

BIS | Department for Business
Innovation & Skills

CALL FOR EVIDENCE

Collective Redundancy
Consultation Rules

NOVEMBER 2011

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Foreword



The Government believes that the UK economy should be supported by a framework of laws that ensures that the labour market is both strong and efficient. It should be flexible to encourage the creation of jobs, effective to enable employers to manage their staff productively and fair to create a level playing field for employers and a strong foundation of protection for workers.

Through the Employment Law Review, launched in May 2010, the Government is seeking to ensure a UK labour market where both employers and workers are informed and empowered and able to negotiate their relationship with minimal intervention by Government. We want to reduce the fear factor for employers to encourage them to take on new employees and manage them effectively, while recognising the fear factor for employees who worry about job security.

Underpinning this approach is a need for a core of fundamental employment protections to safeguard employees from unscrupulous employers and create a level playing field for good employers.

Within the Employment Law Review, we have already consulted on reforms to the dispute resolution and employment tribunal system, and announced that we will extend the qualifying period for unfair dismissal from one to two years.

Building on this, I am now calling for evidence on the operation of the rules for collective redundancy consultation. We recognise that the existing rules are seen to present a barrier to employer flexibility in the labour market. There has not been a significant review of this area since the 1970s, and we are keen to collect more evidence on how these rules work and what the impact of reform would be.

Responding to comments through the Review and Red Tape Challenge, we are seeking now views on a package of potential changes, focusing in particular on how we can increase flexibility for employers and employees in this area. I would like to thank you in advance for contributing.

A handwritten signature in blue ink that reads "Edward Davey". The signature is written in a cursive style and is set against a light yellow rectangular background.

EDWARD DAVEY
Minister for Employment Relations, Consumer and Postal Affairs

Purpose of the Call for Evidence

With this Call for Evidence we are keen to establish what impact the current rules on collective redundancy consultation have on business confidence and flexibility to respond effectively and appropriately to market opportunities and challenges. We want to understand the challenges for business in pursuing collective redundancy consultation – including the barriers to starting consultation and achieving agreement. We also want to explore the issues for employees – including the ability to engage meaningfully with their employer during a consultation and the ability to find and secure alternative employment should that prove necessary. Evidence gathered here will be used to formulate policy proposals that will be put forward for formal public consultation in 2012.

In order to help the Government gather this evidence, this document asks you a number of questions based on your experience of consultations over collective redundancy proposals. Not all the questions in this paper will be relevant to you. Some are aimed at all respondents, some at employers, some at employees' representatives and some at employees themselves.

Disclosure of information you provide

Information provided in response to this Call for Evidence, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004). If you want information, including personal data that you provide, to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

Structure of this Call for Evidence

For ease of reference, the questions are presented at the beginning of this document.

The document then moves to a contextual introduction identifying the business, economic and social factors that are relevant.

Section 1 discusses the process of consultation, including the ability to reach agreement and the issue of establishment.

Section 2 considers the minimum periods for consultation and notification.

Section 3 explores high impact redundancies.

Section 4 examines the link with TUPE and insolvency legislation.

An overview of the legislation and the stages in the consultation process can be found in an Annex at the end.

This Call for Evidence considers the statutory minimum period between consultation starting and the proposed redundancies taking effect. For ease of reference, we refer to these periods as “minimum time periods”.

Summary of Questions

| Call for Evidence | Summary of Questions | | | | | | |
|--------------------------------------|--|---------|---------|---------|---------|---------|------|
| Question 1 | <p>How many consultations has your organisation undertaken in the last five years (since November 2006) on collective redundancies where:</p> <p>a) 100 or more redundancies were proposed within a 90 day period? or</p> <p>b) between 20 and 99 redundancies were proposed within a 90 day period?</p> | | | | | | |
| Question 2 | <p>Of the consultations that you reported in Question 1 please indicate the duration of each according to the categories below where there were 100 or more redundancies proposed:</p> | | | | | | |
| Length of Consultation (days) | 0 – 15 | 16 – 30 | 31 – 45 | 46 – 60 | 61 – 75 | 76 – 90 | 90 + |
| Number of Consultations | | | | | | | |
| Question 3 | <p>Of the consultations that you reported in Question 1 please indicate the duration of each according to the categories below where there were between 20 and 99 redundancies:</p> | | | | | | |
| Length of Consultation (days) | 0 – 15 | 16 – 30 | 31 – 45 | 46 – 60 | 61 – 75 | 76 – 90 | 90 + |

| Call for Evidence | | Summary of Questions | | | | | |
|---|---|----------------------|--|--|--|--|--|
| Number of Consultations (20-99 dismissals) | | | | | | | |
| Question 4 | If any consultations took more than 90 days to complete, please say how many days these consultations lasted for. | | | | | | |
| Question 5 | Over the last five years, how many employees have been made redundant from your organisation, as part of a 100+ collective redundancy exercise? | | | | | | |
| Question 6 | Are you aware of your rights and obligations under sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992? | | | | | | |
| Question 7 | With whom do you consult about collective redundancies? What are the advantages and disadvantages of the engaging with different types of representative? | | | | | | |
| Question 8 | What factors: a) make agreement difficult? b) make agreement more likely? | | | | | | |
| Question 9 | If agreement cannot be reached, when can an employer be confident that the consultation is finished and that redundancy notices can be issued? | | | | | | |
| Question 10 | What happens during consultation? | | | | | | |
| Question 11 | What impact does consultation have on the employer's business decision? (e.g. in terms of number of proposed redundancies actually effected?) | | | | | | |
| Question 12 | Have you experienced specific difficulties when trying to determine what constitutes an establishment for the purposes of collective redundancy consultation? If yes, please describe them. | | | | | | |

