OFF-PAYROLL WORKING RULES FROM 2020

Response by Association of Taxation Technicians

1 Introduction

1.1 The Association of Taxation Technicians (ATT) is pleased to have the opportunity to respond to the HMRC consultation document *Off-payroll working rules from April 2020* ('the Consultation') issued on 5 March 2019[1].

1.2 The primary charitable objective of the ATT is to promote education and the study of tax administration and practice. We place a strong emphasis on the practicalities of the tax system. Our work in this area draws heavily on the experience of our members who assist thousands of businesses and individuals to comply with their taxation obligations. This response is written with that background.

1.3 Our response is set out below. In Sections 2 to 5 we address the specific questions posed in the Consultation, taking each chapter in turn.

1.4 We would be pleased to discuss any aspect of this response further. Relevant contact details are in Section 6.

1.5 The key points in this response are identified below with relevant paragraph references:

a) We question the appropriateness of the proposed definition of *small* and suggest an alternative test based on the extent of an entity's engagement of off-payroll workers. [***2.2 – 2.3***]

b) We think that further consideration is required to the date from which an entity is required to apply the proposed provisions once it has ceased to be small (however defined). [***2.4 – 2.10***]

c) We recommend the inclusion of a provision to prevent an entity becoming subject to the provisions for a single tax year. [***2.11 – 2.12***]

d) We note that our suggested alternative of *small* (see (a) above) would work equally well for corporates and non-corporates. [**2.13**]

e) On balance, we favour the first option (requiring an unincorporated entity to satisfy both the employee and turnover tests) in order to qualify as *small*. [***2.14 – 2.17***]

f) We believe that a requirement for clients to provide a status determination directly to workers would be helpful, particularly if supported with reasons. [***3.1 – 3.2 and 4.9***]

g) We think that the direct provision to the fee-payer of the determination by the client would be preferable to the proposed cascading of it down the chain. [***3.3 – 3.5 and 3.7 – 3.8***]

[1] https://www.gov.uk/government/consultations/off-payroll-working-rules-from-april-2020

h) We think that the easiest way to enable the client to identify the fee-payer would be for the worker to provide that information either directly or upwards through the chain. [***3.9 – 3.10***]

i) Where the client qualifies as *small*, we think that there should be a requirement for the client to communicate that fact to the fee-payer and/or worker. We suggest the provision by HMRC of an appropriate standard form or wording. [***3.11***]

j) We have significant misgivings about the concept of transferred liability except in the exceptional situation of any such transferee party having been complicit in non-compliance. [***3.14 – 3.22***]

k) We think that the level of burden upon clients in providing reasons for a determination would depend on the extent of reasoning that was required. In particular, we note a possible role for the CEST output. [***4.2***]

l) We are unconvinced about the practicality of a client-led process for resolving status disagreements and believe that the emphasis should instead be placed on agreeing status prior to the commencement of the engagement. [***4.3 – 4.7***]

m) We think that the wider implications of clients pre-determining employment status require consideration. [***4.4***]

n) We believe it unlikely that fee-payers would wish to get involved with pension contributions. In order that workers are not disadvantaged, we recommend a repayment mechanism of relevant income tax and NIC deductions made by the fee-payer. [***5.1 – 5.4***]

o) We highlight the vital importance of clear and comprehensive guidance, the role of appropriate advance publicity and the centrality of a reliable and enhanced CEST. [***5.5 – 5.12***]

p) We suggest measures which could discourage inappropriate determinations which were based on risk-aversion rather than proper consideration of all relevant factors. [***5.13***]

q) We question the logic of confining the application of the *small* test to the private sector and recommend consideration of its application to public sector organisations which meet the same criteria. [***5.15 – 5.16***]

2 Defining the scope of the reform

Q1: Do you agree with taking a simplified approach for bringing non-corporate entities in to scope of the reform? If so which of the two simplified options would be preferable? If not, are there alternative tests for non-corporates that the government should consider? Could either of the two simplified approaches bring entities into scope, which should otherwise be excluded from the reform? Is it likely to apply consistently to the full range of entities and structures operating in the private sector? Please explain your answer.

2.1 We welcome the proposed exclusion from the reform for *small* private sector organisations which engage off-payroll workers ('the exclusion'). However, we have a number of concerns regarding its proposed design and operation. We have noted these below in addition to responding to the specific issues raised in Question 1 regarding its application to non-corporate entities.

