

Consultation response

Ref: 4711

Department for Business, Innovation and Skills consultation: Modern Workplaces

8 August 2011

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The Modern Workplaces consultation examines the Government's proposals to change employment law across four areas:

- i) Flexible parental leave
- ii) Flexible working
- iii) Working time regulations
- iv) Equal pay

Age UK has chosen to comment only on part two, the flexible working component, as we consider this to be a crucial issue for older workers. At present a 'right to request' flexible working exists for parents and some carers of adults. The Government proposes to extend the 'right to request' to all employees, and this consultation examines the impact that changing this legal right will have on individuals and employers.

Key points and recommendations

- Flexible working can bring significant benefits to both the individual and to the employer, for example increased productivity and an improved work-life balance. Wherever possible, everyone should be able to choose to work flexibly.
- Age UK supports the extension of the right to request flexible working. We believe this will be of significant benefit to older workers, and will act as a 'nudge' to encourage employers to embed flexibility at the heart of their organisation.
- However, this is just one method of arranging flexible working. Informal arrangements between the employee and management are more common and are often a more effective method, and we encourage employers and employees to examine this option in the first instance.
- The statutory right to request, however, underpins the system and will in many cases be the most appropriate method – a legal duty on the employer to consider requests will meet some needs and help engender a cultural change.
- Around one-third of people aged 55+ who are in work utilise a flexible working arrangement. This demonstrates that many employers are already using flexible practices without damaging their business.
- However, few employers offer flexible working during recruitment. This can prevent unemployed people who need to work flexibly from entering the labour force.
- The 26-week qualifying period should therefore be removed. This sends out a message that flexible working is for favoured employees only.
- Flexible working is often initiated by the employer, which sometimes has negative consequences for the individual. Employers should use it positively and for mutual benefit.

- It is important to move away from the gender stereotypes that surround flexible working – Age UK believes it can be for everyone, regardless of gender or age.
- We believe there should be no set limit on the number of requests made in any 12-month period, as a cap does not give sufficient scope to short-notice and short-term situations which may arise. Employees should only be prevented from making an ‘excessive’ number of requests, as a safeguard against abusing the system.
- Micro-businesses and start ups should not be exempt from the extension. Failure to apply the right to request will strongly suggest that all flexible working is a burden, not a benefit. If there are good business reasons for not offering flexibility a request can be easily refused.
- Instead, the Government should provide additional services to help small businesses deal with complex requests, and to help them design flexible jobs. Only a wholly positive approach will place UK employers firmly on a path towards much-needed cultural change.

1. Introduction

Age UK strongly supports the Government’s proposal to extend the right to request flexible working to all workers. We believe that the option to work flexibly is, in most circumstances, a force for good which carries multiple benefits for both the employer and employee. Older (50+) workers, in particular, have much to gain from the increasing availability of flexible work, as many want or need access to such options in order to extend their working lives, wind down to retirement, or meet personal commitments such as caring responsibilities.

Extending the right to request will, we believe, help precipitate a cultural change towards embedding flexibility in job design, while in the medium term increasing the number of employers who offer flexible options to their employees.

We argue below, however, that there should be no exemptions from the right to request. To create the desired cultural change, it is important to ensure flexible working is seen as a positive step with mutual benefit for both employer and employee. Arbitrary cut-off points such as the size of an employer will create artificial divides and have consequences for both parties – for example, employers losing out on recruiting skilled workers, and individuals finding it harder to extend their working life. With the UK’s ageing workforce this is particularly relevant, and will be contrary to other Government policies designed to encourage people to work for longer.

Age UK evidence: flexible working in the UK

Our own research demonstrates many of the benefits of flexible working. In 2010 Age UK commissioned the University of Kent to undertake an extensive piece of qualitative research on older workers’ experiences of flexible working. This will be referred to throughout this consultation response. The research: ‘Flexible employment: how employment and the use of flexibility policies through the life

course can affect later life occupation and financial outcomes', relayed many positive experiences of flexible working, where employers have met the needs of their workers and subsequently enjoyed increased loyalty and productivity. Most arrangements are made informally which usually improves the employer-employee relationship but can lead to problems, in particular when not supplemented by an organisational HR policy. In addition, problems were reported as often stemming from a line manager refusing to consider flexibility, or a managerial change undermining the existing arrangements. In these last two instances in particular a right to request will have a significant benefit.

