

**Informing Labour Market Enforcement Strategy 2018/19  
Response from the Low Incomes Tax Reform Group (LITRG)**

**1 Executive Summary**

- 1.1 We welcome this new approach to labour market enforcement and appreciate the opportunity to contribute to the Director's strategy.
- 1.2 In 2014, we issued our report '*Travel expenses for the low-paid – time for a rethink?*<sup>1</sup>' in which we looked in detail at agency workers and their use of a particular 'umbrella' scheme (pay-day-by-pay-day (PDPD)) to obtain tax relief for their travel costs. Typically, this results in some small tax/National Insurance (NIC) savings for the workers, considerably outweighed by cost advantages accruing to the employers (particularly when one considers the fees levied).
- 1.3 HM Revenue & Customs (HMRC) called the model 'non-compliant' yet it flourished. Our research showed that this was mainly because of two things – firstly, worker ignorance (or indeed vulnerable workers turning a blind eye to poor practices because they needed the work) and, secondly, the businesses involved apparently having little fear of action being taken against them.
- 1.4 In our view some of the exploitation that workers are experiencing, for example non-payment of holiday pay, may be rooted in similar ground. Our understanding of these issues is one of the reasons that we can make a useful contribution to the Director's strategy.

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<sup>1</sup> <http://www.litrg.org.uk/reports/2014/141117-LITRG-PAYE-report.html>

- 1.5 Further, exploitation often manifests itself in problems with tax and NIC for workers and we can also contribute substantial evidence and insight in this regard. There are ongoing problems with umbrella schemes for example, despite some new legislation from April 2016 that was supposed to spell the end for them. Some umbrella companies are showing a complete disregard for the rules, while others are encouraging workers to use personal service companies in an attempt to side-step them (even though there is legislation in place that should prevent this happening in the form of 'IR35').
- 1.6 Some umbrella companies do neither of those things albeit to their competitive disadvantage and, in the words of PRISM (a not-for-profit professional trade association that represents and promotes the interests of the compliant umbrella companies): 'it doesn't matter how thick you make the rule book, if it is not being visibly enforced there is no incentive to read it.'<sup>2</sup>
- 1.7 The Director notes another example of tax and NIC geared exploitation in his introductory report: 'employers and agencies incorrectly treating workers as self-employed with the intention of evading National Insurance, PAYE and other financial obligations'. A recent Unite suggested that a substantial proportion of construction industry workers are bogusly 'self-employed', indicating the potential extent of this issue at the same time as raising uncomfortable questions about the HMRC policing of the boundaries between employment and self-employment.
- 1.8 Our overriding impression is that HMRC are not currently doing enough to counter problems caused by unscrupulous engagers blatantly avoiding tax and NIC. This led us to urge that HMRC (not just the National Minimum Wage (NMW) unit) be included under the remit of the new Director's work in our original response to the Department for Business, Energy and Industrial Strategy (BEIS) on establishing a new Director of Labour Market Enforcement.<sup>3</sup> We fully appreciate that compliance work is difficult, complex and often fruitless.<sup>4</sup> We also know that HMRC are coping with fewer resources. However, a Director with a strong vision of the priority areas requiring action could lead HMRC to focus their efforts in the most efficient way possible – hopefully resulting in increased protection for workers (or indeed – increased help for workers to protect themselves).
- 1.9 We would like to think that the HMRC minimum wage enforcement unit are functioning in a more effective way, we do though find ourselves questioning their ability to handle 'worker' cases. One of the reasons for this is to do with the 'elective deduction model', under which

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<sup>2</sup> [http://www.prism.contractors/prism/images/The\\_World\\_of\\_Modern\\_Employment.pdf](http://www.prism.contractors/prism/images/The_World_of_Modern_Employment.pdf)

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<https://www.litrg.org.uk/sites/default/files/151123%20Tackling%20exploitation%20in%20Labour%20Market%20-%20LITRG%20response.pdf>

<sup>4</sup> See the example of Legitas

[http://www.heraldscotland.com/news/13110305.Edinburgh\\_firms\\_enter\\_liquidation\\_after\\_58m\\_tax\\_claim/](http://www.heraldscotland.com/news/13110305.Edinburgh_firms_enter_liquidation_after_58m_tax_claim/)

low-paid agency workers are treated as employees for tax purposes so that PAYE is operated as is required by HMRC's rules, but treated as self-employed for all other purposes, meaning that they are not paid the minimum wage, not given paid annual leave, etc. Many compliant umbrella companies who take the welfare of their workers seriously have called on HMRC to act against this model, but to seemingly no avail.

- 1.10 To close these gaps in enforcement, we favour the Gangmasters and Labour Abuse Authority's (GLAA) licensing system (which includes standards covering tax and NIC as well as basic employment rights) being expanded – giving an extra layer of protection for more workers – and we think this could potentially include 'workers' in the form of the 'dependent' self-employed.
- 1.11 No discussion of worker exploitation would be complete without a mention of home care workers who are very often subject to the most unfair practices. These are a group of workers we have much contact with – in part because of the complex interactions that there are between their minimum wage positions and their tax and tax credits positions. This group of workers well illustrate that worker protection does not just lie in effective enforcement of the framework, but in better systemic design in the first place. We strongly urge the Director not to let these workers drop off his radar.
- 1.12 We would like to confirm our readiness to do whatever we can to assist the Director in his work.

## **2 About Us**

- 2.1 The 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 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 Question 1: What information is available from your sector or organisation that might usefully be fed into the intelligence hub?

- 3.1 Often, people contact us with queries about their pay and deductions. Such queries indicate that exploitation can manifest itself in problems with tax and NIC.
- 3.2 Often tax and NIC geared exploitation is not all that obvious, 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. We appreciate that such practices may not be in the same league as some of the gross abuses that will be concerning the Director, but they can leave workers in difficult situations. They can also be indicative of other more serious employment problems.
- 3.3 The queries we receive often expose more disturbing problems within the labour market. Here are a selection of recent queries we have received, which appear to expose respectively, problems with intermediaries in supply chains, the non-payment of the minimum wage and false self-employment.
- 3.4 *'hi im after a little advice please, i am classed as self employed..i think, i work for a sub contractor in the XX delivery network as a delivery driver, in about august my route got took over by a new sub contractor who i now deliver for, my wages used to be paid directly to me by my old employer who did not deduct any tax and ni and i had to sort that out which was fine, i didnt have any holiday pay pension sick pay etc which i accepted as i was sel employed, now this new company i work for use some sort of company called YY who pay me my wages with tax and national insurance deducted so it seems i am employed but with no benifits ie no pension holiday pay etc my question is are they allowed to do this basically am i employed or self employed as i keep getting told different things by my friends many thanks' (sic)*
- 3.5 This person is working under the 'elective deduction model' which was first seen following the 'onshore intermediary' legislative changes,<sup>5</sup> designed to clamp down on 'self-employed' agency workers.
- 3.6 Under this model, the individual is treated as an employee for tax purposes where PAYE is operated so as to comply with the onshore intermediary laws, but treated as self-employed for all other purposes. This means that they may not be paid the minimum wage, and are not paid parental or sick pay and not given paid annual leave, etc. Such treatment will be generating cost savings for the businesses but benefiting the workers in no way at all.
- 3.7 In our opinion it would be extremely unlikely for such a clear division to exist between employment law status and tax law status for low-paid individuals. The individuals concerned are likely to be at least 'workers' under employment law, which would give them rights to basic protections such as the minimum wage and holiday pay. We think that the

