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**24 September 2007**

## **Effective consultation**

### **Comments by Mark Boleat**

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#### **Introduction**

1. On 14 June 2007, the Cabinet Office published this consultation document setting out proposals for reforming the code of practice on consultation. Comments are invited by 28 September.

2. This paper is a personal response by Mark Boleat. He has relevant experience as a former director general of three major trade associations and executive chairman of two associations, author of a number of papers on consultation and policy-making, member of the National Consumer Council for six years and most recently as a temporary civil servant with responsibility for implementing the regulation of claims management activities under the Compensation Act 2006. He was also involved in previous Cabinet Office work on consultation policy.

#### **Executive summary**

3. The author has assisted the Trade Association Forum in preparing a response to this consultation, by writing an analysis, facilitating a seminar and preparing a draft response. The author endorses all but one of the conclusions of that response and therefore does not repeat them here. The exception is the minimum 12 week consultation period which the Forum would like to be retained but the author would prefer to be abolished. This response makes a few additional points, particularly in respect of ensuring an input by consumers and facilitating an input from business. It also includes a case study on the performance of the Home Office.

4. Formal written consultations must be seen in the context of stakeholder engagement and policy-making generally. The code of practice has facilitated better written consultation. However, the impact on policy-making has been muted because of excessive emphasis on the consultation period at the expense of ensuring effective stakeholder engagement, lack of clarity on what is open for consultation and poor feedback. The quality of consultation depends too much on the approach of relevant officials; effective stakeholder engagement is not sufficiently embedded in the culture of government departments and agencies.

5. Consultation documents should be absolutely explicit about what is settled, what is largely settled but might be influenced by the consultation, and what is genuinely open for consultation. Executive summaries and consultation questions should bring out the major points. It is equally important that trade associations and other respondents are open in their responses to consultation documents.

6. The 12 week criterion has been damaging and should be abolished. It has contributed to no consultation at all on some major issues and half baked consultation on others, and has placed undue emphasis on process rather than substance. The length and nature of a consultation should depend on the nature of the issue; officials should be expert at judging this.

7. There is seldom a balanced response to consultations. Business groups are well placed; consumers and voluntary organisations are not. To ensure a balanced response it is often necessary to be proactive, for example by commissioning responses, encouraging the development of effective interest groups or arranging consultation events.

8. Analysis of consultation responses and feedback to respondents is very poor, unnecessarily undermining the credibility of consultation exercises. The analysis of responses should be an objective exercise, attributing comments, and should be separated from the feedback on the impact on policy.

9. Government departments and agencies should regularly commission qualitative external or peer reviews of individual consultation exercises and their whole performance on consultation.

10. Training in consultation techniques and dealing with interest groups should have a much greater emphasis in government departments and agencies.

#### **The effectiveness of consultation**

11. The consultation paper largely views written consultation in isolation. A written consultation is merely a means to an end – better policy-making - and should be viewed in that context. A comprehensive written consultation exercise that fully meets the code of practice is of little value if the policy proposals are badly formulated, the necessary evidence base is lacking and ministers have made up their minds what to do regardless of the results of the consultation.

12. Within the policy-making process a formal written consultation should be just one part of stakeholder engagement. In the case of a major policy exercise, such as the introduction of a new regulatory regime (eg for labour providers under the Gangmasters

(Licensing) Act 2004 or claims management businesses under the Compensation Act 2006), an effective stakeholder engagement programme should include –

- Devising means to ensure that those most affected by the legislation (labour providers and claims management businesses in the two examples) are able to participate in the process. Those means could include encouraging the development of an effective trade association, commissioning a consultant to establish the views of those affected, arranging one-to-one meetings with the major businesses in the sector, and arranging workshops if necessary on a regional basis.
- Similarly, devising means of ensuring that the interests of consumers or other stakeholders are adequately represented.
- Publishing an analysis of the issues to accompany a consultation paper on the proposals.
- Establishing an advisory group of the major stakeholders as an informal sounding board. This group should be established early in the process and should meet regularly until implementation is complete.
- A formal written consultation on the major issues.
- A series of workshops of the issues covered in the consultation.
- Informal “post consultation consultation” with the major stakeholders.
- Formal secondary consultation, often for less than 12 weeks (either because such a long time is unnecessary or because there is not time for a 12 week consultation) on implementation issues, such as rules of conduct, fees and financial requirements.
- Towards the end of the process a review of the effectiveness of consultation arrangements and recommendations for future stakeholder engagement on the specific subject.

13. The code of practice has contributed to more effective consultation. Generally, this has been on the specific subject of the code – that is formal written consultations – but there has also been a limited effect in raising the profile of good consultation generally. However, the code has had only limited beneficial impact because implementation, monitoring and compliance have concentrated almost exclusively on just one requirement of the code – the one that can be measured – that written consultation exercises should have a minimum 12 week period. This requirement is considered subsequently.

14. On the generous assumption that the other parts of the policy-making process are effective the major failings with consultation practice at present are –

- A complete failure to consult at all on some issues where there are no grounds (such as the proposal being a manifesto commitment) for not consulting.
- A failure to engage the major stakeholders where these are not well equipped to handle the consultation. Identifying the stakeholders (eg consumers or small businesses) is not nearly sufficient; there must be proactive work to help such groups understand the issues and obtain their input.
- A failure to be clear of what is open for consultation. Often minds are made up and the main purposes of the consultation exercise are to “tick the consultation box” and to claim support from relevant stakeholders. This discredits the consultation process and acts as a deterrent to engaging in consultation exercises. Businesses would much rather be told that the government intends to do certain things and that consultation would be pointless than to be told that

- government is keen to hear the views of stakeholders and will adapt its proposals accordingly when there is no such intention.
- Feedback from consultation exercise ranges from very good to, more commonly, poor or non-existent. Analyses of consultation responses are often used to justify what the government intends to do rather than be an objective analysis which can help to inform the wider policy debate.
  - It is good practice for there to be a modest review of the effectiveness of consultation at the end of an exercise or on a regular basis for long term or ongoing consultation exercises, and for departments and agencies to commission occasional independent reviews of their whole consultation practice. There is little evidence that such reviews take place and accordingly the opportunity to use past experience to improve the quality of future consultation exercises is limited.

