

**Abstract**

The Immigration Act 2016 introduced a stream of provisions that tackle “illegal” working in the UK, yet labour market insecurity means that precarious employment is well known and rife in many low-income sectors, including agriculture, hospitality, catering and construction. It will be suggested that the focus on “illegal” workers rather than tackling an insecure labour market has in fact left EU citizens with the right to work (and in some instances UK citizens), even more vulnerable not only to precarious working and living conditions but also to exploitation amounting trafficking in human beings.

This paper will examine the implementation of the new immigration provisions against the existing legislative framework that is also applicable to securing the fundamental rights of migrant workers in precarious employment.<sup>2</sup> In particular, the paper will consider i) the role of the new Director of Labour Market Enforcement and ii) the significance of establishing their statutory mandate in an immigration context, when labour law enforcement and policy measures should be developed with a clear firewall between labour inspection and immigration control.

Secondly, the welfare of migrant workers will be considered from an economic perspective, by examining the current channels for securing access to justice for loss of earnings and the enforcement of the minimum wage. This paper will consider the contradictory provisions that do not act in the interest of migrant workers, such as the seizure of earnings as criminal proceeds. When seeking to secure the economic welfare of migrant workers, this paper will ask: to what extent could counter-trafficking measures that require access to compensation for trafficked persons be applied to labour market non-compliance?

Finally, the paper will outline the measures that will ensure that precarity is reduced when EU citizens access the UK labour market by securing their right to non-exploitative work.

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<sup>2</sup> Modern Slavery Act 2015.

## Introduction

The Immigration Act 2016 introduced a stream of provisions that tackle “illegal” working in the UK, with the ultimate aim “to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom. The intention is that without access to work, illegal migrants will depart voluntarily, but where they do not, the Bill contains other measures to support enforced removals.”<sup>3</sup> Whilst the Act is framed around immigration enforcement, it has significant implications for another issue: labour market enforcement. It will be suggested that the focus on “illegal” workers rather than tackling labour market insecurity has in fact left EU citizens with the right to work (and in some instances UK citizens),<sup>4</sup> even more vulnerable not only to precarious working and living conditions but also to trafficking in human beings for the purposes of exploitations (section 1).

Labour market insecurity is an issue for all workers in the UK (not just migrant workers) with approximately 3.2 million people facing job insecurity resulting from a proliferation of non-standard forms of employment.<sup>6</sup> Recent research also indicates that the number of persons living in the UK under the Minimum Income Standard (MIS) now stands at 19 million people who are considered to be just managing as a result of unstable employment, limited opportunities and constrained choices. As such, “the increased risk of being below MIS has been driven principally by the increased chance that someone within each of these employment categories has low income. Even those with fulltime jobs are facing higher rates of low income than previously.”<sup>7</sup>

Section 2 will examine the implementation of the new immigration provisions against the existing legislative framework that seeks to secure the fundamental rights of migrant workers in precarious employment.<sup>8</sup> In particular, the paper will consider i) the role of the new Director of Labour Market Enforcement and ii) the significance of establishing the Director’s statutory mandate in an immigration context, when labour law enforcement and policy measures should be developed with a clear firewall between labour inspection and immigration control.<sup>9</sup>

Section 3 will consider the welfare of migrant workers from an economic perspective, by examining the current channels for securing access to justice for loss of earnings and the enforcement of the minimum wage. This paper will consider the contradictory provisions that do not act in the interest of migrant workers, such as the seizure of earnings as criminal proceeds.<sup>10</sup> When seeking to secure the economic welfare of migrant workers, this paper will ask: to what extent could counter-trafficking measures that require access to compensation for trafficked persons be applied to labour market non-compliance?

Finally, Section 4 will outline the measures that will ensure that precarity is reduced when EU citizens access the UK labour market by securing their right to non-exploitative work<sup>11</sup> through increased awareness raising of labour rights.

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<sup>3</sup> Immigration Bill explanatory notes, as introduced in the House of Commons on 17 September 2015 (Bill 74).

<sup>4</sup> Eurostat, *Trafficking in Human Beings*, 2015 Edition, p. 11.

<sup>5</sup> Crown Prosecution Service, *Two jailed for exploitation and fraud*, 23/01/2017, available at:

[http://www.cps.gov.uk/news/latest\\_news/two\\_jailed\\_for\\_exploitation\\_and\\_fraud/](http://www.cps.gov.uk/news/latest_news/two_jailed_for_exploitation_and_fraud/) [last accessed 15 February 2017].

<sup>6</sup> Trade Union Congress, *Living on the Edge: The rise of job insecurity in modern Britain*, December 2016, p. 15, available at:

<https://www.tuc.org.uk/sites/default/files/Living%20on%20the%20Edge%202016.pdf> [last accessed 15 February 2017].

<sup>7</sup> Joseph Rowntree Foundation, *Households below a Minimum Income Standard: 2008/09–2014/15* by Matt Padley, Donald Hirsch and Laura Valadez (15 February 2017), p. 2 & p. 43, available at: <https://www.jrf.org.uk/report/households-below-minimum-income-standard-200809-201415> [last accessed 17 February 2017].

<sup>8</sup> Modern Slavery Act 2015.

<sup>9</sup> PRO-ACT, *Policy Paper, Improving the identification and support of victims of trafficking for labour exploitation in the EU*, p. 1.

<sup>10</sup> Section 34, *Immigration Act 2016*.

<sup>11</sup> Section 34, *Immigration Act 2016*.

<sup>11</sup> Mantouvalou, V., ‘The Right to Non-Exploitative Work’, in *The Right to Work: Legal and Philosophical Perspectives*, Mantouvalou (ed), Hart Publishing, 39-60.

## 1. Precarious employment in the UK

The vulnerability of EU citizens with the right to work in the UK (and in some instances UK citizens), is increasingly being recognised.<sup>12</sup> Such vulnerability is twofold, and does not only refer to precarious working and living conditions but also, in the most extreme circumstances, to trafficking in human beings for the purposes of labour exploitation.<sup>13</sup> This section will first consider the scale of labour market insecurity in the UK and then continue the discussion with a focus on the extent to which precarious employment leads to exploitation.

### 1.1 Labour market insecurity

As stated in the introduction, the current UK labour market fosters insecurity and precarity as a result of the proliferation of non-standard work practices, as well as the limitations faced by many individuals who are constrained by low income. The precariousness of the current labour market environment, particularly in low-income sectors, can be illustrated from a number of examples whereby the right to decent work is put into question. In particular, the increased use of zero-hour contracts is being subject to close scrutiny, for instance, the largest proportion of “zero-hours contracts” are in the accommodation and food industry (1 in 4 persons in employment on a “zero-hours contract” or 13% of people employed in this industry on a “zero-hours contract”).<sup>14</sup> Two low-income economic sectors that are known for the increased risk of labour exploitation.

