



**BIRMINGHAM LAW SOCIETY**  
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**Response to the Department of Business, Energy and  
Industrial Strategy Consultation on  
Establishing a new Single Enforcement Body for  
employment rights**

**October 2019**



The Birmingham Law Society is the largest provincial law society in the country having over 5,000 members including both solicitors and barristers. This response has been prepared by the Society's Employment Law Committee which has 21 members with a depth of experience whilst acting for employers and employees/workers. This response represents the collective view of its members who are specialist lawyers practising in all aspects of employment law and from all branches of the legal profession.

## Consultation questions

**1. Is the current system effective in enforcing the rights of vulnerable workers?**

*Y/N, please explain your answer.*

*No – it is too complex and convoluted, with potential overlap of jurisdictions of different enforcement bodies and parties don't know where to get advice on compliance or to report breaches – e.g. a modern slavery case will regularly have issues concerning NMW, working time, health and safety – all presently policed by different entities.*

**2. Would a single enforcement body would be more effective than the current system?**

*Y/N, please explain your answer.*

*Yes, as it would address the issues highlighted above and also promote a co-ordinated approach.*

**3. What do you think would be the benefits, if any, of a single enforcement body?**

*Single point of contact for employers and workers to seek advice and, if necessary, to report breach and seek enforcement action. The enforcement body will have a comprehensive range of powers to deal with a multitude of issues in any given case.*

**4. What do you think would be the risks, if any, of a single enforcement body?**

*Expertise in specific areas will have been built up by enforcement officers in their niche jurisdictions. There is a risk that expertise and experience will be lost if all brought under one organisation. Further, the legislative framework is very complex and there is a risk that enforcement officers will become generalists, with too little experience in specific areas.*

*The jurisdiction of the enforcement body will be very wide, and will range from dealing with **reputable** employers who may inadvertently breach NMW or working time due to an (established, but) incorrect interpretation of the law (e.g. overtime holiday pay cases) to **criminal organisations** involved in people trafficking (and everyone else in between). The same "one-size-fits-all" approach should not be taken across the range.*

**5. Do you think the current licensing scheme (for supply or use of labour) should be expanded to other sectors at risk of exploitation by gangmasters?**

*Y/N, please explain your answer.*

*Yes. The care, construction and contract cleaning sectors all have large numbers of relatively lowly paid workers who are vulnerable to abuse. The licence scheme for agricultural and food processing sectors has helped drive up standards and prevent abuse. There seems to be no good reason why suppliers of labour in other sectors such as care should not have to comply with similar obligations as those of suppliers of labour in the agri/food sector.*

- 6. Are there any at risk sectors where you think enforcement of existing regulations could be strengthened to drive up compliance in place of licensing?**

*Y/N, if Y please provide examples.*

*Yes, see Q5 above.*

- 7. Should a single enforcement body take on enforcement of statutory sick pay if this process is strengthened?**

*Y/N, please explain your answer.*

*Yes. It is currently policed by HMRC. If HMRC no longer have responsibility for NMW, it makes sense that other statutory payments such as SSP is policed by the new entity.*

- 8. Should a single enforcement body have a role in relation to discrimination and harassment in the workplace? Y/N, please explain your answer.**

*No – discrimination is a complex and rapidly evolving area of law, where expertise of the EHRC and guidance from the Courts is invaluable. Whereas other areas of worker rights are more binary (e.g. entitlement to NMW), discrimination rights can be multi-layered and multi-textured (e.g. duty to make reasonable adjustments for disabled employees, or justification for indirect discrimination). As EHRC also deals with goods and services, it has a wider perspective of discrimination law within society as a whole.*

*EHRC currently has powers to investigate and bring proceedings against offending organisations – this should continue, with any gaps addressed through reform of EHRC's powers.*

- 9. What role should a single enforcement body play in enforcement of employment tribunal awards?**

*Currently, enforcement of ET awards against disreputable employers is costly and challenging (with a need to get a court order for enforcement). A tribunal award is a judgement debt, but can be better enforced by a single enforcement body with power to fine or take action against a defaulting employer, similar to the BEIS penalty scheme.*

