

Implementation of the Agency Workers Directive – BERR consultation questions with LGE comments

On 8 May 2009, BERR launched its [consultation](#) on the implementation of the Agency Workers Directive, the purpose of which is to give temporary agency workers limited equal treatment with comparable permanent employees. This document contains BERR's consultation questions and commentary, along with LGE's comments.

The concept of 'equal treatment' under the Directive relates only to the basic working and employment conditions, those being: pay; working hours; overtime; breaks; rest periods; holidays; and access to training and collective facilities, such as childcare. It does not include pension provision and sick pay, nor will it change the employment status of temporary agency workers. An important feature of the implementation of the Directive is that it permits the UK to implement the agreement reached on 20 May 2008 between the Confederation of British Industry and the Trades Union Congress, which provides that equal treatment for the majority of the rights will not be required until the agency worker has worked in the relevant role for 12 weeks.

How to respond

LGE is preparing a response to the consultation on behalf of local government and to assist local authorities, LGE have prepared comments on the 46 consultation questions, which are set out on the following pages. LGE's comments are highlighted and you will see that questions 9, 10, 12, 13, 26, 36 and 45 are highlighted in green rather than yellow. Local authorities are asked to pay particular attention to those questions highlighted in green, as they deal with the issues that are likely to have most impact on local authorities. Local authorities may find it useful to review LGE's comments alongside the [full consultation document](#), and then respond by including their own highlighted comments in response to each question.

Local authorities are encouraged to review the proposals and questions and provide us with their views. In order to be included in LGE's response, comments and views should be sent to philip.bundy@lge.gov.uk or luann.donald@lge.gov.uk by 3 July 2009, so that LGE can compile a response by the government's deadline for responses on 31 July 2009. In responding, local authorities may find it useful to review LGE's comments alongside the [full consultation document](#), and then provide their own highlighted comments in response to each question.

Should authorities want to respond directly to BERR, details of how to respond are in the [BERR consultation document](#), and we would be grateful if you would send us a copy of your response.

BERR Consultation events

BERR is running a number of consultation events around the country and local authorities are encouraged to attend those events. LGE is attending each of the events, and will be available to meet with local authorities after the event to discuss the consultation. The dates and locations are below and further details are on the [BERR website](#).

- 15 June 2009 London
- 17 June 2009 Cardiff
- 23 June 2009 Manchester
- 23 June 2009 Newcastle
- 24 June 2009 Leeds
- 30 June 2009 Exeter
- 3 July 2009 Birmingham

BERR consultation questions and commentary, with LGE comments

LGE notes:

LGE's comments are highlighted, otherwise the comments and questions are BERR's

The BERR definition of an employment business is a business that places temporary agency workers with hirers. Most local authorities will normally refer to such businesses as a temp agency. Throughout this consultation response, LGE refers to employment businesses as "the agency".

Scope of the Directive – who is covered, definition of "agency worker"

1. We propose that implementation should apply to people finding temporary work through an "employment business", (not an "employment agency"); that we base the scope of the legislation on the definition of "worker" on that used in the Working Time Regulations 1988, but adjusting this to include agency workers contracted to an "umbrella company". This would exclude workers who are genuinely self-employed, agency workers working through their own limited company, and agency workers employed on "Managed Service Contracts".

Q1 Do you agree that implementation should cover workers placed on temporary assignments by "employment businesses" but not those placed permanently by "employment agencies"?

Yes No

Please comment

LGE comments: LGE anticipates that the majority of local authorities will want to make sure that the definition of agency worker applies only to those placed by agencies to carry out work for authorities on a temporary basis, and subject to the inclusion of "umbrella company" workers (see Q3 below), the proposed definition should ensure that.

Q2 Do you consider that using a definition for agency workers based on that of a "worker" under Regulation 2 of the Working Time Regulations 1988, but in the context of the triangular relationship with the employment business and the hirer, provides the most appropriate coverage for the legislation to implement the Directive ?

Yes No

Please comment

LGE comments: By ensuring that the definition of agency worker will be defined in the context of those who are employed or have a contract for services with the agency and who work on assignment with the hirer, the legislation should only cover those who

local authorities categorise as temporary agency workers and therefore LGE anticipates that local authorities will support the proposed definition of agency worker.

Q3 Should the definition include those agency workers working through an “umbrella company”, but who find work via an employment business?