One particular area of concern arose following significant media coverage and political engagement of the working practices of Sports Direct, the largest sporting retailer in the UK. An independent enquiry was launched to determine the scale of insecurity and non-compliance with worker’s rights based on the terms and conditions of employment (such as disproportionate use of agency workers, emphasis on zero-hour contracts, non-payment of national minimum wage, unreasonable deductions of wages) and non-compliance with health and safety standards.<sup>15</sup> In addition to the focus on the working practices of Sports Direct, two Polish nationals were convicted of conspiracy to arrange travel with a view to exploitation and conspiracy to commit fraud by false representation after they recruited, transferred, housed and exploited Polish workers. The workers were given jobs in the Sports Direct warehouse by employment agencies, and their exploiters retained their travel documents, made deductions from their wages and made threats of violence.<sup>16</sup> This example demonstrates the whole spectrum of potential types of exploitation that may emerge from employment practices that foster precarious terms and conditions.

Another area of concern that has been the subject of scrutiny is the workplace security of individuals who, as part of gig economy business model, are considered to be self-employed. The model is premised on companies developing online platforms such as mobile applications to provide customers with a service. The firms take commission from the earnings of their couriers but claim not to have any direct employer - employee relationship. However, in October 2016, the Employment Tribunal ruled

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<sup>12</sup> Eurostat, Trafficking in Human Beings, 2015 Edition, p. 11.

<sup>13</sup> Letter to Frank Field on support for European victims of slavery, 4 July 2016, available at: <http://www.antislaverycommissioner.co.uk/news-insights/letter-to-frank-field-on-support-for-european-victims-of-slavery/> [last accessed 16 February 2017]; Independent Chief Inspector of Borders and Immigration, An Inspection of Border Force’s Identification and Treatment of Potential Victims of Modern Slavery July to October 2016, (2 February 2017)p. 19, available at: <http://icinspector.independent.gov.uk/wp-content/uploads/2017/02/Potential-Victims-of-Modern-Slavery-Inspection-report.pdf> [last accessed 16 February 2017].

Trafficking in Human Beings is defined in Article 2 of the EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. It is to be noted that the transposition of the Directive and the inclusion of the offence of human trafficking for exploitation in to domestic criminal law is dealt with to varying degrees in three pieces of legislation in the UK: Modern Slavery Act 2015 (England and Wales); Human Trafficking and Exploitation (Scotland) Act 2015 and Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. Thus there is no one single understanding of the offence in the UK.

<sup>14</sup> Office of National Statistics, Contracts that do not guarantee a minimum number of hours: September 2016, 8 September 2016, p.6, available at: <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthatdonotguaranteeaminimumnumberofhours/september2016> [last accessed 16 February 2017]

<sup>15</sup> Business, Energy and Industrial Strategy Committee, Working practices at Sports Direct inquiry, [https://www.publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf?utm\\_source=219&utm\\_medium=module&utm\\_campaign=modulereports](https://www.publications.parliament.uk/pa/cm201617/cmselect/cmbis/219/219.pdf?utm_source=219&utm_medium=module&utm_campaign=modulereports) [last accessed 15 February 2017].

<sup>16</sup> Crown Prosecution Service, Two jailed for exploitation and fraud, 23/01/2017, available at: [http://www.cps.gov.uk/news/latest\\_news/two\\_jailed\\_for\\_exploitation\\_and\\_fraud/](http://www.cps.gov.uk/news/latest_news/two_jailed_for_exploitation_and_fraud/) [last accessed 15 February 2017].

that the claims of one of these companies (Uber) were not legitimate, and that the model was premised upon bogus self-employment - thus leading to recognition of the claimants being employed as workers according to s230(3)9b) Employment Act 1996 and entitlement to the national minimum wage in accordance with Regulations 44, 45, & 57 of the National Minimum Wage Regulation 2015.<sup>17</sup> The Tribunal held that in fact, “any driver who has (a) the app switched on, (b) is within the territory in which he is authorized to work, and (c) is able and willing to accept assignments, is, for as long as those conditions are satisfied, working for Uber under a ‘worker’ contract.”<sup>18</sup> As a result of the widespread impact of these concerns and taking into account the Uber example - 460,000 workers could be falsely classified as self-employed in the UK.<sup>19</sup>

Governmental department have recently initiateid a number of concrete that will i) investigate the employment practices in the UK<sup>20</sup> and ii) establish a new HMRC Employment Status and Intermediaries Unit.<sup>21</sup> Hopefully these initiatives will assist in enforcing labour rights by eliminating aspects of the labour market that permit gangmasters, rogue employers and businesses to easily taking advantage of the precarity and instability faced by so many. Ultimately, by lowering the threshold of decent work to this extent, precarity in the labour market becomes the “norm”.<sup>22</sup>

## 1.2 Precarity amounting to exploitation

As stated at the beginning of this section, the most recent statistics demonstrate that the majority of workers who have been identified in exploitative working conditions in the EU are in fact EU citizens, and entitled to certain employment rights.<sup>23</sup> From 2012-2015, 65% of registered victims of human trafficking (for both labour and sexual exploitation) came from EU Member States, with the top five countries of citizenship being Romania, Bulgaria, the Netherlands, Hungary and Poland.<sup>24</sup> In the UK, the official National Referral Mechanism statistics for 2015 show that a total of 631 referrals of Romanian, Polish, Slovakian and UK nationals feature in the top 10 of referrals according to country of origin (with similar statistics for 2016).<sup>25</sup>

Taking this into account, there are a number of known factors that increase the vulnerability of workers to being subjected to indecent living and working conditions, even where they are entitled to work and are not in an irregular migrant situation:

- Social isolation and dependence upon employer for accommodation and transport exacerbated by lack of language skills;
- Willingness to accept poor working conditions based on poor socio-economic background and poor economic conditions in country of origin;

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<sup>17</sup> Mr Y Aslam, Mr J Farrar and Others v Uber Employment Tribunal judgment 28 October 2016, Case Nos: 2202551/2015 & Others; Mr Y Aslam, Mr J Farrar and Others v Uber Employment Tribunal Reasons (28 October 2016), Case Nos: 2202550/2015 & Others, available at: <https://www.judiciary.gov.uk/judgments/mr-y-aslam-mr-j-farrar-and-others-v-uber/> [last accessed 17 February 2017].

<sup>18</sup> Ibid., para. 86.

<sup>19</sup> Citizens Advice Bureau, Neither one thing nor the other: how reducing bogus self-employment could benefit workers, business and the Exchequer, August 2015, p. 12, available at: <https://www.citizensadvice.org.uk/Global/CitizensAdvice/Work%20Publications/Neither%20one%20thing%20nor%20the%20other.pdf> [last accessed 17 February 2017].

<sup>20</sup> Future world of work and rights of workers inquiry launched, 20 October 2016, available at: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-energy-industrial-strategy/news-parliament-2015/the-future-world-of-work-and-rights-of-workers-launch-16-17/> [last accessed 17 February 2017]; The Independent Review of Employment Practices in the Modern Economy, 30 October 2016, available at: <https://www.gov.uk/government/groups/employment-practices-in-the-modern-economy> [last accessed 17 February 2017].

