EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

BIS Consultation on reforming the regulatory framework for employment agencies and employment businesses

Response from the Employment Lawyers Association

11 April 2013

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Please read this question carefully before you start responding to this consultation. The information you provide in response to this consultation, including personal information, may be subject to publication or release to other parties. If you do not want your response published or released then make sure you tick the appropriate box?

x☐ Yes, I would like you to publish or release my response

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Your details

Name:

Organisation (if applicable): The Employment Lawyers Association

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this consultation.

☐ Business representative organisation/trade body

☐ Central government

☐ Charity or social enterprise

☐ Individual

☐ Large business (over 250 staff)

☐ Legal representative

☐ Local government

☐ Medium business (50 to 250 staff)

☐ Micro business (up to 9 staff)

☐ Small business (10 to 49 staff)

☐ Trade union or staff association

X Other (please describe)

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Applicants and Respondents in the Courts and

Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

A sub-committee was set up by the Legislative and Policy Committee of ELA under the joint chairmanship of Robert Davies of Dundas & Wilson LLP and Trevor Bettany of Speechly Bircham LLP to consider and comment on the Department for Business, Innovation & Skills ("BIS") "Reforming the regulatory framework for employment agencies and employment businesses" consultation paper (the "Consultation Paper"). Its response is set out below. A full list of the members of the sub-committee is:

Anne-Marie Balfour	Speechly Bircham LLP
Phillippa Canavan	Squire Sanders (UK) LLP
Susan Fanning	DLA Piper UK LLP
Emma Harvey	Gorvins Solicitors
John Hayes	Irwin Mitchell LLP
Louise Lightfoot	Eversheds LLP
David Ludlow	Barlow Robbins LLP

Question 1: a) Do you agree with the four outcomes that the government believe should be achieved by the recruitment sector legislation (outcomes are listed below)?

- Employment businesses and employment agencies are restricted from charging fees to work-seekers
- There is clarity on who is responsible for paying temporary workers for the work they have done
- The contracts people have with recruitment firms should not hinder their movement between jobs and temp-to-perm transfer fees are reasonable
- Work-seekers have the confidence to use the recruitment sector and are able to assert their rights

Yes X **No** ☐

b) Please give reasons for your answer.

1.1 Generally, we agree with these four outcomes, but note that these outcomes are largely already achieved by the existing regulatory framework. We are not aware of significant dissatisfaction with the status quo in this area amongst employment agencies/businesses, hirers or work seekers, save for the point raised in response to question 2, below. Paragraph 6.1 of the Consultation Paper suggests that the sector is currently operating efficiently and providing a reliable and trustworthy service to businesses and people seeking work. It is not clear why that would change if the current framework were to remain in place without amendment.

1.2 We accept that the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the "Regulations") can, in places, be complicated and difficult to understand at first sight - for example Regulation 10. However, agencies and hirers have become used to the current framework, and on the whole it is our experience that agencies and hirers alike understand it and accept it. We are not aware of a specific appetite amongst businesses for reducing the regulatory burden, as referred to in paragraph 6.10 of the Consultation Paper. Dissatisfaction appears to relate more to the administrative burden of adapting to the Agency Workers Regulations 2010 ("AWR"), which are outside the scope of this consultation. Therefore, the argument can readily be made that the existing regulatory framework is not broken and does not need fixing, whereas having to acclimatise to a new regulatory framework would add to that administrative burden.

1.3 We consider that the objective of new, streamlined legislation which is easier for businesses and individuals to understand could perhaps alternatively be achieved through clear and accessible explanatory guidance to support the existing regulatory framework.

1.4 We agree that complete deregulation of the recruitment sector is not viable or desirable.

1.5 We note the objective of focusing, for the most part, where work-seekers are most at risk of exploitation (paragraph 6.10 of the Consultation Paper). Regulation in this sector was originally introduced to address the 'rogue elements' within the industry. It is entirely possible that what may be viewed as 'bad' agencies will fail to comply with regulatory

obligations, no matter what those requirements are. Effective enforcement will be important if the most vulnerable work seekers are to be protected.

1.6 The Consultation Paper does not confirm exactly which issues covered by the current legislative provisions would be dropped. It can be implied that anything falling outside the four outcomes would cease.

