

Tackling Exploitation in the Labour Market
Department for Business, Innovation and Skills (BIS) consultation document
Response from the Low Incomes Tax Reform Group (LITRG)

1 Executive Summary

- 1.1 We welcome the launch of this consultation document on tackling exploitation in the labour market. We support anything that effectively protects vulnerable workers. For that reason we have no objection to any of the ideas set out in the consultation document – indeed they seem to represent a step in the right direction towards a more comprehensive framework of protection for workers.
- 1.2 However, we are writing this response on behalf of low-paid taxpayers – remembering that labour market exploitation very often manifests itself in problems with tax and National Insurance (NIC), two topics which are not addressed in the consultation document. We appreciate that problems with employers operating Pay As You Earn (PAYE), for example, may not be in the same league as some of gross abuses outlined in the consultation document, but such problems can leave workers in difficult situations.
- 1.3 We therefore describe some of the tax and NIC geared exploitation that we are aware of and make recommendations about the proposed establishment of a new Director of Labour Market Enforcement and reforming the Gangmasters Licensing Authority (GLA) which we think could help close some of the gaps that workers currently fall through.
- 1.4 The suggestions that we make are mainly driven by our overriding feeling that HM Revenue and Customs (HMRC) are not currently doing enough to counter problems around unscrupulous employers and tax and NIC – particularly with regards to travel and subsistence schemes. While we acknowledge that problems around travel and subsistence are set to dissipate from April 2016 due to the new rules on employment intermediaries, it is

our understanding that other – potentially worse – schemes are set to take their place, so we sincerely hope BIS will take full account of our recommendations when further shaping the new safeguards.

- 1.5 With regard to establishing a new Director of Labour Market Enforcement, we would urge that HMRC (not just the National Minimum Wage unit) be included under the remit of the new Director's work. A Director with a strong vision of the priority areas requiring action could lead HMRC to focus their efforts and resources properly – hopefully resulting in increased protection for workers (or indeed – increased help to protect themselves).
- 1.6 In terms of reforming the GLA, it is apparent to us that the GLA has had positive impact in stamping out vicious and bad working practices in the sectors in which they operate. Therefore we should also like to see the GLA's licensing system expanded – giving an extra layer of protection for more workers. However we go on to say that complex areas of tax law should not be decided as part of a GLA licence application or appeal (even if the decisions reached, are ultimately probably correct). This happened as part of the FS Commercial case with the consequence that questions lingered over the authority of the employment judge's decision and workers continued to get caught out by the controversial scheme involved.
- 1.7 No discussion of worker exploitation would be complete without a mention of zero hours contracts and care workers who are often subject to most unfair practices. We acknowledge that there have been some recent steps towards improving their positions, but in our view these will not have the intended effect and many will continue to lead very precarious existences – not least because of the negative consequences that such work has on the workers tax and NIC – and tax credits situations. We therefore urge BIS not to let these workers drop off of their radar.

2 About Us

- 2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the

administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

3 General comments

- 3.1 We welcome the launch of this consultation document on tackling exploitation in the labour market. We support anything that effectively protects vulnerable workers. For that reason we have no objection to any of the ideas set out in the consultation document – indeed they seem to represent a step in the right direction towards a more comprehensive framework of protection for workers.
- 3.2 However, we are disappointed in the particularly short time frame given to respond to what is a very important consultation, particularly as it has **27 questions**. Respondents and potential respondents are unlikely to have had sufficient time to digest the document, to establish whether they have an interest and what that interest might be and to respond to the consultation in any meaningful way.
- 3.3 We have had to confine our comments to certain areas. Our points relate mainly to questions 1 to 3 and 23 to 25, but we have not been able to format this response into question and answer format given the time constraints.