| Call for Evidence | Summary of Questions |
|--------------------|---|
| Question 13 | BIS is aware that there are some issues around the interaction of fixed term contracts with collective redundancy consultation law. What problems do fixed term contracts create? What do you consider would be a potential solution? |
| Question 14 | What factors do you consider could determine what constitutes an 'establishment'? |
| Question 15 | What are the advantages or disadvantages of the current 90 day minimum time period before redundancies can take effect, in your experience (a) for employers (b) for employees? In particular, what is the relevance of employees' statutory or contractual notice periods? |
| Question 16 | What are the costs to business of the 90 day minimum time period over and above a 30 day period? What generates these costs? |
| Question 17 | If there were a statutory provision for employers and employee representatives to shorten the 90 day minimum time period by voluntary agreement, would this be used? |
| Question 18 | What would be the advantages or disadvantages of being able to shorten the period in this way? |
| Question 19 | What would be the advantages or disadvantages (a) for the employer and (b) for the employee of reducing the minimum time periods when 100 or more redundancies are proposed to 60, 45 or 30 days? |
| Question 20 | How critical is the length of the statutory minimum time periods in instances of high-impact redundancies? Why? |
| Question 21 | What would be the advantages or disadvantages of increasing the threshold for the number of redundancies proposed for the 90 day notification period (i.e. increasing it to a number above 100 redundancies)? What should the threshold be? |

| Call for Evidence | Summary of Questions |
|--------------------|---|
| Question 22 | What would be the advantages or disadvantages of a graduated threshold with different time periods applying for different numbers of redundancies? |
| Question 23 | The Government is also calling for evidence on the Transfer of Undertakings (Protection of Employment) Regulations. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together. |
| Question 24 | What special considerations relating to collective redundancy consultations arise from insolvencies? |

Introduction

Some employers have said during the Employment Law Review that the current 90 day minimum time period before the proposed dismissals can take effect slows their ability to restructure effectively and can put future business success at risk. They report that the difficulty in effecting redundancies has a negative impact on employers' confidence in hiring people, slows employees' reengagement in the labour market and makes it harder for businesses to restructure to react effectively to changing market conditions. Ongoing uncertainty can also have a serious impact on workforce morale and productivity.

A minimum time period has been in place in the UK since 1975 and the argument is made that review is now needed to take account of:

- the increase in the pace of decision-making in all areas of life as a result of innovations in information and communications technology; and
- the need to facilitate a labour market that can generate economic growth in the face of a global economic downturn.

The number of consultations over collective redundancies averages 4,700 notifications each year covering an average 2.8 million employees, 472,000 of whom are faced with redundancy.¹ This has been increased by the recessionary impacts felt in 2009, when there was a spike of 6,609 notifications covering 3.6 million employees of whom 662,000 were facing redundancy. Without that spike, the average number of notifications each year would be 4,238.

Collective redundancies happen for a reason. A business may need to restructure in order to meet the demands of a changing market or to ensure that the business can continue to operate. It can be subject to mergers or acquisitions; it can change product lines and processes. A business can also ultimately fail.

Whatever the reason, the ability to adapt can create a stronger business from which it might grow and expand in future. Restructuring can also mean assuring survival – either in the short or long term – and the protection of jobs that might otherwise be at risk. In a collective redundancy situation, the quality of the consultation can be key in determining the effectiveness of the restructuring – employee experience and engagement can make a difference to the options that can be considered.

The way in which one business reacts to change can also create opportunities and challenges for others; contraction in one area can enable expansion

¹ Based on data supplied to the Redundancy Payments Service.

elsewhere – but there can be negative effects, for example on businesses which are linked through the supply chain. However, allowing businesses to fail when it is inevitable that they must is a key part of an innovative economy that can reinvent itself in response to changing conditions to use resources in the most productive way.

In an effective and flexible labour market, employers have the confidence to generate jobs without worrying about their ability to tailor their workforce as conditions require. And employees who are facing redundancy feel assured that there are opportunities available, and that they have the right information and skills with which to access them.

Of course, the impacts – both positive and negative – reach beyond the business to its employees and their communities and to other job seekers – as well as to the public purse. An important aspect of the consultation process is striking the right balance so that Government agencies have time to respond effectively.

Dismissals regulation is intended to cushion the impact of a macroeconomic shock on employment levels. This protection may add to the overall cost of employing labour and can result in less labour being employed.

However, as has been seen during the recession, the ability of workers' representatives to discuss issues around restructuring can result in alternatives to redundancy. For example, agreements to utilise layoff regulations could spur productivity-enhancing investments by firms in order to avoid downsizing, and encourage firms to invest more in training etc. to increase the productivity of their workers.

In weighing arguments and options for change, therefore, we need to consider the balance between employment protection and an efficient and flexible labour market, between long term business growth and short term economic impact. We also need to understand the role for Government in ensuring meaningful engagement between employer and employee that delivers the optimum outcome.

We would welcome any contextual evidence which is relevant to this consideration.

Scope of the Call for Evidence

The scope of this Call for Evidence is constrained by the need to ensure continued compliance with the 1998 Collective Redundancies Directive (98/59/EC). But there are areas where the implementing legislation goes beyond the requirements of the Collective Redundancies Directive. The most obvious example of this is the minimum time period before redundancies can take effect. But, as the overall objective of the legislation is for consultation that is worthwhile, the minimum time period cannot be considered in isolation. So, it will be important to consider whether there are other areas of the law

which could be improved or whether guidance and best practice examples could help consultation be conducted more effectively.

Other areas that Government has been told are creating difficulties for employers and employees include a lack of clarity about the definition of an 'establishment' for deciding whether a redundancy triggers the need for collective consultation. And there is a degree of uncertainty around the point at which consultation should start and end.

