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BIS/Home Office joint consultation: Tackling Exploitation in the Labour Market

Response from the Employment Lawyers Association

7 December 2015

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Introduction

The Employment Lawyers Association (“ELA”) is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA’s role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, chaired by Jonathan Chamberlain, was set up by the Legislative and Policy Committee of ELA to consider and comment on the consultation Tackling Exploitation in the Labour Market. Its report is set out below. Members of the sub-committee are listed at the end of this paper.

SUMMARY OF QUESTIONS

The case for more effective enforcement

1 Do you agree that more needs to be done to tackle organised labour market exploitation?

Yes

No

Not sure

Please give your reasons Organised exploitation of the labour market is clearly wrong in principle. However, there is no information available that would demonstrate that the issue is not already being tackled using the current enforcement methods. We would expect to see some evaluation of the issues that have arisen in respect of the current enforcement regime. In the absence of any such evidence it is impossible to judge whether these methods are effective or whether more needs to be done.

ELA does not comment on policy matters, but it is Members' experience that protection for whistle-blowers is an effective means of exposing malpractice. The consultation has not asked respondents to consider this as an alternative or complementary measure.

A new Director of Labour Market Enforcement and more flexible enforcement

2 Do you agree with the following statement?

"Establishing a new Director for Labour Market Enforcement to set the strategic direction of the enforcement bodies will be effective in tackling worker exploitation"

Yes

No

Not sure

Please give your reasons It is unclear from the document what strategy the Director will be setting given the two complementary but ultimately differing aims of protecting good employers from unfair competition but also protecting workers from exploitation. The consultation document is not clear as to the nature of the strategy that will be set by the Director, namely, whether it will simply be an overview or whether there will be an operational element to the strategy. Without this information it is difficult to see how the Director role will operate in practice.

3 What other factors should we consider in developing the new Director role?

Ministers should consider any indirect consequences of the new Director role. It may have a certain degree of overlap with the Modern Slavery Commissioner's role and so clear and distinct areas of responsibility will need to be established. It will also be important to consider the main priorities of the role so that good employers are not targeted in the same way as those who actively exploit the labour market. There is a danger of regulation being used to punish the unwary or well-intentioned but disorganised employer as opposed to targeting deliberate malpractice.

New offence of aggravated labour law breach

4 Do you agree that a new offence aggravated labour law breach is needed to tackle the exploitation of works?

Yes

No

Not sure

Please give your reasons Though the creation of a new aggravated labour law breach addresses one aspect of a two-part policy issue.

Existing legal rights protect workers. Exploitation occurs as a result of:

- (a) difficulties with the enforcement of legal rights (and compensation for breaches of such) in exploitative working environments; and

- (b) the continued operation of exploitative employers as a result of the lack of enforcement of these rights and protections.

A new offence of aggravated breach of labour law addresses (b). The creation of a new offence does not suppose a lack of existing legal protections nor seeks to address difficulties in (a). The new offence creates the ability to remove unscrupulous employers from the market.

It is therefore needed to tackle the exploitation of workers in, either;

- (1) lieu of measures to address (a); or
- (2) a conclusion that measures to address (a) will always be insufficient to address (b).

The new offence therefore reduces the exploitation of workers only insofar that it removes exploitative employers from the market. It protects hypothetical future workers from those businesses and stops the further exploitation of current workers. It does not seek to address how workers in exploitative working environments might otherwise enforce their legal rights or seek compensation for breaches of these rights.

This is an example of where the twin policy aims might be better brought into line. Protecting individual workers may also protect good employers.

- 5 Which of the options described would be effective in tackling labour market exploitation?
- (a) create an offence involving a motivation intention to deprive a worker of their rights or to exploit a worker in connection with the commission of the offence;
 - (b) create a new type of improvement notice
 - (c) both (a) and (b);
 - (d) none of the option.

Please give your reasons

- 6 What are the benefits of creating an offence involving intention to deprive a worker of their rights?
- 7 What are the benefits of creating an offence involving motivation to exploit a worker or exploiting a worker in connection with such an offence?
- 8 What are the benefits of creating a new type of improvement notice to tackle exploitation of workers?

Information sharing

- 9 Do you agree on the need for powers to share data and intelligence across the enforcement bodies and with other organisations?

Yes

No

Not sure

Please give your reasons It is unclear from the consultation document what information is proposed to be shared among agencies or for what purpose. Similarly there is no evidence to suggest that there is no information sharing taking place at the moment or what barriers to information sharing have been identified. It is unclear how it is envisaged that information sharing will improve the current situation or contribute towards the creation of a strategic plan to tackle exploitation within the labour market. Without this information ELA cannot give a considered response to this question.

Reforming the GLA

10 Do you agree with the proposal to expand the role of the Authority or should we retain the current model?

Yes, expand the role of the Authority

No, retain current model

Not sure

Please give your reasons

The objectives and remit of the new Authority

11 Do you agree that the mission of the new Authority should be to prevent, detect and investigate worker exploitation, in support of the Director's annual plan?

Yes

No

Not sure

Please give your reasons The new Authority as described will be able to detect and investigate worker exploitation. It will be able to prevent worker exploitation by the removal of exploitative employers from the market following the **prosecution** of these employers.

The prosecution of exploitative employers will only be possible if the ability to detect and investigate the exploitation is such that the Authority can build a sufficient evidential base for prosecution *without* the cooperation of the exploited workers.

