "prescribed manner" to ACAS (the new section 18A (4)). The only reference is at the draft section 18A(10) which defines "prescribed" as being "prescribed in employment tribunal regulations".

10. Is it intended that new regulations should be drafted to specify these? The draft section 18A(12) does not appear to do so. As drafted this lacks clarity as to exactly what a Claimant is expected to provide. In any

event, we suggest that there should be clear guidance provided to Claimants regarding what is required of them so that these requirements can be complied with. Given that a large number of claimants are unrepresented (40,400, according to the statistics published for 2010–11) guidance drafted in non-legalistic way so that it can be easily understood would be helpful. We would suggest that draft guidance is published which is the subject of a consultation exercise to try and achieve this objective.

Complexity

11. The changes to the calculation of time limits for claims are set out in Schedule 2 of the Bill. This seeks to extend the time for presentation of a complaint. It does so by making allowance for the period between:

— the date when a Claimant complied with the new section 18A requirement to seek to conciliate complainants before the presentation of a claim to an Employment Tribunal (Day A); and

— the date when the Claimant receives, or is deemed to have received, the Conciliation Officers certificate ("Day B").

This period is not counted. Further, the Bill states that if the relevant provision would (if not extended by the relevant sub-section) expire during the period beginning with Day A and ending one month after Day B, the time limit expires at the end of that period ie one month after the end of Day B. We consider that, as currently drafted, these rules are complex and will not be easily understood by employees, employers, their representatives or the Employment Tribunals. To illustrate this point below we have set out below two worked examples of how we understand the new rules on time limit would work in an unfair dismissal case:

Example 1

Unfair dismissal: Effective Date Termination ("EDT") = 31.05.12; Time Limit ("T/L") = 30.08.12

Day A = 15.06.12; Day B = 5.7.12

1 month after Day B = 05.08.12

T/L does not fall between 15.06.12 and 05.08.12

Period which does not count = 16.06.12—5.07.12 = 20 days

Add 20 days to 30.08.12 = 19.09.12

Extended T/L ends on 19.09.12

Example 2

Unfair dismissal: EDT = 31.05.12; T/L = 30.08.12

Day A = 15.08.12; Day B = 5.09.12

1 month after Day B = 05.10.12

As T/L falls between 15.08.12 and 05.10.12 extended T/L ends on 05.10.12.

12. As can be seen from the above, the time limit for presentation of a claim, where the effective date of dismissal is the same, will vary from case to case depending upon how quickly the Conciliation Officer's certificate is received by a Claimant. We anticipate that this is likely to give rise to much confusion and unnecessary satellite litigation on the question of whether a claim has been presented in time or not.

13. With discrimination claims, the calculation is likely to be further complicated because the Employment Tribunal may also have to consider whether there has been a "continuing act". We recall that when the statutory disciplinary procedure was introduced, similar changes were made to the rules on the calculation of time limits. This resulted in a period of uncertainty for parties about the date when the time limit for presenting a claim for unfair dismissal expired.[70]

14. In order to avoid unnecessary satellite litigation on the time limits, we consider that the rules concerning time limits need to be simple and easily understood by all who have to use them ie Claimants, Respondents, their advisers and the Employment Tribunal. We do not yet know what the "prescribed period(s)" will be for ACAS to try and settle claims that sent to them. However, it is clear that the Government anticipates that additional time will be required in the process for ACAS and the parties to try and resolve claims using the mandatory conciliation process. Therefore, we would suggest that consideration is given to simply increasing the periods for presentation of Employment Tribunal claims. The existing rules dealing with the circumstances where Employment Tribunals can extend time would remain. This approach, we suggest, has the benefit of simplicity.

[70] Under the Employment Act 2002 (Dispute Resolution) Regulation 2004, the time limit for bringing an ET claim was extended by three months where an employee invokes the statutory grievance procedure. The most significant cases relating to time limits for the Statutory Grievance Procedure were: *Singh t/a Rainbow International v Taylor* and *Joshi v Manchester City Council* (both decisions of the EAT).
In *Singh t/a Rainbow International v Taylor UKEAT/0183/06* the EAT confirmed that the three month time extension runs from the day after the day on which the original time limit for submitting the tribunal claim expires (holding the total time limit was six months). However, the EAT departed from this decision in *Joshi v Manchester City Council UKEAT/0235/07* holding that the time limit for unfair dismissal claims where the statutory grievance procedure has been invoked is six months less one day. They found the words "beginning with" in Regulation 15(1) of the required an "inclusive construction" and mean that the day after the expiry of the normal time limit has to be included in any calculation.

B. Clause 10—Legal Officers

15. When questions about legal officers were proposed (as question 55) in the "Resolving Workplace Disputes" consultation in 2011 the proposals were that some interlocutory work undertaken by the judiciary might be undertaken by qualified legal offers and discussion was principally about the nature of work that could be given to legal officers, particularly under Rule 10.

16. In the response to the consultation, published in November 2011, Government said that it would consider the role of the legal officers in the light of the fundamental review of tribunal rules. The present proposal, however, appears to have been published well before that fundamental review concluded, so there appears to have been a change of approach.

17. The present proposal talks about determining proceedings of particular types to be specified in regulations not yet published. It requires that such a process be agreed by all of the parties. We agree that is an appropriate requirement.

18. The concern of some of our members was that this system might operate unduly favourably to employers, who will generally be in a better position to produce a case set out on paper, than many claimants. No agreed view was reached about this and we can appreciate that the proposal may well be welcomed by many employers as simpler and cheaper than appearing at a hearing. In that the provision requires consent of all parties, however, we do wonder whether it will in fact be taken up to any great extent. The experience, for example, in relation to the arbitration scheme would suggest that it may not.

19. There is a proposed amendment to this section, which adds a subsection that the Secretary of State and the Lord Chancellor should act together and consult on the appropriate level of professional attainment required by legal officers, and the appropriate remit of proceedings that an appointed legal officer should determine, and a mechanism for appeals. Both of these uncertainties will affect the views that we have of this proposal and no final view can be expressed until that has been made clear.

C. Clause 12—Limit of Compensatory Award

20. Clause 12 proposes that the Secretary of State may by statutory instrument amend section 124 of the Employment Rights Act 1996 which prescribes the limit on the compensatory award for unfair dismissal.

21. ELA notes that this is a new proposal and has not been foreshadowed in any previous consultation document and in particular was not a proposal for consultation in "Resolving Workplace Disputes". ELA is concerned that such a potentially significant change to the floor of individual employment rights has not been put out to the usual consultation before being introduced in the Bill.

22. The clause could potentially be used to reduce the current cap on compensation (£72,300) to a specified amount of between one and three times median wages namely £26,000 and £78,000 or a specified number of weeks pay (but not less than 52), or the lower of the two. ELA notes that different limits could be applied to different kinds of employers such as a lower amount for small businesses.

23. In 2010–11 the median unfair dismissal award was only £4,591. 90% of awards were for less than £20,000 and all but 2% were for less than £50,000. Since these figures include the basic award, which is not included in the cap, the average compensatory award must be significantly less. The proposed change is therefore unlikely to have any effect on the vast majority of unfair dismissal cases that come to a hearing.

