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Private Member's Bill: Zero Hours Contracts

This paper, prepared for a Member of the Legislative Assembly, identifies key potential issues for consideration when developing a Private Member's Bill to reform prevailing legislation governing zero hours contracts.

This information is provided to a Member in support of his/her Assembly duties, and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as legal or professional advice, or as a substitute for it.

Introduction

This research paper is presented in support of a Member of the Legislative Assembly's (MLA's) development of a Private Member's Bill (PMB). The PMB is intended to replace specific provisions of the existing Employment Act (Northern Ireland) 2016, as amended ([the 2016 Act](#)), i.e. those relating to Zero Hours Contracts (ZHCs), and instead introduce a "Banded Hours System".

To contextualise subsequent sections in this paper, Section 1 outlines existing definitions used in relevant sources (legislative and non-legislative) for the terms "employee", "worker" and "ZHCs". It also highlights the prevalence of ZHCs in the United Kingdom (UK) labour market. Section 2 presents key merits and demerits of ZHCs. Section 3 summarises how Great Britain (GB), Northern Ireland (NI) and the Republic of Ireland (RoI) have attempted to curb employers' abuse of ZHCs by through legislative and policy interventions. Section 4 concludes, drawing on the previous sections and identifying relevant issues that arguably merit consideration when developing this PMB.

Please note, the information contained in this paper should not be considered legal advice.

1 Background: Employees, Workers and ZHCs.

To contextualise discussion of ZHCs, this section provides prevailing definitions of the terms "employee" and "worker" under NI employment law. It also presents key definitions used for ZHCs and discusses the challenges of agreeing a single, robust definition in this regard. Furthermore, the section briefly highlights the prevalence of ZHCs in the UK.

1.1 Definitions: Employees and Workers

In employment law, individuals' employment status determines their rights and their employer's responsibilities.¹

Some of the key categories for employment status for purposes of a discussion on ZHCs are:²

- Worker;
- Employee; and,
- Self-employed.

¹ <https://www.gov.uk/employment-status>

² <https://www.nibusinessinfo.co.uk/content/employment-status>

It is likely that the majority of individuals employed on ZHCs are either employees or workers.³ Consequently, this section presents definitions – legislative and non-legislative – for the terms employees and workers.

Article 3 of the *Employment Rights (Northern Ireland) Order 1996* (the 1996 Order) makes a distinction between employees and workers. It defines “employees” as follows:⁴

an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

And defines a “worker” as:

an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

In 2014, the then NI Department for Employment and Learning (DEL) explained the distinction between the two, stating:⁵

A ‘worker’ generally means an individual who has a contract or other arrangement to do work or services personally for a reward. This category is often perceived as a hybrid of employee and self-employed status. ‘Workers’ have fewer protections than ‘employees’ in domestic employment law. All employees are workers. However not all workers are employees.

One distinction arising from their different status is “fewer protections”, for example, employees are entitled to maternity, paternity and adoption pay **and** leave. Workers, however, are only entitled to maternity, paternity and adoption pay, and are not eligible to leave entitlements in those regards.

³ Department for Employment and Learning (2014) *Zero Hours Contracts: A Public Consultation*: <https://www.economy-ni.gov.uk/sites/default/files/consultations/del/zero-hours-contracts-public-consultation.pdf>

⁴ The Employment Rights (Northern Ireland) Order 1996: <https://www.legislation.gov.uk/nisi/1996/1919/article/3>

⁵ Department for Employment and Learning (2014) *Zero Hours Contracts: A Public Consultation*: <https://www.economy-ni.gov.uk/sites/default/files/consultations/del/zero-hours-contracts-public-consultation.pdf>

1.1.1 Characteristics of Employees and Workers

To contextualise discussion on ZHCs, it is important to present the distinctions between the employment status of the worker and the employee. Each of their different characteristics are shown below in table 1.

Table 1: Employment Characteristics of Employees and Workers.

Employment Status	Employment Characteristics
<p>Employees</p>	<p>Persons generally are classed as “employees” if:</p> <ul style="list-style-type: none"> • They work under an employment contract; • They are required to work regularly unless they’re on leave, for example holiday, sick leave or maternity leave; • They are required to do a minimum number of hours and expect to be paid for time worked; • A manager or supervisor is responsible for their workload, saying when a piece of work should be finished and how it should be done; • They cannot send someone else to do their work; • The business deducts tax and National Insurance contributions from their wages; • They get paid holidays; • They are entitled to contractual or Statutory Sick Pay, and maternity or paternity pay; • They can join the business’s pension scheme; • The business’s disciplinary and grievance procedures apply to them; • They work at the business’s premises or at an address specified by the business; • Their contract sets out redundancy procedures; • The business provides the materials, tools and equipment for their work; • They only work for the business or if they do have another job, it is completely different from their work for the business; and, <p>Their contract, statement of terms and conditions or offer letter (which can be described as an “employment contract”) uses terms like “employer” and “employee”.</p>
<p>Workers</p>	<p>Persons generally are classed as “workers” if:</p> <ul style="list-style-type: none"> • They have a contract or other arrangement to do work or services personally for a reward (your contract doesn’t have to be written); • Their reward is for money or a benefit in kind, for example the promise of a contract or future work; • They only have a limited right to send someone else to do the work (subcontract); • They have to turn up for work even if they don’t want to; • Their employer has to have work for them to do as long as the contract or arrangement lasts; and, • They are not doing the work as part of their own limited company in an arrangement where the ‘employer’ is actually a customer or client.

Sources : RaiSe and UK.GOV (2020)

Employees can be employed under ZHCs, but generally speaking, in the majority of cases, it is workers who are most likely to be employed under ZHCs. In 2014, the then NI DEL stated:⁶

There have been misconceptions that an individual working under a zero hours contract can never be an employee. This is incorrect. There is case law from the Employment Appeal Tribunal (EAT) which considered the employment status of nurses who worked rostered hours under a 'zero hours contract agreement' providing critical care services. The EAT held that the written contracts did not reflect the true position between the parties. The nurses had worked fixed hours on a regular basis for several years rather than on an ad hoc basis. The EAT held that the nurses were employed under global contracts of employment and there was no difficulty in showing their continuity of employment.

