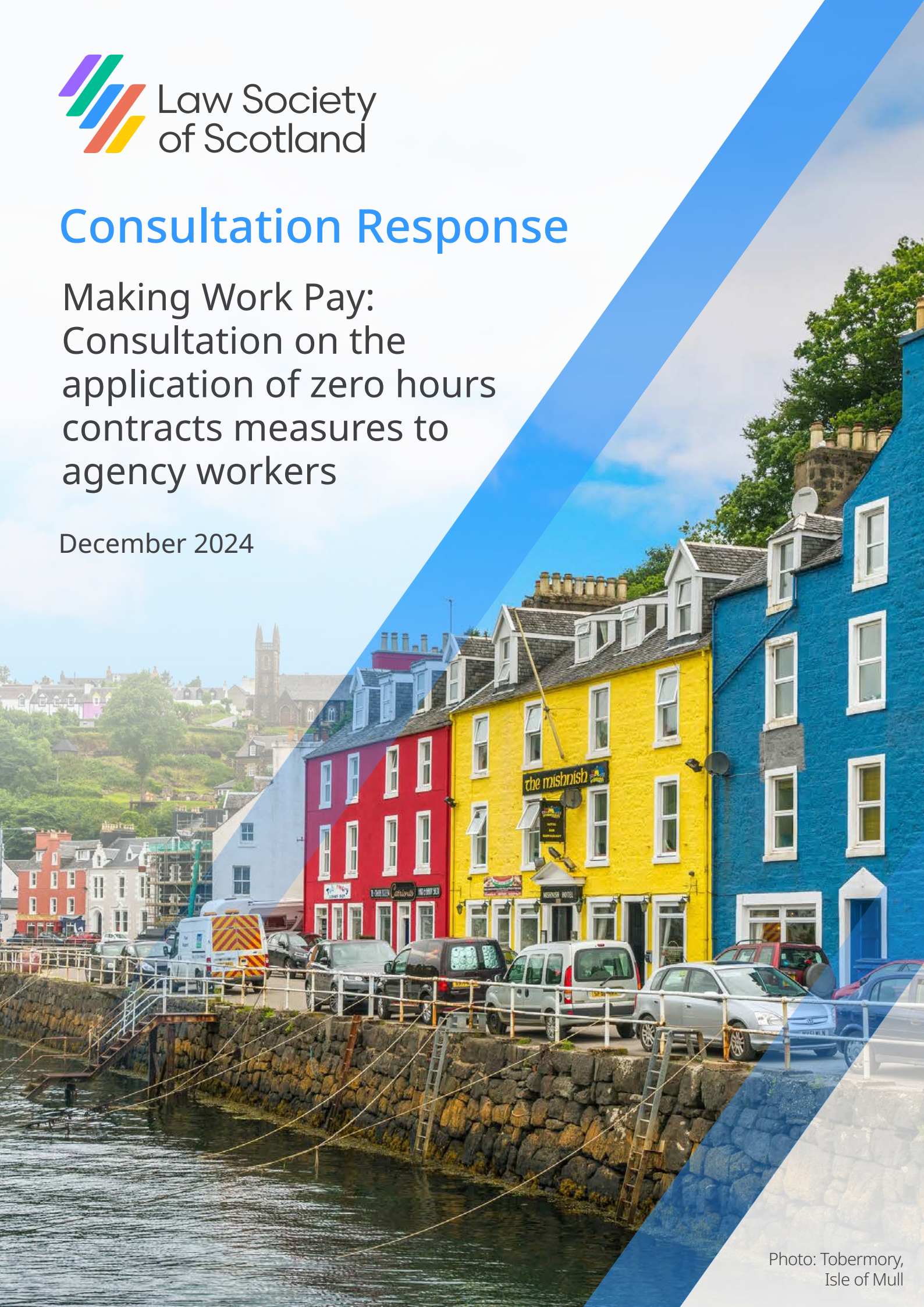


Consultation Response

Making Work Pay:
Consultation on the
application of zero hours
contracts measures to
agency workers

December 2024



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Employment Law sub-committee welcomes the opportunity to consider and respond to the UK Government's Making Work Pay: Consultation on the application of zero hours contracts measures to agency workers.¹ The sub-committee has the following comments to put forward for consideration.

