prospect
union for professionals

GOOD WORK: THE TAYLOR REVIEW OF MODERN WORKING PRACTICES

Employment status consultation

Submission by Prospect to the Department for Business, Energy & Industrial Strategy

1 June 2018
www.prospect.org.uk

Latest revision of this document: https://library.prospect.org.uk/id/2018/01079
This revision: https://library.prospect.org.uk/id/2018/01079/2018-06-01

INTRODUCTION AND SUMMARY

Prospect is an independent trade union representing over 140,000 members in the public and private sectors. Our members work in a range of jobs in both the public and private sectors in a variety of different areas including in aviation, agriculture, broadcasting, entertainment and media, defence, education, energy, environment, heritage, industry, scientific research and telecommunications.

Prospect welcomes the opportunity to respond to the consultation on employment status. We also welcomed the Taylor review, as the issue of employment status has long been a problem for workers and their employers. We are concerned that the current rules provide scope for employers to create sham arrangements to deny workers their employment protection rights.

While for several decades there have been problems of bogus self-employment, the situation has become more complex and wide spread in recent times because of the growth of zero hours contracts and the rise of platform based work (as seen in recent high profile cases with Uber, Deliveroo, and Pimlico Plumbers).

It is important though to note that abuse of workers' rights is not limited to these newer forms of working, but can also occur within more established sectors. For example Prospect has brought successful employment tribunal cases where workers in the public sector have been employed for several years in core services, but have been told they are not workers and denied basic rights such as holiday pay.

We have seen the TUC's outline response to the consultation and have been involved in the discussions among the union affiliates to inform that response. We agree with the TUC proposals.

We believe that there needs to be simplification of the existing three tier process on determining workers' rights. But this must be in a way to ensure all workers are protected and that existing employment rights are extended to those in vulnerable atypical working arrangements.

We have responded to the specific questions below, but have summarised our views here.

- We believe there should be a binary test of employment status, with the test being that an individual is either a worker (encompassing both current employee, worker, and limb B definitions) or self-employed. The existing distinction between employee and worker should be removed.

- There should be a new definition of worker to encompass all those who would currently fall under the employee or limb B definitions. The new definition needs to be considered carefully in conjunction with the social partners and employment law experts and should be subject to full consultation.

- In the shorter term, before a new definition is decided upon, we call for the Government to extend all existing employment protection rights to workers. This would provide for all limb B workers to have protection of unfair dismissal,

redundancy, and family rights. This would give important protections to workers in precarious and vulnerable atypical working arrangements, who most need this protection.

- We do not support the suggestion of codification of employment status tests in legislation. We believe this would be an extremely difficult task to undertake fully. But very importantly we believe this could end up as a tick box exercise for employers to seek to defeat claims of employee status. It also would fail to adequately take account of the body of case law that recognises the need to look at the reality of the working relationship.

- Instead of codifying a status test into legislation, we support the introduction of a statutory code giving guidance on the tests and practical examples. Any breach of the code should to lead to an uplift in compensation by the tribunal (as in the ACAS grievance & disciplinary code). We believe a code would be helpful in changing the culture, help inform and guide employers, and it would give unions an additional tool to use in the workplace to collectively resolve disputes without litigation.

- There should be a reversal of the burden of proof in employment status cases, so that the employer has to show why the individual is not an employee or worker (rather than the burden largely resting on the claimant as it does now).

- Particularly we do not believe that the tests of mutuality of obligation, personal service, or control should be key factors to determine status.

- The tests on employment status for tax and employment rights should not be aligned, this is because they are for very different purposes and simplification would be likely to have unintended consequences.

- However, where an individual is taxed as an employee they should be deemed to have employee status for all employment rights purposes.

- We do not agree with the Taylor review recommendation to rename workers as 'dependent contractors'. This would cause more uncertainty and could throw doubt on existing established case law. Furthermore, the name is not an accurate description of the majority of workers currently falling under Limb B, such as agency or zero hour contract workers.

