The Law Society

Law Society response to the Department for Business, Enterprise and Industrial Strategy consultation on increasing transparency in the labour market

May 2018

Preface

1. The Law Society ('the Society') is the professional body for solicitors in England and Wales, representing over 170,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

Better business reporting

2. Encouraging businesses to be transparent about their employment practices will help to create fair competition and help to level the playing field by ensuring that all businesses are complying with their legal obligations. Reporting obligations will encourage businesses to engage in the wider discussion about the evolving nature of the workforce and how best to increase productivity. It will highlight those organisations who take the development of their workforce seriously at the top level and nudge others to determine, demonstrate and explain their policies[1].

3. There are a variety of groups who have a legitimate interest in knowing how organisations provide services. Potential workers will want to know how the organisation views those they task to provide services and what type of relationship is desired. Those customers who wish to consider how an organisation treats those tasked with providing the service should be able to do so. Company boards, shareholders and potential investors should be interested in employment practices, which are crucial to how the organisation achieves its aims. Being transparent about employment practices also minimises the risk of an expose damaging a company's share price.

4. Being positive about how an organisation treats those who it tasks to provide services can protect and enhance reputation and brand value, including:
   - safeguard and expand customer base;
   - help attract and retain good staff;
   - build and maintain a sustainable and effective relationship with employees and external stakeholders[2];
   - reduce risks to operational continuity resulting from conflict;
   - reduce the risk of litigation;
   - attract institutional investors, including pension funds, who are increasingly taking ethical factors into account in their investment decisions;
   - support company ethics and values.

5. Organisations, just as much as individuals are entitled to information in a clear, relevant and useful format, without reducing their ability to make choices through "framing" which unintentionally misleads the parties as to their options. In setting out concrete requirements for employers to provide information, these risks should be reduced and the parties to a working relationship should remain able to make informed choices regardless of their formal legal status (e.g. worker or employee).

[1] For example, if a certain percentage of an organisation is made up of zero-hour contracts they could explain that the main reason for this is fluctuation in demand.
[2] Research by the CBI in 2016 found that "workplaces that are inclusive - where people can be themselves and give their best work - are more likely to have engaged and productive teams which is vital to long-term business success."

6. A number of voluntary standard marks already exist that highlight organisations who achieve positive employment practices[3]. The highest profile of these are being kite-marked as a Living Wage employer or an Investors in People organisation. Such kite-marking is also used to commit those who commission services to demand certain employment practices from contractors. UNISON's Ethical Care Campaign is currently trying to encourage local councils to adopt an Ethical Care Charter which highlights the link between better standard of care with contractors offering guaranteed hours to carers[4].

7. While industry wide or sectoral collective information measures can assist employers and the workforce, the provision of information on individual contractual rights should also enable individual parties to pursue the provision of information of their own choosing. Basic contract information is only a foundation. An example of the prospective benefits from an approach which allows individuals to raise questions which may help inform a more systemic approach arises from Gender Pay Gap reporting and the #metoo / #timesup campaign, where the accumulation of individual experiences, has informed a debate about practices which have wider relevance. The ICE regulations are only a part of possible measures which enable individuals and groups to access information and question or discuss matters of relevance with their "employer" – whether they relate to training, or testing new ideas about how to work, the impact of Artificial Intelligence or to identify and head off areas which might become ones for dispute.

Who should be required to report?

8. We hope that many organisations, of varying sizes and from different sectors, will see the benefits in making a public statement on employment practices. We also recognise that thought needs to be given as to how to introduce such requirements in a proportionate way. At first we propose mirroring the requirement on who must publish an employment practices statement on the critical aid out for reporting in the Modern Slavery Act. If an organisation meets any of the below criteria they must make the annual statement.
   - is a body corporate, partnership or public body;
   - carries on business, or part of a business, in the UK;
   - supplies goods or services, and
   - has an annual turnover of £6m or more.

9. The Director of Labour Market Enforcement may also, after an inquiry, proscribe that organisations with a smaller turnover who operate in a sector that is of particularly high-risk of labour exploitation have to report.

What should be reported?