1.2 Defining ZHCs

There is an apparent challenge in reaching consensus when defining ZHCs. This is illustrated by the variety of definitions – legislative and non-legislative, including those relating to the collection of UK official statistics - presented in the following paragraphs.

In 2014, the then DEL stated:⁷

There is no legal definition of a zero hours contract in either Northern Ireland or Great Britain employment law. In general terms a zero hours contract is an employment contract in which the employer does not guarantee the individual any work and the individual is not obliged to accept any work offered.

In 2015, the *Small Business, Enterprise and Employment Act 2015* came into force in GB.⁸ Section 153 of this Act amended Section 27 of the *Employment Rights Act 1996* (the 1996 Act) to include the following definition of ZHCs.

Section 27(1) of that 1996 Act defines “ZHC” as:⁹

a contract of employment or other worker's contract under which— (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and (b) there is no certainty that any such work or services will be made available to the worker.

⁶ Department for Employment and Learning (2014) *Zero Hours Contracts: A Public Consultation*: <https://www.economy-ni.gov.uk/sites/default/files/consultations/del/zero-hours-contracts-public-consultation.pdf>

⁷ Department for Employment and Learning (2014) *Zero Hours Contracts: A Public Consultation*: <https://www.economy-ni.gov.uk/sites/default/files/consultations/del/zero-hours-contracts-public-consultation.pdf>

⁸ Small Business, Enterprise and Employment Act 2015: <http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>

⁹ Employment Rights Act 1996 (Section 27(1)): <https://www.legislation.gov.uk/ukpga/1996/18/section/27A>

This definition was introduced to facilitate the banning of “exclusivity clauses” in ZHCs, as discussed below at Section 3 of this paper. There has been some criticism regarding its narrow application, as noted in the 2020 House of Commons Library paper, which stated:

Section 27A of the Employment Rights Act 1996 now contains a limited statutory definition of ‘zero-hours contract’. This applies for the purpose of the prohibition on exclusivity clauses. Here, ZHCs are defined in the following terms: (1) In this section “zero hours contract” means a contract of employment or other worker's contract under which— (a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and (b) there is no certainty that any such work or services will be made available to the worker.

However, academic commentary draws attention to the fact that there are actually many different types of zero-hours arrangements. For example, [...] drew a distinction between ‘zero-hours contracts’, where the worker is obliged to accept any work offered, and ‘casual work contracts’, where the worker can refuse to accept work. [...] concluded that “the supposed category of Zero-Hours Contracts is a deeply uncertain and therefore unsatisfactory one” and that as “a matter of legal analysis, it is conceptually uncertain what kinds of personal work arrangement should or even can be regarded as ZHCs.

It is noteworthy that in 2016, ten years following the 1996 Act, Section 18 of the *Employment Act (Northern Ireland) 2016* included a definition of “ZHC” and “non-contractual zero hours arrangement”. That 2016 provision states:¹⁰

“Zero Hours Contract” means a contract of employment or other worker’s contract under which –

- (a) the undertaking to do or perform work is an undertaking to do so conditionally on the employer making work available to the worker; and*
- (b) there is no certainty that any such work will be made available to the worker.*

Outside NI, in 2018, two years following the enactment of the above NI legislative provision, the International Labour Organisation (ILO) stated:¹¹

... despite widespread assumptions to the contrary, there is no such thing as ‘the’ zero-hours contract (ZHC). It is important to see zero-hours work as

¹⁰ Employment Act (Northern Ireland) 2016: <https://www.legislation.gov.uk/nia/2016/15/section/18>

¹¹ International Labour Office (2018) *Zero-Hours Work in the United Kingdom*: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624965.pdf

a wide spectrum of contractual arrangements, centred on the absence of guaranteed hours for the worker.

In 2020, the Whitehall Department for Business, Energy & Industrial Strategy (BEIS) stated that in GB:

'Zero hours contract' is a non-legal term used to describe many different types of casual agreements between an employer and an individual. Generally speaking, a zero hours contract is one in which the employer does not guarantee the individual any hours of work. The employer offers the individual work when it arises, and the individual can either accept the work offered, or decide not to take up the offer of work on that occasion.

That same year, when discussing the term's use in GB, the House of Commons Library stated:

The term ZHC is most often used colloquially to describe an employment arrangement where there are no guaranteed hours. Under some contracts, workers may be required to accept any work offered by their employer, whereas in others, they may choose to turn down the work..¹²

1.3 Defining ZHCs for Official Statistics

In the UK, the main official data source on information on ZHCs is the Labour Force Survey (LFS), which is administered by the Office for National Statistics (ONS). The LFS uses the following definition for ZHCs:¹³

Zero hours contract – is where a person is not contracted to work a set number of hours, and is only paid for the number of hours that they actually work.

The ONS describes how the LFS statistics are collected as follows:¹⁴

As part of the survey the LFS asks people in employment if their main job has flexible working and, if so, to choose from a list of employment patterns those which best describe their situation. Only those people who select "zero-hours contract" as an option will be included in this analysis.

In 2018, an ILO report voiced misgiving with the ONS approach, stating:¹⁵

¹² <https://commonslibrary.parliament.uk/parliament-and-elections/government/zero-hours-contracts-rights-reviews-and-policy-responses/>

¹³ LFS (2020) *Labour Force Survey User Guide – Volume 3: Details of LFS variables 2020*: <file:///C:/Users/Owner/Downloads/volume3aj2020.pdf>

¹⁴ ONS (2020) DatasetEMP17: People in employment on zero hours contracts: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/emp17peopleinemploymentonzerohourscontracts>

¹⁵ ILO (2018) Zero Hours Work in the United Kingdom: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624965.pdf

..this definition is only provided to respondents if they ask explicitly for clarification of the term. The precise working definition of a zero-hours contract in the LFS is, therefore, deeply unclear as classification is primarily a matter of respondent self-identification. This has caused deep reservations about the quality of the statistical evidence.

