GREEN PAPER RESPONSE

This response (Glamorgan University/PEEL) has been devised by a group that combines academic and practising employment lawyers with post-graduate students and senior human resource management practitioners (HRM). The last are drawn from Capita plc’s Personnel Experts in Employment Law Club (PEEL) that meets monthly to consider recent developments in European and UK employment law. The lawyers and students are from the Law School, University of Glamorgan, Wales, UK. The group makes an annual Study Visit to Brussels to meet with key politicians, policy makers, researchers and officials to discuss matters that affect UK employment law and practice.

In devising this response we have been mindful of the essential features and traditions of UK employment law. These, typically, provide employers with considerable discretion and flexibility as regards, recruitment, work patterns and terms of work for workers. Although, as is known, the UK has for many years had considerable diversity in terms of non-standard work patterns, especially part-time, job sharing and time-account or flexible hours working, it has been flexibility within the employment contract that has been especially important and has promoted adaptability through, say, multi-skilling, highly flexible working hours and, today, flexible notions of the “workplace”. The driver for flexible ways of working in the UK has been as much the “social pull” of those who want to work flexibly and have caring responsibilities or other interests as the “economic push” of employers to require flexible working so as to maximise the use of human resources.

UK Labour law statutory rights, including those derived from the EU, especially concerning equal treatment, health and safety, pay and job security tend to be complex, detailed and bureaucratic, causing many UK HRM practitioners to spend the majority of their time on managing these legal rules. To date, there has been little observable impact of the “simplification”, de-regulation political agenda. Although there is a wide range of statutory employment rights available to employees and workers in the UK, many rights are not “day-one” rights and rights to leave from work are typically unpaid or low paid.

Our approach to the Green Paper has been to reflect on the impact of European Labour Law, including its administrative and management costs, along with the need for efficiency, productivity and flexibility so as to ensure competitiveness. However, many in the group have stressed the need to provide labour rights and supportive workplace practices. This includes those that encourage commitment and productivity from workers and coalesce with notions of human capital investment. We have been able to observe in the UK some of the adverse effects of “too much” flexibility, and too few rights and protections for some workers, along with the consequent effects on reduced training and employability and a growing employment “underclass”. We, broadly, support a balanced approach to legal rights and responsibilities but, as will be argued later, one based on labour market and workplace realities, not assumptions.

In our discussions, we considered many issues that are not covered by the Green Paper. We have focussed on those questions that we consider we have competence to comment on. We have not, therefore, answered all the questions in full.

Question 1

We are not convinced that the simplistic notion of “insiders” and “outsiders” is especially helpful, though we accept that many workers do, indeed, suffer disadvantage at some times in their lives in labour markets and workplaces. We consider that, in the light of recent research, the categorisation of all, say, agency temporary workers, intermittent workers, home-workers etc as “outsiders” requiring legal intervention to protect them is misplaced. Some, clearly, do require legal protections but others who might be described as “strategic individualists” have different aspirations and needs. These are the growing number of, typically, younger and skilled people who take personal ownership of their careers and finances, pensions etc and who choose to work in a varied, flexible way. They focus on their skills, employability and personal development, rather than on a career in a particular employing organisation. They need different types of support structures. Their numbers are growing and they are a global feature today.

We would therefore argue for a closer analysis of notions of “insiders” and “outsiders” and for a wider review of what constitutes being an “outsider”. Unemployment is only one indicator and, indeed, many “insiders” in standard employment suffer disadvantage. There are many groups, including those who are unpaid for their work, for
example, because they are volunteers in social work or health care or work, or work in a domestic environment or, as illegal migrants, that are subject to abuse or exploitation that are only infrequently considered by law. We urge that there be more research in this area.

We suggest that “meaningful reform of labour law” should:

- Be informed by research on labour market realities. This will avoid a situation from a UK perspective whereby many reforms are proposed by law-makers that appear suited for “yesterday’s” labour markets or workplaces rather than supporting future conditions. We would ask whether the notion of “flexicurity” as a basis for reform is either well understood or resonates with employers and workers. We think “flexicurity” is not well understood or familiar in the UK. Similarly, we wonder whether the drive to increased worker mobility is either understood or supported by most people. If mobility is not a major driver for workers, what are the drivers?

