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Using the Delphi Method to Advance Legal Reform: A New Method for Empirical Labour Law Research?

ALYSIA BLACKHAM*

In navigating and mediating the interests of capital and labour, labour law remains a contentious subject of partisan attention, never far from the political agenda.¹ This constant change and political reform jeopardises the predictability and consistency of labour law, making it difficult for employers and workers to know where they stand. Further, there is limited political and legal consideration of how to address long-term issues facing the labour market, and few lasting or strategic reforms are put in place.

The use of doctrinal legal research methods in legal scholarship perpetuates this situation. Doctrinal methods are primarily geared to critiquing, interpreting and developing coherent accounts of existing legal provisions, rather than developing broad-ranging proposals for change.² In this context, alternative analytic processes offer considerable potential to take a deeper and more critical look at long-term labour issues.

This paper explores the use of the Delphi method as a structured group communication process for dealing with complex labour law problems. Drawing on a case study of responses to the ageing workforce, this paper appraises the challenges and potential benefits of the Delphi method in empirical labour law research. It argues that the Delphi method has significant potential to be used in labour law. However, the method poses major practical challenges for researchers and participants, and requires care and perseverance in its implementation. This paper

* Turpin-Lipstein Fellow and College Lecturer in Law, Clare College, University of Cambridge and affiliated Lecturer, Faculty of Law, University of Cambridge.

¹ H Collins, KD Ewing, and A McColgan, *Labour Law, Law in Context* (Cambridge, Cambridge University Press, 2012) 5.

² See P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 29; M van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in M van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?*, European Academy of Legal Theory (Oxford, Hart, 2011) 17; T Hutchinson and N Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 110.

therefore highlights the strengths and limitations of using the Delphi process as an adjunct to traditional legal doctrinal methods.

A. The Delphi Method

The Delphi method is a structured group communication process that allows individuals to deal with complex problems as a group.³ Where knowledge is uncertain or imperfect, the Delphi method can achieve reliable group consensus⁴ and identify divergence of opinion on hypothetical future scenarios.⁵ The Delphi method is very effective for exploring solutions in policy areas with high levels of uncertainty⁶ and can eliminate distractions and distortions in group discussions by allowing responses to be anonymised.⁷ The method is therefore more effective at generating new ideas and exploring future scenarios in areas of uncertainty than traditional face-to-face communication.⁸ At a practical level, the Delphi method allows participants to think through responses, promoting careful and thoughtful contributions, while the anonymity of responses ensures open and honest discussion.

While a range of Delphi structures can be used, a policy Delphi is designed to identify all possible policy options and examine and estimate the impact, consequences and acceptability of particularly policy options.⁹ It also allows respondents to react to and assess different viewpoints on policy issues.¹⁰ Therefore, it is particularly well suited to coordinating and structuring respondents' thinking around how complex labour law issues might develop and evolve in the future¹¹ and provides a constructive forum for discussion, the building of consensus¹² and the clarification of different ideas and viewpoints on labour law issues.¹³

³ HA Linstone and M Turoff, 'Introduction' in HA Linstone and M Turoff (eds), *The Delphi Method: Techniques and Applications* (Reading, Addison-Wesley, 1977) 3.

⁴ G Aichholzer, 'The Delphi Method: Eliciting Experts' Knowledge in Technology Foresight' in A Bogner et al (eds), *Interviewing Experts*, Research Methods (Basingstoke, Palgrave Macmillan, 2009) 252–53.

⁵ M Rayens and EJ Hahn, 'Building Consensus Using the Policy Delphi Method' (2000) 1 *Policy, Politics, & Nursing Practice* 308, 308.

⁶ See A Rotondi and D Gustafson, 'Theoretical, Methodological and Practical Issues Arising out of the Delphi Method' in M Adler and E Ziglio (eds), *Gazing into the Oracle: The Delphi Method and Its Application to Social Policy and Public Health* (London, Jessica Kingsley, 1996) 42.

⁷ Aichholzer, n 4.

⁸ E Ziglio, 'The Delphi Method and Its Contribution to Decision-Making' in M Adler and E Ziglio (eds), *Gazing into the Oracle: The Delphi Method and Its Application to Social Policy and Public Health* (London, Jessica Kingsley, 1996) 22.

⁹ M Turoff, 'The Policy Delphi' in HA Linstone and M Turoff (eds), *The Delphi Method: Techniques and Applications* (Reading, Addison-Wesley, 1977) 83.

¹⁰ *Ibid.*

¹¹ Aichholzer, n 4, 259.

¹² Rayens and Hahn, n 5, 309.

¹³ W Rauch, 'The Decision Delphi' (1979) 15 *Technological Forecasting and Social Change* 159, 163.

The RAND Corporation first used the Delphi method during the Cold War to estimate Soviet nuclear capabilities for the US Air Force.¹⁴ The method has since been used a handful of times in legal and socio-legal research, including for examining the impact of legal rules and how laws operate in practice,¹⁵ offering solutions to law-related problems,¹⁶ developing taxonomies and definitions of legal phenomena¹⁷ and criteria to evaluate policy initiatives,¹⁸ and exploring the future of interactions between law and society.¹⁹ While the Delphi method has been used to answer a range of legal and semi-legal questions, it has rarely been used to inform the process of law reform. This is an area where the Delphi method could add significant value, particularly in developing legal responses to long-term labour law issues.

B. Ageing as a Challenge for Labour Law

A key long-term issue facing UK labour law is demographic change. The UK population is 'ageing rapidly'²⁰ and it is projected that England will experience a 51 per cent increase in those aged over 65 and a 101 per cent increase in those aged over 85 from 2010 to 2030.²¹ As the 'baby boom' generation of the 1960s approaches the state pension age, the median age of the UK population continues to advance upwards, being projected to rise from 39.7 years in 2010 to 42.2 years in 2035.²²

¹⁴ N Dalkey and O Helmer, 'An Experimental Application of the Delphi Method to the Use of Experts' (1963) 9 *Management Science* 458.

¹⁵ JP van Gigch and R Hommes, 'A Study of How Correctional Counsellors and Psychologists Agree upon Pre-Sentence Recommendations' (1973) 15 *Canadian Journal of Criminology and Corrections* 93; B Dziurzynski, 'FDA Regulatory Review and Approval Processes: A Delphi Inquiry' (1996) 51 *Food and Drug Law Journal* 143.

