



Law Society  
of Scotland

# Consultation Response

## Employment Status Consultation

June 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the Department for Business, Energy & Industrial Strategy consultation on Employment Status. The sub-committee has the following comments to put forward for consideration.

## General comments

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Before exploring many of the very specific questions, we would take the opportunity to address an important preliminary question – that is whether it remains appropriate to have a tripartite classification which distinguishes between employees, workers and the self-employed.

The distinction between employees and workers is increasingly difficult to draw and it is the attempt to make such a distinction which lies at the root of a great deal of the complexity and uncertainty in this area of employment law. We would argue that greater clarity and certainty could be achieved by combining these categories of employees and workers and returning to a bipartite system of classification. In other words, the current group known as 'workers' would be subsumed within the category of employees and the dividing line would be between a single, inclusive category of employees and the self-employed.

We recognise that a binary distinction could have some impact on flexibility but we consider that this could be satisfactorily addressed through the requirement of continuity, where appropriate. Assessment of any impact on flexibility should also be balanced against the great benefits of simplicity and certainty which we think a binary system would bring.

Our response to the consultation questions should be read in the context of this proposal to remove the category of 'workers'.

We are only responding to the employment rights element of this consultation, and will not be responding on the tax implications.

## Consultation questions

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### Question 1

**Do you agree that the points discussed in this chapter are the main issues with the current employment status system?**

Yes                       No                       Not sure

**Are there other issues that should be taken into account?**

Yes                       No                       Not sure

### Comments:

In answering this question, and several subsequent questions in this consultation, we have selected the option 'Not sure'. That reflects our concern about the basic premise on which the consultation appears to proceed, as discussed under our general comments, above.

If, as appears to be the case, it has already been accepted that a tripartite classification should be retained, then, we agree that the points being discussed are the main issues. We are not, however, convinced that a tripartite classification should be retained and we would prefer that structural discussion to take place first before moving on to the very detailed questions which have been included in this consultation.

### Question 2 (Chapter 5, page 22 in discussion document)

**Would codification of the main principles – discussed in chapter 3 – strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation?**

Yes                       No                       Not sure

### Please explain why/why not:

The idea of codification of the main principles might be thought to be, at least superficially, attractive. It has long been recognised that the uncertainty around employment status can be a problem for both businesses and individual workers, who may be uncertain as to their respective obligations and rights. There is, however, a significant danger in moving towards codification and it should be recognised that the interests of businesses and workers in this respect may be very different. The interests of employer and worker are different in even the best businesses but that difference is particularly problematic in the context of what might be termed 'unscrupulous employers'. It is therefore difficult to answer this question – and indeed

many others throughout this consultation - without exploring in more detail the varying interests of each group.

Recent case law gives clear examples of situations where businesses sought 'certainty' through carefully constructed contracts and business models.<sup>1</sup> The ability of the courts to disrupt this certainty has, however, been key to the ability of the workers concerned to secure appropriate employment protection. In other words, focusing too strongly on codification and certainty may be harmful to the interests of the workers. If certainty is prioritised through codification, there is a danger that this may weaken employment protection.

If it is decided that there should be codification, in our opinion it should be at a very high level and seek to enshrine broad principles rather than detailed factors.

### **Question 3 (Chapter 5 page 23 in discussion document)**

**What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – full codification of the case law, or an alternative way?**

#### **i) individuals, please state:**

As set out in Question 2, above, it is less clear that clarity and transparency are the most important considerations for individuals. Being brought within the scope of employment protection is likely to be of greater benefit to individuals than simply clarity and transparency.

#### **ii) businesses, please state:**

For businesses, clarity and transparency have very obvious benefits and greater certainty is likely to be achieved through a higher level of codification.

### **Question 4 (Chapter 5 page 23 in discussion document)**

**Is codification relevant for both rights and/or tax?**

Yes                       No                       Not sure

<sup>1</sup> For example *Autoclenz Ltd v Belcher* [2011] UKSC 41, *Uber v Aslam* UKEAT/56/17, and *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51

### Comments:

As indicated above, we are answering only questions related to employment rights.