Some of these points are illustrated in an analysis of Home Office consultation, which forms Appendix 1 to the paper.

15. To some extent these failings reflect an underlying point. Stakeholder engagement generally, and consultation specifically, appears not to feature in training and ongoing career development for officials. While variations in the effectiveness of consultation are to be expected, the extent of those variations, both between and within departments and agencies, is unreasonably great. The need for this to be addressed is considered subsequently.

### **Transparency and honesty**

16. The consultation process is worthwhile only if it is open on both sides. In most consultation exercises some issues will have been settled, some are pretty fixed and some are genuinely open. The current consultation criteria do require that areas open to consultation should be clearly identified. Often this is done well; sometimes it is not. The government may be asking for views on matters which are already settled, perhaps to “tick the consultation box” or perhaps to seek to gain stakeholder support for what is proposed. One particularly undesirable practice which has developed in recent years is for ministers to summon business groups to a meeting, tell them what it is planning to do and then announce that it has “consulted with” or “had discussions with” industry. Every misuse of the consultation process undermines the credibility of consultation as a policy tool.

17. The consultation paper raises the issue of “consultation fatigue”. This is not an issue. An excess of policy initiatives is an issue, but that is a separate subject. If the government is going to do something that will affect business then consultation is always desirable. What is objectionable is consultation which is not genuine.

18. The lack of openness is frequently compounded by impact assessments which set out the preferred option and two or more other, unrealistic, options. Rather than “evidence based policy-making” there is frequently, in Alistair Campbell’s words, “policy - based evidence seeking”.

19. The European dimension needs to be covered here. Much legislation and regulation now emanates from Brussels. Trade associations and government departments and agencies well understand how the policy-making process works in Brussels. However, the European card is sometimes played in a way that inhibits

effective policy-making, in that it is often argued that something has to be done “to implement a directive”, and that therefore consultation is pointless. European requirements should always be justified and open to challenge.

20. Consultation documents should be absolutely explicit about what is settled, what is largely settled but might be influenced by the consultation, and what is genuinely open for consultation.

21. Openness needs to extend to Executive Summaries which should be precisely that, stand-alone summaries of the issues and the consultation proposals. Often (as in the consultation itself) what is labelled “executive summary” is actually what used to be called “introduction”. In other cases, the Executive Summary may deliberately not bring out the key issues.

22. Similarly, specific consultation questions should always concentrate on the major issues and should not be slanted or meaningless and avoid the major issues. A bigger problem is where consultation questions either miss out the major issue completely or invite respondents to choose between a series of options only one of which is plausible, with other plausible options not being mentioned. Good practice is to ensure that the consultation questions do cover the major issues and that it should be made clear to respondents that they should be free to identify the major issues that concern them and cover issues not specifically identified in the questions.

23. It is equally important that trade associations and other respondents are open in their responses to consultation documents. Regular respondents such as trade associations sometimes feel that if they are seen to be too critical then their views will be marginalised. They therefore sometimes make comments such as: “We welcome the opportunity to comment on this consultation exercise. We support the broad thrust of the government’s proposals. However, we have some concern on the detail and the proposed implementation plan.” This can frequently be translated as – “The government’s proposals will not work, but we want to protect our position.” This reflects the lack of trust in whether the consultation is genuine. Interest groups cannot waste brownie points in criticising government proposals if the government has no intention of genuinely consulting, and many take the view that it is not in their interests to explain to government why what it is proposing may not work.

### **The 12 week criterion**

24. It is indisputable that sufficient time must be allowed for consultation. If respondents do not have sufficient time to prepare a response, which in itself may involve a consultation process, then the quality of responses will be lower and policy-making adversely affected.

25. Under the current criteria there should be a minimum of 12 weeks for all written consultations. This has two obvious consequences –

- If there is no time for a 12 week consultation then there may be no formal consultation. A six week consultation, even with ministerial approval, does not “tick the box” and a department with a number of such consultations will be criticised for a poor performance in respect of meeting the 12 week criterion. By contrast, there is no attempt to measure cases where there should not be a consultation but is not. This is a classic example of “the best being the enemy of the good”.

- Pressure to meet the 12 week criterion means that consultation documents can be published prematurely before the preferred option has been properly formulated or supporting analysis is complete. Alternatively, the response date is too late to enable proper consideration to be given to the responses.

26. Regardless of the practicalities of the 12 week period it is also logically untenable. Consultations subjects range from large complex issue on which there are widely differing views and many interested parties, down to minor changes to fees rules for a small group of regulated businesses. 12 weeks is the minimum for the first exercise; four weeks is quite sufficient for the second. And two weeks is better than nothing.

27. The emphasis on the 12 week period to the exclusion of everything else, particularly quality, is amply illustrated in paragraph 2.6 of the consultation paper: "The Cabinet Office produces annual reports on the whole of central Government's performance in relation to the Code ("Assessments of Performance"). These reports focus on the 12-week criterion but also highlight examples of best practice from the year. This information is provided to the Cabinet Office by departmental Consultation Coordinators. According to the report on consultations launched during 2005, the Government carried out 583 formal consultations, 80% of which lasted at least 12 weeks."

28. The Cabinet Office "Assessment of Performance 2006" on consultation is even worse. The summary deals only with the 12 week criterion. There are four brief examples of good practice, none of which seem particularly outstanding, then a lengthy table again entirely on the 12 week criterion with the amazing conclusion that 99.6% of all consultations met the criterion of 12 weeks or ministerial clearance for a shorter period. (The Maritime and Coastguard Agency alone prevents the achievement of a Soviet style 100% perfection rating. However, it is given a consolation prize in that it was also singled out for an example of best practice.) This is an example of a useless analysis. There is not a word on quality – a real case of "never mind the quality, feel the width".

29. Businesses rightly complain that often the time for consultation is too short. However, some business organisations seem to spend more time complaining about the consultation period than they do responding to consultation exercises. The good interest group can if necessary respond within days where it is essential to do so. What businesses do not like is an unreasonably short period given the importance of the issue or an unreasonably short period because ministers have taken a month longer to reach a view than they should have done.