Business has also told Government that they believe there to be overlaps between the collective redundancy rules and other legislation including those that deal with transfers of undertakings and insolvencies.

| Call for Evidence | | Introductory Questions | | | | | | |
|--|--|------------------------|----------------|----------------|----------------|----------------|-------------|--|
| Question 1 | <p>How many consultations has your organisation undertaken in the last five years (since November 2006) on collective redundancies where:</p> <p>a) 100 or more redundancies were proposed within a 90 day period? or</p> <p>b) between 20 and 99 redundancies were proposed within a 90 day period?</p> | | | | | | | |
| Question 2 | <p>Of the consultations that you reported in Question 1 please indicate the duration of each according to the categories below where there were 100 or more redundancies proposed:</p> | | | | | | | |
| Length of Consultation (days) | 0 – 15 | 16 – 30 | 31 – 45 | 46 – 60 | 61 – 75 | 76 – 90 | 90 + | |
| Number of Consultations | | | | | | | | |
| Question 3 | <p>Of the consultations that you reported in Question 1 please indicate the duration of each according to the categories below where there were between 20 and 99 redundancies:</p> | | | | | | | |
| Length of Consultation (days) | 0 – 15 | 16 – 30 | 31 – 45 | 46 – 60 | 61 – 75 | 76 – 90 | 90 + | |
| Number of Consultations (20-99) | | | | | | | | |

| Call for Evidence | | Introductory Questions | | | | | |
|-------------------|---|------------------------|--|--|--|--|--|
| dismissals) | | | | | | | |
| Question 4 | If any consultations took more than 90 days to complete, please say how many days these consultations lasted for. | | | | | | |
| Question 5 | Over the last five years, how many employees have been made redundant from your organisation, as part of a 100+ collective redundancy exercise? | | | | | | |
| Question 6 | Are you aware of your rights and obligations under sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992? | | | | | | |
| Question 7 | With whom do you consult about collective redundancies? What are the advantages and disadvantages of the engaging with different types of representative? | | | | | | |

Section 1: Process of consultation

1.1 The Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act) sets out some requirements on the way that a consultation should start and how it should be conducted. The 1992 Act requires that consultation starts *in good time* and, depending on the number of proposed redundancies, at least 30 or 90 days before the first dismissal takes effect. The consultation must be conducted with a view to reaching agreement about ways to avoid the dismissals, to reduce the numbers of employees to be dismissed and mitigating the consequences. But there remains a degree of uncertainty about when consultation should start and what form it should take.

1.2 The point at which consultation starts is central to establishing the nature of the consultation and the ability of the representatives to have a genuine impact on the number of redundancies. To be most effective consultation should start as early as possible and preferably before the final decision to dismiss has been taken. This will allow employees' representatives the chance to consider the issues and offer viable, well-evidenced alternatives.

1.3 Whilst the 1992 Act requires that certain information is provided, it is not necessary for the employer to have all of that information available to them in order to start the consultation. The 1992 Act requires that the information should be provided for the purposes of the consultation and the Directive states that it should be during the course of consultations. So it seems clear that consultation should start as soon as there is something meaningful to discuss.

1.4 However, it may not always be possible to start consultation before the decision to dismiss has been taken. For example, where the decision to make the redundancies has been taken by a central management, and not the local employer, the final decision may non-negotiable.

1.5 Some employers are deterred from starting consultation at an early stage due to concerns about passing confidential information to their employees' representatives. They fear that the disclosure of some information may be contrary to the Stock Market rules or that the information may be distributed more widely. In practice, the nature of the ongoing industrial relations in the workplace will dictate how confident employers are in disclosing sensitive and confidential information.

1.6 The 1992 Act sets out a duty to consult and minimum time periods before the proposed dismissals can take effect (minimum time periods), but allows for the employer to issue redundancy *notices* during that period if consultation is genuinely complete. Meeting the consultation requirement within the minimum time period should not be an end in itself. Effective consultation should not focus purely on the redundancy process but should be carried out *with a view to reaching agreement* on the redundancy proposals. It should last for sufficient time to allow both parties to offer evidence to support their proposed approach and to react to the proposals put before them.

Ability to reach agreement

1.7 Consideration should be given to the changing issues that arise during consultation. It may be necessary to provide additional information and it is likely that both parties will be asked to react to changing proposals and priorities. In this context, the emphasis is on progress towards an agreement rather than focussing on limiting consultation to the minimum time periods.

1.8 Ideally, the parties should be able to agree on the correct way to approach the proposed redundancies following an open, genuine consultation that has lasted long enough to consider all the issues and allow an exchange of views on how they can be tackled. However, it is possible that consultation may reach a stalemate where agreement looks highly unlikely. At this point, it is likely that management will decide whether there is merit in continuing with further discussions in order to try to break the deadlock or whether the consultation has run its course and should be closed. If the representatives disagree with the management decision they can appeal to them to

reconvene the consultation or, as a last resort, can raise a complaint with the Employment Tribunal.

1.9 Anecdotal evidence suggests that the success of consultation over large-scale redundancies is often dependent on wider industrial relations issues, particularly where consultation needs to take place quickly. The nature and efficacy of consultation is also likely to be influenced by the representatives with whom employers engage; trade union representatives may approach consultation differently to non-union information and consultation representatives or reps who have been specially elected for the purpose. Good ongoing relationships will make the process quicker and more straightforward. Conversely, difficult relationships will hamper the consultation process – no matter how long or short the consultation period.

1.10 In order to help employers and representatives gain a better understanding of when consultation is genuinely complete, the Government is keen to identify examples of good practice.