The ONS address the issue identified by the ILO as follows:

.. the people identified by the LFS as being on a “zero-hours contract” will be those in employment who are aware that their contract allows for them to be offered no hours. This might exclude some people who select another option, such as on-call working, although they have the opportunity to report a “zero-hours contract” as well.

Due to concerns around underestimation, the LFS estimates from 2013 onwards were revised, as explained in the 2018 ILO report, which states:

.... the consensus is now that previous LFS methodology resulted in a gross underestimate of the prevalence of zero-hours contracts.

Simply put, official statistics appear less than robust because some of the respondents in the LFS may not be aware of their actual employment status or indeed what constitutes a ZHC for the purposes of the survey.

The apparent lack of clarity and consensus in reaching a standardised definition of ZHCs presents challenges for policy makers. The lack of a robust universally accepted ZHC definition across the UK may be problematic for those seeking to legislate in this regard.

1.4 Prevalence of ZHCs in the UK

Unsurprisingly, following on from the lack of a shared ZHC definition (as highlighted in the above sub-sections), there also is no clear consensus estimating the prevalence of ZHCs in the UK. A Work Foundations' review of ZHCs found that:¹⁶

The most basic question is how many people in today's labour market are on zero hours contracts and how have they grown over time. We do not know the answer to either question.

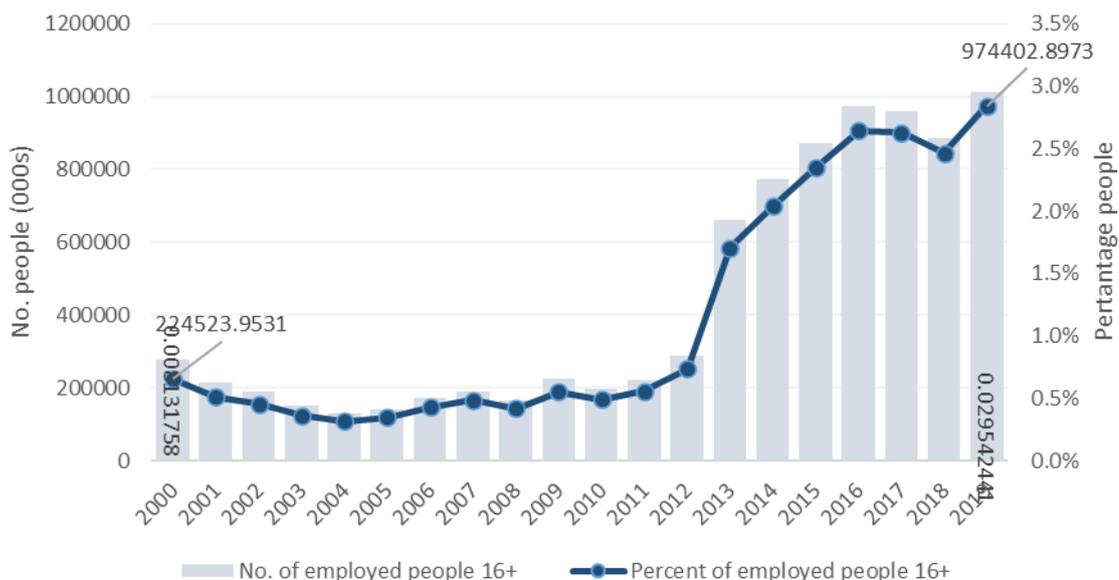
Despite this, and the limitations noted earlier regarding ONS ZHC statistics, the latest available ONS figures (UK official statistics) state that between October and December

¹⁶ The Work Foundation, August 2013, Brinkley, I, Flexibility or insecurity? Exploring the rise of in zero hours contracts, http://www.theworkfoundation.com/DownloadPublication/Report/339_Flexibility%20or%20Insecurity%20-%20final.pdf

2019, there were approximately 974,000 people in the UK employed on ZHCs. This constitutes a marked increase from 225,000 recorded in ONS statistics dated 2000.¹⁷

Figure 1 below shows this rise in ZHCs in the UK from 2000 to 2019.

Figure 1: Rise in prevalence of ZHCs in the UK 2000 to 2019.



Sources: RaiSe and ONS 2020

Table 2 presents the prevalence of ZHCs in UK regions from 2018 to 2019; again using ONS’s ZHC definition.

Table 2: Prevalence of ZHCs in the UK Regions 2018-19.

Region	In employment on a ZHC (thousands)		Percentage of people in employment on a ZHC	
	2018	2019	2018	2019
UK	844	974	2.6	3.0
England	715	844	2.6	3.0
North East	41	47	3.4	3.9
North West	66	92	1.9	2.6
Yorkshire and The Humber	63	69	2.4	2.7
East Midlands	63	100	2.7	4.2
West Midlands	75	67	2.7	2.4
East of England	78	84	2.5	2.7

¹⁷ ONS (2020) *People in employment on zero hours contracts*: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/emp17peopleinemploymentonzerohourscontracts>

London	116	136	2.5	2.9
South East	138	142	3.0	3.0
South West	75	107	2.7	3.8
Wales	43	50	2.8	3.4
Scotland	72	69	2.7	2.6
Northern Ireland	14	11	1.6	1.3

Source: ONS 2020

Table 2 shows that there were 14,000 people on ZHCs in NI in 2018 using the ONS ZHC definition, and 11,000 in 2019. This is the lowest number of all regions in the UK. In percentage terms 1.3% of people are employed on ZHCs in NI. This is also the lowest in the UK.

