****

**Tips, gratuities, cover and service charges: proposals for future action**

Department for Business, Innovation & Skills consultation

May 2016

**June 2016**

**Tipping, Gratuities, Cover and Service Charges**

Response to the Department for Business Innovation & Skills consultation

June 2016

**Introduction**

1. The Society is the professional body for the solicitors’ profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.
2. This response has been prepared by the Employment Law Committee of The Law Society of England and Wales (“the Society”). We welcome the opportunity to contribute.

**Option 1**

**Question 7: Which option (or group of options) do you think best meets the Government’s objective to ensure all discretionary payments for service are clearly seen as voluntary for the consumer? Please provide reasoning for your response.**

1. We would propose a hybrid of Options 1A and Option 1B. A problem with Option 1A is that it could potentially standardise the practice of tipping and normalise the practice of employers topping up their workers’ wages by encouraging tipping. Further, having a discretionary payment for service could well discourage some consumers from tipping in that if the discretionary payment is perceived to be too high, the consumer may refrain from making any discretionary payment as opposed to making a payment but of a lesser amount.
2. We think that some employers will want to go beyond Option 1B so that, not only would they not suggest a specific tip, but they might actually want to discourage customers from leaving tips at all, making up the shortfall by increasing wages. A trend has recently developed in the United States where a number of restaurants have introduced a “no tipping” policy.
3. Option 1A would be suitable for those employers who continue to rely on tipping but it should not be imposed on those who do not want to encourage tipping at all.
4. The best way to implement Option 1A is to include two separate final prices on the bill. This will make it easier for consumers who do want to leave a tip to know what size of tip is appropriate, without having to do the calculation themselves.
5. We would support the use of Option 1C to ensure increased transparency about cover charges, so that consumers are aware of them before they order, including a requirement that such information is provided on menus, signage and websites.
6. However, we do not consider it necessary for the same amount of information to be provided for discretionary service charges. Because they are discretionary, it is sufficient that they are marked as such on the final bill. To require information to be provided on menus, signage and websites will provide an unnecessary burden for businesses in circumstances where consumers expect a discretionary service charge to be part of their ordinary service experience. This is in contrast to cover charges, which are much rarer and are more likely to take consumers by surprise.

**Question 8: Do you expect the ability of consumers to make payments for goods and services by card would be affected by any of the proposals set out within Option 1? Please provide reasoning to support your response.**

1. No. We do not expect that the ability to pay by card would be affected in any way. The technology already exists to give consumers the choice about adding a tip.

**Question 9: Can you suggest any other options to ensure transparency to consumers that voluntary payments are discretionary.**

1. Consumers should be made aware of the tipping policy before placing an order. In the case of restaurants, this means that it should be included on the menus. For those restaurants which choose to adopt a “no tipping” policy, they might want to publicise the policy more widely but they should not be legally required to do so.

**Question 10: Do you consider the current regulatory frameworks (Annex B) appropriate to enforce proposals to ensure that any suggestion of a discretionary for service emphasises that it is discretionary for the consumer?**

1. No, the current framework is insufficient because trading standards laws will only apply if an employer fails to comply with the voluntary Code of Practice where it has undertaken to comply with that Code and has indicated that it is bound by it.

**Question 11: If no, what additional enforcement measures would you suggest? Please reference your suggestions to specific consultation options where possible**.

1. Trading standards laws should be amended so consumers can complain if given false or inadequate information about the tipping policy before placing an order.

**Option 2**

**Question 12: Which option (or group of options) do you prefer to meet the Government’s objective to ensure workers receive a fair share from discretionary payments for service? Please explain your reasoning.**

1. We prefer Option 2A to Option 2B. Most consumers have the expectation that the whole of the service charge will be given to the workers and Option 2B would not be consistent with this expectation. Consumers also expect all retail businesses, from supermarkets to fast food chains, to absorb the costs of card handling fees. Although we prefer Option 2A, if Option 2B is taken up then we would propose that companies are required to notifying their customers that a handling charge will be applied to tips made via card payments and the amount of the handling charge. This could be included on the bill, website, menus etc.
2. We support Option 2C and consider that table sales charges should be banned altogether. This practice risks workers being paid less than the minimum wage in circumstances in which it will be very difficult for them to enforce their rights. It is inconsistent with the expectation of consumers, who intend tips to go to workers.

**Question 13: Can you suggest any other options to ensure workers receive a fair share from discretionary payments for service?**

1. We think that employers who rely on tips should be legally required to operate a tronc. If tips are retained by waiting staff, this lacks transparency and is potentially unfair to kitchen staff. Troncmasters will retain the discretion to reward the waiting staff who generate the largest number of tips with a larger proportion of the tronc.