30. It may be argued that officials need some guidance on what is a reasonable consultation period. However, if officials are competent to develop policy they should be equally competent at deciding when consultation is needed and the time period for individual consultation exercises. That said, they are manifestly not in many cases. This reflects a failure to understand fully the role of interest groups and how to consult effectively. The need for better training is covered subsequently. A more real risk is that the absence of a fixed 12 week consultation period would remove one of the few disciplines in the policy-making process, with the result that ministers or officials will prevaricate and then rush consultation. The author has seen draft responses of the Trade Association Forum and the National Consumer Council which have a similar analysis on this issue but which come to a different conclusion, that the 12 week rule should be retained. This seems to be on the basis that without the rule there would be

a general reduction in consultation periods. This response could easily have come to the same conclusion, but it is perverse to argue for a rule that is designed to compensate for other failings in the system – that is a culture and structure that does not provide for adequate consultation where that is necessary.

31. It is recommended that the 12 week criterion be replaced by a broad principle along the following lines –

“The time period allowed for a written consultation should depend on the nature of the issue and characteristics of the principal respondents. Some consultation is always better than no consultation and the longer the consultation the period the better, other things being equal. A minimum of 12 weeks is appropriate for major issues while four weeks, or even shorter, may be in order on simpler issues.

### **Ensuring a balanced response**

32. Government properly wants all interested parties to respond to consultation exercises. In practice, the weight and depth of responses is heavily weighted in favour of organised and well resourced groups, in particular –

- Established trade associations.
- Trades unions.
- Single interest pressure groups, particular those representing “middle class” issues.

33. There is a particular problem when government introduces regulation for a new sector. Trade associations are organisations set up by companies within a sector to provide them with two basic services – representation and the provision of information and advice. They are strongest in sectors subject to specific and extensive regulation because the demand for these services is strongest in such sectors. There is a clear need for representation, generally to a specific regulator or government department, and companies need sector-specific information about the measures that apply to them. It can be observed that trade associations are particularly strong in financial services, communications and utilities, all subject to specific regulation.

34. Trade associations tend to be weak or non-existent in sectors which are being newly subject to regulation or where a regulatory regime is being considerably strengthened. This is largely because there has been no need for a representative voice or for specific information and advice services. The sector may also have problems that have precipitated the need for regulation that in turn may make it difficult for a trade association to be effective. Those companies engaging in malpractice which leads to regulation tend to be unwilling to support a trade association, and may actively obstruct any association.

35. However, a sector being subject to regulation for the first time or being subjected to much stronger regulation needs an effective representative voice, and government also needs a strong association to ensure that the views of those most affected by the regulation are properly taken into account and to be a channel of communication with the industry. In short, there is likely to be a need for a strong trade association, but one will not exist.

36. In such circumstances government needs to facilitate a response from those who will be most affected. This can be done in one or more of a number of ways –

- Encourage the formation of an association, most appropriate for a situation in which an industry input will be needed in the long term.
- Commission a consultant to prepare a response on the interests of the business sector.
- Arrange a series of one to one and group meetings. In this case a summary of the discussion at these meetings should be recorded as a response and be publicly available.

37. These points are considered more fully in the author's paper *Developing business representation in newly regulated sectors*, reproduced as Appendix 2 to this paper.

38. The second group whose interests are often not adequately represented are consumers. In a few favoured sectors (financial services, utilities and communications) there are government funded consumer groups well equipped to respond to consultation exercises and frequently with an entrenched relationship with the regulator – for example the regulator is obliged to consult them and to respond specifically to any representations that they make. However, in most sectors there is no effective consumer representation. It is left to organisations such as the National Consumer Council, Which? and Citizens Advice to respond. They have limited resources and cannot hope to respond on every issue where a consumer view is needed. To compound the problem they tend to concentrate on the issues – financial services, utilities and communications - where there are already well established publicly funded consumer bodies.

39. This means that on many issues there is no consumer input. Where a consumer input is needed then again government has to facilitate this. This can be through one or more of a number of ways –

- Commission a consumer organisation to make a response. This is most appropriate for a series of related consultations. For example, the Scottish Executive commissioned the Scottish Consumer Council to represent the interest of consumers on health issues.
- Commission a consumer survey.
- Commission a consultant to prepare a response on the consumer interest. For example, the Government of Jersey commissioned the author to respond to consultation documents as a proxy for a consumer response in respect of the regulation of the telecommunications industry in the island.

### **Feedback**

40. Under the existing consultation criteria there should be a feedback statement within three months indicating how policy has changed as a result of the consultation. This process is flawed, confusing two separate issues.

41. Consultation responses are capable of making a significant contribution to policy-making by informing the debate, and not simply as an input to decision making by the government. There should be a comprehensive analysis of responses published within a month of the closing date for responses. Ideally, all the individual responses should also be published. This does raise practical issues, although publishing responses in a separate document on a website should not be difficult. The analysis of responses should be an objective exercise and should not be influenced in any way by policy

considerations nor delayed until policy is settled (as part of a “policy based evidence seeking” practice).

42. There is a general and serious failing with analyses of responses. Although the code of practice emphasises that this is not simply a question of counting votes, that is precisely what it is in most cases. The majority of analyses simply give numbers, for example four respondents were in favour and 13 against. This encourages “write in” campaigns, with interest groups telling their members to send in similarly worded responses. Comments should always be attributed and the views of the major stakeholders explicitly stated. Where a response is felt to have made a significant contribution to the policy debate, even if from an individual or small business, then it should be highlighted, quoted or even reproduced in full. Vote counting should be relegated to a footnote. The reports of Parliamentary Select Committees are a useful model here.

43. The final policy outcome may be many months after the end of the consultation period. It is good practice to identify where the consultation has influenced the outcome, and again to identify responses that have been particularly influential, whoever they are from.

### **Review**

44. It is good practice for any organisation, particularly those that are not subject to competitive pressures, to ensure that its activities are regularly reviewed. The government regularly undertakes such reviews of NDPBs but is reluctant to submit itself to such reviews. There has been very little review of consultation policy and practice by individual departments and agencies, and almost no independent review at all. The only systematic monitoring has been in respect of the 12 week consultation period.