The Government is keen to establish what factors make it easier or more difficult to conclude consultation. It is also keen to discover how far the outcome of a consultation is affected by the degree of management and employee engagement and the quality of their existing relationship.

| Call For Evidence | Questions on Consultation |
|--------------------|---|
| Question 8 | What factors: a) make agreement difficult? b) make agreement more likely? |
| Question 9 | If agreement cannot be reached, when can an employer be confident that the consultation is finished and that redundancy notices can be issued? |
| Question 10 | What happens during consultation? |
| Question 11 | What impact does consultation have on the employer's business decision? (e.g. in terms of number of proposed redundancies actually effected?) |
| Question 12 | Have you experienced specific difficulties when trying to determine what constitutes an establishment for the purposes of collective redundancy consultation? If yes, please describe them. |

“Establishment”

1.11 The 1992 Act does not include a definition of ‘establishment’ and both employees’ representatives and employers have told the Government that this has caused problems. It is often difficult for employers and employees’ representatives to establish when or if the requirement to consult arises or how long it should last. This is likely to be of particular concern in certain sectors, for example in retail, where a central management may control a number of smaller, related workplaces.

1.12 The European Court of Justice (ECJ) has attempted to add some clarity by providing guidance on the concept of an ‘establishment’ by relating it to the local employment unit as opposed to the whole of the enterprise or undertaking². The ECJ based its finding on the aim of the Collective Redundancies Directive to protect the workers in the event of collective redundancies and has thus stated that the concept of an ‘establishment’ should be interpreted in such a way as to have as great a coverage as possible. So for example, the ECJ has held that to be an ‘establishment’ a place of work does not need to have any legal, financial, economic, administrative or technological autonomy.

1.13 The judgments from the ECJ tend to interpret ‘establishment’ very widely with the intention that as many circumstances as possible are covered. However, the ECJ has also recognised that much ultimately turns on the circumstances of a given case. As a result, the Government considers it is likely to be very difficult to provide a statutory definition of ‘establishment’. If the statutory definition is too wide (eg so that it was always an undertaking) it would remove flexibility for employers to be able to decide what the appropriate level to consult should be. On the other hand, if the definition was too narrow there would, in light of case law from the ECJ, be a risk of infraction proceedings for failing to implement the Directive effectively

1.14 The definition of an establishment will vary according to the individual circumstances of each redundancy proposal. However, it may be possible to identify a series of common factors that could be used to help the parties involved make an informed decision on whether a workplace constitutes an establishment.

The Government would like evidence of the practical effect that the lack of a definition for establishment has on the decision-making process.

² *Athinaiki Chartopoiia AE v Panagiotidis* (C-270/05)

| Call For Evidence | Questions on “Establishment” |
|--------------------|---|
| Question 13 | BIS is aware that there are some issues around the interaction of fixed term contracts with collective redundancy consultation law. What problems do fixed term contracts create? What do you consider would be a potential solution? |
| Question 14 | What factors do you consider could determine what constitutes an ‘establishment’? |

Section 2: Duration of Consultation and Notification

2.1 The 1992 Act’s provisions on collective redundancy consultation require that an employer begins consultation with its employees’ representatives:

- At least 30 days before redundancies are effective where between 20 and 99 employees are affected; and
- At least 90 days before redundancies are effective where 100 or more employees are affected.

2.2 The Collective Redundancies Directive also requires that employers must notify the competent public authority in writing about planned redundancies at least 30 days in advance of them taking effect. In Great Britain, notification must be provided to the Government (via the Redundancy Payments Service):

- At least 30 days before redundancies are effective where between 20 and 99 employees are affected
- At least 90 days before redundancies are effective where 100 or more employees are affected.

2.3 Over the last five years only 16% of notifications to Government related to redundancies large enough to trigger the 90 day minimum time period. However, it is the 90 day period that has been identified by some businesses as being problematic. They feel that an effective consultation is often completed within a much shorter timescale and that delay thereafter is unnecessary. What is less clear is the impact of such a delay in redundancies

on businesses and their resilience during times of economic difficulty. For example, does the minimum time period run beyond an employee's statutory or contractual notice period. We hope to receive views on this during this exercise.

2.4 The duty to consult and the minimum time period inevitably has an impact for employees as well as employers. Its main purpose is to allow employees to influence the redundancy process. Employees or their representatives are given the opportunity to suggest alternatives to redundancies, such as redeployment, retraining or alternative processes. But the minimum time period also provides time for employees to seek alternative employment within the company and in the wider jobs market. The consultation period, along with the requirement to notify Government of the proposed redundancies, gives Government agencies the opportunity to assist affected employees in finding alternative training or employment. Since 2008 the Job Centre Plus Rapid Response Service has provided support to over 7,500 employers facing large-scale redundancies. On average each redundancy situation affected around 70 employees.

2.5 So thought needs to be given to the impact of any possible changes on the future employability of employees. Would shortening the minimum time period make it easier or harder for workers to find alternative employment? Would it impact on the public purse by driving workers on to benefits for a longer period?

2.6 With regard to consultation, Government takes the view that there is little advantage in considering changes to the minimum period of 30 days. In any event, the Collective Redundancies Directive requires a 30 day notification period to the competent authority before redundancies can take effect. Notifications submitted must identify when consultation commenced and who the employer is consulting with. Therefore we assume that the consultation must start no later than the day of notification, in order for these pieces of information to be available. This means there can be no dismissal before day 31 after notification (although redundancy notices can be issued (though not come into effect) earlier if agreement is reached sooner).

