Bar Council response to Department for Business, Energy and Industrial Strategy Consultation on "Making Flexible Working the Default"

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the BEIS consultation on "Making Flexible Working the Default".

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Introduction

4. Legislation currently provides a right to request flexible working for employees with at least 26 weeks' continuous employment who have not made such a request in the last 12 months[1]. Workers, including agency workers, and many within the gig economy, are simply not covered. A working parent, or indeed anyone including someone previously self-employed, or re-entering the employed workforce after time away would not have the right to make a such a request due to the length of service requirement. When a formal flexible working request is made, the employer has a duty to consider it. However, the

[1] Flexible Working Regulations 2014 (SI 2014/1398) and Part 8A Employment Rights Act 1996

employer may refuse it on a wide range of grounds and has up to three months in which to do so. The right is mainly procedural rather than substantive and while a refusal to grant flexible working arrangements may give rise to other claims, in practice the legislation is seen by legal practitioners specialist in labour law as toothless. ACAS has issued guidance and a Code of Practice[2]. This can be taken into account by an Employment Tribunal, but failure to follow either does not lead to sanction.

5. The Covid pandemic has changed the ways in which the workforce in the United Kingdom works in ways which many could not have imagined prior to its onset. It is the view of the Bar Council that emergency steps taken by employers, employees and workers to keep going during national lockdowns and during times of restriction and caution, have accelerated a change that was occurring in any event. The pandemic has forced the workforce into trialling innovative methods of working which, in some cases, have endured beyond lockdown due to resulting efficiencies and positive responses. Not all working arrangements during the pandemic have, however, yielded positive results and it is important that any review of flexible working arrangements is balanced and takes into account the needs of those beyond the typical office or desk-based worker. Further, we recognise that some types of flexible working, for example home working, may work for some and not for others. For example senior employees with established networks may not experience the same disadvantages from not being in the workplace – such employees may have much less need to learn from and observe other employees than someone who in training or junior in their role or experience. Those in the formative years of training or building experience or contacts may benefit from some types of flexible working whilst not others. The Bar Council urges a balanced approach whilst recognising we must disentangle the need for an intentional culture of learning and proactive knowledge transfer from presenteeism and proximity bias.

6. With schools shut for many months in 2020 and 2021 and many parents taking on home-schooling, surveys such as that undertaken by the Trade Unions Congress[3] (TUC) as part of its report on "The Future of Flexible Work" (June 2021) have highlighted a disparity between the sexes with many mothers taking on a greater proportion of childcare responsibilities at home. There has been concern across many sectors that any gains for women in the workplace are being lost and that inequalities could become further entrenched if action is not taken. That sentiment has been echoed by organisations at the coalface of dealing with workplace discrimination such as Maternity Action, Working

[2] https://www.acas.org.uk/acas-code-of-practice-on-flexible-working-requests
[3] https://www.tuc.org.uk/research-analysis/reports/future-flexible-work

Families and Pregnant Then Screwed, and campaigners like Anna Whitehouse supported by Sir Robert McAlpine which commissioned the high profile 'Forever Flex' report. The Government has already considered the results of the work done in this area by Chartered Institute of Personnel and Management (CIPD) in its role leading the taskforce including the Megatrends report published in January 2019[4].

7. Many cases heard in the employment tribunal are, in reality, about flexible working and are pursued as indirect sex discrimination claims by women, not least because of the limited enquiry undertaken under the current statutory regime and the very limited remedies available. However, this is not an avenue that men can pursue in most cases due to the need to establish both group and individual disadvantage as a precursor to any claim under s.19 Equality Act 2010. Men as a group do not tend to be disadvantaged in the same way as women in the workplace, for example, Tribunals tend to recognise that provisions, criteria, and practices relating to e.g., working hours and homeworking affect women as a group differently because more women than men tend to be primary carers of children. However, a poll of 3,000 working parents found that one in ten fathers had quit a job after having a flexible working request turned down; one in five with flexible arrangements felt discriminated against by their managers and co-workers, and a quarter said their line manager did not understand the pressures of juggling work with family life.

