An Roinn
Gnóthaí Fostaíochta agus Coimirce Sóisialaí
Department of
Employment Affairs and Social Protection

Regulatory Impact Assessment

Employment (Miscellaneous Provisions Bill), previously titled the Terms of Employment (Information) (Amendment) and Organisation of Working Time (Amendment) Bill 2017

Note:

(1) A transfer of functions came into effect on 1 September 2017 pursuant to the Labour Affairs and Labour Law (Transfer of Departmental Administration and Ministerial Functions) Order 2017, S.I. No. 361 of 2017, which transferred responsibility for employment rights policy and legislation to the Minister for Employment Affairs and Social Protection.

(2) The following Regulatory Impact Assessment (RIA) was carried out by the Department of Jobs, Enterprise and Innovation in April 2017. It is being published now (December 2017) in conjunction with the Employment (Miscellaneous Provisions) Bill 2017. The RIA has been updated to include the new contact details of the relevant officials, following the transfer of functions.

Regulatory Impact Assessment

General Scheme of the Terms of Employment (Information) (Amendment) and Organisation of Working Time (Amendment) Bill 2017

April 2017

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Section 1 - Executive Summary

Summary of Regulatory Impact Assessment (RIA)	
Department: Jobs, Enterprise & Innovation	**Working Title of legislation:** General Scheme of the Terms of Employment (Information) (Amendment) and Organisation of Working Time (Amendment) Bill 2017
Stage: Accompanying a Memorandum to Government	**Date:** April 2017

Related Publications:

Programme for Government 2016: http://www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf

University of Limerick (UL) report: https://www.djei.ie/en/Publications/Publication-files/Study-on-the-Prevalence-of-Zero-Hours-Contracts.pdf

Department of Jobs, Enterprise & Innovation Public Consultation on UL study: https://www.djei.ie/en/Consultations/Consultation-Document-University-of-Limerick-Study-on-the-Prevalence-of-Zero-Hour-Contracts-and-Low-Hour-Contracts.html

Terms of Employment (Information) Act 1994: http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1994_0005.htm

Organisation of Working Time Act 1997:

http://www.lawreform.ie/_fileupload/RevisedActs/WithAnnotations/HTML/EN_ACT_1997_0020.htm

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Policy options considered:

1. Do nothing and rely on current legislative provisions.

2. Implement specific recommendations for legislative change made in the University of Limerick study on zero hour contracts and low hour contracts.

3. Implement the legislative proposals set out in the General Scheme of the Terms of Employment (Information) (Amendment) and Organisation of Working Time (Amendment) Bill

2017.

Preferred option: The preferred option is Option 3 – to implement the legislative proposals set out in the General Scheme of the Terms of Employment (Information) (Amendment) and Organisation of Working Time (Amendment) Bill 2017. This option consists of balanced proposals which will strengthen employment rights protections, particularly for low-paid, more vulnerable workers, while minimising the impact on employers.

The draft proposals address the following four key issues:

- Ensuring that workers are better informed about the nature of their employment arrangements and, in particular, their core terms at an early stage of their employment.
- Strengthening the provisions around minimum payments to low-paid, vulnerable workers who may be called in to work for unreasonably short periods or sent home without any work.
- Prohibiting contracts within the meaning of Section 18(1)(a) and (c) of the Organisation of Working Time Act 1997 (OWTA) that specify zero as the contract hours, except in cases of genuine casual work or emergency cover or short-term relief work for the employer.
- Ensuring that workers on low hour contracts who consistently work more hours each week than provided for in their contracts, are entitled to be placed in a band of hours that reflects the reality of the hours they have worked on a consistent basis.

Options

	Costs	*Benefits*	*Impacts*
Option 1. Do Nothing	Reputational Cost - the opportunity to strengthen the legislative provisions relating to zero hour contracts, low hour contracts and related matters is foregone. Cost to employees: No benefits accrue to employees, particularly those in low paid or	Benefit to employers: No change to existing regulatory situation.	Negative impacts for employees and employers who compete with employers who might take advantage of the current level of regulation in the areas at issue. Employment rights is a complex policy area and changes to the employment rights regime tend to stand for many years. In the absence of balanced proposals based

	precarious work.		on broad consultation in this area, less considered proposals, which have not been subject to broad consultation, may come to the fore with potentially adverse implications.
Option 2. Implement specific UL recommendations for legislative change	Significant costs for employers including the State/Exchequer in terms of (i) additional administrative burdens in complying with new requirements and (ii) the additional financial costs arising in terms of pay/ compensation/new entitlements to increased hours of work.	Short term benefits to employees in terms of new entitlement to increased hours of work, higher rates of compensation whether low-paid or highly-paid.	Significant negative impacts on employers in terms of increased costs, reduced flexibility in managing their business and/or providing services and ultimately job losses. In the longer term, the benefits to employees will be lost where less flexible working arrangements would emerge and jobs will be lost in consequence of these particular proposals.
Option 3. Implement legislative proposals set out in the General Scheme of the Terms of Employment (Information) (Amendment) and Organisation of Working Time	Limited additional costs for employers including the State in terms of complying with strengthened regulatory requirements.	Benefits to employees in terms of improved protections – greater clarity about core terms of employment, improved minimum compensation in certain	Positive impacts for employees arising from improved employment protections. Any adverse impact on employers is minimised through counterbalancing measures and reasonable defences to employers to allow continuing flexibility in managing their