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<sup>5</sup> You can read more about the new rules here: <https://www.litrg.org.uk/latest-news/submissions/140204-onshore-employment-intermediaries-false-self-employment>

existence of such schemes is evidence of the problems that workers face in understanding their employment law positions. In addition, HMRC have taken no action against the elective deduction model from a minimum wage perspective (none that we are aware of anyway), although they must certainly be aware of it having had it brought to their attention by several groups, including the Freelancer & Contractor Services Association, the Recruitment & Employment Confederation and the Association of Professional Staffing Companies.<sup>6</sup>

- 3.8 Another query reads: *'I'm a care worker. My contract is zero hours, basic pay £6.53ph + 0.67ph holiday pay. The job advert specified a car was required. In the induction we were advised petrol costs would be covered by HMRC under the P87 system; however, this will not materialise as we earn under the taxable limit. In 13 weeks I have paid out over £250 for travel to clients but I will never receive any reimbursement for petrol costs. I'm using my credit card to pay for fuel.'*
- 3.9 This person wrote to us about the tax relief position but, for minimum wage purposes, the rules say that expenses incurred 'in connection with an employment' (where not reimbursed) should not bring an employee's wage below the minimum wage. If this person is being paid on or around the minimum wage (the minimum wage was £6.31 at the time), they are very likely to have been underpaid.
- 3.10 Our final example reads: *'My job is as a leaflet distributor. I was initially PAYE, by my employer has informed me that I am now self employed (from Feb 2016). I have undiagnosed learning disabilities and require step by step help with what to do in order to pay tax and National Insurance that is due. My sister is trying to help me, but we really do not know where to start. We have a number of queries. e.g. I do not have a business, but my employer says that I am now self employed. Am I a business? What form should I be filling out to work out my tax and NI? Can I claim expenses (I travel by train or bus to Leighton Buzzard. From there, my employer takes me to the area where we will be posting leaflets). Also, work clothing, in particular footwear.'*
- 3.11 This person seems to be being treated as self-employed when they should be employed – the engager is denying them the certainty of having their pay dealt with under PAYE, employment rights – and avoiding employer's National Insurance in the process.
- 3.12 From our contact with workers and our research into their problems, not to mention our understanding and experiences of the inner workings of the system in general, we have a good understanding of what is going on at the bottom end of the labour market and, importantly, what is driving this kind of behaviour on the part of engagers.

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[http://www.contractoruk.com/news/0011498edm\\_tries\\_avoid\\_false\\_self\\_employment\\_rules\\_hmrc\\_told.html](http://www.contractoruk.com/news/0011498edm_tries_avoid_false_self_employment_rules_hmrc_told.html)

- 3.13 To give an example – there seem to be huge numbers of ‘self-employed’ people in the Construction Industry. Indeed, a recent Freedom of Information request<sup>7</sup> made by Unite the Union reveals that 47% of the workforce are being treated as self-employed. Yet, as put by Mark Harvey and Felix Behling in their paper *The Evasion Economy: ‘...if you walk on to a large construction site, with hundreds of workers, working often in teams, you would not expect them all to be their own boss – the result would not be flexibility but chaos.’*<sup>8</sup>
- 3.14 The Unite report suggests that the widespread self-employment in the construction industry is potentially **false** widespread self-employment, which is clearly a matter for HMRC’s status inspectors. However, it seems that HMRC prefer to spend time and resource undertaking reviews of labour-only subcontractors’ tax returns, not with the aim of picking up on the possibility of employment status reviews with the engagers but rather to seek assurances about the validity of their business expenses.<sup>9</sup>
- 3.15 Surely a more effective use of time and resources would be to tackle the problem at its source by challenging those who exploit others by requiring them to work through structures which are nominally described as self-employment but in circumstances which would more accurately indicate employment.
- 3.16 We would be pleased to share this kind of evidence and insight with the intelligence hub.

**4 Question 2: How can we more effectively promote awareness of rights and responsibilities – of both workers and employers? Should reporting non-compliance (especially of one’s own employer) be made easier?**

- 4.1 Awareness of rights and responsibilities must begin with education and information. Yet there are currently huge gaps in the information on GOV.UK meaning that workers cannot understand their employment status – a key determinant of eligibility for things like the NMW and other employment rights.<sup>10</sup>

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<sup>7</sup> <http://www.unitetheunion.org/news/huge-rise-in-bogus-self-employment-demonstrates-urgent-need-for-radical-employment-reforms/>

<sup>8</sup> <http://ucatt.infobo.co.uk/files/publications/UCATT%20Report%20Evasion%20Economy.pdf>

<sup>9</sup> As explained here: <https://www.taxation.co.uk/Articles/2013/07/03/309981/sign-here-or-else>

<sup>10</sup> We also note in passing that GOV.UK may be unhelpful to some *employers* who want to do the right thing by their workers. For example, the page on GOV.UK that describes ‘casual or irregular work’ (<https://www.gov.uk/employment-status/worker>) consistently refers to a relationship between a *business* and a worker, such that someone engaging a worker for themselves personally and not in the course of a business (such as a care and support employer – e.g. someone who takes on a carer to help them live independently) would not necessarily appreciate that the guidance applies equally to them.