1.7 In respect of the third outcome (ie contracts people have with recruitment firms should not hinder their movement between jobs) it would be neither logical nor reasonable for new legislation to prohibit the inclusion in contracts of notice periods and post termination restrictive covenants, to the extent already permitted by law for ordinary employees. Any new regulation should be clear about this issue to avoid confusion.

2. Question 2: a) Are there any other outcomes that you think should be achieved by the new legislation?

Yes X No ☐

b) If yes, please give details on what these are.

2.1 **Suggested outcome: recognise and take into account the commercial reality that these relationships often are NOT tri-partite**

2.2 We consider it helpful that any new legislation in this area should specifically and clearly address the commercial reality of recruitment sector arrangements. New legislation should deal with not only the simple tri-partite 'work seeker - agency - hirer' commercial relationship, but also the following, which are, in the experience of the Working Party, very frequently used:

(a) Umbrella companies - an umbrella company employs the work seeker and also contracts with the hirer for the supply of that work-seeker's services;

(b) Neutral vendors – where a hirer deals with one 'Neutral Vendor' business, which may fill the vacancies itself or, alternatively, in turn deal with many different recruitment businesses (there are variations to the exact business model);

(c) Personal service companies - individual work seekers supply their services to a recruitment business through their own limited companies, rather than in their personal capacities.

2.3 Any new legislation should clarify how that new legislation applies to the more complex types of engagement, in respect of not only payment but also the relationship the work seeker has with each of the other entities involved in the supply of their work to the end user. Under the present legislation, identifying the entity with which the work seeker has the contract of employment/engagement can be very complicated. Getting to grips with what is actually happening 'on the ground' would be an important priority for the proposed new legislation.

2.4 We are aware from the experience of one member of our sub-committee that the EAS Inspectorate has also found this issue confusing. For example, two Inspectors formed different and opposite views on whether the same particular umbrella company was, or was not, covered by the current recruitment sector legislation. It would clearly be preferable if this inconsistency could be clarified and removed. Further, if the government consider that umbrella companies should not be covered by the main recruitment sector legislation, the additional question arises as to what, if any, regulation should be imposed on them. We are aware that other jurisdictions have specific regulation for umbrella companies (for example *portage salarial* in France).

2.5 **Possible additional outcome: Minimise administration**

2.6 The recruitment sector already has a significant volume of administration to deal with. One suggested outcome would be to minimise as far as possible the administration required by the sector. This is in line with Vince Cable's speech to the Engineering Employment Confederation of 23 November 2011, in which he is reported to have said he "would be simplifying and streamlining the UK's recruitment sector by addressing unnecessarily complex rules on employment businesses and employment agencies".

2.7 **Possible additional outcome: Maintain the opt-out for personal service companies**

2.8 Another outcome could be to maintain a genuinely self-employed individual's right to decide whether or not he/she wishes for his/her business arrangements to be covered by this legislation (Regulation 32). The Consultation Paper does not make the government's intentions clear in this regard.

2.9 **Possible additional outcome: Extend the second outcome beyond pay, to cover all principle rights of work seekers**

2.10 If the intention is to protect often relatively unsophisticated and vulnerable temporary workers, this would be supported by extending the second outcome beyond pay alone, so that there is clarity on who is responsible for other principle rights too.

2.11 **Possible additional outcome: retain and clarify the prohibition on the supply of replacement agency workers during a strike**

2.12 The focus on the four outcomes implies the proposed discontinuance of the current prohibition on employment businesses supplying employers with temporary agency workers to perform the duties normally performed by a worker participating in official strike or industrial action, or the duties normally performed by any other worker who has been assigned to cover the work of such worker. The current prohibition is set out in Regulation 7.

2.13 The issue of whether or not there should be such a prohibition is a policy decision for the government and falls outside of ELA's response. It is, however, a significant provision. In this regard, the following points are relevant:

a) Breach of Regulation 7 is currently a criminal offence.

b) The current prohibition could be viewed as unfair to employment businesses. Whilst the provision exists to protect workers on official strikes, it does not provide total protection for those workers. For example, the employer may still hire replacement labour directly, or could recruit through an employment *agency* (as distinct from an employment *business*). Whilst an employer would face a greater administrative burden in hiring labour directly than procuring the supply of temporary agency workers, that additional burden is manageable. The current prohibition is, arguably, disproportionate, and this should be addressed if the prohibition is to be retained.

c) If the prohibition is to be retained, it would be helpful to include clarification on whether an employer may be liable for aiding and abetting the offence. This issue has not been determined by the courts.