24. ELA appreciates that the existence of the cap can have some effect on the behaviour of parties in a dispute in negotiations but considers that the impact of the current cap has no effect on the level of settlements in the vast majority of cases as compensation never reaches £72,300. If the cap were lowered to a sum equivalent to the annual median wages (which is one possibility), that could have a significant effect on behaviour in negotiations as many more cases in negotiation or at tribunal hearing would come up against the cap.

25. We note that there was a one-off rise in the limit from £12,000 to £50,000 in 1999 and thereafter index linked. ELA notes this rise was a compromise and the original proposal in the *Fairness at Work* White paper was to abolish the cap and bring compensation for unfair dismissal in line with that for breach of other employment rights such as discrimination cases or personal injury cases.

26. This is likely to have the benefit of discouraging the bringing of claims in respect of employment rights where there is no cap such as whistle blowing or discrimination claims in the hope of negotiating a higher settlement or obtaining a higher award from the Employment Tribunal. Such claims are generally more costly to defend and take up more resources in the tribunal in terms of length of hearing and the need to have a full panel hear the case. If the cap were reduced to median earnings (£26,000) in some or all cases, more claimants would be likely to bring additional discrimination or whistleblowing claims to avoid the cap.

27. It may be thought unsatisfactory that an employee who has been found to be unfairly dismissed and who, despite their best efforts to find alternative employment and mitigate their loss, has been unable to find work, could have their compensation capped at potentially £26,000 even though the Employment Tribunal finds their actual losses are far greater. These employees are likely to be the better paid and longer serving

employee or have access to an occupational pension scheme. The main element of large compensatory awards at present is a long period of future loss of earnings or pension loss.

28. On this basis it is possible that a challenge to a cap at this level on the basis of indirect age discrimination might be brought as it is likely to disproportionately affect older employees who are more likely to have longer service and so higher salaries and larger pension losses. If such a challenge were made the Government would have to be prepared to explain its justification for the cap.

29. We are also concerned that the Government proposes having a power to alter the limits between different kinds of employers. Although this is essentially a policy issue, it must be anticipated that it will provoke complaints as to fairness on the basis that, if an employer has been found to have unfairly dismissed an employee, to award compensation by reference to the size of the employer takes no or little account of the effect on the employee.

30. The fairness argument is not helped by the proposal in Clause 13 to impose financial penalties on employers of up to £5,000. This, by contrast, makes no distinction in treatment between different sizes of employer once the tribunal has found an aggravating factor.

D. Clause 13—Financial Penalties on Employers

31. This clause grants the Employment Tribunal a discretion to impose a financial penalty of between £100 and £5,000 and at 50% of any financial award to the claimant where one is awarded.

32. We refer back to ELA's response to the Government's consultation "Resolving Workplace Disputes" page 63 following. We note the Government has taken on board the criticism that to penalise all employers across the board whatever the breach was not justified.

33. We are concerned, however, that the "aggravating factors" in draft Clause12A (1)(b) are not otherwise defined. This may create uncertainty unless and until judicial guidance through case law develops. We anticipate that claimants and their lawyers may use the threat of inviting the tribunal to impose a financial penalty as a factor to negotiate an increase in the level of compensation in any settlement to avoid and/or to settle proceedings. However, it is an additional factor to negotiate about and in the experience of ELA members the more factors there are to negotiate about the more likely a settlement does not occur. This could have the consequence of increasing the number of tribunal claims and/or hearings and, unless some clear guidance is given at the outset, would be likely to frustrate the Government's policy aims for the Bill.

34. We understand the case for the proposition that, if an employer makes significant and/or deliberate breaches of UK legislation and then fails to engage in settlement discussions such that the case goes to hearing, it would be right that, when there are aggravating features, a penalty should be paid towards the costs to the Employment Tribunal system of dealing with the case.

35. As we said in our response to "Resolving Workplace Disputes":

> "by introducing discretion, this could give rise to additional arguments, litigation and legal costs incurred in relation to the exercise of that discretion, and potential appeals (as any exercise of discretion by the Tribunal would have to be appealable). Based on experience of the sort of litigation which arose as a result of the now abolished Statutory Dispute Resolution Procedures, our view is that this would not be desirable."

We went on to suggest:

> "We therefore believe that if it is finally decided that a penalty regime is to be introduced, in any case where an employer has made a genuine attempt to settle the case by way of a reasonable offer, which the employee has not accepted (and does not beat at the Employment Tribunal), the penalty should not be payable."

36. On the issue of paying the penalty to the Consolidated Fund we stated:

> "Those ELA members who mainly act for employees note that the burden of bringing a claim all the way to Tribunal is on an employee Claimant. There is extremely limited public funding for such claims and an employee Claimant with a good case is often unable to pursue it because the burden of legal costs outweighs the value of the claim. In these circumstances where employees do proceed, at financial cost to themselves, the view of those ELA members representing employees is that the employee should be paid the financial penalty directly, or at the very least that the penalty payment be split between the Exchequer and the individual employee. However, those ELA members who mainly represent employers do not agree with this suggestion. One view is that both parties are capable of acting unreasonably or vexatiously in terms of settling a claim prior to the final hearing which could be reflected in the existing regulation of costs in relation to tribunal claims. Potentially a less onerous way of recompensing the Tribunal system for costs incurred would be to incorporate an additional award/penalty into Costs Orders in the Tribunal that is paid to the Exchequer."

These remain our views notwithstanding the proposal to limit financial penalties to cases with aggravating factors.

37. Finally, in our original response we stated:

> "ELA notes that the rationale behind this proposal is to recompense the Tribunal system for the claim which would not otherwise have been brought. However, the Tribunal will only award it if the individual employee proceeds with the claim to a full hearing. One of the reasons why the Government has suggested making payment to the Exchequer is to avoid providing an incentive for speculative claims. As most employees will factor this payment into their negotiations for settlement, it is unlikely that payment of the financial penalty to the Exchequer will provide any less of an incentive to bring speculative claims, than if some or all of it was paid to the employee directly.
>
> ELA also considers that, if revenue is to be raised in this way, it should be directly ploughed back into improving the administration and operation of the Tribunal system, which has appeared to most employment lawyers to have been particularly under resourced in recent years."

These remain our views. As noted above, there is also the inconsistency between the proposal to adopt a variable award level dependent on employer size for the cap on awards but no such distinction proposed for this penalty system.

E. Clause 14—Qualifying Disclosures

38. Clause 14 proposes amendment to section 43B of the Employment Rights Act 1996 to include a new requirement that, to be a "qualifying disclosure", a disclosure has to be made in the public interest. This reflects previous statements by the Department and in wider commentary that the judicial interpretation of the existing provisions, principally in the *Parkins v Sodexho* decision, had inadvertently widened the scope of the Act, such that disclosures received the protection of the law despite having no link with matters of public interest. This is a policy issue and our remarks are directed to the way in which it is sought to implement that.

39. The proposed wording seeks to achieve the objective of re-establishing a link between the enhanced protection afforded to those making protected disclosures and such disclosures being in the public interest. We have two main comments on this.