This consultation on employment status overlaps significantly with the other three consultations under the Taylor Review. In order to resolve many of the issues of abuse in respect of employment status, it is important that there is a joined up approach. We refer to our submissions in the other consultations that would assist in dealing with the problems of bogus self-employment and the protection of workers' rights.

Particularly we believe:

- Tribunals should be able to make recommendations in respect of the wider workforce, when hearing cases of employment status.

- The rules on continuity of employment need to be clarified, the break in between contracts which currently breaks continuity should be extended to stop employers creating artificial gaps in employment to defeat claims for rights based on continuity.
- All key employment rights, such as unfair dismissal, should apply from day one of employment.
- The right to a written statement of particulars of employment should be extended to all workers and apply from day one of employment.
- There should be penalties for employers who are found to have infringed employment rights and particularly where there has been a repeat offence by the same employer. The penalty should form part of the compensation award payable to the claimant.
- There should be stronger enforcement powers of the existing agencies and increased resources for these bodies.
- The Government should encourage and promote the role of collective bargaining and give unions greater rights of access to the workplace.

Questions

Your name: Marion Scovell

Your organisation if replying on their behalf (if applicable): Prospect

Your or organisation address: 8 Leake Street, London SE1 7NN

Trade Union

Responding to both employment rights and tax

Question 1 (Chapter 4, page 21 in discussion document)

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?

Prospect believes that the current provisions around employment status are complex and create enormous uncertainty for workers and employers. The current position leaves enormous scope for employers to abuse the system and deny workers their rights.

Importantly the three strand test of employee, worker, or self-employed does not work, there is no clarity between the tests and the means of establishing rights,

through bringing claims to the employment tribunal, is too cumbersome, expensive, and time consuming.

We consider that the test should be a binary one, between worker (including all those who would fall under the current worker and employee tests) or self-employed. We consider there should be presumption that the individual is a worker, unless the employer can show otherwise.

We note that the Taylor review recommended removing employment tribunal fees for employment status cases, and while we are pleased that the fee system has been abolished, there is still considerable difficulty and cost for employees to bring claims through the tribunal. Prospect has run many cases challenging employment status and because of the complexity of the law we need to put significant resources into bringing these claims, including specialist Counsel for representation. While trade unions may be able to do this, the litigation process is going to be impossible for many low paid workers without support.

Further atypical workers will often be in a very vulnerable position and will be fearful of raising their rights when they have no certainty of more work. This inequality in the position can lead to employers unlawfully denying workers their rights.

Question 2 (Chapter 5, page 22 in discussion document)

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?

No

Prospect does not agree with the proposal to codify a set of main principles into legislation. We do believe that there needs to be greater clarity in determining status, but we do not believe that codification would achieve this.

We would be concerned that trying to codify the existing legal principles would be extremely difficult, but particularly we are concerned that it would remove the ability to recognise new forms of working. It would not keep up with changing models of working. Particularly at the moment with several recent cases and appeals the law is still very fluid on many of the 'gig economy' working practices and platforms.

Codification would also remove the existing ability of tribunals to make judgments based on the whole facts of a matter.

If there was a set of factors included in primary or secondary legislation we would be concerned that employers would use this as a 'tick box' exercise to create contracts specifically aimed at not meeting the test. We have seen this in many cases where employers seek to artificially manipulate the working arrangements to avoid liability for worker status – for example by introducing a substitution clause which is a sham designed to deny the worker rights.

Instead of codifying into legislation we would like to see a Code of Practice on employment status created.

A Code of Practice would ideally be through ACAS and would be subject to detailed consultation with employers, trade unions, and workers.

One benefit of a code of practice is that would be more responsive to changing practices, it could be more easily amended and updated to reflect new forms of working.

A code could also encourage best practice and provide examples and case studies which would assist the parties in understanding this extremely complex area. A statutory code of practice would mean that tribunals and courts would have a duty to consider the code in reaching judicial decisions, which would help create consistency and give guidance to tribunal members. For example, the Equality and Human Rights Commission code on employment is well used and understood by tribunals and practitioners and works well in clarifying the legal position.