45. To ensure that consultation is done to a high standard, departments and agencies should commission modest reviews of their consultation arrangements. The review could be internal, by an official from another department or by an outsider. There is also a case for reviews of particular consultation exercises, to see if there are lessons that can be used to improve future exercises and also to guide future stakeholder engagement in the specific issue. These reviews should involve talking to officials and stakeholders about the quality of the consultation and not be a box ticking exercise. They should not be time consuming or expensive. An individual exercise is capable of being effectively reviewed in two days and department’s performance generally in two weeks.

### **Training**

46. To the extent that consultation is badly done this is partly because staff have not been properly prepared through either formal or on-the-job training. The lack of formal training means that bad practices are likely to be accentuated and good practices not sufficiently disseminated.

47. Training in consultation techniques and dealing with interest groups should be an integral part of the training of officials; this should usefully be supplemented by regular workshops. The role of consultation co-ordinators is crucial here. They should be a valuable resource as opposed to a policeman, advising policy officials on the most effective way of consulting on a particular issue, being able to help with identifying stakeholders etc.

## **Answers to consultation questions**

1. Has the code of practice led to an improvement in the way government consults and to improved policy outcomes?

*Yes, but not substantially because of the concentration on the 12 week period rather than the quality of consultations.*

2. Is 12 weeks generally the right amount of time for formal written consultations? Are there circumstances where a shorter or longer period may be more appropriate?

*No. The effect of the 12 week rule has been that the only criterion that has been monitored is the one that can be easily measured; meeting the 12 week criterion has taken precedence over other considerations such as quality and whether consultation is undertaken at all. There are many circumstances in which a shorter or longer period is appropriate.*

3. Is the system for monitoring and promoting by departments the right approach?

*Yes but in practice it has not worked because far too much has revolved around the 12 week rule. There should be a resource in each department that can help officials make consultation exercises efficient and effective. Departments and agencies should commission external reviews of individual consultation exercises and their performance as a whole.*

4. Is new approach to impact assessment right? How could it be improved in respect of consultations?

*Yes. The previous RIA concept was abused. Any serious proposal needs to have a supporting analytical paper, not a simplistic description of two unrealistic options and the government's preferred option. However, the format for impact assessments is too simplistic, particularly in respect of measurement of benefits.*

5. When in the policy development process should government consult?

*This is a question of judgment; hard guidelines are likely to be abused. On major issues more than one consultation may be needed, eg one of the preferred policy, a second on implementation and several on detailed rules.*

6. Should there be more emphasis on alternative forms of consultation?

*Yes, but not by prescription. Officials should be trained in consultation techniques so that they will be able to select the most appropriate combination of techniques for the issue in question. A formal written consultation should almost never be the only form of consultation.*

7. How do you become aware of government consultations?

*The effective interest group will expect to be directly informed by the department or agency but will also scan government websites and rely on information from contacts to catch consultations which are not primarily aimed at the relevant interest group. An*

*effective directory of interest groups would be a significant help to officials. The publication of lengthy lists of consultees should be abandoned.*

8. How do you rate the feedback from government departments on consultations?

*In general this is terrible, often being used as on-the-job training for junior staff. The analysis of responses should be published as soon as possible after the close of the consultation and should not be tainted by policy considerations. Respondents should be named and quoted where appropriate. Counting votes should be relegated to a footnote. The final policy document should indicate how the outcome has been influenced by the consultation.*

9. Is consultation fatigue an issue?

*Yes, but only because consultation has been misused. Government must never consult simply because it cannot decide. Consultation is always welcome where it leads to better policy-making and never welcome when it is an excuse for inaction or an attempt to get support for what the government will do anyway.*

10. Other issues.

*Consultation questions should always concentrate on major issues and never be used as an attempt to dissuade people from commenting on the major issues. It should always be clear that respondents should not be constrained by the questions.*

11. Would any of the options make for good consultation policy?

*There should be a move to a principles-based approach backed by training and internal and external review.*

12. Are you content that the preliminary analysis would not impose costs?

Yes.

### **The respondent**

Mark Boleat has been Director General of the Building Societies Association, the Council of Mortgage Lenders and the Association of British Insurers, and Executive Chairman of the Council of Property Search Organisations and the Association of Labour Providers. On the other side of the fence, from August 2006 to August 2007, he was Head of Regulation at the Ministry of Justice with responsibility for helping to establish and for implementing the regulatory regime for claims management businesses under the Compensation Act 2006. He is a member of the Gibraltar Financial Services Commission and was Chairman of the Retail Motor Industry Code of Practice Scrutiny Committee. In the commercial sector he is currently a Director of the St Paul Travelers Insurance Company and he has been a director of two listed companies and three life insurance companies. He is a member of the Court of Common Council of the City of London (where is Deputy Chairman of the Markets Committee and a member of the Policy and Resources, Police and Planning and Transportation Committees), Chairman of Hillingdon Community Trust, a Director of the City of London Citizens Advice Bureau and Vice Chairman of the Board of the Association of Charitable Foundations. He also runs a consultancy business specialising in the handling of public policy issues.

# **Appendix 1**

## **Analysis of consultation by the Home Office**

### **Introduction**

1. In July 2006 the Association of Labour Providers (of which the author is Chairman) submitted a complaint to the Home Office that it failed to consult properly at any time about the Accession States Worker Registration Scheme, contrary to the Code of Practice on Consultation, and as a result has made unsatisfactory policy decisions. Although the complaint was on a specific subject some of the points made in it referred to Home Office practices generally. No response was ever received to that complaint. That complaint is largely reproduced below. It gives examples of where there has been no consultation when some was appropriate and also illustrates unsatisfactory consultation.

### **The Accession States Worker Registration Scheme**

2. The key points of the scheme are –
- It applies to eight of the ten Accession States; workers from Malta and Cyprus are exempted.
  - Workers are required to register within one month of beginning work in the UK. The obligation to register is with the worker but employers must show that they have done all they can to encourage workers to register.
  - A £90 (initially £50) fee has to be paid on first registration.
  - When a worker changes job he must re-register within a month but does not have to pay a fee.
3. The official purpose of the scheme is “to monitor the impact on our labour market of workers from the A8 countries”. There is no more detailed explanation of the rationale for the scheme.
4. The scheme imposes a heavy burden on low paid migrant workers and their employers and therefore should properly be the subject of consultation, both on the principle of the scheme and, if the principle is accepted, the operation of it.