From 2018 to 2019, the prevalence of ZHC increases in all regions, with the exception of the West Midlands, Scotland and NI. These regions have seen a decrease in ZHCs from 2018 to 2019.

2 The Merits and Demerits of ZHCs

This section explores key merits and demerits of ZHCs for employers, employees, and workers.

2.1 Merits

Key merits of ZHCs can be summarised under the following headings:

- Flexibility;
- Retained Experience; and,
- Cost.

Each of these are discussed in the following paragraphs.

Flexibility

One of the most commonly cited merits is the flexibility that ZHCs provide for employers, employees and workers. For example, the UK *Taylor Review* (see subsection 3.1) concluded that ZHCs allowed individuals to work flexibly, enabling employers to adapt to changing market conditions. In relation to this flexible working, it stated:¹⁸

¹⁸ Taylor, Matthew et al. (2017) *Good Work: the Taylor Review of Modern Working Practices*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf (page 43)

Flexibility has been a key part of enabling business to respond to changing market conditions and has supported record employment rates. Individuals have the opportunity to work in a range of different ways, on hours that fit around other responsibilities, such as studies or caring responsibilities. The Labour Force Survey published in March 2017 found that almost one fifth of people on zero hours contracts are in full-time education, and 68% of those on zero hours contracts do not want more hours.

The flexibility that ZHCs provide for workers, employees and employers may be one reason for their increase in popularity over the last decade. In 2019, the House of Commons Library noted in one of its publications that there had been a rise in young people taking up employment via ZHCs. It stated:¹⁹

There was a notable rise in the number of young workers (aged 16-24) employed on ZHCs. These numbers are up by 43,000 from late 2018, meaning that 8.8% of workers in that age group were employed on ZHCs as of June this year.

The flexibility that ZHCs provide may be especially appealing to students seeking to top up student loans via casual work. Also, for some young people, who may not be decided on a future career path, ZHCs provide them with the chance to gain experience in various jobs before deciding on a future career.

Retained Experience

In 2013, the then UK Department for Business Innovation & Skills (BIS) conducted a consultation on ZHCs. The BIS consultation document stated:²⁰

Zero hours contracts allow businesses to retain the skills and experience of staff who might wish to partially retire or who have retired. An employer may have made a significant investment in the individual, through training for example.

The 2013 BIS consultation document also argues that ZHCs enable businesses to “retain a pool of trained and skilled staff, who know the culture of the businesses and its procedures, rather than agency staff who may not”.

Cost

The Resolution Foundation have suggested that there is some evidence of firms substituting agency staff for zero hours arrangements as a means of avoiding agency

¹⁹ House of Commons Library (2019) *Zero-hours contracts: Rights, reviews and policy responses* : <https://commonslibrary.parliament.uk/parliament-and-elections/government/zero-hours-contracts-rights-reviews-and-policy-responses/>

²⁰ Department for Business Innovation & Skills (2013) *Consultation :Zero Hours Employment Contracts*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/267634/bis-13-1275-zero-hours-employment-contracts-FINAL.pdf

fees.²¹ Lowering the cost of labour is perhaps always an attractive proposition for an employer. It can also be an economic reality for some employers.

In certain circumstances, ZHCs can be used to lower the wage bill for firms, and consequently keep less profitable areas of their businesses in operation. This can stabilise growth in the medium term and eventually allow the firm to employ additional staff where increased profits warrant further expansion of the labour force.

2.2 Demerits

The demerits of ZHCs can be summarised under the following headings:

- Uncertainty;
- Fairness; and,
- Exclusivity.

Each of these are discussed in the following paragraphs.

Uncertainty

Under ZHCs there is no guaranteed level of regular work or earnings. This creates uncertainty for workers and employees over meeting bills or planning future expenditure. The need to respond to calls to attend work, frequently at short notice, can disrupt life outside of work; and place a particular strain on families and arranging care for dependants.²² Furthermore, uncertainty around future income can make obtaining loans and mortgages very difficult.

There is also some evidence to show a lack of transparency from employers to their employees and workers on the issue of ZHCs can lead to uncertainty - both in terms of employment status and rights. For example, the 2013 BIS consultation on ZHCs, stated:

The information gathering exercise heard that individuals were not always aware they are employed on a zero hours contract, or that there was a possibility they could be offered no work or 'zero hours'. In some cases employers did not make this clear when advertising or interviewing people for jobs, or in the employment contract itself. Furthermore, some employers may not fulfil, or understand, their responsibilities towards individuals they employ on a zero hours contract in terms of their employment rights.

²¹ Resolution Foundation (2013) *A Matter of Time: the rise of zero-hours contracts*:
https://www.resolutionfoundation.org/app/uploads/2014/08/A_Matter_of_Time_-_The_rise_of_zero-hours_contracts_final_1.pdf

²² UNISON (2016): *Zero Hours Contracts* <https://www.unison.org.uk/content/uploads/2016/02/Zero-Hours-Factsheet.pdf>

In 2016, the UK Parliament's BIS Committee report, *Employment practices at Sports Direct* highlighted the difficulties for workers on ZHCs in this regard. It stated:²³

We received damning testimonies from Sports Direct workers, past and present, about the misuse of the contracts and inadequate working conditions, including the following, "... Staff on zero-hour contracts were being forced to work a further three hours without pay (and if they refused, they would not be offered any hours the following day)".

Furthermore, a 2016 Trade Union Congress (TUC) poll of workers on ZHCs found that:²⁴

- More than half (51%) have had shifts cancelled at less than 24 hours' notice.
- Nearly three-quarters (73%) have been offered work at less than 24 hours' notice.
- More than a third (35%) have been threatened with not being given shifts in the future if they turn down work.
- Only a quarter (25%) prefer being on ZHCs.