Any failure to apply the code could result in increased compensation, when the claimant succeeds in their case. This principle of giving an uplift in compensation is well understood when looking at cases of a breach of the ACAS Code on grievance and disciplinary and we believe would work well in the employment status context.

Prospect believes that there needs to be a cultural change, as much as a legal one. Workers need to be certain of their rights and employers should be clearer on their obligations. A code of practice would help with this. We believe the introduction of a code would provide better advice to both parties and would be a way of resolving disputes before they reach the litigation stage.

Trade union representatives in the workplace have a great track record of resolving issues. A code of practice, with clear guidance and case studies, would be beneficial in guiding the parties to reach a resolution with better knowledge of the employment status tests. An authoritative Code of Practice would be extremely helpful to both sides in negotiations.

Question 3 (Chapter 5 page 23 in discussion document)

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 Q.2 above.

Question 4 (Chapter 5 page 23 in discussion document)

Is codification relevant for both rights and/or tax?

No

See answer to Q.2 above.

Question 5 (Chapter 5 page 23 in discussion document)

Should the key factors in the irreducible minimum be the main principles codified into primary legislation?

No

See answer to Q.2 above.

Question 6 (Chapter 5 page 24 in discussion document)

What does mutuality of obligation mean in the modern labour market?

As the consultation document recognises there is ambiguity as to what mutuality of obligation entails. It is currently a key test in employment status cases, but can often be extremely difficult to pin down, resulting in litigation and appeals.

Traditionally the test has been about the requirement to provide and undertake work. However in the newer forms of working practices (such as app based platforms) this has become even more confusing.

It is also a test that has always been very one sided and unscrupulous employers use it to avoid a finding of employee. Employers can say that the worker has no obligation to accept work that is offered to them, however the reality is very different, with workers knowing that if they were to refuse work without good cause (or often even with good cause – such as sickness) then they will not be offered further work.

The mutuality of obligation test is unreliable and often wholly one sided.

Prospect does not believe that the test should not be used in considering employment status.

Question 7 (Chapter 5 page 24 in discussion document)

Should mutuality of obligation still be relevant to determine an employee's entitlement to full employment rights?

No

See answer to Q.6 above.

Question 8 (Chapter 5 page 24 in discussion document)
If so, how could the concept of mutuality of obligation be set out in legislation?

See answer to Q.6 above.

Question 9 (Chapter 5 page 25 in discussion document)

What does personal service mean in the modern labour market?

We believe this test does not work well in the current times. It is often used by employers to circumvent employment status. In reality a clause in a contract that states that personal service is not required and provides a substitution clause is often a sham used by employers. In reality it is often the case that substation is not viable or practicable, so the clause is used to create a smoke screen to employee status.

There is a danger that the use of sham substitution clauses could lead to wider health and safety issues. For example in the Deliveroo case, the CAC queried why Deliveroo would select and train riders for them to go on and delegate to others who had not been formally trained. This raises concerns about untrained workers being able to undertake roles that they have not been trained to do, simply because am employer is using a substitution clause to avoid giving rights to their workers.

Courts may be prepared to look behind a substitution clause in a contract, but then have to make findings of fact on the reality of the situation. This can become a protracted and costly process.

As stated previously we would like to see greater clarity on employment status (through a binary test, code of practice, and statutory presumption), and we believe that the dependence on a personal service clause is counterproductive to resolving disputes simply and quickly.

Question 10 (Chapter 5 page 25 in discussion document)

Should personal service still be relevant to determine an employee's entitlement to full employment rights?

No

See answer to Q9.

Question 11 (Chapter 5 page 25 in discussion document)

If so, how could the concept of personal service be set out in legislation?

See answer to Q.9.

Question 12 (Chapter 5 page 25 in discussion document)

What does control mean in the modern labour market?

We are concerned about the recommendation from the Taylor review to place more emphasis on the control test. We believe this is an artificial test and is increasingly less relevant in many forms of employment.

Particularly, as the consultation document recognises, many workers are not subject to any significant degree of control in how they perform their work. Within Prospect we have many workers who are highly specialist and skilled in the work they do and undertake their work with a significant degree of autonomy. Applying a control test creates uncertainty for many of these workers.