4 Tax and NIC exploitation

- 4.1 Labour market exploitation manifests itself in various ways. Through workers contacting us via our website or research conducted when writing our reports,¹ we know that serious problems can occur for workers in relation to their tax and NIC. This seems to be particularly the case for temporary workers – who tend to be young and unskilled; but even more so of temporary, *migrant* workers – their often limited English, cultural differences and poor awareness of the requirements and protections of the UK system leave them particularly vulnerable to poor treatment or exploitation.
- 4.2 Tax and NIC exploitation is widespread² and can take many forms. Bogus self-employment is one form, where business owners intentionally exploit the vagueness of the rules in order to take on people as self-employed when they should be employed – denying them basic rights and avoiding employers' National Insurance in the process. Employers deducting tax and National Insurance from their workers but failing to pay it over to HMRC is another form – often meaning the workers end up having to pay twice. Workers also have to contend with such abuses as being paid cash in hand or forced to operate through a personal service

¹ One of the ways that LITRG try to make a difference for those on low incomes is by researching particular tax and related areas that may be giving cause for concern and writing reports recommending change: <http://www.litrg.org.uk/reports/>

² Tax compliance was the GLA standard third most likely to be failed in the period May 2012 to April 2015 (out of 32 standards). These findings can no doubt be extrapolated outside of the GLA arena.

company. In the latter case, some vulnerable taxpayers are left clearing up legacy issues for several years, particularly as they are generally incapable of dealing, or less able to deal, with the responsibilities of running a limited company and complying with the required obligations.

- 4.3 While it is to be acknowledged that HMRC have made some progress in tackling these issues, for example by introducing the rules on onshore employment intermediaries and false self-employment,¹ we think HMRC could go further – for example by, increasing public education on what to look out for and better promotion of the HMRCs Tax Evasion Hotline – where workers can report wrongdoing.
- 4.4 Exploitation can also take less obvious forms, for example employers who partner with tax refund agents and then – for payment of some commission – encourage their staff to use them to secure tax refunds upon their departure from the UK or in respect of their tax deductible expenses, for example. Our report, The Tax Repayment System and Tax Refund Organisations² looked at the use of tax refund agents. In it we offered many suggestions to HMRC as to how to ease the tax repayment system for the low-income and unrepresented taxpayer to help workers avoid needing to turn to tax agents. It is therefore disappointing, that several years later, HMRC's system is still so unintelligible (and now often inaccessible due to the new 'digital' forms)³ that many workers continue to feel they need to pay to have their refund organised for them.
- 4.5 Things have not got much better following the transition of information from HMRC's website to the 'simpler, clearer, faster' GOV.UK website.⁴ We think it is a MAJOR failing that the form required to claim a refund on departure from the UK (P85) or the form required to claim a refund in respect of employment expenses (P87) cannot be found in the place where you would intuitively expect them to be – in the 'Claiming a tax refund' section of GOV.UK.⁵ It is our view – and one put to HMRC at every opportunity – that a small number of practical steps around improved support to workers (like moving the forms to the correct place in GOV.UK!) – could help immeasurably on these matters – if not stopping exploitation outright then certainly helping workers to protect themselves from exploitation.
- 4.6 We think it would also be very useful indeed, if HMRC were to produce well targeted, clear and easy to understand information for migrants about the aspects of the UK tax system that are likely to be relevant to them in their own languages AND have it reach them through various channels, such as voluntary sector organisations dealing with that part of the population or large employers or migrant labour. We appreciate that HMRC are under-

¹ <https://www.gov.uk/government/consultations/onshore-employment-intermediaries-false-self-employment>

² http://www.litr.org.uk/reports/2013/Refund_Company_Report

³ For a discussion of some of limitations of the new forms, see our News Article here:

<http://www.litr.org.uk/latest-news/news/140820-tax-relief-employment-expenses-online-claims>

⁴ It is worth saying that in general, we are concerned about the large degree to which much of the material has been simplified and abridged – to the extent that some of it is incomplete or even misleading. Furthermore, even if the information can theoretically be found somewhere in its deep recesses, the search facility on GOV.UK often sees vast volumes of search results returned – cluttered with results of little relevance.