- 4.2 LITRG is hugely concerned about the impact that ‘non-standard work’ such as agency work, zero-hour contracts and dependent self-employment has on the low-paid. The starting point for most such workers is that they are ‘workers’ and therefore have rights to the basic employment law protections such as holiday pay and the minimum wage. However, the GOV.UK information on ‘worker’ status and rights is very confusing.<sup>11</sup>
- 4.3 It is also incomplete – the fact that ‘workers’ are entitled to auto-enrolment is missing from the list of rights, for example, and it makes no reference to the fact that many ‘dependent’ self-employed people would be covered by worker status for most employment law purposes (nor gives an illustration of a dependent self-employed ‘worker’ to help them self-identify).
- 4.4 Workers not understanding their status or rights goes some way to explaining a recent Citizens Advice press release<sup>12</sup> saying that half of people on zero hours contracts, and two in five people on temporary contracts, wrongly believe they are not entitled to paid holidays. It also helps explain why some umbrella companies seem to be marketing ‘employee rights’ to agency workers (in an effort to secure their business): *‘If you join an umbrella company.... you’ll receive the best of both worlds. Not only will you be able to benefit from all the perks contracting offers, you’ll also have access to the same rights and benefits given to permanent employees. These include holiday, sick, and maternity & paternity pay.’*<sup>13</sup>
- 4.5 We think the implication here is that you have no basic rights as an agency worker – which of course is incorrect (as agency ‘workers’ they will have access to all those rights – albeit sick and maternity pay have qualifying conditions including an earnings condition<sup>14</sup>). There is no doubt in our minds that confusion over status and rights could be seeing workers paying for the ‘employment services’ of an umbrella company unnecessarily.
- 4.6 In our response<sup>15</sup> to the BEIS review into ‘*The future world of work and the rights of workers*’ last year we gave some further examples of the inadequacy of GOV.UK and stressed that urgent clarification of the existing ‘worker’ rules is needed. Further, we stressed that while empowering ‘workers’ by giving them better information about their status and rights could help address some of the problems that they face, this also needs to be backed up by an

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<sup>11</sup> <https://www.gov.uk/employment-status/worker>

<sup>12</sup> <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/sharp-practices-paid-holiday1/>

<sup>13</sup> <http://www.parasolgroup.co.uk/help-me-decide/faqs/why-join-an-umbrella-company/>

<sup>14</sup> A qualification aspect is that average weekly earnings (usually calculated over the previous eight weeks) are at the Lower Earnings Limit (£113 per week in 2017/18).

<sup>15</sup> <http://www.litrg.org.uk/sites/default/files/files/161216-LITRG-response-BEIS-Future-work-rights-worker-FINAL.pdf2+164m>

easy and accessible means for them to report their position if things go wrong – something we fear is lacking.

- 4.7 We have some concerns over the Advisory, Conciliation and Arbitration Service (ACAS) helpline, for example. According to a recent National Audit Office report,<sup>16</sup> the number of referrals passed to HMRC about minimum wage issues from the ACAS helpline reduced significantly in the year ending December 2015.<sup>17</sup> We are unsure if this trend has continued but think it is vital that the Director get to the bottom of this before setting his strategy for 2018/19.
- 4.8 In addition to making a complaint about minimum wage issues via ACAS, people can complain directly to HMRC, however the form that they need to use is not user friendly – and does not really allow them to make an anonymous complaint<sup>18</sup> which could be putting many people off using it (more on this in section 5).
- 4.9 We are also not sure where a self-employed person who was really a ‘worker’ would go with a problem about holiday pay, for example. The first page of the GOV.UK ‘employment status’ guide<sup>19</sup> suggests ACAS may be able to help, however ACAS’s strapline per their website is ‘Help & advice for employers and employees’ (of which a ‘worker’ is neither). In any case, from using ACAS’s Helpline Online Automated tool (where you are directed if you call the ACAS helpline), there seems to be very little detailed advice for ‘workers’ on the ACAS website.
- 4.10 Other GOV.UK guidance<sup>20</sup> suggests there may be other avenues for reporting problems, for example, the Employment Agency Standards inspectorate, the Health and Safety Executive (HSE), etc. So, should workers use ACAS? Or should they go directly to the enforcement body concerned? What if their complaint spans more than one area? Should they go to them all?
- 4.11 Low-paid workers require certainty and simplicity. The various routes in to the enforcement bodies could be leaving workers confused and afraid of getting things wrong. Ideally there needs to a single, well publicised, telephone gateway (staffed by people with a good understanding of ‘worker’ issues) where ‘workers’ can go to receive advice and report

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<sup>16</sup> <https://www.nao.org.uk/report/ensuring-employers-comply-with-national-minimum-wage-regulations/>

<sup>17</sup> Until recently, the number of calls which ACAS’s predecessor, the Pay and Rights helpline, referred to HMRC had been increasing. In 2014-15, HMRC received 3,180 referrals – a 40% increase from 2013-14. However since the helpline changed to the ACAS helpline, this trend has reversed with 1,340 referrals (although this is only for period April 2015 to December 2015).

<sup>18</sup> <https://www.gov.uk/government/publications/pay-and-work-rights-complaints>

<sup>19</sup> <https://www.gov.uk/employment-status>

<sup>20</sup> <https://www.gov.uk/pay-and-work-rights>



problems, as well as an internal case management system – this would ease the worker’s task of navigating the different enforcement mechanisms.

**5 Question 3: Given finite resources, how should the enforcement bodies balance enforcement activity that is reactive to individual complaints and that which is proactive based on information and intelligence indicating the likelihood of non-compliance?**

- 5.1 Proactive risk profiling work is vital to the low-paid. Perhaps too much of the current enforcement framework relies on workers complaining about their engagers. Yet not only may workers struggle to actually make a complaint, as alluded to above, even if they can, it should be recognised that realistically, they may still not.
- 5.2 Low-paid workers tend to be disproportionately female, they may also be migrant workers, have low levels of formal qualifications, and a weak collective voice. Bearing in mind these characteristics, it is easy to envisage some workers being afraid of reporting their engager to the authorities for fear of their engager finding out they are the ‘whistle-blower’ or alternatively losing their job if non-compliance is upheld and their engager becomes insolvent – because of back assessment of NMW liabilities, for example.
- 5.3 We can certainly confirm that enquirers to the LITRG website who have found themselves in various different tax ‘schemes’ have been reluctant to give their real name, or send copies of payslips showing what is happening to them. They are likely to be even less forthcoming with the authorities themselves, and we have lost contact with enquirers altogether if we have suggested they make an official complaint – even an anonymous one.
- 5.4 We also think it is important to acknowledge that workers may have been encouraged to accept the position in the first place by Jobcentre Plus and be concerned about sanctions and a subsequent loss of benefits if they complain or try and leave. Given the current culture within the benefits system, we fear that the authorities may be influencing people to accept whatever is on offer whether or not the terms are appropriate to the particular situation.<sup>21</sup>
- 5.5 In light of all these things, we think that proactive work should have at least as much focus on, if not more than, reactive work to compensate for low-paid workers’ inability or unwillingness to complain.