### **The introduction of the scheme**

5. On 16 March 2004 the Home Office announced new arrangements for combating illegal working. This did follow a formal consultation exercise. However, the consultation exercise generally was not successful. Just 50 responses were received of which 14 were from trade associations, three from employment agencies and three from trades unions. Most of the responses also failed to answer most of the questions. Interest groups must take part of the blame for this but such a poor response indicates that the consultation process was itself at fault.

6. The consultation exercise and the RIA were also very narrowly based. The consultation exercise simply asked for comments on what the Home Office proposed to do rather than setting out options. The RIA considered just four options –
- No change.
  - Introduce the revised secondary legislation across all sectors.
  - Codes of practice leading to self-regulation in sectors where illegal working is prevalent.

- Introducing the proposed new secondary legislation only in specified sectors in which illegal activity is prevalent; maintaining the status quo for the remaining sectors within the UK economy.

7. The final two options are impractical and could not be considered to be realistic options. They appear to have been included to make up the numbers. The government had already decided that no change was not an option. It was therefore no surprise that the second option was chosen. There should have been an option which involved the government taking more responsibility for checking entitlement to works documents. The exercise was therefore slanted to produce the response that the government wanted.

8. The WRS was announced as part of the package of measures. However, it had not been included in the consultation document and there had been no prior warning that such a scheme would be introduced. It cannot be argued that there was no time for consultation as the decision to admit the Accession States had been taken a year earlier and negotiations had been going on for several years. In a letter to the ALP on 10 May 2004 the then Minister, Des Browne, accepted that consultation on the WRS was not in line with Cabinet Office guidelines. He justified the decision on the grounds that the decision to introduce the scheme followed “the late decision by some EU partners to introduce restrictions on access to their labour markets”.

#### **Subsequent decisions on the Scheme**

9. In August 2005 the decision was taken to increase the registration fee from £50 to £70, a 40% increase. On 11 July 2005 the Chairman of the ALP had written to the Minister as follows: “If there is to be any increase I trust it will be subject to consultation and a full regulatory impact assessment, neither of which occurred when the scheme was introduced.” There was no consultation and indeed the decision was not even announced until some time after the SI had been laid.

10. It had always been the case that a decision on the future of the scheme would have to be taken by the end of April 2006. This was acknowledged in a letter from Tony McNulty to the ALP on 21 June 2005: “It should be emphasised that the WRS is a temporary arrangement, which we will wish to continue to operate only as long as there is clear value in doing so. The Government will, later this year, be reviewing the need for the Scheme beyond April 2006 and, in doing so, will wish to consider carefully the sort of issues that you have raised in your paper [sent on 25 May 2006]. In the event ministers decided in October 2005 to continue the scheme. This was not announced until 11 May 2006. It even took 14 days for the announcement to be made after certain stakeholders had been told.

11. The Minister’s letter of 21 June 2005 clearly recognised that there would be a review and that views such as those of the ALP would be considered. However, there was still no consultation. The ALP well understands the “poker playing” (to use the Minister’s words) with other member states but this did not preclude a proper consultation exercise which would have fed into the decision taking process. After the ALP objected to the lack of consultation it was told by the relevant official, Ragnar Clifford, that “The decision was not the subject of a formal consultation exercise. But consideration of the issue took account of the known views of stakeholders about the scheme, including views expressed at the IWSG on 6 July 2005.” As a member of the IWSG I did not accept that what happened at the meeting on 6 July could in any way be

regarded as consultation. In the same note Mr Clifford advised that one reason for continuing the scheme was that “both the CBI and TUC supported the scheme”. This implies that those two bodies had been consulted. In fact both have since denied supporting the scheme, which has been accepted by Mr Clifford.

### **Home Office consultation generally**

12. The Cabinet Office code of practice on consultation requires the effectiveness of consultation to be evaluated. The exact words in the Code are -

“5. Monitor your department’s effectiveness at consultation, including through the use of a designated consultation co-ordinator.

5.1 Each department should have a nominated consultation co-ordinator, who should ensure that the consultation code is followed. They should act as an adviser to those conducting consultation exercises.

5.2 Consultation should be evaluated for effectiveness, looking at numbers and types of responses, whether some methods of consultation were more successful than others, and how the consultation responses clarified the policy options and affected the final decision.

5.3 This evaluation should be used to inform future consultations in the department, and lessons learnt can be disseminated across government.

5.4 The consultation co-ordinator should collate information regarding how many national consultations the department has carried out and any deviations from the code, with the reasons given for these. This data should be available for the Cabinet Office to collate annually, and will be made available to the public.”

13. There is no evidence that 5.2 has been complied with in respect of the WRS, or generally. The Home Office’s annual report merely reports (other than a comment about the prostitution review) on whether the 12 week period was complied with - a box ticking approach. If there is no consultation then the 12 week rule is not broken, a good example of the perverse effects of targets.

14. Home Office consultation also at times follows the practice of asking loaded questions and not asking real questions. This was exemplified in the July 2005 consultation document, *Selective Admission: Making Migration Work for Britain*. In its formal response to the consultation document the ALP commented on the consultation process as follows -

“The consultation document sets out the proposals in a clear and helpful way, although a more honest description of the inherent difficulties of seeking to manage migration in a dynamic open economy that is a member of the European Union would have been helpful. The questions for consultation may be a helpful attempt to assist the consultation process and no doubt will make it easier to collate responses. However, some of the questions seem pointless (“Could the proposals to develop a new points-based system affect some groups of migrants more than others” hardly lends itself to a “no” answer). The consultation pointedly does not ask some rather obvious questions –

- Will the new system work more effectively than present arrangements?
- Will the new arrangements be successful in stopping illegal working?
- Is enforcement action by the authorities properly targeted?

- Does the fact that other EU countries have less stringent arrangements for issuing passports jeopardise UK policy?
- Do you believe it is possible for employers to detect forged passports and work permits?
- Is there sufficient joined-up thinking between government polices on migration and the informal economy and the targets that HMRC and Immigration Service staff have to work to?