8. Three-quarters (76%) of a nationally representative sample of partnered fathers who spent the spring 2020 lockdown full-time at home said they wanted to work more flexibly in future, with 63% hoping to work more from home.

9. The Bar Council does not wish to see one system being replaced by another in which differing values are placed on employees and workers with different characteristics. In order to ensure cohesion in the workplace it is important that flexible working is a right that is accessible to all without having to argue why they are more deserving than a colleague.

10. This consultation provides the Government with a unique opportunity to reform employment law in respect of flexible working in a way that does allow the workforce to be built back better and to future proof working methods and arrangements. The Bar Council strongly urges the Government to consider not simply amending parts of the existing legal framework in the ways suggested within the consultation, but to look at overhauling this entire area of law in a

[4] https://www.cipd.co.uk/knowledge/work/trends/megatrends/flexible-working#gref

way that strengthens the ability of employers, employees and other workers to meet the challenges that lie ahead during the post-Covid economic recovery.

11. Maximising and harnessing the talents of the working population and creating a productive and diverse workforce must be central to that mission. Other countries have been embedding flexible working into their culture for many years. For example, Finland, by 2011, was offering the most flexible working schedules on the planet according to a study undertaken by Grant Thornton. Their Working Hours Act 1996 gave most staff the right to start or finish work up to three hours earlier or later. Different working hours or patterns are of course but one facet of agile or flexible working. Jobs which are more output driven may offer greater scope to flex than those where shift patterns are harder to change but, even in the NHS, one of the largest employers in this country, successful flexible working pilots have been trialled with Flex NHS leading the way in this regard. In recent weeks, the data and research produced and collated in the Flexonomics report[5] highlights the surprisingly high financial cost to the economy of *not* embedding flexible working into our culture here in the UK.

12. We suggest that addressing the law on flexible working is an important step on that journey not only in terms of unleashing economic potential, but in speaking to the value placed on all of the working population irrespective of socio-economic status, caring responsibilities, and race, sex, disability or indeed any other characteristic protected by the Equality Act 2010.

13. Working parents are not the only group the economic productivity, wellbeing and personal autonomy of which stands to be increased by measured changes to the legal framework on flexible working, although this is a group that we consider merits special attention.

14. We suggest that simplicity in reframing the right to work flexibly and its application to all of the working population will increase the uptake of flexible working, decrease administrative burdens for employers and make it easier to educate and assist everyone as to the framework within which flexible working can take place.

15. **In summary the Bar Council suggests that the following is given consideration:**

    - ***Making the right to request flexible working a day 1 right for all employees and workers;***

[5] https://www.srm.com/media/3369/2021-11-12-confidential-flexonomics-a-report-by-pragmatix-advisory-for-sir-robert-mcalpine-and-mother-pukka.pdf (November 2021)

- ***Creating a right to work flexibly for all employees with narrow exceptions, more closely defined than the statutory reasons which currently apply and removing the eight statutory reasons;***

- ***Removing the limitation that only one flexible working request may be made in a 12-month period and replacing it with a need for there to be a material change of circumstances and***

- ***Creating useful tools and guidance to support employers in offering and managing trial periods of flexible work and flexible work arrangements in general.***

16. The consultation document refers to both 'employees' and 'workers'. In employment law, those statuses denote different groups with different legal rights, where employees have greater legal rights than workers. Currently, the right to request flexible working applies only to employees. The definition of employment is contained within s.230(1) Employment Rights Act 1996 ('ERA'). A 'worker' is an individual defined within s.230(3) ERA 1996.

17. In order for a contract of employment to exist, there must be mutuality of obligation between employer and employee. That is to say the employer is obliged to offer the employee work and the employee is obliged to accept the work offered.

18. Employment status is likely to remain an essential element of any new flexible working regime. It is difficult to envisage a regime in which someone has a statutory right to request flexible work when there is no obligation in law for the contracting party to offer that work in the first place.