Fairness

Workers on ZHCs often do not receive the same employment rights and entitlements as their counterparts on regular or more traditional employment contracts. The 2016 TUC poll²⁵ found that a substantial majority (82%) of workers on ZHCs said that they do not receive sick pay. Additionally, 63% did not receive maternity or paternity pay. Seven in ten would not receive redundancy pay if made redundant. Just under half (46%) said they don't get holiday pay and just over half (54%) said they have not been given a written statement of terms and conditions.

Exclusivity

Some individuals on ZHCs are prevented from working for another employer even when their primary employer has no work for them. This practice is known as "exclusivity". In 2013, the then BIS highlighted concerns over exclusivity, stating:

In certain cases [exclusivity] can mean that people were stopped from looking for work elsewhere particularly when they needed more hours to bump up their earnings. Feedback from employers themselves suggests awareness that there can be abuses that limit flexibility.

²³ House of Commons Business, Innovation and Skills Committee (2016) *Employment practices at Sports Direct*: <https://publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf>

²⁴ TUC (2018) *Great Jobs with Guaranteed Hours*: https://www.tuc.org.uk/sites/default/files/great-jobs-with-guaranteed-hours_0.pdf

²⁵ Ibid.

Under the *Small Business, Enterprise and Employment Act 2015*, exclusivity clauses in ZHCs are unenforceable in GB,²⁶ and so effectively banned. Additionally, since January 2016, a worker - who was engaged on a ZHC and subsequently was dismissed or subjected to a detriment for breaching an exclusivity clause - can complain to an employment tribunal. Such a scenario amounts to automatic dismissal.

There is currently no similar regulation of exclusivity clauses in ZHCs in NI.²⁷

3 ZHCs: Protecting Workers and Employees in GB, NI and RoI

The 1998 NI devolution settlement empowers the NI Assembly to govern in employment matters and provides the Assembly with legislative competence in the area of employment, including ZHCs.²⁸ This is unlike Scotland and Wales. This section therefore summarises key policy interventions and regulation in GB, NI and RoI, which have been introduced and implemented in those jurisdictions to protect workers and/or employees against abuses or misuses of ZHCs by employers. This information can provide a helpful comparative basis when undertaking future work in this area for purposes of this PMB.

3.1 GB

In 2013, the UK Coalition Government initiated a consultation on the use of ZHCs in GB.²⁹ The consultation was launched on 19 December 2013 and ran until 13 March 2014. The findings of the consultation were particularly critical of the use of exclusivity clauses in ZHCs. As a consequence, the Government announced its intention to ban these practises. And, in 2015, it introduced the *Small Business, Enterprise and Employment Act 2015*,³⁰ which amended Section 27 of the *Employment Rights Act 1996*,³¹ and effectively banned the use of exclusivity clauses in ZHCs in GB (see Section 2 above for a discussion on exclusivity).

Section 27A(2) of the 1996 Act as amended states:

Any provision of a zero hours contract which— (a) prohibits the worker from doing work or performing services under another contract or under any

²⁶ Small Business, Enterprise and Employment Act 2015: <http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>

²⁷ Croner-I (2020) The Differences between Employment Law in Great Britain and Northern Ireland:

<https://app.croneri.co.uk/feature-articles/differences-between-employment-law-great-britain-and-northern-ireland>

²⁸ <https://www.gov.uk/guidance/devolution-settlement-northern-ireland#understanding-what-has-been-devolved>

²⁹ Department of Business & Innovation (2013) *Consultation: Zero hours employment contracts:*

http://web.archive.org/web/20141007085627/https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/267634/bis-13-1275-zero-hours-employment-contracts-FINAL.pdf

³⁰ Small Business, Enterprise and Employment Act 2015: <https://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>

³¹ Employment Rights Act 1996: <https://www.legislation.gov.uk/ukpga/1996/18/contents>

other arrangement, or (b) prohibits the worker from doing so without the employer's consent, is unenforceable against the worker.

In 2020, the House of Commons Library highlighted criticism of these provisions, stating:³²

Commentators highlighted that the contractual unenforceability of the clause would be meaningless vis-à-vis the worker if the employer was nonetheless free to refrain from providing future work should the worker ignore an exclusivity requirement.

However, the *Small Business, Enterprise and Employment Act 2015* also created a power enabling a Minister to make regulations that would penalise employers who use exclusivity clauses. The *Exclusivity Terms in ZHCs (Redress) Regulations 2015*³³ created rights for:

- Zero-hours workers classed as “employees” not to be unfairly dismissed for failing to comply with an exclusivity requirement; and,
- Zero-hours workers classed as “workers” not to be subjected to any detriment for failing to comply with an exclusivity requirement.

The House of Commons Library explains the enforceability of these rights in its paper, as follows:

The rights are enforceable against an employer by way of a claim to an employment tribunal. Where a tribunal considers a claim to be well founded, it may make a declaration to that effect and award compensation, subject to the same limit as that applicable in unfair dismissal claims.

Taylor Review

In 2016, the UK Government commissioned a report to assess the implications for employment regulation of new forms of work, driven by digital platforms. The subsequent report, *Good Work: the Taylor review of Modern Working Practices* (the Taylor Review), included comments in relation to ZHCs. The Taylor Review was generally positive about the flexibility provided by ZHCs, stating:³⁴

Flexibility has been a key part of enabling business to respond to changing market conditions and has supported record employment rates. Individuals have the opportunity to work in a range of different ways, on hours that fit around other responsibilities, such as studies or caring responsibilities. The

³² House of Commons Library (2020) *Zero Hours Contracts*: <file:///C:/Users/Owner/Downloads/SN06553.pdf>

³³ Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015: <https://www.legislation.gov.uk/uksi/2015/2021/contents/made>

³⁴ Taylor, Matthew et al. (2017) *Good Work: the Taylor Review of Modern Working Practices*: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf

Labour Force Survey published in March 2017 found that almost one fifth of people on zero hours contracts are in full-time education, and 68% of those on zero hours contracts do not want more hours.