¹⁶ HG McDonald and CP Kirsch, 'Use of the Delphi Method as a Means of Assessing Judicial Manpower Needs' (1978) 3 *Justice System Journal* 314; SJ Young, AT Pittman, and JO Spengler, 'Best Case Scenario: The Development of a Teaching Tool For Sport Law' (2004) 14 *Journal of Legal Aspects of Sport* 1.

¹⁷ MF Hudson, 'Elder Mistreatment: A Taxonomy with Definitions by Delphi' (1991) 3 *Journal of Elder Abuse & Neglect* 1.

¹⁸ E Guglyuvatyy, 'Identifying Criteria for Climate Change Policy Evaluation in Australia' (2010) 7 *Macquarie Journal of Business Law* 98.

¹⁹ KN Wright, 'A Delphi Assessment of the Effects of a Declining Economy on Crime and the Criminal Justice System' (1982) 46 *Federal Probation* 36; LF Travis, V O'Leary, and V Castelluccio, 'The Future of Sentencing and Parole: A Delphi Reassessment of Sentencing and Parole Reforms' (1985) 10 *Criminal Justice Review* 45; SJ Young and LM Jamieson, 'Perceived Liability and Risk Management Trends Impacting Recreational Sports into the 21st Century' (1999) 9 *Journal of Legal Aspects of Sport* 151.

²⁰ Select Committee on Public Service and Demographic Change, *Ready for Ageing?* (HL 2012–13, 140, 14 March 2013) 7.

²¹ *Ibid.*

²² Office for National Statistics, 'UK Population Projected to Reach 70 Million by Mid-2027' (October 2011): www.ons.gov.uk/ons/rel/npp/national-population-projections/2010-based-projections/sum-2010-based-national-population-projections.html; see also European Commission, *Active Ageing and Solidarity between Generations: A Statistical Portrait of the European Union 2012* (Luxembourg, Publications Office of the European Union, 2011) 27.

Population ageing will have consequences for many industries and government services, including housing, pensions, health and social care, and employment. The proportion of older workers is likely to increase substantially in coming years. Advancements in medical care and improved living conditions mean that individuals are living longer and can reasonably expect substantially more productive, healthy working years in their old age.²³ Further, inadequate pensions may compel older workers to continue in employment: according to 2012 figures, 10.7 million individuals in Great Britain are likely to have insufficient income in retirement.²⁴ This will be compounded by reforms to state pensions, which are gradually increasing the state pension age to 67 years of age by 2028.²⁵ Financial considerations will increasingly compel older workers to stay in employment. As a result, older workers are likely to become a significant feature of the UK labour market in coming years: it is projected that workers over 50 will constitute 31 per cent of the UK workforce in 2020, and that the number of workers aged over 65 will increase from 582,000 in 2005 to 775,000 in 2020, an increase of 33 per cent.²⁶

Despite the significant consequences of population ageing for labour law, government and society are still ‘woefully underprepared’ for demographic change following a ‘collective failure to address the implications’ of ageing.²⁷ Few laws specifically address population ageing, meaning few employers are considering the implications of ageing for their workforce, and even fewer are proactively responding to the needs of older workers. Existing laws have limited potential to effectively address and accommodate demographic change. Therefore, the Delphi method is a useful tool for developing new legal options to respond to the ageing workforce.

C. Existing Legal Responses to the Ageing Workforce

1. Doctrinal Measures

While older workers will constitute a significant proportion of the UK workforce in years to come, there are few UK laws that promote the employment of older workers or encourage employers to actively support an ageing workforce. The key legislative provision that supports older workers is the prohibition of age discrimination in the Equality Act 2010 (UK) (c 15) (‘the Act’),²⁸ which adopts Council

²³ European Commission, n 22, 18.

²⁴ Select Committee on Public Service and Demographic Change, *Ready for Ageing?* (HL 2012–13, 140, 14 March 2013) 7.

²⁵ HM Treasury and HM Parliament, *Autumn Statement 2011* (London, Stationery Office, 2011) 23.

²⁶ V Madouros, *Projections of the UK Labour Force, 2006–20*, Labour Market Trends (London, Office for National Statistics, January 2006) 20–21.

²⁷ Select Committee on Public Service and Demographic Change, n 24.

²⁸ Older workers may also benefit from other, general legislative provisions, like the right to request flexible working, occupational health and safety requirements and employment rights generally. However, age discrimination legislation is the only area of law specifically affecting older workers.

Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('the Framework Directive')²⁹ into UK law. The Act prohibits direct and indirect discrimination, harassment and victimisation in the workplace on the grounds of age, during recruitment, in setting the terms of employment, deciding to award promotions and provide training and in dismissal (s 39). However, less favourable treatment on the grounds of age is not discrimination if the treatment is shown to be 'a proportionate means of achieving a legitimate aim' (s 13(2)). This does not apply to any other protected characteristic. Indirect discrimination may also be justified using the same test (s 19(2)).

The Act includes a number of specific exceptions to the prohibition of age discrimination in employment, including for:

- Occupational requirements which are a proportionate means of achieving a legitimate aim (Sch 9, s 1(1));
- Service in the armed forces (Sch 9, s 4(3));
- Benefits based on length of service that:
 - relate to a period of service of up to five years duration; or
 - relate to a period of service exceeding five years duration and which the employer reasonably believes fulfil a business need (Sch 9, s 10);
- The national minimum wage (Sch 9, ss 11–12);
- Enhanced redundancy payments (Sch 9, s 13); and
- Contributions to personal pension schemes (by order of a Minister) (Sch 9, s 16).

The Act allows (but does not require) employers to take positive action that is a proportionate means of:

- Enabling or encouraging persons who share a protected characteristic to overcome or minimise disadvantage connected to that characteristic;
- Meeting the needs of persons who share a protected characteristic which are different from the needs of persons who do not share the characteristic; or
- Enabling or encouraging persons who share a protected characteristic to participate in an activity in which their participation is disproportionately low (s 158(1)–(2)).

