Employment Status Consultation

Response of the City of London Law Society, Employment Law Committee

31 May 2018

Consultation Questions	
Chapter 4: Issues with the current employment status regimes	
1.	**Do you agree that the points discussed in this chapter are the main issues with the current employment status system? Are there other issues that should be taken into account?** Yes. Some members of the Committee have expressed a view that the Taylor Report could and should have taken a more fundamental and radical approach and considered possible alternatives to the current system, which is still based on the law of master and servant, and which arguably does not match the opportunities and expectations for flexible working arrangements in today's workplace.
Chapter 5: Legislating the current employment status tests	
2.	**Would codification of the main principles – discussed in chapter 3 – strike the right balance between certainty and flexibility for individuals and businesses if they were put into legislation? Why / Why not?** No. (a) Codification is unlikely to eliminate attempts by employers to misclassify individuals (and in fact may strengthen their resolve to find loopholes), and it is likely to lead to more litigation (rather than less) as any new codified regime is tested in the Employment Tribunals and the boundaries are redefined. (b) It would be a huge task to accurately reflect existing case law regarding worker classification which is fact specific and dynamic. It has evolved over time to reflect changing working practices. (c) Codification is also likely to be disruptive to businesses if employers have to reassess the employment status of existing workers. (d) In general terms, our case law is clear, but the tests for determining who falls within which category are fact dependent. Any codification would need to retain an element of flexibility in order to be able to take account of the facts of each case. This will not eliminate the opportunity for employers to mischaracterise the status of individuals by interpreting the facts of each relationship as best suits them. (e) We need to be left with a test which is aligned with existing case law (on whistleblowing and discrimination) on fixed share partners and members of LLPs. (f) White we don't believe codification is the solution, clear information and guidance for employers is lacking. As an alternative to codification: (i) we should refine and clarify our existing definitions; and (ii) a non-statutory guide could be implemented (akin to the ACAS

Consultation Questions	
	Code) which provides guidance on the key principles, includes case studies and can be revised from time to time as the labour market continues to change.
3.	**What level of codification do you think would best achieve greater clarity and transparency on employment status for i) individuals and ii) businesses – full codification of the case law, or an alternative way?** See answer to question 2.
4.	**Is codification relevant for both rights and/or tax?** Yes, but not the solution for the reasons set out in the answer to question 2. We note that no attempt has been made by the Taylor Review or in this consultation to produce a draft of what codified provisions would look like.
5.	**Should the key factors in the irreducible minimum be the main principles codified into primary legislation?** See answer to question 2.
6.	**What does mutuality of obligation mean in the modern labour market?** Mutuality of Obligation: is not as relevant as it may have been historically as, in practice, in almost all contracts, there will be an obligation to provide and pay for work performed. The more pertinent question is <u>how</u> that work is performed and the <u>circumstances</u> in which it is performed – i.e., the factors of personal service, control and exclusivity. The modern economy makes the once clear distinction more blurred.
7.	**Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?** Yes. It should be a relevant factor, albeit not given as much weight as has been the case historically.
8.	**If so, how could the concept of mutuality of obligation be set out in legislation?** Paragraphs 5.10 to 5.14 of the Consultation Document are a good summary of the difficulties in codifying such a broad and flexible concept.
9.	**What does personal service mean in the modern labour market?** Many different things.
10.	**Should personal service still be relevant to determine an employee's entitlement to full employment rights?**

Consultation Questions	
	Yes – but it is easy to exploit. Self-Employed contractor agreements will often rely on the fiction that the appointment is not exclusive and they may provide an alternate worker in their place, but in reality only the specific worker is required to perform the service.
11.	**If so, how could the concept of personal service be set out in legislation?** In our view while remaining one relevant factor the weight attached to it in current law is too great.
12.	**What does control mean in the modern labour market?** Many different things.
13.	**Should control still be relevant to determine an employee's entitlement to full employment rights?** Yes. Control is and should continue to be a key factor, but in order to align with the modern labour market, the focus should not just be on supervision: management relationships and working practices are more sophisticated and no longer rely on a worker acting under the immediate direction of a foreman who gives instructions.
14.	**If so, how can the concept of control be set out in legislation?** It will be difficult to codify in detail: and any attempt to do so would need regular modification to keep up with the rapidly evolving changes to management relationships and working practices.
15.	**Should financial risk be included in legislation when determining if someone is an employee?** Yes, but financial risk, should not be given undue weight. It is possible for employees to take financial risk, e.g., if they have paid for their own training/qualifications, or have been given the opportunity to invest in the business.
16.	**Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?** Not in those terms, which are too vague and imprecise but an indicator could be the person's inclusion in the organisation's reporting structure. These issues are in essence related to control – see the answers to 13 and 14 above.
17.	**Should the provision of equipment be included in legislation when determining if someone is an employee?** Yes – its relevance and the weight to be given to this factor will vary according to the circumstances.

