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Department for
**Employment
and Learning**
www.delni.gov.uk

Employment Agencies and Businesses: Proposed Changes to Investigation Powers and Penalty Regime Summary of Responses to the Consultation

April 2009



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Introduction

Background

The Northern Ireland recruitment industry is governed by the Employment (Miscellaneous Provisions) (Northern Ireland) Order 1981¹ (“the 1981 Order”) and the Conduct of Employment Agencies and Employment Businesses Regulations (Northern Ireland) 2005 (“the 2005 Conduct Regulations”)². The Department for Employment and Learning (“the Department”) is responsible for maintaining this legislation. The 2005 Conduct Regulations replaced and updated legislation dating back to 1982 with the aim of protecting the interests of persons such as work-seekers and hirers using agency services. The legislation is enforced by the Department through a programme of routine inspections and complaint investigations. It is important that the enforcement powers available to the Department are effective from the outset since firm mechanisms are required to deal with any disreputable agencies that mistreat workers or seek to deprive them of their rights.

Between June and September 2008 the Department consulted³ for seventeen weeks on proposals to further amend employment agency legislation to enhance the enforcement powers of the Department to ensure an effective regime is in place to deal with the minority of Employment Agencies that do not comply with the legislation.

In summary, the proposals contained in the consultation were to consider whether:

- **prosecutions under Employment Agency legislation should be triable either in the Magistrates’ Court (as at present) or in the Crown Court in the most serious cases, allowing for the imposition of unlimited fines; and**
- **the Department should be given the power to seek financial information from third parties such as banks and/or financial authorities where an agency or individual is suspected of a serious offence under the 1981 Order.**

The consultation document included a partial Regulatory Impact Assessment, and reference to the findings of a preliminary Equality Impact Assessment and a Human Rights Impact Assessment. The consultation document can be found within the ‘Consultation Zone’ on the Department’s website (www.delni.gov.uk/consultation-zone) or in hard copy from the address on page 4.

¹ S.I. 1981/839 (N.I. 20)

² S.R. 2005 No. 395

³ The proposals were set out in the consultation document *Employment Agencies and Businesses: Proposed Changes to Investigation Powers and Penalty Regime*, which can be found in the Department’s consultation archive at www.delni.gov.uk/consultation-zone

Purpose of this document

This document sets out a summary of the responses received to the consultation along with the Department's response to these.

Responses

The Department received 13 responses to the consultation, 8 of which contained substantive comments. Of the 8 responses which contained substantive comments:

- 2 were from Public Bodies;**
- 1 was from an advice organisation;**
- 1 was from an Employment Agency;**
- 1 was from a Student Body;**
- 1 was from a Trade Union;**
- 1 was from a Voluntary Body; and**
- 1 was from a Political Party.**

A list of those who provided substantive responses is set out at **Annex A**. We would like to thank all those organisations and individuals who took the time to respond to the public consultation. The views expressed have been carefully considered in arriving at the way forward set out in this document.

The Department also held meetings with interested stakeholders to ensure their views would be taken into account (see Annex A for list of stakeholder meetings).

The Department also sought the views of the Northern Ireland Assembly Employment and Learning Committee, both to the consultation proposals and the responses, once the public consultation had closed. The Committee is content with the proposals outlined by the Department.

Analysis of responses and the way forward

All substantive respondents were fully in support of the broad thrust of the proposals contained in the consultation document. The meetings with stakeholders arrived at the same conclusion. **Taking this into consideration, the Department intends to amend employment agency legislation as described above, and make one further amendment in relation to the sharing of information.**

Structure of this document

The following pages set out: the questions that were asked in the consultation document together with contextual information; an analysis of the responses received; and the Department's decisions in light of the outcome of the public consultation.

Departmental contact details

All documents referred to in this response may be obtained from the Departmental web-site or in alternative formats upon request from the Department.

Web-site: www.delni.gov.uk/consultation-zone

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Consultation responses to proposals and the way forward

A. Prosecutions under Employment Agency legislation

The Department proposes that offences under employment agency legislation should be triable either as summary offences in a Magistrates' Court or, in the most serious cases, as indictable offences in the Crown Court. The maximum penalty for such serious offences would therefore be an unlimited fine. The consultation also sought views on what implications there would be for reputable agencies should these proposals become operational.

Q.1: Do you consider that prosecutions under Employment Agency legislation should be capable of being tried in the Crown Court in the most serious cases?

Q.2: Do you agree that the maximum penalty for such serious offences should be an unlimited fine?

Q.3: Do you consider that enabling such prosecutions to be tried in the Crown Court would have any implications for reputable agencies, and if so, what do you consider these implications would be?