However, the research showed that too few employers currently consider flexible working options apart from for the stereotypical beneficiaries, for example maternity leave returnees. The lack of willingness to consider flexibility for carers, even with a right to request, suggests cultural change may take some time to occur.

In addition, there are many people who need flexibility from the start of employment in order to return to the labour force – few employers are willing to offer this. As the Government tackles unemployment this is, we believe, one of the most pressing issues to address. Removing the 26-week qualifying criteria will be a start.

To supplement this qualitative research, for this consultation response we have conducted our own analysis of the Labour Force Survey (LFS)ⁱ to evaluate flexible working patterns among older workers. It is clear that many older workers already work flexibly, which suggests that many employers are agreeing to flexible arrangements without this harming their business.

In analysing the LFS we created our own definition of flexible working based on the available variables – it therefore includes:

- Flexi-time (flexible hours)
- Annualised hours
- Working at home / teleworking
- Term-time working
- Short-time working
- Job sharing
- Nine day fortnights / four-and-a-half day weeks
- Home working

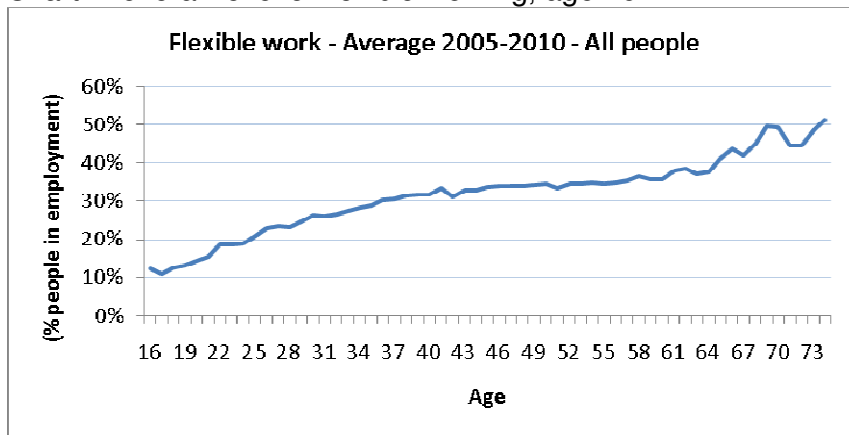
Flexibility in this context means it has been 'arranged' between the two parties – the weight of bargaining power is not known. Flexi-time, term-time working and home working are the most common types of flexible working. We have not included part time work as it cannot be discerned whether this is a flexible arrangement or not.

Chart 1 below indicates that the amount of people working flexibly, as a proportion of the workforce, rises with age, although the increase is relatively small between the mid-40s and mid-50s. This indicates that a right to request will be particularly useful for people aged in their mid-50s and above, and therefore has an important role to play in extending working lives.

It also shows that about a third of people in their 50s already work flexibly (as defined above), suggesting many employers are already using informal arrangements. It is

reasonable to conclude that they would not use these practices were they damaging to business. Extending the right to request will encourage more individuals and employers to consider flexible arrangements.

Chart 1: overall level of flexible working, age 16-74



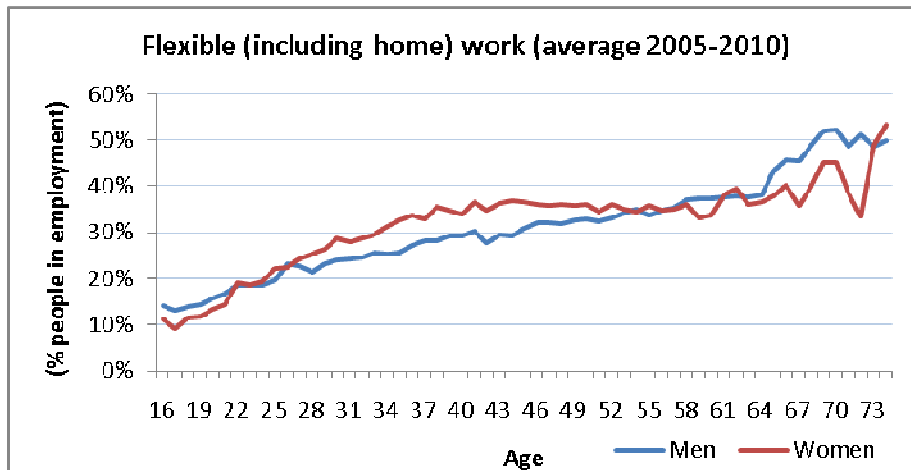
Source: Age UK analysis of the Labour Force Survey

Extending the right to request could help break down gender stereotypes associated with flexible working. By placing as much emphasis on the ability of men to utilise such options as women, negative perceptions of flexibility – and employing older womenⁱⁱ – will be reduced.