(Amendment) Bill 2017.		circumstances, and prohibition of zero hour contracts in most circumstances, banded hours arrangements that reflect the reality of hours consistently worked and strong anti-victimisation provisions. Longer term benefits for employers through improved workplace relations.	businesses/providing their services.

Section 2 – Description of policy context and objectives

2.1 Policy Context

Programme for Government commitment

It is important to emphasise that the Programme for Government contains a commitment to address the increasing casualization of work and to strengthen the regulation of precarious employment. Therefore, these proposals are a policy response to this commitment. This is against a backdrop where employment rights are a key focus of the Oireachtas, evidenced by several Private Members' Bills (PMB) introduced during the last year. In this respect, a Sinn Fein PMB entitled *Banded Hours Contract Bill 2016* was considered at Second Stage last year and is currently undergoing pre-legislative scrutiny before the Joint Oireachtas Committee on Jobs, Enterprise and Innovation, while a Labour Party PMB entitled *Protection of Employment*

(Uncertain Hours) Bill 2016 passed Second Stage in the Seanad last November. Both Bills address certain aspects of the casualization of work or precarious employment but in a manner which lacks the balance necessary to avoid unintended consequences for employers and business. Against this background, it is essential that Government proposals for legislation in this area are drafted as a matter of priority, so as to ensure that Government legislation is progressed as expeditiously as possible.

The draft legislative proposals take account of the study conducted by the University of Limerick (UL) on the prevalence of zero hour contracts and low hour contracts and their impact on employees. The UL study, which was commissioned under the previous Government, took place against a backdrop of increasing debate both nationally and internationally about the use of such work practices.

Background to the University of Limerick Study on the prevalence of Zero Hour Contracts

The University of Limerick (UL) was appointed in February 2015, after a competitive tendering process, to carry out a study into the prevalence of zero hour contracts in the Irish economy and their impact on employees. The study stems from the following commitment which the previous Government made in the Statement of Government Priorities in July 2014: *"To conduct a study on the prevalence of zero hour contracts among Irish employers and their impact on employees and make policy recommendations to Government on foot of this."*

What were the key findings of the UL Study?

UL were not able to establish data to quantify the number of people employed on zero hour contracts. However, based on their stakeholder interviews, UL found that zero hour contracts are not extensively used in Ireland. Through the stakeholder interviews, UL also found evidence of 'if and when' contracts and hybrid contracts where there are a minimum number of guaranteed hours with additional hours on an 'if and when' basis. UL could not quantify the numbers of people employed on such contracts from existing data sources. The difference between a zero hour contract and an if-and-when contract is that a person on a zero hour

contract is obliged to make themselves available for work while a person on an 'if and when' contract is not obliged to be available.

What legislative changes did UL recommend?

UL made the following specific recommendations for legislative changes:

- Employees should receive a written statement of employment on the first day of their new job. Currently an employer has two months to issue that statement.
- That statement on first day of employment should provide a statement of working hours which are a true reflection of those required.
- There should be a minimum of three continuous working hours where an employee is required to report for work; if there is not, the worker should be paid for the three hours.
- An employer should give at least 72 hours of notice of any request to undertake work, unless there are exceptional and unforeseen circumstances. If a worker undertakes extra hours without the minimum notice, they should be compensated at 150% of the rate they would be paid.
- Employers should give a minimum of 72 hours of notice of cancellation of hours. If workers do not get the minimum notice, they should be paid at their normal rate for the hours which were scheduled.
- Legislation should be enacted to provide for employees with no guaranteed hours of work or those on low hours contracts to take an average of the number of hours worked in the previous six months as the minimum to be stipulated in their contract. Periodic reviews of these hours should be put in place so a contract reflects the reality of working hours.
- Employer organisations and trade unions which conclude a sectoral collective agreement can opt out of some of the suggested legislative provisions above.

Public Consultation on the UL study conducted by Department of Jobs, Enterprise and Innovation

Stakeholders who were interviewed as part of UL's study were not given an opportunity to consider the findings and recommendations being made by UL in advance of the report being finalised. In view of the independent nature of the UL Report, consultation following publication of the Report was considered essential, so as to ensure that all stakeholders and interested parties were afforded an opportunity to consider and respond to the Study.