Subjective nature of test as drafted

40. First, the amended wording still retains the element of "reasonable belief (with the proposed amended wording in italic):

> "43B (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure *is made in the public interest and* tends to show one or more of the following…"

The impact of this amendment means that Tribunals, workers and employers are required to assess not just whether the issues *is* (presumably objectively assessed) in the public interest, but also that the individual worker *subjectively believed* that the issue was in the public interest. Therefore, under the test as currently proposed, an employee could still bring a whistleblowing claim where there was no public interest, but the individual genuinely believed that the issues raised were in the public interest. So, an Employment Tribunal might be satisfied that the employee had a reasonable belief that the disclosure made was in the public interest without itself concluding that the disclosure in question was a matter of public interest. For example the belief might be reasonably held based on information believed to be true, but in fact mistaken.

41. In addition, it would as we see it, almost always be necessary for the entirety of the evidence to be heard before the Employment Tribunal could reach a conclusion on the issue. As protected disclosure cases tend by their very nature to be lengthy it may be a very costly exercise for all concerned to take a case to a conclusion, only to find that the disclosure in question was not protected after all as the Employment Tribunal finds that there was no reasonable belief in the subject matter being in the public interest.

42. An alternative would be to move the amendment to an earlier part of the section, as follows:

> "43B (1) In this Part a "qualifying disclosure" means any disclosure of information *made in the public interest* and which, in the reasonable belief of the worker making the disclosure tends to show one or more of the following…"
>
> This ensures that the decision as to whether a matter is in the public remains an objective one for the Tribunal to determine. It also does not materially limit the protection afforded to workers when read alongside the legislative intent. If a worker genuinely (and subjectively) believes a matter to be in the public interest, this would still form part of the Tribunal's assessment of whether a matter is in the public interest. The claims which would then be excluded would be those claims where a worker, genuinely, believes that the issue he has raised is in the public interest but the Employment Tribunal does not agree. In such circumstances the individual employee would still have the remedies available under the unfair dismissal legislation to protect his or her rights.

43. Such an amendment is helpful to workers, employers and the Tribunal alike, as removing a subjective element of the tests gives greater certainty to all parties to any form of dispute. Were this issue not addressed, we fully expect it would be fertile ground for future litigation which could undermine the purpose of the amendment. If one takes the decision in *Sodexho* as an example, one can see how Tribunals will be forced to deal with claimants who are convinced the breach of their employment contracts is a matter of public interest.

Although the Tribunal would still have to make a finding as to whether or not the disclosure was a matter of public interest:

(a) this would be an objective decision for it to reach without having to make any assessment as to the Claimant's state of mind and/or knowledge; and

(b) it could be dealt with as a preliminary issue (in the same way as, for example, the question of whether or not a person is "disabled" within the statutory definition might be decided in a disability discrimination case), thus saving on the cost of a full hearing of the evidence.

Definition of "public interest"

44. The amendment does not seek to define what will be deemed to be within the "public interest". ELA appreciates the difficulties of including an exhaustive definition, and does not suggest that this would be useful for workers, employers or the Tribunal.

45. However, putting this in context:

(a) the need to amend the legislation arose from a lack of clarity following on from case law decisions; and

(b) case law on the meaning of "public interest" is inevitable (and would be useful) going forward.

46. One issue which ELA believes the Government should consider is whether it is appropriate at this stage to consider including any guidance or parameters on such a definition. This would align with the overall purpose of the amendment to the legislation—providing clarity and focus to employment law, for all participants.

47. We consider that such parameters need not be prescriptive or exhaustive but could cover a number of areas including:

(a) impact on a material number of or section of the public; such a definition could align with the test used for indirect discrimination under the Equality Act 2010;

(b) impact on individuals as members of the public and not, by way of example, as workers of a particular employer; and

(c) impact which is substantial and adverse, and not trivial in nature, again aligning with existing tests in discrimination law.

F. Proposed Section 111A—Confidentiality of Negotiations before Termination of Employment

48. We are concerned that there is a distinct possibility that the initial reaction of many advisors to these provisions will be that they are so uncertain and unclear that many will not make use of them. They will instead fall back on the existing without prejudice rules. We explain below why we believe that advisors will have very little confidence in the ability of the proposed rules to allow them to engage in a protected settlement offer under the proposed regime.

49. It is not clear to us why the alternative could not have been to reverse by statute the effect of the decision in *BNP Paribas v Mezzoterro*, and simply say that, in termination (or proposed termination) situations in unfair dismissal claims, it is open to an employer to make a without prejudice offer whether or not a specific dispute has arisen. This in turn would be subject to the same protections provided by the existing rule relating to "unambiguous impropriety".

50. It seems likely that creating this new regime on top of the existing without prejudice regime, will lead to some very complex cases where arguments of both impropriety and without prejudice arise. As we consider that the barrier to without prejudice conversations becoming known to a judge (unambiguous impropriety) is a higher one than the "improper" test is likely to prove, that could create some very difficult issues for a tribunal to resolve.

51. The test for without prejudice conversations and offers is widely understood by advisers at every level and is widely used in practice (albeit with the associated risks that any conversation is found to be outside the without prejudice rule, due to lack of an existing dispute). If this section is simply designed to get round the problem of the non-existence of a dispute when the offer of settlement is made in respect of an unfair dismissal it would be better for that to be tackled head on rather than to impose the uncertainties created by this proposal.

52. We comment on the proposed Clause taking each sub-clause in turn.

Subsection 1

53. In our view, whilst not entirely free from doubt, the words "may not take account of" imply that an Employment Tribunal may be informed of a settlement offer or discussions during the course of a hearing. We believe most judges will think that Government does not propose to extend the without prejudice rule for these circumstances, but has proposed a different regime. If a different intention exists we believe the words will need to be changed or clearly defined. It will not remove this risk to explain the intention in guidance alone as judges will not be constrained from giving words their ordinary and natural meaning.

54. We note that whilst the title of the section refers to negotiations, the word "negotiations" does not appear in the new sub-section. It is suggested that this should be added to the sub section, to make clear that the whole process of offer and counter-offer would be covered by the proposal.

55. We also consider that if our interpretation is shared by the judiciary there may be some practical difficulties in a tribunal being aware of offers and discussions, but having to set them aside in their mind when determining whether or not a dismissal was unfair. For example, if discussions fail to achieve a settlement and are followed by a process of performance management, would the employment judge and/or lay members be able to exclude from their minds the fact that this method of resolving matters had already been attempted when considering if the performance management exercise was a sham?

56. The existence of this provision would not exclude the possibility of an additional debate about whether or not a conversation was also without prejudice. It would avoid the necessity for a second set of proceedings if the decision was that it was not without prejudice as in that event the tribunal is presumably expected to carry on and, when the time comes to determine the question of fairness, simply put out of their mind any information they have about the offer. If the conversation was held to be without prejudice then presumably a second hearing before a different tribunal would be required. Where matters might get very difficult conceptually will be if only part of the conversation or negotiation is clearly without prejudice (for example, where an employee had made a complaint during a negotiation) and therefore inadmissible before the judge. All of this is of course predicated on the basis of our original assumption on the interpretation of this section.

57. We also have a concern that limiting the principle to unfair dismissal cases may result in unlawful disparity of treatment. Many employers may be more reluctant to have a conversation, for example, with an ethnic minority employee than they will with an ethnic majority employee. This will mean disparity of treatment, which may, in turn, found claims. We suggest the department takes advice on this possibility.

Subsection 1 is subject to the following subsections:

Subsection 2

58. We understand this subsection means that if the complainant, at any time in the proceedings, alleges that one of the automatically unfair dismissal provisions applies, then subsection 1 does not apply.