Interestingly, our analysis of the LFS shows that from the mid-50s more men than women actually use flexible options, thereby breaking down the stereotype. This is due to the number of older male workers who use home working, which significantly outweighs the number of women doing so. Chart 2 shows the gender breakdown for all types of flexible working, and Chart 3 excludes home working, illustrating that other flexible options are used by significantly more women than men.

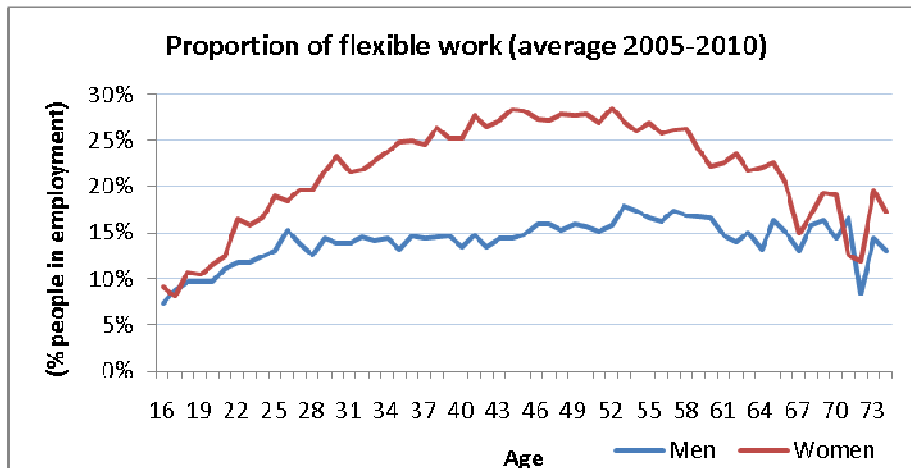
Access to all flexible options should be available regardless of gender. Men often only become aware of the existence of flexible working when they have a caring responsibilityⁱⁱⁱ and we believe extending the right to request will help redress this imbalance, even if many do not choose to utilise the formal legislative procedure and instead pursue an informal negotiation.

Chart 2: flexible working, including homeworking, among men and women aged 16-74



Source: Age UK analysis of the Labour Force Survey

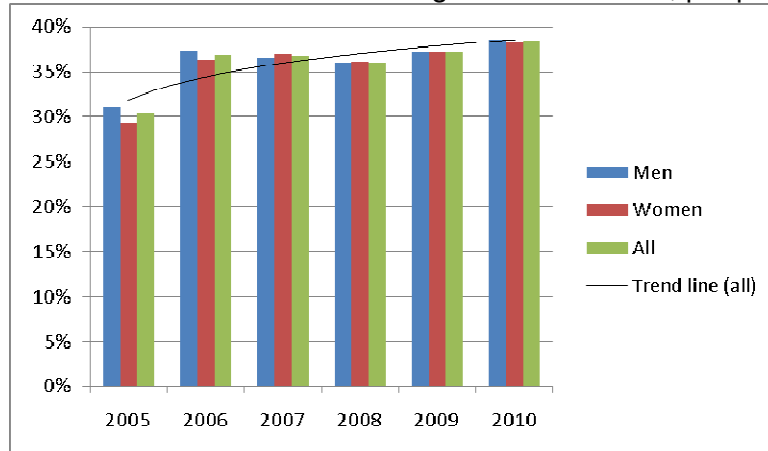
Chart 3: flexible working, not including home working, among men and women aged 16-74



Source: Age UK analysis of the Labour Force Survey

Many employers recognise the value of allowing older workers to work flexibly. The proportion of older workers using such arrangements has increased since 2005. However, the increase has slowed recently suggesting the desired cultural change has not yet arrived, so extending the right to request remains an important policy lever in achieving this. Unfortunately it is not possible to gather more information on the nature and the drivers behind this increase, for example whether it is a result of the recession. It does suggest that many of these arrangements arise from informal negotiations between employer and employee – something which is borne out by qualitative research commissioned by Age UK. Chart 4, below, shows the changes in the rate of flexible working among people aged 50+ from 2005-10.