⁵ <https://www.gov.uk/claim-tax-refund/overview>

funded and under-resourced and that this may not be a priority, although this risks sending out the wrong message and encouraging the exploiters.

4.7 ***A new Director of Labour Market Enforcement***

A director tasked with the sole objective of reducing labour market exploitation might share our view that some investment in this area of compliance would be desirable. Including HMRC within the director's remit (and inviting voluntary bodies such as ourselves and TaxAid to contribute intelligence) could lead to positive changes in the way HMRC deal with labour market exploitation. A fresh perspective may also lead to improvements in how HMRC react to any wrongdoing once it has occurred – for example HMRC's apparent failure to scrutinise employers using what HMRC have acknowledged to be a non-compliant umbrella known as 'Pay day by pay day' (PDPD).

4.8 ***Pay day by pay day***

- 4.8.1 Our recent report 'Travel expenses for the low-paid – a time for a rethink?'¹ took a very close look at umbrella arrangements – and in particular the use of PDPD schemes by low-paid agency workers. We do not reiterate the detail of that report here, but to be helpful, summarise parts of it where appropriate.
- 4.8.2 In a PDPD scheme, tax and National Insurance relief is granted at source on a worker's qualifying business expenses (mainly travel expenses) by the employer – on an earnings period basis. There are typically some small tax/NIC savings for the worker, but cost advantages also accrue to the employers (particularly when one takes into account the fees levied), so that the main gain accrues to the employers.
- 4.8.3 It is HMRC's opinion that the model is non-compliant (although this is disputed by the scheme providers and we look at this further in the next section). However, rather than target the employers, HMRC tend to direct their compliance at the worker who often does not understand, or fully understand what they have entered into. As typically these schemes are marketed to the lowest paid workers, those who are least able to settle the tax liability are most likely to receive the tax bills. In addition, on the basis that a fee will have been deducted already by the PDPD provider before transmitting the balance of the relief given at source to the individual, the HMRC debt may be significantly greater than any financial benefit that individual received in the first place.
- 4.7.4 We would invite the director when appointed to support our representations that HMRC should commit **not to pursue** individual workers for underpayments arising where a PDPD or similar complex scheme is in place; and insist that any compliance activity in respect of such scheme is confined to the employers and scheme operators.

¹ <http://www.litrg.org.uk/latest-news/reports/141117-travel-expenses-low-paid—time-rethink>

5 Reforming the Gangmasters Licensing Authority

- 5.1 In an ideal world, HMRC would relentlessly pursue all tax and NIC exploitation in the temporary labour market. While urging HMRC to do more, we recognise that with the number of employers in the temporary labour market and the cumbersome and slow burning nature of compliance interventions, enforcement will never be universal and not all employers will be compliant with the relevant tax and NIC legislation with regard to their workforce.
- 5.2 It is therefore very welcome that the GLA exists to provide another layer of tax and NIC checks in the form of their licensing standards,¹ thus helping to thwart any wrongdoing at employer level. But currently this only occurs within certain sectors so that workers are therefore essentially subject to a two tier system depending on whether the employer's activities fall within the GLA's remit or outside.
- 5.3 Therefore to the extent that any changes to the GLA's remit as a result of this consultation sees the **extension** of their licensing scheme (and an associated extension of their funding and resource) to other sectors characterised by vulnerable employment such as construction, care homes, car washes and hotel and catering, they will be welcomed by LITRG.
- 5.4 This is subject to two points

- 1) As well as a wider licensing remit we understand that increased powers are also planned for the GLA – the two things together meaning potentially more overlap between the GLA and HMRC's roles. No doubt the GLA and HMRC can work effectively in partnership on straightforward matters, however it should be remembered that the GLA are unlikely to have sufficient depth of knowledge to undertake tax investigations. If this is the intended course of action, it will require careful thinking-through to minimise administrative or operational conflicts.