Consultation Questions	
18.	**Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?** No. It should be what happens in practice, as judged against more objective criteria, which matters. Although intention might be appropriate for some workers such as professional consultants or members of limited liability partnerships, in our view the risk of exploitation of more vulnerable workers is too great.
19.	**Are there any other factors that should be included in primary legislation when determining if someone is an employee? And what are the benefits or risks of doing so?** Yes. We set out below some factors which in our collective experience are those which our clients have found to be relevant. (i) Other relevant considerations should include the ability to direct working days, hours, place of work and the tools used; the ability to require compliance with certain policies and procedures; the ability to restrict an individual's outside activities; and the repercussions of failing to comply with these directions. (ii) Exclusivity is important, but this also goes hand in hand with control. Increasingly, we see clients wanting to restrict an individual's ability to undertake any other work which would be competitive or give rise to a conflict of interest, whether Employees, Workers or Self-Employed. (iii) Other key areas to consider are the *manner and method of payment* - are individuals paid on an hourly or daily basis only for work done, or are they paid a pre-determined monthly/annual sum akin to a guaranteed salary. Again, we increasingly see clients wanting to engage people on a self-employed basis but wanting to be able to structure their fees as guaranteed monthly/annual sums with the opportunity to earn "success fees". (iv) Flexibility and the ability to determine how and when work is performed is not necessarily inconsistent with employment status. The worker might not have a genuine choice.
20.	**If government decided to codify the main principles in primary legislation, would secondary legislation: i) be required to provide further detail on top of the main principles; and ii) provide sufficient flexibility to adapt to future changes in working practices?** Yes, and, as set out in our answer to question 2, the need to do so and the complexity, uncertainty and litigation which would result is a powerful reason not to attempt codification.
21.	**Would the benefits of this approach be outweighed by the risk of individuals and businesses potentially needing to familiarise themselves with frequent changes to legislation?**

Consultation Questions	
	Yes
Chapter 6: A better employment status test?	
22.	**Should a statutory employment status test use objective criteria rather than the existing tests? What objective criteria could be suitable for this type of test?** We do not believe there should be a codified test. We have commented on some of the criteria in our answers above.
23.	**What is your experience of other tests, such as the Statutory Residence Test (SRT)? What works well, and what are their drawbacks?** No comment.
24.	**How could a new statutory employment status test be structured?** See the answer to question 22 above.
25.	**What is your experience of tests, such as the Agency Legislation tests for tax, and how these have worked in practice? What works well about these tests in practice, and what are their drawbacks?** No comment.
26.	**Should a new employment status test be a less complex version of the current framework?** It should – but we doubt that this is achievable for the reasons discussed in the answer to question 2.
27.	**Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals? Could these concerns be mitigated? If so, how?** We doubt whether such a test would prove to be "very simple" in operation, see our answer to question 28 below.
28.	**Are there alternative ways, rather than legislative change, that would better achieve greater clarity and certainty for the employment status regimes (for example, an online tool)?** No. This area of law is extremely fact specific and so does not lend itself to an online tool, which will inevitably be a blunt instrument and limited in terms of what can and cannot be taken into account. Non-binding statutory Guidance, with a summary of the current law and some case studies may be of some help. For example, it could give examples of factors which may be relevant to what it means to be "part and parcel" or an "integral part" of the organisation (see