Chart 4: levels of flexible working from 2005-2010, people aged 50+



Source: Age UK analysis of the Labour Force Survey

We believe that flexible working, used for positive reasons centred on meeting individuals' needs, has a crucial role to play in extending working lives and helping older workers re-enter the labour force. In spite of the positive recent trends, there is still much to be done in terms of cultural change, and we fully support measures which will help make offering flexibility more commonplace, including extending the right to request.

2. Consultation questions

22. Should the Government legislate to extend the right to request flexible working to all employees? Please explain your response.

The Government should legislate to extend the right to request flexible working to all employees without exception. We believe that in most circumstances there are substantial benefits to both individuals and employers, which substantially outweigh any costs that may be incurred. A working culture which embraces flexibility is hugely desirable for a variety of reasons, and the right to request will help move towards that culture.

Older workers stand to benefit significantly from extending the right to request itself and from the greater provision of flexible options. Research by the CIPD has shown that 28 per cent of workers aged 50+ stated they would work for longer if allowed to work flexibly,^{iv} indicating that expanding the right to request is integral to the Government's 'extending working lives' agenda.

Another finding drawn from our qualitative research is also highly relevant. It dealt with a range of individuals' experiences and views in detail, and uncovered some interesting findings. Older workers are extremely business savvy, and are well aware of what arrangements are likely to be acceptable to employers.^v Extending the right to request is therefore likely to lead to productive discussions and negotiations around flexibility, and significant benefits to employers.

The importance of a ‘right to request’

A formal procedure is by no means the only way of increasing the availability of flexible working. Informal agreements between a worker and their manager are often effective. Indeed, such arrangements are more common among older workers who currently enjoy flexible working than those formally established under the right to request.^{vi} However, informal arrangements do not work for everyone, and so a legal right to make such a request without fear of reprisals is necessary to underpin the system. Furthermore, extending the right to request to all employees will act as a ‘nudge’, sending a clear signal to employers and playing a crucial part in changing their behaviour.

We believe that many older workers want and would benefit from increased flexible working.^{vii} However, without a right to request many 50+ employees find it hard to approach their employer. In a study conducted by the Centre for Research into the Older Workforce, only one of the 38 participants had negotiated flexible working patterns, in this case with a local authority. Most of the remainder said they would not consider approaching their employer about flexible working, in spite of it being something they would like. This was most commonly because they did not think their request would be well received.^{viii}

The present right to request for parents and some carers has helped increase the availability of flexible working as a mainstream option for these groups, with many employers happy to arrange flexible working patterns. However, workers who do not fall into these categories are often denied flexibility. The right to request will help them improve their work-life balance, with the side-effect of boosting productivity and bottom lines for employers.

Much of the evidence gathered on the impact of the right to request has shown a positive response from employers and individuals. Legislation supporting flexible working enjoys a high level of public support. 60 per cent of individuals think the legislation should be extended to include everyone,^{ix} while 90 per cent think that all employees should be treated equally by their employer when considering requests.^x There is also fairly strong support among employers^{xi} with many believing the right to request has had a positive impact on their business.^{xii}

However, one negative result of the current limited right to request is that it is encouraging a ‘concession culture’, where flexible working is only available for those included in the right to request groups. In 2007 the Equal Opportunities Commission concluded that:

“Regulation supporting flexibility is working well but is reinforcing a concession culture way of thinking about flexibility rather than positioning flexibility as available to everyone and able to deliver business benefits. Confusion over what flexible working means and what options are genuinely available is also limiting use.”^{xiii}

This highlights the need for continued positive communications around flexible working to employers, and for encouraging them to go much further than the legislative minimum.