All substantive respondents to the consultation agreed that, in the most serious cases, prosecutions under Employment Agency legislation should be capable of being tried in the Crown Court and that the maximum penalty for such serious offences should be an unlimited fine. Some of the respondents indicated concern that enabling such prosecutions to be tried in the Crown Court may have implications for reputable agencies by increasing the administrative burden.

“While Council would not wish these additional powers to pose a further administrative burden on reputable agencies and the courts, it also believes that all cases should be taken to the highest possible court.”

(Larne Borough Council)

“We welcome the proposal to bring serious cases to trial in the Crown Court. It would emphasise that there are serious breaches and also the need for agencies to review their practices to ensure they are not committing breaches of the regulations. This would benefit the individual agency, other agencies already operating according to the regulations and, importantly, the agency workers.”

(Law Centre NI)

“NIACRO would consider that prosecutions under employment agency legislation should be capable of being tried in Crown Court in the most serious

cases. However it would be important to have in place clear definitions of ‘seriousness’ to ensure consistency of enforcement.”

(NIACRO)

“The ICTU agrees that there is the need for an effective and fit-for-purpose enforcement regime that is capable of deterring or prosecuting those who are determined to abuse the industry’s users and undermine the vast majority of legitimate businesses that operate in the sector. We consider that a maximum penalty fine of £5,000 through the Magistrates Court in most cases will not be an effective deterrent.”

(NICICTU)

“The ICTU believe that in some cases rogue employers continue to operate as the current penalties are insufficient as a deterrent.”

(NICICTU)

“The ICTU considers that if “reputable agencies” are indeed reputable and are operating within the law then they have nothing to fear from these proposals. In fact these changes, actively and properly utilised by the Department, will be to the benefit of reputable agencies.”

(NICICTU)

Departmental Response:

The Department considers that it is important to strengthen the current enforcement regime to target those who cut corners illegally to the detriment of agency workers, hirers and reputable agencies who are disadvantaged by such practices.

The Department intends to bring forward provisions, in a forthcoming Employment Bill, to provide that offences of failure to comply with a prohibition order; failure to comply with regulations made under the 1981 Order; and seeking a fee for work-finding services will be triable either in the Magistrate’s Court or in the Crown Court. On conviction on indictment in the Crown Court a person will be liable to an unlimited fine; on summary conviction in the Magistrates’ Court a person will remain liable to a fine not exceeding £5,000.

The Department hopes that having the most serious cases tried in a Crown Court would mean that the prospect of an unlimited fine would be more of a deterrent in cases where an agency was making a lot of money through illegal practices.

B. Increased powers

At present, the Department does not have clearly defined powers to examine an agency’s financial records. The Department cannot obtain financial

information from third parties such as banks or other financial institutions regarding agencies suspected of obtaining money unlawfully.

The consultation contained proposals to amend the 1981 Order to clarify powers available to the Department to be able to demand and secure copies of financial information from an agency or an individual directly or from third parties such as banks.

The Department considers that such a power should only be available where the agency is suspected of serious offences under the legislation and is asked for, but does not provide, the necessary financial information. The Department also considers that the use of this power should only be authorised by a senior officer of the Department (at least Director level).

Q.4: Do you agree the Department should have powers to seek financial information from third parties such as banks and/or financial authorities where an agency or individual is suspected of a serious offence under the 1981 Order?

Q.5: Do you consider that the level of authorising officer (Director) for the use of this power is appropriate?

Q.6: What if any implications do you consider the proposals would have for reputable agencies?

Again, all substantive respondents agreed that the Department should have the necessary powers to seek financial information from third parties, such as banks and/or financial authorities, where an agency or individual is suspected of a serious offence under the 1981 Order. Respondents also agreed that Director is the appropriate level of authorising officer for the use of this power. However, one respondent was also in favour of a lower level officer being given authorisation powers if necessary. On the question of implications for reputable agencies, only positive implications were highlighted.

“No negative implications and only positive implications, as non-compliant EA/EBs would be forced into compliance, thus levelling the playing field.”

(Altmore IT Recruitment)

“This proposal will allow the Department to more fully investigate alleged malpractice and make it more difficult for disreputable agencies to hide their unlawful behaviour.

(Law Centre NI)

“The changes proposed to Article 7 of the 1981 Order are significant. Given this we think it is right that the use of these powers would require high level authorisation. We would hope that this requirement did not impede the operational efficiency of the Department in pursuing these disreputable agencies.”

“These proposals will be beneficial to the reputable employment agency sector in Northern Ireland. Moves that remove the incentive for illegal action will always benefit the reputable.”