Also the control test would effectively rule out many agency workers from having any rights. For agency workers the control is split between the agency and the end user, so placing particular emphasis on the control test, would mean that agency workers could be deprived of even basic worker rights.

Prospect does not believe that there should be greater emphasis on the control test.

Question 13 (Chapter 5 page 25 in discussion document)

Should control still be relevant to determine an employee's entitlement to full employment rights?

No

See answer to Q.12 above.

Question 14 (Chapter 5 page 25 in discussion document)

If so, how can the concept of control be set out in legislation?

See answer to Q.12 above.

Question 15 (Chapter 5 page 26 in discussion document)

Should financial risk be included in legislation when determining if someone is an employee?

No

In respect of each of the questions at Q.15 – Q.19, we refer back to our main point that we do not consider that the existing factors should be codified into legislation.

We do agree however that the concept of financial risk is a relevant factor to be considered in determining the different status between worker and self-employed. This could be outlined in a new Code of Practice.

Question 16 (Chapter 5 page 26 in discussion document)

Should 'part and parcel' or 'integral part' of the business be included in legislation when determining if someone is an employee?

No

In respect of each of the questions at Q.15 – Q.19, we refer back to our main point that we do not consider that the existing factors should be codified into legislation.

We do agree however that the concept of integration within the business is a relevant factor to be considered in determining the different status between worker and self-employed. This could be outlined in a new Code of Practice.

Question 17 (Chapter 5 page 26 in discussion document)

Should the provision of equipment be included in legislation when determining if someone is an employee?

No

In respect of each of the questions at Q.15 – Q.19, we refer back to our main point that we do not consider that the existing factors should be codified into legislation.

We oppose the suggestion that the provision of equipment should be any part of the test of employment status. This is a factor that employers have sought to artificially create to try and defeat employment status claims. This has been abused to the point where employers have insisted on workers hiring equipment from the employer and then argued this demonstrates they are self-employed.

Question 18 (Chapter 5 page 26 in discussion document)

Should 'intention' be included in legislation when determining if someone is an employee in uncertain cases?

No

In respect of each of the questions at Q.15 – Q.19, we refer back to our main point that we do not consider that the existing factors should be codified into legislation.

However, we feel particularly strongly that the intention of the parties should not be any part of the test of employment status. This would be contrary to, and undermine, the line of cases where courts have determined it is permissible to look at the reality of the situation, rather than the labels that are applied by the employer.

Furthermore the 'intention' test would be weighted too strongly on the employer, who could simply argue it was never their intention to create an employee or worker relationship, in order to defeat a valid claim.

Question 19 (Chapter 5 page 26 in discussion document)

Are there any other factors that should be included in primary legislation when determining if someone is an employee?

No

And what are the benefits or risks of doing so?

In respect of each of the questions at Q.15 – Q.19, we refer back to our main point that we do not consider that the existing factors should be codified into legislation.

Particularly we consider there should be a binary test of status, underpinned by a statutory code of practice, and a presumption of worker status.

Question 20 (Chapter 5 page 27 in discussion document)

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?

We do not believe that there should be codification within primary or secondary legislation. See our response to Q.2.

Question 21 (Chapter 5 page 27 in discussion document)

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?

We do not believe that there should be codification within primary or secondary legislation. See our response to Q.2.

In any event however, we believe that legislation in any area can be subject to change and this simply the reality as there would be changing models of employment and development through case law.

The proposal of a statutory code of practice instead of codification in legislation would be a much better and easily changeable tool.

Question 22 (Chapter 6 page 29 in discussion document)
Should a statutory employment status test use objective criteria rather than the existing tests?

No

While we recognise the need for greater clarity for workers and employers, we do not believe the suggestions in the consultation document would achieve this. Particularly we would be very concerned that in an effort to simplify the tests, this could lead to employers being able to manipulate the position to avoid statutory employment protection rights.

What objective criteria could be suitable for this type of test?

Particularly we strongly disagree that the three proposals in paragraph 6.6 of the consultation document would be appropriate.