<sup>21</sup> Frank Field MP, May Government acts to protect the vulnerable human underbelly of Britain’s labour market, 20 October 2016, available at: <http://www.frankfield.co.uk/latest-news/press-releases/news.aspx?p=1021353> [last accessed 17 February 2017]; Frank Field MP, Letter to Frank Field MP, from Financial Secretary to the Treasury October 2016, available at: <http://www.frankfield.co.uk/upload/docs/Jane%20Ellison%20MP%20reply%20regarding%20self-employment%2013.10.16.pdf> [last accessed 17 February 2017].

<sup>22</sup> Robert Goodin, Exploiting a situation and exploiting a person, in Reeves, S (ed) Modern Theories of Exploitation (1987, Sage Publications), p. 184.

<sup>23</sup> Article 21, Treaty of Lisbon, 2009.

<sup>24</sup> Eurostat, Trafficking in Human Beings, 2015 Edition, p. 11 & p. 34.

<sup>25</sup> National Crime Agency, National Referral Mechanism Statistics – End of Year Summary 2015, 12 February 2016, p. 5, available at: <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2015-nrm-statistics/676-national-referral-mechanism-statistics-end-of-year-summary-2015> [last accessed 17 February 2017].

- Lack of monitoring and workplace inspection.<sup>26</sup>

The resulting impact means that individuals are very often completely unaware of employment rights, such as the provision of a written contract, entitlement to National Minimum Wage and statutory annual leave. In addition, unscrupulous employers do not abide by health and safety regulations, leading to unsafe working conditions.

Furthermore, by framing provisions under immigration legislation fails to recognise the heightened vulnerability of migrant workers to labour exploitation and the need to strengthen the application of a labour market approach. In particular, the focus on immigration over and above labour market enforcement activity creates a hostile environment, which in fact facilitates the occurrence of labour exploitation in the UK. Indeed, the focus on immigration is also problematic in the sense that, one of the most significant, and yet “least understood features of forced labour in the UK is that most suspected victims have the right to work [as EU nationals]. Yet the stigma migrants increasingly face in the UK often means that people believe their migration status is more precarious than it is. Threats to report migrants to immigration authorities are used by traffickers to control victims and to silence those who complain.”<sup>27</sup>

Taking into account the current scope and scale of precarious employment practices in the UK, the next section will consider the impact of the Immigration Act 2016. In particular, focus will be placed on the extent to which labour market enforcement is strengthened and the potential consequences of framing this issue within an immigration context.

## **2. The Immigration Act 2016: a firewall between immigration & labour market enforcement?**

The purpose of the Immigration Act 2016 is “to tackle illegal immigration by making it harder to live and work illegally in the United Kingdom. The intention is that without access to work, illegal migrants will depart voluntarily, but where they do not, the Bill contains other measures to support enforced removals.”<sup>28</sup> Whilst the Act is framed around immigration enforcement, it has significant implications for another issue: labour market enforcement. When it comes to labour market enforcement, the stated aim of the Immigration Act 2016 was to reduce exploitation and protect vulnerable migrant workers from rogue employers through legislation that “improve[s] the effectiveness of the enforcement of certain employment rights to prevent non-compliance and the exploitation of vulnerable workers, via an intelligence-led, targeted approach [and] give[s] labour market enforcement bodies new tools to tackle rogue businesses prepared to exploit their workers.”<sup>29</sup>

The dual purpose of the legislation raises the question as to the positioning and implementation of the new labour market enforcement provisions under the Immigration Act 2016 alongside the existing domestic and international legislative framework that contains measures aimed at securing the fundamental rights of migrant workers in precarious employment that may amount to exploitation.<sup>30</sup>

For instance, just 12 months prior to the implementation of the immigration provisions outlined above, the Government hailed new modern slavery legislation<sup>31</sup> as an indication of the UK’s position as a global leader in the fight against contemporary forms of labour exploitation.<sup>32</sup> In addition, the protection of

<sup>26</sup> Weatherburn A., & Toft, A., 'Managing the Risks of Being a Victim of Severe Labour Exploitation: Findings from a Research Project Exploring the Views of Experts in the UK' (2016) 45 (2) Industrial Law Journal 257-262, p. 258-259.

<sup>27</sup> Robinson, C., (2015) “The UK’s new immigration bill creates perfect conditions for slavery to thrive”, The Guardian, <http://www.theguardian.com/global-development/2015/aug/28/slavery-ukimmigration-act-2014-hostile-environment-undocumented-migrants-focus-on-labour-exploitation-flex> (accessed 15 November 2015).

<sup>28</sup> Immigration Bill [2015-2016] explanatory notes, as introduced in the House of Commons on 17 September 2015 (Bill 74).

<sup>29</sup> Home Office, Immigration Act 2016 Factsheet – Labour market enforcement (Sections 1-33) (July 2016), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537203/Immigration\\_Act- Part\\_1\\_-\\_Labour\\_Market\\_Enforcement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537203/Immigration_Act- Part_1_-_Labour_Market_Enforcement.pdf) [last accessed 15 February 2017]

<sup>30</sup> Modern Slavery Act 2015; EU Directive 2011/36/EU, ILO Protocol on Forced Labour 2014, Goal 8.7, UN Sustainable Development Goals 2015.

<sup>31</sup> Modern Slavery Act 2015 (England and Wales), Human Trafficking and Exploitation (Scotland) Act 2015, Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

<sup>32</sup> Home Secretary speech on modern slavery, Home Secretary speech, delivered 4 December 2013 at Thomson Reuters Conference; Home Office, News story, Modern slavery white paper published, 16 December 2013,

labour rights of all workers (regardless of migration status) was reasserted by the UK when demonstrating its commitment to international law by being the first State to ratify and enforce the ILO 2014 Forced Labour Protocol and Recommendation.<sup>33</sup> Significantly, the ILO Forced Labour Protocol reiterates the importance of ensuring that “the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy.”<sup>34</sup>

Taking into account these recent legislative developments, this section will consider the extent to which the Immigration Act 2016 permits labour law enforcement and policy measures to be developed with a clear firewall between labour inspection and immigration control.<sup>35</sup>

## 2.1 Tackling labour market abuse with an immigration lens

The Immigration Act 2016 introduced new and modified criminal offences for illegal working, amending the Immigration Act 1971 and Section 21 of the Immigration, Asylum and Nationality Act 2006 respectively. The new Section 34 offence of illegal working deals with those who are disqualified from working according to their immigration status<sup>36</sup> and Section 35 amends the offence of employing illegal worker, where an employee is disqualified from employment and the employer has reasonable cause to believe that the individual is disqualified: the introduction of the modified more objective mens rea makes the offence easier to prove.<sup>37</sup> In addition, the Act further extended provisions that deny irregular migrants access to services, as introduced by the Immigration Act 2014<sup>38</sup> such as housing,<sup>39</sup> financial services<sup>40</sup> and driving licenses.<sup>41</sup>

The national roll-out of the right to rent checks under ss 39-42 may potentially, exacerbate the precarious situation of migrant workers (regular and irregular).<sup>42</sup> Section 39 introduces an offence whereby landlords or agents who lease premises to tenants who have been disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement and the landlord/ agent knows or has reasonable cause to believe that the premises are occupied by a disqualified adult may be liable to a maximum sentence of 5 years. The right to rent checks will contribute to increasing the dependence on employers (as highlighted in section 1.2) in two ways: i) workers will depend upon employers for the provision of (often substandard) accommodation,<sup>43</sup> thus driving the issue even further underground and making it more difficult to detect<sup>44</sup> and ii) as the cost of accommodation provided by rogue employers is often deducted from wages the debt of the migrant worker will substantially increase. In addition, there is very limited evidence to demonstrate the

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<https://www.gov.uk/government/news/modern-slavery-white-paper-published> [last accessed 16 February 2017].

