Call for Evidence

Collective Redundancy Consultation for employers facing Insolvency

March 2015

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 How to Respond

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate option on the call for evidence response form and, where applicable, how the views of members were assembled.

A copy of the Call for Evidence Response form is available at:

<https://www.gov.uk/government/consultations/collective-redundancy-consultation-for-employers-facing-insolvency>

If responding this way please email to: policy.unit@insolvency.gsi.gov.uk

Or post to:

Pabitar Powar

The Insolvency Service

4 Abbey Orchard Street

London

SW1P 2HT

Confidentiality and Data Protection

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.

What Happens Next?

This call for evidence will close 12 June 2015. The Government will analyse the responses received with a view to considering our next steps. If you have any queries on any of the issues raised please send them to Pabitar.Powar@insolvency.gsi.gov.uk Foreword

**Collective Redundancy Consultation when Facing Insolvency: A Call for Evidence**

**March 2015**

Constructive engagement with employees is important for business at all times, but especially when facing situations such as insolvency. The purpose of this call for evidence is to look at consultation with employees where a business is facing insolvency or has moved into an insolvency process. Whilst our current system generally works well and is effectively complied with and its benefits are agreed upon, we want to explore in more detail how consultation operates in these situations and what are the challenges and best approaches.

In this country we have clear levels of protection for employees, which set out employers’ duty to consult with employee representatives and notify the Secretary of State when proposing collective redundancies. The intention of this legislation is to ensure that unnecessary redundancies are avoided and to mitigate the effects of redundancies where they do unfortunately need to occur.

Consultation helps ensure employees are appropriately informed and enables them to contribute to decisions that affect them. This in turn allows employers to make better business choices; to ensure that all possible options for rescuing the business, preserving jobs and supporting employees are explored. Notifying the Secretary of State helps to mitigate the effects of redundancies where they occur by ensuring that government agencies that support employees facing redundancy are able to give timely and effective advice and training, which can help individuals return to employment and reduce stress and uncertainty. Being made redundant, or making redundancies, is never easy but this legislation is intended to ensure that it is done in the best way possible for both employers and employees.

I held a round table discussion with representatives to discuss these issues and it is clear that there is a real willingness to seek approaches to deliver improved outcomes.

Your responses will be greatly appreciated.

**JO SWINSON MP**

Summary

This call for evidence seeks to understand what happens in consultation with employees when it is conducted by businesses that are imminently facing, or have moved into, formal insolvency and what suggestions there are for how outcomes for both employees and businesses might be improved.

This call for evidence comes after the Department for Business, Innovation and Skills’ Call for Evidence (November 2011, *Collective Redundancy Consultation Rules*) and Consultation (June 2012*, Collective Redundancies: A Consultation on Changes to the Rules*). This consultation and the response, published in December 2012, found generally high levels of regard for, and understanding of, the legislation but also led to changes in April 2013, to make consultation simpler and more effective. Recent Employment Tribunal findings have highlighted the need for the Government to return to this issue to look in more detail at the particular circumstances that surround consultation in the face of, and during insolvency.

In such circumstances there may be particular challenges in conducting effective consultation, but it remains important to do.

We invite evidence and views on:

* Your understanding of the current requirements, their purpose and benefits
* Factors that facilitate and/or inhibit effective consultation
* The role of directors and insolvency practitioners
* Ensuring timely notification and effective consultation

This call for evidence will run for 12 weeks and primarily be of interest to business owners and directors, employee representative bodies, HR professionals, the legal profession and insolvency practitioners.

1. Introduction

## 1.1. The Legislation

Like all other EU Member States the UK has to comply with the requirements of the Collective Redundancies Directive (Directive 98/59). The aim of the Directive is to provide greater protection for employees in large-scale redundancies.[[1]](#footnote-1)

The duty to consult with employees and notify the Secretary of State where collective redundancies are proposed is implemented in domestic law through the Trade Union and Labour Relation (Consolidation) Act, 1992, Section 188 to 198. The duty to consult arises where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less. Details of the legislation can be found at <http://www.legislation.gov.uk/ukpga/1992/52/part/IV/chapter/II> and the table below sets out its key provisions for collective redundancy consultations.