Yes No

Please comment

LGE Comments: Widening the definition of workers to include those people working through “umbrella companies” should not significantly increase the number of individuals covered by the agency workers legislation. The definition of “umbrella companies”, is at page 18 of the consultation document. As BERR indicate, in reality those working through “umbrella companies” are in practice working in a similar way to agency workers, the most common reason for the arrangement being because of tax management considerations. Therefore, local authorities may take the view that it is appropriate that those people are covered by the legislation and in any event it is anticipated that the use of umbrella company workers in local authorities is not significant.

Q4 Should the definition exclude the self-employed, Limited Company Contractors and those working on managed service contracts?

Yes No

Please comment

LGE Comments: Local authorities do not generally categorise the self-employed, limited company contractors or those working on managed service contracts as agency workers and therefore LGE anticipates that local authorities will support their exclusion from the definition of an agency worker. In particular the exclusion of those working on managed service contracts is welcomed. That will mean the legislation will not apply to situations where a company provides a specific service for a local authority (e.g. IT support or catering), under a contract for services that specifies outputs and service levels, where the agency worker is under the control of a agency, rather than the local authority.

Q5 Do you think that there are likely to be consequences of using the proposed definition which the government should take into account? If so, please comment.

Yes No

Please comment

LGE Comments: LGE do not see that the proposed definition will have consequences that are not already addressed in the consultation. However, local authorities are asked

to comment if they foresee any consequences, not already addressed.

Working Time and holiday entitlements

2. We consider that the implementation of the Directive as regards equal treatment on the duration of working time, and paid holiday entitlement, entails providing agency workers remaining in a given job for more than 12 weeks should have the same entitlement to rest time and leave as a permanent employee, if such entitlements are more generous than the statutory minimum requirements.

Q6 Do you agree with our proposed approach to implementation of the Directive's requirements in respect of working time and holiday entitlements?

Yes No

Please comment

LGE Comments: The Directive states that the "basic working and employment conditions of temporary agency workers shall be.....at least those that would apply if they had been recruited directly to occupy the same job".

In relation to holiday, the government's proposal is that following the 12-week qualifying period, agency workers should receive the same contractual leave entitlements as comparable permanent employees receive. In any event, agency workers are currently entitled to statutory leave under the Working Time Regulations 1998 (28 days per year for a full-time worker) and therefore the increase may not be significant. Bearing in mind the provisions of the Directive, that require terms at least the same as those applicable to direct employees, it is difficult to see how a lesser entitlement than is proposed could be granted. LGE anticipates though that local authorities will want to make absolutely sure that comparable contractual leave entitlements should be based on the same length of service requirements as apply to permanent employees.

Q7 In particular, do you see benefit in our suggested approach to simplifying the administration of entitlement to leave entitlements above the statutory minimum?

Yes No

Please comment

LGE Comments: As agency workers may work in a number of different roles, there may be differing entitlements to holiday leave. To simplify the administration of this, rather than have a situation where the agency worker might be expected to carry over additional contractual leave over and above the statutory entitlement from one employer to another, the proposal is that the additional entitlement could be satisfied by a one off payment at the end of the assignment, or be included as part of an hourly/daily rate. The government's proposal appears to be a pragmatic one. Further, LGE anticipate that in the majority of cases the agency will administer and arrange holiday, and therefore apart from the costs of providing the holiday itself, the government's proposal should have little impact on local authorities.

Q8 Are there other factors not discussed above that need to be taken into account by our implementation? If so, please add comments

Yes No

Please comment

LGE Comments: LGE do not foresee any factors concerning holiday that are not already addressed on the consultation. However, local authorities are asked to comment if they anticipate any consequences, not already addressed in the consultation.

Pay

3. We propose that the definition of pay, for the purposes of our implementation, should be basic pay plus other contractual entitlements directly linked to the work undertaken by the agency worker whilst on an assignment. This would include payment for overtime, shift allowances, unsocial hours premiums/bonuses, and bonuses where they relate directly to personal and individual performance, but exclude aspects of remuneration that are provided in recognition of the long-term relationship between employer and permanent employee such as profit sharing schemes.

Q9 Do you agree with our proposed approach to the definition of “pay” for the purposes of the Directive?

Yes No

Please comment

LGE Comments: The proposal is that “pay” will include basic pay, plus any other contractual entitlements that are directly linked to the work undertaken. In addition to basic pay, this might include:

- overtime pay
- shift and unsocial hours allowances; and
- bonuses, where they are directly related to personal and individual performance, for example a piece-work bonus.