However, the report stated that the flexibility offered by ZHCs was one-sided in favour of the employer, stating:

There is an issue of flexibility not being reciprocated, with a requirement to be available for work at very short notice, without any guarantee that work will actually be available. This makes it very difficult for a person to manage their financial obligations, or for example secure a mortgage.

The Taylor Review recommended that in order to redress the balance of one-sided flexibility, the UK Government should consult the Low Pay Commission (LPC) on a proposal allowing non-guaranteed hours to attract a higher rate of National Minimum Wage. The Government did consult the LPC, but at the time of writing this paper, the Government has no plans to legislate in this regard.

3.2 NI

In 2014, the (then) NI DEL conducted a consultation on ZHCs.³⁵ The consultation did not recommend an outright ban. A DEL official in oral evidence to the then Committee for Employment and Learning (CEL) explained the reason for this as follows:³⁶

An outright ban on zero-hours contracts would have a disproportionate impact upon flexibility within the economy, and potentially remove some employment opportunities.

In 2016, Section 18 of the *Employment Act (Northern Ireland) 2016* provided for an enabling power to be inserted into the Employment Rights (NI) Order 1996 in relation to ZHCs. As mentioned above in subsection 1.2 of this paper, Section 18 of the 1996 Order also includes a definition of "ZHC". The explanatory notes attached to the 2016 Act state:³⁷

Section 18 inserts new Article 59A into the Employment Rights (Northern Ireland) Order 1996. The inserted Article empowers the Department to make appropriate provision to prevent abuses associated with the use of zero hours contracts, non-contractual zero hours arrangements or worker's contracts of a kind to be specified in regulations.

³⁵ Department for Employment and Learning (2014) *Zero Hours Contracts: A Public Consultation*: <https://www.economy-ni.gov.uk/sites/default/files/consultations/del/zero-hours-contracts-public-consultation.pdf>

³⁶ Official Report: Minutes of Evidence. Committee for Employment and Learning, meeting on Wednesday, 18 February 2015: <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=11375&evidID=6781>

³⁷ Employment Act (Northern Ireland) 2016: <https://www.legislation.gov.uk/nia/2016/15/notes/division/4/7/1>

On 27 July 2020, RaiSe received the following response for the DfE about ZHCs and Section 18 of the Employment Act (Northern Ireland) 2016:³⁸

In terms of Section 18, this section provides for an enabling power to be inserted into the Employment Rights (NI) Order 1996. This enabling power would permit the Department to make regulations containing such provisions as it considers appropriate for the purposes of preventing abuses arising out of, or in connection with, the use of the zero hours contracts, non-contractual zero hours contracts arrangements or workers' contracts of a kind specified by the regulations. This section was introduced at the Further Consideration stage of the Employment Bill process.

In the absence of Ministers, from January 2017 to January 2020, it was not possible to progress further work on the matter of zero hours contracts.

Minister Dodds has asked officials to develop policy proposals in relation to zero hours contracts. She is mindful of the references to zero hours contracts in the New Decade New Approach document, but recognises that the issue is a complex one. The Covid-19 pandemic has been extremely challenging for workers, businesses and the economy as a whole. The Minister therefore wishes to consider a wide range of options for greater regulation of zero hours contracts to ensure that there is a balance between the needs of workers and businesses. In developing these proposals, the Minister wishes to take account of the views of all stakeholders. Any proposals to regulate the use of zero hours contracts will be subject to public consultation prior to the introduction of any necessary legislation in the Assembly.

It would appear that regulating against abuses in ZHCs is currently under consideration by DfE.

New Decade New Approach

Previously, in January 2020, the *New Decade New Approach* (NDNA) document stated:³⁹

...the Executive should move to ban zero hours contracts.

In July 2020, the House of Commons Northern Ireland Affairs Committee (NIAC) published a report of its inquiry into NDNA.⁴⁰ There was no mention of ZHC in that report or in any published oral or written submission to the NIAC in that regard.

³⁸ Email response from DfE received by RaiSe 27 July 2020.

³⁹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf

⁴⁰ House of Commons Northern Ireland Affairs Committee (2020) *New Decade New Approach Inquiry*. <https://committees.parliament.uk/work/113/new-decade-new-approach-agreement/publications/>

Also, in July 2020, the first meeting of NDNA Joint Board took place. The Joint Board consists of the NI Secretary of State and the NI First and Deputy First Ministers. A press release accompanying this first meeting stated that the Joint Board will:⁴¹

- *Support the Northern Ireland Executive in ensuring sound and stable governance that delivers for the people of Northern Ireland;*
- *Review funding provided by the UK Government to meet commitments set out in the NDNA agreement;*
- *Support transformation in health, education and justice through the NDNA funding package; and,*
- *Consider the effectiveness of infrastructure delivery, drawing on expertise from the Infrastructure and Projects Authority as appropriate.*

The press release also stated:

In its first meeting, all participants reaffirmed their commitment to the NDNA agreement and to ensure that commitments set out in the agreement were delivered as a priority.

RaISe will keep a watching brief on developments regarding ZHCs and the work of NDNA Joint Board.

3.3 Rol

In 2015, the Rol, Department of Jobs, Enterprise and Innovation commissioned the University of Limerick to undertake research into the prevalence ZHCs in Rol. The key objectives of the research were as follows:⁴²

- To fill the gap that currently exists in terms of available hard data and information concerning the prevalence of ZHCs in the Irish economy and the manner of their use;
- To assess the impact of ZHCs on employees; and,
- To enable the Minister to make any evidence-based policy recommendations to Government considered necessary on foot of the study.