10. The purpose of the statement would be to encourage businesses to be transparent about their employment practices. We believe that this will increase competition to drive up standards by incentivising companies to constantly question whether they employ the best working practices. There should be a consultation to gain a consensus on what information can proportionally be made public to achieve this aim.

[4] 10% of local councils have currently signed the Charter.

11. The basic obligations will create a measure which will bring about real transparency, but still give businesses enough flexibility to make the right choices for their business.

12. There has already been some debate what information should be made public. Citizens Advice recommends that large companies should have to publish information on the proportion of their workforce on different types of employment contracts. They believe that this would require businesses to engage in discussions about the overall shape of their workforce and job quality[5].

13. The benefits of reporting will only be realised if statements are easily accessible. The signed statement must be published on an organisation's website with a link in a prominent place on the homepage. If an organisation does not have a website then the statement should be made available on request within ten working days.

14. The statements will evolve over time, to reflect the changes in business practices.

Punishment for those who do not report

15. If an organisation which is required to produce a statement fails to do so the Director of Labour Market Enforcement will be able to request an injunction through the High Court requiring compliance. If the organisation then fails to comply they will be in contempt of court, which is punishable by an unlimited fine.

16. Organisations that are prepared to break one part of labour market law are often also guilty of neglecting other laws. Not complying with the reporting requirement would highlight to enforcement agencies that there is a high risk that the organisation is not taking its employment duties seriously. This is likely to necessitate a direct intervention into the organisation.

17. A failure of an organisation to comply with reporting provisions has the risk of damaging the reputation of the organisation. Customers, investors and elements of civic society may wish to apply pressure if they believe an organisation is operating unethically.

Written Statements

18. Under Section 1 of the Employment Rights Act 1996 an employer is required to provide to the employee a written statement, which does not necessarily have to be a contract, setting out the particulars relating to the main terms and conditions for:
    - pay,
    - hours of work,
    - holiday entitlement,
    - incapacity for work due to sickness or injury - including any provisions for sick pay, and
    - pensions[6].

[5] How can job security exist in the modern world of work? - Citizens Advice, January 2017.
[6] Section 1 Statement

19. S1 of the Act was intended to underpin the basic standards and protection for employees, but the lack of an effective sanction of a breach is a concern.

20. We believe that the right to a written statement should be extended to cover permanent employees with less than one month's service and non-permanent staff. Providing statements enables both parties to clarify their rights and obligations early reducing the prospect of disputes and the risk of employment tribunals being flooded with claims, particularly about status or holiday/working time related rights. The cost of the provision of such statements is negligible.

21. The written statement should be provided on (or before) the individual's start date. As long as a statement is provided in writing, there should be no need for it to be in paper form This would mean that the obligation to provide the statement is not overly-prescriptive.

22. We believe that the prescribe content of the principle statement should be:
    - The businesses name[7];
    - The employee's name, job title or a description of work and start date;
    - How much, and how often, an employee will get paid;
    - Hours of work (and whether employees will have to work Sundays, nights or overtime);
    - Holiday entitlement (and if that includes public holidays);
    - If an employee works in different places, where these will be and what the employer's address is;
    - How long a temporary job is expected to last, or the end date of a fixed-term contract;
    - How much notice the employer and the worker are required to give to terminate the agreement;
    - Sick leave and pay entitlement;
    - Remuneration beyond pay - e.g. vouchers, lunch, uniform allowance.

23. We would also support including where an employee will be working and whether they might have to relocate, since existing legislation requires a statement as to whether the employee may have to relocate and consistency is desirable. However, in practice we would observe that it is hard for employers to require employees to relocate their home without agreement, and common that in the event of a refusal there is a termination of employment either by mutual agreement or with it being acknowledged that there is a redundancy for statutory purposes. In practice employers benefit little from the inclusion of such a statement, and it might be considered to create an undue impression of the strength of an employer's right to require relocation. Further, in practice, the likelihood of enforced relocation for persons engaged on non-employed contracts is relatively low.