Similarly, positive action may be taken in recruitment and promotion to address a disadvantage or disproportionately low participation (s 159). However, a person with a protected characteristic may only be treated more favourably if: they are as qualified as the other person; the employer or company does not have a policy of treating people who share the protected characteristic more favourably in recruitment or promotion; and the action is a proportionate means of overcoming

²⁹ OJ L 303/16.

or minimising the disadvantage, or promoting participation in the activity (s 159(3)–(4)).

While positive action is allowed under the Act, employers are unlikely to take advantage of the provisions, as positive action is seen as too risky and resource intensive to be beneficial, and may lead to a ‘potential minefield’ of legal action if employers ‘get it wrong’.³⁰ Rather than being helpful to employers, the sections are a ‘trap for the well intentioned’.³¹ The drafting of the sections makes them ‘too dangerous [for employers] to use safely’,³² limiting the possibility of positive action in the UK.

The Act also establishes a public sector equality duty, requiring public authorities or people exercising public functions to, in exercise of their functions, have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and conduct prohibited by the Act;
- Advance equality of opportunity between persons who share and do not share a protected characteristic, including by:
 - removing or minimising disadvantages suffered by persons who share a protected characteristic that are connected to that characteristic;
 - taking steps to meet the particular needs of persons who share a protected characteristic; and
 - encouraging persons who share a protected characteristic to participate in public life or activities in which their participation is disproportionately low; and
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it, including by tackling prejudice, and promoting understanding (s 149).

A review of the public sector equality duty was conducted in 2013 ‘to establish whether the Duty is operating as intended’.³³ The Steering Group concluded that it was too early to make a final judgement about the impact of the duty, as it was only introduced in April 2011, and the available evidence was inconclusive, particularly in relation to the associated costs and benefits of implementing the duty.³⁴ The Group recommended the government consider conducting a formal evaluation of the duty in 2016.

³⁰ Thomson Reuters, ‘Positive Action: Tie Breaks in the Recruitment Process’, *Prolegal*, 2 May 2012: www.prolegal.co.uk/legal-news/tie-breaks-in-the-recruitment-process.htm.

³¹ A Hoggarth and L Taft, ‘Legal Insight: Positive Discrimination—A Trap for the Well Intentioned?’ *HRZone*, 10 May 2012: www.hrzone.com/topic/recruitment/legal-insight-positive-discrimination-trap-well-intentioned/120274.

³² Kingsley Napley, ‘“Positive Action”—Will it Make Any Difference?’ 12 May 2011.

³³ HM Government, ‘Review of Public Sector Equality Duty’ (*GOV.UK*, no date) www.gov.uk/government/policy-advisory-groups/review-of-public-sector-equality-duty-steering-group.

³⁴ Government Equalities Office, *Review of the Public Sector Equality Duty by the Independent Steering Group* (London, Government Equalities Office, 6 September 2013) 11.

In sum, the Act provides less protection for age discrimination in employment than other forms of discrimination,³⁵ particularly as both direct and indirect age discrimination may be justified as a ‘proportionate means of achieving a legitimate aim’. This provides significant scope for employers to undermine the principle of equal treatment on the grounds of age. In the hierarchy of discriminatory grounds, age therefore ‘occup[ies] the lowest rung’.³⁶ Further, positive action to enable older workers to participate in employment is likely to be rare, and the public sector equality duty is significantly circumscribed.³⁷ Therefore, existing laws have limited potential to effectively address and accommodate demographic change.

2. Practical Implementation of UK Age Discrimination Law

Given the doctrinal limitations of the Act, it is unsurprising that it has had limited impact in practice.³⁸ Few employers are adopting proactive measures to support ageing workers, and very few are actively seeking to recruit older workers. The 2011 Workplace Employment Relations Study found only 3 per cent of employers surveyed had special procedures to encourage applications from older workers. This was down from 5 per cent in the 2004 survey. Further, while 78 per cent of employers had an equal opportunity policy in place that explicitly mentioned age, less than 10 per cent had processes in place to monitor promotions and pay rates for discrimination.³⁹ It appears that many employers are not well prepared for the growth in older workers, with most adopting a compliance-focussed approach to age discrimination laws.⁴⁰

Further, the law appears to be having limited success at improving employer attitudes towards older workers. The 2011 Special Eurobarometer on Active Ageing found that, in the last two years, 4.38 per cent of UK respondents had

³⁵ H Meenan, ‘Age Discrimination in the EU and the Framework’ in M Sargeant (ed), *The Law on Age Discrimination in the EU* (Alphen aan den Rijn, Kluwer Law International, 2008) 18; M Sargeant, ‘Age Discrimination’ in M Sargeant (ed), *The Law on Age Discrimination in the EU* (Alphen aan den Rijn, Kluwer Law International, 2008) 3, 5; M Sargeant, ‘The European Court of Justice and Age Discrimination’ [2011] *Journal of Business Law* 144, 146.

³⁶ C McGlynn, ‘EC Legislation Prohibiting Age Discrimination: “Towards a Europe for All Ages”?’ in A Dashwood et al (eds), *Cambridge Yearbook of European Legal Studies*, vol 3 (Oxford, Hart, 2000) 294; see further *R (Age UK) v Secretary of State for Business, Innovation and Skills* [2009] IRLR 1017 [20].

³⁷ S Fredman and S Spencer, *Delivering Equality: Towards an Outcome-Focused Positive Duty—Submission to the Cabinet Office Equality Review and to the Discrimination Law Review* (June 2006) 9; L Dickens, ‘The Road is Long: Thirty Years of Equality Legislation in Britain’ (2007) 45 *British Journal of Industrial Relations* 463, 473.

³⁸ This may also reflect the broader limitations of law in achieving social change: indeed, the link between law and social change is far from clear. See R Cotterrell, *The Sociology of Law: An Introduction* (London, Butterworths, 1984) 68.

³⁹ B van Wanrooy et al, *The 2011 Workplace Employment Relations Study: First Findings* (URN 13/1010, London, Department for Business, Innovation and Skills, January 2013) 34–35.