¹ [Consultation on the application of zero hours contracts measures to agency workers](#)



Consultation Questions

Part one: Right to guaranteed hours

5. Do you think the guaranteed hours should be offered by the employment agency (option 1) or the end hirer (option 2)

- Option 1, guaranteed hours should be offered by the employment agency
- Option 2, guaranteed hours should be offered by the end hirer
- Don't know

Please explain your answer

The tripartite relationship between agency worker, employment agency and end hirer requires the end hirer to keep the agency worker at arms length distance to ensure that the relationship remains that of a worker. Any attempt to formalise the working pattern, such that it might create mutuality of obligations between the end hirer and agency worker, will undermine the flexibility of the agency worker arrangement to the extent that unintended consequences are inevitable.

The end hirer is a client (tantamount to a customer) of the employment agency. If their needs are not met by the agency arrangement then we think it likely that they will seek to vary the model or abandon it altogether.

Our concern is that end hirers will refuse to retain the services of an agency worker for 12 weeks or more if there is a threat of guaranteed hours which do not fit their commercial needs or which might otherwise undermine their resource/funding structure. This might result in excessive turnaround of agency workers or deliberately short assignments which might exacerbate the overall uncertainty for agency workers rather than improve it.

Whilst a 12 week period coincides with when agency workers are entitled to the same basic working and employment conditions as directly recruited employees, this is a short reference period which is unlikely to reflect the commercial needs of the end hirer. We appreciate that proposals suggest that there might be an exception if the work is "inherently temporary", but seasonal work or predictable peaks/troughs in their workforce requirements might similarly justify why the 12 week reference period is not indicative or normal or predictable hours. In light of the current proposals being an obligation to offer, then we consider it likely that end hirers will take earlier avoidance measures rather than solidify arrangements which might expose them to risk. This will then risk resulting in workers having more limited options to secure a position that fits into their circumstances, and while it is intended to be open to a worker to refuse shifts offered to them, they simply won't have this option if there is a significant reduction in the number of end hirers electing to continue their use of agency workers.

Employment agencies are typically the employer and therefore it would make sense for them to re-contract with the agency worker if any individual end hirer



was using an agency worker in a predictable and prolonged way. However, it is difficult to see how an employment agency could guarantee hours without first contracting the end hirer to do likewise. Some end hirers might be happy to commit to guaranteed hours provided that there is certainty about how the relationship might end and who would be liable for costs associated with that or they might just seek to terminate their relationship with the employment agency early. The interaction between this proposal and Day 1 rights therefore needs to be carefully explored.

We consider that issues that might arise include when there is limited hours or syncoated engagement with the agency, that there is an administrative burden in the recording, monitoring and reporting of hours, and vulnerable workers will not understand the relationship, rights and obligations.

Lastly, we'd encourage further consideration of the likelihood of detriment cases arising from enforcing such rights and whether employment agencies would be better placed to create a change of culture associated with working patterns across the sectors that depend on this type of working arrangement. We are concerned that a broad-brush approach without providing for the technical issues that may arise will create issues.

6. Should end hirers be required to pay a transfer fee or use an extended hire period if they are required to offer guaranteed hours to an agency worker?

- Yes
- No
- Don't know

Please explain your answer

We have assumed that this question is predicated on the end hirer being required to offer guaranteed hours direct to the agency worker, and not indirectly via the employment agency. A transfer fee appears to recognise the efforts made by an employment agency to source an appropriately skilled agency worker and make that introduction and therefore a likely commercial necessity. However the short 12 week reference period risks employment agencies being perceived as recruitment agencies where transfer fees are not due until after the end hirer has assessed the skills of the agency worker. We therefore think it likely that the concept of transfer fees will need to change to ensure that end users aren't capable of taking avoidance measures which might expose employment agencies to additional administration and risk. If the transfer fees are too onerous then we think it likely that end users will reconsider using agency arrangements to the extent that they have been.



We are concerned that the financial burden of transfer fees may reduce growth and fair work. We are also mindful that there may be an impact on a worker's access to benefits if they refuse to be transferred.

7. If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to guaranteed hours to them, please explain them here.

In the experience of our committee members, agency workers appreciate the flexibility afforded to them via the arrangement. We'd highlight that some agency workers will deliberately want to work below a threshold that might jeopardise their ability to access universal credit or other benefits. Whilst proposals are such that the agency worker will have a right to refuse an offer, there ought to be consideration as to whether or not the 12-week period will be rolling (which we assume there must be intention for it to be, otherwise it would result in non-representative average hours, and allow for end hirers to easily "game" the system), and how frequent either the end hirer or employment agency would need to make an offer. Consideration should be given to whether an agency worker might be capable of accepting an offer based on a lower guaranteed hours and whether this might circumvent the need for continuous offers to be made temporarily or indefinitely, or in what circumstances an opt-out option might be appropriate.

Agency workers may work for multiple agencies, therefore this scenario would require to be covered.