(Law Centre NI)

“The ICTU agrees that for example in an investigation, where it appears agency workers may have been denied money that is owed to them, it is crucial for the Department to discover what payments have been made to an agency to identify what monies have been received and the identities of those making the payments.”

(NICICTU)

“The ICTU considers that if ‘reputable agencies’ are indeed reputable and are operating within the law then they have nothing to fear from these proposals. In fact these changes, actively and properly utilised by the Department, will be to the benefit of reputable agencies.”

(NICICTU)

“...if cases were to be held up for the lack of an appropriate officer being available to officiate, then an unacceptable bottleneck could form. We would urge that the senior concern here is efficient enforcement, and if by granting lower ranking officers this authorisation, then the bottleneck could be cleared, this would be preferable”.

(Altmore IT Recruitment)

“We consider that the level of authorising officer (Director) for the use of this power is appropriate”

(NIACRO)

Departmental Response:

The Department wishes to ensure that the Northern Ireland legislative framework provides an effective and fit-for-purpose enforcement regime that is capable of deterring or prosecuting those who are determined to abuse the industry’s users and undermine the vast majority of legitimate businesses that operate in the sector.

The Department has concluded that more effective powers to obtain information are necessary to enable the Department’s Employment Agency Inspectors to establish the extent and scale of illegal practices committed by an agency that the Department suspects of committing an offence, such as identifying cases where fees have been illegally charged to work-seekers.

The Department intends, therefore, to include provisions in the forthcoming Employment Bill which would enable Employment Agency Inspectors to seek information from third parties, such as banks, where such information is needed to determine the extent of non-compliance and where the Department has asked for, but has not received the information from the agency concerned.

Before seeking the information from third parties, the Department will have to formally request the person carrying on, or connected with the carrying on of the business of an agency, to supply the necessary financial information by a specified deadline. If the agency fails to provide the information by the stated date, the Department will be legally able to seek the information directly from the bank or other financial institution.

The Department considers that the level of authorising officer, Director/Grade 5, is appropriate.

C. Additional amendment – information sharing

The Department has identified a further measure which will further strengthen the enforcement powers. The measure relates to the sharing of information between Employment Agency inspectors and HMRC National Minimum Wage Inspectors.

In its response, the Law Centre (NI) stated:

“Again, although outside the scope of this consultation, we would argue that while enforcement remains divided between three distinct agencies, the most serious offenders will evade full penalty. This risk is heightened because of the restrictions on information sharing between enforcement agencies.”

(Law Centre NI)

The issue was also raised during meetings with stakeholders which took place during the consultation period.

Legal information-sharing barriers, particularly in relation to Employment Agency Inspectors and National Minimum Wage Inspectors, were also identified as problematic in the GB Vulnerable Workers Forum Report which was published in August 2008. One of the recommendations of this report involved tackling these barriers.

Departmental response

Currently the Department is prohibited by Article 7B of the 1981 Order from sharing information discovered in the course of inspections with other enforcement bodies, with one exception. Section 19 of the Gangmasters (Licensing) Act 2004 does allow the Department to share inspection findings with the Gangmasters Licensing Authority about persons already acting as a gangmaster. This is used to exchange information between DEL and the GLA about potential and actual breaches of their respective legislation.

The Department now proposes to establish a similar information-sharing gateway between DEL and HM Revenue and Customs National Minimum Wage compliance officers. This will allow DEL inspectors to inform HMRC about breaches of the National Minimum Wage Act 1998. HMRC inspectors will be able to pass information about breaches of the 1981 Order to DEL.

This measure, which requires amendments to the National Minimum Wage Act 1998, and the 1981 Order, will be contained in the forthcoming Employment Bill.

D. Impact assessments

Partial Regulatory Impact Assessment

The consultation document contained a partial Regulatory Impact Assessment (RIA) on the proposals. Under these proposals non-compliant firms facing prosecution may face higher costs, owing to the greater costs involved in Crown Court cases than Magistrates' Court cases. These costs are avoidable if firms comply with their legal obligations and are therefore not regulatory costs. The Department may face higher costs as a result of some prosecutions taking place in the Crown Court. It is anticipated that no more than 1-2 Crown Court cases per year will be taken at an estimated cost of £20,000. The partial RIA considered three options:

Option 1: Do nothing.

Option 2: Make offences under the 1981 Order and the Conduct Regulations triable either as summary offences in a Magistrates' Court or as indictable offences in the Crown Court. The penalties and powers of prosecution would depend on which court the case came before.