As described, the new Authority has no powers to incentivise the exploited workers to cooperate with investigations. Query if the Authority should also be given such powers. Possible incentives could be those described in answer (19).

12 Should the new Authority work with business to provide training, and develop codes of conduct and voluntary accreditation schemes?

Yes

No

Not sure

Please give your reasons Guidance and Codes of Practice can be helpful to employers, particularly small employers. However, what is better is clear legislation. It is possible (even likely) that the employers who would engage with the Authority in such efforts will be the employers who are already complying with existing laws and are not at risk of exploiting labour. Therefore, if the aim of the Authority working with businesses in this way is to reduce the risk of labour market exploitation, there is a real risk that such efforts may not achieve this.

13 Should the new Authority be able to charge for such services?

Yes

No

Not sure

Please give your reasons We are of the view that the Authority should not be able to charge for such services. As set out in our response to question 12, the employers who are likely to engage the Authority to provide these services are unlikely to be the employers who are at risk of exploiting the labour market. In our view, it would difficult to justify charging employers who are already compliant with the law for such services.

14 What other tasks might the new Authority perform?

No comment

Powers of the New Authority

15 Do you agree that the new Authority should be able to investigate labour market breaches and offences that fall under the remit of the new Director, including the new aggravated breach offence and Modern Slavery Act offences, as well as breaches of National Minimum Wage/National Living Wage and employment regulations, where they are connected with labour exploitation?

Yes

No

Not sure

Please give your reasons Paragraph 50 of the Consultation document provides that the term “labour market exploitation”:

... means more than merely deliberate non-compliance. It involves a greater criminal intent within an exploitative business model and can include:

- *Threats of violence or retribution against workers or their families;*
- *Intimidation;*
- *Deliberate and systematic withholding of wages or spurious deductions at a significant level; and / or*
- *Difficulty in obtaining retained documents.*

Workers have a wide range of employment rights under existing legislation. While question 15 clearly identifies breaches of the National Minimum Wage / National Living Wage as proposed areas to be investigated by the Authority, it does not detail the remaining “employment regulations” it proposes the Authority investigate. In order to answer this question, we would require further information regarding the regulations the Authority proposes to investigate and a precise definition of labour market exploitation.

16 Do you agree that the new Authority should have the power to investigate these offences across all sectors of the labour market?

Yes

No

Not sure

Please give your reasons

17 Are the investigative powers proposed appropriate given the new Authority's functions?

Yes

No

If No, which ones should not be designated?

The ability to enter and search premises with a warrant authorised by a Justice of the Peace (under section 8 of the Police and Criminal Evidence Act (PACE))

The power to enter premises to execute an arrest warrant or for the purpose of arresting someone for an indictable offence (under section 17 PACE)

The power to search premises controlled by person under arrest (under section 18 PACE)

The powers to search a person at time of arrest and, when a person is arrested for an indictable offence, to search premises in which person was immediately prior to arrest (section 32 PACE)

The power to use reasonable force in exercise of PACE powers, (section 117 PACE)

The ability to seize evidence and then sift through it under section 50 of the Criminal Justice and Police Act.

Please give your reasons

Please give your reasons

18 Are there any additional powers the new Authority should have? Please describe and give your reasons.

19 Do you agree that the new Authority should be able to use Proceeds of Crime Act powers to recover criminal assets?

Yes

No

Not sure

Please give your reasons As described the new Authority has no powers to (a) incentivise the cooperation of exploited workers; nor (b) assist the exploited workers secure compensation for the breaches of their legal rights.

Should the new Authority be empowered to use the Proceeds of Crime Act to recover criminal assets it will enable the Authority to redistribute the monetary value derived from those assets to the exploited workers as compensation for the breaches of their legal rights (which the exploited workers would have been able to secure but for the exploitative working environment in which they were contained).

This will enable the Authority to incentivise the cooperation of exploited workers to assist in the detection and investigation of exploitation, which in turn will assist the Authority in its prosecutions of exploitative employers.

20 What are the benefits of the new Authority having a formal power to ask for assistance from relevant organisations?

21 Which organisations should this new power apply to?

22 Should other enforcement organisations be given the 'right to ask' the new Authority to offer operational support?

Yes

No

Not sure

Please give your reasons

Licensing

23 Do you agree that the current licensing criteria should be reformed?

Yes

No

Not sure

Please give your reasons

24 What reforms do you think would improve the current licensing regime?

25 Do you agree that we should introduce a more flexible approach to licensing, based on a risk assessment, judged on a sector by sector basis and agreed by Ministers and Parliament?

Yes

No

Not sure

Please give your reasons

26 Are there any sectors that you would remove from the current licensing regime?
Yes/No/Not sure; Please give your reasons

Yes

No

Not sure

Please give your reasons

Governance and oversight of the new Authority

27 Will the proposed governance arrangements enable the new Authority to achieve its mission under appropriate oversight?

Yes

Tacking exploitation in the labour market

No

Not sure

Please give your reasons

ELA Sub-committee

Chair: Jonathan Chamberlain, Wragge Lawrence Graham

Tessa Fry, GSC Solicitors LLP
Kate Henry, Reculver Solicitors
Sarah Lovell, Shoosmiths LLP
Laurence Mills, Lewis Silkin LLP