<sup>33</sup> ILO, Ratifications of P029 - Protocol of 2014 to the Forced Labour Convention, 1930, Date of entry into force: 09 Nov 2016, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:3174672](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:3174672) [last accessed 16 February 2017]; ILO, ILO Forced Labour Convention, United Kingdom joins renewed fight to end forced labour, 22 January 2016, [http://www.ilo.org/global/standards/WCMS\\_445132/lang--ja/index.htm](http://www.ilo.org/global/standards/WCMS_445132/lang--ja/index.htm) [last accessed 16 February 2017].

<sup>34</sup> Article 2(c)(ii), ILO Protocol of 2014 to the Forced Labour Convention, 1930.

<sup>35</sup> PRO-ACT, Policy Paper, Improving the identification and support of victims of trafficking for labour exploitation in the EU, p. 1.

<sup>36</sup> Previously Section 15 of the Immigration, Asylum and Nationality Act 2006 which prohibited the employment of adults who are subject to immigration control and do not have leave to enter or remain in the UK, or who are subject to a condition preventing them from undertaking employment. The prohibition is supported through both a civil penalty regime and a criminal sanction for employers of illegal workers. Which replaced section 8 of the Asylum and Immigration Act 1996 which first made it a criminal offence to employ illegal workers.

<sup>37</sup> Section 35(4), Immigration Act 2016.

<sup>38</sup> Immigration Act 2014: Chapter 1 Part 3 (right to rent scheme); Sections 46 and 47 (entitlement to driving licenses); section 40 (access to financial services).

<sup>39</sup> Section 39 - 42, Immigration Act 2016.

<sup>40</sup> Section 45, Immigration Act 2016.

<sup>41</sup> Section 43-44, Immigration Act 2016.

<sup>42</sup> Originally piloted under Immigration Act 2014 in West Midlands, December 2014.

<sup>43</sup> European Union Agency for Fundamental Rights, FRA Severe Labour Exploitation, p. 51, [http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf) [last accessed 15 February 2017]

<sup>44</sup> Weatherburn, A., “Using an integrated human rights-based approach” (2016) 2 European Human Rights Law Review 184-194, p. 189.

effectiveness of the additional checks<sup>45</sup> when it comes to immigration enforcement<sup>46</sup> thus reinforcing the disproportionate impact on the precarity of migrant workers.

Thus, despite the recognition of the vulnerability of migrant workers to the increased risk of exploitation in the private sector,<sup>47</sup> and the need for the legal and policy frameworks to deal with migration and protection of labour rights as two separate entities,<sup>48</sup> there appears to be a discrepancy in the current legislative position. To what extent does this impact on the protection of labour rights of migrant workers, particularly when labour market enforcement measures are given statutory basis in an immigration framework. Does the Immigration Act 2016 constitute an encroachment on “the clear firewall that should exist between labour inspection and immigration control”?<sup>49</sup>

Overall, the measures discussed thus far reinforce a dominant immigration discourse and fail to minimize precarity in the labour market. Implementing more measures to determine the irregular status of migrant workers will only lead to more emphasis being placed on the power of the employer over the exploited worker, thereby increasing the risk of labour exploitation. Being mindful of the emphasis on immigration, the next section will consider the extent to which the Act facilitates and strengthens labour market enforcement including securing the protection of workers who are susceptible to exploitative working practices.

## 2.2 Strengthening labour market enforcement

The introduction of expanded labour market compliance measures was intended to build on the modern slavery legislation in order “to tackle illegal working and crack down on worker exploitation across all labour sectors.”<sup>50</sup> However, it must be noted that the introduction of these measures in the Immigration Bill 2015-2016, called into question the ability of labour market enforcement agencies to truly deal with labour exploitation and abuses of employment law. For instance, the reformed Gangmasters Labour Abuse Authority (hereinafter “the GLAA”) (formerly the Gangmasters Licensing Authority) will remain a Home Office Non-Departmental Public Body (NDPB), thus working in close proximity with key Home Office immigration authorities that enforce the non-compliance with immigration rules. For some critics, this institutional positioning severely threatens the expertise the GL(A)A has developed as an independent authority.<sup>51</sup>

The establishment of a new Director of Labour Market Enforcement was strongly supported in a public consultation.<sup>52</sup> As a result, the statutory mandate of the Director is proscribed in ss 1-9 Immigration Act 2016. The statute outlines the role of the Director who must develop a labour market enforcement strategy assessing the current and future scale and nature of non-compliance in the labour market,<sup>53</sup> publish an annual report,<sup>54</sup> and establish an information hub that gathers, stores, processes, analyses and disseminates information relating to non-compliance in the labour market.<sup>55</sup> However, there are still a number of issues that are not clarified in statute, including a clear description of the specific

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<sup>45</sup> In the pilot scheme a total of 13 referral notices from enforcement staff by the end of the six-month evaluation period. As a result of these five civil penalty notices had been issued. The total value of these penalties was £3,480. Eight cases have been given a ‘no action’ notice. Home Office, Evaluation of the Right to Rent scheme Full evaluation report of phase one, p.15.

<sup>46</sup> In total 109 individuals who were in the UK illegally were identified, of whom 63 were previously unknown to the Home Office. Home Office, Evaluation of the Right to Rent scheme Full evaluation report of phase one, p. 19.

<sup>47</sup> Preamble, ILO Protocol of 2014 to the Forced Labour Convention, 1930.

<sup>48</sup> PRO-ACT, Policy Paper, Improving the identification and support of victims of trafficking for labour exploitation in the EU, p. 1.

<sup>49</sup> Ibid.

<sup>50</sup> Department for Business, Innovation and Skills & Home Office, Tackling exploitation in the labour market, Public Consultation, October 2015, Ministerial Foreword by Home Secretary Theresa May, p.6, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/471048/BIS-15-549-tackling-exploitation-in-the-labour-market.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471048/BIS-15-549-tackling-exploitation-in-the-labour-market.pdf) [last accessed 16 February 2017]

<sup>51</sup> FLEX Briefing: Immigration Bill Part One - January 2016, p. 1, available at: <http://www.labourexploitation.org/sites/default/files/publications/FLEXImmBillBriefFINAL.pdf> [last accessed 16 February 2017].