Consultation Process and Responses

Some 48 responses were received in response to the consultation from a wide range of stakeholders, including trade unions, employers and business representative bodies, public representatives, Government departments/agencies and non-Governmental organisations. The responses contained a variety of views both for and against the findings and recommendations as made by UL. In broad terms, a majority of submissions from trade unions and NGOs were supportive of the UL findings and recommendations, although some believed the recommendations did not go far enough. On the other hand, the majority of employer and business representative bodies were very critical of the study and were opposed to the implementation of the UL recommendations on the grounds that the proposed legislative changes are unworkable, would add significantly to costs and lead to job losses. Most importantly, the responses to the public consultation contained extensive material and practical examples of the impacts of the specific legislative changes proposed by UL, which have informed the draft proposals which are the subject of this RIA.

2.2 Objectives

The objective of these legislative proposals is to provide a balanced policy response to the Programme for Government commitment to address the increasing casualization of work and to strengthen the regulation of precarious employment. More specifically, the objective is to strengthen employment rights protections, particularly for low-paid, more vulnerable workers, in the four key areas listed beneath, while minimising the impact on employers.

- Ensuring that workers are better informed about the nature of their employment arrangements and in particular their core terms at an early stage of their employment.

- Strengthening the provisions around minimum payments to low-paid, vulnerable workers who may be called in to work for unreasonably short periods after being rostered for a longer period or sent home without any work.

- Prohibiting contracts within the meaning of Section 18(1)(a) and (c) of the Organisation of Working Time Act 1997 (OWTA) that specify zero as the contract hours, except in cases of genuine casual work or emergency cover or short-term relief work for that employer.

- Ensuring that workers on low hour contracts who consistently work more hours each week than provided for in their contracts, are entitled to be placed in a band of hours that reflects the reality of the hours they have worked on a consistent basis.

Section 3 – Identification and description of policy options

3.1 Option 1 - Do nothing

The "do nothing" option would mean that the current legislative provisions in this area would continue to apply. The opportunity to proactively address concerns about increasing casualisation of work and precarious work would be foregone. The Programme for Government (PfG) commits to tackling the increasing casualization of work and to strengthen the regulation of precarious employment. In the absence of balanced proposals, based on broad consultation, less considered legislative proposals could come to the fore, the content of which could have significant adverse impacts on competitiveness and on jobs.

3.2 Option 2 - Implement specific legislative changes recommended in the University of Limerick study

UL made very specific recommendations for legislative changes set out at 2.1 above. The UL recommendations did not have the benefit of input from stakeholders prior to being finalised,

resulting in recommendations that would have significant adverse impacts. Certain recommendations are simply unworkable in practice, and will have unintended consequences, some of which would produce perverse outcomes. Further, the UL recommendations failed to differentiate between low-paid workers and high-paid workers. The Government's proposals are very much focussed on low-paid, more vulnerable workers.

Two UL recommendations that are deliberately excluded from the Government's proposals are Recommendations 5 and 6, which provide as follows:

Recommendation 5: An employer shall give notice of at least 72 hours to an employee (and those with non-guaranteed hours) of any request to undertake any hours of work, unless there are exceptional and unforeseeable circumstances. If the individual accepts working hours without the minimum notice, the employer will pay them 150% of the rate they would be paid for the period in question.

Recommendation 6: Employers should give a minimum of 72 hours of notice of cancellation of hours. If workers do not get the minimum notice, they should be paid at their normal rate for the hours which were scheduled.

These recommendations were not acted upon because of the many practical examples, provided in responses to the public consultation, of where it would be impossible for employers to give the required 72 hours of notice. The public consultation further demonstrated that if these particular UL recommendations were to be implemented, so many exceptions would need to be provided for (covering a broad range of exceptional and unforeseen circumstances) as to make the provision meaningless and of no real benefit to employees. This position was not altered by the dialogue process with ICTU and Ibec. The considered view is that the existing provisions should stand, i.e. employers must give at least 24 hours notice to employees being called in to work and at least 24 hours notice of any cancellation of work.

3.3 Option 3- Implement legislative proposals set out in the General Scheme of the Terms of Employment (Information)(Amendment) and the Organisation of Working Time (Amendment) Bill 2017

This is the preferred option. It consists of balanced proposals which will strengthen employment rights protections, particularly for low-paid, more vulnerable workers, while minimising the impact on employers. This option addresses the four key issues in the following manner:

(i) Ensuring that workers are better informed about the nature of their employment arrangements and in particular their core terms at an early stage of their employment.