Government is keen to receive evidence on the advantages or disadvantages of a statutory 90 day minimum time period before dismissals can take effect.

| Call For Evidence | Questions on Duration of Consultation and Notification |
|--------------------|---|
| Question 15 | What are the advantages or disadvantages of the current 90 day minimum time period before redundancies can take effect, in your experience (a) for employers (b) for employees? In particular, what is the relevance of employees' statutory or |

| Call For Evidence | Questions on Duration of Consultation and Notification |
|--------------------|---|
| | contractual notice periods? |
| Question 16 | What are the costs to business of the 90 day minimum time period over and above a 30 day period? What generates these costs? |
| Question 17 | If there were a statutory provision for employers and employee representatives to shorten the 90 day minimum time period by voluntary agreement, would this be used? |
| Question 18 | What would be the advantages or disadvantages of being able to shorten the period in this way? |
| Question 19 | What would be the advantages or disadvantages (a) for the employer and (b) for the employee of reducing the minimum time periods when 100 or more redundancies are proposed to 60, 45 or 30 days? |

Section 3: High Impact Redundancies

3.1 In the previous section, we looked at the minimum time periods when 100 or more redundancies are proposed. Notification to Government is particularly important in cases where the impact of redundancies is likely to be severe. This might be because of a large number of redundancies being proposed or because of a limited supply of alternative opportunities for the affected workers.

3.2 In the current difficult economic climate with fewer job opportunities available, higher redundancies can result in higher short-term and long-term unemployment and we can expect more people to remain on job seekers' allowance, with a knock-on effect on consumer spending and aggregate output.

3.3 Collective redundancies have different impacts in different sectors. Some sectors support a flexible workforce better than others. Similarly

different impacts are seen in different regions. Some regions may not feel the impact of large-scale redundancies as deeply as there are other good job opportunities available. However, regions where there is one major employer may be more susceptible to major economic shock as a result of large-scale redundancies.

3.4 The length of the consultation period, then, takes on different importance in different regions and across different sectors. In the more flexible labour markets, rapid consultation may be a good thing to allow employees faster access to alternative employment. Whereas in other areas or sectors a longer consultation may be more appropriate to give greater consideration to the wider impact of the redundancies and to give more thought to issues such as redeployment.

Government would like to understand more about the advantages or disadvantages of the 90 day minimum time period for high impact redundancies.

| Call For Evidence | Questions on High Impact Redundancies |
|--------------------|---|
| Question 20 | How critical is the length of the statutory minimum time periods in instances of high-impact redundancies? Why? |
| Question 21 | What would be the advantages or disadvantages of increasing the threshold for the number of redundancies proposed for the 90 day notification period (i.e. increasing it to a number above 100 redundancies)? What should the threshold be? |
| Question 22 | What would be the advantages or disadvantages of a graduated threshold with different time periods applying for different numbers of redundancies? |

Section 4: Fit with other legislation

4.1 Collective redundancy consultations often take place at times of difficulty or major change for a business and its employees. As a result, it is likely that the employer will have to fulfil other legal obligations alongside his obligation to consult his workers about the planned redundancies.

4.2 In some circumstances there is an overlap between the different legal obligations. This overlap can cause a reduction in protection for employees or flexibility for business. The 1992 Act³ recognises that there are special circumstances in which it may not be practicable for employers to comply with all of the consultation requirements. However, employers are, nevertheless, required to consult as far as is reasonably practicable and in the past the Courts have taken a narrow view on the application of this exemption.

Business Transfers and TUPE

4.3 Redundancies are often part of the process of a business transfer. It is usually the case that these redundancies take place after the transfer and are made by the transferee company. Both the TUPE Regulations and the collective redundancy rules require that employers consult with representatives of their employees. However, these consultations cannot currently take place at the same time, despite their being a degree of connection between the decisions to be taken.

4.4 The collective redundancy consultation rules require that the employer consults with representatives of his employees. As the transferee does not become the employer until after the transfer, he cannot engage in consultations over possible post-transfer redundancies until after the transfer has completed. This has a significant impact on the employers' ability to restructure effectively after the transfer and could result in him employing staff for whom there is no work for a significant period of time. The transferee will need to conduct a full consultation after the transfer and cannot fulfil even part of his obligation to consult in advance. Employees' representatives may also be disadvantaged as they lose the opportunity for early engagement, early access to information and the ability to discuss some possible alternatives to redundancy, including redeployment within the transferor company.

Insolvency

4.5 Businesses in financial difficulty will sometimes need to enter an insolvency procedure such as administration. In these circumstances

³ Section 188(7) of the 1992 Act)

insolvency office-holders are under pressure to act quickly in order to either rescue the business or to achieve the best return for creditors. This may include a reduction in the number of staff employed by the business. If the business is no longer viable, it will have to be closed with the loss of all staff.

4.6 Employers involved in insolvencies where there is a possibility that large-scale redundancies will be necessary are required to consult about those redundancies. However, the special circumstances that the legislation allows for may well permit the minimum time period to be shortened in some insolvency situations. The Government is keen to find out if there are any issues particular to collective redundancy consultation in insolvency situations. The Government, therefore, is seeking evidence on the way that redundancies in insolvencies are handled and the experience of employers, insolvency practitioners and employees during these difficult times.

| Call For Evidence | Questions on Fit with Other Legislation |
|--------------------|---|
| Question 23 | The Government is also calling for evidence on the Transfer of Undertakings (Protection of Employment) Regulations. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together. |
| Question 24 | What special considerations relating to collective redundancy consultations arise from insolvencies? |

Annex - Overview of Legislation

The rules on collective redundancy consultation and notification are set out in sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992⁴ (the 1992 Act). These sections of the 1992 Act implement the Collective Redundancies Directive⁵ (the Directive).

The Collective Redundancies Directive requires that employers consult with representatives of their employees where they are planning collective redundancies. A collective redundancy is where an employer is planning to dismiss as redundant at least 20 employees in a 90-day period.

The consultation must start *in good time*, be conducted with a view to *reaching an agreement* and be *genuinely complete*⁶ before redundancy notices can be issued. It must cover at least ways of avoiding the redundancies, reducing the number of workers affected, and mitigating the impact on the workers through discussion of measures such as redeployment or retraining.