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<sup>21</sup> An example can be found here:

<http://forums.moneysavingexpert.com/showthread.php?t=5721490>

**6 Question 4: Effective use of the spectrum of enforcement tools: the enforcement bodies have a variety of tools that they can use, from fines and repayment of wages owed, to public naming of organisations caught being non-compliant, to the new Labour Market Enforcement Orders and Undertakings, potentially leading to up to two year prison sentences.**

- a. What evidence is there on the effectiveness of different penalties at achieving redress for workers and changing the behaviour of employers?**
- b. How can the enforcement bodies target their different enforcement tools to greatest impact, both addressing non-compliant behaviour and supporting compliant businesses?**
- c. Are there additional tools or powers that enforcement bodies could use to change employer behaviour?**

6.1 In terms of the minimum wage enforcement (the thing we know most about when it comes to the various bodies, so restrict our comments to), HMRC have a variety of tools to hand, including penalties and naming and shaming. However, minimum wage underpayment still seems to be a huge issue<sup>22</sup> and as such, we question whether HMRC are making sufficient and appropriate use of the tools to make them an effective deterrent.

6.2 Of note are the recent comments and recommendations in the recent LPC report<sup>23</sup> which we endorse and which include:

- The Government should fully evaluate its communications campaign around the 2017 National Living Wage (NLW) and NMW upratings. Awareness of the minimum wage can contribute to increased compliance.
- The LPC recommends improved guidance around the technical errors employers have made so that others can learn from their mistakes.
- Naming of employers found to underpay could be made a more regular and predictable occurrence to build on the momentum the policy has acquired.
- Publicising the increase in enforcement activity could help increase employers' awareness of the risk of being found not to comply with the minimum wage. Using 'nudges' like a 'tick box' declaration on payroll software where an employer is asked to confirm that staff are paid the minimum wage could also be helpful.
- The LPC recommends that HMRC establish information systems that allow Government to learn as much as possible about the nature and extent of non-compliance from the cases it investigates. It could also gather intelligence from

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<sup>22</sup> This report has shown that underpayment, and therefore non-compliance, remains an issue that affects hundreds of thousands of people each year – Low Pay Commission (LPC): Non-compliance and enforcement of the National Minimum Wage (Sept 17)

<sup>23</sup> <https://www.gov.uk/government/news/low-pay-commission-report-on-non-compliance-with-the-minimum-wage>

other parts of Government, for example working with the Jobcentre Plus Jobmatch Team to identify online job adverts that appear non-compliant.

- 6.3 When thinking about ‘effective use of the spectrum of enforcement tools’, we take the opportunity to highlight the proliferation of ‘non-compliant’ pay day by pay day (PDPD) umbrella company schemes, which suggests that HMRC lack the will or resources to carry out effective enforcement against those employers who use them. This may or may not spill over into HMRC’s minimum wage compliance activity, but may certainly help explain some of what the Director is seeing in the labour market in terms of long supply chains, etc. and so help him develop his strategy for 2018/19.
- 6.4 To explain further: our report ‘*Travel expenses for the low-paid – a time for a rethink?*’<sup>24</sup> 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.
- 6.5 In a PDPD scheme, the employer, on an earnings period basis, grants tax and National Insurance relief at source on a worker’s qualifying business expenses (mainly travel expenses). It is HMRC’s opinion that the model is non-compliant (although this was disputed by the scheme providers and we look at this further in section 15), however rather than target the employers, it is the worker (who often does not understand, or fully understand what they have entered into) that bears the brunt of HMRC’s compliance function by way of auto-generated P800 tax calculations and follow-up collection activities for unpaid taxes.
- 6.6 As typically these schemes are marketed to the lowest paid workers, it is those who are least able to settle the tax liability who will receive such bills. In addition, on the basis that a fee will already have been deducted 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 the worker received in the first place.
- 6.7 To be clear, based on HMRC’s view of the law, PDPD operators are operating the PAYE scheme incorrectly. In line with their own regulations,<sup>25</sup> HMRC should therefore pursue the employer first rather than the employee. Under the regulations, only if the employer satisfies HMRC that the PAYE under-deduction was a genuine error despite taking reasonable care, does the liability shift to the employee, and then only if HMRC serve a direction formally requiring the employee to pay the outstanding tax, against which the employee can appeal.
- 6.8 If nothing else, following this order must surely make sense from an administrative point of view – it must be far easier to deal with one single employer rather than chase large

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<sup>24</sup> <http://www.litrg.org.uk/reports/2014/141117-LITRG-PAYE-report.html>

<sup>25</sup> <http://www.legislation.gov.uk/ukxi/2003/2682/regulation/72/>

numbers of employees – yet HMRC routinely fail to comply with their own regulations, bypassing the employer and enforcing the debt solely against the employee.

**7 Question 5: Joint working: how and when can agencies benefit from working together and sharing information, and what other organisations should they be working with, both nationally and at a local level?**

- 7.1 In theory, agencies can benefit from working together and sharing information – it should make them more effective and save time, effort and money.
- 7.2 However, in our experience, different Government departments struggle to work together. It may help to have a comprehensive protocol in place, providing a clear overview of what is expected of the agencies in terms of working together collaboratively and coordinating enforcement activity, along with a clear demarcation of the various roles of the enforcement bodies and a process for dealing with any administrative or operational conflict. This would help the authorities determine which agency should lead in the context of a joint investigation and which enforcement tools would provide the most effective response. In addition, see our comments to in section 15.
- 7.3 In terms of other organisations that the enforcement bodies should be working with, we would like to stress the importance of building contacts and relationships with charities who are on the ground helping people with problems at work (such as Citizens Advice and TaxAid<sup>26</sup>), and trade organisations and representative bodies who may be keen to help stamp out wrongdoing in their sectors by reporting exploitation. The general public may also prove to be a useful ‘partner’ in terms of helping to build a picture of risk – however it does not appear to be currently possible for a member of the public to report any suspicions about non-compliant businesses they come into contact with.
- 7.4 We also recommend that HMRC’s tax fraud/evasion data be routinely scrutinised by the enforcement bodies. As alluded to throughout this response, there is much overlap between the Director’s work and HMRC’s tax compliance work. More specifically, minimum wage breaches often go hand-in-hand with bogus self-employment but these cases may be largely invisible to minimum wage compliance officers as they will not appear in official data.
- 7.5 HMRC could be a rich source of information here – for example, workers may have reported such irregularities to the ‘cash in hand’ hotline.<sup>27</sup> Even where HMRC do not investigate reports themselves from a tax perspective, they could pass the data over to the enforcement agencies for their consideration (although we recognise that this may involve a change of data protection and non-disclosure laws).