The definition would not include other benefits such as company car allowances and in line with the [TUC/CBI agreement](#), occupational social security schemes would be excluded from the definition of pay. That will exclude pensions and should exclude sick pay schemes, but to be absolutely sure, LGE will clarify that point. However, in terms of pensions, under the Pension Act 2008, from 2012 “Personal Accounts will include agency workers, meaning that agency workers will be enrolled from day one of employment with an employer contribution on the same basis as permanent workers.

It appears unlikely that the definition of pay could be reasonably further restricted and therefore LGE anticipate that local authorities will support the government’s proposed definition of pay.

Q10 Are there other factors not discussed above that need to be taken into account by our implementation? If so, please add comments

Yes No

Please comment

LGE Comments: Local authorities are asked to comment if they anticipate any consequences, not already addressed in the consultation document. In particular they are asked to consider any contractual entitlements they provide that are not already addressed and might be directly linked to the work undertaken and could, therefore, fall into the definition of pay. It may be that certain entitlements may not easily fall into the category of an entitlement directly linked to the work undertaken, and in such cases local authorities may want to submit that they should be excluded from the definition of pay.

Q11 Specifically, in the light of the Pensions Act 2008, are you aware of any particular areas of concern regarding agency workers? If so, please give details.

Yes No

Please comment

LGE Comments: Under the Pensions Act 2008, from 2012 "Personal Accounts" will include agency workers, giving them the benefit of workplace pension saving with an "employer" contribution - agency workers will have access to pension saving as other workers, and will be automatically enrolled from day one on the same basis as permanent workers. What the consultation document does not make clear is who is responsible for auto-enrolling the agency worker and who will have to pay the "employer" contribution. Under the Pensions Act 2008, it will be the party that pays the agency workers that is responsible. Therefore, as in nearly all cases the agency will pay the agency worker, it is the agency that will be responsible. However, as a consequence the cost will be passed onto the local authority hirer.

Defining the 12 –week qualifying period

4. We propose that the 12-week qualifying period should be 12 calendar weeks, regardless of the working pattern (e.g. part-time as opposed to full-time. We propose that a new qualifying period will begin only if a new assignment with the same employer is substantially different .

Q12 Do you agree that the 12 week qualifying period should simply be 12 calendar weeks, no matter the number of hours or days worked during that period?

Yes No

Please comment

LGE Comments: The 12-week qualifying period is an important factor and therefore so

is the calculation of that 12-week period. The government's proposal means, for example, that even if an agency worker worked one day in each 12 calendar week, after the 12th week they would become entitled to equal treatment. The alternative approach that immediately comes to mind would be to define a "week" for the purposes of calculating what would contribute to one of the 12 weeks, as requiring at least, say, 20 hours work in the week. However, as the government indicate, such a system would be difficult to operate and LGE are concerned that any such provision could amount to indirect sex discrimination, as a smaller proportion of women than men would be able to meet the 20-hour requirement. On balance, therefore, LGE's view is that local authorities will agree with the government's proposal for the calculation of weeks.

Breaks between assignments

5. We invite views on the minimum duration of a break between assignments before the 12 weeks clock should start again.

Q13 Do you agree that there should be a minimum break between assignments before the "12 week" clock should start again rather than a 'reference period'? If yes, how long should the minimum break period be?

Yes No

Please comment

LGE Comments: This is an important question and local authorities are asked to consider carefully their use of agency workers. Where the same worker carries out two assignments for the authority, the authority is asked to report back whether there is a typical period of a break between assignments. LGE can then liaise with authorities to determine the appropriate period before the 12-week clock should start again. However, in determining the appropriate period authorities will need to bear in mind that were the period to be too short, it would be likely to be viewed as a method of avoiding the objectives of the Directive and therefore unlawful. In direct employment cases, one week is enough to break continuity of service. However, in the consultation document the government has indicated that a one-week period would not be appropriate in this context, as a one-week break after 10 weeks in a job would start the clock ticking again and an individual would be back to day one in terms of their accrual of rights.

Change of responsibilities during an assignment

Q14 Do you agree with the approach we have outlined to the question of whether a change in responsibilities entails the commencement of a new assignment?