2.14 **Possible additional outcome: address current National insurance/expenses issues**

2.15 For the protection of work-seekers, another outcome could be to clarify and properly enforce rules on tax relief for expenses. We are aware that currently, widespread abuse of the rules relating to national insurance and expenses is being reported in the press, with allegations being made that certain agencies and umbrella companies may be profiting from paying wages as travel and food expenses that are not genuinely incurred. Currently the work-seeker may not understand what is happening, but can be penalised later.

3. DO YOU THINK THERE ARE CIRCUMSTANCES, OUTSIDE OF THE ENTERTAINMENT AND MODELLING SECTOR, WHERE AGENCIES SHOULD BE ALLOWED TO CHARGE FEES?

YES ☐ NO ☐

b) If you answered yes, in what circumstances do you think agencies should be able to charge fees?

3.1 The question of whether or not agencies should be able to charge fees is a policy decision for the government and falls outside the scope of ELA's response.

3.2 There may be areas where this is possible, but we anticipate that such areas would be limited to sectors in which a greater degree of marketing of candidates to hirers is required, which incurs up front expenditure on the part of the agency; and sectors with relatively higher earning, sophisticated work seekers, rather than low paid temporary workers at greater risk of exploitation. A potential example would be (very-) targeted executive search services.

3.3 We note, however, that non-entertainment/modelling agencies do not generally appear to consider it necessary to be able to charge fees. There seems to be a feeling that it is 'not the done thing' to be seen to be charging work seekers and also charging hirers.

3.4 We are aware that some agencies feel that job websites and newspapers have an unfair advantage as they are allowed to charge work seekers for 'situations wanted' postings.

4. QUESTION 4: A) DO YOU THINK THE CURRENT DEFINITION OF "EMPLOYMENT AGENCY" AS SET OUT IN SECTION 13 OF THE EMPLOYMENT AGENCIES ACT 1973 COULD BE IMPROVED?

YES X NO ☐

b) Please give reasons for your answer.

4.1 It would be helpful for the entire definition to be all in one place, to save cross referring from the Regulations, to the Act and then back to the Regulations.

4.2 The defined terms of 'Employment Agency' and 'Employment Business' could be clearer. It is not immediately clear what each refers to. This could be remedied by using different defined terms for the same concepts, for example 'Permanent Placement Agency' and 'Temporary Placement Agency'.

4.3 Consideration should be given to whether online job boards should be brought within the definition.

4.4 A condensed version of the current wording could be formulated as:

"Permanent Placement Agency" means the business (whether or not carried on for profit or in conjunction with any other person) of finding work-seekers employment with employers and/or of supplying work-seekers to employers for employment by them. This does not apply to the Excluded Services [the definition would include the contents of Reg13(7) of the Act].Where a person carries on both a Permanent Placement Agency and a Temporary Placement Agency, it is a Permanent Placement Agency when it acts in the capacity as a Permanent Placement Agency."

4.5 We suggest further clarity be provided as to whether an umbrella company falls within the definition of "Employment Business/Temporary Placement Agency".

5. QUESTION 5: A) DO YOU THINK LEGISLATION SHOULD REQUIRE EMPLOYMENT AGENCIES TO ALLOW WORK-SEEKERS A COOLING OFF PERIOD IN SITUATIONS WHERE FEES CAN BE CHARGED?

YES ☐ **NO** ☐

b) Please give reasons for your answer

5.1 This policy issue is beyond ELA's remit . However, we observe that a cooling off period may be argued to help to protect vulnerable and/or unsophisticated work seekers

6. QUESTION 6: A) IF YOU ANSWERED YES TO QUESTION 5, DO YOU THINK THERE SHOULD BE ONE STANDARD COOLING OFF PERIOD?

YES X **NO** ☐

b) What do you think the cooling off period should be?

6.1 One standard statutory cooling off period, rather than the two current different cooling off periods, would be preferable, for clarity, consistency and simplicity in the legislation.

6.2 In order to be effective, a cooling off period should:

- allow work seekers a proper opportunity to reflect, to take advice and to observe the quality of the work finding services for which they would be required to pay a fee; but
- not be so long as to enable the work seeker to derive valuable benefit from the agency's investment in him or her, for which the agency will not be paid.