During the course of the consultation the employer must provide the representatives, in writing, with all relevant information including details of the reasons for the redundancies, the number and categories of workers to be made redundant, the number and categories of workers normally employed, the period over which the redundancies will take place, the criteria for redundancy selection and the method for calculating redundancy pay.

The Collective Redundancies Directive also requires that the employer notifies the competent public authority of the planned redundancies at least 30 days in advance of the redundancies taking place.

The 1992 Act implements these elements in UK law, but goes beyond the Directive's minimum requirements in a number of important respects. Of most significance are the UK's minimum consultation and notification periods. The Collective Redundancies Directive does not set a minimum period for consultation, though subsequent ECJ case law⁷ clarifies that consultation must be genuinely complete before redundancy notices can be issued. The 1992 Act requires that the consultation must start at least

⁴ <http://www.legislation.gov.uk/ukpga/1992/52/contents>

⁵ Directive 98/59/EC (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:225:0016:0021:EN:PDF>)

⁶ See ECJ decision in *Irmtraud Junk v Wolfgang Kühnel* (C-188/03)

⁷ *Irmtraud Junk v Wolfgang Kühnel* (C-188/03)

- 30 days where between 20 and 99 redundancies are proposed; or
- 90 days where 100 or more redundancies are proposed.

before the first of the dismissals takes effect. If a satisfactory conclusion to the consultation is reached and agreed to by the employer and the employee representative, redundancy notices may be issued during this period. However, redundancies must not become effective (i.e. employees must not cease to be employed) before the minimum period has expired.

Similarly, where the Directive requires that notification of the competent authority must take place at least 30 days before the first dismissal, the 1992 Act goes further. It requires that the notification must be sent to the Government at least

- 30 days where between 20 and 99 redundancies are proposed; or
- 90 days where 100 or more redundancies are proposed.

before the first of the dismissals takes effect. In the UK, notification must be sent to the Government (usually via the Redundancy Payments Service) before any redundancy notices are issued.

Stages to Collective Redundancies Consultation

| | |
|--|--|
| <p>Process triggered</p> | <p>Employer identifies that there is the potential for collective redundancies.</p> <p>Employer begins consultation with employee reps in good time.</p> <p>Employer notifies Government that consultation has begun.</p> |
| <p>Consultation with a view to reaching agreement</p> | <p>Possible for employer and union to reach agreement before end of minimum time period.</p> <p>If agreement reached and consultation genuinely complete, redundancy notices can be issued but dismissal cannot take effect.</p> <p>The statutory period is a minimum period so it is possible for the consultation to run on longer should the employer choose.</p> |
| <p>Day 30</p> | <p>Final day of minimum time period for 20-99 redundancies</p> |
| <p>Day 31</p> | <p>Earliest that dismissals can take effect for collective redundancies involving 20-99 redundancies</p> |
| <p>Day 90</p> | <p>Final day of minimum time period for 100+ redundancies</p> |
| <p>Day 91</p> | <p>Earliest that dismissals can take effect for collective redundancies involving 100+ redundancies</p> |

How to respond

Call for evidence – Collective Redundancies

You can complete your response online through Survey Monkey:

<https://www.surveymonkey.com/s/JCJW5G5>

Alternatively, you can email, post or fax this completed [response form](#) to the Department for Business, Innovation and Skills (BIS).

Email : collectiveredundancies@bis.gsi.gov.uk

Postal Address:

Richard Lowe
3rd floor Abbey 2
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

Fax: 0207 215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **31 January 2012**

Name:**Organisation (if applicable):****Address:**

Please state if you are responding as an individual or representing the views of an organisation, by selecting the appropriate group. If responding on behalf of a company or an organisation, please make it clear who the organisation represents and, where applicable, how the views of the members were assembled. Please tick the boxes below that best describes you as a respondent to this consultation:

| | |
|--------------------------|---|
| <input type="checkbox"/> | Business representative organisation/trade body |
| <input type="checkbox"/> | Central government |
| <input type="checkbox"/> | Charity or social enterprise |
| <input type="checkbox"/> | Individual |
| <input type="checkbox"/> | Large business (over 250 staff) |
| <input type="checkbox"/> | Legal representative |
| <input type="checkbox"/> | Local government |
| <input type="checkbox"/> | Medium business (50 to 250 staff) |
| <input type="checkbox"/> | Micro business (up to 9 staff) |
| <input type="checkbox"/> | Small business (10 to 49 staff) |
| <input type="checkbox"/> | Trade union or staff association |
| <input type="checkbox"/> | Other (please describe): |

Call for evidence: Collective Redundancies

Q 1. How many consultations has your organisation undertaken in the last five years (since November 2006) on collective redundancies where: a) 100 or more redundancies were proposed within a 90 day period? Or b) between 20 and 99 redundancies were proposed within a 90 day period?

| |
|--|
| |
|--|

Q 2. Of the consultations that you reported in Question 1 please indicate the duration of each according to: Number of Consultations (100+ dismissals)

| | |
|-------|--|
| 0-15 | |
| 16-30 | |
| 31-45 | |
| 46-60 | |
| 61-75 | |
| 76-90 | |
| 90+ | |

Q 3. Of the consultations that you reported in Question 1 please indicate the duration of each according to: Number of Consultations (20-99)

| | |
|-------|--|
| 0-15 | |
| 16-30 | |
| 31-45 | |
| 46-60 | |
| 61-75 | |
| 76-90 | |
| 90+ | |

Q 4. If any consultations took more than 90 days to complete, please say how many days these consultations lasted for.

| |
|--|
| |
|--|

Q 5. Over the last five years, how many employees have been made redundant from your organisation, as part of a 100+ collective redundancy exercise?