Design of the exclusion

2.2 The Consultation proposes that, for the purposes of the exclusion, the existing statutory definition of *small* found at s382 of Companies Act 2006 be used. Whilst this test will be familiar to corporate entities, and is relatively simple in operation, we would query whether it is consistent with the policy objective of ensuring that those who work like employees are broadly taxed in the same way as employees. In particular, there does not seem to be any clear reason for a test based on a particular client's financial results and employee levels to affect the treatment of their off-payroll workers.

2.3 It may therefore be more logical to base the exclusion test on the extent of an entity's engagement of off-payroll workers. This might incorporate both a broad test which looks at the overall aggregate payments made to all off-payroll workers, as well as a more focused consideration of the amount paid to any particular off-payroll worker. Where either or both of these amounts exceed a certain threshold in a given period then the off-payroll working rules would apply. Such a test would ensure that only those organisations that benefit from significant levels of off-payroll labour are brought within the scope of the reform.

Operation and application of the exclusion

2.4 The Consultation indicates that organisations would have to consider whether they were *small* by applying the respective test on an accounting period by accounting period basis. Where an organisation ceases to be small, the off-payroll working rules would apply from the start of the next tax year following the end of that accounting period.

2.5 We are concerned that this approach may not provide sufficient time for organisations which cease to be small to adequately prepare for and implement the off-payroll rules. Organisations may not realise that they have exceeded the balance sheet or turnover element of the test until they come to draw up statutory accounts for the period. This may not be until shortly before, or even after, the start of the next tax year, especially as the deadline for a private company filing accounts with Companies House is not until nine months after the end of the accounting period.

2.6 Under the proposed approach, the amount of time that affected organisations will have to prepare for the application of the off-payroll working rules will depend upon their accounting period end, which appears to be rather arbitrary and potentially unfair. By way of example, an organisation with a March year end will only have five days from the end of their accounting period before the rules apply, whereas a business with an April year end will have over 11 months.

2.7 We believe that, when an organisation ceases to be small in an accounting period, they should be allowed a period of at least one year from the end of that accounting period before they are required to apply the off-payroll working rules. This could be achieved through deferring the onset of the rules until the start of the second tax year after the end of the accounting period in which the organisation ceases to be small.

2.8 For example, an organisation with a December 2021 year-end that realises they will not be small when drawing up accounts for that year would have to apply the off-payroll rules from April 2023, rather than April 2022. This would give affected businesses (which are by definition at the smaller end of the scale with more limited resources) adequate time to review existing contracts and ensure they have appropriate systems in place. We note that a similar *grace period* applies in other regimes

where a business has to adapt to new systems due to an increase in size, for example corporation tax Quarterly Instalments Payment (QIPs).

2.9 We appreciate that our proposal (in 2.7 above) would mean that, depending on their accounting year-end, some businesses would have longer to prepare for the introduction of the off-payroll rules than others. However, this has to be weighed against the importance of ensuring all businesses have a minimum guaranteed amount of time in which to prepare.

2.10 A further alternative, and one which would remove the variation based on accounting period end, would be to link the application of the rules to the financial year, and not the tax year. This could mean, for example, that a company which ceases to be small during the year ending December 2021 would apply the rules from 1 January 2023.

2.11 We are also concerned that the current design of the exclusion tests could see organisations moving in and out of the off payroll rules in different years. If an organisation ceases to be small in one period, they will be required to apply the off-payroll rules from the start of the next tax year. However, if their turnover, balance sheet total or employee numbers fall sufficiently in the following period, they may be classed as small again and our understanding is this would mean they are no longer required to apply the rules. This could, for example, result in a business only being within the scope of the rules for a single tax year. Such a situation is of no benefit to any of the parties involved. It is not proportionate or cost effective for a small business to have to introduce new procedures when they are likely to drop below the threshold in the near future. Further, the PSC, worker and fee payer may find it confusing if their obligations or tax position change in the course of (or between) contracts simply because of factors unrelated to the specific contract/relationship. Such confusion may increase the risk of error and non-compliance.