<sup>52</sup> Department for Business, Innovation and Skills & Home Office, Tackling exploitation in the labour market, Government Response, January 2016, p.10, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/491260/BIS-16-11-government-response-to-tackling-exploitation-in-the-labour-market.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/491260/BIS-16-11-government-response-to-tackling-exploitation-in-the-labour-market.pdf) [last accessed 16 February 2017]

<sup>53</sup> Section 2, Immigration Act 2016.

<sup>54</sup> Section 3, Immigration Act 2016.

<sup>55</sup> Section 8, Immigration Act 2016.

functions of the Director when it comes to assessing the scale and nature of non-compliance in the labour market,<sup>56</sup> unlike comparable roles that have been created by statute such as the statutory basis of the functions of the Independent Anti-Slavery Commissioner in Section 41 of the Modern Slavery Act 2015.<sup>57</sup> Furthermore, it appears that the Director's role is to centralise and streamline the functions of the three main public bodies responsible for enforcing these requirements: the National Minimum Wage Inspectorate; the GLAA; and the Employment Agency Standards Inspectorate.<sup>58</sup> However, the Act fails to concretise in legislation the relationship between the Director and the governance of each of the three enforcement bodies. This is of particular relevance to the GLAA, "as a Non-Departmental Public Body (NDPB) should be able to operate at an 'arms length' from Ministers and the relationship between the Director and Secretary of State and the GLAA should reflect its role as a NDPB."<sup>59</sup>

In January 2017, Sir David Metcalf was announced as the first Director of Labour Market Enforcement. He is the former Chairman of the Migration advisory Committee and a member of the Low Pay Commission.<sup>60</sup> Despite the encouraging professional background of the first Director, there are still questions regarding the statutory role of the Director to report to the Secretary of State of the Home Office, who is equally responsible for immigration enforcement and approving the Director's proposed Labour Market Enforcement Strategy.<sup>61</sup> In addition, the Director must report on "any matter, which the Secretary of State has requested the Director to report on".<sup>62</sup> Whilst the statutory enumeration of non-compliance in the labour market does not make reference to section 34 & 35 offences of illegal working and any other immigration offences,<sup>63</sup> there is nevertheless an expectation, that the Director will closely cooperate and collaborate with "immigration enforcement wherever labour market breaches are linked to migrants who do not have permission to live or work in the UK."<sup>64</sup> Of course, coupled with the statutory basis of the Director in the Immigration Act 2016 and the close scrutiny of the Director by the Secretary of State, this expectation may potentially limit the possibility of ensuring a "firewall" exists between labour market enforcement and immigration control.

Despite the concern for the Director's ability to truly focus on labour market enforcement without any concern of overlap with immigration enforcement, the mandate of the Director may be assured by securing key engagement with the aforementioned Independent Anti-Slavery Commissioner. The current Commissioner has already begun to work towards combating modern slavery and exploitation in the UK, and has stated the intention of ensuring that "potential victims of exploitation are identified and assisted properly, and do not get criminalised and prosecuted under the offence of illegal working."<sup>65</sup> In particular, the Commissioner has emphasized the need for collaboration and joint-working with the Director of Labour Market Enforcement and the GLAA to provide assurance to potential "victims of modern slavery [who] often do not trust the authorities and are fearful of immigration repercussions once they come forward."<sup>66</sup>

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<sup>56</sup> Section 2(2), Immigration Act 2016.

<sup>57</sup> FLEX Briefing: Immigration Bill Part One - January 2016, p. 2, available at: <http://www.labourexploitation.org/sites/default/files/publications/FLEXImmBillBriefFINAL.pdf> [last accessed 16 February 2017].

<sup>58</sup> Home Office, Immigration Act 2016 Factsheet – Labour market enforcement (Sections 1-33) (July 2016), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537203/Immigration\\_Act-Part\\_1\\_-\\_Labour\\_Market\\_Enforcement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537203/Immigration_Act-Part_1_-_Labour_Market_Enforcement.pdf) [last accessed 15 February 2017]

<sup>59</sup> FLEX Briefing: Immigration Bill Part One - January 2016, p. 2, available at: <http://www.labourexploitation.org/sites/default/files/publications/FLEXImmBillBriefFINAL.pdf> [last accessed 16 February 2017].

<sup>60</sup> Department for Business, Energy & Industrial Strategy & Home Office, Sir David Metcalf named as the first Director of Labour Market Enforcement, 5 January 2017, <https://www.gov.uk/government/news/sir-david-metcalf-named-as-the-first-director-of-labour-market-enforcement> [last accessed 16 February 2017].

<sup>61</sup> Section 2(1), Immigration Act 2016.

<sup>62</sup> Section 4(3)(a), Immigration Act 2016.

<sup>63</sup> Section 3(3), Immigration Act 2016.

<sup>64</sup> Home Office, Immigration Act 2016 Factsheet – Labour market enforcement (Sections 1-33) (July 2016), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537203/Immigration\\_Act-Part\\_1\\_-\\_Labour\\_Market\\_Enforcement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537203/Immigration_Act-Part_1_-_Labour_Market_Enforcement.pdf) [last accessed 15 February 2017]

<sup>65</sup> Independent Anti-Slavery Commissioner, Independent Anti-Slavery Commissioner Annual Report 2015-16, p. 43, available at: <http://www.antislaverycommissioner.co.uk/media/1097/annual-report-2016.pdf> [last accessed 16 February 2017].

<sup>66</sup> Independent Anti-Slavery Commissioner, Independent Anti-Slavery Commissioner Annual Report 2015-16, p. 43, available at: <http://www.antislaverycommissioner.co.uk/media/1097/annual-report-2016.pdf> [last accessed 16 February 2017].

Once again, despite the emphasis on multi-agency cooperation between all relevant agencies, it is vital that the GLAA and Director of Labour Market Enforcement remain sufficiently distanced from immigration authorities, as the primary duty of labour inspectors is to protect workers and not to enforce immigration law.<sup>67</sup> Maintaining independence will enable exploited workers, whose vulnerability is enhanced by their irregular migration status to report the labour exploitation to an authority who will deal first and foremost with the labour exploitation and abuse. To ensure that enforcement of immigration regimes does not become implicated with labour inspection, then the UK government could look to the US model where a Memorandum of Understanding exists between the Departments of Homeland Security and Department of Labour so as to ensure that their enforcement activities do not conflict.<sup>68</sup>

### **3. Securing the economic welfare of migrant workers**

Despite the measures discussed thus far, they do not address one of the principal factors that maintains the precarious nature of migrant workers: lack of economic security. As a result, targeted actions against their economic welfare such as debt bondage or the non-payment of wages, sustains their vulnerability to exploitation, very often leaving them with no alternative or exit strategy.<sup>69</sup> Thus, labour market enforcement measures should ensure channels for securing access to justice for loss of earnings and the enforcement of the minimum wage.<sup>70</sup>