Q 6. Are you aware of your rights and obligations under sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992?

Yes [] No []

Q 7. With whom do you consult about collective redundancies? What are the advantages and disadvantages of the engaging with different types of representative?

Q 8. What factors: a) make agreement difficult? b) make agreement more likely?

Q 9. If agreement cannot be reached, when can an employer be confident that the consultation is finished and that redundancy notices can be issued?

Q 10. What happens during consultation?

Q 11. What impact does consultation have on the employer's business decision? (e.g. in terms of number of proposed redundancies actually effected?)

Q 12. Have you experienced specific difficulties when trying to determine what constitutes an establishment for the purposes of collective redundancy consultation? If yes, please describe them

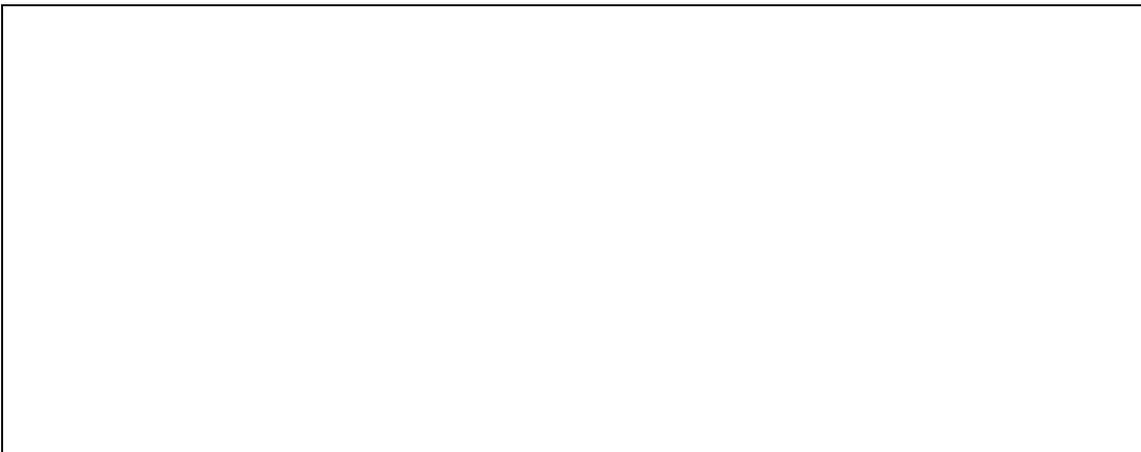
Yes [] No []

If yes please describe

Q 13. BIS is aware that there are some issues around the interaction of fixed term contracts with collective redundancy consultation law. What problems do fixed term contracts create? What do you consider to be a potential solution?

A large, empty rectangular box with a thin black border, intended for the respondent to provide their answer to question 13.

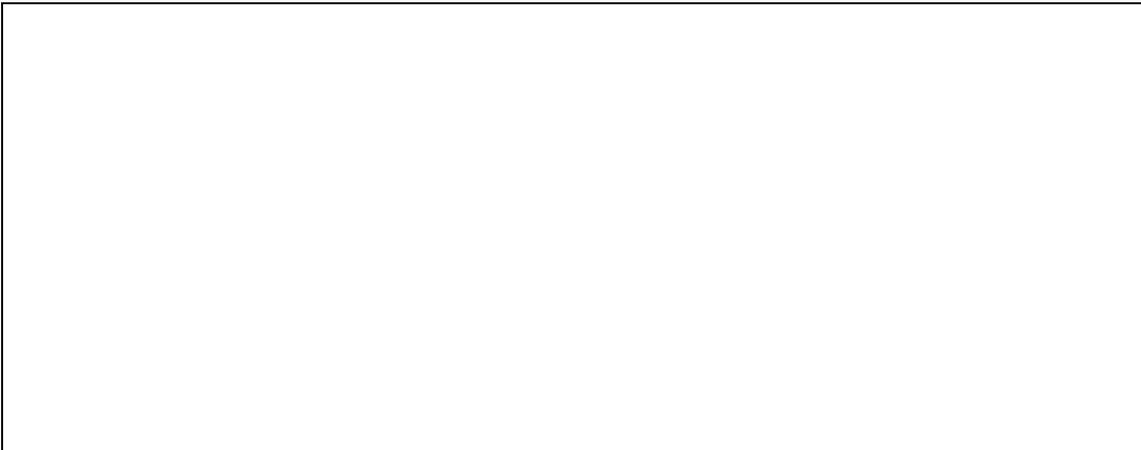
Q 14. What factors do you consider could determine what constitutes an 'establishment'?

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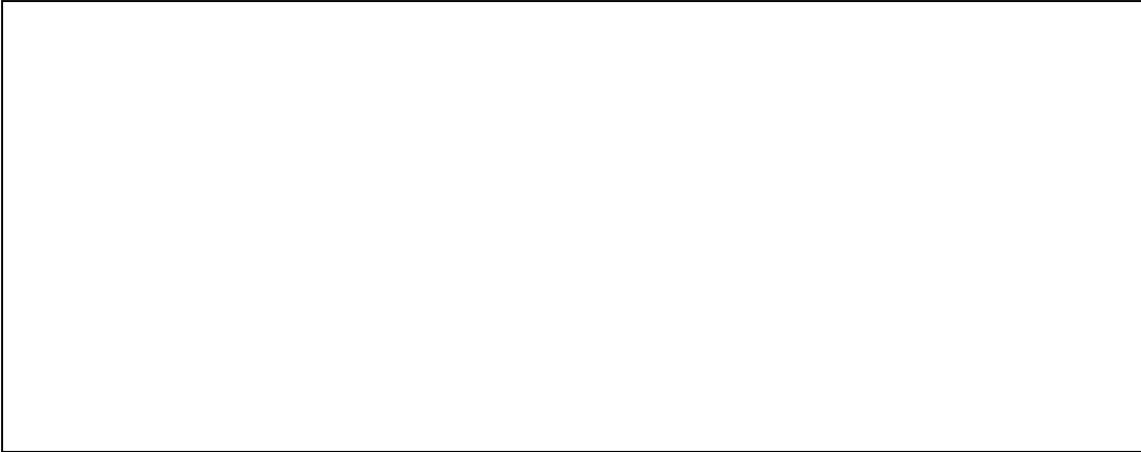
Q 15. What are the advantages or disadvantages of the current 90 day minimum consultation period work, in your experience (a) for employers (b) for employees? In particular, what is the relevance of employees' statutory or contractual notice periods?