The length of time test would avoid rights being accrued by those on zero hours contracts, and could incentivise employers to engage different workers for short periods in order to defeat employment status claims.

The percentage of an individual's income that comes from one engager would create a meaningless test. Many workers are dependent on a number of different employers and may have two or three jobs, this should not mean that they are denied employment rights. Also it could mean that two workers doing the same work and number of hours could be treated differently for status issues (for example where one has only one job with short hours they would be a worker, but another doing a number of different engagements to build up to 'full time hours' would not be).

The location of work is also an unreasonable test. In many cases workers will have different work locations, particularly this will be a case for mobile workers, but also it would be a difficulty for many who are employed on consultancy work with different clients.

Question 23 (Chapter 6 page 30 in discussion document)

What is your experience of other tests, such as the Statutory Residence Test (SRT)? What works well, and what are their drawbacks?

We do not have any comments on other types of tests, such as the SRT.

Question 24 (Chapter 6 page 30 in discussion document)

How could a new statutory employment status test be structured?

We believe the best and simplest approach would be to adopt a binary test, so that an individual is either a worker (encompassing the current definitions of employee and worker) or self-employed.

Once an individual is classified as a worker then they should be entitled to the full range of employment protection rights, including under minimum wage, rights to a written statement of particulars, redundancy, unfair dismissal, and equality rights.

We recognise that the definition needs to be carefully considered. We support the TUC's proposal for a detailed consultation with the social partners and expert employment lawyers to create a new definition that would be fit for purpose to cover the different ways of working and particularly prevents employers from the existing practices of finding particular contractual clauses to try and defeat claims of workers' rights.

We also believe though that there needs to be immediate action, while we still have the three category test, to ensure that workers' rights are improved. This should be that all economically dependent workers should be accepted as employees with the full range of employment rights.

In cases of dispute the burden should be on the employer to demonstrate that the individual is not an employee – in effect reversing the burden of proof to assume individuals are employees unless the employer can show they are genuinely self-employed.

Question 25 (Chapter 6 page 31 in discussion document)

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?

We do not have any comments on other tests, such as the Agency legislation test for tax.

Question 26 (Chapter 6 page 31 in discussion document)

Should a new employment status test be a less complex version of the current framework?

No

There needs to be a binary test and a new definition of worker. See our answers above.

Question 27 (Chapter 6 page 32 in discussion document)

Do you think a very simple objective or mechanical test would have perverse incentives for businesses and individuals?

Yes

Could these concerns be mitigated? If so, how?

No

Prospect strongly disagrees with any proposal to have a simplified on line or mechanical test for determining employment status.

We understand the HMRC test has proved unreliable, and the test for tax purposes is currently not as nuanced as for employment law.

We do not believe that workers' important rights in such a complex area could, or should, be subject to an on line tick box exercise. The results would not in our view be reliable and employers could manipulate the arrangements so that an on line tool comes out with their desired result.

If any such tool was created it must not be seen to be determinative or be taken into account in resolving employment tribunal cases.

Question 28 (Chapter 6 page 32 in discussion document)

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

See answer to Q27 above.

Question 29 (Chapter 6 page 33 in discussion document)

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?

Prospect believes that the tests for employment status for employment rights and tax should not be aligned.

But it is important that wherever an individual is taxed as an employee that they must be entitled to all employment protection rights as an employee.

Question 30 (Chapter 7 page 34 in discussion document)

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?

No

Prospect believes that the current category of worker, with the very limited employment rights, should not be retained in the longer term.

We do not think it is right that there should be a significant proportion of the working population who do not have access to the full set of rights, such as family leave and protection against unfair dismissal. With growing numbers of the workforce in atypical working arrangements we believe it is important that all workers have basic rights. Particularly zero hours contracts and more casualisation of work create vulnerability and it is precisely these workers who require better protection.

Therefore Prospect does not believe that the intermediate worker test should be retained.

Instead we believe there should be a binary test, with a new definition of worker encompassing all those who are currently employees and the limb b workers. This would mean that there would be a distinction between the genuinely self-employed, but all other workers would have the full range of statutory rights.