Consultation Questions	
	question 16 above).
29.	**Given the current differences in the way that the employed and the self-employed are taxed, should the boundary be based on something other than when an individual is an employee?** See our comments on alignment under question 62 below.
Chapter 7: The worker employment status for employment rights	
30.	**Do you agree with the review's conclusion that an intermediate category providing those in less certain casual, independent relationships with a more limited set of key employment rights remains helpful?** This creates certain difficulties in relation to alignment with tax legislation, as noted in the answer to question 62 below. As to employment rights, while the UK remains subject to (or aligned with) EU Directives on Discrimination, Whistleblowing and Acquired Rights (TUPE) it will have to make a policy decision on whether the distinction is essential as well as helpful. We express no view on that. Introducing an additional category is likely to add further uncertainty.
31.	**Do you agree with the review's conclusion that the statutory definition of worker is confusing because it includes both employees and Limb (b) workers?** Yes.
32.	**If so, should the definition of worker be changed to encompass only Limb (b) workers?** Yes
33.	**If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?** None that we can think of.
34.	**Do you agree that the government should set a clearer boundary between the employee and worker statuses?** Yes
35.	**If you agree that the boundary between the employee and worker statuses should be made clearer:** i. Should the criteria to determine worker status be the same as the criteria to determine the employee status, but with a lower threshold or

Consultation Questions	
	pass mark? If so, how could this be set out in legislation? ii. Should the criteria to determine worker status be a selected number of the criteria that is used to determine employee status (i.e. a subset of the employee criteria)? If so, how could this be set out in legislation? iii. Or, is there an alternative approach that could be considered? If so, how could this be set out in legislation? Suggested approach (ii) is probably more clear and usable: but we would need to see a draft to comment in detail. Any draft will have to be consistent with relevant legislation on discrimination, whistleblowing and TUPE, and bear in mind the position of fixed share partners and members of Limited Liability Partnerships - while addressing the need to protect workers who are in a more vulnerable position.
36.	**What might the consequences of these approaches be?** Beyond observing that any approach would inevitably be tested in litigation, it is not possible to answer this without seeing a draft of proposed legislation.
37.	**What does mutuality of obligation mean in the modern labour market for a worker?** See the answer to question 6 above. In general, the same or very similar principles are relevant to determining employee and worker status.
38.	**Should mutuality of obligation still be relevant to determine worker status?** See the answer to question 7 above and in relation to determining who is a worker it should not be part of the test.
39.	**If so, how can the concept of mutuality of obligation be set out in legislation?** See the answer to question 8 above.
40.	**What does personal service mean in the modern labour market for a worker?** See the answer to question 9 above.
41.	**Should personal service still be a factor to determine worker status?** Yes – see the answer to question 10 above.
42.	**Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?**

Consultation Questions	
	Yes.
43.	**Should we consider clarifying in legislation what personal service encompasses?** Yes, but we doubt whether this is feasible.
44.	**Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?** None that we can think of.
45.	**Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?** If the question is whether there should be emphasis on control by comparison with personal service, we agree.
46.	**What does control mean in the modern labour market for a worker?** See the answer to question 12 above.
47.	**Should control still be relevant to determine worker status?** See the answer to question 13 above.
48.	**If so, how can the concept of control be set out in legislation?** See the answer to question 14 above.
49.	**Do you consider that any factors, other than those listed above, for 'in business in their own account' should be used for determining worker status?** No.
50.	**Do you consider that an individual being in business on their own account should be reflected in legislation to determine worker status? If so, how could this be defined?** No.
51.	**Are there any other factors (other than those set out above for all the different tests) that should be considered when determining if someone is a worker?** See the answer to question 19 above.
52.	**The review has suggested there would be a benefit to renaming the**