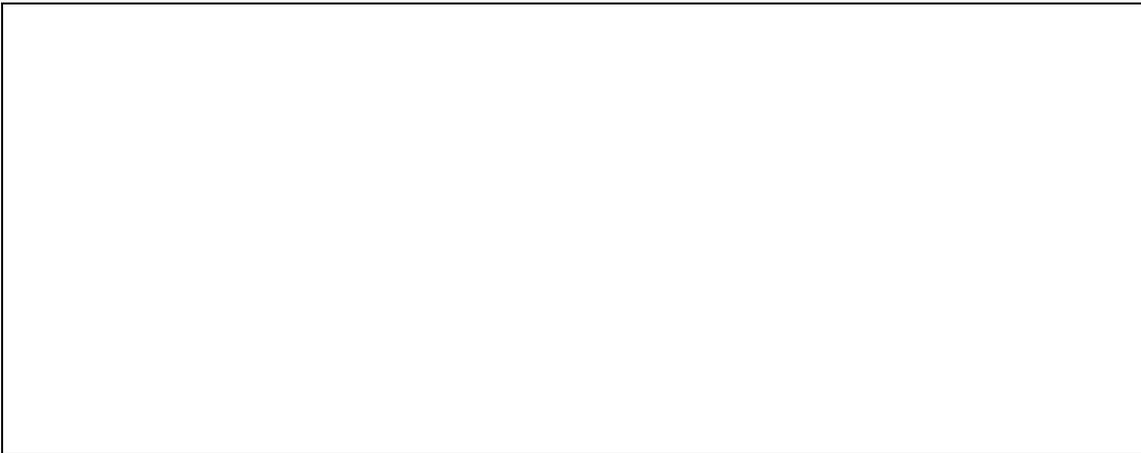
Q 16. What are the costs to business of the 90 day minimum time period over and above a 30 day period? What generates these costs?



Q 17. If there were a statutory provision for employers and employee representatives to shorten the 90 day minimum time period by voluntary agreement, would this be used?



Q 18. What would be the advantages or disadvantages of being able to shorten the period in this way?



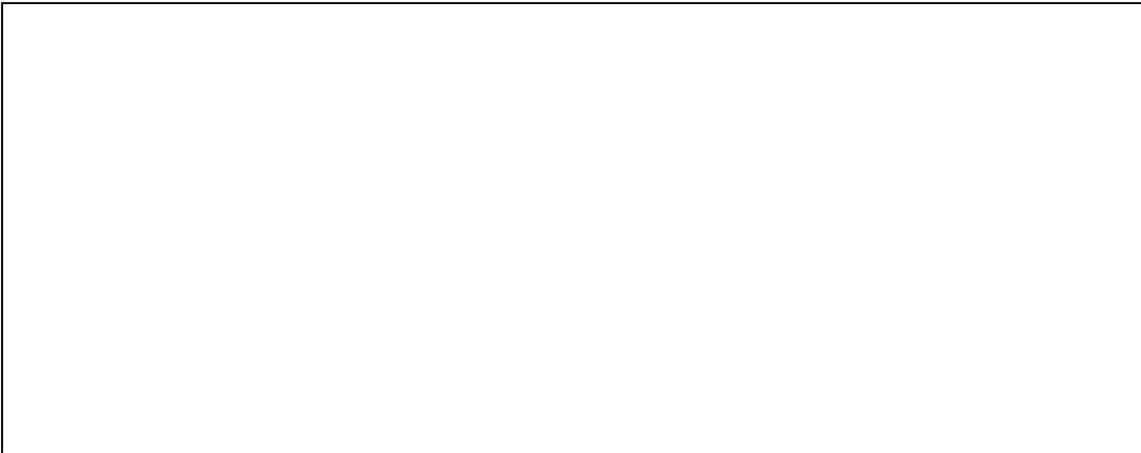
Q 19. What would be the advantages or disadvantages (a) for the employer and (b) for the employee of reducing the minimum time periods when 100 or more redundancies are proposed to 60, 45 or 30 days?

Q 20. How critical is the length of the statutory minimum time periods in instances of high-impact redundancies? Why?

Q 21. What would be the advantages or disadvantages of increasing the threshold for the number of redundancies proposed for the 90 day notification period (i.e. increasing it to a number above 100 redundancies)? What should the threshold be?

A large, empty rectangular box with a thin black border, intended for the respondent to provide their answer to question Q 21.

Q 22. What would be the advantages or disadvantages of a graduated threshold with different time periods applying for different numbers of redundancies?

A large, empty rectangular box with a thin black border, intended for the respondent to provide their answer to question Q 22.

Q 23. The Government is also calling for evidence on the Transfer of Undertakings (Protection of Employment) Regulations. Please identify any issues that you have in terms of how the TUPE Regulations and the rules on collective redundancy consultation fit together.

Q 24. What special considerations relating to collective redundancy consultations arise from insolvencies and administrations?

Do you have any other comments that might aid the consultation process as a whole?

Thank you for your views on this consultation.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

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