⁴⁰ This conclusion will be explored further in a subsequent publication.

been a victim of old age discrimination and 13.4 per cent had witnessed old age discrimination in the workplace or in seeking employment.⁴¹ Further, the majority of respondents saw the exclusion of older workers from training (71.9 per cent) and employers not viewing older workers positively (68.2 per cent) as important factors in individual decisions to retire.⁴² The practical efficacy of age discrimination laws therefore remains doubtful, particularly in effecting attitudinal change.

The Act's limited success at achieving practical change may reflect its dubious doctrinal and institutional foundations. The Act adopts a 'reflexive law' approach,⁴³ attempting to tailor regulation to particular contexts and integrate formal legal devices with self-regulation.⁴⁴ It provides significant scope for internal regulation by workplaces and few prescriptive 'command and control' regulations.⁴⁵ In implementing the Act, government departments have emphasised the creation of employer networks (such as the Age Action Alliance), the production of good practice guides and case studies, and holding forums to encourage discussion between organisations.⁴⁶ This reflects the strong focus on deliberation within and between organisations in reflexive regulation, including through the dissemination of best practice.⁴⁷

While reflexive regulation may increase law's 'regulatory potential',⁴⁸ it will only be effective where it provides legal incentives for internal organisational action and scrutiny,⁴⁹ mechanisms for effective deliberation and participatory decision-making (such as collective bargaining),⁵⁰ and an external body to back-up and enforce regulations where voluntary methods fail.⁵¹ While the Act adopts a reflexive law strategy, the UK equality framework lacks the institutional requirements for effective reflexive regulation in practice. In particular, there are few legal incentives for internal scrutiny and action in the private sector and limited information 'flows' regarding equality matters,⁵² the public sector equality duty is significantly

⁴¹ Eurobarometer, *Active Ageing* (Special Eurobarometer 378, Brussels, European Commission, January 2012) 33.

⁴² *Ibid.*, 49–50.

⁴³ See C McCrudden, 'Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review's Consultative Paper' (2007) 36 *Industrial Law Journal* 255.

⁴⁴ S Deakin, C McLaughlin, and D Chai, 'Gender Inequality and Reflexive Law: The Potential for Different Regulatory Mechanisms' in L Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford, Hart, 2012) 118.

⁴⁵ See McCrudden, n 43.

⁴⁶ See, eg DWP, *Opportunity Age: Meeting the Challenges of Ageing in the 21st Century* (London, Department for Work and Pensions, 2005) 21.

⁴⁷ McCrudden, n 43, 259–60; Deakin, McLaughlin and Chai, n 44, 119.

⁴⁸ G Teubner, *The European University Institute Press Series* (Zenon Bankowski (ed), A Bankowska and R Adler (trs), *Law as an Autopoietic System* Oxford, Blackwell, 1993) 97.

⁴⁹ B Hepple, 'Agency Enforcement of Workplace Equality' in L Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Oxford, Hart, 2012) 64–65.

⁵⁰ McCrudden, n 43, 260; Deakin, McLaughlin, and Chai, n 44, 120.

⁵¹ Hepple, n 49, 55.

⁵² See S Deakin and R Hobbs, 'False Dawn for CSR? Shifts in Regulatory Policy and the Response of the Corporate and Financial Sectors in Britain' (2007) 15 *Corporate Governance: An International Review* 68, 70.

circumscribed⁵³ and there is no duty to consult relevant interest groups in making equality decisions.⁵⁴ Barnard, Deakin and Hobbs have therefore argued that the UK lacks the basic institutional structures for effective reflexive law, particularly given the low levels of union representation in UK workplaces.⁵⁵

To achieve effective reflexive regulation in the UK and, thereby, enhance the efficacy of the Act, Hepple, Coussey and Choudhury recommend the imposition of positive duties on private sector employers to achieve employment equality or fair participation, in addition to the public sector equality duty.⁵⁶ Imposing a positive duty on employers, including on the ground of age, would encourage a more proactive and less compliance-focussed organisational response to the equality framework.⁵⁷ Further, it would shift the responsibility to organisations to identify and address unlawful discrimination, irrespective of whether an individual complaint has been received.⁵⁸

Imposing a duty on the private sector would probably generate significant consternation amongst employers and encounter substantial political resistance. The Act currently limits positive duties to public bodies, on the assumption it would be 'unfairly onerous' to apply them to the private sector.⁵⁹ However, the private sector has 'potential strategic importance' in addressing inequality given it employs the vast majority of the UK workforce.⁶⁰ Private and public sector equality duties 'harness the energies' of those in the best position to promote equality and achieve structural change.⁶¹ It is also potentially unfair and practically problematic to create a division between the public and private sectors.⁶² Therefore, the imposition of positive duties to achieve employment equality on private sector employers should be seriously considered.

It is also necessary to consider the practical content of any positive duty that might be placed on employers, and how it would be enforced. Hepple, Coussey and Choudhury propose the duty include obligations to:

- Conduct periodical reviews (once every three years) of employment practices to determine whether certain groups are enjoying fair participation in employment;

⁵³ Fredman and Spencer, n 37, 9; Dickens, n 37, 473.

⁵⁴ See further, B Hepple, M Coussey, and T Choudhury, *Equality: A New Framework—Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Oxford, Hart, 2000) 57–58; see also Hepple, n 49, 64–65.

⁵⁵ C Barnard, S Deakin, and R Hobbs, *Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time* (Working Paper 294, Cambridge, ESRC Centre for Business Research, December 2004) 23.

⁵⁶ Hepple, Coussey, and Choudhury, n 54, 59–65 and 69–72.

⁵⁷ L Dickens, 'Equality and Work-Life Balance: What's Happening at the Workplace' (2006) 35 *Industrial Law Journal* 445, 447; Fredman and Spencer, n 37, 6–7; Dickens, n 37, 474.

⁵⁸ Fredman and Spencer, n 87, 6–7.

⁵⁹ S Fredman, *Discrimination Law*, Calderon Law Series (Oxford, Oxford University Press, 2002) 178.

⁶⁰ Fredman and Spencer, n 37, 8; see also Dickens n 37.

⁶¹ Fredman, n 59, 176.

⁶² *Ibid*, 178.