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| **Key Provision** | **Detail**  |
| **Employers have a duty to notify the Secretary of State in writing of proposed redundancies before any dismissals take effect** | Notification should be sent as soon as possible and is a separate requirement to consultation. Consequently, the date for giving notification may be different to the date the consultation commenced and so the time periods before redundancies take effect may not entirely overlap.If proposing to dismiss 100 or more employees the notification must be sent at least 45 days before the first of those dismissals can take effect. If proposing to dismiss 20-99 employees the notification must be sent at least 30 days before. It must state, where relevant, the date that consultation was started. Employee representatives should be given a copy.Failure to provide the notification to the Secretary of State in accordance with the requirements is a criminal offence, punishable on summary conviction by a fine. |

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| **The consultation should begin in good time and with a view to reaching agreement.**  | The consultation must begin once the redundancies have been proposed and before any decision to make redundancies has been made. No dismissals can take effect until the consultation is complete and the minimum period has elapsed. Consultation may also take longer to complete than the minimum period before dismissal can take effect.  |
| **Employers must consult with appropriate employee representatives**  | Where there is an employer recognised trade union consultation must occur with trade union representatives. Otherwise, if no union is recognised, with the elected or appointed employee representatives who have authority from those employees to receive information and to be consulted about the proposed dismissals on their behalf. |
| **There are certain topics consultation must cover** | This includes: avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals. Consultation should be undertaken with a view to reaching agreement on these issues. |
| **There is certain information employers must provide to employee representatives in writing** | Including: the reasons for the proposals; the numbers and descriptions of employees whom it is proposed to dismiss as redundant; the total number of employees of any such description employed by the employer at the establishment; the proposed method of selecting the employees who may be dismissed; the proposed method of carrying out the dismissals, including the period over which the dismissals are to take effect; and the proposed method of calculating the amount of any redundancy payments to be made |
| **Mitigating circumstances**  | If in any case there are special circumstances rendering it not reasonably practicable for the employer to comply with any of the above requirements they shall take all such steps towards compliance with that requirement as are reasonably practicable in the circumstances.Insolvency in itself has been determined by case law not to be such a special circumstance, but it may be, in an individual case, that there are other circumstances that make it not reasonably practical to comply during an insolvency. |
| **Protective Awards** | When an employer fails to adequately consult they are liable to pay a Protective Award up to a value of 90 days pay per employee, dependent upon the seriousness of the employer’s default in complying with the legislation.In the case of an insolvent company, sums under a Protective Award may be recoverable as arrears of pay from the National Insurance Fund, subject to statutory caps.  |

## 1.2. Our Work So Far

The Government has worked to ensure that the duty and benefits of consulting and notifying the Secretary of State are well understood. Our work so far has included:

* Issuing a number of articles in the publication for insolvency practitioners Dear IP[[2]](#footnote-2)
* Signing a Memorandum of Understanding between the insolvency practitioner trade body R3, the Insolvency Service and Job Centre Plus (May 2011)[[3]](#footnote-3), to ensure that Job Centre Plus can receive early confidential warning of insolvencies, and be ready to support employees under threat of redundancy
* The Department for Business, Innovation and Skills’ call for evidence (November 2011)[[4]](#footnote-4), consultation (June 2012) and published response (December 2012)[[5]](#footnote-5)
* Publishing ACAS guidance on *Handling Large Scale Collective Redundancies,*  (April 2013)[[6]](#footnote-6)

The outcome of this work means that those concerned should understand the requirements and benefits of consultation.