6.3 Bearing in mind that fees are only chargeable where a work seeker is actually paid for an assignment, instead of having a cooling off period that is a fixed number of days or weeks from signing up with an agency, it may be fairer to consider linking the cooling off period to the first assignment secured for the work seeker.

7. QUESTION 7: A) DO YOU THINK IT IS NECESSARY TO LEGISLATE TO ENSURE THAT THERE IS CLARITY ON WHO IS RESPONSIBLE FOR PAYING A TEMPORARY WORKER FOR THE WORK THEY HAVE DONE?

YES X NO ☐

b) Please give reasons for your answer.

7.1 In many cases it will be obvious where the responsibility for paying lies, for example where this is clear in a contract between agency and work-seeker. It is less clear in the case of umbrella arrangements and gross pay schemes. As these arrangements can be very complicated in practice this is an aspect where specific clarification would be advisable.

7.2 Legislation is not strictly necessary, as it will be open to a work seeker to bring an individual claim if he or she has not been paid. However, problems associated with this are:

- The work seeker may feel compelled to list multiple Respondents if it is not clear to him/her who is responsible for paying, and liability can be established in the course of those proceedings. This increases the burden on the Tribunals.
- The work seeker may be unaware of the identity of one or more entities in the supply chain.

8. QUESTION 8: A) REGULATION 6 RESTRICTS EMPLOYMENT AGENCIES AND BUSINESSES FROM PENALISING A WORK-SEEKER FOR TERMINATING OR GIVING NOTICE TO TERMINATE A CONTRACT. DO YOU THINK THAT THE TEXT OF REGULATION 6 COULD BE IMPROVED?

YES X NO ☐

b) Please give reasons for your answer.

8.1 The protection of Regulation 6(1)(a)(i) could be expanded to protect a work seeker who has indicated an intention to terminate a contract, without actually terminating or giving notice to terminate.

8.2 It would be helpful for any formal guidance accompanying any new legislation to give examples of what constitutes a detriment. We understand that a typical detriment is a work seeker being 'blacklisted' and not offered further work.

8.3 Regulation 6(b) appears to be of limited protective value to work seekers, and there are circumstances in which an agency has proper reason to know the identity of a future employer - for example, to establish whether a transfer fee is payable.

8.4 The exemptions under Regulation 6(3) (work seekers employed under a contract of service or apprenticeship) could result in unfairness and therefore could be removed. For example, work seekers on 'zero hours' employment contracts could fall outside the protection.

9. QUESTION 9: A) REGULATION 10 HAS THE EFFECT OF RESTRICTING EMPLOYMENT BUSINESSES FROM CHARGING UNREASONABLE TRANSFER FEES TO HIRERS. DO YOU THINK THAT THE TEXT OF REGULATION 10 COULD BE IMPROVED?

YES X NO ☐

b) Please give reasons for your answer.

9.1 It is insufficiently clear.

9.2 It could be improved by:

- Separating the different scenarios within Regulation 10(4), so that it is clearer and easier to follow and understand, even if this also makes the drafting slightly repetitive and lengthier;

- Defining 'period of hire', rather than referring the reader back to the description in paragraph (1) when interpreting Regulation 10 (3);

- Including more clarity on the work seeker's original relationship with the agency and hirer .

9.3 We also suggest guidance be issued with examples of reasonable/unreasonable transfer fees in various circumstances. Some reference could be made to a permanent placement fee where the employment business also operates as an employment agency.

10. QUESTION 10: A) DO YOU THINK EMPLOYMENT AGENCIES AND BUSINESSES SHOULD PUBLISH INFORMATION ABOUT THEIR BUSINESS?

YES ☐ NO ☐

b) Please give reasons for your answer

10.1 ELA does not have a view on whether employment agencies and businesses should be obliged to publish information about their businesses. It is unclear the extent to which such information would in fact be relied upon by potential hirers and individual work-seekers.