### Question 5 (Chapter 5 page 23 in discussion document)

**Should the key factors in the irreducible minimum be the main principles codified into primary legislation?**

Yes       No       Not sure

### Comments:

In principle, yes, although subject to the concerns we have expressed above about codification.

Case law on employment status has been developing in a very ad hoc manner over more than a century, with particular focus on developments since mid-20th century. It is clear in several decisions that there is a strong contextual and purposive approach and decisions, either implicitly or explicitly, may be influenced by changing policy. The result is a line of precedent which is not always entirely clear or consistent. If there is to be statutory codification, it would be appropriate to take the opportunity to devise a set of high level principles. These would no doubt draw to a significant extent on principles as they have developed through the jurisprudence but it should not be a simple codification of existing case-based factors.

### Question 6 (Chapter 5 page 24 in discussion document)

**What does mutuality of obligation mean in the modern labour market?**

#### Please state:

In answering this question, we would make two points; the first about the concept of mutuality as it has developed through case law and the second about the 'modern labour market'.

#### Mutuality of obligation

Before attempting to identify what mutuality of obligation might mean in the 'modern labour market' we think it would be important to clarify precisely what is meant by mutuality of obligation in the context of employment status. It appears from case law that mutuality of obligation can be used in different ways. In a very broad sense, mutuality of obligation – the 'wage/work' bargain of – can be regarded as little more than the basic obligation necessary to constitute a contract. It is sometimes, however, used in a much narrower

sense to reflect some kind of on-going obligation between individual assignments – the ‘umbrella contract’ of for example, *Byrne Bros (Formwork) Ltd v Baird*.<sup>2</sup>

It appears that the principle of mutuality of obligation is sometimes used to deny employment status where it would be better to recognise employment status and then consider the second question of whether that status is followed by the required element of continuity. We agree that mutuality of obligation is an important principle but much greater clarity and certainty could be attained by focusing on mutuality during a particular engagement or assignment, leaving the question of whether there is any ongoing or overarching obligation to the rules of continuity.

### Modern labour market

It may be misleading to focus too much on the ‘modern labour market’ as something which is fundamentally new or different. The gig economy, zero-hour contracts and flexible working are some of the many concepts which have been highlighted as characterising this modern labour market but, while the particular business models may have changed, there is clear continuity with, for example, casual workers of the past. This is a point we will make repeatedly throughout this response.

If the ‘modern labour market’ is taken to refer to the ‘on demand’ employment model and a highly insecure workforce, it is essential to recognise mutuality of obligation in practice and not simply in a legal, contractual sense. Often it will be precisely those workers who apparently have little or no entitlement to on-going work who are, in practice, most *obliged* to provide good service.

### Question 7 (Chapter 5 page 24 in discussion document)

#### Should mutuality of obligation still be relevant to determine an employee’s entitlement to full employment rights?

Yes                       No                       Not sure

#### Comments:

In short we agree that mutuality of obligation should remain relevant but subject to the points we have made in Question 6, above. In particular, we are in favour of status and continuity being treated clearly as two distinct questions. Separation of these elements would enhance the certainty and clarity of status while retaining appropriate flexibility through the use of continuity.

<sup>2</sup> *Byrne Bros (Formwork) Ltd v Baird* [2002] I.C.R. 667

### Question 8 (Chapter 5 page 24 in discussion document)

**If so, how could the concept of mutuality of obligation be set out in legislation?**

**Please state:**

Our view is that this is a question for further consultation at a later stage. Until there is a much clearer framework, there is little point – and indeed it may be misleading – to move on to matters of detailed implementation.

### Question 9 (Chapter 5 page 25 in discussion document)

**What does personal service mean in the modern labour market?**

**Please state:**

As set out in the answer to Question 6, above, we think it is misleading to focus too much on the idea of the ‘modern labour market’ as something fundamentally different to the labour market of the past. This is a point which has emerged, and continues to emerge, in decisions such as *Uber*, *Pimlico Plumbers* and others.<sup>3</sup> Particular methods and business models may change but the underlying relationship of employer/business and worker/service provider is strikingly similar.

The essence of this principle of personal service is fairly clear – that an individual is required personally to provide a service. As evidenced through more than a century of case law, it is capable of being understood and applied even where the specific context in which the service is performed changes.

