



Bar Council response to the Future of Work Commission's Call for Evidence

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Future of Work Commission's Call for Evidence.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council is pleased to respond to the following questions at the invitation of the Future of Work Commission:
 - A. To what extent have traditional concepts in employment law been outgrown by new models of work?
 - B. How can existing rights for working people be adapted and improved to operate in these new models?
 - C. What is the impact of new technology on representation and the organisation of people at work?

¹ Future of Work Commission (2017) [Call for Evidence](#)

5. In preparing this response, two Bar Council Committees were specifically consulted, namely the Law Reform Committee and the Legal Services Committee.

6. The Bar Council was asked to limit its response to around 1500 words, which it has sought to do. Plainly, however, there is *much* more that could be said in response to such far-reaching questions and it is aware that the Employment Law Bar Association ('ELBA'), Industrial Law Society ('ILS'), Employment Lawyers' Association ('ELA') and Institute of Employment Rights ('IER') will have much to contribute to the debate.

7. Further, it has not been asked to focus on two of the general questions posed of consultees including whether new legislation is needed in employment or other areas of law, but would be happy to be included in any further consultations concerning all of the questions. (This is not least because of the inherent uncertainty as to the role which EU law will play in employment law in the United Kingdom in the context of Brexit. EU law has, in particular, had a significant impact on the jurisprudence in equalities law in this country.)

8. Finally, the Bar Council is aware of the recent publication of the Taylor Review, which considers many issues equally germane to the FWC's work.

QUESTIONS & RESPONSES

Question A- To what extent have traditional concepts in employment law been outgrown by new models of work?

9. The labour market in the UK today comprises different types of worker, some of whom would not even choose to be labelled as a worker. Workers and employees may work full-time, part-time, in a job share, temporarily, seasonally, flexibly, in an office, peripatetically, at home and perhaps even a combination of these. They may provide their services within the classic worker-employer relationship underpinned by the traditional wage-work bargain – work to be performed in return for a wage. This was once seen as a master-servant arrangement and some of the duties which are recognised in law do not stray too far from that characterisation. Services may be provided through or under the guise of self-employment, through an agency or partnership model or through a corporate vehicle, most commonly a limited company. Essentially, however, the UK adopts a three-tier system of:

- Employees;
- Workers, and;
- Independent Contractors.

10. In any of these types of relationship, the relative bargaining power of the parties is informative; the greater the power of the individual, the lesser the scope for exploitation.

11. The statutory definitions for ‘employee’ and ‘worker’ are to be found in section 230 of the Employment Rights Act 1996 and give rise to differing rights including as to pay, notice and compensation for loss of employment. Of course, separately there is a body of case-law concerned with these definitions for taxation purposes which are not entirely aligned with employment law. The Taylor Review suggests that the three-tier approach to status should be maintained, but that any non-employee should be renamed a “dependent contractor”. Whether that would achieve anything of substance is debatable. However, as a general proposition, the Bar Council considers that changes of substance should be given priority given the vast array of issues which require attention in light of fast-changing employment practices.

12. The law has recognised that the label parties give themselves or each other are not determinative and has been astute to look at the substance of the relationship itself where necessary. In recent times, several cases have examined the potential for abuse and inequality in the context of zero-hours contracts (where the worker is under an obligation, but has no reciprocal right to any guaranteed work whatsoever) and in situations in which a “self-employment” arrangement may not be all that it seems (for example the well-publicised cases concerning Uber drivers and Deliveroo riders as part of the ‘gig economy’). Working in a self-employed capacity may bring its own challenges, for instance in relation to equality and diversity. A large proportion of Barristers are self-employed in the traditional sense. The Bar Council has been focusing its attention on E & D policies, and the Bar Standards Board has recognised the need to improve the retention of barristers in the profession with caring commitments.

13. The other side of the coin is the freedom and independence which newer models of work may afford to those who choose to work in that way, whether because of the autonomy derived or the ability to manage work and life in a way that suits individual circumstances. The effect on competition and quality may also be positive or have some positive effects, as has been recognised in the case of the Bar. Some gig economy workers wish to avail themselves of different apps or platforms through which they can deliver their services to an end user. It should be recognised that while there is scope for exploitation, there is equally scope for potent business growth and opportunity and a genuine desire to work in an agile way should not be unduly dampened.

14. New models of work and working patterns are driven by changes in society including as to the composition of the labour force, such as the age of workers, and steps taken to alleviate historic and current inequality between men and women in the workplace. The Future of Work Commission has also rightly recognised that the

evolution continues with advances in technology and the way in which we communicate and interact. A future with increased automation and the greater use of artificial intelligence is not consigned to the world of sci-fi or fantasy. There is already sector-wide investment, including within the legal sector, demonstrating confidence that change will occur.