Option 3: As Option 2, plus amend Article 7 of the 1981 Order to clarify powers available to the Department to be able to demand and secure copies of financial information from an agency or an individual directly or from their bank or building society.

Option 3 may in principle affect a larger number of agencies than just those who are prosecuted by the Department. But it is considered that any costs are avoidable as such a power should only be available where a serious offence is suspected and where the agency has already been asked but has refused to provide the necessary information. On the basis of current experience and practice, this might occur in perhaps 1-2 occasions per year. For these firms, the costs of inspection may be higher if they were required to provide information to the Department. These costs are likely to be low, although exact quantification is not possible at this stage. The overwhelming majority of agencies would be unaffected.

Q7: Do you agree with the assessment of costs and benefits made in the Partial Regulatory Impact Assessment? If not please specify your reasons and provide additional information to assist the assessment.

All but one of the substantive respondents agreed with the assessment of costs and benefits made in the Partial Regulatory Impact Assessment.

"We agree with the Regulatory Impact Assessment that the impact of these measures will be broadly beneficial."

(Law Centre NI)

However Altmore IT Recruitment stated:

“Not enough thought has been given to the impact on compliant EA/EB’s of a failure to enforce against non-compliant EA/EB’s.”

Preliminary Equality Impact Assessment

The Department carried out a Preliminary Equality Impact Assessment (EQIA) on these proposals. The overall aim of these proposals was to provide additional protections for vulnerable workers, including migrant workers. The preliminary EQIA did not identify any negative differential impact on Section 75 groups and therefore a full EQIA is not considered necessary at present. The Department undertook to revisit the need for a full EQIA after the consultation closes.

In order to assess if there would be a need to carry out a full EQIA, the consultation asked:

Q8: Do you agree with the outcome of the Department's preliminary Equality Impact Assessment? If not please specify your reasons and provide additional information to assist the assessment.

All substantive respondents agreed with the findings of the preliminary EQIA.

Human Rights Impact Assessment

The Department carried out an assessment of the human rights implications of these proposals and has concluded there is no interference or limitation on Convention rights.

Q9: Do you agree with the outcome of the Department’s Human Rights Impact Assessment? If not please specify your reasons and provide additional information to assist the assessment.

All substantive respondents agreed with the findings of the Human Rights Impact Assessment.

Departmental response

The Department is content that most respondents did not raise any issues with the partial RIA, with the exception of one who considered that not enough thought had been given to the impact on compliant agencies of a “failure” to enforce the law against non-compliant agencies. The Department recognises that non-compliant agencies are at a competitive advantage as they do not spend time and effort complying with the law. However the Department has a programme of inspections and powers to investigate complaints in order to ensure agencies comply. Where agencies are in consistent or repeated breach of the law, the Department has powers to prosecute or apply to an Industrial Tribunal to prohibit these agencies.

Furthermore the Department considers that the proposals to be taken forward in the forthcoming Employment Bill prove that considerable thought has been given to the protection of reputable agencies.

The Department will publish a final RIA when the Employment Bill is introduced into the Northern Ireland Assembly.

We do not feel there is a requirement to carry out a full EQIA at this time.

NEXT STEPS AND THE WAY FORWARD

The Department is grateful to all those who took the time to respond to the consultation, and to those stakeholders who met with officials to discuss the proposals.

Our intention now is to take these proposals forward, in the forthcoming Employment Bill, through the Northern Ireland Assembly.

The following summarises the new proposals included in the way forward:

Prosecutions / Increased Penalties

The Department will bring forward provisions to provide that offences will be triable either in the Magistrate's Court or in the Crown Court:

On conviction on indictment a person will be liable to an unlimited fine. On summary conviction a person will remain liable to a fine not exceeding £5,000.

Increased Powers

The Department will bring forward provisions to enable Employment Agency Inspectors to seek information from third parties, such as banks.

Information-Sharing

The Department will remove the legal information-sharing barriers which currently exist between DEL Employment Agency Inspectors and HMRC National Minimum Wage Inspectors and create a gateway for the legal exchange of information.

Annex A: List of Respondents to the Consultation

RESPONDENTS

Through Public Consultation

Alliance Party

Altmore IT Recruitment

Ballymena Borough Council

Larne Borough Council

Law Centre (NI)

Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO)

Northern Ireland Committee of the Irish Congress of Trade Unions (NICICTU)

The National Union of Students and the Union of Students in Ireland (NUS USI)

Post-public consultation

Northern Ireland Assembly Employment and Learning Committee

At Stakeholder Meetings

Confederation of British Industry (CBI)

Recruitment and Employment Confederation

NIC ICTU

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