EMPLOYMENT LAWYERS ASSOCIATION

RESPONSE TO THE CONSULTATIVE DOCUMENT ON "IMPROVING WORKER INVOLVEMENT – IMPROVING HEALTH AND SAFETY"

15 SEPTEMBER 2006

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent both Applicants and Respondents in the Courts and Employment Tribunals. It is not, therefore, 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 & 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 ELA's Legislative & Policy Committee consisting of David Widdowson and Alastair Currie of Bevan Brittan, Fleet Place House, 2, Fleet Place, London EC4M 7RF to consider and comment on the consultation document "Improving Worker Involvement – Improving Health and Safety". Their comments are set out below.

Preliminary points

1. From paragraph 14 of the consultative document, it appears that the possibility of consolidating the existing sets of regulations into one single source has been rejected. We would suggest that there are advantages in revisiting this and, at the same time, in taking the opportunity to produce updated guidance, which is a format we believe to be very helpful for effective implementation of legislation. The amendments proposed could then be included at the same time. We would be pleased to comment further on the concerns expressed over the complexity and bureaucracy of doing so.

2. We have not commented on questions 5, 6, 7, 9, 17, 18, 19 and 20 as we do not think these are properly within the scope of our function as an association.

3. **Questions 1 and 2 Have we got the right legislation, guidance and encouragement? Have we got the balance between these three right?**

   The balance to be struck between legislation guidance and encouragement is essentially a matter of policy and so outside our function as an organisation. As commented above, we believe there are advantages in a single set of regulations to cover all consultation on health and safety matters. This would provide the opportunity to set out updated guidance which, at least in respect of the 1977 Regulations, could be said to be much needed, those Regulations having been created in the context of a very different industrial relations environment to that of today.

4. **Question 3 - What impact have the ICE Regulations had (or do you think they will have) on your organisation and what impact have they had (or do you think they will have) on consultation on health and safety**

   As an organisation of practising lawyers, there is extensive experience amongst our number of advising on the implementation of the ICE Regulations. Anecdotally, we have reports that health and safety matters are the subject of discussions within the context of structures set up under or in response to these Regulations. One option that could be considered would be to include health and safety as a specific matter to be included within the scope of the standard provisions which apply in default of agreement as set out in Regulation 20 of the ICE Regulations. The disadvantage of this approach is that it would in practice require either the co-option of safety representatives (SRs) or representatives of employee safety (ROES) onto the consultative body or, alternatively, allowing this to be discussed with the employee representatives, which would result in two parallel obligations involving different sets of

employee representatives. Overall, it is our view that the two consultative processes are best kept separate, although there would of course never be any barrier to an employer choosing to raise health and safety issues in the general consultative process.

5. **Question 4 – Do you think the existing guidance could be improved? If so, in what way? What is the most useful part of our current guidance? What would be the most useful type of new guidance we could produce (for example case studies)?**

Given the changing nature of the face of British industry and the changes brought about by technology, it would, as a general proposition, be desirable for guidance on legislation to be updated to reflect these changes reasonably frequently. An interval of 10 years would seem to us to be the upper end of the spectrum. As to the format of guidance, it is our experience that real examples to illustrate points being made in guidance is of great value of making the guidance effective. We have in mind, in particular, the guidance, given in relation to the Disability Discrimination Act.

6. **Question 8 – Do you agree that a duty on employers to consult safety representatives on the overall mechanism of risk assessment and on significant assessments would be helpful? Are our proposals practical?**

It is true to say that neither the 1974 Act nor the 1977 Regulations impose a specific duty on employers to consult with safety representatives over risk assessments. Under the EU "Framework Directive" (89/391/EEC), however, there is a wider obligation imposed on employers in Member States in respect over consultation and interpretation – see, for example, the case of *United Kingdom v EU Council* [1997] IRLR 30. Although the relevant UK legal provisions pre-date this Directive by a number of years, it is our view that, were it ever to be argued, either in a domestic court or before the ECJ, that an employer is currently under no obligation to consult on risk assessment, the outcome could not safely be predicted and it is more than arguable that such an obligation is already comprised in the general duty as set out in our regulations but using the ECJ's approach to the meaning of health and safety.