As stated above we believe the new definition should be the subject of detailed consideration and consultation. In the meantime the existing tests could be retained, but all statutory rights (including unfair dismissal and family rights) should be extended to all workers, who are covered by limb b.

Question 31 (Chapter 7 page 35 in discussion document)

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?

No

While there is the three tier approach, we think it is right that the worker definition should encompass both employees and those in limb b. This is important to ensure that individuals do not fall between the definitions.

Question 32 (Chapter 7 page 35 in discussion document)

If so, should the definition of worker be changed to encompass only Limb (b) workers?

No

We consider this would not be helpful, because it could mean that workers would fall between the different definitions and may be denied rights.

Question 33 (Chapter 7 page 35 in discussion document)

If the definition of worker were changed in this way, would this create any unintended consequences on the employee or self-employed categories?

Yes

See answers above to Q30 to Q32.

Question 34 (Chapter 7 page 36 in discussion document)

Do you agree that the government should set a clearer boundary between the employee and worker statuses?

No

We would be very concerned that an attempt to set such a boundary would push more people in the limited worker category with fewer rights.

Question 35 (Chapter 7 page 36 in discussion document)

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 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?

Prospect does not agree that the boundary should be made clearer. Our primary point is that current employee and worker categories should be combined.

Question 36 (Chapter 7 page 36 in discussion document)

What might the consequences of these approaches be?

See answers to Qs 30-34 above.

Question 37 (Chapter 7 page 37 in discussion document)

What does mutuality of obligation mean in the modern labour market for a worker?

As we state above in answer to Q6 we do not think mutuality of obligation is an appropriate test to determine employee or worker status. In determining worker status the test is even more problematic, because it can be used by employers to artificially defeat claims of worker status.

As the consultation document recognises there is ambiguity as to what mutuality of obligation entails. It is currently a key test in employment status cases, but can often be extremely difficult to pin down, resulting in litigation and appeals.

Traditionally the test has been about the requirement to provide and undertake work. However in the newer forms of working practices (such as app based platforms) this has become even more confusing and irrelevant.

It is also a test that has always been very one sided and unscrupulous employers use it to avoid a finding of worker or employee. Employers can say that the worker has no obligation to accept work that is offered to them, however the reality is very different, with workers knowing that if they were to refuse work without good cause (or often even with good cause – such as sickness) then they will not be offered further work.

The mutuality of obligation test is unreliable and often wholly one sided.

Prospect does not believe that the test should be used in considering worker status.

Question 38 (Chapter 7 page 37 in discussion document)

Should mutuality of obligation still be relevant to determine worker status?

No

See answer to Q37.

Question 39 (Chapter 7 page 37 in discussion document)

If so, how can the concept of mutuality of obligation be set out in legislation?

We do not think the concept of mutuality of obligation should be set out in legislation.

Question 40 (Chapter 7 page 37 in discussion document)

What does personal service mean in the modern labour market for a worker?

As we state in answer to Q9 we do not think personal service should be used to define employee or worker status.

We believe this test does not work well in the current times. It is often used by employers to circumvent employment status. In reality a clause in a contract that states that personal service is not required and provides a substitution clause is often a sham used by employers. In reality it is often the case that substation is not viable or practicable, so the clause is used to create a smoke screen to employee status.

There is a danger that the use of sham substitution clauses could lead to wider health and safety issues. For example in the Deliveroo case, the CAC queried why Deliveroo would select and train riders for them to go on and delegate to others who had not been formally trained. This raises concerns about untrained workers being able to undertake roles that they have not been trained to do, simply because am employer is using a substitution clause to avoid giving rights to their workers.

Courts may be prepared to look behind a substitution clause in a contract, but then have to make findings of fact on the reality of the situation. This can become a protracted and costly process.

As stated previously we would like to see greater clarity on employment status (through a binary test, code of practice, and statutory presumption), and we believe that the dependence on a personal service clause is counterproductive to resolving disputes simply and quickly.

Question 41 (Chapter 7 page 37 in discussion document)

Should personal service still be a factor to determine worker status?

No

See answer to Q40.