The consultation process would be enhanced through arranging a number of expert seminars to discuss the proposals. There is also a need to secure the views of migrant workers through an appropriate research survey, otherwise they will be left out of the consultation process.”

### **Effect of poor consultation**

15. The Home Office has been described as dysfunctional (by a previous Home Secretary) and IND has been described, among other things, as “not fit purpose” by another previous Home Secretary. This accords with the ALP experience of attempting to have meaningful discussions on the important issue of the WRS and on immigration matters generally. The approach to consultation contributes to these problems. Stakeholders have knowledge and practical experience which can considerably improve the decision taking process if it was used effectively. The Home Office appears not fully to recognise this.

## **Appendix 2**

# **Developing business representation in newly regulated sectors**

**Mark Boleat, 13 July 2006**

### **Introduction**

This paper aims to –

- Establish the need to secure effective business representation in sectors being subject to specific legislative, regulatory or policy measures.
- Explain how that need can be met such as to maximize the effectiveness of the policy-making process.

The paper draws heavily on one case study – the regulation of labour providers under the Gangmasters (Licensing) Act 2004 (described in Appendix 1), although the analysis is generally applicable.

### **Trade associations generally**

Trade associations are organisations set up by companies within a sector to provide them with two basic services – representation and the provision of information and advice. Some provide other services such as training and conferences, but these are not basic trade association services. Some associations also run self-regulatory schemes, generally with great difficulty. There are inherent tensions in representing a sector and regulating it. It is particularly difficult for a new trade association to take on a regulatory role.

Some general features of the nature and operation of trade associations should be noted –

- They comprise companies that compete with each other, and which therefore may be unwilling to co-operate.
- They suffer from the free-rider principle, that is companies benefit to a large extent (and almost totally in respect of representation) whether they pay to join or not.
- Their objectives are long term and not easily quantifiable; it is therefore difficult to establish whether an association is being effective and difficult to persuade businesses to join.

Trade associations tend to be strongest in sectors subject to specific and extensive regulation. There is a clear need for representation, generally to a specific regulator or government department, and companies need sector-specific information about the measures that apply to them.

It can be observed that trade associations are particularly strong in financial services, communications and utilities, all subject to specific regulation.

### **The role of trade associations in policy-making**

Some officials may see trade associations as “the enemy”, seeking to frustrate the wishes of government. In practice, good trade associations substantially aid the policy-making process –

- They can provide the views of the industry through a single source, rather than many individual companies. Good associations are also expert on public policy and

therefore present views in a way that is relevant to the process and do not, for example, demand things that cannot be done.

- They can be an informal sounding board at the early stages of the policy-making process. This should help ensure that the industry, the issues, and the implications of possible policy measures are properly understood.
- Staff of an association should be expert on their sector and the relevant regulation and legislation, and therefore can be a useful resource to policy makers. They can provide factual information when needed and can usefully provide a check, particularly to help ensure that draft legislation and regulations are not faulty and will achieve their desired purpose.
- They can help “sell” policies and regulations to a sector if they have been consulted and involved.
- They can be a counterweight to other lobbying bodies, such as environmental groups and trades unions.
- They can be a channel of communication between an industry and the government. This can include using the association as a cover for an official view that could not otherwise be given. (Wording such the following can be useful: “The association believes that the government’s current intention is to introduce the new regulations from.....)

However, trade associations can bring these benefits to the process only if they are effective. This requires that –

- They effectively represent the interests of their members.
- They have staff who can add value through their own knowledge of the sector and of regulation.

In turn, these require that their membership covers a reasonable proportion of their sector and that they are adequately funded.

### **The specific problem in newly regulated sectors**

For reasons that have already been explained trade associations tend to be strongest in sectors subject to specific regulation. They tend to be weak or non-existent in sectors which are being newly subject to regulation. This is largely because there has been no need for a representative voice or for specific information and advice services. The sector may also have problems that have precipitated the need for regulation that in turn may make it difficult for a trade association to be effective. Those companies engaging in malpractice which leads to regulation tend to be unwilling to support a trade association, and may actively obstruct any association.

However, a sector being subject to regulation for the first time needs an effective representative voice, and government also needs a strong association for the reasons set out earlier. In short, there is likely to be a need for a strong trade association, but one will not exist.

In such circumstances efforts will be made by some of the market participants to establish a new association or to strengthen an existing one. Such attempts generally fail for one or more of several reasons –

- In the case of an existing association the staff are not capable of doing what is now required.

- Most businesses will not understand the need for a strong association, and therefore will not be prepared to finance it, until it is too late.
- The distrust between competing institutions cannot quickly be overcome in such a way as to allow the association to have effective leadership from its members.
- There is lack of understanding about how to establish a trade association even if there is a willingness to do so.

There generally needs to be a kick-start which requires significant funding – often more than is likely to be available from potential members in the short term. The funding is likely to be a minimum of £50,000 a year and more realistically £100,000 a year. This sum has to be sufficient to allow the employment of a top quality director part time and the establishment of a website (all the infrastructure a modern trade association needs). This funding can come from one of five sources –

- A group of large companies in the sector. This is possible only where the sector has a group of relatively large companies willing and able to provide the necessary finance. This model was followed in the establishment of the Council of Property Search Organisations – an association was needed because of the introduction of home information packs.
- A large customer or supplier who recognises the need for a strong trade association and for whom it is worthwhile to provide the necessary financial support. This model was followed in the establishment of the Organisation for Adult Trades and Services where the financial support came from a significant customer – the Festival of Erotica. That association eventually collapsed because the sponsor wanted too much control. The model was used more successfully in the establishment of the Association of Independent Financial Advisers, where the financial support came from the life offices that obtain business from financial advisers.
- An individual willing to run the association and take the financial risk in so doing in the hope that the association will become viable in the longer term. This model has been used in the establishment of the Association of Labour Providers. Annex 1 gives details of this Association.
- Regulators. In some sectors (financial services and communications for example) regulators do this to some extent by funding practitioner panels. Where a new regulatory regime is being established funding may be available to support a new association.
- Other public bodies. Various domestic and international bodies have funds that in particular circumstances can be used to support the establishment of trade associations. Examples include –
  - The London Development Agency, the European Union and the Learning and Skills Council have helped to fund the establishment of the Ethnic Beauty and Hair Association.
  - The European Commission has funded the establishment of an association for the Earth Observation service sector.
  - The United Nations Development Program has funded the establishment of the Somali Money Transmitters Association (which notwithstanding its name is a British organisation).