Currently, Section 3 of the *Terms of Employment (Information) Act 1994* sets out a lengthy list of terms of employment which employers must provide in a written statement within two months of commencement of employment (see weblink on page 1 of this document). This legislation emanates from EU Directive 91/533/EEC (the "Written Statement Directive") on an employer's obligation to inform employees of the conditions applicable to the employment contract or employment relationship. Recommendation 1 of the UL Study proposed that the *Terms of Employment Information Act 1994* be amended to require employers to provide the written statement of their terms of employment on or by the first day of employees commencing their employment and that this requirement should also apply to people working non-guaranteed hours on the date of first hire. Having regard to the responses to the consultation process and detailed engagement with lead social partners, it is considered reasonable that the most

fundamental or core terms of employment should be provided much earlier than the two month period currently allowed. However, it is also considered reasonable that five days would be allowed for compliance as opposed to the first day as UL recommended.

Amendment proposed under Preferred Option 3:

Amend the *Terms of Employment (Information) Act 1994* to provide for:

> **Day 5 statement of core terms of employment:** Employers must inform employees in writing, within 5 days of commencement of employment, of 5 core terms of employment. The 5 core terms are:
>
> 1. the full names of the employer and the employee,
> 2. the address of the employer,
> 3. the expected duration of the contract (where temporary or fixed-term),
> 4. the rate or method of calculating pay, and
> 5. what the employer reasonably expects the normal length of the employee's working day and week will be.
>
> Other required terms to be provided within the current two month period.
>
> **Create a new offence:** An employer who fails to provide the "Day 5" statement within one month of commencement of employment shall be guilty of an offence.
>
> **Redress:** An employee can seek redress through the WRC but only after one month in continuous employment.

(ii) Strengthening the provisions around minimum payments to low paid, vulnerable workers who may be called in to work for unreasonably short periods or sent home without any work.

The UL report and the responses to the consultation identified this as an issue and the need to deter unscrupulous employers from calling employees into work and then sending some of them home without work or offering a reasonable number of hours of work but then sending them home after an unreasonably short period.

Currently, if an employee is contracted to work a number of hours in a given week and is then not required to work, Section 18 provides for compensation of 25% of the hours or 15 hours, whichever is the lesser. Thus where a worker is offered four hours work the maximum compensation would be one hour.

Amendment proposed under Preferred Option 3:

Amend section 18 of the Organisation of Working Time Act 1997 (OWTA) to provide for:

> **New minimum payment** of 3 times the National Minimum Wage (NMW) or 3 times the minimum rate of an Employment Regulation Order (ERO) where employees are called in to work and sent home without work or worked for an unreasonably short time having been promised a longer shift. The existing defences for employers will continue to apply, i.e. the new minimum payment will not apply in situations of genuine casual work, emergency situations, on-call work and employment contracts where the employee agrees to do less than three hours work per shift.

(iii) Prohibiting contracts within the meaning of Section 18(1)(a) and (c) of the Organisation of Working Time Act 1997 (OWTA) that specify zero as the contract hours, except in cases of genuine casual work or emergency cover or short-term relief work for the employer.

UL made no recommendation on this issue. While Section 18 is considered to have operated as an effective deterrent against the extensive use of zero hour contracts, the Government proposals recognise the desirability of reinforcing the underlying purpose of Section 18 by specifying that it shall be unlawful for an employer to give an employee a contract of employment that specifies zero hours as the contract hours.

Amendment proposed under Preferred Option 3:

Amend section 18 of OWTA to provide for:

> **Prohibition** of contracts within the meaning of Section 18(1)(a) and (c) of the OWTA that specify zero as the contract hours, except in cases of genuine casual work or emergency cover or short-term relief work for the employer. However, employers will continue to be permitted to employ workers for genuine casual work or relief work without breaching section 18.
>
> **Remove** the term "zero hour working practices" from the title of Section 18

(iv) Ensuring that workers on low hour contracts who consistently work more hours each week than provided for in their contracts, are entitled to be placed in a band of hours that reflects the reality of the hours they have worked on a consistent basis.

This emerged as a significant issue in the UL study and the responses to the public consultation. However, the specific proposals made by UL to address this issue were unworkable in practice. Firstly the six-month review period recommended by UL is considered too short to take account of seasonal variations as well as normal peaks and troughs of a business. Secondly, UL proposed that the average hours worked over the six-month review period would become the new minimum contract hours for an employee, which would result in ever-increasing minimum contract hours over time. It would also be open to abuse by employers if they sought to terminate an employee's contract at the six monthly review period, leaving the employee without recourse to the Unfair Dismissals Acts (which, in general, does not apply to employees with less than 12 months service).

Amendment proposed under Preferred Option 3:

Insert a new section in the OWTA to provide for:

- **Creation of a new right** for an employee, whose contract does not reflect the reality of hours consistently worked over the previous 18 months, to be placed in an appropriate

band of hours that better reflects the actual hours worked over that reference period. The reference period of 18 months will allow for account to be taken of the normal peaks and troughs and seasonal fluctuations of a business.