### Question 10 (Chapter 5 page 25 in discussion document)

**Should personal service still be relevant to determine an employee’s entitlement to full employment rights?**

Yes       No       Not sure

**Comments:**

Personal service remains central to the concept of employment but it is important to learn from case law and to recognise the dangers inherent in focusing on ‘personal service’ to the extent that even a very

<sup>3</sup> *Uber v Aslam* UKEAT/56/17, and *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51

limited possibility of substitution can prevent attribution of employment status.<sup>4</sup> A more nuanced approach (as in, for example *Macfarlane v Glasgow City Council*),<sup>5</sup> which acknowledges the interaction between control and substitution, would be preferable.

### **Question 11 (Chapter 5 page 25 in discussion document)**

**If so, how could the concept of personal service be set out in legislation?**

**Please state:**

As discussed above in relation to Question 8, our view is that this is a question for a later stage. Until there is a much clearer framework, there is little point – and indeed it may be misleading – to move on to matters of detailed implementation.

### **Question 12 (Chapter 5 page 25 in discussion document)**

**What does control mean in the modern labour market?**

**Please state:**

As discussed in Question 6 above, too much focus on the ‘modern labour market’ as opposed to previous labour markets may be misleading. It is clear from case law from the late 19th century<sup>6</sup> through to recent decisions that ‘control’ is relatively easy to identify although difficult to define. Control is a fluid concept and it is important to recognise that it can manifest itself in different ways in different environments.

### **Question 13 (Chapter 5 page 25 in discussion document)**

**Should control still be relevant to determine an employee’s entitlement to full employment rights?**

Yes       No       Not sure

<sup>4</sup> For example, *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497 and *Express & Echo Publications Ltd v Tanton* [1999] I.C.R. 693

<sup>5</sup> *Macfarlane v Glasgow City Council* [2001] I.R.L.R. 7

<sup>6</sup> For example, *Yewens v Noakes* (1880) 6 Q.B.D. 530



**Comments:**

Control, in some form, remains one of the key distinguishing factors between employment and self-employment. It does remain relevant but the concept needs to be sufficiently flexible to incorporate and acknowledge a wide range of forms of control.

**Question 14 (Chapter 5 page 25 in discussion document)**

**If so, how can the concept of control be set out in legislation?**

**Please state:**

As above, our view is that this is a question for a later stage. Until there is a much clearer framework, there is little point – and indeed it may be misleading – to move on to matters of detailed implementation.

**Question 15 (Chapter 5 page 26 in discussion document)**

**Should financial risk be included in legislation when determining if someone is an employee?**

Yes       No       Not sure

**Please explain why/why not:**

Financial risk – or the economic reality approach – has been a factor in much of the case law concerning employment status and it remains a relevant consideration.

**Question 16 (Chapter 5 page 26 in discussion document)**

**Should ‘part and parcel’ or ‘integral part’ of the business be included in legislation when determining if someone is an employee?**

Yes       No       Not sure

**Comments:**

As with the other factors specified in previous questions, this may be a relevant factor although by no means determinative.

### Question 17 (Chapter 5 page 26 in discussion document)

**Should the provision of equipment be included in legislation when determining if someone is an employee?**

Yes       No       Not sure

#### Comments:

As with the other factors specified in previous questions, this may be a relevant factor although by no means determinative.

### Question 18 (Chapter 5 page 26 in discussion document)

**Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?**

Yes       No       Not sure

#### Comments:

It is much less clear that 'intention' should be included as a factor due to the likely imbalance of power in contracts of employment. Where parties are of equal bargaining power – which is likely to be the case in a small minority of situations – it may be a relevant factor.

### Question 19 (Chapter 5 page 26 in discussion document)

**Are there any other factors that should be included in primary legislation when determining if someone is an employee?**

Yes       No       Not sure

#### Comments:

We have not identified any other factors.

**And what are the benefits or risks of doing so?**

**Please state:**

Not applicable.