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<sup>26</sup> [www.taxaid.org.uk](http://www.taxaid.org.uk)

<sup>27</sup> <https://www.gov.uk/report-cash-in-hand-pay>

**8 Question 6: Size and distribution of resources: Overall, is the enforcement resource adequate? Are the resources provided to the enforcement agencies proportionate to their roles? If these were to be altered, on what type of activities should the agencies focus their resource?**

8.1 We have no comments other than to say: unless there is talk of extended funding at the same time as talk of extended remits, we fear efforts to monitor and enforce compliance and safeguards will be ineffective.

**9 Question 7: Long supply chains are clearly an issue in some sectors, for example retail, construction and the garment industry. While the firm at the head of the chain is normally compliant, this is not always the case further down the chain. There are number of options used in other parts of the world or in other contexts that could be used to address this problem:**

- Certification of suppliers could be used to set standards in each sector, enabling lead firms to only sub-contract to organisations that have demonstrated they comply with the rules. If this did not have the desired effect, then a stronger regime of licensing could be implemented, supported by monitoring and enforcement.
- Joint liability could be introduced to ensure that lead firms bear some responsibility for their supply chain (possibly to be waived if they use certified or licensed providers).
- The purchasing power of public procurement could be used to stronger effect to enforce compliance in the private sector.
- A limit on the number of layers in the supply chain could be introduced.
- The goods from non-compliant producers could be embargoed (so called 'hot goods'), creating pressure on the ultimate purchaser to only use reputable contractors and suppliers.

**How would each of these work in your sectors? Do you have suggestions as to how else this problem could be tackled?**

9.1 We support anything that effectively protects vulnerable workers. For that reason, we have no objection to any of the ideas set out here. Saying that, we have concerns that matters such as the economic landscape, the government's strategy of labour market deregulation and commercial interests will make implementing any of them a challenging objective.

9.2 In any case, given our understanding that one of the main drivers for long supply chains is the NIC savings for the engager – we wonder if there is another option?

9.3 Let us explain. Agency workers historically were called upon as an additional labour resource. These days it seems that businesses are bringing in agency workers more frequently and, in some instances, are using them instead of directly hired staff to make up the bulk of the workforce, for example as in the recently publicised case of Sports Direct.

Such arrangements can lead to two ‘extra’ intermediaries in the supply chain – the agency and the umbrella company the agency workers are employed by.

- 9.4 One of the reasons for this (again set out in full in our umbrella company report ‘*Travel expenses for the low-paid – a time for a rethink?*’,<sup>28</sup> but outlined in brief here to be helpful) is that agency workers who are employed by umbrella companies have been able to receive tax- and NIC-free home-to-work expense reimbursements under the ‘temporary workplace’ rules (swapping taxable salary for tax- and NIC-free expense reimbursements also saves the employer 13.8% National Insurance on the expense element). Having this ‘tax efficiency’ throughout the supply chain means that contracts can be negotiated at lower prices, making agency workers a very attractive option for end clients.
- 9.5 HMRC take the view that these umbrella arrangements are using the temporary workplace rules in a way that was not intended. Further, all sorts of variations of the theme have popped up over time, which HMRC have not managed to tackle through their ordinary compliance and enforcement activity (see our comments previously on PDPD in section 6).
- 9.6 New rules were introduced from April 2016 that were supposed to restrict relief for home-to-work travel expenses and spell the end for umbrella companies (except in cases where a worker is NOT under the supervision, direction or control of any person). But, with apparently little fear of HMRC, many umbrella companies are simply saying that their workers fall outside the new rules and continue to claim relief on the same basis as before. They are also managing to avoid some of the new rules from April 2016 that were designed to restrict their ability to process expenses, tax- and NIC-free, at the point of pay.
- 9.7 If HMRC could manage to get a proper handle on travel and subsistence schemes, this (in time) could reduce the incentive of taking on agency workers and lead to fewer issues around long supply chains.
- 9.8 HMRC also need to better enforce IR35 as part of this.<sup>29</sup> Personal Service Companies (PSCs) that fall outside ‘IR35’ are not caught by the new travel and subsistence rules. This has resulted in many workers being told they must provide their services through their own company, as we can see from the following extract from an item of correspondence: ‘*Dear Sir/Madam, I work for an agency called AA. They work with a company called XX which provides the payroll for their agency workers. When I was hired by AA I had to register with XX in order to be paid. By registering with XX, it meant having to register as a limited company, despite solely working for AA...*’

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<sup>28</sup> <http://www.litrg.org.uk/reports/2014/141117-LITRG-PAYE-report.html>

<sup>29</sup> IR35 rules were introduced in Finance Act 2000. They apply in situations where the worker would be treated as an employee or office holder of the client if the intermediary company did not exist. If caught, the worker is then treated as receiving any income which has not been paid out by way of a salary as additional employment income at the year-end – this deemed employment payment is treated in the same way as salary, i.e. subject to PAYE tax and NIC. IR35 removes much of the tax advantage gained by the worker drawing dividends from the company.

- 9.9 Thus, not only are more intermediaries added to the supply chain, but further problems are generated for workers as the responsibilities and obligations associated with running a limited company mean they are often totally inappropriate for workers, leading to messy compliance issues that can take years to unpick.
- 9.10 In our experience, most low-paid worker PSC arrangements would be caught by IR35 and therefore the travel and subsistence restrictions. Unfortunately, however, IR35 is widely regarded as being ineffective and rarely enforced by HMRC.<sup>30</sup>
- 9.11 Interestingly, the new off-payroll working in the public sector and flat rate VAT rules from April 17, may lead to some of those who were pushed into PSCs after April 16 being pulled out of them and put back into umbrellas.<sup>31</sup> This is the latest in a long line of market reactions to tax environment changes – the story of which is told well through the OTS chart of reforms.<sup>32</sup>

**10 Question 8: Sector specific solutions: What additional measures could be brought in to sanction industries with relatively high levels of non-compliance? How would we ensure compliant businesses were not over-burdened?**

- 10.1 The recently introduced Labour Market Enforcement (LME) undertakings and orders<sup>33</sup> further strengthen the enforcement bodies' powers. A breach of an LME order can, for the first time in terms of labour market sanctions, result in a sentence of up to two years' imprisonment.
- 10.2 We would have thought that these new powers would be useful to sanction industries with relatively high levels of non-compliance, however we would like to stress the importance of publicising when the new powers have been used to send out a strong message and to help inject confidence into the system.
- 10.3 Clearly, the use of the new powers will need to be carefully considered and will need to be determined on a case-by-case basis. We think special consideration will need to be given to

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<sup>30</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/personal-service-companies/news/personal-service-companies-report-published/>

<sup>31</sup> As explained here: <https://www.ft.com/content/71bbc3b8-028e-11e7-aa5b-6bb07f5c8e12>