#### **3.1 Enforcement of minimum wage and recovery of back-pay**

The role of the GLAA has, in recent years, become of increasing importance when it comes to securing back pay and compensation for exploited workers. Admittedly, up until 2013, despite identifying £397,000 in lost wages, through unpaid holiday pay and failure to pay the minimum wage,<sup>71</sup> the GLAA “secured no compensation payments through the imposition by the courts of compensation orders on those convicted of offences under the Gangmasters Licensing Act 2004 during the three financial years 2010-13.”<sup>72</sup> Indeed, at this time suspected breaches of minimum wage legislation were investigated by the national minimum wage inspectorate (NMWI). However, as it was not possible to identify the number of exploited workers who subsequently sought compensation under civil law as it was not recorded.<sup>73</sup>

Significant progress has subsequently been made in terms of securing back pay of wages to workers, in 2013, the GLAA secured a compensation order of £57,801 based on non-payment of wages and annual leave.<sup>74</sup> In 2014-2015, the GLAA secured £13,617 through direct informal interventions with labour providers, this increased to £82,000 on behalf of 2,326 exploited workers in 2015-2016<sup>75</sup> and currently stands at over £50,000 in the third quarter of 2016-2017.<sup>76</sup>

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<sup>67</sup> International Labour Office (ILO) (2006) Labour Inspection: Report III (Part 1B). ILC95-III(1B)- 2006-01-0329-1-En. Geneva, International Labour Office.

<sup>68</sup> US Department of Labour (2011) “Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites”, DOL, <https://www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf> [last accessed 16 February 2017].

<sup>69</sup> Hannah Lewis, Peter Dwyer, Stuart Hodgkinson, & Louise Waite, *Precarious Lives: Forced labour, exploitation and asylum* (Policy press, 2015), p.135.

<sup>70</sup> National Minimum Wage Low Pay Commission Report Spring 2016 Presented to Parliament by the Secretary of State for Business, Innovation and Skills by Command of Her Majesty March 2016, p.273, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/571631/LPC\\_spring\\_report\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/571631/LPC_spring_report_2016.pdf), [last accessed 16 February 2017].

<sup>71</sup> Gangmasters Licensing Authority, Parliamentary Question – Recovery of lost wages, 6 January 2014, available at: <http://www.gla.gov.uk/media/2571/blomfield-060114-lost-wages.pdf> [last accessed 16 February 2017].

<sup>72</sup> Gangmasters Licensing Authority, Parliamentary Question – Compensation Orders, 4 February 2014, available at: <http://www.gla.gov.uk/media/2570/blomfield-040214-court-orders.pdf> [last accessed 16 February 2017].

<sup>73</sup> Gangmasters Licensing Authority, Parliamentary Question – Recovery of lost wages, 6 January 2014, available at: <http://www.gla.gov.uk/media/2571/blomfield-060114-lost-wages.pdf> [last accessed 16 February 2017].

<sup>74</sup> Ibid.

<sup>75</sup> Gangmasters Licensing Authority, *Gangmasters Licensing Authority: Annual Report and Accounts, 1 April 2015 - 31 March 2016*, p. 23, <http://www.gla.gov.uk/media/2834/gla-annual-report-and-accounts-2015-16-pdf.pdf> [last accessed 16 February 2017].

<sup>76</sup> Gangmasters Licensing Authority, *Performance and Insight Report Period Covered: 1 April 2016 to 31 December 2016*, p. 6 & p.9, <http://www.gla.gov.uk/media/2879/gla-performance-report-dec-2016-external-only-pdf.pdf> [last accessed 16 February 2017].

However, these are measures taken on an informal basis as the GLAA's mandate does not permit them to recover any arrears of pay on behalf of workers. Nevertheless, GLAA enforcement officers can advise the employer to repay the money to the affected workers. Where formal investigations lead to successful prosecutions, the GLAA will seek redress for the victims of criminal gangmasters through the imposition of compensation orders and to deprive those gangmasters of the financial benefits of their criminal activity using the Proceeds of Crime Act 2002.<sup>77</sup> Finally, under the Immigration Act 2016 the future role of the GLAA is hoped to be strengthened following the introduction of new investigatory powers for Labour Abuse Prevention Officers when investigating labour market offences.<sup>78</sup>

### 3.2 Minimum wage enforcement v. confiscation of wages as proceeds of crime

The Immigration Act 2016 could be seen as a double-edged sword. On one hand, the Act seeks to secure the enforcement of the national minimum wage through the strategic development of priorities regarding non-compliance by the Director of Labour Market Enforcement and through new labour market enforcement orders and undertakings,<sup>79</sup> that came into force on 25 November 2016, whereby businesses and employers who mistreat workers can face a criminal conviction for non-compliance with a maximum sentence of 2 years imprisonment. In addition, "the penalties imposed on employers that underpay their workers in breach of the minimum wage legislation [have been increased] from 100% to 200% of arrears owed to workers. By increasing penalties for underpayment of the minimum wage it is intended that employers, who would otherwise be tempted to underpay, comply with the law and working people receive the money they are legally due."<sup>80</sup>

On the other hand, the Immigration Act 2016 provisions potentially undermine the economic welfare of migrant workers who receive wages in the informal economy. The Act introduces the power of Immigration Officers to seize wages as the proceeds of crime<sup>81</sup> and requires a prosecutor to consider requesting a confiscation order from the Courts under the Proceeds of Crime Act 2002 if a person is convicted of the new illegal working offence in England and Wales or Northern Ireland.<sup>82</sup> However, the impact of this particular provision may well be limited,<sup>83</sup> as prosecutors may consider it not in the public interest to pursue confiscation orders as the realisable amount may well be less than the benefit, meaning that the amount to be confiscated may be low and thus disproportionately difficult to enforce.<sup>84</sup> In addition, in light of the low income of migrant workers, courts may refuse the confiscation orders on the grounds that they are disproportionate. In 2012, the Supreme Court found the Proceeds of Crime Act 2002 not to be in compliance with the Section 3 of the Human Rights Act 1998 as it was held to be incompatible with Article 1 of Protocol No. 1 of the European Convention on Human Rights.<sup>85</sup> Subsequently in 2014, the European Court of Human Rights ruled that the confiscation of the wages of an irregular migrant constituted a violation of the right to peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the European Convention on Human Rights.<sup>86</sup> Furthermore, commentators have suggested that the imposition of a six month prison sentence with an unlimited fine<sup>87</sup> for those

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<sup>77</sup> Gangmasters Licensing Authority, Parliamentary Question – Recovery of lost wages, 6 January 2014, available at: <http://www.gla.gov.uk/media/2571/blomfield-060114-lost-wages.pdf> [last accessed 16 February 2017].

<sup>78</sup> Section 12, Immigration Act 2016.

<sup>79</sup> SS 14-17, Immigration Act 2016; SS 18-24, Immigration Act 2016.