For this reason, to legislate specifically to impose an obligation to consult in respect of risk assessment might give rise to a belief that consultation in respect of other areas of health and safety which are not specifically identified but which, by parity of reasoning would still require consultation, do not in fact require it. That could produce, on the basis of our comments above, a dangerous belief that, unless a duty is specifically imposed or is otherwise obviously within the scope of the general duty at Section 2.6 of the 1974 Act, then none exists. A more preferable approach, and one which would take into account the practical problems identified in paragraphs 53 to 60 of the consultation document, could be to deal with the matter in guidance where examples could be given of situations where a risk assessment might be regarded as significant. This would also address the understandable concerns over proportionality and administrative burdens, particularly on smaller businesses which are likely to not at present have sophisticated structures for dialogue on health and safety matters. The guidance could also draw attention to the specific obligations which currently exist as referred to in paragraph 57.

7. **Questions 10 and 11 – Do you agree that employers should have a duty to respond to representations from safety representatives? Do you consider that written representations and responses would be necessary? What sort of systems do you think would work? What do you consider to be a reasonable time for a response?**

The current view of the nature of "consultation", is that probably it includes an obligation on an employer to respond to representations received during the consultative process from employees. To some extent, the nature of this will depend upon the particular matter under

discussion and, for that reason, this again may be a subject better dealt with in guidance rather than through amending legislation. That would then avoid the need to decide whether to stipulate that the response be in writing or not, and this could be decided according to the particular issue. Again, guidance with examples could be used here. It would always be open to SRs or ROESs to make a complaint under the Act/Regulations that an employer has failed to consult in a particular instance if it considers that it has made representations which have not been properly answered. That claim would then be determined according to the particular facts but, clearly, the Court or Tribunal would pay careful regard to the guidance issued.

As to a "reasonable time", again, this could be a matter for guidance but we would suggest that it would be an exceptional case where a failure to respond could be justified more than 28 days after the representations had been made.

8. **Question 12 – Do you agree that both the proposed duties should be extended to include consulting and responding to representatives of employee safety under the HSCWE Regulations? If not, why not?**

The consultation obligations under the 1996 Regulations are differently worded to those in the 1974 Act and the 1977 Regulations and, indeed, much wider in scope. There would, in our view, be no justification for treating ROESs any differently to SRs in relation to the employer obligations to respond to representations or, indeed, in any respect although it is the case that employers may choose to consult with all employees rather than ROESs where no trade union is recognised. As presently framed, the effect of the various statutory provisions and regulations require the employer to consult first with SRs and, where there are workers who are not represented by SRs, to do so with ROESs. A possible issue which does arise, however, would be that of employer resources and affordability; it is likely that it will be smaller employers who will not have recognition agreements with trade unions and so consult with ROESs. There may, therefore, be limitations on the extent of training or resources available.

9. **Question 13 – Do you agree that the titles of "safety representative" and "representative of employee safety" should be changed to "health and safety representative" and "representative of health and safety"?**

We would agree that the changes proposed are likely to promote wider involvement in matters of health and safety.

10. **Question 14 - Will the options suggested improve worker involvement for those who do not have access to either a trade union or non-trade union safety representative – for example people who work in very small organisations? If not, what do you think would work better for such people?**

In that the relevant legislation makes no differentiation for these purposes we would suggest that the key to successful engagement and involvement in smaller organisations is likely to be through continued use of initiatives such as those referred to at paragraphs 20 to 25 of the consultative document.

11 **Question 15 – If we were to propose legislative amendments how can we keep administrative burdens to a minimum and maximise the impact on improved health and safety?**

In our experience it is the requirement to maintain records which has the greatest impact on administrative burdens. The guidance approach we have proposed would keep these to a minimum.

12 **Question 16 – Our resources are always limited and we may not be able to do everything we need to do straightaway. We will need to make choices about what options to carry forward first. So please would you tell us which option (whether it is one of ours, or a suggestion of your own) will, in your opinion, be the single most effective thing we can do, and why?**

We believe that the need to redraft guidance should be the priority here and is likely to be most effective in achieving the aims set out in the consultative document.

15 September 2006