Are you (select the appropriate option): Respondent type ☐ Business representative organisation/trade body ☐ Central government ☐ Charity or social enterprise ☐ Employer ☐ Individual ☐ Legal representative ☐ Local government ☐ Trade union or staff association

Respondent type x Other (please describe) **Centre for Law at Work, University of Bristol Law School**

Section 1: Improving the transparency of information provided to work seekers

Work seekers are people or limited company contractors contracted by employment businesses, intermediaries or umbrella companies and who are placed with a third-party to carry out 'temporary agency work'.

A key facts page could include the following additional information:

a) Who will be responsible for paying the work seeker, and how they are being engaged;

b) What happens to any money paid to an umbrella company or intermediary before it is paid to the work seeker;

c) How much the work seeker will be paid by the umbrella company or intermediary;

d) What statutory deductions will be made;

e) Any other fees, costs or charges that will be deducted;

f) What additional benefits there are e.g. access to a benefit in kind scheme, childcare vouchers, group insurance policies.

1: To what extent would you agree that a key facts page would support work seekers in making decisions about work?

1 (a): If slightly or strongly agree, what key facts do you think should be made prominent?

1(b): If slightly or strongly disagree, please provide reasons below

Agree strongly Agree slightly Neither agree nor disagree Disagree slightly Disagree strongly Don't know

This 'key facts page' will help to ensure that work seekers have information regarding responsibility for their payment and their contractual rights. We consider, however, that the proposal does not go far enough. First, it does not include other important information, such as who is the employer, who is responsible for paying other benefits, such as holiday pay or any sick pay. Second, the proposed enforcement mechanism is inadequate. The proposal is that the payment is enforced by means of the Conduct of Employment Agencies and Employment Businesses Regulations 2001 alone, relying on enforcement by the EAS under the Employment Agencies Act 1973. Enforcement of the existing duties to provide information in e.g regulations 12 and 13 occurs little in practice,

and in most cases any breach will not come to the attention of the EAS. We consider the provision should be backed by further deterrent remedies to ensure it is effective in practice. At present a civil remedy is only available for a breach of the Regulations insofar as it causes 'damage' (see regulation 30), which will hardly ever be the case in relation to a failure to provide information. The provision should be backed by other penalties – for example (i) the possibility of bringing a claim in the Employment Tribunal, backed by penalty payments, if the information is not provided; (ii) if another claim is brought in the Tribunal and succeeds, the failure to provide the relevant information should lead to an uplift in any award, along the lines of s.38 of the Employment Act 2002.

1 (c): Thinking about work seekers and employers in the recruitment sector, would ensuring work seekers are provided with a key facts page have a:

Significantly positive impact **Small positive impact** Some negative and some positive impact Small negative impact Significantly negative impact No impact Don't know

Work seekers would be aware of the commercial entity against which they have a contractual and potential statutory claim. A 'key facts page' could also help evidentially in determining the scope of contractual rights or assist in mounting an estoppel argument regarding the legitimate expectation of a work seeker in terms of reliance on such representations. The danger, however, is that this statement of 'key facts' enables the employment business to recruit on the basis of false advertising (see p. 10) and only provide the true rate and source of payment at this point of registration with the employment business.

We consider that the consultation is also unduly narrow. It takes for granted the use of umbrella companies, and does not consider whether legislation should abolish the possibility of payment through them, so that work relations are not further fragmented or fractured. The use of the umbrella company or other intermediary just means there is yet another cost ultimately deducted from the value of the work seeker's labour.

2: What information would be important to include in a "key facts" page?

- **Hours**
- **The employer**
- **The entity responsible for paying other benefits, such as holiday pay or any sick pay.**

2 (a) What conditions should be in place to ensure the 'key facts' page is provided and understood by the work seeker before any contractual engagement?

The key facts page should be consistent with the advertisement regarding the terms of hire. It should then be provided to the work seeker before any offer is made of work, along the lines in regulations 13-16 of the 2003 Regulations. It should be a requirement that the information is provided in a single document. Where the work seeker is being recruited from another country or has English as a second language, the terms should be available in the language with which the agency worker is most familiar. In addition, to ensure the 'key facts' page is provided, there should civil remedies for breach: see above.

3: Should an employment business be required to ensure that the work seeker understands fully the information being given to them? **Yes** No Don't know

Translation should be provided where appropriate (see above). Further, there should be an opportunity to gain independent legal advice. Information should also be available on agency worker rights on the Government gov.uk website.