Restricted access to and quality of flexible work

The Department for Business, Innovation and Skills (BIS) has made the valid point that access to and quality of flexible working are not the same.^{xiv} The right to request can help redress this, as it is an employee-led process. There are many instances when employers use so-called flexible working as a tool to make workers cover extra shifts or change working patterns at short notice, for example. Managers sometimes use flexibility to marginalise and reduce the career options of some workers, for example by forcing people onto short-time working (often referred to as ‘*Kurzarbeit*’).^{xv}

It is important to note such negative impacts do not stem from employee-initiated requests – the right to request will at least redress the balance of power to a degree, although will not go far enough to help such ‘victims’.

Furthermore, the Age UK qualitative research referred to above has identified some common problems with access, including:

- Employers are much more willing to accommodate requests from ‘known and trusted’ existing employees.
- There is variation between industrial sectors, as well as a contrast between public and private sector.
- Employees may receive support from one manager, but when reporting lines change the offer of flexible working can be withdrawn or lead to in-work relationship difficulties.
- Employers may be completely unwilling to consider flexibility at the request of the employee, but only too willing when it helps them.

There are therefore plenty of examples of employees finding flexible working either used against them or impossible to access. The following quote demonstrates a not-atypical experience:

“Calling in sick is one thing, they don’t seem so worried. Refusing to work a shift would be the wrong thing to do... absolutely wrong. Refuse a shift and they take you off rota for two months to teach you. Flexibility is for them only.”^{xvi}

This is a significant issue, and statistics showing take-up of flexible working should always be viewed with this in mind. It is important to stress that employers have more to gain through adopting flexible working practices which actually benefit their staff rather than forcing differentiated working patterns on people who would not choose to do so normally.

Gender stereotyping

We believe that the availability of flexible working should not be dictated by stereotypes. The current right to request helps to reinforce these, in particular the stereotype that flexibility is mainly for women, therefore extending it will help move beyond such views. As stated in the introduction, in reality many men do engage in

flexible working (in particular home working) and so the stereotype is not entirely true, although the degree of gender imbalance does depend on the type of flexibility.

Code of practice

23. Do you support the proposal to replace the statutory process for the consideration of requests with a Code of Practice? Please explain your response.

24. Should the Code of Practice detail the existing statutory procedure or is there a less burdensome procedure? Please explain your response.

25. Should a Code of Practice be principle-based (i.e. requiring requests to be considered in a reasonable manner and time) or provide a 'safe harbour' (i.e. where employers following the process precisely get protection)? Please explain your response.

26. If you do not agree that we should introduce a Code of Practice to govern flexible working requests, what alternative could be introduced to reduce the administrative burdens of considering requests, without diminishing employee rights? Please explain your response.

As explained in our answer to question 22, Age UK believes that while the formal 'right to request' will help underpin the system, informal arrangements will often work best. With this in mind, we do not object to removing the strict process which employers must follow and replacing it with a Code of Practice. However, in doing so there must be ample safeguards against employers finding a way of avoiding meeting requests, or ignoring their employees altogether. Requirements on employers not to discriminate on the basis of receiving a request – formal or informal – must be clear.

Cultural change is a significant part of the answer, and we believe that a strict procedure is not an essential element to achieving this. The legal obligation to consider requests, coupled with clear guidelines and best practice examples, will help the more negative employers change their behaviour.

Prioritising requests

27. Do you agree with our proposals on prioritisation of multiple flexible working requests that cannot all be accommodated? Please explain your response.

We agree that prioritising certain groups would not be the best approach, and would only serve to reinforce the existing stereotypes. We are also mindful that too much detail in this area could increase the burden of considering requests on employers.

The Government should issue clear guidance, if necessary within the statutory code, reminding employers that requests can only be refused on one of the specified criteria. It must be made crystal clear that accepting a request from one person does not constitute grounds for a refusal of another person's request.

26-week qualifying condition

28. Do you agree that the current 26-week qualifying period should be retained? Please explain your response.

Age UK does not agree that the 26 week qualifying period should be retained. Having this in place acts as a significant barrier to entry into the labour market for many jobseekers, in particular those who have caring or other family responsibilities and who may have a greater need to work flexibly.

Employers who advertise jobs as being flexible are all too rare, meaning that for many it is impossible to find a job that meets their personal requirements. Without a right to request flexible working, they are highly unlikely to broach the subject with a prospective employer for fear of being discriminated against and subsequently denied the job, not to mention the reality of this discrimination. There are therefore people being kept out of the labour force as a result.

