



The Insolvency  
Service

# Call for Evidence on Collective Redundancy Consultation for Employers facing Insolvency

## Government Response

April 2018

## **Government Response: Call for evidence on collective redundancy consultation for employers facing or nearing insolvency**

### Call for Evidence

1. The importance of consulting with employees before making collective redundancies has been discussed in both the call for evidence and the summary of responses, published in March and November 2015 respectively. <https://www.gov.uk/Government/consultations/collective-redundancy-consultation-for-employers-facing-insolvency>
2. When proposing to make 20 or more employees redundant at one establishment within 90 days, the law requires that the employer must begin consultation 'in good time' with a view to reaching agreement with appropriate employee representatives. The employer must also notify the Secretary of State (SoS) in writing at least 30 days before the redundancies are made. Where there are special circumstances that mean it is not reasonably practicable to comply with these requirements, the employer should do their best to comply in the circumstances. The reality of making collective redundancies where the employer is in or nearing insolvency is much less straightforward.
3. To better understand the difficulties employers face when proposing to make redundancies in insolvent collective redundancy situations, the then Government launched a call for evidence in March 2015. The responses showed the benefits of consultation. The purpose of the legislation was understood by respondents as a means to encourage constructive engagement with employees and to ensure the appropriate support mechanisms are available to those who would be affected by the redundancies.
4. However, the responses highlighted that the legislation around collective redundancy consultation can be complex and difficult to apply in a real life insolvency situation where decisions need to be made quickly and there is very little money available. By the time insolvency professionals are engaged in the management of the company, options are limited and attention is duly focused on trying to rescue the business for the benefit of creditors and employees.
5. For employers, this may be the first time they have ever dealt with a collective redundancy situation. The process can be daunting and confusing

when trying to navigate through both insolvency and employment law when the business is in financial distress. The assistance of insolvency professionals and employment advisors becomes invaluable.

6. Since the call for evidence closed and the summary of responses published, the Government has continued to consider how best to tackle the issues raised within the confines of the EU Directive on Collective Redundancy (Directive 98/59) on which our national laws, at Section 188 to 199 of the Trade Union and Labour Relation (Consolidation) Act 1992, are based. In conclusion, the Government will seek to develop guidance to address any misunderstanding and provide clarification for consultation in insolvency situations.

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7. 82% of respondents said meaningful consultation is not possible in an insolvency situation. A number of reasons were given, but most pertinent was the view that by beginning the consultation process, the chances of rescuing the business could be reduced considerably if competitors and employees became aware of the company's financial difficulties.

8. Respondents also reflected on a perceived conflict between employment and insolvency law. Under employment law the obligation to avoid, reduce or mitigate the number of dismissals was often seen to be a cause of tension with the circumstances and objectives of the insolvency. Many respondents spoke of the difficulties facing insolvency practitioners with a lack of time and/or money making consulting challenging. Often by the time IPs were appointed there was little scope for 'meaningful consultation' with a view to reaching an agreement to avoid or reduce redundancies.

**Government therefore proposes to work with the sector to provide insolvency professionals with guidance setting out principles for insolvency practitioners when dealing with collective redundancies. At a later date, the Government will consider if additional measures are necessary such as a new Statement of Insolvency Practice.**

9. The guidance will set out what is expected of insolvency practitioners and could include:

- a. If advising pre-appointment, reminding directors on their duty to consult with employees;

- b. Taking steps to commence consultation where trading is continued post-insolvency even if the circumstances of insolvency mean that the process is cut short or truncated;
- c. Preparing a contemporaneous statement setting out the circumstances of the dismissals and action taken or to be taken by the insolvency practitioner. This statement will provide transparency for other interested parties e.g. employment tribunals assessing protective award claims may be interested in the decision-making process undertaken by the insolvency practitioner when consulting with employees.

10. Concerns around confidentiality were also raised by respondents in relation to the requirement to notify the Secretary of State. Whilst respondents may appreciate that the Secretary of State does not disclose confidential information, the law also requires the employer to send the notice to the employee representative at the same time as to the Secretary of State, which for some respondents raised concerns that any information leak could compromise a potential rescue. Others cited not having enough information to complete the notification form and uncertainty as to when to send the form as contributory factors inhibiting notification to the Secretary of State.

**The Government therefore proposes to update existing guidance to make the purpose of the notification and how to complete the form clearer, and will explore ways to reduce the burdens involved in submitting the form.**

11. Employers must consult with appropriate employee representatives. Responses to the call for evidence also highlighted that the lack of a pre-existing structure for employee engagement can be a significant inhibitor to consultation for insolvency practitioners when first appointed. Electing employee representatives could take time and maybe an obstacle to achieving a successful turnaround which is dependent on taking speedy action.

**The Government therefore proposes to draw together information on what insolvency practitioners can do to ensure compliance with the requirement to consult while rescuing the business or managing an orderly winding down of the company.**

12. This could include guidance on:
- a. Consulting with employee representatives who were elected for a different purpose who could properly be regarded as having authority from affected employees to be consulted on their behalf, for example a works council;

b. The election of special employee representatives for the purposes of redundancy consultation, in the absence of pre-existing employee representatives.

13. Consultation does not need to be complex, lengthy or expensive and guidance is designed to help employers and insolvency practitioners handle the collective redundancy consultation process as efficiently and constructively as possible.

14. For some respondents, the sanctions for failing to consult (a protective award against the company) was considered ineffective in an insolvency situation. The reason given was that the Government guarantees the protective award and pays former employees, rather than the company. The sanction for failing to notify the Secretary of State is prosecution, which is an offence that has been pursued infrequently in the last 20 years.

15. The Government believes that the current package of sanctions is effective and in the main, collective redundancy consultation legislation operates well. Rather than introduce further legislation, we will consider how effective new guidance can be issued. In developing these solutions, the Government will continue to engage with interested parties, including insolvency professionals, trade unions and the employment tribunals, to deliver strong tools for consultation and notification and will keep the tools, once developed, under review.