Annex 2 gives more information on these examples.

As a general observation, the availability of money to fund a new association and the need for such an association are not strongly related.

## **Management and administration of a new association**

There is now a fairly well trodden route that can be followed to establish a new association.

The first stage is to adopt a standard, four page, constitution for a new trade association that has worked effectively for a number of associations (including the Council of Mortgage Lenders, the Association of Independent Financial Advisers, the Organisation of Adult Trades and Services, the Council of Property Search Organisations, the Association of Labour Providers and the Ethnic Beauty and Hair Association). The basic features are –

- The association is unincorporated.
- Management is in the hands of an executive committee to which everything is delegated.
- The executive committee has power to appoint a director.
- Transitional provisions set out the names of the initial executive committee (to serve until the first AGM) and the initial subscription scale.

This constitution can then be used as the basis for a modest “prospectus” which should be sent to all companies in the sector inviting them to join.

The modern association can be run entirely on a virtual basis. There is no need for a physical office or administrative staff. The necessary infrastructure comprises –

- A virtual office giving an address and telephone answering service (available for £50 a month from the London Center).
- A website as the means of communication to members and the outside world (set up cost about £2,000 and perhaps £2,000 a year to manage).
- The use of e-mail as a means of communication with members.
- Borrowing or hiring meeting rooms as necessary.

Where a new association is of significant size then it may be necessary to have administrative support. This can be provided by another trade association, preferably in a related field, or by a specialist association management company such as Kingston Smith Association Management or Associa. However, this is likely to cost a minimum of £15,000 a year.

Adopting this approach means that the Association has no fixed costs and no commitments. The need for trade association services will change as a new regulatory regime is put in place. It might be appropriate after a few years for the new association to be absorbed into a larger one, to merge with another, to expand rapidly or even to close down. This approach allows such developments to take place at minimal cost.

## **Leadership of the Association**

A new association, particularly one that has to deal with a major new regulatory regime, needs exceptional leadership, which has the necessary experience and standing to “hit the ground running”. This can be provided only by an experienced trade association professional or someone else with the necessary public affairs experience. Generally, the position can be part time – one or two days a week. A rate of between £500 and £1,000 a day will need to be paid, depending on circumstances.

Such a person can be the director with the chairman coming from a member – but only if there is such a person who can command the respect of the whole industry and who will be an effective chairman. The director role can be combined with that of chairman, particularly where there is no ideal candidate from within the industry. The association is therefore run by an executive chairman. This model has worked well in the Council of Property Search Organisations (chaired by Fiona Hoyle, former Senior Legal Adviser to the Council of Mortgage Lenders) and the Association of Labour Providers (chaired by Mark Boleat, former Director General of the Association of British Insurers).

There is a third model, an independent chairman combined with a professional director. This can work only if the two people get on and the necessary funding is available – although there may be some people willing to do the chairmanship on a pro bono basis.

### **How government can help a newly established association**

The first question for government or a regulator is whether there is a need for a strong trade association to help ensure that public policy objectives are achieved. This is a judgment call. If there is a need the next question is how can the association be established or strengthened. This requires some knowledge of the industry and the people in it. The necessary work can be done in-house or through a modest consultancy exercise (£5,000 - £10,000 depending on the sector).

Based on this exercise officials or ministers can adopt one of four courses of action –

- Persuade an existing association in a related field to take on the task.
- Where the industry is relatively concentrated, persuade the chief executives of the large companies of the importance of having a strong trade association and ask them to commit the necessary resources.
- Where there are significant customers or suppliers persuade them to provide funding.
- If none of the above is feasible provide the necessary start-up funding on the basis of a scoping report (which should be an extended version of the report mentioned in the previous paragraph).

Officials may also be able to help by pointing the industry towards suitable consultants or potential chairmen where an external chairman is necessary.

When an association has been established there is some concrete help that can be given to help “sell” the association to its actual and potential membership and to convince the executive committee members that they are involved in an important organisation –

- Making available meeting rooms free of charge.
- Officials offering to attend part of executive committee meetings to brief the committee on developments and discuss issues.
- The Minister offering to meet the Association or speak at any meeting it may organise.
- Appropriate mentions of the association in speeches and policy documents.
- Providing as much help as possible on a day-to-day basis to the director of the association.
- Ensuring that other government departments and stakeholders are aware of the new association and that it can be of help to them.

There is a chicken and egg problem here. This sort of help can be given only if the association is effective – but such help may well be essential in order to make the association effective. Judgment is needed here.

**Concluding comments**

The good trade association makes a vital contribution to the policy-making process and should be seen by officials as a valuable resource. They are particularly needed in areas being subject to major policy or regulatory actions, but in such areas any trade associations are likely to be weak and ineffective.

A good association does not materialise because there is a need for it, even if the industry wants it and is willing to pay for it. There is a need for leadership and a role for government at least acting as a catalyst and possibly taking a more interventionist role. The benefits to the policy-making process should be substantial and the costs modest.

## **Annex 1**

### **Case study – Association of Labour Providers**

This case study previously explains how, with the support of Defra, the Association of Labour Providers developed from nothing in early 2004 to a fully effective trade association.

#### **The need for an association**

For some years there has been extensive malpractice in the provision of contract labour to the food industry. Beginning in 2003 attempts were made to deal with the issue through an industry coalition under the auspices of the Ethical Trading Initiative, and driven to a large extent by the trades unions. The chosen policy measures were a binding code of practice, enforced through the supermarkets, and pressure for legislation through a private member's bill. In fact, the Morecambe Bay tragedy led to the private member's bill becoming law. The labour providers, at whom such measures were aimed, were scarcely involved in the process, just one labour provider participating in the policy debate.

An existing association should have represented the interests of labour providers. The Recruitment and Employment Confederation (REC) is a large national trade association whose members include labour providers. However, the REC chose to ignore the issue, partly because it did not want to be seen to be involved in the "gangmaster" issue and partly because it failed to understand the importance of the issue to its members. The REC was invited to get involved by a number of parties but declined – until very late in the day and then only half-heartedly.