- 10. Do you believe a new body should have a role in any of the other areas?**

*If yes, please explain your answer.*

*Yes. It is important that emphasis is placed on training, advice and support for employers to aid in compliance, and not just a body that takes action when there is a breach of the law.*

*Enforcement of working time, holiday pay and health and safety assessments for workers could/should be moved from HSE to the new enforcement body.*

- 11. What synergies, if any, are there between breaches in areas of the ‘core remit’ and the other areas referenced above?**

*The key theme is that it should be easy for workers to seek enforcement action when they are not being paid their entitlements, whether NMW, holiday pay, SSP, unpaid or Tribunal judgments.*

- 12. Should enforcement focus on both compliance and deterrence?**

*Y/N, please explain your answer.*

*Yes, see answer to Q10 above.*

- 13. As a worker, where would you go now for help if you had a problem with an employment relationship?**

*Acas, TU, CAB, GOV.UK, HMRC, EAS, GLAA, other, I wouldn't know where to go.*

*Employment lawyers tend to find that workers will access support through ACAS, TU and CAB/law centres if the individual cannot afford legal advice and representation. The route to finding advice on GOV.UK, HMRC, EAS, GLAA is not clear or well sign-posted.*

- 14. As a worker, how would you like to access help?**

*Through a single body, through a specialist body, through Acas, TU, CAB, GOV.UK, other.*

*See Q13 above.*

- 15. As an employer, where would you go now for support on how to comply with employment law?**

*Acas, GOV.UK, HMRC, EAS, GLAA, Business Association, consultant, lawyer, other, I wouldn't know where to go.*

*Employers and workers are familiar with ACAS. There is perhaps an opportunity for ACAS to be a gateway to sign-post where advice can be obtained. Employers are also likely to seek advice from specialist HR advisors and employment lawyers.*

- 16. As an employer, how would you like to access help?**

*Through a single body, through a specialist body, through Acas, TU, CAB, GOV.UK, other.*

*See Q15 above.*

- 17. Is there enough guidance and support available for workers/employers?**

*Y/N, how could it be improved?*

*No, as mentioned above, the law concerning the rights of workers is a complex area of law, and information about rights is not well sign-posted, particularly when different areas of law (e.g. NMW and working time) are policed by different entities.*

**18. Should a new single enforcement body have a role in providing advice?**

*Yes – online resources in plain language with examples so employers and workers can understand their rights and obligations.*

**19. Would having a single enforcement body make it easier to raise a complaint?**

*Y/N, please explain your answer.*

*Yes – for reasons set out above. It will need publicity and user-friendly on-line access so that workers and employers know that it exists. For example, it is doubted that many workers know that the Employment Agency Standards Inspectorate even exists, or that NMW is policed by HMRC (as opposed to the Employment Tribunal).*

**20. Would a single enforcement body improve the ability to identify the full spectrum of non-compliance, from minor breaches to forced labour?**

*Yes, providing that it is properly resourced and enforcement officers have the ability to specialise, and are not generalists.*

**21. What sort of breaches should be considered ‘lower harm’? Should these be dealt with through a compliance approach?**

*Technical breaches or where there is an evolving development in the law (e.g. worker status in the gig economy) should be dealt with through a compliance approach.*

**22. Which breaches should be publicised?**

*None, only prosecutions, more serious breaches above a specified threshold, all.*

*Prosecutions and, in exceptional cases, more serious breaches where there might be a public interest for publication – e.g. concerning developments re: gig economy workers/contractors.*

**23. Do the enforcement powers and sanctions currently available to the existing enforcement bodies provide the right range of tools to tackle the full spectrum of labour market non-compliance?**

*Y/N, please explain your answer.*

*More resources need to be deployed to enable workers and employers (particularly SMEs) to access advice and support to avoid breaches in the first place.*

*One lacuna appears to be that if a worker complains about a breach (for example being paid below NMW), and enforcement action is taken to prosecute and fine the employer (through criminal proceedings), it may still lead to the worker not being paid and being out of pocket. Is there not scope to make provision that the enforcement body seeks to*

*recover wages (on behalf of a complainant)? This could be done in a number of ways, including by presentation of claims to the Employment Tribunal (i.e. the enforcement body on behalf of the complainant) through an extension of tribunal jurisdiction for the Tribunal to judicially determine the level of award and issue a judgment at the civil standard of proof, rather than through criminal proceedings.*