### Question 20 (Chapter 5 page 27 in discussion document)

**If government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?**

**i) be required to provide further detail on top of the main principles:**

Yes       No       Not sure

#### **Comments:**

If the aim of statutory intervention in this area of employment status is to clarify and simplify the law, it seems to us that any need for further secondary legislation would suggest the aim of the primary legislation had not been achieved.

**ii) provide sufficient flexibility to adapt to future changes in working practices**

Yes       No       Not sure

#### **Comments:**

It is very difficult to give a single answer to this question as it is far from clear that the interests of businesses/employers are the same as the interests of employees/workers in terms of flexibility. In any case, as in our answer to part i), we would not be in favour of additional secondary legislation.

### Question 21 (Chapter 5 page 27 in discussion document)

**Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?**

Yes       No       Not sure

#### **Comments:**

As explained in our opening comments, we are not convinced of the benefits of the proposed approach.

## Question 22 (Chapter 6 page 29 in discussion document)

**Should a statutory employment status test use objective criteria rather than the existing tests?**

Yes       No       Not sure

### Comments:

If it is decided to proceed with some form of statutory principles, our preference would be to clarify and amend the principles/factors we already have from case law rather than introducing new objective criteria.

We would add further that the idea of 'objective criteria' suggests that 'employment status' is something neutral which can simply be identified. What decades of cases demonstrate is the extent to which individual decisions can be strongly influenced by context.<sup>7</sup>

**What objective criteria could be suitable for this type of test?**

**Please state:**

Not applicable.

## Question 23 (Chapter 6 page 30 in discussion document)

**What is your experience of other tests, such as the Statutory Residence Test (SRT)?  
What works well, and what are their drawbacks?**

**Please state:**

We have limited experience of such tests in practice but are concerned that they would lack sufficient flexibility. We would also note that these other tests generally relate to party/state issues which are quite different to the party/party relations which are central to employment law. We would not be in favour of using them as a model.

<sup>7</sup> *Ferguson v Dawson* [1976] 1 W.L.R. 1213 (strong health and safety motivation) and *Massey v Crown Life Insurance Co* [1978] 1 W.L.R. 676 (tax)

### Question 24 (Chapter 6 page 30 in discussion document)

**How could a new statutory employment status test be structured?**

**Please state:**

We are not in favour of such a test and therefore have no further views on structure.

### Question 25 (Chapter 6 page 31 in discussion document)

**What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?**

**Please state:**

As we stated in response to Question 23 above, we have limited experience of such tests in practice but are concerned that they would lack sufficient flexibility.

### Question 26 (Chapter 6 page 31 in discussion document)

**Should a new employment status test be a less complex version of the current framework?**

Yes       No       Not sure

**Comments:**

As noted above, we are not in favour of such a test.

While we are strongly in favour of a much less complex approach, it is important to consider why the current law relating to employment status has become so complex. Employment status, in the UK framework of statutory employment rights, is not a neutral concept – it is the threshold (together with continuity of employment) required for access to key protective legislation. Its complexity to a large extent reflects changing government policy and conflicting interests between employers and employees.

We are strongly in favour of simplicity but we would prefer to achieve that through a return to a binary distinction, as explained in our general comments, above.

### Question 27 (Chapter 6 page 32 in discussion document)

**Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?**

Yes       No       Not sure

#### **Comments:**

This would be much too simplistic particularly without significant restructuring of the underpinning framework, as indicated in our general comments. The various approaches and ‘tests’ which have emerged from case law over the decades are a reflection of how important employment status is to the operation of statutory employment law.

### Question 28 (Chapter 6 page 32 in discussion document)

**Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?**

Yes       No       Not sure

#### **Please state:**

As explained in our general comments, it is our view that clarity, certainty and simplicity would be better achieved by means of a binary system of classification. If we had such a binary system in place, then we would welcome any additional information, such as an online tool, which might assist in making the law more accessible.

Without addressing the underlying causes of the current complexity, these alternative methods on their own are unlikely to have significant impact.

### Question 29 (Chapter 6 page 33 in discussion document)

**Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?**

Yes       No       Not sure

### Comments:

As explained in our general comments, we are in favour of a binary system for employments status with the dividing line being drawn between employees and the self-employed.