<sup>32</sup> As set out and commented on in the Social Market Foundation's 'rules of engagement' report (page 31): <http://www.smf.co.uk/wp-content/uploads/2017/06/5600-SMF-PRISM-Report-WEB-AW-FINAL.pdf>

<sup>33</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/572991/Code\\_of\\_Practice\\_Print.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/572991/Code_of_Practice_Print.pdf)

employers in sectors whose operation is largely determined by Government funding – for example the social care sector.<sup>34</sup>

- 10.4 According to the UK Home Care Association, which represents care providers, local authorities need to pay agencies £16.70 an hour to cover the cost of paying workers properly and provide enough profit to keep the businesses sustainable. The average paid by local authorities, which provided data, was only £14.58.<sup>35</sup>
- 10.5 While there is no excuse for non-payment of the minimum wage, and while some homecare providers seem to be making a profit,<sup>36</sup> we recognise the difficult conditions facing many others (culminating in some of them handing back local authority contracts<sup>37</sup>). It seems to us that any action in this sector needs to be managed carefully to prevent it becoming even more unstable (something the Care Quality Commission raised the alarm about last autumn<sup>38</sup>).

**11 Question 9: What systemic employment issues facilitate or are linked to the failure to pay NMW/NLW? For example: the lack of payslips for workers; non-payment of holiday pay or sick pay; payment of travel/sleep time in certain sectors. How could these be addressed?**

- 11.1 In general, there are many fault lines in the system, which breed endless opportunities for unscrupulous employers: employment status and tax status, tax and NIC, employment and self-employment, temporary and permanent workplace, etc.
- 11.2 On top of this, workers have to contend with things like an overall lack of education and information, and overly complex and constantly changing laws. In our view, these things facilitate or are linked to the failure to pay the NMW/NLW and the issue of non-payment of minimum wage in connection with travel time in the social care sector well illustrates this.
- 11.3 The Resolution Foundation found in its report on ‘The scale of minimum wage underpayment in social care’, that around 160,000 care workers (or 11%) were earning less than the NMW in 2013/14 due to the failure of employers to pay homecare workers for their travel time.<sup>39</sup> It further estimated the average underpayment as £815 per worker.

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<sup>34</sup> A 48% non-compliance rate found by HMRC in social care employers in the period between April 2011 and March 2013.

<sup>35</sup> [https://www.ukhca.co.uk/pdfs/ukhca\\_homecare\\_deficit\\_2016\\_final.pdf](https://www.ukhca.co.uk/pdfs/ukhca_homecare_deficit_2016_final.pdf)

<sup>36</sup> <http://www.bbc.co.uk/news/business-32715728>

<sup>37</sup> <https://www.theguardian.com/society/2017/mar/20/care-contracts-cancelled-at-95-uk-councils-in-funding-squeeze>

<sup>38</sup> [http://www.cqc.org.uk/sites/default/files/20161019\\_stateofcare1516\\_web.pdf](http://www.cqc.org.uk/sites/default/files/20161019_stateofcare1516_web.pdf)

<sup>39</sup> <http://www.resolutionfoundation.org/app/uploads/2015/02/NMW-social-care-note1.pdf>



- 11.4 So what is causing this? The current rules say that a care worker's pay should average out at or above the minimum wage once you factor in the time they spend in the client's home, time spent travelling between their different clients during the day and their associated out-of-pocket expenses, including vehicle mileage.
- 11.5 The rules do not direct that either travel time or associated expenses must be paid as separate items. The framework itself therefore allows for the non-payment of travel time – although it is necessary to have a good understanding of the rate paid for 'contact time' before being able to determine whether a worker is being underpaid the minimum wage or not.
- 11.6 Nevertheless, we can see that workers who receive lower pay rates per hour are more at risk of being underpaid when travel time and associated expenses are factored into the minimum wage pay calculation. Moreover, the higher the proportion of travel, the bigger the risk.
- 11.7 Such opaqueness makes the system open to abuse or error by employers. Further, it is clear from the number of 'NMW and travel' related queries to our website that there is a lot of confusion about these rules on the part of workers. This is not surprising given the only guidance in GOV.UK<sup>40</sup> on this is in the 'Employing people/Payroll' section and uses oversimplified examples, which hampers the workers' ability to check whether their employers are compliant.
- 11.8 It is therefore not enough to simply ensure that pay rates are above minimum wage when travel time is added on to the hours they spend with clients. The rules should be changed so that care providers must pay travel time (and associated expenses) as a separate item. (This would also help deal with a disturbing knock on effect on a care worker's tax credits position, whereby if an employer does not pay them directly for their travel time (even if their overall remuneration at least equals the minimum wage) the claimant's weekly *remunerative* hours of work may be insufficient to meet the minimum Working Tax Credit requirement.)<sup>41</sup>
- 11.9 In the absence of such a simplification, a more sophisticated, sector-specific calculator would help make sure that more care workers understand their minimum wage rights.<sup>42</sup> We suggest that this is accompanied by more detailed guidance. A better series of worked examples would be helpful. They should be based on real-life situations like those used by

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<sup>40</sup> <https://www.gov.uk/minimum-wage-different-types-work>

<sup>41</sup> We look at these kinds of complex interactions in our forthcoming report '*Care workers and the lack of design in the systems they rely on*'.

<sup>42</sup> The current GOV.UK minimum wage calculator does not deal with travel time or expenses, asking only very rudimentary questions including: Are you an apprentice, how old are you and does your employer provide you with accommodation?

the Resolution Foundation in their report '*Does it pay to care*'<sup>43</sup> to illustrate the typical working patterns and conditions of home care workers in the UK.

- 11.10 We also think that care workers' payslips should state how much time they are paid for. This would make it easier for care workers to check their wages against their travel time and help them to understand their position sufficiently to challenge it if necessary. We highlight that in the Spring 2016 Report,<sup>44</sup> the LPC recommended (not for the first time) that the Government consider requiring that payslips of hourly-paid workers should include the number of hours for which they are being paid.

**12 Question 10: The proportion of the labour force covered by the NLW is predicted to increase to 14 per cent by 2020, inevitably leading to an increase in the number of complaints to HMRC about correct payment of wages. How should HMRC balance responding to individual complaints against proactive, risk-based enforcement?**

- 12.1 See our comments in section 5. They must also make sure they are making the best possible use of HMRC's information on tax fraud and evasion as this could help fill intelligence gaps and thus free up resource to deal with an increased workload – as suggested by us in section 7.