- Place considerable emphasis on the accessibility and practicability of legal rules. There is a need to reflect HRM as well as notions of social dialogue. The need for accessibility should not simply be a dimension of the “less red-tape”, “burdens of business” arguments, as current drives towards simplification may leave more workers vulnerable, especially those working in small firms. Law should reflect best employment practice, much as the Open Method of Co-ordination (OMC) reflects best practice in different member states. It remains vital that law provides a “level playing field” within and across member states. Law should not legitimise poor labour standards or encourage social dumping in the race to promote better regulation that at present looks more like less regulation. We think that workers are very sensitive about having rights removed or weakened. We recognise that amending and simplifying law is very challenging but urge care in this regard. Generally, UK employers and workers welcome the approach of the European Court of Justice, whilst although not all decisions are to our liking, they do tend to be clear and concise in the labour law field. Amendments of law that reflect ECJ decisions are also to be welcomed.

- Place considerable emphasis on the review and consolidation of law, much as the recent initiatives have responded to equal treatment law and developments in the area of recognition of qualifications. Worker mobility should be assisted by increased consistency of transposition into national law. We also urge greater rigour regarding the enforcement of European law at national level. We consider, from a UK perspective that some key Directives have been transposed both late and inadequately into national law. This discredits European law.

- Reform laws that promote or support labour market or organisational rigidity. Although the core strategy of the Acquired Rights Directives is well understood, today their workings are causing problems in the UK. Some are derived from the continuing uncertainty over what constitutes a “transfer” and others over the options for the transferee/new employer regarding harmonising employment terms. Many cases are pending in the UK following the transposition of the 2001 Directive. The extension of the Directive into wider professional service provision appears anomalous in the context of the European Employment Strategy (EES) and the Lisbon Process that encourages skills development, flexibility and adaptability. Research into outsourcing, intermediation and business restructuring clearly reveals the negative consequences, in terms of labour costs, lack of flexibility for employers, lack of incentives for workers and generally, the lack of positive labour market outcomes.

- Reflect on the “Danish” model, along with an emphasis on promoting effective labour market transitions and support for measures that take a “life cycle” approach. This may well mean a switch of emphasis towards state social security provision and state funded active labour market policies. However, again, the aspirations and needs of individuals should be carefully considered, along with ensuring that measures are both useful and lead to sustained improvement. Many initiatives from the EES/OMC are costly but have a limited impact and the experience of successful measures, such as to support redundant workers, lone parents and aspiring women/ethnic minority etc entrepreneurs should have active rewards for “good” employers and far wider dissemination. We would support legislation that requires employers themselves to play a more active role to facilitate successful transitions. In South Wales recently there has been considerable public concern over the decision of Burberry’s plc to off-shore production of their high quality clothing manufacture from Wales to China. The workers affected will receive no more than a relatively
small lump sum payment but there is no obligation on Burberrys to re-train, provide outplacement support or otherwise help workers. As this is an off-shoring situation, the Acquired Rights provisions do not apply, thus encouraging off-shoring and heightening worker anxieties and the potential for industrial unrest. European law needs to be more alive to the issues around globalisation and transnational legal regulation more generally.

**Question 2**

From a UK perspective, the notion of “flexibility” is well known and the UK would argue that it already has a flexible labour market. However, flexibility has two meanings in the UK, as referred to in the introduction to this response. Functional and numerical flexibility for employers has been articulated and debated since the 1980s, including as a consequence of considerable flexibility within the employment relationship. This is achieved through re-negotiation of contract terms or the operation of the implied obligations in the contract of employment (“economic push flexibility”). Many argue that the lack of regulation has enabled employers to achieve this form of flexibility through the use of some contract arrangements that are precarious and poorly rewarded. Examples are the so-called stand-by or zero-hours contracts whereby workers have to be available for work but are only paid for times that they are actually working. Such people also have major problems in accessing even basic employment rights. However, in the recent years there has been considerable growth in various forms of “social pull flexibility” such as flexi-hours, time-account working, job-sharing, teleworking etc. These are a positive response to those with caring responsibilities or have other priorities in their life, such as study, entrepreneurism or sport. The UK’s Work and Families Act, 2006 has extended the right to request to work flexibility for most carers, but does not provide a right to do so. We would support labour laws that promote and support social pull flexibility and provides additional choice for workers. Such ways of working are helpful to employers who consider it helps recruitment and retention of staff and there is recent research indicating that this type of flexible working increases productivity through reduced labour turnover and declining worker absence and improved worker commitment. Although some employers and some employer organisations would oppose legal measures to restrict “economic push flexibility”, such as by limiting the circumstances in which fixed term or zero-hours contracts can be used, we accept that there is an urgent need to find appropriate legal protections for the workers on, say, zero-hours contracts. This point is considered below.

In terms of “security” we would urge that where job losses are caused by economic factors, not involving issues of misconduct or capability on the part of the worker, the law should require more active measures to support the workers affected and not simply rely on information and consultation of workers and lump sum payments of compensation.