In addition, an increased profile for the GLA as a 'tax enforcement' body may mean increased uncertainty in the workers' minds as to where to obtain information about their rights – not to mention to report tax and NIC abuses. It is therefore important that there should be a single, well publicised, telephone gateway to the bodies as well as an internal case management system – to ease the worker's task of navigating the different enforcement mechanisms.

- 2) Tax law is ever more complex and often the meaning of tax and social security legislation is unclear or is open to interpretation. Where there is a dispute as to whether something an employer is doing is compliant or not in the context of a GLA licence application or appeal, for absolute, unequivocal certainty, we would urge that the GLA pass the case to HMRC to test the legality in the independent tax

¹Licensing Standard 2.1 Critical: PAYE, NI and VAT: This Standard requires a licence holder to accurately calculate and deduct tax and National Insurance from all workers' pay and pay the correct amount to HM Revenue and Customs in a timely manner.

tribunal, so that it could be heard by a judge with significant tax experience, used to dealing with complex tax issues. It would then be for the GLA to take action around the licensing standards based on the outcome.

The importance of this is probably best demonstrated using an example. In the FS Commercial case,¹ the GLA won an appeal in their own tribunal system against a business operating a controversial PDPD scheme. The result was that the business's licence was revoked and it could not operate in any GLA regulated sectors (although this had no impact on its activity outside the GLA arena). While the tax and NIC issues were considered and declared non-compliant by the Judge in that case, so that most gangmasters operating PDPD removed themselves from the marketplace there and then, this did not set a precedent in pure tax terms. As such a few hard-line PDPD operators – within the GLA arena – questioned whether the judgement in the GLA case was a proper authority with at least one, continuing to promulgate PDPD for another two years after the decision.²

Had the FS Commercial case been heard in the tax tribunal with the same result, it might well have resolved much of the confusion about the compliance status of PDPD and potentially many thousands of workers could have avoided getting caught out by PDPD and the issue that we mentioned in the previous section. A worker's best protection lies in absolute clarity and certainty. Where an employer has a different view of the law from the authorities, HMRC – as the body tasked with collection and management of the tax system – need to deal with the points of difference in the appropriate way, to achieve this. In the case of PDPD, we think this would have been by raising an assessment for the underpaid tax/NIC, which could then have been taken to appeal in the First Tier Tribunal by the employer.

5.5 ***April 2016 changes***

- 5.5.1 While the era of travel and subsistence problems may be about to come to an end due to the new employment intermediary rules from April 2016,³ we think there is still merit in HMRC and the GLA getting things procedurally correct in the future. This is because the April 2016 changes look set to give rise to alternative creative schemes (with potentially worse consequences for low-paid workers). We are aware of one that is focused on questions around the fundamental elements of 'control, supervision and direction (concepts

¹ *FS Commercial v Gangmasters Licensing Authority* [2012]:

<http://www.gla.gov.uk/PageFiles/1475/FS%20Commercial%20Ltd.pdf>

² We are aware of one case for example where a PDPD operator had its licence removed in August 2013. The business subsequently appealed the revocation – essentially on the basis that the FS Commercial judge had got it wrong. Because the licence was revoked without immediate effect', the business could continue operating until the appeal was resolved. The case was listed to be heard in December 2014. A few days before the case was due to be heard, the business dropped the appeal 'for commercial reasons' however in the meantime they prolonged the amount of time they could operate.

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/442693/Employment_Intermediaries_and_Tax_Relief_for_Travel_and_Subsistence_-_Consultation_Document.pdf

open to interpretation). Another, the Elective Deductions Model,¹ will remove the few employment rights that they already have.

- 5.5.2 Given that these schemes seek to exploit the complexity of the underlying law, it seems likely that a PDPD type scenario will raise again. HMRC and the GLA will need to be watchful of this and prepared to react quickly – and appropriately – at the first signs of any such developments.

