1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Business and Trade consultation on Making Work Pay: the application of zero hours contracts measures to agency workers.[1]

2. The Bar Council is the voice of the barrister profession in England and Wales. Our nearly 18,000 members – self-employed and employed barristers – make up a united Bar that aims to be strong, inclusive, independent and influential. As well as championing the rule of law and access to justice, we lead, represent and support the Bar in the public interest through:

   - Providing advice, guidance, services, training and events for our members to support career development and help maintain the highest standards of ethics and conduct
   - Inspiring and supporting the next generation of barristers from all backgrounds
   - Working to enhance diversity and inclusion at the Bar
   - Encouraging a positive culture where wellbeing is prioritised and people can thrive in their careers
   - Drawing on our members' expertise to influence policy and legislation that relates to the justice system and the rule of law
   - Sharing barristers' vital contributions to society with the public, media and policymakers
   - Developing career and business opportunities for barristers at home and abroad through promoting the Bar of England and Wales
   - Engaging with national Bars and international Bar associations to facilitate the exchange of knowledge and the development of legal links and legal business overseas

   To ensure joined-up support, we work within the wider ecosystem of the Bar alongside the Inns, circuits and specialist Bar associations, as well as with the Institute of Barristers' Clerks and the Legal Practice Management Association.

3. As the General Council of the Bar, we are the approved regulator for all practising barristers in England and Wales. We delegate our statutory regulatory functions to the

[1] Consultation

operationally independent Bar Standards Board (BSB) as required by the Legal Services Act 2007.

Q5: Do you think the guaranteed hours should be offered by the employment agency (option 1) or the end hirer (option 2)?

4. Don't know – we are neutral on this question.

Q6: Should end hirers be required to pay a transfer fee or use an extended hire period if they are required to offer guaranteed hours to an agency worker?

5. Don't know – we are neutral on this question.

Q7: If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to guaranteed hours to them, please explain them here.

6. Given that the competing factors involved in agency work are flexibility vs avoiding exploitation, we consider that there is a risk that the complexity of this legislation in and of itself requires a prompt, separate method of enforcement. i.e. some form of ombudsman that an agency worker could complain to.

7. The first problem with Employment Tribunal enforcement is the current backlog of cases, particularly in the South-East. It takes time to bring such a claim before the Tribunal. We are aware of other reforms which the government is contemplating which may also require increased resource such as widening the availability of interim relief.

8. The second problem is that the complexity of the legislation is such that it raises a number of points of potential evidence that needs to be heard. For example, points such as 'reference periods', 'varying of terms and conditions' 'limiting events' and the complex legislation regulating the ending of the relationship, all lend themselves to evidence, cross-examination, submissions and a trial.

9. This is in contrast to (for example) straightforward wages claims, the majority of which are listed for a few hours and determined by the Employment Tribunal.

10. Separately, there appears to be an interchangeable use of the phrase 'worker' and 'employee'. If someone has guaranteed hours this must surely create mutuality of obligation with other factors of personal service and control also being present. In these circumstances, we query why the phrase 'worker' is being used at all, if the intention is for this person to be treated as an employee. This is a point which we consider the government needs to expressly address as part of the Bill going forward.

Q8: Do you agree that the responsibility for providing an agency worker with reasonable notice of shifts should rest with both the employment agency and the hirer, so that where a tribunal finds that unreasonable notice was given, it will apportion liability according to the extent that the agency and the hirer are each responsible for the unreasonable notice?

11. Our answer is a cautious yes. We agree in principle that the party which is the cause of the mischief that the legislation is trying to address should ultimately be responsible for the financial consequence of that decision.

12. We simply caution that litigating such a point will involve the Claimant and two separate Respondent's appearing in the Employment Tribunal. The cost of that to the state and to the employers is likely to be significantly disproportionate to the sum in issue. We do, of course, recognise, however, that even a small amount of money may be of importance to the individual, but the Employment Tribunal is a time consuming and lengthy process to achieve that sum.

13. It may be that the government is hoping that this element of the legislation will have a deterrent effect, and that maybe various industries could adopt sector wide standard expectations as to what constitutes unreasonable notice. The government could assist with this through providing for an ACAS Code within the legislation.

Q9: Do you think that legislation should prescribe how the end hirer should notify the agency that they have a shift available and of changes to these and when notification should be deemed to be received?

14. Yes. We are of the view that notification should be in writing. However, writing should be widely defined so as to include online systems, emails and text messages to reflect modern working practices.

15. It is also important not to restrict short notice work. It should be possible to offer work verbally and for the offer to be valid. If there is a failure to follow it up and put it in writing, that prohibition should not prevent the individual from undertaking the work. Any penalty for breach should fall on the party who has failed to put it in writing.

Q10: If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to reasonable notice of shifts to them, please explain them here.

16. Whilst there is a basis for the underlying rationale set out in the consultation, the government must, we suggest, be cautious about preventing all forms of short notice work.

17. For example, there is value in a business (e.g. a staff canteen) being able to contact an agency in the morning because a member of staff has called in sick and obtaining an agency worker for the day. Therefore, whilst the government understandably wishes to regulate agency relationships generally, there is at least part of the market where the very value of the relationship comes from short notice work, particularly in the form of sickness cover.

Q11: Do you agree that the agency should be responsible for paying any short notice cancellation or curtailment payments to an agency worker?

18. Yes. If this becomes the case, then many agencies will simply add this to their terms and conditions, and it will become a point of negotiation with the end user.

Q12: Do you think that the agency should be able to recoup this cost from the end hirer if/to the extent that the end hirer was responsible for the short notice cancellation or curtailment?

19. Yes. If this is a point of contract rather than legislation, it will be market forces which determine whether or not such clauses are included in contracts.

20. Legislation may not be necessary.

Q13: If you think that the agency should be able to recoup this cost from the end hirer, do you think the government should legislate to ensure that the agency can recoup the costs?

21. Legislation should only be needed if the government wishes to interfere in the ability of the agency and the end-user to negotiate terms. It should only interfere if it considers that there is a particular mischief that it considers the market cannot adequately address.

Q14: Do you think that it should be possible to override legislative provisions allowing agencies to recoup cancellation or curtailment costs through contracts signed after implementation (or that are clearly entered into in contemplation of the commencement of the legislative provisions)?

22. Yes. There should be clear transitional provisions. This will create certainty. It would be undesirable to have historic agreements which do not sit with current legislation. Legal certainty is better.

Q15: If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to payment for short notice cancellation or curtailment to them, please explain them here.

23. No.

Bar Council[2]
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[2] Prepared by members of the Law Reform Committee