2.12 It may therefore be preferable to design the exclusion such that once an organisation is no longer small (meaning that the off-payroll rules apply) they remain within those rules for a minimum period (three years is suggested) regardless of whether they become small again within that period. This could be coupled with more targeted exclusion conditions and specific protections. For example, organisations that only cease to be small on a temporary basis (e.g. due to a large one-off contract) before becoming small again in subsequent periods could be allowed to apply for exemption from the off-payroll working rules in a similar way that Para 1(3) of Sch1 VATA 1994 provides for businesses which temporarily exceed the VAT threshold to request not to be registered.

Application of the exclusion to non-corporate entities

2.13 We note that if, as set out in 2.3 above, the test as to whether an organisation is small is based on the extent of their engagement of off-payroll workers, then this could apply equally to both non-corporate and corporate entities without any modification.

2.14 If the Companies Act 2006 definition is used then, from the point of view of simplicity and consistency, our preference would be for the exclusion to apply in the same way, and with the same tests, to both non-corporate organisations and companies. However, we acknowledge that unincorporated businesses may have practical difficulties in applying the balance sheet element of the proposed definition of *small*. It therefore appears sensible to base the test as to whether an unincorporated organisation is small on the turnover and employee tests as proposed in the Consultation.

2.15 Looking at the two proposed options for applying the exclusion to non-corporate entities set out on page 8 of the Consultation, our preference would be for the first option. That is, in order to be small, a non-corporate entity would have to have both fewer than 50 employees and turnover of not more than £10.2m. This has the effect of restricting the exemption more narrowly.

2.16 The second option (which would deem non-corporate entities to be small where they had either fewer than 50 employee or turnover of not more than £10.2m) might be more open to manipulation by. It is generally harder to artificially structure arrangements so that two tests are met than one. At an extreme, allowing non-corporate businesses to be exempt from the reform if they merely have fewer than 50 employees could incentivise the use of off-payroll workers over employees.

2.17 The requirement for non-corporate businesses to meet two tests to be considered small would also bring them more in line with the test for corporate entities (where any two out of three conditions are required to be met).

3 Information requirements

Q2: Would a requirement for clients to provide a status determination directly to workers they engage, as well as the party they contract with, give off-payroll workers sufficient certainty over their tax position and their obligations under the off-payroll reform? Please explain your answer.

3.1 We believe that this requirement has the potential to be helpful in providing certainty to workers. This is especially the case where there is a long labour supply chain, where there might otherwise be an increased the risk of a determination not reaching the worker.

3.2 However, we believe that there also needs to be a meaningful way for workers to understand the decision taken and know what their options are should they disagree. To achieve this, the client could be required to provide the worker with both the status determination and the reasons automatically, rather than upon request by the worker. The earlier that the worker establishes that understanding, the better. We comment in section 4.2 below on how the reasons might be supplied and more widely on the timing in sections 4.3 and 4.4 below.

Q3: Would a requirement on parties in the labour supply chain to pass on the client's determination (and reasons where provided) until it reaches the fee-payer give the fee-payer sufficient certainty over its tax position and its obligations under the off-payroll reform? Please explain your answer.

3.3 We do not believe that this requirement alone would provide sufficient certainty to fee-payers and workers. The best way to provide certainty to the fee-payer would be for the client to provide the determination directly to them. This would remove the risk of any member of the labour supply chain either not passing on a determination or altering it in some way. Alternatively, if the worker receives a determination directly from the client it could be made a requirement for the worker in turn to pass the determination to the fee-payer.

3.4 If a determination is to be passed down a supply chain, or from the worker to the fee-payer, we would stress the importance of making it clear that determinations (and reasons where provided) have to be passed on without being altered or amended.

3.5 We are also concerned that a requirement to pass reasons for a determination (where requested) to other parties in the supply chain could be problematic where any of the information contained in those reasons is of a sensitive nature commercially, either for the worker or the client.

Q4: What circumstances might result in a breakdown in the information being cascaded to the fee-payer? What circumstances may result in a party in the contractual chain making a payment for the off-payroll worker's services but prevent them from passing on a status determination?

3.6 We do not have an appropriate evidence base to respond to this question.

Q5: What circumstances would benefit from a simplified information flow? Are there commercial reasons why a labour supply chain would have more than two entities between the worker's PSC and the client? Does the contact between the fee-payer and the client present any issues for those or other parties in the labour supply chain? Please explain your answer.