Yes No

Please comment

LGE Comments: The government's proposal is that where responsibilities change during an assignment, a new qualifying period will start only if that change results in the

job being “substantially different”. On the face of it, the proposal seems to be a pragmatic way of balancing the rights of agency workers, hirers and agencies. However, local authorities are asked to consider how often the same agency workers may change roles and therefore, whether this provision could have a substantial impact. LGE anticipate that in most cases, agency workers will stay in the same job, and if jobs do change, the length of each job will be 12 weeks or longer and therefore the impact of the proposal could be minimal. However, in certain cases agency workers might perform two separate assignments in what is labelled the same job, but in different parts of a local authority under separate management structures, for example, a supply teacher carry out two teaching assignments, but in two separately managed schools. In such cases, authorities may want the two different assignments to be classed as “substantially different”.

Q15 Are there other factors that our implementation on this point needs to bear in mind, including to reduce scope for circumvention of the Directive’s objectives?

Yes No

Please comment

LGE Comments: LGE do not foresee any factors concerning the qualifying period that are not already addressed in the consultation. However, local authorities are asked to comment if they anticipate any consequences that have not already been addressed.

Permanent contracts of employment and payment between assignments – possible exemption from principle of equal treatment

6. We invite views on the approach to take regarding the flexibility available under the Directive to permit alternative arrangements for agency workers on permanent contracts of employment who are paid between assignments

Q16 Do you agree that it would be helpful to make use of this derogation when implementing the Directive?

Yes No

Please comment

LGE Comments: If made use of, the derogation would mean that the Directive and the principle of equal treatment would not apply to agency workers who are on permanent contracts of employment with the agency who are paid between assignments. LGE anticipate that local authorities will support the derogation, however, anticipate that it will have limited impact in the local government sector.

Q17 To what extent would you expect implementation of this exemption to impact on current practice in the agency sector?

Please comment

LGE Comments: As above, LGE anticipate that the exemption would have limited impact on the local government sector's use of agency workers, however, local authorities are asked to comment on this, should they consider otherwise.

Q18 Were the exemption to be implemented, what is your view regarding the level of pay that should be required between assignments? How long should an agency employing a worker on this basis be required to retain that worker after the end of the assignment concerned?

Please comment

LGE Comments: The government's proposal is that the exemption should only apply where the pay between assignments is at least 50% of the rate paid during the previous assignment. The government says it has an "open mind" on how long after an assignment an agency worker would need to be employed to fall into the exemption.

Where a local authority makes use of this type of agency worker arrangement, the authority is asked to comment, bearing in mind that if too low a rate were paid or too short a period were set, it might be unlawful under the Directive, because it would be viewed as an attempt to avoid the terms of the Directive.

Agreements between workers' and employers' representatives

7. We invite views on the role that collective or workplace agreements might play in implementing the Directive.

Q19 Do you have any views on the role that collective or workplace agreements might play in implementing the Directive, taking account of the need to provide the appropriate level of protection as set out in the Directive and the TUC and CBI agreement? If so, please provide details

Yes No

Please comment

LGE Comments: Provided the appropriate level of protection is maintained, the Directive allows collective agreements to set out the working and employment conditions of temporary agency workers. Whilst local authority employers will support the use of appropriate collective agreements, this provision may have limited impact because of the practicalities of setting up such agreements.

Pregnant women and new mothers

8. We invite views on compliance with the Directive's provisions concerning pregnant women and new mothers.

Q20 Do you consider the extension of the provisions described in paragraph 4.40 appropriate for protecting the health and safety of agency workers who are pregnant or new mothers?

Yes No

Please comment

LGE Comments: The government's proposal is to specifically extend to agency workers certain provisions that apply to protect the health and safety of new and expectant mothers. Those provisions are:

- the right to adjustment to working conditions or hours or the offer of suitable alternative work, if there are health and safety risks and where those options are not possible, suspension on full pay; and
- the right to reasonable paid time off to attend ante-natal appointments.

Whilst local authorities will support the proposal as a way of ensuring the health and safety of new and expectant mothers, we anticipate that they will want to ensure that as far as is possible, the responsibilities for administering the duties is with the employment business, not the local authority.

Q21 Is the length or expected length of the placement the appropriate period during which a woman should continue to be offered alternative work or suspended on full pay as a result of a health and safety risk?

Yes No

Please comment

LGE Comments: LGE anticipates that local authorities will agree it is the appropriate period, as otherwise the agency worker would receive an entitlement above that she would have received if she were not a new or expectant mother.