- **Redress:** An employee will be able to seek redress through the WRC but redress will be limited to being placed in an appropriate band of hours.

1) **Reasonable defences:** Employers will be able to rely the following reasonable defences in refusing an employee's request –

   - the facts do not support the employee's claim,
   - significant adverse changes have impacted on the business (e.g. loss of a significant contract),
   - emergency circumstances (e.g. business has had to close due to flooding)
   - where the hours worked by the employee were due to a genuinely temporary situation (e.g. cover for another employee on maternity leave).

2) **Collective agreements:** This provision will not apply to an employer who has entered into a banded hour arrangement through an agreement by collective bargaining within the meaning of "collective bargaining" given by Section 1A of the Industrial Relations (Amendment) Act 2015.

Section 4 –Analysis of costs, benefits and impacts

The costs, benefits and impacts of the three options under each of the four key policy issues being addressed is set out beneath.

1. Policy Issue (i) - Inform employees of terms of employment early in their employment

(i) Option 1: Do nothing.

While there is no evidence of widespread non-compliance with the existing provision by employers it was raised in the UL study and the subsequent public consultation that many employees on low hour contracts or contracts with no guaranteed hours do not know from week to week what hours that they are expected to work. Further, there was a concern that many employees may not be aware of the nature of their employment relationship or the core terms and conditions including, for example, the identity of their employer, particularly where the employer is a limited company.

There would be no additional costs for the Exchequer or employers from this option. Neither would it have an impact on national competitiveness, the environment, consumer or competition protection, the compliance burden, North-South or East-West relations. However, this option has a negative impact on socially excluded and vulnerable groups in that those in precarious employment tend to be susceptible to poverty. It also has a marginal negative impact on the right to just and favourable conditions at work.[1] Further, in the absence of balanced proposals in this area based on broad consultation, less balanced or considered legislative proposals may come to the fore, with potentially significant adverse impacts on competitiveness and on jobs.

(ii) Option 2: UL Study Recommendation - amend legislation to ensure employers inform employees of all terms of employment on the first day

Currently, Section 3 of the Terms of Employment (Information) Act 1994 sets out a lengthy list of 15 terms of employment which employers must provide in a written statement within two months of commencement of employment. If this option is implemented, employers would be required to present this lengthy statement of 15 terms to all employees on the first day (which means that it would be necessary for the employer to prepare the statement before the employee started) instead of within two months. For example, under this option an employee taken on only for the busy Christmas period would be entitled to this written statement (signed

[1] See Article 23 of Universal Declaration of Human Rights

by the employer) on the first day and would be entitled to pursue a case to WRC if they did not receive it, even if they left the employment on the second day.

There would be an additional compliance cost on employers, including the State. This is because every employee would have to be presented with a written statement with the 15 information items on first day of employment. including those employed to provide short-term cover. It would also be a major administrative burden on other employers especially those that experience a high staff turnover as employers would have to keep evidence of signed copies of this statement. The written statement would effectively have to be prepared for each employee prior to the employee commencing work, even for those employees who do not subsequently show up for work. It could also limit job opportunities for low skilled workers in particular by bringing to an end the practice of employers giving an individual an opportunity of a number of days work as a trial period - employers when faced with the option of giving an employee a start versus this onerous requirement of providing a formal and lengthy written statement of terms of employment on the first day of employment, may choose not to employ that individual. It could have a marginal impact on Ireland's competitiveness vis-à-vis the UK, whose legislation is currently the same as Ireland in this regard – i.e. the full statement of 15 items within two months. However, this option would have no impact on the environment, consumer or competition protection or North-South or East-West relations. This option would benefit employees by providing the full list of information items required under section 3 of the 1994 Act on the first day of employment. However, these benefits must be weighed against the significant burden this option would place on employers, particularly small and medium sized employers, with limited, if any, dedicated HR expertise/resources. Placing unnecessarily onerous requirements on small business owners, family owned businesses and other small employers is not necessarily in employees' interests in the longer term.

This option would benefit the socially excluded and vulnerable groups unless it had the unintended consequence of pushing more work into the shadow economy. It would have a positive impact on human rights in that employees would have a full understanding of their terms of employment on commencing work for that employer. However, this option would impose a disproportionate burden on employers which could not be justified in terms of

employee benefits (some of the required information items set may be of limited interest to employees at the commencement of employment).

(iii) Option 3 – Preferred Option - Amend legislation so that employers provide a written statement with five core terms of employment by the fifth day of employment and make non-compliance an offence.

From the UL study, the subsequent public consultation and from cases taken to the Workplace Relations Commission it is clear that some employees simply do not know who their employer is. This option proposes to give employees at an early stage of employment their core terms of employment:

1) the full names of the employer and the employee,
2) the address of the employer,
3) the expected duration of the contract (where temporary or fixed-term),
4) the rate or method of calculating their pay
5) what the employer reasonably expects the normal length of the employee's working day and week will be.