Question 42 (Chapter 7 page 37 in discussion document)

Do you agree with the review's conclusion that the worker definition should place less emphasis on personal service?

Yes.

There should be less emphasis on personal service for worker status.

Question 43 (Chapter 7 page 38 in discussion document)

Should we consider clarifying in legislation what personal service encompasses?

No

We do not agree that the separate tests should be included in legislation.

Question 44 (Chapter 7 page 38 in discussion document)

Are there examples of circumstances where a fettered (restricted) right might still be consistent with personal service?

There could be, but we do not believe the personal service test should be applied.

Question 45 (Chapter 7 page 39 in discussion document)

Do you agree with the review's conclusion that there should be more emphasis on control when determining worker status?

No

There should not be more emphasis on control when determining worker status. We are very concerned about the recommendation from the Taylor review to place more emphasis on the control test. We believe this is an artificial test and is increasingly less relevant in many forms of employment.

Particularly, as the consultation document recognises, many workers are not subject to any significant degree of control in how they perform their work.

Within areas where Prospect is organised, we have many workers who are highly specialist and skilled in the work they do and undertake their work with a significant degree of autonomy. Also many workers in more senior management roles will not be subject to much in the way of control. Applying a control test creates uncertainty for many of these workers.

Also the control test would effectively rule out many agency workers from having any rights. For agency workers the control is split between the agency and the end user, so placing particular emphasis on the control test, would mean that agency workers could be deprived of even basic worker rights.

Prospect does not believe that there should be greater emphasis on the control test.

Question 46 (Chapter 7 page 39 in discussion document)

What does control mean in the modern labour market for a worker?

See answer to Q45.

Question 47 (Chapter 7 page 39 in discussion document)

Should control still be relevant to determine worker status?

No

See answer to Q45.

Question 48 (Chapter 7 page 39 in discussion document)

If so, how can the concept of control be set out in legislation?

We do not think the test of control is helpful and we do not think the tests should be set out in legislation.

Question 49 (Chapter 7 page 39 in discussion document)

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?

Yes

We believe there are a range of factors that can be taken into account in determining if someone is genuinely self-employed. For example, integration into the business, ability to profit from the manner in which the work is done, provision of indemnity insurance, the degree of economic dependence on the employer. These factors, along with those listed in paragraph 7.26, are all factors that tribunals and courts can weigh up in determining status.

However as we state above, we do not believe that the factors should be codified into legislation. Rather we believe there should be a statutory code of practice to give guidance on determining status taking account of the reality of the situation.

Question 50 (Chapter 7 page 39 in discussion document)

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

We do not believe it is necessary to further amend the legislation, as the concept of being in business on their own account is understood and covered by the existing definition.

Question 51 (Chapter 7 page 39 in discussion document)

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?

No

Question 52 (Chapter 7 page 40 in discussion document)

The review has suggested there would be a benefit to renaming the Limb (b) worker category to 'dependent contractor'? Do you agree? Why / Why not?

No

Prospect does not agree with the suggestion in the Taylor review to rename Limb b workers as 'dependent contractors'.

Introducing a new name would create further confusion and could have a very detrimental impact by throwing doubt on the existing body of case law.

Importantly the phrase 'dependent contractors' would not be recognisable for a number of workers already covered by limb b, such as zero hours workers, agency workers, and many other atypical workers. In fact 'contractors' are only one type of atypical worker currently covered by the limb b status.

Question 53 (Chapter 8 page 43 in discussion document)

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?

Prospect does not have direct experience of advising platform based workers, and is not in a position to comment on this section on a particularly informed basis.

However, we believe that whilst the arrangements for workers under these models are different to the traditional working arrangements, all the general principles we support above should apply to this group. For example employers should not be able to create sham clauses to defeat worker status and all workers should be entitled to minimum rights.

We also believe it is important to recognise that actual performance of work duties should not determine working time or rights to the national minimum wage. It is common in many established employee jobs that there is an element of 'waiting to be called to action' which is a fundamental part of the duties. Therefore we believe that all workers working through an app based platform should be entitled to be paid while they are logged on to the app and confirmed that they are available for work.