59. There is therefore the possibility that a claimant might, for tactical reasons alone, make an allegation that he or she was dismissed for an automatically unfair reason.

60. We considered if this subsection should be amended so that the claimant had to have a genuine belief in that allegation. Whilst the possibility of tactical allegations exists we also have considerable reservations about imposing this additional burden, because it would make hearings even more complex. However it remains our view that this sub-section means that there is the possibility that a tribunal could be proceeding for some time under the impression that an offer could not be taken into account later, and then if it emerges that an automatically unfair allegation is involved the tribunal would have to bring back into account that an offer had been made. Possibly the existing costs rules would deal with a claimant who was found to have lied or deliberately concocted such a claim.

61. On balance, however, we consider this sub-section serves little purpose. It is not clear why this category of claim requires the additional "protection" and whether it is worth the complexity it creates. There seems little reason in principle why this category of claim should not be settled and if the offer of settlement fails why the standard rule as to disclosure of the offer should not be applied.

Subsection 3

62. The word "improper" introduces a novel concept, and is likely to create uncertainty for some time. It is our experience that very broad terms such as this will lead to a variety of interpretations and so lead to inconsistent attitudes being taken in different regions (or even in different tribunals in the same region). Additional uncertainties are also created by the fact that the Tribunal has the liberty to take into account any offer to such extent that it considers "just". This also implies some improper behaviour may be overlooked but there is no clarity as to how this is to be assessed. A complete and open discretion is given to the judge, and in practice any decision made would be almost impossible to appeal. Such arbitrary and unfettered discretions, although they exist elsewhere in the law, can generate discontent with the system of justice and are best avoided if possible. In unfair dismissal cases in the future this is most likely to be a discretion exercised by judge alone which will contribute to the lack of acceptance as historically all parties level of acceptance of the fairness of the system has been influenced by the tripartite nature of the adjudication.

63. There are three separate levels of uncertainty:

(a) The meaning of improper.

(b) When will it be just to lift the veil.

(c) To what extent will the veil be lifted.

This example illustrates one of our concerns:

Assume a conversation in which the employer says: "Your performance is unacceptable. We could put you on a Performance Improvement Plan, give you some training but my view is that would just be delaying the inevitable. I want you to go. Let's agree a severance payment?" The employee resigns and claims constructive unfair dismissal.

64. It is this situation the legislation is intended to legitimise and protect and yet we cannot tell whether the Tribunal can "take account" of the conversation or not. We presume the legislative intention is to allow the Claimant's case to be struck out on the basis that the Tribunal cannot take into account the conversation he relies on as repudiation. However, why would announcing an intention to dismiss without following a fair procedure or to run a sham procedure not amount to "impropriety"? The imprecision of the language means that there would be no easy cases. Impropriety will always be alleged until the EAT has fixed it with some meaning.

65. We note that there is a possibility that ACAS or BIS will produce guidance as to what amounts to improper behaviour. Some reservations were expressed about yet another set of guidance to which tribunals and employers would have to refer and we doubt that judges would be constrained from giving words their ordinary meaning by guidance, however persuasive the authorship.

66. Additionally, we noted that the phrase "connected with improper behaviour, "is very broad and presumably covers the possibility that further discussions might arise after there had been improper conduct, during which subsequent discussions nothing improper was said or done. However, because it would be connected with the initial improper behaviour, it would be open for the tribunal to take it into account.

Subsection 4

67. We interpret this as being the equivalent to making an offer that was "without prejudice save as to costs", and it was anticipated that this would cover offers made by both employers and employees. We do not understand why this rule cannot be expressed in language that makes this plain which this sub-section fails to do.

Subsection 5

68. This is understood to mean that, where the Tribunal has also dealt with a discrimination claim between the same parties to an unfair dismissal claim and an offer had been made in the discrimination claim, that offer would be taken into account in the unfair dismissal claim. Whilst this was our view about the meaning of this subsection, we did not think it well expressed and we were concerned that it would not be entirely clear to unrepresented parties.

MEMBERS OF THE WORKING PARTY

Co-Chairs

Paul McFarlane: Weightmans LLP

David Widdowson: Abbiss Cadres LLP

Members

Jonathan Chamberlain: Wragge & Co LLP

Rachel Dinley: AC Beachcrooft LLP

Felicia Epstein: Pattinson & Brewer

Chris Goodwill: Clifford Chance LLP

Sean Jones QC: 11 KBW Chambers

Stephen Levinson: Radcliffes Le Brasseur

Brona Reeves: Barclays

Phillip Paget: Gordons LLP

Paul Statham: Pattinson & Brewer

Douglas Styles: McGuire Woods LLP

Maeve Vickery: Pardoes

N Walker: Taylor Wessing LLP

Emma Wilkinson: Citizens Advice

Fraser Younson: BLP LLP

July 2012

Memorandum submitted by the British Association of Picture Libraries and Agencies (BAPLA) (ERR 46)

British Association of Picture Libraries and Agencies—BAPLA is the trade association representing photographers, commercial companies, and cultural heritage organisations in the image licensing sector.

BAPLA wishes to draw your attention to the following:

1. Photographic Works will be Excluded from any Extended Collective Licensing Scheme

According to assurances given by IPO to BAPLA and to its European sister Association, CEPIC, extended collective licensing will not apply to photographic works.

BAPLA seeks assurances from Parliament and the IPO that exclusion of photographic works remains IPO's intention, during and after the passing of this Bill and therefore if the Bill is passed that the following is added as an exclusion in the amendments made in the second reading on 12 July 2012 page 183—116B (6) "Nothing in this section applies in relation to Crown copyright or Parliamentary copyright, or photographic works".

In particular BAPLA would wish to see the exclusion of photographic works detailed in the Code of Conduct of collecting societies (or authorised bodies) as images appear in all printed media and broadcast works and are used to illustrate sound recordings.

Notes:

A. Extended collective licensing conflicts with the normal exploitation of the work; and unreasonably prejudices the legitimate interests of the author/right-holder.

B. Images contain many layers of rights which when used commercially and with no knowledge of these rights pose too numerous risks for the user, subject, author and issuing agent of these works—picture libraries and agents. Layers of rights include for example trade marks appearing in many registered buildings, (in particular USA and Europe), images of children, or models.

Mass digitisation projects which by definition do not take into account these rights pose many risks to those making secondary copies and to secondary and subsequent users of those works.

C. Many photographers hold their work with several agencies, often in different territories, further compounding the risks to uses that infringing uses of works will attract litigation.

D. Picture libraries and agencies are instructed and are mandated by contract by many hundred often many thousand photographers to represent their works. Our sector is the largest representative of these works dwarfing the numbers, the works and remuneration derived from secondary rights.[71]

2. The Scope of Orphan Works—OW is Limited to Analogue Images Only

BAPLA's position on OW has remained consistent since work on this area with Government began more than 10 years ago; that OW be limited to non commercial use only and only by cultural heritage organisations and publicly accessible libraries.

The Bill states that the scope of OW legislation will apply to analogue images only. We would seek assurances that prints or other physical copies made from digital images will be excluded and enquire whether by "analogue photograph" we include only an original work, not a slavish or illegal copy. This must also be reflected in the Bill as an Amendment to 116A.