3.7 We believe that the proposed simplified information flow would be highly beneficial. In fact, as mentioned at 3.3 above, we would suggest that this is taken a step further, with the proposed requirement for determinations to be passed down a supply chain being replaced with a requirement for the client to supply their determination directly to the fee-payer and worker. Such an approach would address problems with the flow of information being interrupted during the supply chain, and could also address concerns around privacy of information (noted at 3.5 above) and the transfer of liability within the supply chain (see 3.15 below).

3.8 Alternatively, as set out at 3.3 above, if, as we suggest, it is made a requirement for the client to provide the determination directly to the worker, it could be made a further requirement for the worker to then provide that determination to the fee payer. The worker will know the identity of the fee payer, and this would ensure that information reaches the required parties without the risk of being lost in the labour supply chain.

Q6: How might the client be able to easily identify the fee-payer? Would that approach impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

3.9 Where the identity of the fee-payer is not known to the client because they do not engage directly with them, then this information could be requested directly from the worker (where they are known to the client) or by the information being passed upwards through the labour supply chain.

3.10 The administrative burdens for all parties are likely to be lower where such a requirement can be built into contractual documents and processes. To ensure that the required information is provided by the worker or chain entities, it could be made a condition that the client cannot make any payment until they are informed of the identity of the fee-payer. That would incentivise transmission of the fee-payer's identity.

Q7: Are there any potential unintended consequences or impacts of placing a requirement for the worker's PSC to consider whether Chapter 8, Part 2 ITEPA 2003 should be applied to an engagement where they have not received a determination from a public sector or medium/large-sized client organisation taking such an approach? Please explain your answer.

3.11 One potential difficulty with this requirement arises where a private sector client meets the conditions to be classed as *small* and is therefore not required to determine the worker's status or

apply the other requirements of the off-payroll rules. In such circumstance, the fee-payer and worker will not receive a determination but may not be aware of the reason for this. To provide certainty to fee-payers in these circumstances, and ensure the worker is aware that they need to apply Chapter 8, Part 2 ITEPA 2003, it would be helpful to require small clients that benefit from the exclusion to inform the fee-payer and/or worker that this is the case. This would also allow fee-payers and workers to distinguish between those clients which are too small to be in scope and those which are failing to comply with their obligations under the off-payroll working rules. The provision by HMRC of standard wording or a template for small clients to use would reduce their administrative burdens as well as providing HMRC with the opportunity to prompt the worker and remind them of the PSC's obligations under Chapter 8, Part 2 ITEPA 2003.

3.12 We note that the continuing requirement in certain circumstances for Chapter 8, Part 2 ITEPA 2003 to be applied by PSCs means that the proposed changes to the off-payroll working rules are not in themselves a simplification but instead add further complexity. As noted in our response to the previous round of consultation on this issue[2], our strong preference would have been for the relevant law in relation to private sector contracts to remain unchanged and for there to be a substantial reinforcement of HMRC resources in order to achieve very substantially greater compliance. However, we acknowledge that the Consultation is not intended to consider alternative approaches to tackling non-compliance, and have therefore not commented further on this matter.

Q8: On average, how many parties are in a typical labour supply chain that you use or are a part of? What role do each of the parties in the chain fulfil? In which sectors do you typically operate? Are there specific types of roles or industries that you would typically require off-payroll workers for? If so, what are they?

3.13 We do not have an appropriate evidence base to respond to this question.

Q9: We expect that agencies at the top of the supply chain will assure the compliance of other parties, further down the labour supply chain, if they are ultimately liable for the tax loss to HMRC that arises as a result of noncompliance. Does this approach achieve that result?

3.14 We are concerned about the practicalities of agencies at the top of a supply chain ensuring compliance of other parties further down the chain. Such agencies may not be aware of all of the parties in a chain and therefore be unable to ensure compliance, especially in longer supply chains. We also believe that this approach could lead to confusion as to who within a chain is responsible and liable for any tax loss.

Q10: Are there any unintended consequences or impacts of collecting the tax and NICs liability from the first agency in the chain in this way? Please explain your answer.

3.15 We are uncomfortable with the proposal to transfer liability to a party (whether the first agency in the chain or the client) where that party has complied with all of their requirements under the off-payroll rules and is not in a position to prevent non-compliance by another party in the chain. As noted above, the first agency may not be aware of the identity or even existence of the failing party and it seems inappropriate to impose liability on them when they have fulfilled their own obligations and carried out appropriate checks on the party they have directly engaged with.