24. Including duration and conditions of any probationary period is likely to be required across the EU pursuant to the Transparency Directive, which is referred to in the Consultation Introduction. As a matter of efficiency, and with a view to reducing the cost to business of adapting further following withdrawal from the EU, and to promoting effective understanding, we would suggest that as a

[7] This should also include the name of the legal entity (e.g. whether a limited company, partnership, individual owner, etc.) to assist unrepresented workers in asserting their statutory rights and/or enforcing any claims.

general rule or to provisions of EU law, and proposed law, that have overlapping subject matter are reviewed under UK policy consideration. This is not to advocate for an institutionalised commitment to uniform adoption of EU rules, but the experience of Switzerland and its evolved practice of "autonomous adoption" of processes and rules that are not inconsistent with matters of fundamental EU policy may be informative. (In this regard, we note the Directive Article 15 would require a right to adequate compensation if the statement is defective.)

25. The EU Transparency Directive also says training entitlement and that should be included. We think that the level of rights and obligations regarding training is of less fundamental importance to the workforce, and at the moment less material to employers. We consider it would be unduly burdensome to include training detail information at the first level of a statement the more so in circumstances where, as we suspect, few organisations will have these in detail, particularly for workers.

26. Whether to include other types of paid leave - e.g. maternity, paternity and bereavement leave - is a question of balancing the prevalence (or lack thereof) of these benefits for workers against the cost of compliance. We acknowledge that some members of the workforce will regard these as material matters, and to make informed choices about their counterparty it is useful to have this information automatically. This is also reduces the risk of discrimination or adverse treatment arising if enquiries are made after the engagement commences.

27. We are undecided whether it should be prescribed that the statement must state if a previous job counts towards a period of continuous employment, the date that period started and think a decision should be made on totality of evidence. The Government is consulting about changing the length or period which would break continuity. Assuming it is expanded, there will be a transition period of uncertainty as to what the appropriate break is. There is a danger that requiring the statement to be provided could inadvertently facilitate inaccurate judgements on which workers are likely to rely given the authority of their employers.

28. The guidance Acas currently provides on written contracts is a good resource. It would be helpful if the Acas or GOV.UK website included non-binding examples of electronic/paper formats for the provision of statements to enable smaller businesses to adapt them. This would also be consistent with the EU Transparency Directive Article 4.2. It should also be considered whether this website might be a means to describe the rights of employers in connection with exclusivity, referred to in Article 8 of the EU Transparency Directive.

Knowing the identity of your employer

29. Most of the discussion on the scope of employment rights, both in policy and case law terms, has focused on the rights attached to employee and worker status. It is also necessary to understand how the employing entity is defined by the law, as it is the employer who bears responsibility for compliance with, and liability for breach of, employment legislation. For this reason it is important to understand which entity, or entities, should be considered to be the employer.

30. The common law has traditionally adopted a ‘unitary’ approach which treats the employer as the relevant contracting person. Only in specific contexts will the law

look behind that strict identification of the employer. An example is where in relation to relevant transfers falling within the scope of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) an employee may be deemed employed by the transferor in the relevant undertaking, and therefore within scope to transfer, even if the individual is employed by an entity other than the transferor[8].

31. The traditional approach of identifying the employer can limit the effectiveness of employment protection legislation if the consequence is that the legislation does not engage in relation to those persons with the ability to ensure compliance. For example, private equity portfolio companies and end user clients of employment agencies may in effect control workers' activities and compliance with employment law standards but not be legally responsible for compliance on the basis of not being the individuals' employer either in contractual or statutory terms. Also, in group company situations the actual/contractual employer might not take the decisions which employment law seeks to regulate, for example decisions concerning redundancies[9].

32. If the Government wishes to consider whether there is a better way to identify the employer, we would recommend considering the approach applied in the USA under the Fair Labor Standards Act and, in relation to trade union matters, by the National Labor Relations Board. Under the 'joint employer' approach various factors can be taken into account in determining whether a worker is jointly employed both by the 'contractual' employer and some other person or persons. These include the authority to hire and fire employees, authority to set conditions of employment, day-to-day supervisors and other relevant factors. By adopting this approach the ambit of employment protection could be widened to circumstances where an entity other than the contractual employer is able to control and determine employment law compliance[10].