July 2012

Memorandum submitted by the Royal Borough of Kensington and Chelsea (ERR 47)

Summary

Whilst the Bill seeks to deliver clearer and faster decisions any successful reform needs to be supported by investment in proper conservation skills within local Government. As currently proposed the reforms are likely to place a significant burden on local Government resources and any reform should be accompanied with a political commitment to capacity building of skilled officers. The dramatic cut in local Government resources over the last five years does not equate to the increasing number of heritage applications which do not generate a fee income. In the Royal Borough of Kensington Chelsea for example there has been a steady increase for example: 539 in 2009, 632 in 2010 and 693 in 2011. The main concerns are regarding resources and training.

1. *The unification of planning permission and conservation area consent*

No objection in principal provided the current criminal penalty for contravention is continued into any new system.

[71] Copyright, Contracts and Earnings of Visual Creators 2011. Singh, Bentley, Cooper.

2. *Heritage Partnership Agreements (HPAs)*

These agreements between a local planning authority and the owner or other interested party of a listed building would allow specified work to be undertaken to a listed building without the need for consent. This system would require front loading and to be successful local authorities will need to have in house expertise and available resources invested at the heart of the process. Agreements should be chargeable with fees set locally to ensure the process can be sufficiently resourced similar to a PPA depending on the complexity of the building or buildings and the details of the HPA. The HPA should be supported by a legislative foundation, best practice guidance for local Government and owners as well as training. It should be made clear that the specified works within an adopted heritage agreement should not prejudice the requirement for other permissions or regulatory requirements.

3. *Defining the boundaries of special interest in list descriptions*

The identification of heritage significance is welcomed particularly for the grey areas of curtilage structures, fixtures, fittings and later extensions and alterations. Sufficient skills and resources will need to be invested in this process without compromising other key heritage work by English Heritage. Clarity as to the local planning authorities involvement in the process to enable planning of resources.

4. *Immunity certificates (COI)*

The Bill will make it easier to apply for certificates of immunity from the listing of a building by enabling owners or third parties to apply for certificates at anytime rather than when a planning or listed building consent is submitted. There are concerns that in seeking certainty on the status of buildings there could be undue pressure on local planning authorities provoking reactionary responses to the potential protection of buildings without the opportunity for thorough and informed investigation often requiring access. Further clarity is required as to the procedure, particularly: the time frame for assessment; and the input of local planning authorities and other third parties as consultees. A reasonable time period for consultation is essential. This amendment has the potential for weakening heritage protection if insufficient resources are available and the real threat of potential buildings worthy of listed status slipping through the net.

July 2012

Memorandum submitted by UNISON (ERR 48)

1. UNISON is the UK's largest public services trade union with more than 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers working full or part time in local authorities, the NHS, the police service, universities, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

We have extensive experience of employment relations in small and large organisations including dispute resolution and efficiently negotiating fair pay and conditions for all employees.

2. The Enterprise and Regulatory Reform Bill 2012 contains the following employment measures:

- The introduction of early conciliation at ACAS for all potential employment.
- Tribunal claims. All claims must be sent to ACAS before they can be submitted to an employment tribunal. However, conciliation will remain voluntary and free. The Bill also adjusts time limits for employment tribunal claims to allow for early conciliation at ACAS.
- Permitting "legal officers" in the Employment Tribunals to decide certain types of cases where the parties have agreed in writing.
- Employment Appeal Tribunal (EAT) cases in the future will be decided by Judges sitting alone, unless the Judge decides that employer and employee representatives should be involved.
- Protected Conversations that cannot be used in Tribunals.
- New powers for the Secretary of State to reduce compensatory awards in unfair.
- Dismissal cases to a maximum of:
  - between median annual earnings and three times median annual earnings (currently median earnings are £26,000 and three times median earnings is £78,000); and
  - one year's earnings.
- New powers for the Secretary of State to vary compensation awards for unfair dismissal firms by type of firms, including in small businesses.
- New powers for employment tribunals to impose financial penalties equivalent to 50% of any compensation award on employers who have breached employment laws. The penalties will only apply where the tribunal decides there are "aggravating features". The penalties will be paid to the State and not the individuals concerned, will be subject to a minimum of £100 and a maximum of £5,000; and can be reduced by 50% if the employer pays within 21 days.

— Whistle-blowing rights will be limited to situations where a worker believed that a disclosure was made in the public interest and can demonstrate that this belief was reasonable in the circumstances.

— In the future annual increases to the statutory limits, used when calculating an employee's entitlement to statutory redundancy pay, will no longer be rounded up to the nearest £10 or £100.

— "Compromise agreements" will be renamed as "settlement agreements".

— New powers to introduce "sunset clauses" or "review provisions" into legislation.

— The Bill will also limit the powers of the Equality and Human Rights Commission.

ACAS Early Conciliation (Clauses 7, 8 and 9)

3. Under the present system, all claims that are submitted to an Employment Tribunal are also submitted to ACAS and an ACAS Conciliator is appointed. The Bill proposes to change this system to involve ACAS prior to the submission of an Employment Tribunal claim through proposed new sections 18A and 18B of the Employment Tribunals Act 1996. This would require mandatory submission of a claim to ACAS prior to the filing of an Employment Tribunal claim in most circumstances (unless the claim is a multiple claim that has already been filed).

4. UNISON generally supports any efforts that assist workers and employers to efficiently resolve workplace disputes, and would welcome further resources dedicated to this goal. However, UNISON is concerned that that this will require a considerable amount of additional resources and do not consider that ACAS has presently has the capacity to provide the additional required assistance to conciliate disputes.

5. The Bill does not provide sufficient detail to comment in full on how conciliation will work in practice and there needs to be further consultation on the proposed future regulations. It is suggested that the period of conciliation is one month, this may be sufficient if ACAS has staff available to conciliated disputes as soon as they are notified of them and both the employer and worker actively engage in the process, however, UNISON is concerned that this time period may not be sufficient if ACAS or the parties, for some reason, are not immediately available.

6. UNISON understands that it is proposed that a certificate be made available to workers who have provided information to ACAS regarding their employment relationship dispute. UNISON's view is that this will only assist in resolving employment relationship problems if this is more than a "tick box" exercise and both parties are engaged in trying to resolve the dispute in good faith. This may mean, in order to create meaningful change, that further resources are made available to ACAS to facilitate more face-to-face conciliations between parties.

7. UNISON supports a free (no cost) and voluntary system of conciliation and understands that this is what is proposed under the Bill. It is important that all information prepared for the purposes of conciliation is without prejudice to the proceedings which is consistent with current ACAS practice. UNISON agrees with the TUC in their *Briefing for the Second Reading of Bill* dated 11 June 2012 and generally supports these proposals if they encourage earlier settlement of disputes. We agree that it is very important that workers are not barred from making an Employment Tribunal claim because they did not provide sufficient information to ACAS prior to filing a claim.

Reinstatement and Re-engagement (Clause 7)

8. Clause 7(9) states that in situations where a prospective claimant is no longer employed, the ACAS conciliator should seek to promote reinstatement and re-engagement as outcome of the conciliation or should seek to agree an amount of compensation when the prospective claimant does not want to be reinstated or re-engaged.