**Question 3**

From a UK perspective, there is little evidence that law and/or collective agreements either hinder or stimulate change at the workplace. The incidence of industrial action in the UK is very low, even where there has been a considerable number of initiatives by large employers to outsource, off-shore, introduce new technology etc. This is likely the result of strict UK legislation on industrial action.

Research indicates that in the UK SMEs are generally hostile to employment legislation and in particular EU legislation. There is a considerable amount of rhetoric about the “red-tape” imposed on SMEs. In reality, there is little evidence that SMEs fail or face major problems as a result of employment law. Efforts to reduce bureaucracy and provide targeted advice and support for employment law duties and also to use the fiscal system to provide tangible support for SMEs would be helpful. The UK government has a number of current initiatives to provide such support. We would not agree with legislative proposals that would reduce the rights of workers that happen to be employed in SMEs.

**Question 4**

There is already considerable flexibility available to employers in the UK as to who, how and on what terms staff are recruited. We would urge that law should provide appropriate protections for the workers affected and ensure they have access to some, at least, of the key rights. The Austrian Severance Act, 2002 appears to offer some interesting ideas and experience. Certainly we would argue that in the UK there is a need to find a legal mechanism to reduce the fears of precariousness for many groups of workers as these carry with them major non-work problems.
associated with access to finance, loans, insurance, pensions, housing etc. The notion, as in the UK of a lump sum payment that is directly linked to length of employment following job loss, rather than responding to future needs, seems in need of review.

**Question 5**

In order to answer the first part of this question we would need to know what is being proposed. This is especially so in terms of “flexible employment protection legislation”. We would not, broadly, want to see rights reduced. The issue for us would be the type of flexibility and flexibility for whom. We would not want greater complexity and bureaucracy. Given the high numbers in the UK who are not working through reasons of incapacity or poor skills etc, but who find that work “does not pay”, as in work they lose social security payments and have other costs, such as travel costs, we would support active labour market policies. In particular, we support those that would ease transition from, say, incapacity to work through part-time work or re-training where social security payments are subsidised, at least in the short term. We would expect there to be a legal obligation on the part of workers to co-operate with active labour market measures.

**Question 6**

We do not feel equipped to respond to this question in detail but would note the positive outcomes of the UK Government’s initiatives to encourage partnership at work between employers and unions/or employee representatives. We are less used to collective agreements being used to develop obligations on employers, for example, as regards training. We do, though, note the positive outcomes of the 2002 Employment Act that provides for trade union “learning representatives” that have statutory time off from work to identify training needs and develop training in partnership with the employer. At present, there is little research on the topic but it may be a model worth further exploration.

**Question 7**

There is an urgent need to provide a clear framework for employment status across the EU, but especially in the UK. The Perulli Paper and subsequent debates clearly demonstrate the complexity and controversy of the topic. It has to be unacceptable that so many people are denied access to even basic European rights due to ambiguity about their employment status. Case-law in the UK is complex, variable and often unconvincing. Although the UK has a special category, “Worker”, that has access to some rights we would draw to your attention to the fact that this category developed separately from EU legislation (UK Wages Act, 1986) and that courts have found providing a clear definition of it notoriously difficult. No new “Worker” rights have been given since 2000. Generally, the “Worker” category has added complexity and confusion. The conceptual basis and rationale for such an employment category remains unclear, so that managers and workers alike find it hard to understand and apply.

We would argue for a clear definition of employees, based on drawing a distinction between dependent workers, who should properly be considered employees, and genuine entrepreneurs who obtain their legal and other protections from commercial law. This approach, in essence, is applied to good effect in Australia and other states. There is then the question of whether all non-entrepreneurs should have access to all rights or whether there should be gradations. There are arguments on both sides, but, in the light of our case-law experience, we would resist an approach that added complexity and uncertainty and oppose approaches that so often leave vulnerable people outside employment law. The numbers of non-employees who are not entrepreneurs in the UK is extremely high. They generally provide core functions for employing organisations yet are “in the shadows” of employment law.