11. QUESTION 11: WHAT INFORMATION DO YOU THINK WOULD BE OF MOST INTEREST TO:

A) WORK-SEEKERS ☐ HIRERS ☐

The sub-committee considers that work-seekers would be most interested in the following information (starting with topic of most interest): type of occupational sector that the agency/business operates in; number of placements available; average length of placements; number of payroll errors; equalities policies; and feedback/reviews from work-seekers

11.1 We consider that hirers would be most interested in the following information (starting with the topic of most interest): type of occupational sector that the agency/business operates in; length of time it takes to fill a vacant post; feedback/reviews from hirers; number of work-seekers available.

11.2 Although not on the Government's proposed list of information, ELA considers that many hirers would be interested in an employment business' ratio of temporary to permanent placement conversions.

12. QUESTION 12: A) DO YOU THINK IT SHOULD BE COMPULSORY FOR EMPLOYMENT AGENCIES AND BUSINESSES TO PUBLISH INFORMATION ABOUT THEIR BUSINESS?

YES ☐ NO ☐

12.1 ELA does not have a view on whether it should be compulsory for employment agencies and businesses to publish information about their business. However we note that these are not obligations placed on ordinary employers.

b) Please give reasons for your answer.

The following points are relevant:

12.2 We question whether it would be feasible in practice to verify, police or enforce the accuracy of any information published.

12.3 This step would therefore have limited protective value for work seekers.

12.4 This requirement would mean imposing obligations on agencies/businesses that go beyond the obligations of ordinary employers.

12.5 "Bad" agencies may be inclined simply to make up the information, which may lead to workers being misled to a greater extent than might otherwise be the case.

12.6 A "good" agency will build a good reputation, and would be expected already to be publishing some of this information.

12.7 Many employment agencies and businesses are very small businesses and a compulsory requirement could be a considerable drain on resources.

12.8 Feedback reviews from work seekers/hirers could be helpful if genuine, but may not always be genuine! In addition, the agency/business could selectively pick which reviews to publish, which will reduce the likelihood of the reviews being an accurate reflection of the agency/business. Commercially, good agencies will want to do this without it being

compulsory. There could also be potential here for breaches of the Data Protection Act 1998. For example, where an agency is required to publish feedback of its hirers and work-seekers, but for which it has not obtained their consent. In addition, certain hirers may contractually prohibit an agency/business from publishing any feedback concerning assignments to them.

12.9 Agencies will generally publish the type of occupational sector in which they operate anyway. Making this compulsory is not necessary.

12.10 Requiring agencies to publish up to date information on the number of jobs/placements available, the number of work seekers available, the average length of time it takes to fill a vacant post and the average length of placements could be onerous, particularly if a high degree of accuracy is required, or if the information has to be kept absolutely up to date as it is the experience of members of the Working party that this is data that can change considerably day to day . The cost of compliance would be an issue, and this appears to undermine one of the underlying reasons for this review of legislation – namely to invigorate the market and reduce burdens on businesses.

12.11 In the event that employment businesses are required to publish information about their business, we question the usefulness of some of the suggestions included in the consultation document as a meaningful piece of data. For example, the "average length of placements" - the data provided by a business which works in a sector where the majority of its assignments last for one week, would be significantly skewed due to its inclusion of a small number of long-term sickness assignments. The median figure would, therefore, be more appropriate than the average. In addition, this would not be a useful way for a work-seeker to compare two employment businesses that work in different sectors. .

12.12 It could be open for start-up agencies to seek to create an impression of being 'bigger than they are' in order to improve the perception of them position in the market. The requirement to give specific information on staff and vacancies could prevent such approach – but, please refer to 12.5 which will remain a concern given the challenges in verifying such information..

12.13 Work seekers may respond to specific advertised vacancies, rather than to a particular agency per se, or general information about an agency. If so it is unlikely that the size of the business, staff numbers and locations of the employment business or agency will be of interest to either party.

12.14 If payroll errors are to be published it will be important that 'payroll error' is clearly defined. Some errors will be far more serious than others. We understand that a relatively high percentage of EAS Inspectorate issues are payroll ones and the requirement to publish this information could reduce non-compliance. However, it is questionable how genuine this information about payroll errors would be and (as referred to above) query how this would be policed.

