

Consultation from the Department  
for Business Innovation & Skills  
and the Home Office

Tackling Exploitation in the Labour Market

Response from Thompsons Solicitors

December 2015



## Introduction

As a firm of solicitors who represent trade unions and as a result much of the labour market, Thompsons has a deep interest in and professional expertise of employment rights and the exploitation of workers.

While we would welcome moves to increase worker rights, what is being proposed in this consultation are measures which will do little to combat the inherent problem of employers' non-compliance with the law.

There is already in place a raft of legislation which is meant to protect workers from exploitation. The need, therefore, is not for yet more legislation, but for the existing laws - which should in themselves be sufficient to tackle exploitation - to be applied in full, consistently, and enforced properly.

Unfortunately, the proposals set out in this consultation, like many others coming out of the government in recent months, suffer from a lack of evidence to justify additional legislation. Nor is there is enough detailed information in the consultation document for consultees to reach a full and rounded view on the merit and feasibility of the proposals.

The main problem in this area is the lack of resources given to the bodies tasked with enforcing existing legislation and bringing businesses to account for exploiting the labour market. There is no information in this consultation on how the proposed new powers and statutory body would be funded and whether the funding would be ring-fenced against the kind of budget cuts facing other governmental organisations.

In their forewords, ministers say they are highly motivated to protect workers against exploitation, yet there is a critical lack of joined up thinking across government which makes such statements appear as mere window dressing. With the introduction of tribunal fees, for example, this government has made it much more difficult for workers to take action to the Tribunal when they are exploited by their employer. Meanwhile, it is not made clear how this new extra legislation is compatible with the government's "red tape challenge".

# Questions

## The case for more effective enforcement

1. Yes. Thompsons believes more needs to be done to tackle organised labour market exploitation as this is an important issue which affects many workers across the country. However, while this is an urgent problem, the answer to it is not to introduce new, ill-thought through, legislation. Current legislation, if properly enforced by fully resourced agencies, should be enough to make major strides in the direction the government professes it wants to go.

Significantly, what this question implies is that only organised exploitation is worth tackling. This is not the case. While there is far too much criminal activity seeking to exploit workers in an organised way, there is also a huge amount of exploitation taking place in a 'disorganised' or 'casual' fashion. Indeed, this category of exploitation is probably the most common. So, for example, there are employers who do not know enough about the law and accidentally flout it, and those where there are isolated incidents of managerial incompetence that do not in themselves constitute long-term, knowing, illegal activity.

We are concerned that any fixation just on 'organised' activity ignores the pressing need to deal with 'disorganised' exploitation. Exploitation of any kind is illegal so it should all be subject to the same level of ministerial concern.

## A new Director of Labour Market Enforcement and more flexible enforcement

2. Legislation currently in place should be sufficient to tackle exploitation and the consultation document fails to set out enough evidence for why a new director is required.

While it is important for government departments and bodies to speak to each other and share information, surely this already happens? Establishing a new director to facilitate this risks being a waste of money. Rather than seeing the appointment of another bureaucrat, we would prefer more resources being provided to existing enforcement bodies to enable them to do their jobs to the utmost of their ability.

3. If there is to be a new director, great care must be taken to ensure they are even-handed in how they use their powers and resources. The position could be undermined by a director who embarks on a narrow 'mission', thus ignoring other cases and types of exploitation in the labour market. Any new director must have a clearly defined mission statement and sufficient resource with which to carry out their objectives.

Other issues which should be considered if there is to be a new Director is their accountability and independence to/from other government organisations; whether the funding was ring-fenced from budget cuts; how often the Director reported on their work and to whom this was reported.

## New offence of aggravated labour law breach

4. No. It is not necessary to create a new offence as there are already enough laws covering this area which are not enforced as they should be.

The word 'aggravated' is loaded with connotations and recent examples of new 'aggravated' offences have turned out to be largely decorative. The coalition government introduced the notion of 'aggravated' features in cases taken to the Employment Tribunal, yet in response to a Parliamentary Question made by Kevin Brennan MP in October 2015, the minister responsible, Nick Boles MP, stated that since its implementation in April 2014, only two out of eight fines had been paid. The remaining six are still outstanding. This shows that the current punishment for an 'aggravated' offence is already in place but is not producing any meaningful results. What reasons are there to think that the new 'aggravated' offence would be any different?