[2] See https://www.att.org.uk/technical/submissions/payroll-working-private-sector-att-comments

3.16 We would also note that perfectly legitimate businesses can close down or be unable to meet their obligations due to factors outside their control (for example the death or severe illness of a key director or staff member or the loss of a major client), which it would be practically impossible for clients to pick up as part of assurance procedures.

3.17 We note that, if our proposal in 3.3 were to be accepted, such that the determination is required to be passed by the client directly to the fee-payer and worker rather than down the chain, then the instances in which liability would have to be transferred would be reduced. Reducing the number of entities that have a requirement to act would be expected to reduce the possibility of non-compliance and would also remove the near impossible requirement for the agency at the top of the supply chain to ensure the compliance of that whole chain.

3.18 If liability is to be transferred, then there will need to be both guidance as to what is considered sufficient due diligence and a right of appeal against the transfer for parties which have undertaken sufficient due diligence. From a practical perspective, we are unclear what HMRC would consider reasonable due diligence. Clear and comprehensive guidance will be required.

Q11: Would liability for any unpaid income tax and NICs due falling to the engager (if it could not be recovered from the first agency in the chain), encourage clients to take steps to assure the compliance of other parties in the labour supply chain?

3.19 As noted above for agencies, we are uncomfortable with clients that have complied with their obligations being liable for the failings of other parties, especially as it can be difficult for clients to be aware of the existence or identity of other parties in a supply chain.

3.20 We would therefore not like to see liability transferred to either clients or agencies except for where they have knowledge of the non-compliance further down the chain and were complicit in it.

3.21 As noted above, requiring the client to pass a determination directly to the fee payer would reduce the possible instances of non-compliance in the chain. If a fee-payer were to fail to act on a determination from a client that the off-payroll working rules apply, then liability should rest with that fee-payer. It should only be possible for that liability to be transferred elsewhere if it could not be recovered from the fee-payer **and** the other party (either the client or the worker) were aware of the non-compliance and took no steps to notify HMRC.

Q12: Are there any potential unintended consequences or impacts of taking such an approach? Please explain your answer.

3.22 Please see our responses to Q9, Q10 and Q11 above.

4 Helping organisations to make the correct status determination and ensuring reasonable care

Q13: Would a requirement for clients to provide the reasons for their status determination directly to the off-payroll worker and/or the fee-payer on request where those reasons do not form part of their determination impose a significant burden on the client? If so, how might this burden be mitigated? Please explain your answer.

4.1 As set out in Section 3.2 above, we believe that it would be helpful to require the client to automatically provide the worker with the reasons for their determination alongside the status determination, and not just when requested by worker. Although this would introduce some extra initial administrative burdens on clients, we believe that this would be balanced by the extra certainty for workers.

4.2 The exact level of administrative burdens for clients would depend upon what is intended by providing *reasons*. Would, for example, providing a copy of the responses entered into CEST and the answer it generates suffice? Such an approach could significantly reduce additional administrative burdens. If more detail is needed, then administrative burdens could be reduced for clients if HMRC were to provide a standard form or template for providing determinations and reasons to workers which could be built into the client's systems and processes.

Q14: Is it desirable for a client-led process for resolving status disagreements to be put in place to allow off-payroll workers and fee-payers to challenge status determinations? Please explain your answer.

4.3 The Consultation suggests that a client led process would be helpful in allowing for determinations to be *challenged*. However, we believe that this may be the wrong way to approach the issue. In practice, it may be hard for workers to challenge a status determination once given, especially where a role is competitive or the client is sufficiently dominant such that the worker does not have a strong negotiating position. Workers may also be concerned that any such challenge could affect their chances of future engagements with other clients. It would be better for all parties involved if there was some way for clients and workers to agree status before commencing an engagement rather than arguing once a determination has been made.

4.4 We note that the Consultation indicates at page 17 that some clients may wish to take a decision on status at the time of advertising for a role. Such an approach may seem pragmatic and more efficient, especially to larger clients where they are engaging a significant number of workers. It could in the process remove the requirement for a dispute resolution mechanism but it could at the same time involve the imposition of inappropriate contractual terms and non-appealable status decisions upon workers.