⁴¹ Northern Ireland Office (2020) <https://www.gov.uk/government/news/first-meeting-of-new-decade-new-approach-joint-board>

⁴² University of Limerick (2015) *A Study on the Prevalence of Zero Hours Contracts among Irish Employers and their Impact on Employees*: <https://dbej.gov.ie/en/Publications/Publication-files/Study-on-the-Prevalence-of-Zero-Hours-Contracts.pdf>

3.3.1. Banded Hours

The subsequent report included a recommendation to introduce a system of banded hours to limit abuses of ZHCs by employers. The report stated that banded hours could provide more certainty for those on ZHCs, particularly in the retail and hospitality sectors. It described the system of banded hours as follows:⁴³

Banded hours place each employee within a set guaranteed 'band' of hours e.g., 15-19 hours. A periodic review takes places on an annual basis and if any employee continuously works above the band they are in, they are automatically lifted into the next band (i.e., the higher number of hours that they have actually been working now becomes their new guaranteed band).

Recommendation 9 of the report stated:

When negotiating at sectoral level, we recommend that employer organisations and trade unions examine examples of good practice which can provide flexibility for employers and more stable working conditions for employees, such as annualised hours and banded hours agreements.

This recommendation was ultimately taken onboard by the RoI Government and a system of banded hours contracts was introduced by provisions in the Employment (Miscellaneous Provisions) Bill 2017 and the *Employment (Miscellaneous Provisions) Act 2018 (the 2018 Act)*.

Employment (Miscellaneous Provisions) Bill 2017

The Explanatory Memorandum of the Employment (Miscellaneous Provisions) Bill 2017⁴⁴ (the 2017 Bill), which would in turn become the 2018 Act, described the purposes of the 2017 Bill as follows :

...to: (a) Ensure that employees are better informed about the nature of their employment arrangements and, in particular, their core terms at an early stage of their employment – a new offence is being created for non-provision of core terms within a specified period.

*(b) **Prohibit zero hours contracts in most circumstances.***

(c) Strengthen the provisions around minimum payments to low-paid employees who may be called in to work for a period but not provided with that work – an enhanced minimum payment is being introduced.

*(d) **Introduce a “banded hours” provision** so that employees on low hour contracts who consistently work more hours each week than provided for in their contracts of employment, are entitled to be placed in a band of hours*

⁴³ Ibid.

⁴⁴ Employment (Miscellaneous Provisions) Bill 2017: <https://www.oireachtas.ie/en/bills/bill/2017/87/?tab=documents>

that better reflects the reality of the hours they have worked over a reference period.

(e) Strengthen the anti-penalisation provisions for employees who invoke a right under the Terms of Employment (Information) Act 1994 and the Organisation of Working Time Act 1997.

The Employment (Miscellaneous Provisions) Act 2018

Section 16 of the 2018 Act amends Section 18 of the *Organisation of Working Time Act, 1997*,⁴⁵ introducing a 'banded hours' system. It states:⁴⁶

The Act of 1997 is amended by the insertion of the following section after section 18:

"18A.(1) Where an employee's contract of employment or statement of terms of employment does not reflect the number of hours worked per week by an employee over a reference period, the employee shall be entitled to be placed in a band of weekly working hours specified.

Table 3 below presents the specified weekly hours as per the 2018 Act.

Table 3: Bands of weekly working Hours under the Employment (Miscellaneous Provisions) Act 2018.

Band	From	To
A	3 hours	6 hours
B	6 hours	11 hours
C	11 hours	16 hours
D	16 hours	21 hours
E	21 hours	26 hours
F	26 hours	31 hours
G	31 hours	36 hours
H	36 hours and over	

Source: Employment (Miscellaneous Provisions) Act 2018

The band of weekly working hours on which the employee is entitled to be placed shall be determined by the employer on the basis of the average number of hours worked by that employee per week during the reference period. The reference period mentioned above is 12 months.

⁴⁵ Organisation of Working Time Act, 1997: <http://www.irishstatutebook.ie/eli/1997/act/20/enacted/en/html>

⁴⁶ The Employment (Miscellaneous Provisions) Act 2018: Section 16: <http://www.irishstatutebook.ie/eli/2018/act/38/section/16/enacted/en/html#sec16>

Simply put, if an individual works on a low-hour contract or a ZHC, and consistently works more hours each week than their contract provides for, they can ask their employer to change the contract terms. They are entitled to be placed in a band of hours that better reflects the number of hours they have worked over a 12-month period.

Individuals must apply in writing to their employer and request to be placed on banded hours contract. The employer will decide which band of weekly hours applies to them, based on the average number of hours that they worked per week during the past 12 months. The employer must place them on a band of weekly hours no later than 4 weeks from the date they made the request. Once they have been placed on banded hours, they are entitled to work an average of those hours for the next 12 months.

Section 18 of the 2018 Act amends the *National Minimum Wage Act 2000*⁴⁷ to provide protection for employees called into work but sent home without work. It states:⁴⁸

...employee shall be remunerated by his or her employer in respect of the employee's working hours in any pay reference period, at an hourly rate of pay that on average is not less than the national minimum hourly rate of pay.

The following extract from the Second Stage debate on the Bill explains the underlying rationale for this provision:

Employees who are "on call" will continue to be excluded from this minimum payment. The focus here is on low-paid employees. I want to ensure that where low-paid employees are called in to work but sent home again without work, they get a reasonable compensation payment.