The introduction of a new 'aggravated' offence also risks those cases deemed less severe not being paid the enforcement attention they deserve, particularly in a context of government budget cuts. There will be cases that fall just below the threshold for an 'aggravated' case but are nevertheless very serious. These may not be dealt with using the full force of the law if justifying the introduction of a new aggravated offence becomes the government's overriding concern.

5. D – None of these options would have a beneficial impact on the punishment of labour exploitation. The options laid out are a distraction to what the real agenda should be - to rigorously enforce the law as it currently exists.

It is worth thinking about the likely success rate of any such policy. One comparison could be drawn with corporate manslaughter, which typically sees very low success rates. What information is provided in the consultation to show any new offence would be any more effective?

- 6, 7, 8. No further response, see answer to question 5.

## Information sharing

9. We are concerned about how this information sharing would operate. Rigorous safeguards must ensure that there are proper protections in place. This and the last government have a poor record in protecting people's data appropriately.

## Reforming the GLA

10. The GLA is not a body with which Thompsons deals.

## The objectives and remit of the new Authority

11. No. This question rests on the assumption that a new authority should be created in the first place. We should be cautious about the assumption that a new authority is necessary and is an appropriate solution to the problem of labour market exploitation, particularly as the government has not provided enough information for respondents to form a full evidence-based opinion.
12. If the view is taken that exploitation of the labour market is often inadvertent and not 'aggravated' then training is important to ensure businesses know the correct measures and do not commit offences by accident or through sloppy practices. However, those who exploit on purpose would not pay much attention to training, codes of conduct or voluntary accreditation schemes.

There is also the risk of mission creep. Any new authority would have to ensure its focus - and the use of the great majority of its resources - was on enforcement not training, and any shift in the balance towards training would put the effectiveness of the enforcement operation at risk.

13. No. It is important that the body maintains enforcement as its primary function and does not move into profit-making.

The introduction of a commercial incentive would risk the body focussing on profit-making activities to the detriment of its core responsibility. This is particularly likely in a context of financial squeezes on all government departments and we have seen, for example in NOMS, the controversy caused when taxpayer-funded civil servants are used to provide services for profit on the open market.

It is also possible that one body carrying out both training and enforcement could cause conflicts of interest and the potential that recipients of training, who may also be in contravention of employment laws, could manipulate the system by paying for training in the expectation it would reduce the severity of any enforcement action.

14. Any new authority should only perform tasks which are part of its primary, enforcement, function.

## Powers of the New Authority

15. No. We cannot agree with this premise because we do not agree that the creation of a new offence and a new authority is needed or justified. There are already bodies which are in place to enforce these laws, what is important is that they are given the necessary tools, resources, and powers to do their job.
16. No. We cannot agree with this premise because we do not agree that the creation of a new offence and a new authority is needed or justified.
17. No. Again, we do not agree that a new authority and offence is required. What is more, the government has failed to provide enough information to enable a view to be formed on whether or not proposed powers are 'appropriate'.

18. We do not believe a new authority is necessary. Powers already held by existing authorities are sufficient to tackle labour market exploitation.
19. Yes. Although we do not agree that a new authority is necessary, if one were to be created then, if a subject of investigation is convicted it would be sensible to use the Proceeds of Crime Act. However, given this point is limited to criminal activity; the government fails to explain how non-criminal activity would be dealt with.
20. Authorities already have the ability to ask other organisations for assistance, the problem lies where there is no power to compel an organisation to do so. If one considers the recently granted legal right of employees to request flexible working from their employers we can see that merely granting the right of request is pointless if the respondent is unwilling to respond.
21. All organisations should benefit from any new formal power to ask for assistance.
22. Yes. See answer to 21.
- 23-26. The GLA is not a body with which Thompsons deals.
27. Even if we agreed that the new authority should exist (which we do not) the government has failed to provide enough information for any respondent to give a considered view on whether the governance arrangements would be sufficient.

## Details of respondent

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