9. UNISON would welcome any steps towards encouraging reinstatement or re-engagement and we consider this should be the primary remedy awarded in any successful unfair dismissal case. As experienced representatives of workers, UNISON is aware that it is very rare to obtain an order of reinstatement or re-engagement from an Employment Tribunal and this is often because of the deterioration of the relationship between the employer and worker during the time between the end of employment and the remedy hearing. However, UNISON is concerned that conciliators may encourage reinstatement or re-engagement, but that this may be resisted by employers who may view the worker (unfairly) as a "trouble maker" due to their exercising their legal right to raise an employment relationship dispute. UNISON would support further requirements on employers to actively consider re-engagement or re-instatement during conciliation in the subsequent regulations.

Impact on Time Limits for Employment Tribunal Complaints (Clauses 8 and 9)

10. Employment Tribunal claims must be lodged in an Employment Tribunal within three months less one day of the relevant act. This is significantly shorter than the period in which other civil claims can be brought, for example, defamation claims must be brought within 12 months, personal injury claims must be brought within three years and breach of contract claims must be brought within six years. A longer limitation period results in a higher possibility that a claim may be able to be resolved between the parties without recourse to the Courts. Therefore, UNISON considers that it is essential that time limits for filing claims are extended to

allow meaningful conciliation (as outlined in Schedule 2 of the Bill). UNISON agrees that during the conciliation period and prior to the lodging of any Employment Tribunal claim, that the limitation period should be effectively frozen so as to not discourage participation in conciliation or to disadvantage those who actively engage in conciliation.

Role for Legal Officers (Clause 10)

11. Currently, all employment disputes are determined by full employment tribunals or by an Employment Judge sitting alone. Legal officers can be appointed under the Employment Tribunal Act 1996 but can only determine cases where the parties have agreed the terms of the determination or the case has been withdrawn. To date, no legal officers have been appointed in the employment tribunal system.

12. Clause 10 states that legal officers should be able to determine specified types of claims where both the worker and the employer had consented in writing. The reason this Clause has been included in the Bill is because the Government is exploring options for the "rapid resolution" of more straight forward cases, including cases involving unfair deduction from wages, non-payment of the National Minimum Wage and holiday pay claims. The Government is considering permitting legal officers to decide such cases if the parties agree in writing.

13. UNISON supports the principle of the rapid resolution of disputes. Often low paid workers wait for months or years to recover wages or holiday pay from employers. However, UNISON has some concerns with the proposal to permit legal officers to determine employment disputes. Legal officers do not receive the equivalent training to Employment Judges and may not be employment law specialists. Decisions made by a legal officer would have the same status as an employment tribunal decision and could only be appealed to the Employment Appeal Tribunal. Such appeals are complex and costly and the EAT cannot consider the merits of any case, only points of law. We are aware that legal organisations have raised the issue of whether using legal officers might contravene Article 6 on a fair trial of the European Convention on Human Rights. UNISON believes if legal officers are to determine some basic cases, it is essential that any decision can be reviewed by an Employment Judge or appealed to an employment tribunal.

Judges sitting alone in the Employment Appeal Tribunal (Clause 11)

14. Clause 11 proposes substantial changes to the composition of the Employment Appeal Tribunal (EAT). EAT cases, as a rule, are determined by a panel comprised of a Judge and either two or four lay members, with an equal number of employer representatives and employee representatives. Where cases have been decided by a Judge sitting alone in an employment tribunal, any appeal will usually be heard by a Judge sitting alone in the EAT. EAT cases can also be determined by a panel of a Judge plus one or three lay members but only with the consent of the parties.

15. UNISON is firmly opposed to Clause 11 as it will significantly reduce the role for lay members in the Employment Appeal Tribunal and undermine the tripartite nature of the EAT. We do not agree that EAT cases should always be decided by a Judge sitting alone unless the Judge orders that employer and worker representatives should be involved. There is substantial evidence that lay members contribute significantly to the quality of decision-making in employment tribunals and the EAT, through their industrial relations experience. Such insights would be lost if Clause 11 is adopted.

16. UNISON experience of complex and large scale equal pay litigation involving tens of thousands of cases reinforces this view. Industrial relations experience is essential in these cases and without it UNISON believes that many EAT decisions made by Judges alone would have triggered a further round of litigation because of misunderstandings of how negotiations between unions and employers on equality proofed pay systems work.

New Powers to Limit or Increase Compensation Awards in Unfair Dismissal Cases

17. Clause 12 of the Bill creates new powers for the Secretary of State to vary the limits for compensation awards in unfair dismissal cases. In 1999, the Labour Government increased the cap in unfair dismissal compensatory awards, after a long period of it falling in value, in unfair dismissal cases from £12,000 to £50,000. Since then the limit has been automatically increased in line with RPI and currently stands at £72,300. The current cap on basic awards in unfair dismissal cases is £12,900.

18. The Government is proposing to introduce a new power for the Secretary of State to limit (or potentially increase) the limit for compensatory awards in unfair dismissal cases by imposing a maximum of:

— between median annual earnings and three times median annual earnings (currently £26,000 and £78,000 respectively) or one year's earnings or whichever is the lower of the above. Median annual earnings will be determined in line with the ONS Annual Survey of Hours and Earnings (ASHE).

19. This change has been included in the Bill even though it has not been consulted on and was not announced as part of the Government's response to the *Resolving workplace disputes* consultation.

20. UNISON does not support any reduction in the compensation levels which can be awarded in unfair dismissal cases. There is no justification for these proposals. According to Employment Tribunal and EAT Statistics for 2010–11 published by the Ministry of Justice, the median award for unfair dismissal was only

£6,277. Any reduction in the limit for compensatory awards will reduce the incentive on employers to comply with basic unfair dismissal rights and to treat staff fairly. Reducing the limit will also mean that those on average or above average earnings will no longer be properly compensated for unlawful actions by their employer.

21. UNISON is also concerned by proposals permitting the Secretary of State to vary the level of awards depending on the type of employer, for example small businesses. Reducing compensation rights for staff in small businesses will mean that they will be treated as second class citizens. It may also mean that employees are more likely to bring discrimination claims against small businesses which are more complex and costly to defend.

Financial Penalties (Clause 13)

22. Clause 13 provides for a financial penalty sanction to be imposed on employers when they breach workers' rights and when there are "aggravating features". In principle, UNISON supports the concept of financial penalties for employers who flout workers' rights because this may encourage compliance with the law.

23. It is proposed that these penalties will be for a minimum of £100 and a maximum of £5,000, but could then be reduced if payment is made within 21 days. UNISON does not consider that this level of penalty is high enough to provide a meaningful sanction to employers and encourage compliance with the law. UNISON considers that it should also be made clear that any contravention of workers' rights is serious and reprehensible and avoiding a penalty is not necessarily recognition of lack of wrongdoing. Additionally, any sanction should be paid to the workers who were affected by the employer's illegal action and not to the state.

24. UNISON does not agree that a financial penalty should not be imposed when there are recommendations made. Cases when recommendations are made will most likely be cases when an employer has either flouted workers' rights or has not complied with the law.

25. UNISON's experience is that Employment Tribunals generally act conservatively when awarding compensation to a successful Claimant and are concerned that the award of a penalty may indirectly reduce the amount of compensation received directly by the Claimant. UNISON would support regulations that prevent the reduction of compensation when a penalty is awarded.