Continuity of employment

33. Another source of uncertainty in status is how continuity of employment is defined. Gaps, unless capable of being breached by Section 212 of the ERA 1996 as a temporary cessation of work[11], will remove continuity, and those employment protections associated with length of service. So it is currently possible to remove employment protection rights by using intermittent employment models, which break continuity.

34. We would suggest that extending the period counted as a break in continuous service beyond the current one week. Somewhere between one month or six weeks feels to be an appropriate period for a break in employment. Arguably six weeks would be the best fall back, because employment may be more regularly regarded as continuing by custom where there are monthly breaks. Since a

[8] Albron Catering BV v FNN Bondgenoten and another [2011] IRLR 76, ECJ).
[9] The law only has limited provision for that latter situation - where collective redundancy consultation is required by an employer under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 , it is in effect no defence for the employer that a parent company took the relevant decision and did not allow the subsidiary sufficient time to consult.
[10] For further discussion of the issue of the identity of the employer see Prassl, 'The Concept of the Employer', Oxford University Press, 2015 and Prassl and Einat, 'Employees, Employers, and Beyond: Identifying the Parties to the Contract of Employment', chapter 16 of Freedland (ed), 'The Contract of Employment', Oxford University Press 2016.
[11] For example *Prater -v- Cornwall County Council* [2006] 2 All ER 1013.

break is an exception to the accumulation of rights, a more noticeable, less "natural" period would help with transparency and to support the idea that it must have been understood to break continuity by the parties.

35. The existing exemptions to the break in continuous service rules are sufficient, thus do not need reforming.

36. There is to a degree some uncertainty about the continuity rules, particularly in relation to whether employment is to be regarded as continuing by custom, and what a break is. Sectors such as agriculture and education have developed a body of case law which helps clarify the approaches in their areas. These could be better publicised. The changes in rights and the effective continuity to former Employee Shareholder Schemes participants could bear clarification.

Right to request

37. We support Matthew Taylor's recommendation to introduce a Right to Request a more stable contract. While this has been criticised as a somewhat weak measure, experience from the right to request atypical work has been that, over time, more employees exercise this right so that they appear to become less fearful of adverse consequences from making a request. This may have contributed to socialising the possibility of agile or atypical working, ultimately increasing the take up over time as employers fielded more requests.

38. A right to request should, as with the right to request atypical working, include requirements to give reasons as to any refusal and, possibly, a frame of reference of those reasons. They would always be capable of analysis and, if necessary, claims for redress if unlawful criteria were applied e.g. ones which were discriminatory based on prohibited characteristics, or where decisions reflected adverse treatment for the assertion for the statutory right (where claims may be made to an Employment Tribunal).

39. This right should apply to all groups of workers. If groups are excluded it is likely to make the overall exercise or ultimate transition less consistent. It is also difficult to legislate for categories of worker based on perceptions of work type e.g. "blue/white collar" as was contemplated in the Government's 2005 consultation on TUPE. Trying to restrict the right to request on a sectoral basis unworkable for similar reasons.

40. Employers should be able to take account of the individual's working pattern in considering a request, so long as this does not determine the response. It would be useful if a broader list of non-exhaustive factors was published and a categorisation of permitted reasons for declining. This could work in similar way as the right to request atypical work currently operates.

41. There should be a qualifying period of continuous service before individuals are eligible for this right We suggest this matches the 12-week period applicable to agency workers' rights to request conversion to more regular status. Consistency of time periods generally is likely to promote understanding of rights. Employers should be able to plan, and that includes an inbuilt right to have flexibility before they must plan for more "regular" modes of work.

42. One month is an appropriate length of time the employer should be given to respond to the request. This enables real time response more consistent with the nature of many "worker" relationships which tend to be shorter terms.

43. It would be sensible to limit the number of requests an individual can submit to their employer. We suggest two in any 12-month period to avoid imposing undue administrative burden.

44. For those who work in Small to Medium Enterprises there should be limitations on right to request consistent with other small business exclusions. This is due to the proportionality and cost associated with such requests. Subject to this, we do not think they should have longer response periods or derogations from a general rule: consistency is relevant to understanding and enforceability.