- If certain groups are not enjoying fair participation in employment, draw up and implement an ‘employment equity plan’ in consultation with interest groups to address barriers to participation and make reasonable adjustments to secure fair participation; and
- Disclose the results of periodical reviews and equity plans in company reports, to employees and to employee representatives.⁶³

A failure to comply with these requirements could be used as evidence in proceedings for unlawful discrimination. Further, the Equality and Human Rights Commission could secure written undertakings or deliver notices directing employers to comply with the requirements and, if not complied with, apply to an Employment Tribunal for enforcement.

D. Using the Delphi Method to Examine Proposals for Reform

Positive duties to achieve employment equality could be a key reform for promoting the employment of older workers. However, there has been limited academic consideration of whether this would be practicable in the UK context. Instead, it appears that positive duties have been abandoned in recent academic commentary, on the assumption they would be seen as unacceptable by government, lobby groups and employer bodies. Therefore, to illustrate how the Delphi method could be used to investigate labour law policy options, this study examines the introduction of positive duties as one example of a contentious future labour law scenario.

1. Research Procedures

a. Sample Selection

In a previous research study,⁶⁴ qualitative expert interviews were conducted with 17 active participants in community affairs who had special knowledge regarding older workers.⁶⁵ The experts were purposively sampled, using a literature review, lists of individuals and organisations consulted during government reviews, media articles and online databases,⁶⁶ with further respondents being identified

⁶³ Hepple, Coussey, and Choudhury, n 54, 71; see also F McAndrew, *Workplace Equality: Turning Policy into Practice* (London, Equality and Diversity Forum, November 2010) 19–20.

⁶⁴ The results of which will be published elsewhere.

⁶⁵ M Meuser and U Nagel, ‘The Expert Interview and Changes in Knowledge Production’ in A Bogner et al (eds), *Interviewing Experts*, Research Methods (Basingstoke, Palgrave Macmillan, 2009) 24.

⁶⁶ R Stake, ‘Qualitative Case Studies’ in Y Lincoln and N Denzin (eds), *Strategies of Qualitative Inquiry*, 3rd edn (London, SAGE, 2008) 130.

via theoretical⁶⁷ and snowball sampling.⁶⁸ The experts represented government, trade unions, employer groups, lobby groups, the judiciary and academia. At the conclusion of the in-person expert interviews, these same experts were invited to participate in a Delphi survey.

As noted by Turoff,⁶⁹ 'A policy question is one for which there are no experts, only advocates and referees'. In this survey, the experts were participating in their roles as advocates and lobbyists, with strong and partisan views on the issues at hand. Therefore, it was foreseeable that this Delphi survey might not generate consensus. However, it could still clarify and articulate the experts' views on particular scenarios and issues.⁷⁰ Given the partisan nature of the responses, care was taken to ensure the expert group was as representative of different perspectives as possible.⁷¹

b. The Delphi Process

The policy Delphi method adopted in this study was a multistage process with two asynchronous rounds of online surveys. The process involved:

- Initial measurement of opinions (Round 1);
- Data analysis;
- Design of a subsequent questionnaire based on initial responses; and
- Second measurement of opinions (Round 2).⁷²

Between rounds, participants were provided with statistical group feedback about the beliefs of other participants to promote consensus.⁷³

The first survey consisted of eight policy 'options items' to elicit opinions on the desirability and feasibility of policy scenarios.⁷⁴ Drawing on the qualitative expert interviews, meaningful hypothetical scenarios were created which might represent the future of law and policy structures affecting older workers.⁷⁵ These scenarios acted as 'straw models', presenting different perspectives on how the employment of older workers might evolve, to promote deep discussion amongst participants.⁷⁶ Scenarios were drafted to comprise no more than 20 words and

⁶⁷ KM Eisenhardt, 'Building Theories from Case Study Research' in AM Huberman and M Miles (eds), *The Qualitative Researcher's Companion* (Thousand Oaks, Sage Publications, 2002) 13; JM Corbin and AL Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, 3rd edn (Thousand Oaks, Sage Publications, 2008) 117.

⁶⁸ T May, *Social Research: Issues, Methods and Process* (Buckingham, Open University Press, 1993) 100; L Webley, 'Qualitative Approaches to Empirical Legal Research' in P Cane and HM Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford, Oxford University Press, 2010) 934.

⁶⁹ M Turoff, 'The Design of a Policy Delphi' (1970) 2 *Technological Forecasting and Social Change* 149, 151.

⁷⁰ *Ibid.*, 153; Rauch, n 13, 163.

⁷¹ WN Dunn, *Public Policy Analysis: An Introduction*, 4th edn (Harlow, Prentice Hall, 2007) 181.

⁷² Rayens and Hahn, n 5.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Aichholzer, n 4, 262.

⁷⁶ Rotondi and Gustafson, n 6, 43; Ziglio, n 8, 20.

with sufficient specificity to enable their effective analysis.⁷⁷ Participants were also given the opportunity to suggest additional or different policy options during the first survey round.⁷⁸ As it is beyond the scope of this paper to report on all eight options items, this paper will present the results from one item:

Employers have a positive duty to achieve employment equality, including for older workers.

In the survey, participant experts were asked to identify scenarios that were likely to be important, desirable and feasible.⁷⁹ Definitions of these terms were provided to ensure respondents had a similar understanding of what the terms meant (see the Appendix).⁸⁰ Questions were assessed on a four-stage assessment scale (1 = very low or negative, 4 = very high or positive).⁸¹ No option was provided for participants to make a neutral response. This decision was made as neutral responses provide little information in survey analysis.⁸² Further, not providing a neutral option may force respondents to think about the issue to the point where they are able to adopt a non-neutral stance.⁸³ Participants were also asked to rate their confidence in their assessment of each scenario (1 = no confidence, 4 = high confidence). Self-rating is a meaningful way to identify expertise and can improve the accuracy of responses.⁸⁴ Participants were invited to make comments regarding their selection and/or suggest other scenarios⁸⁵ and/or suggest changes to the wording of existing scenarios.⁸⁶

The second survey included five elements:

1. 'Goal items' to evoke opinions about the desirability of particular policy goals and objectives.⁸⁷ These items were also intended to expose the assumptions underlying the experts' conflicting positions in the first round,⁸⁸
2. Re-worded scenarios from the first survey to clarify or further develop scenarios in response to participant comments. Changing the wording of a policy option is often necessary in a policy Delphi, and can positively impact upon the level of consensus achieved;⁸⁹

⁷⁷ HA Linstone and M Turoff, 'Evaluation—Introduction' in HA Linstone and M Turoff (eds), *The Delphi Method: Techniques and Applications* (Reading, Addison-Wesley, 1977) 232.