Our qualitative research shows this to be a common trend, with several participants clearly stating they were afraid to mention flexible working to their employer pre-employment, for example:

“Once I was in the job, yes. I don’t think I’d be happy to bring it up beforehand unless the job advertised flexibility... I would be loathe to bring it up at the job interview.”

A right to request at the point of job offer would empower people to ask, while of course placing no additional obligation on the employer to accept. Our research shows that many older jobseekers find it harder to return to work than younger age groups, and this is exacerbated when there are flexible working requirements too.^{xvii}

We do not believe a right to request at point of job entry would be a significant barrier. If the employer were unable to accept the request then the process would follow as normal, and the employee would reasonably be expected to work to the expected job specification. Any performance issues arising in the first six months, when a new employee would typically be on a probationary period, could then be dealt with accounting for their flexible working pattern.

Instead, there would be a clear gain for employers as they would attract a much broader pool of potential recruits, making it easier for them to fill the skills gaps in their organisation as well as enhancing their reputation as a good place to work. Removing the 26 week qualifying period would enhance this.

Requests for temporary changes to terms and conditions

29. Do you agree that the restriction on the number of requests allowed in any 12-month period should be changed? Please explain your response.

30. Do you have an alternative proposal for promoting temporary changes to working patterns?

Many people have to deal with rapidly changing circumstances which do not follow a predictable pattern, and therefore having a cap is likely to be restrictive and detrimental to individuals and employers. Both will be unable to respond to short-term and short-notice changes to working patterns.

We understand the need to safeguard the system from abuse, but do not feel that imposing an annual restriction on requests is the right way to set about it.

Attempts to restrict the free operation of the right to request must be approached cautiously. There is no evidence presented to suggest that the right to request has been abused on a widespread level – in fact the opposite appears to be true.^{xviii}

Consequently, we propose there should be no set number of requests made per year, but that instead the employer should be protected against employees misusing the right. If an employee made an ‘excessive’ number of requests in a set period, the employer could be considered within their rights to refuse to consider this. It would, however, be necessary to ensure that satisfactory procedures to challenge an employer’s decision were available to individuals through ACAS.

In addition, refusal of a request must be recognised as a potential factor in unfair and constructive dismissal cases. Guidelines should include a general description that ‘several’ requests may be permitted before an employee could be considered to be abusing the right.

Exemptions for micro-business and start-ups

31. Do you agree with the Government that micro-businesses and start-ups should be exempted from the extension to the right to request flexible working for the three year moratorium? Please explain your response.

We do not agree with the proposed exemption. The Government cannot argue that extending the right to request will bring widespread benefits, and then effectively say ‘but these should not apply to micro-businesses and start-ups’. We believe that small businesses will benefit from considering the wider application of flexible working, and that extending the right to request will not produce an undue burden.

As stated earlier, our research showed that older workers are extremely business savvy and well aware of the tribulations facing businesses. This group, at least, are not so unreasonable as to demand flexible work and expect it to be delivered whatever the cost to their employer. There is a pervading stereotype that employees are selfish and have no regard for their employer – our qualitative research shows this to be false, in particular when the employer is a small businesses. Therefore it will be counterproductive to exempt small businesses.

A far better approach would be to include small businesses and offer them tailored support in developing flexible jobs, provide advice on recruiting more widely and the role flexibility can play in this, and delivering a support function for dealing with requests to work flexibly. BIS could play a crucial role here, and we believe this would have a significant impact on promoting cultural change among employers.

Approaches to support people into flexible working

32. What support do you think employers need to enable them to operate flexible working?

While a formal policy can be helpful, it often takes time and effort to develop this and so is mostly restricted to larger employers.

Therefore, it is particularly small and medium-sized enterprises that may require additional support when designing and implementing flexible working policies. We believe the Government may need to go further than simply posting guidance on the ACAS website. While ACAS guidance is often of a high standard, it is simply not disseminated widely enough to have the desired impact.

There should be an active campaign to advocate the benefits of flexible working, coupled with specific advice produced in conjunction with industry bodies who are likely to be aware of the specific economic and environmental factors facing each employer. This should include relevant examples of good practice, and access to HR expertise for support and advice.