### Question 30 (Chapter 7 page 34 in discussion document)

**Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?**

Yes       No       Not sure

### Comments:

As explained in our general comments, we are not in favour of the retention of an intermediate category. We would much prefer a simpler, binary system for establishing status as either employed or self-employed. Flexibility could still be secured through the use of continuity.

### Question 31 (Chapter 7 page 35 in discussion document)

**Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b) workers?**

Yes       No       Not sure

### Comments:

We agree that it is confusing but we do not agree with the proposed way of tackling this confusion. As previously stated, we would prefer to address the confusion by creating a single category of 'employee' which would subsume the current category of 'limb (b) worker'.

The current confusion is not something which can be addressed by a simple statutory change of words. In itself, the message is not difficult that 'employees' are a higher-protected subset of 'workers'. Arguably the confusion arises not from s 230 itself but from a statutory employment framework which has developed piecemeal over many years reflecting shifting government policies.

### Question 32 (Chapter 7 page 35 in discussion document)

**If so, should the definition of worker be changed to encompass only Limb (b) workers?**

Yes  No  Not sure

#### Comments:

In view of our answer to Question 31 and our general comments, this is not relevant.

### Question 33 (Chapter 7 page 35 in discussion document)

**If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?**

Yes  No  Not sure

#### If yes, please state:

In view of our answer to = Question 31 and our general comments, this is not relevant.

### Question 34 (Chapter 7 page 36 in discussion document)

**Do you agree that the government should set a clearer boundary between the employee and worker statuses?**

Yes  No  Not sure

#### Comments:

In accordance with our general comments and previous answers, we are not in agreement with this proposal but instead would prefer a single boundary between employee and self-employed. In line with this approach, workers would be subsumed within a single category of employees and therefore our answer to many of the following questions will be the same as our answer to the relevant question in the context of employee status.



### Question 35 (Chapter 7 page 36 in discussion document)

If you agree that the boundary between the employee and worker statuses should be made clearer:

i) **Should the criteria to determine worker status be the same as the criteria to determine the employee status, but with a lower threshold or pass mark? If so, how could this be set out in legislation?**

Yes                       No                       Not sure

**Please state:**

Not applicable.

ii) **Should the criteria to determine worker status be a selected number of the criteria that is used to determine employee status (i.e. a subset of the employee criteria)? If so, how could this be set out in legislation?**

Yes                       No                       Not sure

**Please state:**

Not applicable.

iii) **Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation?**

Yes                       No                       Not sure

**Please state:**

Not applicable.

### Question 36 (Chapter 7 page 36 in discussion document)

**What might the consequences of these approaches be?**

**Please state:**

Not applicable.

**Question 37 (Chapter 7 page 37 in discussion document)**

**What does mutuality of obligation mean in the modern labour market for a worker?**

**Please state:**

We do not support the distinction between employee and worker and our answer to this question is therefore the same as our answer to Question 6, above.

**Question 38 (Chapter 7 page 37 in discussion document)**

**Should mutuality of obligation still be relevant to determine worker status?**

Yes       No       Not sure

**Please explain why/why not:**

As explained in our general comments, we are in favour of workers being subsumed within the category of employees. Our answer to this question is therefore the same as our answer to Question 7.

**Question 39 (Chapter 7 page 37 in discussion document)**

**If so, how can the concept of mutuality of obligation be set out in legislation?**

**Please state:**

Please see our answer to Question 8, above.

**Question 40 (Chapter 7 page 37 in discussion document)**

**What does personal service mean in the modern labour market for a worker?**

**Please state:**

See answer to Question 9, above.

### Question 41 (Chapter 7 page 37 in discussion document)

**Should personal service still be a factor to determine worker status?**

Yes       No       Not sure

**Please explain why/why not:**

As in Question 10 above, personal service should still be a factor to determine employee status. We are not, however, in favour of retention of worker status.

### Question 42 (Chapter 7 page 37 in discussion document)

**Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?**

Yes       No       Not sure

**Please explain:**

As explained in our general comments, we do not support the continued distinction between employees and workers.