⁷⁸ Rayens and Hahn, n 5, 310.

⁷⁹ Ziglio, n 8, 19; Aichholzer, n 4, 263.

⁸⁰ Turoff, 'The Design of a Policy Delphi', n 69; Turoff, 'The Policy Delphi', n 9, 85.

⁸¹ Aichholzer, n 4, 263.

⁸² Turoff, 'The Policy Delphi', n 9, 90.

⁸³ *Ibid*; Rayens and Hahn, n 5.

⁸⁴ Linstone and Turoff, 'Evaluation—Introduction', n 77, 234.

⁸⁵ Aichholzer, n 4, 264.

⁸⁶ Turoff, 'The Policy Delphi', n 9, 93.

⁸⁷ Rayens and Hahn, n 5; Dunn, n 71, 183.

⁸⁸ Dunn, n 71, 182.

⁸⁹ Turoff, 'The Design of a Policy Delphi', n 69, 161.

3. Repetition of scenarios that led to disagreement in the first round, with the aim of allowing participants to revisit or reconsider their original opinions in light of the feedback provided;
4. New scenarios posed by respondents in the first survey round; and
5. New implementation scenarios, posing possible means of implementing scenarios that achieved a strong level of consensus in the first round.

Between the surveys, participants were provided with the median response for each question and a summary of comments made by other participants, to allow these responses to be taken into account in the second survey.⁹⁰ The surveys were pretested with five colleagues to identify confusing or ambiguous questions.⁹¹

In other reported Delphi studies, three survey rounds have been sufficient to attain stable responses from participants, with further rounds only antagonising participants with excessive repetition.⁹² In this study, consensus appeared to have been achieved on many issues following the second survey round, making a third survey unnecessary. This is consistent with previous studies, which have found that changes tend to be limited to the early rounds of a Delphi.⁹³ Further, as found in other studies, the motivation and commitment of participants declined during the second round of the Delphi,⁹⁴ making a third round impracticable.

The Delphi was conducted online using a Google Forms survey tool. Google Forms was selected as it offered a free, accessible, streamlined and user-friendly mechanism for conducting an online roundtable. This created challenges for experts from government departments, as the hosting website was blocked by some government servers. Where this occurred, in Round 1 experts were asked to complete a hard-copy version of the survey, with the researcher manually entering the responses into the online database. For Round 2, the survey was hosted on a server that mirrored the Google Forms website, allowing it to be accessed by all respondents.

The response rate for each round of the Delphi is included in Table 1 below. To encourage a higher response rate, the researcher met with most respondents in person as part of the expert interview process, to develop stronger relationships and commitment; provided respondents with an extended period of time in which they could answer the survey; encouraged experts to respond by sending out follow-up emails (up to two follow-up emails were sent for each round, as required); and emphasised the importance of individual respondents contributing given the need for diversity of opinion.

⁹⁰ Aichholzer, n 4, 267.

⁹¹ Tuross, 'The Policy Delphi', n 9, 93.

⁹² Linstone and Tuross, 'Evaluation—Introduction', n 77, 229.

⁹³ Aichholzer, n 4, 267.

⁹⁴ *Ibid.*

Table 1: Response rate for Delphi roundtable by survey round

Round	Number of participants	Response rate	Period of survey
1	13	76%	May–July 2013
2	8	62%	October 2013–January 2014

Table 1 hints at the difficulties encountered in maintaining participant enthusiasm throughout the Delphi process, both in the declining response rates and the period over which the survey was conducted. These issues are explored further below.

E. Results

1. Means of Analysis

Rayens and Hahn recommend two criteria for measuring the degree of consensus in a Delphi survey.⁹⁵ First, it is necessary to consider the inter-quartile range (IQD) of an item. On a four point Likert-type scale,⁹⁶ an IQD of more than 1.00 indicates a degree of disagreement.⁹⁷ However, the IQD is not sufficiently sensitive to distinguish between degrees of agreement when $IQD = 1.00$.⁹⁸ Therefore, the percentage of respondents who are generally positive about a scenario may be used as a secondary criterion of consensus.⁹⁹ Following Rayens and Hahn, this study regarded both: (1) scenarios having an IQD of more than 1.00; and (2) scenarios having an IQD of 1.00 and receiving positive responses from between 40 and 60 per cent of respondents as having a degree of disagreement worthy of further exploration in Round 2.¹⁰⁰

Prior to analysis, responses were adjusted to exclude respondents who self-identified as having ‘no confidence’ in their response to ensure a minimal level of knowledge about each area.¹⁰¹ Following this adjustment, the answers of two respondents were excluded for two scenarios in Round 1 (four answers in total); and the answers of one respondent were excluded for five scenarios in Round 2 (five answers in total).

⁹⁵ Rayens and Hahn, n 5.

⁹⁶ That is, a four-stage assessment scale (such as: 1 = very low or negative, 4 = very high or positive).

⁹⁷ Rayens and Hahn, n 5, 312.

⁹⁸ See further *ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, 312–13.

¹⁰¹ Aichholzer, n 4, 267.

2. Round 1 Results

The results from Round 1 are included in Table 2 below. The table provides: the number and per cent of experts who were generally positive about the scenario; the inter-quartile range of the responses; and a summary of respondent comments. Both original and confidence-adjusted results are provided

Table 2: Round 1 results—positive duty scenario

Scenario	Desirable			Feasible			Important			Confident		
	%	n	IQD	%	n	IQD	%	n	IQD	%	n	IQD
Employers have a positive duty to achieve employment equality, including for older workers (n = 12)	84	10	1	84	10	1	75	9	1.25	92	11	1
<i>Confidence adjusted</i> (n = 11)	82	9	1	82	9	1	73	8	1.5			
<p><i>Summary of comments:</i> This duty could be modelled on the public sector equality duty. Positive discrimination should be a last resort, but may be useful in some circumstances. The question is unclear. It is necessary to define employment equality. Does this mean a statutory duty? The duty will require enforcement to be effective. Unless it is directed to tackling a specific issue it is likely to be pointless. The government is unlikely to adopt this given it will increase the burden on business. It is easier to argue that measures should be age-neutral. This is already in place under the current legislation.</p>												

While a significant majority regarded the scenario as desirable and feasible, the IQD for both original and confidence-adjusted results indicated a degree of disagreement over whether the scenario was important. The comments also demonstrated significant confusion regarding the scenario itself, what it might entail in practice, how it would be enforced, and whether it was already in place under the Act. Given this confusion and concern, it was surprising that the vast majority of respondents regarded the scenario as feasible.