Whistle-blowing: "Public Interest Test" (Clause 14)

26. The Employment Appeal decision of *Parkins v Sodexho* Ltd [2002] IRLR 109 raised the possibility that workers could use whistle-blowing rights to challenge changes to their contract of employment. Clause 14 may reflect that the Government considers that this was an unintended consequence of the legislation.

27. Clause 14 would alter the law in relation to whistle-blowing by not allowing protected disclosures unless the worker reasonably believed that it was in the public interest. UNISON is concerned that this proposal has not been subjected to public consultation and may not have been thought though because most workers would consider that disclosures that were capable of being covered by whistle-blowing rights would be made in the public interest.

Statutory Redundancy Pay: Increases and Decreases to Limits (Clause 15)

28. UNISON is concerned that the change to the rounding process will slightly decrease the annual up-ratings of SRP but is pleased to note that the annual uprating remains linked to RPI not CPI.

Renaming "Compromise Agreements" (Clause 16)

29. Clause 16 renames "compromise agreements" (the legal agreements used to resolve employment disputes) as "settlement agreements". This appears to be a minor change if this is the only alteration envisaged. However, UNISON would comment that the word "settlement" appears to assume that there is already a problem or dispute to settle where "compromise" suggests that there has been co-operation between the parties and a mutual agreeable outcome reached. UNISON notes that not all compromise agreements are currently used when the parties are in dispute, for example, voluntary redundancy situations.

Sunset Clauses (Clause 49)

29. Clause 49 of the Bill makes it possible for Government Ministers to introduce "sunset clauses" and "review provisions" into primary or secondary legislation. A sunset clause provides that legislation will cease to have effect on a particular date. A review provision requires that legislation is reviewed at a particular time to ensure that it is still appropriate, necessary and that the aims of the legislation cannot be achieved by other means. UNISON does not agree that sunset clauses and review provisions should be used as a matter of course. While it is important to review and repeal moribund legislation, UNISON believes that when Parliament adopts legislation it does so to address significant economic or social needs. It is rare that such needs will be transient in nature. UNISON is also concerned that this power could be used to weaken or remove existing employment rights.

EQUALITY AND HUMAN RIGHTS COMMISSION (CLAUSE 51)

30. Clause 51 would change the functions of the Equality and Human Rights Commission (EHRC) by amending the Equality Act 2010.

31. UNISON agrees with the TUC in its stated opposition to these proposals to reform the EHRC's statutory remit, to contract out its helpline, to stop its grants programme and slash its budget by 60%. UNISON is very concerned that these changes will seriously hamper the effectiveness and independence of the EHRC and further disadvantage those who have suffered discrimination.

PROTECTED CONVERSATIONS (GOVERNMENT AMENDMENTS)

32. The Government have tabled amendments to the Bill seeking to have a protected space for employers to offer compromise agreements to employees without the offer being potentially used as evidence at a later Tribunal hearing. We believe that this can happen anyway where both parties agree to it and are pleased that the Government have not gone as far yet as legislating for employers to have "protected conversations" with older workers about performance.

July 2012

Memorandum submitted by the Historic Houses Association (ERR 49)

The Historic Houses Association represents Britain's historic houses, castles and gardens in private ownership. There are 1,500 HHA properties throughout the UK of which about a third are open to the public. The HHA estimates that approximately two-thirds of the built heritage is privately owned and maintained. Between them HHA members represent, collectively, one of the greatest "ownerships" of listed buildings in Britain: both I and II* properties as well as of Grade II properties, many being ancillary buildings. The HHA welcomes 13 million visitors each year and one in five of all HHA properties offers educational visits—there are more than 300,000 such visits annually.

The beneficial effect that public visiting to these places has on the wider economy is estimated at an additional £1.6 billion, from inbound tourists alone. Over 30,000 people are directly employed by HHA members or are employed in businesses in their grounds.

The costs of maintaining Britain's private houses, castles and gardens are significant and expenditure by private owners in looking after England's historic environment is substantial. HHA owners spend £140 million per year (*HHA Survey*, 2009), but the backlog of urgent repairs at HHA member houses totals over £390 million, an increase of £130 million on the figure six years earlier. Only a small fraction of the costs of major repairs to privately owned historic houses is funded by public grant. Therefore, ensuring the economic viability of historic houses is of great importance.

The HHA appreciates that the Enterprise and Regulatory Reform Bill is a central element in the Government's aim for strong, sustainable and balanced economic growth, powered by investment, exports, technology and enterprise.

In an effort to stimulate this growth the Government wants to make sure the appropriate conditions are in place to encourage investment and exports, boost enterprise, support green growth and build a responsible business culture.

A. *Principal aims of the Bill*

The HHA understands that the principal aims of the Bill are:

1. Improving the employment tribunal system by encouraging parties to come together to settle their dispute before an employment tribunal claim is lodged.

2. Establishing a new Competition and Markets Authority, bringing together the competition functions of the Office of Fair Trading and the Competition Commission.

3. Setting the purpose of the UK Green Investment Bank in legislation.

4. Addressing the disparity between directors' pay and long-term company performance by giving shareholders of UK-quoted companies binding votes on directors' remuneration.

5. Deterring the importation and sale of unauthorised replicas of designs which qualify for copyright protection.

B. *Simplification of Regulation*

The HHA understand that the Bill will apparently simplify regulation by reducing inspection burdens on businesses of all sizes and increasing SME access to reliable, consistent advice on complying with regulations in areas such as trading standards, health and safety and environmental health and introducing powers to put a

time-limit on new regulations via "sunset clauses". Departments should make a case to keep regulation, otherwise it will be scrapped.

However, the HHA is concerned that the recommendations of the Tourism Regulation Taskforce are not to be implemented in this Bill. In particular, the HHA believes this legislation could have been included and still wishes to see the introduction of:

- Clearer guidance on maintaining the character of a listed building and a derogation for small enterprises to allow owners and managers to manage the risk flexibly, reasonably and proportionately;
- Adjustment to the Use Classes Order and/or the General Permitted Development Order to allow tourism related development to benefit and a more liberal approach to alternative uses for heritage assets;
- Revisions to the procedures for the UK visa regime to make it more competitive and Britain a more welcoming destination for tourists;
- Amendment to civil partnership and marriages regulations so that they no longer preclude the use of a building or room with a religious connection;
- Simplification of a whole suite of food and drink regulations;
- Amendment and simplification of the Licensing Act including the introduction of a *de minimis* level for low alcohol sales under which a full licence is not required;
- Exemption to the Age Discrimination provisions of the Equality Act to allow accommodation providers to focus on particular age markets; and
- Development of guidance specific to tourism businesses to help them comply with health and safety legislation and ensure regulators act consistently and proportionately.

C. *Heritage Consent Regimes*

Of most importance to the historic environment is the intention to improve the operation of heritage consent regimes, apparently "without reducing necessary protections". Notably, schedule 16 of the Bill allows for the introduction of Heritage Partnership Agreements, which could be of particular value to larger historic houses and properties where consent issues may be more complex, involving more than one type of protection.

