Acas welcomes the opportunity to comment on the proposed Regulations for Early Conciliation as these will provide the framework for the service we have been asked to operate.

There are a number of key choices to be made in establishing an effective operating model for Early Conciliation. Acas will use its long experience and unrivalled expertise in the delivery of successful dispute resolution provision to inform these decisions.

There can however be no piloting of Early Conciliation and the optimum delivery arrangements may only become apparent once the enabling legal changes have been introduced and the service has begun. It is therefore very likely that the precise arrangements will need to be altered in the light of experience so Acas welcomes the light touch approach of the Regulations.

Proactive conciliation, promptly and appropriately provided will be critical to the successful delivery of Early Conciliation and it will therefore be essential to avoid any artificial barriers to the exercise of conciliator judgement as to how this is best achieved. Internal policy guidance will be crucial and prescription is likely to be unhelpful in this respect as we may need to be nimble in adjusting our approach in the light of experience.

The Acas Council’s responses to the specific questions asked in the consultation document are set out in the attached document.
Question 1: We would welcome views on the content of the form, our intention that claimants should not be required to provide information on the EC form about the nature of the dispute.

Acas is in favour of a minimum of detail being provided by a prospective claimant at the EC request stage. Our experience of Pre Claim Conciliation is that in around three-quarters of cases a tribunal is avoided. This shows that having no written information is not a barrier to successful resolution. We believe that detailed written submissions tend to reinforce positions that people feel obliged to defend which is generally unhelpful to attempts to settle the matter prior to a claim being lodged.

Question 2: We would welcome views on whether there are other jurisdictions where EC would not be appropriate, and the reasons for those views.

Acas has not identified any additional jurisdictions.

Question 3: We consider that the ECSO model is the right way forward. If you disagree, please tell us why.

Acas believes that the ECSO model is the right way forward. We have run a short experiment with the use of an ECSO stage in Pre-Claim Conciliation (PCC) the nearest thing we have to EC. The survey is currently in the field and preliminary headline findings will be available in mid-February. The indications from early qualitative research are that the ground is better prepared for substantive conciliation by the use of this filter/preparation stage. Additionally and importantly, where claims are based on misconception or misunderstanding a simple explanation is sometimes all that is needed to save face, time and money all round.

Acas believes that in order to meet claimant’s expectations of a speedy response to their lodging of a request for Early Conciliation, a dedicated team of Support Officers concentrating on out bound calls will enable us to contact within one working day. It will also ensure we are able to use valuable Conciliator time efficiently by establishing when claimants will be available and if any adjustments are needed to meet their needs.

Question 4: We believe that Acas should make reasonable attempts to contact the prospective claimant but that these attempts should not continue indefinitely. We would welcome views on what users might regard as “reasonable attempts”, including whether there should be a maximum number of attempts and/or a specified period of time for the ECSO to attempt to contact the prospective claimant.

Acas would prefer that this is treated as a matter for internal Acas policy on Early Conciliation. Acas Conciliators are very experienced in exercising good judgement regarding the timing and number of attempted contacts with the parties. If the Regulations were to specify time periods or numbers of
attempted contacts we would be fearful of being unnecessarily restricted in exercising our judgement. Acas would not wish to pursue those who clearly do not wish to participate but equally would not want to give up on those who do want to take part simply because we have reached an artificial time limit or number of attempts. We are not able to pilot Early Conciliation and in our view it would be unhelpful to place restrictions on our judgement prior to the start of the service without any evidence of the most appropriate approach.

We are also concerned about the possibility of unhelpful satellite litigation if prospective claimants were to argue that the conciliator had attempted too many or too few contacts prior to issuing the Certificate. We consider that it would be more appropriate for Acas to develop operational guidance on matters such as this. This would allow us to review quickly and to make appropriate adjustments in the light of experience.

**Question 5:** We would welcome your views on whether it is appropriate to apply the same constraints, in terms of time and attempts, to contacting the prospective respondent as that for the prospective claimant, or whether you consider a different approach is justified. If so, please explain what this might be and your reasoning.

Acas considers that the issues are the same for our approach to respondents as for prospective claimants and therefore constraints on Acas ability to effect good judgement are not appropriate for the same reasons as outlined in the response to question 4.

**Question 6:** We would welcome views on whether you consider our approach to contacting the prospective respondents is the right one. If not, please explain why.

Acas considers that Early Conciliation is the start of a process of enforcing rights, and it is an inevitable part of such a process that the party against whom the action is being progressed must find out about it.

The most suitable service for potential claimants who are uncertain as to whether they wish to initiate a claim that their employer will be informed about is the Acas Helpline. Acas can make clear to claimants at the notification stage that if they are in any doubt about whether to proceed or want a sounding board to enable them to consider further the strengths and weaknesses of their position, they can have a confidential conversation with a Helpline Adviser.

Consequently, it is the view of Acas that once a prospective claimant has taken the formal step of notifying Acas of an intention to pursue an ET claim that Acas should have a discretionary entitlement to initiate a conversation with the respondent about the case, having first spoken to the Claimant. There are a number of reasons for this.

One common employer complaint is that they are often not aware that an employee holds a grievance against them until an ET1 arrives in the post. On occasion this claim is long and detailed and prepared by legally trained
representatives. At this point the employer tends to feel constrained to respond legally, positions become entrenched, and the prospects of settlement diminish.

Sometimes resolution of the case is only possible where information can be exchanged between the two parties. For example it may be the case that claimants only come to realise that their arguments lack sufficient substance when the conciliator is able to make them aware of information gleaned from their employer.

It is important to note that the role of a conciliator in these instances is to explore the scope for the two parties to reach a settlement; it is not to provide bilateral advice to the claimant on the merits of their case. Acas is acutely aware of the need for its conciliators both to be impartial and to be seen to be impartial in their dealings with the parties. So, if claimants were able to prohibit conciliator discussion with respondents in cases that subsequently become tribunal claims some employers, small employers in particular, may believe that Acas’s prior involvement with the claimant has endorsed the claim in some way. This carries with it the serious possibility of undermining the trust necessary for effective conciliation.

Acas is mindful of the fear that if it makes contact with an employer this may entail them undertaking unnecessary preparatory work or appointing a representative for a tribunal claim that may never be made. Acas feels that this underestimates the capacity of its skilled conciliators to have conversations with employers, in pursuit of case settlement, without causing alarm or raising the stakes. Employers in any case may prefer to have the right to decide for themselves whether to take any action in preparation for a case that may, or may not, progress further.

In summary, it is the view of Acas that the lodging of a claim for EC should entail the same requirement of transparency as is currently the case with ET1 applications. Acas expects that in the large majority of cases the claimant will be agreeable to Acas engaging with the respondent to explore the scope for settlement. Where they are not Acas considers that its conciliators should have the discretion to discuss the request with the respondent where it judges that this could be in the interests of resolution.

**Question 7: Do you consider there is any other information that should be included on the EC certificate?**

Acas considers that the EC certificate should be confined to information which enables the Employment Tribunal to evidence that the obligation to notify Acas has been fulfilled as well as the timescale for this so they are able to make judgements. We think that it needs to be a routine document that doesn’t unwittingly give the prospective claimant any steer as to whether they should be pursuing their claim to tribunal or not.

**Question 8: We would welcome any views on our proposed approach for handling prospective respondent EC requests.**

Acas supports the proposal to allow prospective Respondent EC requests and is working up its approach to handling these.