12.15 A requirement to publish equalities policies would bring the issue of equality into recruiters' mindsets. In the experience of our Working Party, elements of the recruitment industry is comparatively lacking in awareness of its obligations, and could improve on

equality issues. We are aware of a prevailing perception in some quarters that it may be easier for agencies to ignore equality issues such as disability and pregnancy than it is for ordinary employers. The process is also different for an agency, which will have to 'sell' the concept of reasonable adjustments for a particular candidate, and without incentives and reminders not to, may ignore a disabled candidate in favour of a candidate perceived as easier to 'sell' to prospective end-users. Having said that it is questionable whether having an equality policy would be sufficient to address these concerns. An alternative could be to publish certain equality statistics in their last three months' placements - although it is also noted that this is a step beyond what ordinary employers are required to do (with an associated additional level of administrative burden).

c) If you answered yes, what information do you think it should be compulsory to publish?

12.16 It may be argued that if the publication of equalities policies was made compulsory that should help the recruitment sector to understand and comply with its equality obligations.

13. QUESTION 13: A) DO YOU THINK TRADE ASSOCIATION CODES OF PRACTICE HELP TO MAINTAIN STANDARDS IN THE SECTOR?

YES X NO ☐

b) Please give reasons for your answer.

13.1 Agencies/businesses often want to be members of trade associations for commercial reasons, for example:

- it suggests that they are of good repute, which gives comfort to hirers and commercial advantage to agencies;
- hirers will sometimes make membership a prerequisite for an agency to be on their preferred supplier list.

13.2 Trade association codes of practice tend to encompass legislative compliance obligations, as well as adding helpful guidance on best practice. Compliance with a trade association's code of practice is usually a condition of membership. Membership can be withdrawn on account of breach. Therefore these codes help to maintain standards.

13.3 In litigation involving rival agencies, reference is often made to, and emphasis is often placed on, compliance with, for example, the REC code of practice.

13.4 Trade Associations also provide and give access to cost effective training on the law and regulatory enforcement.

13.5 A caveat, however, to the above is that the members are reliant on the trade association operating, and exercising its powers, in a fair and appropriate manner.

14. QUESTION 14: WHAT OTHER NON-REGULATORY TOOLS COULD BE USED TO MAINTAIN STANDARDS IN THE RECRUITMENT SECTOR? PLEASE BE AS SPECIFIC AS YOU CAN IN YOUR RESPONSE.

14.1 We observe, but do not advocate, the model in other European countries such as Germany of mandatory trade association or chamber of commerce membership.

14.2 ACAS guidance for agencies/businesses could be used, perhaps with penalties for non-compliance similar to those for non-compliance with the ACAS Code on Discipline and Grievance.

14.3 We consider that there is potential for BIS to issue updated and more focused guidance for agencies, for hirers and for workseekers. In this regard we note that 2010 Regulations were borne out of the wider EU social partnership agreement and that this stakeholder approach was adopted in the UK prior to the adoption of those regulations. Therefore future Guidance could be devised via the input of (and potentially agreed with) stakeholders such as REC, TEAM, the CBI and TUC.

14.4 Employment Tribunals sharing information with the EAS where it appears from an individual claim that there may be an infringement of interest to the EAS.

15. QUESTION 15: DO YOU THINK THAT THE GOVERNMENT SHOULD ENFORCE THE RECRUITMENT SECTOR LEGISLATION?

YES X NO ☐

b) Please give reasons for your answer.

15.1 Government enforcement can be very effective, and we understand that, for example 70% of unpaid wages complaints end up paid relatively quickly. However, it can only be truly effective if properly resourced (and we question whether such resourcing is realistic in the

current economic climate) and if work seekers are aware of the appropriate contacts for reporting infringements.

15.2 Work seekers are often unsophisticated, without the means or know how to pursue infringements of their rights, and relatively vulnerable. They are relatively unlikely to commence litigation. Government enforcement assists them.

15.3 Government enforcement is available (sometimes alongside the option for individuals to bring claims) in relation to other labour law obligations, for example, the national minimum wage, data protection, equality and health and safety.

15.4 Perceived problems with the current government enforcement regime are that:

- There appear to be relatively few inspectors to police these matters;
- the existing rules have not been widely enforced and nothing is done about many "bad" operators:
- the EAS is not particularly vigilant at prosecuting shadow directors of phoenix companies.

15.5 More effective enforcement could be achieved by closer liaison between the enforcement agencies i.e. the Employment Tribunals and EAS as suggested in the answer to question 14.

16. QUESTION 16: A) DO YOU THINK THAT PROHIBITION ORDERS SHOULD BE INCLUDED IN THE NEW ENFORCEMENT REGIME?

YES ☐ NO ☐

b) Please give reasons for your answer.