Heritage Partnership Agreements will permit the "granting of listed building consent under section 8(1) in respect of specified works for the alteration or extension of the listed building to which the agreement relates and specify any terms on which that consent is given and any conditions attached to it". HHA member houses were part of the original pilots for testing HPA's during the Heritage Protection Review and the HHA believes they can deliver results, certainty and partnership.

As well as putting Heritage Partnership Agreements between local authorities and heritage owners onto a statutory basis, the changes would merge Conservation Area Consent with planning permission and allow parts of buildings to be specifically excluded from listing.

However, the issue of the right of appeal against listing decisions should also have been dealt with in the Bill. The introduction of a right of appeal by owners on designation decisions made by English Heritage is essential. The right of appeal should be restricted to owners, in line with the planning system. In particular, for domestically-occupied private properties, there should be no third party right of appeal.

The new legislation should make the heritage system easier to use, but the changes in the Enterprise and Regulatory Reform Bill are modest and not the solution to heritage protection problems faced by owners and mangers of the historic environment.

For this reason there is a need for proper heritage protection reform and while the Bill does make some useful amendments to existing heritage legislation, it will benefit a relatively small minority of cases. Even before recent expenditure reductions IHBC figures show that only 70% of local planning authorities had a Conservation Officer and the number is now significantly less. This is one of the key problems that the Bill does not address, that local authorities do not have the skilled staff needed to operate the current heritage protection system.

July 2012

Memorandum submitted by Squire Sanders (UK) LLP (ERR 50)

Submission to the Public Bill Committee in respect of New Clause 8(4) of the Enterprise and Regulatory Reform Bill (the "Bill") (inserting a new Chapter 4A, Part 10 of the Companies Act 2006)

SUMMARY

1. Under the proposed amendments to the Companies Act 2006, if a director's service contract is modified and the first binding vote on remuneration policy is not carried the director will lose entitlement to all

remuneration until a subsequent vote is carried. This will discourage companies from making appropriate changes to contracts in preparation for the new regime.

About Squire Sanders

2. Squire Sanders is an international law firm operating in 18 countries through 37 offices. In the UK, Squire Sanders advises a variety of quoted companies (ranging from FTSE 100 downwards) on issues relating to executive remuneration issues and therefore expect to be advising on the issues referred to in this submission once they are enacted.

Background

3. Although there has been public consultation on the principles involved, the text of the amendments to the Bill that have been tabled in respect of the introduction of a new binding shareholder vote remuneration policy has not been subject to consultation and we are concerned that its current form may have significant unintended consequences.

New Clause 8 (3)

4. This sub-clause appears to be intended to have the effect that the new prohibition in s 266B of the Companies Act 2006 on paying remuneration otherwise than in accordance with a remuneration policy approved by shareholders under the new Chapter 4A, Part 10 of the Companies Act 2006 will not apply to payments made under contractual commitments entered into before 27 June 2012. This means, for example, that if a company is in the situation that the first binding vote on remuneration policy (likely to be in 2014 for most quoted companies) is not carried, the company will be able to continue to pay its directors salary under pre-27 June 2012 service contracts, pending a resolution at a subsequent general meeting being carried.

Effect of New Clause 8(4)

5. The effect of sub-clause 8(4) appears to be that if any changes are made to a service contract after 26 June 2012 then the "grandfathering" effect of having a pre-27 June service agreement is entirely lost. If that is correct, then if the vote referred to in paragraph three above is lost then the company will be unable to pay the relevant executive directors any remuneration (including salary) until a subsequent vote is carried. We do not think that such an outcome is appropriate and indeed may not have been intended when new Clause 8(4) was drafted.

6. We understand that the overall intention of the introduction of the binding vote on remuneration policy, combined with the changes to remuneration reporting regulations on which the Department for Business Innovation and Skills is currently consulting, is to promote the adoption by quoted companies of remuneration policies that are more in line with the expectations of shareholders.

7. It would therefore be expected that quoted companies will be examining their existing remuneration policies in the run-up to the new regime coming into force, with a view to ensuring that such policies meet the expectation of shareholders. However, if making changes to remuneration arrangements would lose the "grandfathering" status of pre-27 June 2012 contracts, companies will be discouraged from making changes even though it is public policy to encourage companies to make such changes.

Suggested Amendment

8. We would suggest that new Clause 8(4) be amended so that the pre-27 June position is "grandfathered" even if the relevant contract is subsequently amended in the following form:

> *"(4) An agreement entered into, or any other obligation arising, before 27 June 2012 that is modified or renewed on or after that date is to be treated for the purposes of subsection (3) as remaining in the form that existed prior to any such modification or renewal."*

9. This amendment would resolve the issue outlined above in respect of executive directors holding positions before 27 June 2012. However, there could still be the issue of a lack of a fall back position in respect of the executive directors appointed after 27 June 2012, where no grandfathering would apply, although that situation is perhaps less significant.

July 2012

Memorandum submitted by the Design and Artists Copyright Society (DACS) (ERR 51)

1. DACS (the Design and Artists Copyright Society) is the UK's leading visual arts rights management organisation representing nearly 80,000 visual artists. Established by artists for artists in 1984 as a not-for-profit organisation to promote and protect the copyright and related rights of visual artists, DACS is constituted as a company limited by guarantee under UK law, and is currently governed by a board of non-executive directors comprising representatives from a range of artistic disciplines alongside others drawn from business and the legal profession. In 2011 DACS paid royalties of £8.2 million to visual artists.

2. DACS provides three rights management services for artists and their beneficiaries:

(a) Collective rights management (Payback).

(b) Copyright licensing.

(c) Artist's Resale Right.

3. The Enterprise Regulatory Reform (ERR) Bill contains a clause of some concern to DACS, in addition to recent amendments which have been tabled.

4. DACS shares the concerns expressed by the Alliance Against IP Theft in relation to the drafting of Section 56.

5. There are proposals of further reforms to the UK's copyright framework which we understand are still being considered by the Government. These reforms are controversial and our members have already expressed their concerns in this regard. Section 56 seems to enable the enactment of future reforms by Statutory Instrument, removing the requirement for Parliamentary debate. This is of serious concern to us and our members.

6. DACS understands that the Intellectual Property Office has made it clear that the intention of Section 56 is to allow the Government to ensure existing penalties for copyright offences are maintained when amending existing exceptions. If this is the genuine intention of Section 56, then we would ask that it be reworded to reflect this. We would support the amendments to Section 56 tabled by Mr Iain Wright (published on 12 July 2012).

7. DACS has welcomed the Government's proposal to enable Extended Collective Licensing in the UK, and to seek to resolve the issue of licensing orphan works.

8. We do have concerns about the detail of some of the amendments introduced by Mr Norman Lamb on 5 July 2012. Particularly 116 A (5) (c) which currently implies that a body authorised to grant licences to use orphan works is not able to take a licence to use orphan works. We recognise that this seeks to deal with the issue of self-licensing, where bodies could potentially claim a work is an orphan and license to use it themselves. We agree with the proposal to capture this in the present Bill, however, this provision implies that if DACS, for example, were a licensing body dealing with visual works, that we would not be able to ever take a licence to use an orphan music track for example. Better wording may be: "not to be granted by the body who is also seeking the licence."

9. In addition DACS is seeking assurances from the Government that the tabled amendments enabling Extended Collective Licensing deals with the criminal liability which arises under section 107 of the Copyright Designs and Patents Act (1988).

July 2012