



Law Society  
of Scotland

# Consultation Response

Draft secondary legislation: off-payroll working rules  
from April 2020

February 2020



## 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 Tax Law Sub-committee welcomes the opportunity to consider and respond to HMRC's consultation on *Draft secondary legislation: off-payroll working rules from April 2020*<sup>1</sup>. We have the following comments to put forward for consideration.

## General comments

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The draft secondary legislation consists of the draft Income Tax (Pay As You Earn) (Amendment) Regulations 2020 and the draft Social Security Contributions (Intermediaries) (Miscellaneous Amendments) Regulations 2020. We will refer to these as the "IT Regulations" and the "SS Regulations", respectively. If neither of these is specified, our point applies to both. We have [four] main comments and set these out below under the following [four] headings.

As a general comment, we have an overriding concern that the proposed new off-payroll legislation is insufficiently clear as to who falls within it and when, and much is left to HMRC to determine. In other words, the proposed new rules are legislation-light and guidance-heavy. This makes it difficult for businesses (end users) and contractors to be certain what the new rules mean and gives HMRC a wide scope of discretion in enforcing them, which is unlikely to be of comfort to those potentially within their scope. It is important that the law is clear and understandable so that individuals and businesses are able to guide their conduct appropriately.

We note the ongoing review of off payroll working<sup>2</sup> and note that this may impact matters relating to this draft legislation.

<sup>1</sup> <https://www.gov.uk/government/consultations/draft-secondary-legislation-off-payroll-working-rules-from-april-2020>

<sup>2</sup> <https://www.gov.uk/government/news/off-payroll-review-launched>

## Comments on draft regulations

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### Recovery Powers following Genuine Business Failures – include exclusions in the regulations

We propose that the regulations include a prohibition on HMRC using the recovery powers against another party in cases where the unpaid PAYE/NICs results from a genuine business failure of the deemed employer.

The regulations do not include provision that prevents HMRC from pursuing other persons in the labour supply chain for unpaid PAYE/NIC debts where this results from a genuine business failure of the party who should have accounted to HMRC for these amounts. This appears to be at odds with HMRC's stated intention (see HMRC's response to the consultation on the reform, the note introducing this consultation and HMRC draft guidance at ESM10031).

Leaving this matter to a decision of HMRC (which could change) does not give taxpayers the same certainty as having this included in the regulations. As the principle - that other businesses should not be penalised in such circumstances - appears to be accepted, we consider that this should be included in the regulations. This would seem the minimum defence that it would be reasonable to include in the regulations, as we note that a wider defence for a business having taken reasonable care to comply with the new rules has not been accepted by HMRC.

In respect of this reasonable care point, we note that the draft guidance at ESM10031, when specifying instances where HMRC would look to recover, seems focussed on an element of fault or avoidance motive by the person from whom recovery is sought (but does not go as far as to say reasonable care should be a defence). It is our view that at least some minimum factors or guidelines to consider in deciding whether recovery should be pursued should be included in the regulations, rather than this being completely left to HMRC discretion.

### Conditions for Recovery of relevant debts – drafting changes regarding services before 6 April 2020

We propose that regulation 97LC in the draft IT Regulations and regulation 29LC in the draft SS Regulations are amended as follows:

- In (a), before the words “a tax year commencing”, the words “services provided before, or” be included. This is to reflect the HMRC announcement (on 7 February 2020) that the government has decided that services provided before 6 April 2020 are not to be subject to the new regime. Including these words would give greater clarity for those reading the legislation.
- the word “or” at the end of (b) should be included. This is to make it clear that only one of the conditions set out in (a), (b) or (c) needs to be met in order for the provision to apply to prevent recovery.

Also in the draft SS Regulations, we propose that regulation 1(3) is amended to delete the words at the end “and do so even if relating to services provided before that time”. This is to reflect the HMRC announcement

(on 7 February 2020) that the government has decided that services provided before 6 April 2020 are not to be subject to the new regime. Further, including words at the end such as “and providing that the payments relate to services provided after 6 April 2020” would give greater clarity on this point for those reading the legislation.

We note the reference in regulation 97LD of the draft IT Regulations to “section 688AA(3) ITEPA” and later to a paragraph (b) of that, however that section does not appear in the draft legislation we have seen. It may be intended to be a reference to section 688AA (2), however there are no subparagraphs (a) and (b) within that.

### **“No realistic prospect of recovering within a reasonable period” – add clarification or a requirement to give reasons**

We propose that the regulations include either a requirement for the HMRC officer to give reasons as to their view that there is “no realistic prospect of recovering within a reasonable period” or some parameters or factors that must be considered in coming to such a conclusion.

The phrase occurs, for example, in draft IT Regulations at regulation 97LD and 97LG, in the context of requiring the HMRC officer to be of that view, and also in regulation 97LI, in the context of the taxpayer using this as a ground of appeal. It is also in the SS Regulations. This appears to be a fertile ground for disputes and some minimum parameters here would avoid some of these arising. Alternatively (and this may be more achievable), a requirement to give reasons as to the basis of the view taken by an officer (and the taxpayer in the case of an appeal on this ground) may help to reduce disputes. It would also be consistent with the requirement to give reasons for a status determination which has been built into the draft regulations and with the rationale behind making that change.

### **Scope of the inclusion of certain fee payers in the chain – clarification needed**

We propose that exclusions are added to the regulations to make it clear that payroll providers (and similar entities involved in the chain of payments) are not intended to be caught by these provisions as, although technically within the chain (and so current drafting), they are not a link in the contractual chain concerned with the supply of the labour.

While HMRC documents (for example, the technical note to this consultation) makes it clear that the intention is to catch agencies contracting “in the labour supply chain”, the proposed legislation is not clear on this point. This highlights a recurring theme that a key difficulty with the proposed new off-payroll rules is that the legislation is insufficiently clear as to who is within it and when, and much is left to HMRC to determine what it will do in practice in enforcing the new rules. This has the potential to lead to inconsistent and changing practice, and that does not give certainty to businesses potentially within the scope of these regulations.



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