<sup>80</sup> Department for Business, Energy and Industrial Strategy, National Minimum Wage and National Living Wage: Policy on HM Revenue & Customs enforcement, prosecutions and naming employers who break National Minimum Wage law, July 2016, p. 10, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539577/bis-16-373-enforcement-policy-document-national-minimum-wage.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539577/bis-16-373-enforcement-policy-document-national-minimum-wage.pdf) [last accessed 15 February 2017].

<sup>81</sup> Section 48, Seizure and retention in relation to offences, Immigration Act 2016; Home Office, Immigration Act 2016 Factsheet – Labour market enforcement (Sections 1-33) (July 2016), available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/537203/Immigration\\_Act-Part\\_1\\_-\\_Labour\\_Market\\_Enforcement.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537203/Immigration_Act-Part_1_-_Labour_Market_Enforcement.pdf) [last accessed 15 February 2017].

<sup>82</sup> Section 34(3), Immigration Act 2016.

<sup>83</sup> Johanna Walsh, Mellissa Curzon-Berners, New criminal offence for illegal workers – will it have any impact?, 25 May 2015, Criminal Law blog, available at: <https://www.kingsleynapley.co.uk/comment/blogs/criminal-law-blog/new-criminal-offence-for-illegal-workers-will-it-have-any-impact> [last accessed 16 February 2017].

<sup>84</sup> *R v Carter and Others [2006] EWCA Crim 416*; DPP's "Guidance for Prosecutors on the Discretion to Instigate Confiscation Proceedings" 28 May 2009, available at: [https://www.cps.gov.uk/news/assets/uploads/files/prosecutors\\_discretion\\_280509.pdf](https://www.cps.gov.uk/news/assets/uploads/files/prosecutors_discretion_280509.pdf) [last accessed 16 February 2017].

<sup>85</sup> *R v Waya* [2012] UKSC 51, para. 83.

<sup>86</sup> *Paulet v The United Kingdom* [2014] (Application no. 6219/08), paras 63-69.

<sup>87</sup> Section 34(3)(a), Immigration Act 2016.

who are found to be guilty of the illegal working offence is grossly disproportionate to any harm which migrants in a vulnerable position may be considered to have done.<sup>88</sup>

Consequently, the seizure of earnings as the proceeds of crime reduces the likelihood of exploited workers to come forward and bring exploitative labour conditions to the attention of the labour inspectorate agencies, thus reinforcing the power imbalance between irregular migrant workers and rogue employers.

### 3.3 Remuneration through access to redress and compensation

One method of securing the economic welfare of migrant workers who have not received their wages is to offer improved access to redress and compensation based on existing mechanisms. This section will consider the extent to which counter-trafficking measures that require access to compensation for trafficked persons could be applied to labour market non-compliance. The importance of providing victims of human trafficking with adequate financial support and assistance is recognised as a legal obligation on States proscribed by a number of key anti-trafficking and fundamental rights instruments.<sup>89</sup>

The Modern Slavery Strategy emphasises the role of access to compensation in achieving positive long-term outcomes for survivors of human trafficking and securing “avenues for victims to receive reparation and compensation.”<sup>90</sup> However, in the UK, despite clear legal obligations at a regional level,<sup>91</sup> the adequacy of the difference avenues of redress for access to compensation for victims of human trafficking is put into question.<sup>92</sup>

For instance, the newly introduced Slavery and Trafficking Reparation Orders<sup>93</sup> aim at providing victims with redress, however, reparation orders are only available once there has been a successful prosecution and criminal proceedings have concluded.<sup>94</sup> Another option is to seek a claim from the Criminal Injuries Compensation Authority (CICA) a government funded programme that is only applicable to victims of violent crimes. Thus, where victims of human trafficking have not experienced physical violence as part of their exploitation, they are not entitled to compensation where they have been subjected to psychological control, such as coercion, deception or debt bondage, rather than violence.<sup>95</sup> In addition, a claim to the CICA will only be accepted where a crime has been reported and requires cooperation with law enforcement authorities. Two aspects that are known to be problematic for some potential victims of labour exploitation who are reluctant to come forward to authorities. Finally, redress for non-payment of wages can be sought through the Employment Tribunal and historically this was the principal avenue of redress for seeking back -pay in wages for victims of trafficking.<sup>96</sup> However, since January 2015, the Deduction from Wages (Limitation) Regulations 2014 amended the Employment Rights Act 1996, by placing a two-year limit on any complaints for a

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<sup>88</sup> Migration Rights Network (MRN) (25 August 2015) “Response to government announcement on ramping up enforcement action”, Migrant Rights Network, available at: <http://www.migrantsrights.org.uk/news/2015/mrn-response-government-announcement-ramping-enforcement-action> [last accessed 16 February 2017].

<sup>89</sup> Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) to ensure trafficking victims’ right to obtain compensation, both from the perpetrators and from the State; Article 17 of Directive 2011/36/EU requires that victims of human trafficking have access to existing compensation schemes available to other victims of violent crimes; Article 16 European Victims Directive also provides for the right of victims to obtain a decision on compensation in the course of criminal proceedings.

<sup>90</sup> HM Government, Modern Slavery Strategy, 2014, p. 59, available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/383764/Modern\\_Slavery\\_Strategy\\_FINAL\\_DEC2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383764/Modern_Slavery_Strategy_FINAL_DEC2015.pdf) [last accessed 16 February 2017].

<sup>91</sup> *Supra* note 89.

<sup>92</sup> Focus on Labour Exploitation Working Paper, Access to compensation for victims of human trafficking, July 2016, available at: <http://www.labourexploitation.org/sites/default/files/publications/DWP-Compensation-F.pdf> [last accessed 16 February 2017].

<sup>93</sup> Ss 8-10, Modern Slavery Act 2015.

<sup>94</sup> Independent Anti-Slavery Commissioner Strategic Plan 2015-17, P. 9, available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/468729/IASC\\_StrategicPlan\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468729/IASC_StrategicPlan_2015.pdf) [last accessed 16 February 2017].

<sup>95</sup> Focus on Labour Exploitation Working Paper, Access to compensation for victims of human trafficking, July 2016, pp. 7-8, available at: <http://www.labourexploitation.org/sites/default/files/publications/DWP-Compensation-F.pdf> [last accessed 16 February 2017].