Holiday Pay

45. The government should act to change the length of the holiday pay reference period. We consider 52 weeks to be rational and effective in ironing out the risk of either party looking to game their rights/costs by selecting other periods.

46. We support the recommendation that atypical workers should be offered more choice in how they receive their holiday pay. For instance, they could be given a right to review/request their entitlement to annual leave and holiday pay at specified periods during their contract, which should include consideration of their overall working hours and pattern of work during the preceding months.

Information and Consultation of Employees Regulations (2004) (ICE)

47. ICE regulations could be improved by, in addition to including workers of an entity, being extended to include workers/employees at a site, rather than of an employing entity. For most practical purposes, multi-employer employee/workers will generally be there because of the invitation and, to a degree, commercial power of a principal client or client group.

48. In line with this, the scope of the regulations could be extended to cover broader subject matter e.g. training, impact of technology, future work flow and not restricted to the more legalistic questions typically covered by ICE regulations such as redundancy. A name change would more accurately reflect the scope and tenor of revised regulations.

49. ICE regulations should be extended to include workers in addition to employees. This may increase the sense of attachment and engagement by including workers more in matters of common concern. Inclusion may help reduce the possibility of fragmenting the workforce and arbitrage based on the nature of information processes. It does not eliminate the freedom to make commercial decisions based on the costs and values attached to different legal statuses, and nor should it, but would reduce indirect incentives to internal competition between workers and employees.

50. Inclusion of workers in these regulations would decrease the disincentive for businesses which might otherwise seek forms of engagement, and which may fear

that informing and consulting workers may be signs more consistent with elevating their status to that of employees.

51. We do not have a view on the what the threshold for successfully requesting ICE regulations be, but there should be some form of de minimis threshold for proportionality.

52. The Government may look to widen the stakeholder groups it deals with to include more digital based and newer economy organisations, helping benefit from the experience of businesses which rely on the flow of information, data, ratings and feedback as part of their business model. It may be possible to explore ways to share the data available to platforms and large data-based businesses as to behavioural traits and methods of eliciting responses and preferences, and analysing them, (assuming informed consent and GDPR-compliant processes).

53. It is positive that the Government is considering steps that could be taken to ensure workers' views are heard by employers and taken into account. Greater clarity over status and therefore access to the redress systems attached to it will increase the likelihood that workers' views can be heard, if only as an alternative to formal dispute resolution mechanisms.

54. Enabling digital businesses to create worker chat rooms / online forum, or even requiring them to do so, may help facilitate the exchange of views. Again, in line with our answer to Q42 above, where there are structural disincentives to inclusion, such as the fear that workers may more likely be considered "integrated" into the business or are more likely to have the appearance of employees, that could be adverse to the policy aim of achieving greater inclusion and engagement. Regulations could provide that this does not 'upgrade' their status.

55. In line with experience on the implementation of Gender Pay Gap reporting, more opportunities for individuals to access information about practices which may be questioned could be created. For example, as has been canvassed in connection with reforming the laws on sexual harassment and the uses of non-disclosure agreements, it may be worth considering the reinstatement of rights to serve questionnaires on businesses by workers (like employees) who are concerned that unlawful discrimination may arise. This is not to extend formal annual reporting obligations as with the Gender Pay Gap or modern slavery: it is to preserve the possibility that, according to the position of individual businesses, tools to engender dialogue can be approved without institutionalising regular formal reporting obligations.

56. Two examples of where there could be greater employee engagement, away from a dispute-oriented approach centred on legal rights are:

    - promoting the debate on lifelong learning and access to alternative training/skills points

    - more support for moments of engagement at times of significant workforce change e.g. collective redundancies or individual non-fault terminations of employment. It is not uncommon for employer to provide access to reskilling/training/litigation services such as outplacement consultancy. For a long time, it has been policy to erode the value of the £30,000 exemption on severance payments. It could be argued that there is more social benefit to

maintaining an element of tax relief where employers offer retraining/ reskilling support in restructurings, where the offerings have been discussed with the workforce or affected workers.