**Question 8**

We consider this a very important question. Many in our group are cautious because they fear that such a concept might legitimise member states or employers reducing existing rights. However, should there be assurances/laws that require that the “floor” is exactly that, ie an irreducible minimum, we would suggest it should contain the following: (We recognise the limited competence of the EU in some areas of employment law, such as pay.) We think all rights should be from the first day of employment with an employer and would urge, in the interests of fairness and simplicity that they should apply to all (except genuine entrepreneurs) at work, regardless of employment status:

- Health, safety and welfare protections, including working time protections. These should extend to all at work, including entrepreneurs
• Equal treatment provisions, though these can be widened and enforced more effectively; protection from victimisation, including for membership and activities of trade unions (and professional or other bodies?)
• Information and consultation provisions. It is essential these are applied to all at work, especially those who are most likely to be affected by workplaces changes. Might this include some self-employed persons?
• Proof of the nature and content of the employment relationship
• Protection from abuses and in terms of payment and other benefits
• Protections that aim to respond to reconciling work and home life
• Access to training and employability support
• Protections when moving to work in other member states

We consider that the above list would have little impact on job creation and employers, it would be simple to apply and would be attractive and motivating to all at work.

Question 9
This issue has recently become fraught and highly controversial in the UK. Currently, we have complex and confusing case-law and two draft pieces of legislation. A Private Member’s Bill seeks to implement the terms of the draft EC Directive on Temporary Agency Work by applying the non-discrimination principle to temps at the client enterprise. The Government has launched a Consultation on “Vulnerable” temps. This recognises that not all temps are within an homogeneous group (some are very well rewarded and have high status) and that energies should be directed towards protecting those temps that suffer poor working conditions. The problem in the UK has been that where an agency does not voluntarily provide employee status, courts have tended to find there is no employee relationship between the temp and the agency. This denies them access to most employment protective rights. The courts have then considered and have sometimes confirmed an “implied” employment contract with the agency’s client. This enables temps to assert employment rights against the client. This judicial approach has caused consternation amongst employer /clients. It is an approach that defies legal logic, as well. Although, very recently, there is evidence that UK courts are pulling back from this approach, many uncertainties remain. Agency working is, as is known, highly developed in the UK. It is playing an increasing role in job creation, employment restructuring and labour market transitions. It seems to us that law should encourage good practice and “good” agency working. It should also provide appropriate protections for the temps themselves. We consider that the simplest and most coherent way forward is to require an agency to provide standard employment contracts and with them, the normal employment rights. This would lead to some slight increases in fees and may drive some smaller agencies out of the marketplace. This may well be a reasonable price to pay for clarifying law and providing protections. It would also be attractive to clients, who would then know where they stood.

In the UK, the issues around outsourcing are extremely complex. Generally, it is simpler to leave employment responsibilities with the employer (though we have case-law in the UK that has accepted joint vicarious liability for occupational accidents where more than one employer was on a construction site). It seems a sound principle of law that, generally, you should only have liability for those matters and those people you have voluntarily accepted as your responsibility.

Question 10
Yes

Question 11
As is known the issue of working time and its regulation has been both controversial and politicised in the UK. In reality, most UK employers have few problems with the existing Directive and although many apply the “48 hour opt-out” a far fewer number actually activate it and require long working hours. It is an “insurance” against sudden or unforeseen work demands. The draft, rejected in November 2006, would have likely been acceptable to most employers in the UK as it provided considerable flexibility especially regarding the averaging of hours. Less scrupulous employers who impose long unbroken hours on workers are anyway increasingly being subject to claims for compensation based on the law of negligence or the contract of employment. There is no doubt, however, that the “stand-by” issue is problematic for many employers and is adding greatly to labour costs in various employment sectors (eg. health care sector). The proposed definitions of “active and inactive on-call time” are understandable in
terms of aiming to reduce burdens on employers in some sectors. However, legally, the concepts are hard to understand, for “active” on call time is simply “working time”. At a practical level, and listening to members of the PEEL Club, we understand that many UK employers (both private and public sector), for example, running residential, healthcare, leisure and educational facilities have been adjusting work arrangements in the light of the various ECJ decisions. This has not always been easy but the ECJ decisions have at least been clear, if not always welcome!

**Question 12**
In general, transnational working is eased through increased convergence of definitions and rules. We do, though recognise, that the common law traditions in the UK make finding consistent definitions and practices complex. The move towards a common academic and vocational framework is a model that might be learnt from.

**Question 13**
Yes; we consider that close monitoring of law, including its impact on employers is essential in order to ensure the “level playing field”. In the UK we recognise that we are often in opposition to legislative proposals from the EU. This appears regardless of the composition of the UK Government. Nonetheless, although there are several cases where our transposition of legislation has been held to be inadequate, generally, our UK, EU derived laws are applied and enforced. It seems appropriate now that there should be greater co-operation and co-ordination of administrative (and judicial?) bodies. A move towards increased consistency in the enforcement of health and safety law appears promising. This is an area where the social partners would have a particularly useful role.

**Question 14**
We do not feel especially well placed to answer this.

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