We think that more detailed consideration is required of the wider implications of such pre-determinations, including whether they could properly exclude the opportunity for challenge by the worker. We think that any reference to such pre-determination within departmental guidance should be worded very carefully.

Where the client was seeking a worker with a very specific skill set or personal attributes for a highly specialised role, we anticipate that it would be more practical and appropriate for agreement of the status under the off-payroll working rules to be built into the contract negotiations.

A common factor in relation to any determination is that, whilst it is ostensibly a matter between the client and the worker, the crucial test is how it will be regarded by HMRC. The functionality of CEST and the availability of adequate support from HMRC are critical in that context – on which please see sections 4.6 and 5.8 to 5.13 below.

4.5 If a post-determination client-led process were to be introduced it would be important for this to be sufficiently independent and rigorous. We note the proposal in the Consultation that legislation

would set out the requirements for such processes, but it is unclear what (if any) sanctions would be applied where a client did not follow these and merely rubber stamped their previous decision. Without such sanctions, or an avenue for further recourse by the worker, we believe that a client-led process might be of little value to workers.

4.6 Critical to all of this is that CEST is developed into something that is reliable and accurate and in which both worker and client can have confidence. There also needs to be a safety net where CEST does not or cannot reach a conclusion to ensure that the client can comply with their classification obligations. We discuss CEST in more detail in our response to Question 18 below.

4.7 If a client-led process were to be introduced, careful thought would have to be given to the requirements for this, and detailed guidance produced for clients. It may also be necessary to consider placing a time limit on when workers can challenge a determination that balances the rights of the worker and fee-payer against certainty for the client.

Q15: Would setting up and administering such a process impose significant burdens on clients? Please explain your answer.

4.8 The level of administrative burdens would depend upon the exact requirements of the process. However, we note that larger clients would generally be better equipped to deal with such requirements as they will often have dedicated human resources and tax staff who could carry out such processes. As noted above, detailed guidance for clients and practical HMRC support would be required.

Q16: Does the requirement on the client to provide the off-payroll worker with the determination, giving the off-payroll worker and fee-payer the right to request the reasons for that determination and to review that determination in light of any representations made by the off-payroll worker or the fee-payer, go far enough to incentivise clients to take reasonable care when making a status determination?

4.9 As set out above, we believe that providing the determination directly to the worker and fee-payer would provide more certainty to those parties and assist them in meeting their obligations. We also believe that the client should be required to provide the reasons for a determination automatically, and not only where requested. This would provide clarity to the fee-payer and worker, and may also incentivise clients to take reasonable care in making the determination as it may be more obvious to the worker and fee-payer where they do not.

4.10 We further believe (as discussed in sections 4.3 and 4.4 above, that encouraging workers and clients to agree status up front, rather than argue about it a later date, could remove the need for a client-led process for resolving status determinations.

4.11 We believe that this approach, together with appropriate sanctions being applied by HMRC where a client has failed in their obligations, should act as an incentive to take reasonable care when making a status determination.

5 Other matters

Q17: How likely is an off-payroll worker to make pension contributions through their fee-payer in this way? How likely is a fee-payer to offer an option to make pension contributions in this way? What administrative burdens might fee-payers face which would reduce the likelihood of them making contributions to the off-payroll worker's pension?

5.1 We believe it is unlikely that many fee-payers would offer an option to make pension contributions in this way due to the extra administrative costs involved.

5.2 There may also be concerns about the VAT treatment of such arrangements where a PSC is VAT registered. If a fee-payer were to make a pension contribution on behalf of a worker, then presumably the PSC would be required to charge VAT on the full amount invoiced to the fee-payer (i.e. including the pension contribution). This might introduce complications for input VAT recoverability by the fee-payer.

5.3 The tax relief available on pension contributions and the introduction of initiatives such as automatic enrolment are a clear sign that the Government is keen to encourage *employees* to save towards their retirement. It is important that those who work through PSCs are similarly encouraged to contribute to a pension. In particular, those who are subject to the off-payroll working rules, and therefore subject to tax and National Insurance Contributions (NICs) as if they were employees, should have access to the same reliefs as employees.