Access to employment, collective facilities and vocational training

9. We invite views on the Directive's provisions regarding access to employment, collective facilities and vocational training, including the possible implications for our current legislation on "temp to perm" fees.

Q22 Do you consider that our proposals will meet the requirements of Article 6.1?

Yes No

Please comment

LGE Comments: Article 6.1 states that: "agency workers shall be informed of any vacant posts in the user undertaking to give them the same opportunity as other workers in

that undertaking to find permanent employment. Such information may be provided by general announcement in a suitable place in the undertaking”.

The government considers that the Article 6.1’s requirement will be met where:

- vacancy lists are displayed on notice boards;
- agency workers are included on vacancy list circulation lists; and
- by ensuring that the agency worker is informed of the arrangements when they commence the assignment, including frequency of lists and typical deadlines for applying.

LGE agree with the government’s view. However, if implemented, local authorities may want to negotiate terms with agencies that if possible places the administrative responsibility for informing agency workers of permanent posts on the employment business, and seek an indemnity for any claims and costs that arise if the employment business fails to comply with those terms. Local authorities should note that this is a “day one” right, and is not subject to the 12-week qualifying period in the CBI/TUC agreement.

Q23 Do you think our proposals (in question 22) will properly include the interests of agency workers who are on short-term assignments or who are often away from the hirer’s premises, eg drivers or those working in satellite sites?

Yes No

Please comment

LGE Comments: LGE’s view is that as the proposal is for agency workers to be informed of the arrangements at the commencement of the assignment, those on short-term contracts or who work remotely will be adequately protected, as they will know how to access the information.

Temporary to permanent status

Q24 Do you consider that the existing legislative provisions are consistent with the requirements of the Directive in respect of prohibiting agency workers from taking up permanent employment with the hirer?

Yes No

Please comment

LGE Comments: Under the Conduct of Employment Agencies and Employment Businesses Regulations 2003, agencies are able to charge a “transfer fee”, if the hirer organisation takes on an agency worker as a permanent employee. The transfer fee will only be enforceable if the contract between the employment business and the hirer provides for an extended period of hire as an alternative to paying the transfer fee. The

government's view is that in order to comply with the Directive, it may be necessary to require any such transfer fees to represent a "reasonable level of recompense."

LGE has no comment on whether the existing legislative provisions are consistent with the Directive. However, it is anticipated that local authorities will support the proposal to limit transfer fees, to a reasonable level, as that will provide authorities with more freedom to engage workers on a permanent, employee basis.

Q25 Were it to be necessary to adjust the current legislation to make specific provision on the question of a 'reasonable level of recompense', do you have views as to how the provision should be framed? In particular, should legislation or guidance seek to address the question of how the level of the 'reasonable recompense' should be calculated?

Yes No

Please comment

LGE Comments: Local authorities will want clear guidance on what transfer fees would amount to a "reasonable level of recompense", and would not want the amount to exceed the amount already permissible under the 2003 Regulations. In order to assist LGE with its response, local authorities are asked to indicate whether they have paid transfer fees, and if so the typical level of those fees.

Access to onsite facilities for agency workers

Q26 Do you agree with the proposed approach (5.14 – 5.16) regarding implementation of the Directive's provision on access to onsite facilities?

Yes No

Please comment

LGE Comments: Article 5.1 of the Directive states that "temporary agency workers shall be given access to the amenities or collective facilities in the user undertaking, in particular any canteen, child-care facilities, and transport services, under the same terms as workers employed directly by the undertaking, unless the difference in treatment is justified by objective reasons".

Like access to employment vacancies, this is a "day one" right and not subject to the 12-week qualifying period. The government's proposal is that responsibility for providing the access will remain solely with the hirer, and as the hirer provides the facilities, that appear to be appropriate.

The ability to justify less favourable treatment is an important exemption, which local authorities will seek to use where appropriate. The government proposes to adopt the same test for justification as set out in the Fixed-Term and Part-Time Workers legislation. That provides that less favourable treatment (i.e. not providing access) will only be justified if it is:

- necessary to achieve a legitimate objective, for example a genuine business

objective, and

- an appropriate way to achieve that objective.

Local authorities will be familiar with this test. However, local authorities are asked to provide examples of the type of collective facilities they provide, identifying where they foresee difficulties and substantial costs arising from providing that benefit to temporary agency workers. It may then be possible for LGE to ensure that any government guidance on the test of justification takes account of those examples.

