



Law Society  
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# Consultation Response

Good work plan: establishing a new single enforcement body for employment rights

October 2019



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law Sub-committee welcomes the opportunity to consider and respond to the UK Government's consultation – Good work plan: establishing a new single enforcement body for employment rights. We have the following comments to put forward for consideration.

## Consultation Questions

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

No.

In a number of respects the current system is not effective in enforcing the rights of workers, especially vulnerable workers. By way of example, the process by which claimants enforce employment tribunal judgments involving awards of compensation is inadequate. Whenever rights have to be asserted and enforced by way of an employment tribunal claim, there will be an inbuilt delay, dictated by the capacity of the tribunal office in question and, to an extent, the respondent's approach to the claim. In addition, there is a concern that there is a lack of co-ordination between the different bodies involved which may allow vulnerable workers to fall between the gaps.

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

No.

While it could have the potential to be more effective we would be concerned about how effective it would actually be in practice.

Although there may be both scope and merit for some degree of consolidation of functions, it may be impractical and disruptive to bring all areas specified in the consultation document within the remit of a single body. In particular, the range of functions listed, the expertise required to perform them, and geographic/jurisdictional variances may render such an approach difficult. There would be a high risk of a loss of specific expertise and too bureaucratic an approach. Significant planning and resource would be required to ensure that expertise was retained and that some of the challenges identified could be met.

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

To the extent consolidation could be beneficially achieved, the advantage to users would be better awareness among the public of their rights and the mechanism to protect them, a more user-friendly system with clearer processes and ideally quicker and fairer outcomes to claims. There may be better opportunities for consolidation of information, for example to identify sectors and employers in need of further guidance or remedial action.

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

We have referenced above in our answer to question 2 some of our concerns. Primarily these would be around the loss of specific expertise; lack of resources and a one size fits all mindset coupled with too much bureaucracy. These are not insurmountable problems but would represent significant challenges.

### **Question 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?**

We have limited practical experience of how this scheme operates in practice but in principle could see that there may be benefits to extending it to other, similar, areas.

### **Question 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?**

Don't know.

We are not aware of any from our experience but would not rule this out.

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

Don't know.

If an enforcement body is established which is able to process claims quickly, it may be beneficial for it to take on the enforcement of statutory sick pay. However, we are not aware of significant issues with the current system.

**Question 8. Should a single enforcement body have a role in relation to discrimination and harassment in the workplace?**

No.

This role should remain within the remit of the EHRC and employment tribunals, where trained staff, employment judges and experienced lay members have the necessary expertise to determine such claims.

A shared role between the EHRC and the new single enforcement body could potentially lead to a fragmentation of strategy and general approach to the enforcement of discrimination claims. This is wholly undesirable, not least for the fact that in the eyes of the public it would generate confusion. Overall, this would ill serve the twin policy goals of access to justice and the prevention of discriminatory conduct.

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

In line with our response to question 8, this responsibility should remain with employment tribunals who should be given any additional powers necessary (particularly in relation to Scotland where current enforcement options are more limited).

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

No.

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

Whilst there may be synergies in identifying ‘rogue employers’ across a range of different areas we do not believe that there are sufficient synergies to justify a shift of powers and responsibilities to a new body. Our experience is that for the majority of employees and employers these issues tend to be isolated issues that arise from time to time in the workplace. If there was credible evidence to establish that there was substantial linkage between these areas then that would cause us to reconsider our view.

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

Yes.

The two issues are naturally linked.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

Not applicable.

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

No.

In our experience there are issues of (i) awareness of rights and mechanisms to enforce those rights, (ii) support by way of guidance and funding where assistance is required and (iii) ultimate enforcement of any judgment or remedy granted.

Improvements could be made in a number of ways, including by providing claimants with access to specific legal advice that is affordable. We appreciate the difficulties of achieving this but it remains a key deterrent for individuals being in a position to know about and enforce their rights.

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

No.

Any enforcement body with a remit to uphold workers' rights should not also provide advice in its fullest sense to individuals. This could be unfair to respondents and would seriously jeopardise the impartiality of any body tasked with investigating and enforcing the law. However, it may be appropriate for such a body to issue general guidance as a means of making its processes as clear as possible and managing claimants' expectations realistically.

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

Yes.

By virtue of there being a single point of contact, and assuming there would be scope for standardising forms, processes and guidance, it could become easier for individuals to raise complaints. It is recognised that this could especially be the case where different rights, currently within the jurisdiction of different bodies, are being asserted.

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

Yes.

Such a body should be in a position to identify and cross refer multiple areas of non-compliance – provided it is working effectively.

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

If there is an enforcement body it should have a range of remedies available to allow it to deal appropriately with particular types of breach. Accidental or inadvertent breaches could be dealt with by way of a warning notice that seeks compliance rather than imposing a punitive measure. There are many areas currently where rectification notices are used – such as health and safety and data protection. A similar approach should be adopted here. The vast majority of employers do not intend to break the law. Where the breach is not pre-meditated and is accidental and the likelihood of actual harm is low then a light touch compliance approach should be adopted.

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

More serious breaches above a specified threshold.

Only breaches which fall into a ‘serious’ category and where it can be said that there is a public interest in publicising.

**Question 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?**

No.

We refer to our response to question 24 below. Otherwise the powers are adequate. Enforcement is the main issue.

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

Yes.

We believe this would be a useful addition to the available powers.

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

Yes.

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

Yes.

If there is to be a single enforcement body, then it would make sense for it to have this responsibility.

**Question 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?**

Yes.

However, we would be very concerned at such an approach applying to all breaches of employment law and regulations. Such an approach would be draconian. There may well be some limited situations where from a public policy perspective it is right to effectively impose a strict liability further up the chain. However, those instances should be limited.

**Question 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?**

Our comments above apply here as well. Only in certain limited circumstances.

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

No.

It should be limited to very specific instances – as referenced in question 27, above.

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

No comment.

We are not in a position to comment on the likely effectiveness across different sectors.

**Question 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?**

Yes.

For those limited cases where this may be relevant a threshold would be necessary.

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

Yes.

We believe it would have a deterrent effect – but we are concerned about whether it is a proportionate response if aimed at all breaches.

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

No comment.

We are not in a position to comment on the likely effectiveness across different sectors.

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

No.

We refer to the reasons set out above in our response to question 27.

**Question 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?**

Increasing visibility and awareness of organisations that are acting in breach of material provisions of Labour Market Regulation could encourage greater action. Publicity is key, but bearing in mind that it should only apply to serious and material breaches – not every breach.

**For further information, please contact:**

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