- 24. Should civil penalties be introduced for the breaches under the gangmasters licensing and employment agency standards regimes that result in wage arrears?**

*Y/N please explain your answer.*

*Yes, because at the present time, the choice is between threatening criminal proceedings or actually prosecuting in the criminal courts. Civil penalties are a useful middle ground that might assist in recovering funds for workers being out of pocket.*

- 25. If Y, do you agree with the proposed levels set out in the consultation?**

*Y/N, if no, what level should these be set at?*

*Yes, there seems to be no reason why the rate should depart from the civil penalties regime and levels for NMW.*

- 26. Should a single enforcement body have a role in enforcing section 54 of the Modern Slavery Act?**

*Y/N, please explain your answer.*

*Yes, potentially, as the jurisdiction overlaps with enforcement of other workers' rights. At present modern slavery statements required under section 54 cannot be effectively enforced as it requires civil court proceedings brought by the Home Office. This is likely to lead to lack of enforcement, which in turn allows less reputable employers to circumvent their obligations as to transparency in their supply chains.*

- 27. Would introducing joint responsibility encourage the top of the supply chain to take an active role to tackle labour market breaches through the supply chain?**

*Y/N, please explain your answer.*

*Yes, but with a rigorous process applied to each stage so the onus does not rest with the top of the supply chain to have a disproportionate responsibility for breaches lower down the supply chain.*

- 28. Do you think it would be fair and proportionate to publicly name a company for failure to rectify labour market breaches in a separate entity that it has no direct relationship with?**

*Y/N, please explain your answer.*

*Yes, but only after the company has been given an opportunity to take all reasonable steps to rectify the breaches and has failed to do so.*

- 29. Should joint responsibility apply to all labour market breaches enforced by the state?**

*Y/N, please explain your answer.*

*No, if the breach can be identified and attributable to a specific company in the supply chain that company should bear the responsibility for the breach. This is in line with response to Q28*

**30. Would it be effective in all sectors?**

*Y/N, if no, which, if any sectors would they be effective in?*

*The critical feature of the SEB is to tackle the persistent breaches of employment law. Breaches can arise in all sectors and irrespective of the size of business. On that basis it is imperative that it is applied to all sectors to reduce the impact of these breaches on workers who suffer detriment as a consequence of the unremedied breaches*

**31. Do you think there should be a threshold for the head of supply chain having a responsibility for breaches at the top of the chain?**

*Y/N, please explain your answer.*

*Yes, the threshold should be a % value of the breach with an incremental reduction in the penalty subject to the efforts made by the head of the supply chain to rectify the breaches lower down the chain. Consideration also should be given to the duration of the business relationship between the head of the supply chain and the company in breach.*

**32. Do you think embargoing of hot goods would act as an effective deterrent for labour market breaches?**

*Y/N, please explain your answer.*

*Yes, it is often the suppliers of 'hot goods' which are in breach of employment rights i.e. use of low paid vulnerable workers. The impact on vulnerable workers of applying an embargo on hot goods may be detrimental if applied rigorously. A temporary and time limited embargo may serve to act as a deterrent if the breach is not remedied in the short term.*

**33. Would it be effective in all sectors?**

*Y/N, if no, which, if any sectors would they be effective in?*

*No, hot goods extend to fashion items as much to perishables, therefore the suggestion of suggestion of embargoing 'hot goods' cannot be applied to all sectors and is not one size fits all.*

**34. Should embargoing of hot goods apply to all labour market breaches enforced by the state?**

*Y/N, please explain your answer.*

*Yes, subject to comments made above, if the breaches are not remedied in a specified time frame hot good should be embargoed as a last resort.*



**35. Are there other measures that the state could take to encourage heads of the supply chain to take a more active role in tackling labour market breaches?**

*Y/N, please explain your answer*

*Tax incentives could be applied for businesses at the head of the supply chain which can evidence they have applied good practice policies, with an option to share the incentive. Heads of supply chain might offer training to managers/ owners of smaller businesses at the lower parts of the chain.*