Both employer and employee will have a clear understanding of the essential elements of the employment relationship at an early stage. Requiring the employer to specify the normal length of the working day and week is intended to improve the certainty for employees around their working hours and their earnings. While this requirement will present an additional challenge to many employers, it is carefully worded to ensure that it is on the basis of the employer's reasonable expectation at the commencement of employment, which will allow for changes to those hours in the normal course of changing circumstances. This will be to the benefit of employees and employers alike in that it will help to promote better work practices around recruitment and greater clarity around the essential elements of the employment relationship.

There would be an additional (but small) burden on the Inspection and Enforcement Division of the Workplace Relations Commission as non-compliance with the 'five items on the fifth day of employment' statement would become a new offence. Currently, failure to provide the written statement required by the *Terms of Employment (Information) Act 1994* does not constitute an offence. Creating an offence provision will strengthen the legislation considerably and act as a

deterrent against non-compliant employers. It only becomes an offence if still not provided after one month.

This option will have some limited cost implications for employers, including the State, in terms of the administrative cost of complying with the additional requirement. However, it is not as onerous as Option 2 (UL recommendation).

The preferred option would not impact on the environment, consumer or competition protection or North-South or East-West relations. It would benefit the socially excluded and vulnerable groups as evidence from the WRC shows that such persons are often the most exploited in the workplace. It would have a positive impact on human rights in that employees would have a greater understanding of their core terms of employment in their first week of employment. ***This is the recommended option as it provides a balanced solution between ensuring that employees are better informed about the nature of their employment at an early stage while not imposing unnecessarily onerous requirements on employers.***

2. Policy issue (ii) - Provide for new floor minimum payment if called into work for periods and not provided with that work

(i) Option 1: Do nothing.

Section 18 of the *Organisation of Working Time Act 1997* remains as is - if an employee is contracted to work a number of hours in a given week and is then not required to work, this section provides for compensation of 25% of the hours or 15 hours whichever is the lesser.

As it stands, Section 18 has limited impact on costs for employers. Very few complaints are taken by employees under the existing Section 18 which may be due to a number of factors including (i) where small numbers of hours are at issue, the compensation available would not justify the effort of making a complaint to the WRC or (ii) for employees in insecure employment, they may not feel in a position to object/lodge a complaint to the WRC.

It is generally accepted that because of Section 18, zero hours contracts are less prevalent here than in other jurisdictions. However the deterrent effect on employers is limited because it appears that the provisions of Section 18 are not regularly invoked.

The 'do nothing' option does not impact the environment, consumer or competition protection or North-South or East-West relations. Doing nothing has potentially negative impacts on the socially excluded and vulnerable groups and on employees' human rights, because of the opportunity foregone in not addressing the issues identified. Furthermore, the 'do nothing' option leaves it more likely that less considered legislative proposals in this area could come to the fore with potentially significant adverse impacts on employers, competitiveness and jobs.

(ii) Option 2 – UL study Recommendation - provide for a minimum period of three continuous hours where an employee is required to report for work. Should the period be less than three hours the employee shall be entitled to the three hours remuneration at the normal rate of pay.

This option would have significant implications for employers in terms of increased pay/compensation costs. They would be obliged to pay somebody for three hours, regardless of the rate of pay. It would have a considerable impact on the public pay bill as it would mean that highly paid professionals (e.g. pharmacists, lecturers) would be entitled to three hours pay even if only scheduled for one hour of work. This would have very significant consequences across many sectors of the economy. At first glance it would benefit employees but it is likely that employees would lose the flexibility to work short shifts i.e. employers would insist on employees working in shifts of a minimum of three hours. An individual and an employer should be entitled to agree a contract for 1 hour per week if that suits both parties. The UL study recommendation would set aside that possibility.

This option would have no impacts on the environment, consumer protection (unless the employer imposed the cost on customers), human rights or North-South or East-West relations. This policy option is not targeted specifically at socially excluded and vulnerable groups i.e. all

employees would get a minimum three hours or paid for same. This option is not recommended.

(iii) Preferred Option 3 – amend Section 18 of the *Organisation of Working Time Act 1997* so that the minimum an employee will receive is 3 times the National Minimum Wage (NMW) or 3 times the statutory minimum rate set down in an Employment Regulation Order (ERO).

This floor payment is to protect low paid workers as well as act as a deterrent against employers from continually calling those on insecure working arrangements into work for unreasonably short working periods when originally scheduled for a longer shift. This policy option is targeted at low paid employees, which includes socially excluded and vulnerable groups, who were identified in the consultation process on the UL study and engagement with social partners as being most in need of stronger protections in this area. As women are overrepresented on the National Minimum Wage, this option will have a positive impact on gender equality.[2] Furthermore, it is intended to act as a strong deterrent against unscrupulous employers calling more people in to work than they need, giving work to those who are first to report in for work and sending home without pay those workers the employer does not require.