**13 Question 11: Should the remit of the NMW/NLW team within HMRC be extended to cover other types of non-payment of wages?**

- 13.1 Given worker ignorance around holiday pay – as alluded to in section 4 – we think HMRC should assume responsibility for enforcing it and should use any such powers proactively to help secure the most vulnerable workers their entitlements.<sup>45</sup>
- 13.2 This would also give those workers that *are* aware of their holiday pay rights a realistic chance of securing those rights. Currently they have to bring claims to an employment tribunal. Employment tribunal fees may no longer be an issue<sup>46</sup> but there are other barriers to this route, in particular for people who may lack the confidence or knowledge of the system to initiate a claim themselves. This may include young people with lower levels of

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<sup>43</sup> <http://www.resolutionfoundation.org/app/uploads/2013/08/Does-it-pay-to-care.pdf>

<sup>44</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/571631/LPC\\_spring\\_report\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/571631/LPC_spring_report_2016.pdf)

<sup>45</sup> We have also recently (anecdotally) heard of some employers – particularly in the agency worker arena – starting to view untaken holiday pay as an additional revenue stream.

<sup>46</sup> Although remarks by the justice minister at the Conservative party conference suggest this may not be a foregone conclusion.

education or migrant workers with English as a second language or due to cultural differences do not feel trusting of the establishment.

- 13.3 In this regard, we note Matthew Taylor’s recommendation<sup>47</sup> in his review of modern working practices, which we endorse:

*‘All three of these entitlements (NMW, sick pay and holiday pay) require the enforcement body to have a detailed knowledge of calculating pay and as such, we believe HMRC should assume responsibility for enforcing these rights. As this proposal is designed to protect the most vulnerable in work, enforcement of holiday pay cases should be restricted to those on low pay and not be a state-funded resource for those who could afford to take their case to an employment tribunal. The Review does acknowledge the complexity in achieving this though and would expect any changes in this area to be phased in over a realistic timeframe.’*

**14 Question 12: How can the GLAA most effectively use its extended remit and resources to enforce non-compliance?**

- 14.1 We commend the GLAA’s efforts to date<sup>48</sup> and think they should continue doing what they are doing, i.e. using their extended remit and new police-style powers to clamp down on the more serious forms of labour market exploitation, including modern slavery.
- 14.2 So far, there has been no extension to the number of sectors in their licensing remit, however we think this should change, as covered directly below.

**15 Question 13: Is there a case for extending licensing into new sectors such as construction, care, or cleaning? What might this look like for different sectors?**

- 15.1 It is apparent to us that the GLAA has had positive impact in stamping out vicious and bad working practices in the sectors in which they operate. Therefore, we would be very happy to see the GLAA’s licensing system expanded – giving an extra layer of protection for more workers in sectors characterised by vulnerable employment such as construction, care homes, car washes and hotel and catering. Currently this only occurs within certain sectors meaning that workers are essentially subject to a two-tier system depending on whether the employer’s activities fall within the GLAA’s remit or outside.

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<sup>47</sup> <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

<sup>48</sup> Per this press release: <http://www.gla.gov.uk/whats-new/latest-press-releases/01072017-new-powers-for-law-enforcement-to-combat-slavery-and-labour-exploitation/>

- 15.2 However, considering there is a licensing standard in respect of tax and NIC,<sup>49</sup> this means more overlap between the GLAA and HMRC's roles, so what we say above is subject to two points:
- 1) No doubt the GLAA and HMRC *can* work effectively in partnership on straightforward matters (see our comments in section 7), however it should be remembered that the GLAA are unlikely to have sufficient depth of knowledge to undertake things like tax investigations. It is also worth saying that an increased profile for the GLAA as a 'tax enforcement' body may mean increased uncertainty in the workers' minds as to where to access information – not to mention to report abuses (see our comments in section 4 for more on this).
  - 2) Tax law is constantly increasing in complexity and often the meaning of tax and social security legislation is not clear 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 GLAA licence application or appeal, for absolute, unequivocal certainty, we would urge that the GLAA pass it to HMRC to test the legality – in the tax tribunal. It would then be for the GLAA to take action around the licensing standards based on the outcome.
- 15.3 The importance of this is probably best demonstrated using an example. In the *FS Commercial* case,<sup>50</sup> the GLAA won an appeal in their own tribunal system against this business operating a controversial PDPD scheme – meaning its licence was revoked and it could not operate in any GLAA regulated sectors. 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 GLAA arena – questioned whether the judgement in the *FS Commercial* case was a proper authority, with at least one continuing to promulgate PDPD for another two years after the decision. It also did not apply to any businesses operating PDPD outside of the GLAA regulated sectors.
- 15.4 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 section 6.

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<sup>49</sup> Licensing 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 HMRC in a timely manner.

<sup>50</sup> *FS Commercial v Gangmasters Licensing Authority* [2012]:  
<http://www.gla.gov.uk/PageFiles/1475/FS%20Commercial%20Ltd.pdf>

- 16 Question 14: Should the Employment Agency Standards Inspectorate (EAS) remit be extended to cover:**
- a. regulation of umbrella companies and other intermediaries in the supply chain;**
  - b. compliance under the Agency Workers Regulations (AWR) (requiring employers to treat agency workers and permanent staff equally on certain contract terms)?**
- 16.1 In answer to part a: the barriers for operators to enter into the ‘umbrella’ industry are low – it is relatively easy to set up an umbrella structure without a significant capital outlay. This means there is a wide spectrum of operators.
- 16.2 Some umbrella companies evidently take compliance and the welfare of their employees very seriously, however others seem to have a rather more laid-back approach to both (as alluded to throughout this submission). In the absence of any statutory regulation of the sector, there is some attempt to self-regulate<sup>51</sup> but this is not a complete solution. We therefore do see some merit in the EAS’s remit being extended to cover umbrella companies.
- 16.3 In answer to part b: the AWR mean that agency workers and umbrella company employees (umbrella company employees are still classed as agency workers for the purposes of AWR) should receive equal treatment compared to the end client’s own employees.
- 16.4 For example, workers should be allowed to use any shared facilities (e.g. a staff canteen or childcare) from the first day they work in an assignment location. After 12 weeks’ continuous employment in the same role, they should get the same terms and conditions as the end client’s own employees, including pay and any annual leave above the minimum 28 days required by law.
- 16.5 There are rules in place which mean that their assignments cannot just be stopped as they get near 12 weeks of continuous work, however as the Director is undoubtedly aware, the AWR legislation has to a large extent been sidestepped – temporary work agencies are simply adopting different approaches to temporary staffing, for example the problematic ‘Swedish derogation’ model.<sup>52</sup>
- 16.6 Even where they are not being sidestepped, in reality, lower paid workers tend to be on similar packages across the board so they are unlikely to see much difference to their position because of AWR.
- 16.7 Clearly LITRG are in favour of continued provision to protect agency workers, however if AWR is not achieving what is intended it seems to us that a wholesale review of the AWR

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<sup>51</sup> <http://www.prism.contractors/>

<sup>52</sup> Sometimes there are problems with these ‘pay between assignments’ contracts as explained by Citizens Advice: <https://www.citizensadvice.org.uk/work/rights-at-work/agency-workers/problems-with-pay-between-assignment-contracts/>

might be in order rather than just bringing the AWR under the EAS' remit. As AWR stems from European legislation, Brexit may be present a realistic opportunity to do this.