19. However, this does leave a significant proportion of the workforce caught by a potential lacuna. One of the identified benefits of being a worker is the flexibility that attaches to that status, i.e., the ability to work as and when, for example around periods of study. This is, of course, not a complete picture. Worker status encompasses those who are working in that manner by choice with a view to their own personal circumstances, to those at the other end of the spectrum who are underemployed, agency workers or those who are in a poor bargaining position to improve their working circumstances.

20. In light of the legal difficulties, it may be worth exploring the creation of a framework in respect of which workers can make a request for flexible working (for example to undertake work from home) but one that is less prescriptive than the regime for employees. It would create the right to request and the right to have the request considered through which a discussion is facilitated. It is accepted that such a right would be less effective than any new flexible working

regime for employees. It would nonetheless be the basis for a conversation taking place whilst still recognising the legal and conceptual hurdles.

Consultation Responses to Specific Questions

Do you agree that the Right to Request Flexible Working should be available to all employees from their first day of employment?

21. The Bar Council strongly agrees but only as a bare minimum. The Government, we suggest, ought to consider going much further than this. The Bar Council has suggested above that the Government should give further consideration to:

    a. Extending the right to request to work flexibly to all *workers* from day 1 and
    b. Creating a substantive right to work flexibly for all *employees* from day 1.

22. For some job applicants to access the job market in the first place, including for those returning from a period of leave or having been out of the market due to other factors including redundancy, some degree of flexible working may be essential from the outset. It may well be impossible and potentially economically infeasible to remain in post for 26 weeks before then acquiring the right to ask for flexible working.

23. It is anachronistic now not to have the right to even request flexible working until 26 weeks' continuous employment has been attained. In our introduction, we make the point that the right itself is largely procedural rather than substantive and it is widely regarded in the employment law community as a toothless piece of legislation with limited remedy available.

24. The Bar Council considers that the right to request flexible working arrangements ought to be a day 1 right for all workers and not just employees. Further, a substantive right to work flexibly save in narrow circumstances in which this simply is not practicable ought in our view to apply from day 1 to all employees.

25. If all that were to occur as a result of the current Consultation were a modification to make the existing right to request to work flexibly a day 1 right, this would represent a very modest change indeed. For an employee for whom flexible working is essential or important, it is difficult to see why they would accept a job in the hope of a favourable response to a statutory request they can only make once in 12 months after being in post for 26 weeks and so a day 1 right does provide some benefit whilst retaining much of the uncertainty. For many, this would not be affordable, or it may not be a gamble worth taking and it would, in our view, impact on general recruitment, including by further

entrenching sex inequality and economic disparity in the workforce, and retention of talent. Shifting the right to make a statutory request from 26 weeks to day 1 is, while welcome, of limited benefit overall. The case for workers is somewhat different given the legal and conceptual issues referred to in the introduction and if a right to request is to be given to workers then this would be better framed as a day 1 right especially as the nature and duration of engagements for workers tends to be different to employees and a 26 week period may be wholly infeasible in some cases as the engagement may well last for less time than that.

Whether the eight business reasons for refusing a Request all remain valid

26. The Bar Council considers that the eight prescriptive business reasons, which are so widely drafted as to provide an employer with a ready-made opt out in almost any case in which a flexible working request is made, should be abolished, and replaced with a different regime. That regime ought to place the burden of proof on the employer as to its reason for refusal and whether its reason is an adequate one in all the circumstances. This would be an important step in changing the overall culture and tendency of employers to see the eight reasons as a checklist or selection of reasons to opt out.

27. Section 80G(1)(b) Employment Rights Act 1996 ('ERA') provides that an employer who has received an application for a variation of contract shall only refuse the application because *he considers* that one or more of the following grounds applies—

> *(i) the burden of additional costs,*
> *(ii) detrimental effect on ability to meet customer demand,*
> *(iii) inability to re-organise work among existing staff,*
> *(iv) inability to recruit additional staff,*
> *(v) detrimental impact on quality,*
> *(vi) detrimental impact on performance,*
> *(vii) insufficiency of work during the periods the employee proposes to work,*
> *(viii) planned structural changes, and*
> *(ix) such other grounds as the Secretary of State may specify by regulations.*

28. There is no definition of what would amount to a "detrimental" impact on subsections (ii), (v) or (vi), and no guidance as to how much additional cost would amount to a burden, or how 'inability' in (iii) and (iv), or "insufficiency" in (vii) are to be measured.