3. Round 2 Results

The scenario was redrafted for Round 2 to address the confusion evident in Round 1. Respondents were again provided with a summary of the Round 1 comments in the survey itself, and were invited to reconsider the scenario with an additional clarification:

Amended Scenario 7: A statutory duty is imposed on all employers (public and private) to achieve employment equality.

The content of the duty might include:

- Conducting periodical reviews (eg once every three years) of employment practices to determine whether certain groups are experiencing fair participation in employment;
- If certain groups are not experiencing fair participation in employment, drawing up and implementing an ‘employment equity plan’ in consultation with interest groups to address barriers to participation and make reasonable adjustments to secure fair participation; and
- Disclosing the results of periodical reviews and equity plans in company reports, to employees and to employee representatives.

The results from Round 2 are included in Table 3.

Table 3: Round 2 results—amended positive duty scenario

Scenario	Desirable			Feasible			Important			Confident		
	%	n	IQD	%	n	IQD	%	n	IQD	%	n	IQD
A statutory duty is imposed on all employers (public and private) to achieve employment equality.	87.5	7	1	37.5	3	1.25	75	6	1.25	100	8	.25
<i>Summary of comments:</i> Public authorities already need to give consideration to this because of the statutory public sector equality duty. Existing provisions affecting the private sector (including those that allow but do not require positive action) are unlikely to be strengthened, particularly under the current government.												

Having clarified the scenario, the results demonstrated increased disagreement between the respondents. The majority of respondents no longer regarded the scenario as feasible, though this generated significant divergence of opinion.

The respondents were also divided on whether the scenario was important. The comments indicate that respondents doubted the potential to achieve this reform under the current government, particularly in the context of a deregulatory governmental agenda.

F. Analysis

1. Evaluation of the Positive Duty

The results of the Delphi survey indicate that the introduction of a positive duty on employers to achieve employment equality still has theoretical merit in the UK context. A vast majority of Round 2 respondents (87.5 per cent) thought such a duty would be desirable. However, the respondents were divided on whether this change was important. This may indicate that a positive duty is not seen as a priority for governmental reform or, alternatively, that other reforms should take precedence.¹⁰²

Respondents also disagreed about whether the introduction of a positive duty was feasible, particularly given government austerity measures and the ‘red tape challenge’. The Coalition Government has ‘set a clear aim’ to reduce ‘the overall burden of regulation’¹⁰³ and eliminate ‘unnecessary burdens on business’.¹⁰⁴ The government’s ‘default presumption [is] that burdensome regulations’ must go, and Ministers must proactively make a case for retaining ‘burdensome’ rules.¹⁰⁵ The government has a ‘vision’ of a labour market ‘with minimal intervention by the Government’.¹⁰⁶ In this context, the respondents’ concern about feasibility is wholly reasonable: it is unlikely that new regulations will be imposed on business in this climate.¹⁰⁷

The positive duty generated significantly different responses in the two rounds. Following its rewording and clarification, the scenario received a markedly less

¹⁰² Reforms that achieved consensus regarding their importance in the survey included workplaces adopting an age management approach; making easily accessible information and guidance available to employers; effective leadership; and the extension of the right to request flexible working arrangements. These reforms will be discussed in a later publication.

¹⁰³ Cabinet Office, ‘About Red Tape Challenge’ (Red Tape Challenge, no date) www.redtapechallenge.cabinetoffice.gov.uk/about/.

¹⁰⁴ Department for Business, Innovation and Skills, *Flexible, Effective, Fair: Promoting Economic Growth through a Strong and Efficient Labour Market* (URN 11/1308, London, Department for Business, Innovation and Skills, October 2011) 7.

¹⁰⁵ Cabinet Office, n 103.

¹⁰⁶ Department for Business, Innovation and Skills, n 104, 4.

¹⁰⁷ That said, the right to request flexible working was extended to all UK employees in 2014, extending regulation on business. However, the reforms also removed the statutory procedure for considering such requests. Therefore, while the reforms extended the burden on business, it was simultaneously ‘cutting red tape’.

positive reception. The surprisingly positive response in Round 1 may therefore be attributable to a lack of clarity or inadequate explanation of the scenario, or to conflicting interpretations of the scenario. Confusion occurred despite the survey being extensively pre-tested and piloted. This reflects a fundamental challenge of the Delphi method: while the literature suggests limiting scenarios to 20 words, and framing scenarios broadly to allow for discussion, this may lead to misunderstanding or confusion, both between the researcher and the respondents and between different respondents. This will affect the veracity of respondents' assessments and reduce the validity of the exercise. However, generating prescriptive future scenarios, or providing detail about how a scenario might be implemented, defeats the purpose of the Delphi discussion. This remains a fundamental challenge of the Delphi method.

2. Utility of the Delphi Method at Achieving Consensus

Substantial disagreement remained at the end of Round 2 for this scenario. Ideally, a third survey would have been conducted to delve further into the lack of consensus. However, the motivation and commitment of participants appeared to decline during the second round of the Delphi,¹⁰⁸ making a third round impracticable. This is not an uncommon experience with Delphi surveys: respondents are busy and have other priorities. It is difficult to encourage respondents to participate in repeated rounds of a survey, particularly when they have already completed an in-person expert interview. While a number of strategies from the literature were adopted to encourage respondents to participate in this study (as discussed above), the Delphi method remains a very demanding experience for participants. Where a study involves senior officials or individuals in demanding roles, the Delphi method is likely to experience significant practical limitations, and will be frustrating and time-consuming to implement.