This option will impose some limited costs on employers in terms of a compliance burden and but this is outweighed by the benefits accruing to the employees concerned. The new provisions are also balanced by maintaining the existing exceptions in Section 18, which provide that the compensation provisions do not apply in certain circumstances including casual work, emergency situations, on-call working. Neither is intended to interfere with arrangements where it suits both the employee and employer to work for short shifts.

This option will not have a major impact on the Exchequer as it is targeted at low-paid employees. It will have no impacts on the environment, consumer or competition protection, or

[2] http://www.lowpaycommission.ie/publications/women-on-nmw-report.pdf

North-South and East-West relations. It will have a positive impact on human rights in terms of improving the employment rights of low-paid workers. ***This is the preferred policy option because it is a balanced and practical solution, focussed on low-paid, vulnerable employees but does not impose unnecessary burdens on employers.***

3. Policy Issue (iii) – Prohibit contracts within the meaning of Section 18(1)(a) and (c) of the Organisation of Working Time Act 1997 (OWTA) that specify zero as the contract hours, except in cases of genuine casual work or emergency cover or short-term relief work for the employer.

(i) Option 1: Do nothing.

As it stands, Section 18 has limited impact on costs for employers. It is generally accepted that because of Section 18, zero hours contracts are less prevalent here than in other jurisdictions. However the deterrent effect on employers is limited because it appears that the provisions of Section 18 are not regularly invoked.

The 'do nothing' option does not impact the environment, consumer or competition protection or North-South or East-West relations. Doing nothing has potentially negative impacts on the socially excluded and vulnerable groups and on employees' human rights, because of the opportunity foregone in not addressing the issues identified. Furthermore, the 'do nothing' option leaves it more likely that less considered legislative proposals could emerge in this area with adverse impacts on competitiveness and jobs.

(ii) Option 2: Prohibit zero hours contracts in all circumstances

UL made no comparable recommendation.

(iii) Preferred Option 3 – Prohibit zero hour contracts within the meaning of section 18(1)(a) and (c) of the OWTA.

This option provides for the prohibition of contracts within the meaning of Section 18(1)(a) and (c) of the OWTA that specify zero as the contract hours, except in cases of genuine casual work or emergency cover or short-term relief work for the employer. This amendment reinforces the

underlying purpose of section 18 by making it unlawful for an employer to give an employee a contract of employment that specifies zero hours as the contract hours. However, employers will continue to be permitted to employ workers for genuine casual work or relief work without breaching section 18. This exclusion will be particularly important for employers in the health and education sectors, where employers need greater flexibility to provide cover for emergencies or short-term relief work. Therefore, this option will impact employers in that they cannot specify zero as the number of contracted hours. It will have a positive impact on employees in terms strengthening the existing protections of Section 18 against the use of zero hour contracts. It will benefit socially excluded groups as they are most at risk of precarious employment. The option will have no impact on the environment, consumer or competition protection or North-South and East-West relations.

Policy issue (iv) - Banded working hours - Provide that those on low hour contracts who consistently work more hours each week but whose contracts do not reflect the reality of the hours worked would be placed on a band of hours that is a truer reflection of the amount of hours they work

(i) Option 1: Do nothing.

The core issue being addressed is the difficulty caused for employees on low hour contracts who consistently work more hours each week but whose contracts do not reflect the reality of the hours worked. This was highlighted in the UL study, in the public consultation and in the dialogue process with ICTU and Ibec. Employees on such arrangements can experience a number of difficulties including unnecessary uncertainty over their hours and level of earnings, causing problems in accessing financial credit/mortgages and difficulties in terms of work/life balance, particularly for those with caring responsibilities. Furthermore, the practice is open to abuse by unscrupulous employers who might seek to exercise undue control over employees. Low hour and uncertain hour contracts benefit employers as they provide them with a lot of flexibility. Doing nothing does not affect the environment, consumer or competition protection or North-South and East-West relations. It negatively impacts the socially excluded and vulnerable groups as they are the people most at risk of in-work poverty. This option has

significant costs for the category of employees affected by this practice in that the opportunity to strengthen the legislation in this area would be foregone. Furthermore, the 'do nothing' option leaves it more likely that less considered legislative proposals could emerge in this area with potentially significant adverse impacts on employers, competitiveness and jobs.

(ii) Option 2: -Implement Recommendation 4 of the UL study – the average hours worked over a six month reference period would become an employee's new minimum contract hours. If the employer is unable to provide the employee with these floor hours, the employee would be entitled to compensation.