6 Zero hours and care workers

- 6.1 No discussion of worker exploitation would be complete without a mention of zero hours contracts and care workers who are often subject to most unfair practices.
- 6.2 For many workers, zero hours contracts mean financial insecurity. But low weekly earnings can have other, more unexpected consequences for workers from a tax and NIC perspective. In our submission on zero-hours contracts,² we noted one part of the system that seemed to put them at a particular disadvantage – having to meet the Lower Earnings Limit (LEL)³ in order to qualify for welfare support like the state pension, statutory payments (like sick pay, etc.) and some contribution-based benefits, such as Jobseekers' Allowance.
- 6.3 While we appreciate that the government have recently taken steps to improve protection for workers by, for example, banning exclusivity clauses in the Small Business, Enterprise and Employment Act 2015, our feeling is that such changes will not make much of a difference to those staff holding unskilled/low paid roles and who needed the Government's protection the most.
- 6.4 This is because by BIS's own admission, exclusivity clauses are contained in only 9% of all zero hours contracts, which we think are most likely to be for staff holding skilled technical rather than elementary roles. Additionally these proposals will do little to help those staff who are not under an exclusivity clauses in the literal sense but who feel like they are due to the practice of blacklisting if they turn down work.
- 6.5 In a nutshell, we think these provisions are too narrow and limited in scope, and we think the government need to go much further to protect low-paid workers on zero hours contracts.
- 6.6 In addition, the difficulties faced by care workers who provide home care are also well known – not least in respect of travel time and breaches of the National Minimum Wage rules, as we explain in the next paragraph.

¹ This is where a worker is deemed to be self-employed but elects to pay tax and NIC as if they are employed. This means that the Government receives the full tax contribution from the individual but the individual receives none of the other rights that normally accompany paying full taxes such as holiday pay. In particular the worker is susceptible to be paid less than the NMW as this right does not apply when self-employed.

² You can see our full response here: www.litrg.org.uk/zero-hour

³ As of 2015/16, the Lower Earnings Limit (LEL) is £112 – with earnings at this level, employees are treated as paying NIC, even though they actually do not start to pay anything until £155 per week.

- 6.7 The NMW Regulations require that ‘working time’ is paid at the NMW or above over a pay reference period, e.g. a week or a month. In the case of care workers, ‘working time’ effectively means the time they spend in the client’s home (‘contact time’) and the time spent travelling between their different clients during the day. Many workers are paid an hourly rate solely by reference to their contact time. As a general principle, it is *not unlawful* for care workers to be paid by reference solely to their ‘contact time’, so long as the total pay averages out at or above the NMW once travel time is factored in (and taking account of out-of-pocket expenses, including vehicle mileage). However this unpaid travel time leads to difficulties where they are claiming working tax credit¹ which requires the claimant to undertake a minimum number of hours each week of ‘qualifying remunerative work’ which must be done ‘for payment or in expectation of payment’.
- 6.8 More worryingly, the NMW legislation does not cover travel between home and place of work under any circumstances, which places ‘itinerant’ workers like care workers in an impossible position. Demand for home care usually centres around mornings, lunchtime and evenings, with periods of inactivity in between. However, journeys home in those long gaps between client appointments do not need to be paid for, neither do connected out of pocket expenses like petrol.
- 6.9 HMRC may have recently stepped up their National Minimum Wage enforcement activity substantially (as outlined throughout the consultation document). However, we are concerned that the hike in the rate coming into force in April 2016 will mean a further incentive for employers to exploit this imperfection in the rules – perhaps by giving workers increasingly ‘gappy rotas’ – leaving them little choice but to go home in the interim. There is nothing that the NMW enforcement team can do about this – as there is no legal wrongdoing, however it leaves care workers in a miserable situation. We urge the Government not to lose sight of this.

LITRG
07/12/2015

¹ To be entitled to WTC, the claimant needs to work a minimum number of hours in remunerative work. Where the employer doesn’t pay them directly for their travel time (even if their overall remuneration at least equals the National Minimum Wage) the claimant’s weekly *remunerative* hours may be insufficient to meet the minimum WTC requirement.