Despite these practical limitations, the Delphi method appears to be a very effective tool for achieving consensus. Given the positive duty scenario was re-worded and clarified between Rounds 1 and 2 of the survey, it is impossible to assess the utility of the Delphi method at achieving consensus on this particular question. However, the effectiveness of the method is evident from other scenarios in the survey. Across the whole survey, three of the eight scenarios achieved consensus in Round 1, a further three scenarios achieved consensus in Round 2, and two scenarios (including the positive duty) did not achieve consensus over the two rounds. On the face of it, the Delphi process was highly successful at achieving consensus.

It is possible that agreement was only reached because of a survival effect: two representatives of employer associations failed to participate in Round 2,

¹⁰⁸ This is visible in the limited written comments submitted in the survey and the declining participation rate.

potentially skewing the results. However, closer analysis of respondent behaviour over the two rounds shows that the survivor effect does not account for the consensus achieved. Table 4 below presents further analysis of the three scenarios where agreement was reached in Round 2 of the survey. A significant proportion of respondents changed their responses between Rounds 1 and 2, implying that the survey feedback may have moderated conflicting perspectives. The Delphi therefore appears to have resolved or reduced the respondents' disagreement across these three scenarios, supporting its efficacy as a consensus-building exercise.

Table 4: Change in responses between Round 1 and Round 2 where consensus was achieved

Question	Number of changed responses	Average change (absolute values)	% change
Work ability n = 8	5	1.2	62.5
Flexible working n = 8	3	1.3	37.5
Consultation n = 8	4	1	50

G. Using the Delphi Method in Labour Law Research

This study demonstrates the significant practical challenges in using the Delphi method to advance labour law research: the process can be time-consuming and demanding; maintaining response rates and participant enthusiasm is a constant challenge; scenarios may be misinterpreted or lead to confusion; and administering an online survey requires a level of technical expertise. That said, the method remains an excellent tool for exploring solutions in policy areas with high levels of uncertainty and divided opinion. Therefore, it is particularly well suited for developing long-term solutions and hypothetical scenarios for the advancement of labour law. As labour law continues to be a contentious area of government policy, the Delphi method provides new opportunities to constructively consider and generate consensus around policy options. While positive reform may be difficult in the context of a deregulatory governmental agenda, the Delphi method could also be a key means of assessing the impact of deregulation and austerity measures in employment.

While the Delphi method has significant potential to develop labour law, it is likely to raise additional challenges when used with labour *lawyers* as respondents. Lawyers are 'professional pessimists', expected to consider and plan for worst-case

scenarios.¹⁰⁹ In creating something new, lawyers become 'mired in contemplating and planning for every possible mishap that might occur'.¹¹⁰ While pessimism is helpful for the legal profession, it limits the potential for broad, unburdened thinking about future scenarios. Instead, lawyers consider the limitations and potential hazards of scenarios, and fail to distinguish the theoretical merit of an idea from its practical implementation. Policymakers or scientists may therefore be more comfortable participating in a Delphi study than lawyers.

The Delphi method may, therefore, need to be adapted to be used in labour law research. In the current study, respondents were reluctant to evaluate the *idea* of the positive duty without details of how it would be implemented, enforced and defined. This raises two options for researchers: first, this detail could be provided in the scenarios, creating a 'straw man' model for respondents to critique. However, this may lead to respondents becoming trapped in detail and neglecting to evaluate the broader merits of the scenario or idea. Second, respondents could be provided with additional background material regarding the nature and objectives of the Delphi process to contextualise their responses. While this material was already provided in this survey, it may be necessary to particularly emphasise that the scenarios are posited to generate argument and, rather than being fixed in stone, are merely a starting point for the development of solutions. It is doubtful whether this clarification would have affected the respondents' behaviour or responses in this survey.

H. Conclusion

This paper demonstrates the significant potential of the Delphi method for developing consultative and collaborative solutions to long-term labour law issues. As a result, the Delphi process is a worthy adjunct to traditional legal doctrinal methods. At the same time, the Delphi method poses a number of practical challenges in its implementation, particularly when drawing on lawyers as respondents. It may be that, over time, labour lawyers will become more accustomed to the demands of the Delphi method, just as they are with quantitative surveys. For this to occur, there will need to be a critical mass of labour law Delphi studies, which is likely to take some time. That said, given the significant potential of the Delphi method in contentious policy areas, this would be a very beneficial development.

¹⁰⁹ C O'Grady, 'Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate' (2006) 30 *Law and Psychology Review* 23, 23; see also MEP Seligman, PR Verkuil, and TH Kang, 'Why Lawyers are Unhappy' (2005) 10 *Deakin Law Review* 49, 56.

¹¹⁰ O'Grady, *ibid*, 24.

Appendix: Definition of Terms

For this survey, ‘important’, ‘desirable’, ‘feasible’, and ‘confident’ were defined as follows:¹¹¹

Desirability

- Very desirable: will have a positive effect and little or no negative effect; extremely beneficial.
- Desirable: will have a positive effect and little or no negative effect; beneficial.
- Undesirable: will have a negative effect; harmful.
- Very undesirable: will have a major negative impact; extremely harmful.

Feasibility (Practicality)

- Definitely feasible: no hindrance to implementation; no research and development required; no political roadblocks; acceptable to the public and all other stakeholders.
- Possibly feasible: some indication this is implementable; some research and development still required; further consideration or preparation to be given to political or public reaction.
- Possibly unfeasible: some indication this is unworkable; significant unanswered questions.
- Definitely unfeasible: all indications are negative; unworkable; cannot be implemented.

Importance (Priority/Relevance)

- Very important: a most relevant point; first-order priority; has direct bearing on major issues; must be resolved, dealt with, or treated.
- Important: is relevant to the issue; second-order priority; significant impact but not until other items are treated; does not have to be fully resolved.
- Slightly important: insignificantly relevant; third-order priority; has little importance; not a determining factor to major issues.
- Unimportant: no priority; no relevance; no measurable effect; should be dropped as an item to consider.

¹¹¹ These definitions are adapted from Ziglio, n 8, 32–33, and Turoff, n 9, 91–92.

Confidence in Your Assessment of this Scenario

- High confidence: low risk of being wrong.
- Moderate confidence: some risk of being wrong.
- Low confidence: substantial risk of being wrong.
- No confidence: great risk of being wrong.