5.4 We would therefore recommend that a mechanism be introduced to allow those working through PSCs to recover the NICs as well as the income tax in respect of contributions made to their personal pension. This could, for example, be through the self-assessment system, or a stand-alone process (similar to that for employees claiming expenses) built into the Personal Tax Account.

Q18: Are there any other issues that you believe the government needs to consider when implementing the reform? Please provide details.

5.5 We welcome the delay in introducing reform to the private sector until April 2020. Although the off-payroll rules have now applied in the public sector for over two years, the private sector has a wider range of industries and working practices which need to be considered. In addition, not all agencies will have experience of working with the public sector rules.

5.6 We understand that the intention is for draft guidance to be published alongside the draft legislation in summer 2019. We welcome this approach, as it will provide more time for businesses to prepare for the introduction of the reform. However, we would stress the importance of this guidance having a strong practical focus, clearly setting out the steps that affected parties need to take both before the rules come into force and once they have. The guidance should also be written in clear and plain English (with consistent use of terminology) so that it can be understood by the broad cross-section of affected businesses, including clients, agencies and workers. Where examples are provided, these should not be weighted in favour of determinations that the new rules apply or give the impression that it was always safer to conclude in that manner.

We would see the involvement of relevant stakeholders in the design and review of such guidance as very helpful.

5.7 As well as guidance, we believe that a HMRC publicity campaign will be needed to alert clients, agencies and workers to the upcoming changes. This should start as soon as possible. The private sector reform has a much wider reach than the public sector rules, and may include relatively small businesses (albeit small clients will be excluded). In particular, some workers, especially those on lower incomes, may not have agents who can alert them to the upcoming changes.

5.8 We are pleased to see the commitment in the Consultation to work with interested parties in enhancing CEST, as this tool will become of increasing importance once reform is extended to the private sector. However, this needs to be accompanied by a commitment to continue to improve and update CEST post April-2020 as and when new case law emerges.

5.9 We note that although it is expected that many clients will use CEST to determine employment status, this is not a legal requirement. Instead, and assuming that the private sector rules are in line with those for the public sector, the client merely has to take reasonable care in coming to a conclusion on the worker's status. We believe that this point should be made clear in HMRC guidance. CEST may not always give a clear answer on status, and may not be appropriate in all circumstances and industries. In those cases, it is important that clients understand what else they need to do in order to demonstrate they took reasonable care in determining a worker's status.

5.10 Turning to the operation of CEST, as set out in our previous consultation response, one particular area of concern is that CEST does not consider mutuality of obligation. Whilst we do not wish to enter into a detailed discussion of this issue here, we note that HMRC's assumption that there will always be mutuality of obligation where a contract exists, or will exist, does not appear to be consistent with the tests developed by the Courts.

5.11 We understand that CEST views the level of control exercised over workers as being a key determinant. However, we note that the level of control will vary between different industries due to legal and other requirements. In certain industries work must be carried on in a specified location only and to specified requirements. There is therefore the need to balance this test carefully with other factors.

5.12 We would also stress the need for HMRC support for clients beyond CEST. Where a case is complex or unusual, or CEST does not provide an answer, it will be important that clients have adequate HMRC support and guidance to be confident that they are making the correct status determinations. The lack of such support could cause clients to act in a risk-averse manner and make blanket decisions or inappropriately class workers as subject to the rules. We see it as critical to the success of the extension of the provisions into the private sector that HMRC are engaged in the determination process – both through the provision of a reliable and fully supported CEST and through ready access to specialist HMRC officers who have the experience and authority to advise on determinations in unusual or complex situations where CEST cannot provide an appropriate Yes/No conclusion.

5.13 The Consultation notes in section 4 on page 17 that:

> "HMRC has not seen evidence to suggest widespread blanket decisions are being made in the public sector but where reasonable care has not been taken to reach these decisions, the liability for paying the income tax and NICs can transfer to the public authority."

We do not have the evidence base from which to know whether there have been widespread blanket decisions in the public sector blanket (although that is a recurring theme from our members

at our conferences) but we think that this statement overlooks the point that HMRC would only be seeking a transfer of liability in a situation where a blanket decision had been made that the contract fell outside of the rules.