On the face of it, this option would benefit employees as it would provide for minimum hours. However, the specific proposal made by UL to address this issue is unworkable in practice. Firstly the six-month review period recommended by UL is too short to take account of seasonal variations and normal peaks and troughs of a business. Secondly, the six-month review period in UL's proposal would result in ever-increasing minimum contract hours. It would also be open to employers to terminate an employee's contract at the six monthly review period, leaving the employee without recourse to the Unfair Dismissals Acts (which in general does not apply to employees with less than 12 months service).

This option would severely limit an employer's flexibility to recruit and retain staff. It would have a significant effect on the public pay bill e.g. a teacher who was covering a maternity leave would become entitled to the hours she covered as a minimum even after the original teacher returned from maternity leave. If the school/ETB could not provide the hours she would be entitled to 25% of the average hours she previously worked or compensation for same. It could potentially affect Ireland's competitiveness as it is a measure not in existence in labour markets close to Ireland and could be a deterrent for foreign direct investment as well as preventing indigenous employers from scaling up. In the long-term, it could negatively impact the socially excluded and vulnerable groups as employers could make greater use of short-term contracts to avoid the requirements of this proposal. This option does not affect the environment, consumer protection or North-South and East-West relations.

(iii) **Preferred Option 3 - provides for the creation of a new right for an employee, whose contract of employment does not reflect the reality of the hours worked on a consistent basis over a reference period of 18 months, to be placed in a band of hours that better reflects the actual hours worked over that reference period.**

This option has considerable benefits for employees. It will provide greater certainty and a truer reflection of an employee's hours of work and level of earnings, thereby addressing, in particular, difficulties employees may have accessing financial credit, including mortgages. The reference period of 18 months is considered sufficiently long to allow for the normal peaks and troughs of businesses, including those subject to seasonal fluctuations. The 18 month reference period is also considered a fair reference period for sectors such as the education sector where the academic year is a different length to the calendar year.

The option will impose additional costs on employers in terms of administrative costs in that an employer will have to look back over the employee's working time records to check the validity of the employee's claim. As an employer is obliged to retain these records this is not a very significant burden. It will impose an additional burden on the employer in defending any case taken to the WRC by the employee. The option will not impose additional pay costs on employers because the provision is designed for the purpose of merely allowing an employee, whose contract does not reflect the hours they have been working on a regular basis over an extended period of time, to be placed in a band of hours which properly reflects the actual hours worked. It does not entitle the employee to be placed in a band of hours that is higher than the reality of the hours they have been working. Further, the proposed legislative provisions contain other measures to ensure the option is a balanced one, without any unnecessary adverse consequences for employers. Specifically, employers will be able to rely on the following reasonable defences in refusing an employee's request:

- the facts do not support the employee's claim,
- significant adverse changes have impacted on the business (e.g. loss of an important contract),
- emergency circumstances (e.g. business has had to close due to flooding)

- where the hours worked by the employee were due to a genuinely temporary situation (e.g. cover for another employee on maternity leave).

Employees will be able to seek redress through the WRC if they believe their rights under this provision are infringed. However, redress will be limited to being placed in the appropriate band of hours.

Provision is made to exempt employers from these requirements where a collective agreement has been negotiated with the workforce. This will accommodate those employers who already operate banded hours arrangements collectively agreed with the relevant trade unions or employers who may wish to do so in the future. The bands proposed are wide which will also achieve the intended outcome without being overly restrictive on the employer.

This option does not affect the environment, consumer protection, competitiveness or North-South and East-West relations. It will have a positive impact on the socially excluded and vulnerable groups as it will strengthen the employment protections in this area.

It would have limited impact on the Adjudication division of the WRC as employees who believe that they should be on a band of hour and are refused by their employer may pursue a case to the WRC. ***This is the preferred option as it provides a balanced and practical approach to assist employees whose contracts do not reflect the reality of the hours worked, while ensuring that the proposal also provides reasonable defences for employers.***

Section 5 - Consultation

These proposals have taken account of the study conducted by the University of Limerick (UL) on the prevalence of zero hour contracts and low hour contracts and their impact on employees. Most importantly, the proposals have taken account of the extensive material provided in response to public consultation on the UL study. Finally, the Department of Jobs,

Enterprise and Innovation has developed and refined these proposals through a detailed dialogue process with ICTU and Ibec over the period October 2016 to March 2017.

Section 6 – Enforcement and compliance

The proposed legislation when enacted will come within the existing remit of the Workplace Relations Commission (WRC). The WRC will continue to be responsible for monitoring and enforcing compliance with employment rights legislation. The proposals will lead to a limited increase in work for both the WRC's Inspectorate Division, as failure to provide a 'Day 5 statement of core employment terms' will become an offence, and their Adjudication Division, as the banded hours proposals introduce a new employment right.

Section 7 - Review

The effect and impact of the new legislation will be kept under review by the Department of Employment Affairs and Social Protection.

Section 8 - Publication

This RIA will be made public on the Department's website, along with the published Bill in due course.