29. No other grounds for refusing an employee's request have been specified by the Secretary of State, and there is no catch all of "some other reasonable ground". The eight grounds set out in this provision are exhaustive. Perhaps inevitably, employers have tended to use this list of eight reasons as a checklist.

30. The only substantive (as opposed to procedural) ground on which an employee may challenge the decision, is if it was "based on incorrect facts" (see s.80H(1) ERA). As to what this scope of enquiry permits – this was considered by the Employment Appeal Tribunal (one of the very, very few appellate authorities considering these provisions) in ***Commotion Ltd v Rutty*** [2006] IRLR 171, in which HHJ Burke QC held at paragraph 37 – 38 (emphasis supplied):

> *[an] employee is entitled to present a complaint to an employment tribunal on the basis that the decision to reject his application for flexible working was based on incorrect facts sections see 80H(1)(b). It must follow that the tribunal is entitled to investigate the evidence to see whether the decision was based on incorrect facts. There is, we would suggest, a sliding scale of the considerations which a tribunal may be permitted to enter into in looking at such a refusal. The one end is the possibility that all that the employer has to do is to state his ground and there can be no investigation of the correctness or accuracy or truthfulness of that ground. At the other end is perhaps a full enquiry looking to see whether the employer has acted fairly, reasonably, and sensibly in putting forward that ground. Neither extreme is the position, in our judgment, which applies in the relevant statutory situation.* ***We accept Mr Dunn's [counsel for the employer] submission that the tribunal is not entitled to look and see whether they regard the employer as acting fairly or reasonably when he puts forward his for rejection of the flexible working request.*** *However, we reject Mr Dunn's submission that the tribunal is not entitled to examine the facts objectively at all, for if they were not so entitled, the jurisdiction set out or the right to make an application set out by s.80H(1)(b) would be of no use.* ***The true position, in our judgment, is that the tribunal is entitled to look at the assertion made by the employer ie the ground which he asserts is the reason why he has not granted the application and to see whether it is factually correct.*** *In this case, it does not arise; but another case, it may be for instance that the bona fides of the assertion might have to be looked into.*
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> *In order for the tribunal to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise. In doing so, the tribunal are entitled to enquire into what would have been the effect of granting the application. Could it have been coped with without disruption? What did other staff feel about it? Could they make up the time? and matters of that type. We do not propose to go exhaustively through the matters at which a tribunal might wish to look, but if the tribunal were to look at such matters in order to test whether the assertion made by the employer was factually correct, that would not be any misuse of their powers and they would not be committing an error of law.*

31. This decision was the subject of some criticism in leading textbooks (e.g., *Harvey on Industrial Relations and Employment Law* at division J, para [916.02]) as to whether the scope of inquiry which a tribunal is permitted to undertake is as wide as suggested in this judgment. The legislation directs consideration of whether *the employer considers* that one or more of the grounds apply – i.e., simply asking if the employer has the necessary subjective belief – albeit based on facts which are not "incorrect". Whether or not the scope of investigation is properly considered to be as broad as suggested in *Rutty*, it is certainly clear that the task of an employment tribunal falls far short of considering whether the decision is objectively justifiable.

32. Claimants have frequently sought to ensure that the refusal of any requests have been considered by tribunals on their substantive merits by including claims of sex discrimination – and in particular indirect sex discrimination. By way of example, this was seen in ***Shaw v CCL Ltd*** [2008] IRLR 284.

33. It is understood that the 2019 Conservative Party Manifesto[6] stated:

> *"…we will encourage flexible working and consult on making it the default unless employers have good reason not to."*[7]

34. The Bar Council respectfully suggests that the stated desire to have flexible working as a default unless employers have good reason not to, requires two important steps to be put into place:

a. The ability of an employment tribunal to consider whether an employer has a "good reason".

b. The burden of proving this "good reason" to be placed on the employer.