We are concerned that risk-aversion on the part of private sector clients (where once they have secured the services of a worker there is nothing to lose from a determination that the proposed rules do apply) coupled with a perfectly understandable preference on the part of HMRC for a determination in favour of the rules applying (as that reduces the pressure on HMRC resources and accelerates and/or increases Exchequer revenues) will militate against proper care being taken in determinations. In that situation (for the reasons given in section 4.3 above), the worker is unlikely to have any real practical means under the proposals of achieving an amended determination.

In order to discourage and ideally prevent casually made and risk-averse determinations that the proposed rules applied, we suggest that consideration should be given to the practicality of four measures:

- Improvement to CEST so that it produced more reliable and respected results;
- Additional resourcing to the Helpline so that officers with appropriate training and authority could advise swiftly and objectively in situations where CEST could not provide a Yes/ No conclusion;
- A requirement within the legislation for all determinations to include a declaration that the client had taken reasonable steps to ensure that they were in possession of all relevant facts[3]; and
- The inclusion within the legislation of a provision requiring a client which proposed to issue a determination that the rules did apply to a contract to ensure that their determination was supported either by CEST or specific advice from a Helpline officer.

We think that the combination of these four measures might give much needed credibility to the proposals and reduce the incidence of inappropriate determinations.

5.14 Many workers may be concerned that if, come April 2020, they are suddenly classified as falling within the off-payroll working rules, then HMRC will seek to argue that their PSC has failed to apply IR35 correctly in previous periods. The *Off-payroll working in the private sector (IR35): Budget 2018 brief* published on 29 October 2018[4] states *"HMRC will not carry out targeted campaigns into previous years when individuals start paying employment taxes under IR35 for the first time following the reform and businesses' decisions about whether their workers are within the rules will not automatically trigger an enquiry into earlier years."*. This comment is welcome, but we believe that it would be helpful to reiterate it in guidance and future announcements to provide some assurance to affected workers.

5.15 Finally, we note that all of the changes proposed in the consultation will apply equally to the public sector from April 2020, other than the exemption for *small* businesses. We understand from this that small public sector bodies will continue to be subject to the off-payroll working rules, whereas similarly sized private sector bodies will not be. Arguably this distinction is unfair and we can see no obvious policy rationale for it. Whilst many public sector bodies would not qualify as small, we note that HMRC's Employment Status Manual indicates at ESM9020[5] that the definition can include GP

[3] A comparable requirement can be found in VAT Regulations 1995, SI 1995/2518, Regulation 102(10)(c).
[4] https://www.gov.uk/government/publications/off-payroll-working-in-the-private-sector-ir35-budget-2018-brief
[5] https://www.gov.uk/hmrc-internal-manuals/employment-status-manual/esm9020

practices and dental surgeries providing NHS services, many of which would fall to be classed as *small* under the tests proposed in the Consultation. We see the fact that such entities are funded by the Exchequer as irrelevant in the particular context. That same justification would apply equally to a private sector entity which was undertaking a contract for any government department or other public body. We would therefore recommend that the exemption for *small* clients be extended equally to both the public and private sector. By reducing the areas of distinction, that would simplify the legislation and assist understanding.

5.16 If there is to be the difference in treatment referred to above, it will be important to publicise it and make it clear in guidance as it will be important for small clients and their advisers to carefully consider whether they fall within the public or private sector for these purposes.

6 Contact details

6.1 We would be pleased to join in any discussion relating to this consultation. Should you wish to discuss any aspect of this response, please contact our relevant Technical Officer, Emma Rawson (erawson@att.org.uk, mobile 07773 087111).

The Association of Taxation Technicians

7 Note

7.1 The Association is a charity and the leading professional body for those providing UK tax compliance services. Our primary charitable objective is to promote education and the study of tax administration and practice. One of our key aims is to provide an appropriate qualification for individuals who undertake tax compliance work. Drawing on our members' practical experience and knowledge, we contribute to consultations on the development of the UK tax system and seek to ensure that, for the general public, it is workable and as fair as possible.

Our members are qualified by examination and practical experience. They commit to the highest standards of professional conduct and ensure that their tax knowledge is constantly kept up to date. Members may be found in private practice, commerce and industry, government and academia.

The Association has over 9,000 members and Fellows together with over 5,000 students. Members and Fellows use the practising title of 'Taxation Technician' or ‘Taxation Technician (Fellow)’ and the designatory letters 'ATT' and 'ATT (Fellow)' respectively.