<sup>96</sup> *Ibid.*

deduction from wages from the date of payment of the wages.<sup>97</sup> This has a significant impact on persons who are subjected to unscrupulous employers, as there is a concern that the limitation will in fact incentivise exploitative employers to continue their exploitative practices.<sup>98</sup>

As outlined above, the current avenues for redress and compensation for victims of trafficking are not yet sufficiently robust and effective so it is too premature to consider that such an approach could be extended to those who have not received adequate remuneration as a result of precarious employment. Nevertheless, it is hoped that the increased focus on non-compliance with the national minimum wage by the Director of Labour Market Enforcement will lead to a greater enforcement and subsequent compliance. Engagement with securing compensation and back pay is vital to tackling labour market non-compliance as such assurances may encourage more victims to report to the police and seek access to justice.<sup>99</sup>

#### **4. Reducing the precarity of migrant workers: the “right to non-exploitative work”**

Throughout this paper, the need to mark a clear separation between the protection of workers’ rights and immigration law enforcement has been emphasised. This is of particular importance when it comes to securing the rights of EU migrant workers, who have, under Article 21 of the Treaty of Lisbon, the right to freely reside and work in the territory of other EU Member States. Thus it is important that Member States respect this right by ensuring that their legal and policy framework effectively addresses the two issues separately. It is of vital importance that the legislative framework does not create a new norm, whereby exploitation is not tackled because employers know that the irregular status of individuals will be prioritised over an above the substandard working conditions.

Overall, the role of the State in ensuring that the labour market landscape upholds the rights of workers is crucial to combating labour exploitation. Especially since the extent to which acts are considered to be exploitative “depends on the context in which they are performed.”<sup>100</sup> As stated in section 2, where precarity in employment becomes the norm and is tolerated in society and in the law, the threshold for combating exploitation becomes unacceptably high. Thus, unfortunate legislative developments (as exemplified in this paper through the Immigration Act 2016) highlight, i) the norm-setting role of the state and ii) the potential for immunity in the private sector when it comes to the exploitation of workers who are made vulnerable by the States’ legal and policy framework.

Nevertheless, despite the discussion in this paper critiquing the placement of the GLAA and the statutory basis of the Director of Labour Market Enforcement within the context of the Immigration Act 2016, the strengthening of certain aspects of labour market enforcement does suggest an engagement with tackling exploitation in the UK. This is a positive development.

Indeed, when it comes to securing the right to work, the focus should be on the right to non-exploitative work.<sup>101</sup> In order to achieve this, awareness raising will be crucial to ensuring that migrant workers know their rights and are informed of their entitlements as workers. This is applicable in two contexts when it comes to awareness raising for EU nationals. First of all, awareness raising and the provision of information to EU nationals pre-departure is vital. There has been significant focus on pre-departure information and programmes for third country nationals coming to the EU, however, there is very little when it comes to the mobility of EU National exercising their right to work in low income sectors. For example, the Irish Training and Employment Authority Know Before You Go guide has information on

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<sup>97</sup> Regulation 2, Deduction from Wages (Limitation) Regulations 2014.

<sup>98</sup> National Minimum Wage Low Pay Commission Report Spring 2016 Presented to Parliament by the Secretary of State for Business, Innovation and Skills by Command of Her Majesty March 2016, p.273, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/571631/LPC\\_spring\\_report\\_2016.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/571631/LPC_spring_report_2016.pdf) [last accessed 16 February 2017].

<sup>99</sup> FRA, Severe labour exploitation: workers moving within or into the European Union States’ obligations and victims’ rights, June 2015, p. 21, p. 75, pp 81-84, available at: [http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation\\_en.pdf](http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf) [last accessed 16 February 2017].

<sup>100</sup> Robert Goodin, Exploiting a situation and exploiting a person, in Reeves, S (ed) *Modern Theories of Exploitation* (1987, Sage Publications), p. 183.

<sup>101</sup> Mantouvalou, V., ‘The Right to Non-Exploitative Work’, in *The Right to Work: Legal and Philosophical Perspectives*, Mantouvalou (ed), Hart Publishing, 39-60.

working in Ireland, translated into 15 EU Member State languages.<sup>102</sup> Secondly, awareness raising in the workplace, such as the recent government awareness raising campaign of the minimum wage,<sup>103</sup> is also of vital importance. <sup>104</sup> In both instances, the role of the state and relevant authorities play a crucial role in ensuring that information is disseminated effectively.

Thus, the expectation of increased inter-agency working between the new Director of Labour Market Enforcement, the Independent Anti-slavery Commissioner and business will be critical when sharing information and coordinating awareness raising campaigns. Furthermore, the expansion of the licensing regime to all economic sectors will ensure that the regulation of employers and workplaces will ensure the enforcement of employment rights in accordance with GLAA licensing standards.<sup>105</sup> Nevertheless, taking into account the large number of labour providers in all economic sectors, the provision of sufficient resources will be crucial to achieving effective enforcement and implementation of these new powers. For instance, the recent £4.3 million increase in funding for enforcement of national minimum wage is a positive step in this direction<sup>106</sup>

## Conclusion

The paper has demonstrated that the dual emphasis of the Immigration Act 2016 must be dealt with an element of caution when it comes to implementation. First of all, immigration enforcement should not trump the protection of vulnerable persons to exploitation, including (potential) human trafficking victims. Secondly, taking into account the precarity that exists in the labour market in low-income economic sectors, the mandate and role of labour market enforcement bodies must be situated “at arms length” from immigration enforcement bodies to ensure that those who are subjected to exploitative working and living conditions have the confidence to come forward and report any abuse or wrongful conduct from rogue employers to authorities. Thirdly, the importance of securing access to justice and thus the economic welfare of migrant workers is of crucial importance, that will not only ensure that workers are justly remunerated but send a message to exploiters that exploitative working practices will not be tolerated and punished accordingly. Finally, the importance of the State in developing labour market enforcement legislation and policy measures has been demonstrated, as well as the crucial role of enforcement bodies to securing the “right to non-exploitative work.”

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<sup>102</sup> Training and Employment Authority, Know before you go, available at:

[http://www.fas.ie/en/pubdocs/Know\\_Before\\_you\\_go/english/home.html](http://www.fas.ie/en/pubdocs/Know_Before_you_go/english/home.html) [last accessed 17 February 2017].

<sup>103</sup> Department for Business, Energy & Industrial Strategy, Revealed: most bizarre excuses for underpaying staff the National Minimum Wage, 11 January 2017, available at: <https://www.gov.uk/government/news/revealed-most-bizarre-excuses-for-underpaying-staff-the-national-minimum-wage> [last accessed 17 February 2017].

<sup>104</sup> Department for Business, Energy & Industrial Strategy, Home Office, Sir David Metcalf named as the first Director of Labour Market Enforcement, 5 January 2017, <https://www.gov.uk/government/news/sir-david-metcalf-named-as-the-first-director-of-labour-market-enforcement> [last accessed 16 February 2017].

<sup>105</sup> Fit and Proper Test, Pay and Tax matters, Prevention of Forced Labour and Mistreatment of Workers, Accommodation, Working conditions, Health and Safety, Recruiting Workers and Contractual Arrangements, Sub-Contracting and Using Other Labour Providers: see GLA Licensing Standards, <http://www.gla.gov.uk/media/2745/licensing-standards-aug-2016.pdf>.

<sup>106</sup> HM Government, Autumn Statement 2016, 23 November 2016, available at:

<https://www.gov.uk/government/publications/autumn-statement-2016-documents/autumn-statement-2016> [last accessed 17 February 2017].