**Question 14: Can you provide evidence to explain whether current handling deductions vary depending on the amount of discretionary payment for service or a percentage charge? Please provide an explanation as to why the current approach is adopted.**

1. The Society does not employ anybody in circumstances in which tips are paid.

**Question 15: As an employer, can you provide evidence regarding the cost to employers of handling discretionary payments for service for tax purposes? Please support your response with breakdowns of costs incurred.**

1. The Society does not employ anybody in circumstances in which tips are paid.

**Question 16: Do you agree with the proposed E24 tronc guidance updates? Please provide reasoning or further additions to support your response.**

1. Yes, we agree with the proposed tronc guidance updates, which accord with the expectation of consumers that tips will be retained and distributed by the workers.

**Question 17: Which option for troncs (guidance or rules) do you think is most suitable to achieve the Government’s stated objectives?**

1. We agree with Option 2D that well managed tronc systems should be incentivised but updating the tronc guidance will not be sufficient for this purpose. Consumers are not widely aware of the tronc guidance and so are not empowered to decide where to spend their money unless the situation is made much more transparent.
2. Accordingly, the updated guidance should be put on a statutory footing so that it is directly enforceable by the workers (please see our answer to question 19 below).

**Question 18: Do you consider the current regulatory frameworks (Annex B) appropriate to enforce proposals to ensure that workers receive a fair share from discretionary payments for service?**

1. Apart from excluding tipping from the minimum wage, the regulatory frameworks in Annex B do nothing to protect workers as there is no mechanism for them to enforce their rights directly. The complex tax rules impose an unnecessary burden upon employers without benefiting workers and there is no reason to keep them.

**Question 19: If no, what additional enforcement measures would you suggest? Please reference your suggestions to specific consultation options where possible.**

1. If Options 2A and 2C are chosen, and the updated tronc guidance is also put on a statutory footing, there is a simple mechanism by which all of these rights can be enforced. Legislation should be introduced which makes void any contractual term which results in workers receiving less than the full value of the tips received, or allows the employer to interfere in the redistribution of those tips in any way. This will give workers a claim of unlawful deductions from wages which can be brought in the Employment Tribunal, or a claim for breach of contract in the County Court.
2. The value of such claims is likely to be quite small and a major barrier to workers in bringing them is the current rate of tribunal and court fees. Therefore, the fees should be waived or a greatly reduced fee introduced for any claims of this nature.
3. Troncmasters should also be protected from unfair dismissal and other detriments for the decisions which they make while carrying out their duties, in the same way as employee representatives and the trustees of occupational pension schemes.
4. In addition, employers should be vicariously liable for any discrimination or unfair allocation of the tronc by the troncmaster.

**Option 3**

**Question 20: Do you agree with the suggested updates (within Annex C) to the current voluntary Code of Practice? Please provide reasoning or further additions to support your response.**

1. We note that it is not sufficient for information about whether tips are retained by staff to be included on bills. Some consumers would prefer not to give any custom to businesses which are not committed to passing their tips on to workers. For the information to be helpful to consumers, it must be provided on menus, signage and websites so that they can make an informed choice before placing an order.
2. However, if Options 2A and 2C are chosen, there will be no need to provide this information to consumers as the treatment of tips will already be consistent with their expectations. Similarly, if employers are given the option not to allow workers to retain tips, only those employers which follow this path should be required to explain their position to consumers. The administrative burden should fall on the employers which confound the expectation of consumers, not those which do not.
3. The same reasoning applies to the treatment of tronc systems. If a tronc system is not controlled by the workers, this misleads consumers as much as if deductions are made from the pool of tips. It is incumbent on any employer which wishes to take this approach to provide information transparently to its potential consumers, before they have decided whether they want to give their custom to the business. Employers which allow the tronc to operate in the expected way would be exempt.
4. We agree with the proposed updates to the Code of Practice in all other respects. The information provided to workers will remain important whatever else happens.

**Question 21: Which option(s) outlined in this section (3A and 3B) do you consider would best support the proposals under Options 1 and 2 to achieve the government’s stated objectives? Please provide an explanation to support your answer.**

1. Option 3A is wholly inadequate for these purposes. It imposes an administrative burden on employers while doing very little to provide meaningful protection either to workers or to consumers. Option 3B is a little better but only if there is a proper enforcement regime in place which gives workers the ability to enforce their rights.
2. We propose that, if an employer fails to comply with the Code of Practice, it will render void any contractual term which would result in workers receiving less than the full value of the tips received, or would allow the employer to interfere in the redistribution of those tips in any way. This will give a directly enforceable right to the affected workers, either in the Employment Tribunal or in the County Court.
3. Once again, we note that, if Options 2A and Options 2C are introduced, this will be consistent with the expectation of consumers. It will no longer be necessary to provide any information to them and so the administrative burden can be reduced.

**Question 22: Do you have any evidence of the costs of complying with the current voluntary Code of Practice? If so please provide details.**

1. The Society does not employ anybody in circumstances in which tips are paid.

**Question 23: As an employer, do you estimate any additional costs in adhering to the suggested additions to the voluntary Code of Practice?**

1. The Society does not employ anybody in circumstances in which tips are paid.

16 June 2016



-------------------------------------------------------
John Hughes
President
Birmingham Law Society