#### **The establishment of the Association**

Defra was conscious of the need to involve the industry in the policy debate and took the initiative by arranging meetings of labour providers in East Anglia. This was done with the assistance of Dr Jennifer Frances, the leading academic on the subject. Dr Frances, in turn, took the initiative to invite Mark Boleat, a trade association consultant, to attend a meeting of labour providers in Cambridge in January 2004 and to outline the steps that would have to be taken to establish a trade association. Mark Boleat saw the need and potential for a trade association and offered to establish one and run it for a limited period as executive chairman, working at risk.

The Association was duly established by 18 companies. It adopted the standard constitution for a new association, acquired an accommodation address and telephone answering service and established a website. It was up and running and reasonably effective within two weeks of the decision being made to establish it. However, the 18 companies contributed under £10,000 in subscription income and no financial support was forthcoming from the supply chain or Defra. The Association needed to increase membership rapidly in order to become viable. It failed to do this, partly because potential members did not understand the need for an association, partly because no resources were available for marketing and partly because of concern about the activities of some of the members of the initial Executive Committee.

However, the need for an association was growing as the industry coalition was finalising the code of practice and, as a result of the Morecambe Bay tragedy, the government's decision to adopt the private member's bill to regulate labour providers. The Association

quickly and effectively became involved in the policy debate by drawing on the practical experience of the members, the knowledge of Dr Frances (who served as an unpaid adviser to the Executive Committee) and the trade association experience of the executive chairman.

### **Support for the Association**

Defra gave as much practical support as possible –

- Meeting rooms were made available free of charge for Executive Committee meetings.
- Defra officials attended meetings of the Executive Committee and freely joined in the discussion on the major issues.
- Defra ministers made themselves available to meet the Chairman and the Executive Committee.
- Defra officials readily responded to any requests for information and advice from the Association.
- Defra effectively promoted the association to other government departments and stakeholders.

The Association failed to attract the critical mass of members needed to make it viable, raising just £17,000 of subscription income in the first year and recording a loss of over £22,000. It was kept afloat by the Chairman working on a pro bono basis.

The fortunes of the Association improved early in 2005 due to further Defra support and also support from the supply chain. Defra was able to use funding available to implement the Gangmasters (Licensing) Act to give financial support to the Association for two projects –

- A greatly enhanced website including a member only section.
- A membership campaign run by a consultancy.

By this stage the Association had published a useful series of briefs for its members on topical subjects and also provided a limited range of services such as insurance and a stakeholder pension scheme. It was seen to be an effective and efficient association.

At this time supply chain support also materialised. Some of the major supermarket groups strongly encouraged their suppliers to use only labour providers that were members of the Association.

The combination of these factors led to the number of members increasing from 46 at the beginning of 2005 to 112 by the end of June, with subscription income running at a little under £50,000. The number increased to 135 by the end of the year. There was some fall-off in membership when subscriptions were renewed in early 2006, but also some new members joined. In July 2006 the Association had 117 members.

### **Sustainability**

The Association has never been financially viable. At the end of 2005 it had an accumulated deficit of nearly £30,000. There is little prospect of this deficit being paid off. The Chairman intends to retire in the final quarter of 2006. The Association has achieved a great deal and if it closes down it can be counted a success. However, there is still a need for an association, in particular to provide an information and advice service. The Association is looking at two possible options –

- Another consultant taking on the role.
- Another trade association taking the ALP under its wing.

Some external financial support is ideally needed combined with a partial write off of the accumulated deficit.

### **Some lessons**

The ALP was established and has been effective because of a combination of factors each of which was essential –

- The clear need for an association because of the imposition of a new regulatory regime and the failure of the existing association, the Recruitment and Employment Confederation, to be involved.
- Support by Defra – in getting labour providers together and providing concrete support to the Association.
- A group of labour providers who saw the need for the Association and who were willing to become involved in the Executive Committee.
- The role of Dr Jennifer Frances in helping to get labour providers together, providing expert advice on the issues and involving Mark Boleat.
- Mark Boleat for providing the necessary trade association skills and also for bearing the financial risk.
- The supermarkets for encouraging labour providers to join.

What could have been done better? Had the Association been established with start-up funding of £50,000 it would have been able to become fully effective more rapidly. Resources could have been devoted to a marketing campaign and the development of services which would have led to increased membership at an earlier stage.

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For further information about the Association see the website  
[www.labourproviders.org.uk](http://www.labourproviders.org.uk)

## Annex 2

### Newly established associations

This annex gives details of new associations that have been established, how they have been funded and the role of the author of this paper as a consultant.

Association	Year	Need	External funding	Consultancy support	Current status
Association of Independent Financial Advisers	1997	To replace previous unsatisfactory arrangements	Over £400,000 from life companies	Advice in establishing	Successful. Large association with City offices
Accident Management Association	2001	To represent the industry to insurance companies	None	Advice in establishing	Successful. Run as a virtual association with budget of £100,000
Organisation of Adult Trades and Services	2002	To improve standards and represent an industry in a shady area	From major exhibition organiser	Advice in establishing	Superseded by another. Funder wanted too much control
Council of Property Search Organisations	2003	To deal with government initiative on home information packs	None	Advice in establishing and Executive Chairman for a year	Successful. Run as virtual association by an executive chairman with budget of £200,000
Employment Related Services Association	2005	To provide a single voice to deal with the main customer – the government	None	Advice in establishing	Status uncertain
Association of Labour Providers	2004	To deal with proposed regulation of labour providers	Chairman	Advice in establishing and Executive Chairman	Successful but not sustainable with out external finance
Earth Observation Association	2005	European Commission decided it should exist	European Commission	Part of a group seeking EU contract	Status uncertain
Ethnic Beauty and Hair Association	2006	Represents a specialist sector	London Development Agency/EU/ Learning & Skills Council	Advice in establishing	Slow progress; due to launch in October 2006
Somali Money Transmitters Association	2006	To help deal with the need for regulation in a specialist sector	Over \$1m from UN development Program	Advice of establishing and support on representation	Established with offices in London and Dubai.