For example, if an employer calls an employee into work but then decides they are not needed, that employee would be entitled to three times the minimum wage, which is €28.65, every time that occurs. This is to discourage the unscrupulous practice of calling employees into work and then sending them home without work or more meaningful compensation.⁴⁹

⁴⁷ National Minimum Wage Act 2000: <http://www.irishstatutebook.ie/eli/2000/act/5/enacted/en/html>

⁴⁸ The Employment (Miscellaneous Provisions) Act 2018: Section 18:
<http://www.irishstatutebook.ie/eli/2018/act/38/enacted/en/print#sec18>

⁴⁹ Employment (Miscellaneous Provisions) Bill 2017: Second Stage: <https://www.oireachtas.ie/en/debates/debate/dail/2018-02-14/29/>

Criticisms of Banded Hours Contracts

In February 2018, the Irish Human Rights and Equality Commission (the Commission) published a report presenting key observations of the 2017 Bill. The report listed the following concerns in relation to banded hours arrangements:⁵⁰

- A limitation of banded hours mechanisms;
- The interaction with the social welfare system;
- The identification of a suitable 'reference period' before a worker secures the right proposed;
- Two drafting issues;
- A significant potential adverse effect; and,
- Enforcement.

The Commission report further stated:⁵¹

The Explanatory Memorandum to the Bill states that the purpose of the new section 18A is to enable a worker to be given hours work that are 'a more accurate reflection of the hours worked'. However, the choice of banded hours as the mechanism to achieve the stated goal has a significant disadvantage. Banded hours can be a threat to the income of a worker. If the number of hours that a worker has been providing are at or near the upper limit of a band and if the relevant band is sufficiently wide, then the number of hours at the lower limit can result in a significant reduction in income.

For example, under the banded hours in the Bill, somebody who works 34 hours per week (Band C) who exercises their right to be given a contract in that band could have their working time reduced to 25 hours per week, which would result in a cut in their pay of 26 percent. In monetary terms, if they are on the national minimum wage, their pay could be cut from €314.50 to €231.25 per week.

⁵⁰ Irish Human Rights and Equality Commission (2018) *Observations on the Employment Miscellaneous Provisions Bill 2017*: <https://www.ihrec.ie/app/uploads/2018/02/Observations-on-the-Employment-Miscellaneous-Provisions-Bill-2017-.pdf> (page 22-28)

⁵¹ Irish Human Rights and Equality Commission (2018) *Observations on the Employment Miscellaneous Provisions Bill 2017*: <https://www.ihrec.ie/app/uploads/2018/02/Observations-on-the-Employment-Miscellaneous-Provisions-Bill-2017-.pdf>

4 Concluding remarks

The lack of a single, agreed, robust definition of a ZHC presents a significant challenge for those attempting to formulate policy or to legislate in this regard. As noted in subsection 1.2 of this paper, the ILO suggest that ZHCs should be viewed as a wide spectrum of contractual arrangements, centred on the absence of guaranteed hours for the worker. It is perhaps this diversity, inherent in ZHCs, which makes reaching agreement on an accepted, universal definition so elusive.

At first look, the prevalence of ZHCs appears to be on an ever-increasing trajectory. As reported in Section 1 of this paper, ONS (UK official statistics) puts a figure of 974,000 people in the UK employed on ZHCs in 2019. This is a large increase from the 225,000 reported in 2000. The most recently available ONS statistics show 11,000 people employed on ZHCs in NI. This is the lowest number in all the regions of the UK and is down from 14,000 since 2018.

However, as noted in subsection 1.3, the *official figures* may have been underestimated particularly before the 2013 revision. It is generally accepted that in more recent years there is more public awareness of ZHCs. This may go some way in improving the accuracy of official figures in the LFS.

Section 2 highlighted the flexibility offered to employers, workers and employees alike. This is perhaps one reason for the increasing prevalence of ZHCs. This issue of flexibility is particularly relevant for younger people who are able to use ZHCs to help gain experience in certain jobs also for students topping up loans.

The flexibility offered by ZHCs is countered by the lack of certainty they provide. Uncertainty of future income can prove a major issue for individuals and families trying to save for the future or those trying to obtain loans and mortgages. Added to this uncertainty, another disadvantage is the apparent lack of employment rights reported by workers and employees on ZHCs. Consequently, there have been several attempts to regulate the against the misuse of ZHCs in the UK and the RoI.

In GB, the legislative response to curb abuses of ZHCs by employers has largely concentrated on exclusivity clauses. As noted in subsection 3.1 of this paper, the *Small Business, Enterprise and Employment Act 2015* effectively banned the use of exclusivity clauses in GB. However, this legislation does not apply in NI. Consequently, this would appear to be an issue that merits some consideration when developing legislative proposals in NI. Some research into the prevalence of exclusivity clauses in NI may prove helpful in this regard.

In NI, a 2013 DEL consultation on ZHC rejected an outright ban. However, in 2020 the *NDNA* document proposed that the NI Executive should move to ban ZHCs. At the timing writing, it would appear that DfE intend to develop policy proposals to regulate the use of ZHCs; also, that these proposals will be subject to public consultation prior

to the introduction of any necessary legislation in the Assembly.⁵² RaISe will also keep a watching brief on the work of the NDNA Joint Board in relation to ZHCs.

In the RoI, legislative responses to abuses of ZHCs by employers have largely focused on introducing a system of banded hours contracts to replace ZHCs. The *Employment (Miscellaneous Provisions) Act 2018* introduced the system of banded hours. The rationale was that a set guaranteed 'band' of hours, for example, 15-19 hours per week would go some way to increase certainty of income for families and individuals.

It is noteworthy that the *Employment (Miscellaneous Provisions) Act* has come in for some criticism, particularly from the Irish Human Rights and Equality Commission. The lack of enforcement against any breaches of the system is one criticism that merits some consideration. Furthermore, the Commission has suggested that the band system actually puts some individuals at a disadvantage in terms integration with the social welfare system.

Perhaps the most challenging issue is the potential threat to income inherent in the hourly bands system? Assume the following scenario as an example of how this could occur:

An individual has been employed under a ZHC and has typically worked on average 34 hours a week. A new "banded hours system" is introduced and the individual is employed on a new contract within a new band. The new band is between 25 to 35 hours. The individual could have their hours reduced to 25 hours per week, and still be employed on the "correct" band. Consequently, that person would be financially worse off.

⁵² Email response from DFE received by RaISe 27 July 2020.