Question 54 (Chapter 8 page 43 in discussion document)

What would the impact be of this on a) employers and b) workers?

See answer to Q53 above.

Question 55 (Chapter 8 page 43 in discussion document)

How might platform-based employers respond to a requirement to pay the NMW/NLW for work carried out at times of low demand?

See answer to Q53 above.

Question 56 (Chapter 8 page 43 in discussion document)

Should government consider any measures to prescribe the circumstances in which the NMW/NLW accrues whilst ensuring fairness for app-based workers?

See answer to Q53 above.

Question 57 (Chapter 8 page 43 in discussion document)

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?

See answer to Q53 above.

Question 58 (Chapter 8 page 43 in discussion document)

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 tools or materials to carry out tasks?

See answer to Q53 above.

Question 59 (Chapter 8 page 43 in discussion document)

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?

See answer to Q53 above.

Question 60 (Chapter 9 page 44 in discussion document)

Do you agree that self-employed should not be a formal employment status defined in statute? If not, why?

Yes

We agree that there should not be a formal status of self employed in the statute. We believe this is unnecessary and that trying to define this as an additional status would give employers a new test to aim at in order to defeat worker status. It may also mean that some individuals could fall through either test and be in some kind of grey area in between.

Many of Prospect's members in our BECTU sector who work as freelancers in entertainment and media are self-employed and are taxed as self-employed. Their arrangements work well and we would not want to see the genuinely self-employed brought into disputes around employment status.

Instead we believe it is important that employment law provisions protect workers who are in atypical working arrangements and are often vulnerable and exploited. Creating a new worker (including employee) status in the legislation is in our view a much more positive approach to dealing with bogus self-employment and protecting workers on zero hours contracts, agency workers, and others who are wrongly denied basic employment protection rights.

Question 61 (Chapter 9 page 45 in discussion document)

Would it be beneficial for the government to consider the definition of employer in legislation?

No

We do not believe it is beneficial to create a definition of employer in the legislation. We consider this would be likely to confuse matters and create further legal uncertainty.

If the proposal to require the employer to extend the right to a written statement of terms to workers, which is set out in the consultation on proposals to increase transparency in the UK labour market, is agreed this should provide certainty to individuals about who their employer is.

We do however believe that the law should be changed to protect workers employed through third parties, such as agencies or umbrella companies. In these cases workers often fall through the employee status tests, particularly because of a lack of control.

We believe that the end user of the worker's services should be treated as the employer.

Question 62 (Chapter 10 page 46 in discussion document)

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?

No

Prospect does not believe that the tests for tax and employment rights should be aligned. The tests are different and serve very different purposes. The current test for tax is a binary test and does not include the more nuanced tests for worker status. It is important that clarity is retained in tax purposes.

As stated above, many of Prospect's members in our BECTU sector, who work as freelancers in entertainment and media, are taxed as self-employed and this arrangement works well for them. Many of these people are required to provide their own expensive equipment (such as recording and mixing equipment) and to have indemnity insurance. These individuals are clearly self-employed for tax purposes and this is appropriate. However they may also fall into the definition of limb b workers, with entitlement to working time protections and are likely to be covered by the employment status with the Equality Act for protection against discrimination at work.

We believe the tests for tax and employment rights should be retained as separate and distinctive assessments.

Question 63 (Chapter 10 page 47 in discussion document)

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?

Yes

We do believe that those who are taxed as employees should be deemed to be employees for employment rights. If they are treated employees for paying tax, then we can see no reason why they should not receive the full employment protection rights.

Question 64 (Chapter 10 page 47 in discussion document)

If these individuals were granted employment rights, what level of rights (e.g. day 1 worker rights or employee rights) would be most appropriate?

They should have full employee rights, as they have been clearly assessed as employees for tax purposes. As we note above there may be individuals who are treated as self-employed for tax but still have limb B rights, this is because they fall into the more nuanced current test for worker rights and can legitimately be both. But where the individual is assessed as being an employee under the tax rules, then they should have full employment protection.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Prospect
1 June 2018