3 (a): If yes, how do you think this should be achieved?

This question is answered above.

BEIS has estimated the cost of a new information document to be between £33,000 and £1 million over a ten year period. This is based on the assumption that it will take up to one hour to produce a key facts page.

4: Do you feel an hour is an accurate estimate of the time it would take to produce information document for a work seeker? About right Too high Too low Don't know

4 (a): If too high or too low, please provide reasons for your answer below:

4 (b): Other than the time taken by personnel to produce a "key facts" document, are there other business costs we should be aware of?

Yes (please provide details below) No Don't know

Cost should not be determinative of a basic statement of employment rights.

4 (c): If yes, please provide further details below:

Section 2: Extending the remit of the Employment Agency Standards inspectorate to cover umbrella companies and intermediaries in the supply chain

5: Have you used or are you currently using an umbrella/intermediary?

Not applicable.

6: Do you know of any examples of the benefits and/or problems for agency workers of using an umbrella company or intermediary?

This form of supply chain is highly problematic, enabling profits to be made at the expense of the agency workers or work seekers. There is no benefit for the workers in such an arrangement and, rather than encouraging or acknowledging their operation, the consultation should consider whether they should be prohibited altogether.

7: Should the extension of the remit of the Employment Agency Standards inspectorate to cover the regulation of certain activies of umbrella companies and intermedaries in the supply of work seekers to a hirer; (please tick all relevant boxes) **Yes** No Don't know i. Be limited to the regulation of the key facts page and provision of information relevant to those facts as part of a work offer by the hirer or employer? ii. Be aligned to the regulation of the types of employment rights already regulated by EAS under the current legislative framework such as non-payment of wages, deductions from wages which the work seeker has not agreed too, and failure to provide written terms and conditions before the assignment starts?

The EAS inspectorate should be used to prevent operation of umbrella companies and intermediaries for the reasons given above.

At the very least, if involved in paying workers, such companies and intermediaries should be under an obligation to provide a key facts page and be held legally responsible for their conduct regarding non-payment and unlawful deductions from wages.

Section 3: Ensuring the Swedish Derogation is used appropriately

8. Have you used or are you currently using a pay between assignments contract (PBSA)

Not applicable

9. In your experience what are the benefits and any problems associated with working on a PBA contract basis

Not applicable

10. In your experience how effective do you think the pay between assignments contracts are in supporting workers and work seekers when they are not working?

We have no experience but the minimum permissible period in regulation 10 (four weeks) and the minimum rates in regulation 11 (50 per cent. of <u>basic</u> pay only subject to meeting the threshold in the national minimum wage legislation) show that the support can be ineffective in supporting workers. The employment tribunal decision in *Bray and others v*

***Monarch Personnel Refuelling (UK) Limited* (19 December 2012) illustrates how the derogation can be exploited to offer minimal support: the contracts only guaranteed the agency workers minimum of four weeks' pay at 50 per cent of pay for a four-week period, as permitted by regulation 10(1)(d), but the arrangements were upheld.**

11. Do you have evidence that there are wider issues (beyond equal pay) with PBA contracts, for example agency workers not being able to access facilities, rest break, annual leave or job vacancies

Not applicable

11 (a) Do you believe that the above would justify wider state enforcement

Yes, in principle: agency workers are a vulnerable group, often dependent on the provision of work from the agency or hirer, who will often not bring legal proceedings even where their rights are infringed.

12. To what extent to you agree that the enforcement of the Agency Worker Regulations should come within the remit of the Employment Standards Inspectorate?

We think that additional means of enforcing the Regulations should be adopted. But the mechanism will need much more thought. The EAS could, for example, provide legal advice or assistance to individuals. Alternatively, it could itself bring claims backed with financial penalties for non-compliance, along the lines of how the HMRC enforces the national minimum wage legislation.

Any further comments

The Swedish derogation allows employers and agencies to avoid equality of pay under regulation 5 at minimal cost. Agency workers need not be offered even any compensatory benefit when the derogation is used, again as illustrated by the decision in *Bray*. No measures in the Regulations protect against abuse. It is inconsistent with the important social rights which the Regulations are meant to guarantee to allow contracting out by means of this derogation.: see the TUC report of 2018 available at:
https://www.tuc.org.uk/research-analysis/reports/ending-undercutters-charter.
Abolition of the Swedish derogation should be overseen by the Employment Agency Standards Inspectorate.