### Question 43 (Chapter 7 page 38 in discussion document)

**Should we consider clarifying in legislation what personal service encompasses?**

Yes       No       Not sure

**Please explain:**

As with many of these questions, there are likely to be different answers from the business and the individual perspective. While greater definition may benefit the business, it also creates greater scope for the contract to be constructed in such a way as to exclude the individual.

**Question 44 (Chapter 7 page 38 in discussion document)**

**Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?**

Yes       No       Not sure

**Please state:**

**Question 45 (Chapter 7 page 39 in discussion document)**

**Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?**

Yes       No       Not sure

**Please explain:**

We are not in favour of retention of the status of worker and therefore would not agree with this conclusion.

**Question 46 (Chapter 7 page 39 in discussion document)**

**What does control mean in the modern labour market for a worker?**

**Please state:**

As we do not favour the distinction between employee and worker, our answer to this question is the same as our answer to Question 12 in the context of employment.

**Question 47 (Chapter 7 page 39 in discussion document)**

**Should control still be relevant to determine worker status?**

Yes       No       Not sure

**Please explain:**

Control should still be relevant to determine employee status. We are not in favour of retention of worker status.

**Question 48 (Chapter 7 page 39 in discussion document)**

**If so, how can the concept of control be set out in legislation?**

**Please state:**

Until the general framework of any statutory reform is agreed, we do not think it is appropriate or helpful to move to detailed definitions.

**Question 49 (Chapter 7 page 39 in discussion document)**

**Do you consider that any factors, other than those listed above, for 'in business in their own account' should be used for determining worker status?**

Yes       No       Not sure

**Please state:**

We are not in favour of retention of worker status and have no specific comment in response to this question.

**Question 50 (Chapter 7 page 39 in discussion document)**

**Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?**

Yes       No       Not sure

**Please state:**

We do not consider it is necessary to define this concept in legislation.

### Question 51 (Chapter 7 page 39 in discussion document)

**Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a worker?**

Yes       No       Not sure

**Please state:**

We have no further comment in relation to this question.

### Question 52 (Chapter 7 page 40 in discussion document)

**The review has suggested there would be a benefit to renaming the Limb (b) worker category to 'dependent contractor'? Do you agree? Why / Why not?**

Yes       No       Not sure

**Please explain why/why not:**

We are not in favour of retaining the worker category. If it is retained, we do not see any benefit in renaming it. A change of name will not address any of the underlying tensions between employer and worker or concerning government employment policy. If anything, a change of name is likely to create new and further confusion.

### Question 53 (Chapter 8 page 43 in discussion document)

**If the emerging case law on working time applied to *all* platform based workers, how might app-based employers adapt their business models as a consequence?**

**Please state:**

Before commenting on this and the subsequent questions we consider that it may not be appropriate to treat all platform based workers in the same way. The decision in the *Uber* case was very specific to taxi drivers.<sup>8</sup> They are part of a group that might include delivery drivers, delivery cyclists and other 'mobile' workers. In addition there will be other workers who are essentially home based such as those providing, for example, occasional translation services or other services where they can be on call or off call but

<sup>8</sup> *Uber v Aslam* UKEAT/56/17

based from home. In the former situation one can see why time spent 'logged on' would potentially be working time whereas in the latter situation it is more difficult to see why time spent at home, not doing the task but logged on would be working time. However restricting our comments to the Uber type situation of mobile workers we would anticipate that employers faced with time spent in the territory with the app switched on would be likely to require workers to accept any assignment offered and indeed may stipulate that within any particular area at any point in time there should only be a set number of workers who are 'logged on'. Employers may restrict the ability of workers to log on in quiet periods. In short it is likely to lead to less flexibility and more control with employers using their knowledge of demand for the services in particular areas and at particular times to control the numbers who log on. That may in itself have benefits in requiring greater control and responsibility by the app provider – but it could lead to a costlier service if demand outstrips supply.

In all of this we have to be alive to the potential for unintended consequences. A measure that might appear on the surface to give workers greater protection may have the result of reducing the ability of workers to earn if the number of shifts they can do is restricted or if the employer operates a smoothing of pay out over the longer time period – so less pay per assignment but guaranteed pay whilst logged on. It may be beneficial to assess how this all operates in practice before legislating.