33. When looking for jobs, what could employers or recruitment agencies provide that would highlight that a job has flexible working opportunities?

Organisations of all sizes should be encouraged to develop a policy on flexible working. This need be only a very simple, short paragraph stating that they welcome all requests, and can easily avoid being a complex document. The Government or ACAS could help by providing a template and then encouraging employers to use it.

This could then easily be communicated to jobseekers. As stated in question 28, removing the 26-week qualifying period would also help break down barriers here.

34. What support is required to help people to undertake varied-hours working?

Our research found that often the greatest barrier to flexible working from within an organisation is often a lack of managerial awareness. Raising awareness among employers and managers would be a good first place to start.

The Government can also provide support to both individuals and employers, through clear guidance and good practice examples.

As suggested in question 31, helping sectoral bodies produce bespoke guidance and advice to employees in their sector (not necessarily restricted to members) could also be beneficial, increasing the relevance and awareness of guidance.

35. Do you have any further comments or suggestions relating to our proposals or impact assessment on flexible working?

There are many benefits to employers resulting from offering flexible working, which run wider than those stated in the impact assessment, including:

- Increased productivity
- Reduced absenteeism
- Increased employee engagement
- Improved relationship between managers and employees
- Improved workplace morale
- Better psychological health of the workforce
- Keeping skilled older workers by allowing winding down to retirement
- Improved staff retention
- Increased pool of talent from which to recruit
- Enhanced reputation as a 'good' employer

If employers are aware of all of these then they are more likely to embrace the cultural change towards flexible working, so the Government must find the best way disseminating this information.

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- ⁱ Age UK (2011) analysis of Labour Force Survey Q4 2010. The types of flexible working included are: home working; flexi-time; annualised hours; term time working; job sharing; nine day fortnight or four-and-a-half day week; zero hours contract; on-call working. This does not differentiate between employer- and employee-led arrangements – this would be a useful differentiation to make in future Government surveys.
- ⁱⁱ European Commission (2010), Flexible working time arrangements and gender equality
- ⁱⁱⁱ Atkinson & Hall (2009) The role of gender in varying forms of flexible working, Gender, Work & Organisation vol 16 no. 6 Nov 2009
- ^{iv} CIPD (2010), Focus on the ageing workforce, Employee Outlook report Summer 2010
- ^v Alden E (2011), Flexible employment: how employment and the use of flexibility policies through the life course can affect later life occupation and financial outcomes', Age UK Research Report (forthcoming)
- ^{vi} Alden E (2011), Flexible employment: how employment and the use of flexibility policies through the life course can affect later life occupation and financial outcomes', Age UK Research Report (forthcoming)
- ^{vii} For example see Alden E (2011) or CIPD (2010), both cited above
- ^{viii} McNair S & Flynn M & Owen-Hussey L (2006) 'Older workers in the south-east, Centre for Research into the Older Workforce
- ^{ix} Holmes K, Ivins C, Hansom J, Smeaton D, Yaxley D (2007), The future of work: individuals and workplace transformation, Working Paper Series, EOC
- ^x Hayward et al (2007) 3rd Work Life Balance Employee Survey, BERR
- ^{xi} For example, the CIPD/KPMG survey in 2006 found 35 per cent supported extending the right to request. This is even higher among HR managers with 73 per cent support (Woolf C (2010), IRS Employment Review Survey 2010.
- ^{xii} Only ten per cent of employers believed the right to request had a negative impact on their business (38 per cent positive, 52 per cent neutral); CBI (2008), Employment Trends Survey
- ^{xiii} Equal Opportunities Commission (2007), Enter the timelords: transforming work to meet the future
- ^{xiv} BIS (2010), Work and Families Act 2006 evaluation report
- ^{xv} Loretto, Vickerstaff and White (2005) From Older workers and options for flexible work
- ^{xvi} Alden E (2011), Flexible employment: how employment and the use of flexibility policies through the life course can affect later life occupation and financial outcomes', Age UK Research Report (forthcoming)
- ^{xvii} Alden E (2011), Flexible employment: how employment and the use of flexibility policies through the life course can affect later life occupation and financial outcomes', Age UK Research Report (forthcoming)
- ^{xviii} See the BIS (2010) Impact Assessment into extending the right to request to parents of children aged 17