Consultation Questions	
	Limb (b) worker category to 'dependent contractor'? Do you agree? Why / Why not? No. This seems to be a mere change in form over substance, without any apparent purpose, unless it were to reflect a potential alignment for tax purposes.
Chapter 8: Defining working time	
53.	**If the emerging case law on working time applied to all platform based workers, how might app-based employers adapt their business models as a consequence?** The Committee considers this to be a policy issue and prefers not to answer these questions, beyond a general observation that so called "app based employees" should be treated no differently from any other employees.
54.	**What would the impact be of this on a) employers and b) workers?** The Committee prefers not to answer these questions, beyond a general observation that so called "app based employees" should be treated no differently from any other employees.
55.	**How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?** The Committee prefers not to answer these questions, beyond a general observation that so called "app based employees" should be treated no differently from any other employees.
56.	**Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?** The Committee prefers not to answer these questions, beyond a general observation that so called "app based employees" should be treated no differently from any other employees.
57.	**What are the practical features and characteristics of app-based working that could determine the balance of fairness and flexibility, and help define what constitutes 'work' in an easily accessible way?** The Committee prefers not to answer these questions, beyond a general observation that so called "app based employees" should be treated no differently from any other employees.
58.	**How relevant is the ability to pursue other activities while waiting to perform tasks, the ability of workers to refuse work offered without experiencing detriment, requirements for exclusivity, or the provision of**

Consultation Questions	
	tools or materials to carry out tasks? The Committee prefers not to answer these questions, beyond a general observation that so called "app based employees" should be treated no differently from any other employees.
59.	**Do you consider there is potential to make use of the data collected by platforms to ensure that individuals can make informed choices about when to log on to the app and also to ensure fairness in the determination of work for the purposes of NMW/NLW?** The Committee prefers not to answer these questions, beyond a general observation that so called "app based employees" should be treated no differently from any other employees.
Chapter 9: Defining 'self-employed' and 'employers'	
60.	**Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?** Yes – for the same reasons we would oppose any attempt at codification : see the answer to question 2 above.
61.	**Would it be beneficial for the government to consider the definition of employer in legislation?** No.
Chapter 10: Alignment between tax and rights	
62.	**If the terms employee and self-employed continue to play a part in both the tax and rights systems, should the definitions be aligned? What consequences could this have?** In our view this issue of alignment is fundamental. (a) It is difficult to separate tax from workers' rights: to date employment status has largely been driven by the tax benefits to employers and workers of engaging a worker on a self-employed basis for tax purposes (specifically the avoidance of employers' NICs). The avoidance of employment law rights other than minimum wage and working time rights is merely an ancillary benefit. Employment rights have been a secondary consideration. (b) Recent challenges that have been brought by workers to determine their status have not been because the tests are uncertain but because employers have the incentive of NICs savings that encourage them to misclassify Employees/Workers as Self-Employed contractors. (c) The introduction of Worker status has meant that employment and tax

Consultation Questions	
	status are not always aligned. We now have two tax categories: (i) Employees, engaged under a contract of employment and (ii) Self – Employed, being workers who are genuinely in business on their own account. (d) For employment rights purposes there is a third category of Worker that straddles the two tax categories. Certain Workers have the benefit of limited employment rights but are taxed as Self-Employed. (e) Tax should be collected efficiently and fairly and that, accordingly, there is a policy argument for clarifying where Workers should fall. (f) We have discussed the merit of re-aligning employment status to the two tax classifications and , for example, stating that Workers (or the potential category of "dependent workers") should be taxed as Employees. (i) This might remove the incentive for employers to offer workers flexible terms (because employment taxes would be due in any event) and could encourage a black economy. For example black cab drivers are Self-Employed but Uber drivers are Workers because there is a greater degree of control over what they do when they are allocated jobs by a platform – if the latter were taxed as Employees there would be no incentive for Uber to enable them to work flexibly/it would be likely to exert a greater degree of control. (ii) Some considered that that if there is an expectation of benefits or rights deriving from Worker status the Worker should then have to pay a corresponding "stamp" in return for those rights. Aligning the two tests would simplify the current system and address the fact that many employers and individuals are incentivised to misrepresent their employment status in order to benefit from tax advantages. If someone is aligned to Employees for employment rights purposes should they not also be in the same category for tax purposes? (iii) There could be merit in Workers being taxed at source by their employer which would capture tax and NI revenue (as is the case with construction workers already). If there is no tax benefit to be gained by being characterised as a Worker, that may lead to less mischaracterisation.
63.	**Do you agree with commentators who propose that employment rights legislation be amended so that those who are deemed to be employees for tax also receive some employment rights? Why/why not?**

Consultation Questions	
	Some of the issues are identified and discussion in our answer to question 62. This is ultimately a policy issue, on which we prefer not to express a concluded opinion.
64.	**If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?** This is another policy issue, on which we prefer not to express a concluded opinion.