Recent Employment Tribunal findings however have highlighted that there could be further improvements. In response to this Government held a Ministerial meeting with key stakeholders, (February 2015), as we want to explore in more detail, the specific impact the circumstances of facing insolvency, or being insolvent, has on effective consultation. We are looking at this in more detail because during this period of time consultation may become complicated, but it remains important. Also, at this time the duty to consult is handed over from director to insolvency practitioner and we wish to understand this process and the role that the different key players perform.

## 1.3. What we are seeking to do now

We are now taking a closer look at; how consultation works where employers are facing insolvency, or have become insolvent, examples of good practice and we are inviting suggestions for improvement. The responses to this call for evidence will then be considered as to whether or not any policy changes are necessary.

2. Areas for Consideration

## 2.1. Employers’ Understanding

**Definition: Employer should be considered throughout Areas for Consideration to refer to both directors in the lead up to formal insolvency and insolvency practitioners where formal insolvency has been entered into. Please make clear where your answers specifically refer to directors or insolvency practitioners as the case may be.**

We would like to better understand how employers who are facing insolvency, or are insolvent and insolvency practitioners understand the requirements to consult with employees and notify the Secretary of State where they are proposing collective redundancy. We would also like to build a clear picture of how this understanding is implemented in practice and to have your views on the purpose and benefits of consultation.

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| **Questions**  |
| **Current Practices**1. What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.
2. How does meaningful consultation with a ‘view to reaching agreement’ work in practice? How does notification work in practice? Please provide examples where possible.
 |
| **Benefits** 1. What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?
2. In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?
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## 2.2. Facilitators and Inhibitors

We also want to understand what factors and circumstances, if present, facilitate or inhibit employers from conducting high quality consultation in circumstances where employers are imminently facing, or transitioning into, formal insolvency.

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| **Questions** |
| **Facilitators**1. What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.
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| **Inhibitors**1. What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.
2. What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.
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## 2.3. The Role of Directors

Conversations with stakeholders have identified that one of the keys to effective consultation in situations where employers are imminently facing formal insolvency is that consultation is started early enough. This means that directors play an important role in ensuring employee representatives are in place, starting consultation and notifying the Secretary of State.

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| **Questions** |
| **Director’s Role**1. Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?
2. Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?1. How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?
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## 2.4. Ensuring Effective Notification and Consultation

It is important for Government to understand what can be done to ensure that timely and effective notification and high quality consultation occur when employers are imminently facing, or have become insolvent. It is important to understand how the processes, guidance, incentives and sanction are working in practice and how they could be improved.

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| **Questions** |
| **Process for Notification and Consultation**1. How might the process for notifying the Secretary of State and sharing information with third parties be improved?
2. Could the process requirements for consultation be further clarified or improved?
 |
| **Guidance**1. Wouldfurther guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?
 |
| **Incentives and disincentives** 1. How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?
2. What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?
3. Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?
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| **Sanctions**1. The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective? |
| **Memorandum of Understanding [[7]](#footnote-7)**1. How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?
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1. <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1416497123394&uri=CELEX:31998L0059> [↑](#footnote-ref-1)
2. Articles 33, 39, 40 and 44 under Chapter 11 of Dear IP, range from December 2008, Issue 38, to October 2010, Issue 47. Can be accessed via: <https://www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipindex.htm> [↑](#footnote-ref-2)
3. <https://www.gov.uk/government/publications/workers-of-companies-facing-closure-memorandum-of-understanding> [↑](#footnote-ref-3)
4. <https://www.gov.uk/government/consultations/call-for-evidence-uo-collective-redundancy-consultation-rules> [↑](#footnote-ref-4)
5. <https://www.gov.uk/government/consultations/collective-redundancies-consultation-on-changes-to-the-rules> [↑](#footnote-ref-5)
6. <http://www.acas.org.uk/media/pdf/h/3/Handling-large-scale-collective-redundancies-advisory-booklet.pdf> [↑](#footnote-ref-6)
7. <https://www.gov.uk/government/publications/workers-of-companies-facing-closure-memorandum-of-understanding> [↑](#footnote-ref-7)