15. It seems, however, that traditional concepts in employment law still cover most working relationships. The Taylor Review notes that 60% of the total labour market consists of permanent full-time employees, perhaps the most traditional of all working models. While the Bar Council does recognise that traditional concepts are not always fit for purpose where newer models of work are concerned, this statistic provides perspective.

Question B- How can existing rights for working people be adapted and improved to operate in these new models?

16. In seeking to answer this question, the Bar Council observes that surveying workers may not always provide the clearest picture. Those who are content with their lot may find their views and feelings wholly changed by events which cause them to seek redress, particularly if that redress is difficult to access or does not exist.

17. As a starting point, the Bar Council is driven to observe that rights which are, in practice, unenforceable are meaningless. The introduction of fees in the Employment Tribunal in 2013 had a severe and chilling impact on the ability of the most vulnerable in society to bring claims to enforce such rights as they already had (for a basic visual see Figure 1). The Supreme Court's judgment in the UNISON tribunal fees challenge was handed down on 26 July 2017 and declares these tribunal fees to be unlawful. This important judgment is likely to go a long way in improving the enforcement of rights for working people insofar as access to justice is improved.

18. Turning to the substance of rights, the principal ones for those who are recognised to be workers and employees relate to pay, access to benefits when away from work due to ill health or family reasons and safeguards relating to the termination of work such as minimum notice periods and, where there is sufficient length of service, from unfair dismissal. The Equality Act 2010 casts a wider net in terms of those whom it protects.

19. It is impossible to do justice to this question without going into substantially greater detail, but in the spirit of contributing to this important debate, the Bar Council would highlight that there is a balance to be struck between protecting those who are vulnerable by reason of their weaker bargaining position and those who are willingly and knowingly entering into competitive and entrepreneurial modes of working and providing services. In summary, those who are considered to be in need of protection

qua workers or akin to workers should be classified as workers. Giving courts and tribunals the flexibility to determine status on a case by case basis, where status is in issue, can have some benefits, contrary to the view taken in the Taylor Review that new statutory definitions are required. One view may be that sector-wide regulation is needed to avoid abuse and exploitation, blunt a tool though that may be. Another is that creating a new statutory definition will, in time, give rise to further attempts to evade the consequences which a putative employer wishes to evade. Perhaps some consideration should be given to whether ordinary rules of interpretation and contract law should apply to the definition of worker status. Additionally, a cheap(er) fast track process to determine unclear status cases is commendable.

20. Classification as a worker would be important for the purpose of at least:

- a. The National Minimum Wage – this is a complex piece of legislation and careful thought would need to be given as to how to ensure a fair minimum wage is paid to the worker who is delivering services through multiple platforms e.g. apps;
- b. The Working Time Regulations – for the purpose of rest breaks and annual leave (bearing in mind that rolled up holiday pay may not achieve the purpose of supporting health and wellbeing by taking time off work);
- c. Maternity, Paternity, Adoption and Parental Leave – there may be a move towards bringing even genuinely self-employed persons within the legislative scheme;
- d. Written statement of terms – a clear record of the bargain is essential and should be compulsory;
- e. Cessation of work – an extension of the statutory minimum notice period to all workers, and;
- f. Pension rights.

Question C- What is the impact of new technology on representation and the organisation of people at work?

21. New technology has led to:

- a. The emergence of the gig economy in which platforms or apps are used to connect people who want services with people who provide services. Those engaged in this work may choose to use multiple platforms to seek work and may even do so alongside a more traditional model of work;

- b. Some jobs or aspects of jobs being automated in some manner, which can give rise to loss of jobs and deskilling over time, but also to the creation of new types of job as well;
- c. Remote and flexible working becoming a realistic and business productive means of delivering services, if the infrastructure is there to support it;
- d. Communication by telephone or email becoming a highly common method of interaction; and
- e. Day to day and face-to-face contact between workers, employees, unions, representative bodies and management being limited in some cases, unless there is investment in financial and logistical support for remote or peripatetic workers.

22. While true even within traditional models of work and traditionally unionised sectors, newer models of work and work within the gig economy is much more unlikely to benefit from collective bargaining. Sectoral collective bargaining could be used to set the going rate for pay, overtime, sick pay, holiday and family leave, not to mention to address job losses and deskilling of people and indeed entire industries.

23. Generally, the impact of new technology specifically on the representation and organisation of 'people at work' is negative insofar as it does not encourage communication to establish and expose exploitation, engenders secrecy and misunderstandings and prevents any or any effective collective bargaining from taking place. Unions are not the only method by which workers or 'dependent contractors' as the Taylor Review would suggest can have a voice in their work, but they are an obvious and well-established method of so doing.

Figure 1

Cases sent to employment tribunals

— Total cases



Source: Ministry of Justice

BBC

Bar Council

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