16.1 Their existence provides teeth for the legislation and a "reality check" for agencies. This encourages compliance.

17. QUESTION 17: A) DO YOU THINK INDIVIDUALS SHOULD BE ABLE TO ENFORCE THEIR RIGHTS AT AN EMPLOYMENT TRIBUNAL?

YES X NO ☐

b) Please give reasons for your answer.

17.1 Individual work seekers should not be worse off than ordinary workers and employees in terms of their enforcement options.

17.2 This can operate in parallel with, rather than instead of, government enforcement.

18. QUESTION 18: WHAT GUIDANCE DO YOU THINK INDIVIDUALS WOULD NEED TO BE FULLY AWARE OF THEIR RIGHTS AND HOW TO ENFORCE THEM?

18.1 An explanation that the relationship is not always a simple tri-partite one between agency, employer and workseeker.

18.2 A statement setting out their rights in respect of terms and conditions - perhaps a universally accepted statement, available on ACAS and/or BIS websites.

19. QUESTION 19: A) DO YOU THINK THAT THE GOVERNMENT SHOULD PROACTIVELY PUBLISH THE FINDINGS OF INVESTIGATIONS THAT HAVE BEEN CARRIED OUT, INCLUDING THE TRADING NAME OF EACH EMPLOYMENT AGENCY/BUSINESS, AND LISTING THE INFRINGEMENTS TO THE LEGISLATION?

YES X NO ☐

b) Please give reasons for your answer.

19.1 This action should:

- Improve compliance and act as a deterrent to what might be described as “bad” agencies;
- Provide a useful resource for workseekers and hirers,

19.2 There is a concern that flagging any minor infringement would be unfair particularly when other employers are not "named and shamed" in this way. It is also likely to be administratively burdensome to publish every minor infringement in a clear and fair way.

19.3 This suggests that there is an argument that only material/serious infringements should be published;

19.4 For fairness, agencies/businesses should be afforded the opportunity to be able demonstrably to remedy infringements, where possible and appropriate, and this noted on the publication. Alternatively, if infringements have been remedied, there may not need to be publication in all instances.

19.5 It is the experience of members of the Working Party that investigations are patchy, in that agencies/businesses are investigated only in relation to a reported complaint, or if they fall within a sector or business type that is the focus of concern at a particular time.

Publishing the results of investigations would be more meaningful if inspections were more widespread, but we recognise that resources are unlikely to be available for this.

19.6 The length of time for which published information would remain available should be considered. If it is substantial, then the date of the infringement should be clear. The agency/business should have the opportunity to have subsequent improvements noted alongside publication of the infringement.

20. QUESTION 20: A) DO YOU THINK IT IS NECESSARY TO LEGISLATE TO REQUIRE EMPLOYMENT AGENCIES AND BUSINESSES TO KEEP RECORDS TO DEMONSTRATE THAT THEY HAVE COMPLIED WITH THE REGULATORY REQUIREMENTS?

YES ☐ NO X

b) Please give reasons for your answer.

20.1 It is sufficient for agencies and businesses to decide whether to keep records to enable them to demonstrate compliance and to defend claims, to function effectively, to meet HMRC requirements and to comply with the AWR.

21. QUESTION 21: WHAT RECORDS DO YOU THINK EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESSES SHOULD BE REQUIRED TO KEEP RELATING TO:

a) work-seekers?

21.1 Those records that are required in order to comply properly with:

- The Agency Workers Regulations 2010;
- The Data Protection Act 1998;
- The Immigration and Nationality Act 2006;
- Existing Regulation 29 of the Regulations.

21.2 Records relating, where appropriate for the type of work sought, to an applicant's suitability for working with children and vulnerable adults.

21.3 Records of evidence that a work seeker meets the regulatory, qualification or other requirements for the type of role sought. For example, in relation to work seekers in the medical sector, evidence of qualifications, inoculations, annual appraisals would be appropriate.

b) hirers?

21.4 Records of the information an agency needs in order to comply properly with:

- the AWR;
- Regulation 29 of the Regulations.

c) other employment agencies/employment businesses?

21.5 Clear and transparent records of other agencies or businesses eg. Umbrella companies operating as principals in a supply chain, including payment history and split fee networks.