35. The best way of achieving the first of these would be to adopt the 'justification' test used in the Equality Act 2010, and ask whether the employer has shown that its refusal of the request amounted to:

> *"a proportionate means of achieving a legitimate aim".*

36. This is a test well known, and well understood, by practitioners in this area. It involves a two-stage inquiry of asking:

a. Firstly, whether there is a legitimate aim being pursued by the employer. This ought not be restricted to the eight business reasons currently set

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[6] www.conservatives.com – Manifesto at p.39

[7] https://www.conservatives.com/our-plan/conservative-party-manifesto-2019
See "*Fairness in the Workplace*" at p39

out in the legislation, but ought to be open ended. The needs of employers are frequently specific to their sector / geographic location / operating methods. Guidance would no doubt be of assistance – to be issued by a respected and expert body such as ACAS. Crucially, it does not involve a tribunal substituting its decision for that of an employer, or dictating to business what should be done, but does allow meaningful consideration of the aims identified.

b. The second question is whether an employer has acted proportionately in seeking to achieve their legitimate aim. This calls into issue the process adopted, whether meaningful consideration has been given to the contentions of the parties, whether there have been trial periods etc. Again, the scope of enquiry is not closed, and can be tailored to the individual circumstance.

37. Given that a very large number of the claims about refusing flexible working arrangements which end up in litigation are taken as sex discrimination claims, (and a great many employees never get beyond an informal and disappointing discussion with a manager before even making a statutory request) the Bar Council considers that this is an additional reason why the objective justification test would be appropriate if applied across the board to all of the workforce and not just in the case of women seeking flexible arrangements.

38. Data and surveys show that employers and employees want to make flexible working work. The replacement of the eight business reasons by an objective justification regime is an important step in embedding this in UK work culture and bringing greater balance to the worker-employer relationship, where the employer typically wields power.

39. It also allows a business to be able to deal with flexible working arrangements proposed on their merits and to consider requests holistically. Where necessary a refusal to allow flexible working can be explained by reference to the employer's aim and the question of proportionality.

Do you agree that employers should be required to show that they have considered alternative working arrangements when rejecting a statutory request for flexible working?

40. While the Bar Council considers that the time has come to move away from a regime that simply allows for requests to be made and requires them to be considered, to a regime by which there is a right to work flexibly unless certain factors apply, it does agree with this premise in the alternative.

41. Given our view that the eight business reasons should be removed, and it should be for the employer to establish a reason which is objectively justified, it would certainly assist any employer to consider alternatives before invoking any exception to the right to work flexibly (or if the Government retains the existing system, before rejecting a statutory request).

42. The current system fails to ensure a proper discussion between the parties. The threshold for the employer to comply with "consideration" of a request is far too low. By requiring an employer to demonstrate that it has considered alternatives where the employee's proposal is deemed unworkable, this will assist in redressing the balance and encouraging sensible discussions.

Would introducing a requirement on employers to set out a single alternative flexible working arrangement and the business ground for rejecting it place burdens on employers when refusing requests?

43. The Bar Council does not consider that it imposes any real burden on an employer to have to explain why it will not accommodate a flexible working request (and a change to arrangements, i.e., if a substantive right to work flexibly is introduced) in the context of all alternatives considered. There is no need to limit an employer's response to a single alternative flexible arrangement especially when in many cases there may be more than one. It would be positively unhelpful to introduce this kind of 'reject one – suggest one' scheme.

44. Overall, requiring an employer to consider all reasonable alternatives ought not to add any time to the process if the employer was giving a flexible working request genuine consideration in any event.

Do you think the current statutory framework needs to change in relation to how often an employee can submit a request to work flexibly?

45. Yes, the Bar Council strongly endorses change. At present only one request can be made in every 12-month period. This is an unduly restrictive and artificially fettered approach which fails to recognise that an employer and / or employee's circumstances may change within that period to a material extent such that it is essential for flexible working to be considered again, perhaps in a different way. It is not hard to think of ordinary life events, seen time and again in every workplace across the country, which may necessitate a review of how someone works.