Access to training

Q27 Are there further steps that could be taken to help “employment businesses” and hirers use Government initiatives to promote training for agency workers?

Yes No

Please comment

LGE Comments: Local authority employers are keen to support training of employees and workers. However, any initiatives to support the training of agency workers would have to ensure that cost burdens on local authorities were minimised.

Some cost-neutral steps that the government could introduce that may motivate employment business and hirers to promote training for agency workers are:

- Extending the Skills Pledge – currently the Skills Pledge is aimed at ‘eligible employees’ gaining basic skills but this could be extended to include eligible workers, meaning that the employer could receive additional information and advice from their Skills Brokers about sources of funding available for training agency workers.
- Tax credits – offer the incentive of tax credits for providing training opportunities for agency workers.
- Salary sacrifice for learning vouchers – currently employers can offer non-cash benefits to employees through salary sacrifice schemes. This scheme and the tax incentives offered by it could be offered via the agency’s payroll administration for agency workers. Although normally agreed through a variation to an employment contract, this arrangement could be replicated in the contract between the agency and the employment business (which sometimes does equate to an employment contract). HMRC could explore whether its rules could be amended to allow this.

Thresholds for bodies representing workers

10. We invite views on our proposals for implementing the Directive’s provisions for calculating the threshold above which bodies representing workers are to be formed, in particular on whether the threshold should apply to the agency or the hirer.

Q28 Have we identified the relevant thresholds under UK law to which Article 7 applies?

Yes No

Please comment

LGE comments: In the UK, workers representative bodies, such as works councils or trade unions, can be set up in companies or organisations with a certain number of employees. Statutory information and consultation rights on business and employment issues apply – where requested by employees – in businesses or organisations with at least 50 employees (although there are other bodies that organisations may consult with). The government has listed those pieces of legislation that it considers will be affected by including temporary agency workers in the numbers to be counted towards establishing the requirement to inform and consult. The government believes that the Trade Union & Labour Relation (Consolidation) Act 1992 consultation requirements where 20 or more employees may be affected by redundancy are not included in the Article 7 requirements because agency workers cannot be made redundant. We agree that the government is correct in this approach.

Q29 Do you agree that temporary agency workers should count towards the thresholds applicable to the temporary-work agency rather than those applicable to the hirer?

Yes No

Please comment

LGE comments: Local authorities should agree that it will be better to count the temporary agency workers towards the threshold of the agency, rather than the hirer, as some agency workers are actually employees of the agency. It is also the case that most agency workers will have many short-term assignments over a short period of time and they are therefore more likely to develop a relationship with the agency.

Q30 Do you have other comments on the way this Article should be transposed?

Yes No

Please comment

LGE Comments: LGE do not have any substantive comments, but local authorities are asked to provide comments, should they wish.

Information to workers' representatives

11. We invite views on complying with the Directive's requirements concerning hirer's obligations to provide suitable information on the use of agency workers when providing information on the employment situation to bodies representing workers.

Q31 Does the list under paragraph 7.2 identify the relevant regulations which establish a direct or indirect requirement to provide information on the employment situation?

Yes No

Please comment

LGE comments: Article 8 of the Directive requires the hirer to provide suitable information on the use of agency workers when providing information about employment issues to representatives such as trade unions etc. The government lists the regulations it believes will be triggered by this requirement, for example the Transfer of Undertakings (Protection of Employment) Regulations 2006, Health and Safety (Consultation with Employees) Regulations 1996, etc. We agree with this list.

Q32 Do you agree with our interpretation of the legal effect of Article 8 of the Directive (paragraph 7.3)?

Yes No

Please comment

LGE comments: Article 8 of the Directive says that the hiring organisation "... must provide suitable information on the use of temporary agency workers when providing information on the employment situation ...". The use of the word "when" suggests that this requirement to provide information on the use of temporary agency workers is included when the obligation to inform and consult is triggered by business decisions affecting employment. We agree with the government that Article 8 should be interpreted as offering no new and separate requirement to provide information on the use of agency workers outside of existing information and consultation requirements.

Q33 Do you agree that it would be preferable to define the meaning of the term 'suitable information' in our implementation (paragraphs 6.4-6.5 above)?