**17 Question 15: Should employment agencies be required to provide greater clarity on the information they provide workers, for example explaining all deductions and setting out the full amount workers will get paid in people's contracts?**

- 17.1 Historically, if a worker found work through an agency, the agency would normally deal with the worker's pay themselves. However, these days, agencies prefer not to do this as it saves them time and money and means they can concentrate on matching workers with available work. As such, they usually suggest that people use an umbrella company. It is not against the law for them to do this, however this quadripartite arrangement can be very confusing, particularly for lower paid workers.
- 17.2 We think this whole area is one that could benefit from greater clarity – indeed, LITRG have recently launched a new 'working through an umbrella company' factsheet<sup>53</sup> to offer guidance to around tax and employment status and provide practical tips to help agency workers avoid any problems with their pay and deductions.
- 17.3 The factsheet covers a range of issues which, from scrutinising our query data, we know workers are likely to have questions on, including: holiday entitlement and other employment right issues, the availability (or otherwise) of travel expense relief and why they may have been handed over to an umbrella company by an agency in the first place. It includes a helpful diagram explaining how umbrella companies work, a sample payslip to help demystify the sometimes confusing payslip entries and links to more help.
- 17.4 Very importantly, it includes a 'ready reckoner' to help workers understand whether what they are being offered to work through an umbrella company is roughly equivalent to what they might have otherwise received, once the various deductions the umbrella company must make have been considered.
- 17.5 Using this factsheet as a pointer towards areas that agency workers most struggle with, we think the Director should recommend amending the legislation to improve the transparency of information which must be provided to workers – including better information in terms of rates of pay and those responsible for paying them.
- 17.6 At the very least Government guidance on agency worker and umbrella company worker issues should be improved – remembering the likely makeup of the workforce.

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<sup>53</sup> <https://www.litrg.org.uk/latest-news/news/170927-press-release-litrg-launch-practical-help-umbrella-company-workers>

**18 Question 16: How can EAS evolve to deal with the emergence of online platforms and apps which provide job finding services?**

- 18.1 We assume that this question refers to the gig economy, whereby individuals are contracted for short-term engagements or specific projects through online platforms such as Uber or TaskRabbit.
- 18.2 The problems highlighted around the gig economy mainly seem to be around 'worker status' and securing the rights that this status brings.<sup>54</sup>
- 18.3 Based on the queries we receive, gig economy workers would seem to have less autonomy than genuinely self-employed people and may derive all or most of their income from the business that they work for. Thus, many may well fall under the definition of 'worker'.
- 18.4 One such query reads: *'I am a "self employed" owner driver for a parcel delivery company. I own my own van and pay relevant insurances and fuel. I have a 2 year contract to deliver and collect parcels in a designated area. Until now we have been allowed to work away under our own steam. "New delivery rules" are being implemented which means i am now being told where to go and when, no matter the personal cost in excess fuel and time it will take me. I.E. it may take 1 extra hour and 20 extra miles to do the same route as i do now. I am financially penalised if i miss a time window. Their own drivers are not. There is no pay increase or payment to compensate this. I am now expected to do the same job as their own employed drivers without any worker rights. No sick pay, holiday pay or workplace pension like their own employees. My contract has not changed since i signed it. I never had any say in the contract...it was given to me with no negotiation. If i did not sign it i could not work. I have been told i must fulfill my contract but i feel like i am being treated as an employee. There are several of us in this situation and we dont know where to turn. Please help!!!'* [sic]
- 18.5 Our understanding is that the EAS is currently a very small body that enforces the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (Conduct Regulations).<sup>55</sup> According to these rules and regulations, recruiters must: not stop someone from working elsewhere; not make unlawful deductions from pay; not withhold payments or wages due not charge a fee to anyone seeking a temporary or permanent job; provide written contracts for their agency workers, including terms and conditions.
- 18.6 This is a very specific remit. It is therefore hard to see how the EAS could regulate the gig economy, without vast new resources, and the right support and expertise in place. It seems to us that the gig economy fits more squarely under the remit of the GLAA, who have licensing standards covering basic employment rights. Indeed, this was recently suggested

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<sup>54</sup> <https://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf>

<sup>55</sup> <https://www.gov.uk/government/publications/employment-agency-standards-eas-inspectorate-enforcement-policy-statement>

by the CIPD: *“In addition, it is crucial that the Gangmasters and Labour Abuse Authority is given sufficient resources to monitor and enforce compliance with existing employment rights. There is also a case to strengthen the role of ACAS to allow it to proactively work with business to improve their working practices if they are in danger of falling foul of the law through a lack of resources or ignorance.”*<sup>56</sup>

- 18.7 On another view, there should be no need to bring in the EAS or even the GLAA, if the current statutory framework of rights is adequately communicated and enforced (provided HMRC take on the role of holiday pay enforcer) – see our comments in section 4 for more on this.
- 18.8 A number of bodies have recently recommended that the burden of proof should be reversed to help gig economy workers establish their status. This would mean that it is for the engager to prove that the individual is not entitled to ‘worker’ employment rights, not for the individual to prove that they are so entitled. It is worth noting that the Taylor review made this recommendation. We all await the Government’s response to the review and any clarity that the outcome can bring to worker status – this will no doubt also help inform the Director’s strategy for 2018/19.
- 18.9 Of course, tax law only recognises two types of status – employed and self-employed – and so a lack of clarity remains for ‘gig economy’ workers even if changes are made to employment law. It is important for the Director to appreciate that any changes in employment law need to be accompanied by a thorough review of the tax position of such workers, particularly given that a good number of them are probably being treated as self-employed incorrectly and also considering that not being paid under PAYE (and having a ‘secondary contributor’) will also be denying them entitlement to Statutory Sick Pay (and other statutory payments) as explained in our submission to the Matthew Taylor review<sup>57</sup> – a very important part of the safety net for workers.

LITRG

10 October 2017

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<sup>56</sup> <https://www.cipd.co.uk/about/media/press/170317-gig-economy>

<sup>57</sup> <https://www.litr.org.uk/latest-news/submissions/170518-independent-review-employment-practices-modern-economy>