Do you think that the current statutory framework needs to change in relation to how quickly an employer must respond to a flexible working request?

46. Yes. The employer currently has three months in which to consider a request which we consider on balance to be too long. There will be a substantial number of requests which are made in response to fast changing life events where a wait of up to three months would make continued employment an impossibility.

47. We also recognise there are typically many demands on an employer and that employers vary in size and resources, and some may wish to take HR or legal advice. Balancing those factors, the Bar Council considers that if the current regime is continued i.e., simply a procedural right to request flexible working, the employer should respond as soon as reasonably practicable and by no later than 4 weeks unless the parties agree to extend that period up to a maximum of the existing 3 months (which it can itself be extended but only by agreement under current legislation).

48. If the Government considers legislating for a substantive right to work flexibly, we consider that the time in which to invoke any exception / objective justification should be same bearing in mind that the right would be available from day one and likely to be the subject of pre-contract negotiations and discussions.

If the right to request flexible working were to be amended to allow multiple requests, how many requests should an employee be allowed to make per year?

If the right to request flexible working were amended to reduce the time period within which employers must respond to a request, how long should employers have to respond?

49. The consultation paper is unequivocal as to the benefits of flexible working. This reaction is not caused by the need to work from home during the pandemic but the consequence of employer and employee experiences since it was introduced.

50. This response adopts the words of the consultation; *the manifesto was clear that the Government could do more to make things easier for those balancing work with caring and other commitments* and suggests this could be done by removing the unfair restriction which means only one application can be made in a twelve month period.

51. In identifying the benefits of flexible working the consultation paper implicitly acknowledges the importance of flexibility for employees and in particular those with caring responsibilities. That need for flexibility is connected to an employee's personal circumstances which may not change for years but equally may change more than once in a twelve-month period.

52. The circumstances set out at paragraph 9 which might justify flexible working – such as illness or the care of the elderly – are not ones which can be predicted. For example, if an employee who has had a flexible working request refused (or indeed accepted) on January 20th suddenly discovers that their mother is seriously ill on July 20th why should they have to wait six months to make a further request? If the second request is motivated by a desire to nurse a dying relative it is impossible to understand the logic of one application every year.

53. If employers spoke in clear and near-universal terms of the disadvantages of flexible working this might lend weight to a restrictive approach and yet the opposite is the position.

54. The employee in the situation referred to above might find they have to give up work if the one application in a twelve-month period rule is maintained. If that is a potential effect of this rule then it would run contrary to a clear theme of the consultation – namely that flexibility leads to happy employees who in turn will perform well for their employers.

55. If the reasons which justify the right to make more than one application in a twelve period are sound it must mean that an answer within a shorter period than three months is often essential (see above).

56. The circumstances which may make a second request necessary – illness or bereavement – are inevitably stressful and distressing. A significant delay (and that would include three months)would be capable of causing some employees to leave work rather than being able to wait for an answer.

57. Whilst employers must have a proper opportunity to assess the application and see if it can be granted it should not be to the disadvantage of the employee.

58. The right to make a second application within a twelve-month period and get a speedy response should depend upon the validity and appropriateness of the request not upon timing.

59. The Bar Council considers that there should be no limit on the number of requests but that the employee must bear the burden of demonstrating that there has been a material change of circumstances such as to justify making a further request where one or more other requests have been made. This will allow an employer to respond summarily to someone making essentially the same request again and again.

Are you aware that it is possible under the legislation to make a time-limited request to work flexibly?

60. The Bar Council is aware of this right which is very much under-utilised and understood. Further, an employee may be reluctant to use their once only in every 12 months right for a temporary adjustment to their working arrangements.

What would encourage employees to make time-limited requests to work flexibly?

61. Removing the limit that only one statutory request may be made in any 12-month period and increasing awareness of the right to do so. Here we consider that ACAS or other statutory guidance would be very helpful for employers and employees.

62. For the avoidance of doubt, the Bar Council considers that if a substantive right to work flexibly is implemented, this should give the parties to the employment relationship some scope to vary the arrangement temporarily as is currently possible under the existing regime.

8th December 2021