Yes No

Please comment

LGE comments: The Directive does not define what 'suitable information' should be provided to workers' representatives on temporary agency workers when the obligations to inform and consult are triggered. In the absence of a definition, this issue would most likely be defined through case law. To avoid this, the government proposes to define this phrase with reference back to the principle of equal treatment and therefore believes should be interpreted to include information about basic working and employment conditions. This should be an acceptable proposal for the local government sector. Local authorities, as large employers, should be able to amend their existing policies on informing and consulting with workers' representatives to include the information required on agency workers.

Establishing “equal treatment”

12. In order to establish that an agency worker has not received equal treatment, it will be necessary to identify the “given job”. (ie the job occupied by the agency worker).

Q34 Do you agree with the approach to defining the limits of a “given job”?

Yes No

Please comment

LGE Comments: In order to establish equal treatment it will be necessary to identify the “given job”, being the job occupied by the agency worker. In most cases that will be obvious, however, where not, the government proposes that guidance could assist the parties in identifying the given job. Identifying the given job is unlikely to be a problem for local authorities, where the parameters of most roles are relatively well defined. Nevertheless, LGE anticipate that local authorities will welcome any guidance that is produced.

Q35 Are there any particular considerations we should bear in mind regarding the preparation of the Regulations on this point, or factors you would like to see reflected in the guidance concerned?

Yes No

Please comment

LGE Comments: Local authorities are invited to comment on any particular considerations they would like to see reflected in the guidance.

Determining equal treatment

13 We consider that the key factor in establishing “equal treatment” for an agency worker will in practice be comparison with a comparable worker doing broadly similar work in the same organisation. The wording of the Directive does not, however, rule out other factors being brought to bear and we would envisage making it clear, perhaps in our accompanying guidance, the circumstances in which other factors might be relevant in the absence of a comparable worker.

Q36 Do you agree with our proposed approach on the question of determining equal treatment within the context of the Directive’s requirements? Are there additional factors that you consider should be taken into account?

Yes No

Please comment

LGE Comments: The question of defining the relevant comparator is important, as it will have a direct impact on whether or not there has been equal treatment.

The government considers that the key will be to identify a comparable employee doing broadly similar work in the same organisation. However, in the absence of a comparable

worker, the government indicates that other factors might be relevant to determine equal treatment. Those factors will be existing pay scales for permanent staff and relevant collective agreements. However, the government envisages making clear that comparison with workers in other organisations or in other geographical locations are unlikely to be relevant.

LGE anticipate that in the majority of cases agency workers in local authorities will be able to identify a comparable worker doing broadly similar work in the same authority. If not, LGE welcomes the proposal to clarify that cross-employer comparisons will in most cases be irrelevant. LGE is concerned however, that unless clear guidance is issued on how other factors such as collective agreements and pay scales may be used to determine equivalent treatment, then complicated assessments could arise, as with equal pay claims, on whether a job is comparable and could be viewed as being of equal value.

Local authorities are asked to consider if all types of agency workers in their authority would be able to identify a comparable employee doing broadly similar work in the organisation, and if not what they consider might be appropriate factors to determine equal treatment.

Liability

14. We propose that primary liability will for compliance with obligations under the Directive rest with the agency, whilst acknowledging that the agency will inevitably be reliant on information from the hirer. We suggest that agencies should have a reliable defence in the event that they had taken “reasonable steps” or “best endeavours” to obtain information from the hirer, who would become liable if it became clear that information provided was inaccurate or incomplete. We propose not to make specific provision regarding the nature of the information that should pass from hirer to agency, but to give agency workers the ability to ask their agency for information relating to their equal treatment rights under the Directive.

Q37 Do you agree with our proposed approach to liability?

Yes No

Please comment

LGE Comments: Local authorities should welcome the proposal that agencies will have primary liability.

Q38 Are there any additional factors that you would wish to see addressed in guidance accompanying the implementing Regulations?

Yes No

Please comment

LGE Comments: The government suggests that the guidance could include templates and tools that the parties could use to identify the appropriate information to pass from the hirer to the agency. The type of information that an authority would need to make available to an agency so that the agency could determine equal treatment would be pay scales and the workplace benefits offered to comparable permanent employees. In

most cases, LGE anticipates that local authorities will be able to easily provide that information, however, local authorities are asked to comment if they consider any issues should be specifically addressed in the guidance.

Information on equal treatment for workers

Q39 Do you agree that the approach described in paragraph 8.15 is appropriate for ensuring that agency workers have access to information on equal treatment ?