We consider Part One to be the most challenging aspect of the proposals and encourage Part One and Part Two to be seen as mutually exclusive proposals.

Part two: Reasonable notice of shifts and payment for shifts cancelled or curtailed at short notice

8. Do you agree that the responsibility for providing an agency worker with reasonable notice of shifts should rest with both the employment agency and the hirer, so that where a tribunal finds that unreasonable notice was given, it will apportion liability according to the extent that the agency and the hirer are each responsible for the unreasonable notice?

- Yes
- No
- Don't know



Please explain your answer

We think it likely that the agency worker will not necessarily know or be able to evidence which party was responsible without disclosure of evidence. Therefore ensuring that both employment agency and end user are joint and severally liable seems sensible to ensure the agency worker has a right of recourse. This also appears to recognise the employment relationship with the employment agency, whilst acknowledging that the notification must originate with the end hirer. We would further comment, however, that this would likely risk in an increase of claims proceeding to a tribunal hearing to determine apportionment when it is disputed between the agency and end hirer. However, in circumstances where such claims may likely be disproportionate to pursue, this would create a risk of it being too difficult for a worker to force payment of the late notice / cancellation penalty.

There may also be some confusion on this for vulnerable employees. We foresee that there could also be conflict here with DWP getting into work programmes, job trials etc.

9. Do you think that legislation should prescribe how the end hirer should notify the agency that they have a shift available and of changes to these and when notification should be deemed to be received?

- Yes
- No
- Don't know

Please explain your answer

We think it sensible for this to be in writing so that it's easier to evidence.

We would suggest that a code of conduct or similar be introduced for this process.

10. If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to reasonable notice of shifts to them, please explain them here.

Whilst we consider this to be a sensible proposal, the practicalities of enforcement of any remedy must be considered, along with whether there will be resource to deal with claims arising out of claims about late cancellation or curtailment.

The committee observes that vulnerable workers and/or those returning to the workforce needs sensible and detailed consideration. Many "get back to work" programmes are outsourced to an agency, a charity such as Enable and then enable make the placement. Therefore, careful consideration needs to be given to



this ultimate 4-way relationship. It is suggested that specific needs clients require specific consideration of exemption.

Short notice cancellation and curtailment of shifts

11. Do you agree that the agency should be responsible for paying any short notice cancellation or curtailment payments to an agency worker?

- Yes
- No
- Don't know

Please explain your answer

This would recognise the employment relationship between the employment agency and the agency worker. Furthermore it is less likely to simplify sources of taxable income for the agency worker.

Consideration, however, ought to be given to 3rd sector agencies which are commissioned by local government and health boards. The financial burden in such cases may result in a decreased use of such workers or NHS "bank staff".

This would likely result in clauses being inserted as standard in contracts between agencies and end hirers, potentially to the detriment and decrease of the use of agency workers.

12. Do you think that the agency should be able to recoup this cost from the end hirer if/to the extent that the end hirer was responsible for the short notice cancellation or curtailment?

- Yes
- No
- Don't know

Please explain your answer

We consider it appropriate that any end hirer who is responsible for a financial losses suffered by an agency worker as a result of them agreeing to do a shift which is then subject to short notice cancellation or curtailment by the end hirer, be responsible for payment.



13. If you think that the agency should be able to recoup this cost from the end hirer, do you think the Government should legislate to ensure that the agency can recoup the costs?

- Yes
- No

Please explain your answer

We do not consider it necessary in circumstances that commercial contracts are likely to be capable of dealing with it and that both parties are of similar bargaining positions. We also consider that any attempt to legislate could potentially overburden the Employment Tribunal system - assuming they are to have jurisdiction over such matters - compared to commercial courts or other mediation/alternative dispute resolution options in circumstances of a breach of contract.

14. Do you think that it should be possible to override legislative provisions allowing agencies to recoup cancellation/curtailment costs through contracts signed after implementation (or that are clearly entered into in contemplation of the commencement of the legislative provisions)?

- Yes
- No

Please explain your answer

Provided that there is no intention to override legislative provisions that impose short notice cancellation or curtailment payments to the agency worker, then we consider the employment agency and end hirer to be of sufficiently equal bargaining power that they should be free to contract on a commercial basis as best suits their respective positions.

15. If you think there are other factors specific to agency workers that need to be taken into account in applying the new right to payment for short notice cancellation or curtailment to them, please explain them here.

We encourage Part One and Part Two to be seen as mutually exclusive proposals.

We agree that improving notice periods and reducing short cancellation/curtailment would be beneficial to agency workers.





For further information, please contact:

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