## **Question 54 (Chapter 8 page 43 in discussion document)**

### **What would the impact be of this on (a) employers and (b) workers?**

#### **a) employers**

Impact on employers could include the following:

- Increased cost unless carefully managed – by controlling logging on rights and pay smoothing
- Need to exert tighter control
- Greater risk of employment status
- Greater certainty of supply
- May benefit more responsible employers by restricting ability of 'cowboys' to operate.

#### **b) workers**

- Reduced flexibility to pick and choose
- Likely to be more consistent work flow
- Tighter controls around what it means to be logged on
- Could strengthen arguments for employment status

- Greater pay certainty – although whether that means more pay depends on the impact on ability to get logged on shifts and whether employers modify pay per assignment to smooth it out over the logged on period
- Greater security and certainty of work although could reduce opportunities to be allowed to log on

### **Question 55 (Chapter 8 page 43 in discussion document)**

#### **How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at periods of low demand?**

They may restrict the number of workers who can log on and operate a smoothing of pay across the period.

### **Question 56 (Chapter 8 page 43 in discussion document)**

#### **Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?**

This links back to the point we made in answer to Question 53 – not all app based workers will be the same. So yes – if tighter legislation is to be put in place here, very careful consideration should be given to what constitutes ‘working’ in a variety of different scenarios – not just the taxi driver scenario.

### **Question 57 (Chapter 8 page 43 in discussion document)**

#### **What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes ‘work’ in an easily accessible way?**

Some practical features and characteristics might include:

- Is the worker constrained in any way by having to be ‘available’ for work
- Does the individual require to be in a particular location when the app is on?
- Is that location somewhere where they would not, but for working, be?
- Is the work subject to peaks and troughs of demand?
- Is the work location specific?
- Can the worker undertake other normal day to day activities while ‘logged on’?
- How critical is an immediate response?



### **Question 58 (Chapter 8 page 43 in discussion document)**

**How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provisions of tools or materials to carry out tasks?**

These are all relevant considerations.

### **Question 59 (Chapter 8 page 43 in discussion document)**

**Do you consider there is a potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?**

We think that is likely to be a matter for individual employers. It may be that employers would choose to use data in that way – since they have an interest in ensuring a consistent supply of workers to provide the service. However it is difficult to see how any mandatory requirement to use or provide such data would work.

### **Question 60 (Chapter 9 page 44 in discussion document)**

**Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?**

Yes       No       Not sure

**Please explain why/why not:**

As the self-employed are by definition not included in the scope of statutory employment rights, there is no need for them to be defined in statute.

### **Question 61 (Chapter 9 page 45 in discussion document)**

**Would it be beneficial for the government to consider the definition of employer in legislation?**

Yes       No       Not sure

**Please explain why/why not:**

**Question 62 (Chapter 10 page 46 in discussion document)**

**If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?**

Yes       No       Not sure

**Please explain:**

We favour a binary classification in employment which would match with that in tax.

**Question 63 (Chapter 10 page 47 in discussion document)**

**Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why / Why not?**

Yes       No       Not sure

**Please explain why/why not:**

As above, we are in favour of a return to a much simpler binary distinction.

**Question 64 (Chapter 10 page 47 in discussion document)**

**If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?**

**Please state:**

As in our general comments, it would be our preference to have a simpler binary classification of status. Flexibility, where appropriate, could be achieved through varying requirements of continuity.

**Do you have any other comments that might aid the consultation process as a whole?**

**Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.**

- As commented in the response to various specific questions, we consider that it is unhelpful to include in one single consultation questions which are foundational to the framework together with questions which relate to methods of implementation. We would prefer to see the latter type of questions forming part of a later consultation process by which stage the underpinning principles would be in place.
- The consultation covers a very wide range of issues, some of which would benefit from separate and more specific consultation – for example questions relating to working time regulation.
- Many of the questions seem to assume that employers and employees/workers have mutual interests and do not adequately reflect their very different bargaining positions in most work relationships.

**For further information, please contact:**

Marina Sinclair-Chin  
Policy Team

Law Society of Scotland

DD: 0131 476 8136

MarinaSinclair-Chin@lawscot.org.uk