Yes No

Please comment

LGE Comments: This proposal is that rather than a requirement to automatically provide information to agency workers, the approach will follow the model in the Fixed-Term and Part-Time Workers legislation. That means that an agency worker can ask their agency for the relevant information, and if that information is not supplied within 21 days then, an employment tribunal may draw an inference. Local authorities as hirers would be responsible for providing the agency with the relevant information so that it can answer the request.

Local authorities are asked to comment on the proposal, however, LGE anticipate that authorities will see the approach as a proportionate way of ensuring protection for agency workers, without placing undue burdens on agencies and hirers.

Q40 Do you consider that a template for information provision to workers could be of assistance?

Yes No

Please comment

LGE Comments: LGE's view is that providing a template will be of assistance to local authorities, as it should enable them to identify with ease the relevant information.

Q41 Could existing regulations on the provision of information to work-seekers be further simplified in the context of our implementation to reduce the administrative burden on the recruitment industry whilst ensuring that protection for workers and employers remains in place ? If so how?

Yes No

Please comment

LGE Comments: Under the Conduct of Employment Agencies and Employment Businesses Regulations 2003, agencies must supply hirers with all the details they have on the worker they are supplying for an assignment. They must also supply the agency

worker with information about the hirer. In most cases, the details have to be provided, even when there are multiple short-term assignments with the same hirer. The government intends to review these requirements, with the aim of simplifying the requirements and it is anticipated that local authorities will welcome that proposal, provided that authorities can still obtain sufficient information on the agency worker to enable the authority to ensure that the appropriate checks on suitability for the role are satisfactory.

Dispute resolution and Employment Tribunals

15. On dispute resolution, we propose that an agency worker's first port of call should be the temporary work agency; we are also discussing with Acas how they might become involved in helping to resolve disputes and claims, such as pre-claim and post-claim conciliation. Where complaints cannot be resolved in this way, and we intend to enable agency workers should be able to pursue a claim through Employment Tribunals.

Q42 Do you agree with our proposed approach to dispute resolution? In particular, do you agree that the agency concerned should be the first point of contact for an aggrieved agency worker?

Yes No

Please comment

LGE Comments: It is anticipated that local authorities will agree that the first point of contact for an aggrieved agency worker should be the agency.

Review of restrictions and prohibitions on use of temporary agency workers

16. We invite views on complying with the Directive's requirement to review any restrictions and prohibitions on the use of agency work.

Q43 Do you agree with our view that there are no restrictions in UK legislation that would need review in the context of Article 4? If not, which provisions do you think require consideration?

Yes No

Please comment

LGE Comments: LGE has no substantive comments on this issue, however, comments from local authorities will be welcomed.

Reducing administrative burdens/regulatory costs

17. We will be setting up a working group to consider how administrative burdens surrounding the use of agency workers, partly in relation to the Directive, but also more generally, to see if there is any scope for further simplification.

Q44 Which areas do think the working group should focus on?

Please comment

LGE Comments: The government recognises that the implementation of the Directive is likely to increase the administrative costs for agencies and hirers. Local authorities are, however, invited to provide suggestions on how they consider the administrative burdens in relation to agency workers could be simplified, whilst still meeting the requirements of the Directive.

Entry into force

18. All Member States are required to adopt the necessary laws to implement the Directive by 5 December 2011. We have received a number of representations to the effect that the entry into force of the regulations should be delayed in order for all concerned to adjust to their requirements, particularly during difficult economic times. We are also aware, however, that others would wish to see earlier entry into force in order to enable agency workers to derive benefit from the Directive from an earlier point

Q45 When do you consider the regulations should come into force and why?

Please comment

LGE Comments: Local authorities are asked to indicate when they consider the regulations should come into force. LGE recognise that a key consideration for authorities will be the need to minimise the adverse costs effects of the implementation of the Directive and the time that authorities will need to prepare.

Other areas

19. We consider that we have identified the key issues that need to be addressed in this Consultation Paper. However we would welcome your views on whether there are any other aspects of implementation on which you would welcome elaboration in legislation or guidance, including your proposed solutions.

Please comment on whether there are any other aspects of implementation on which you would welcome elaboration in legislation or guidance, including your proposed solutions

LGE Comments: Local authorities are invited to comment, as their own use of agency workers may raise particular issues not already raised in the consultation.