



HM Government

# United Kingdom Labour Market Enforcement Strategy 2018/19

Director of Labour Market Enforcement  
David Metcalf

May 2018



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**Director of Labour Market Enforcement  
David Metcalf**

Presented to Parliament pursuant to Section 5 (1)  
of the Immigration Act 2016

May 2018



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# Foreword

Profound changes have occurred in the labour market in the last four decades. The employment relationship has fissured and average workplace size fallen. Trade union membership, the coverage of collective bargaining and labour's share of our national income has all declined markedly (Section 1).

Hand-in-hand with such changes came the realisation that labour market laws and regulations are not being fully enforced. I was proud to be appointed the first Director of Labour Market Enforcement in January 2017. My remit, and this first full Strategy, covers three of the four main state enforcement bodies: HMRC NMW which enforces the national living/minimum wage; the Gangmasters and Labour Abuse Authority which licenses gangmasters in horticulture and food processing and was recently given powers under the Police and Criminal Evidence Act 1984 (PACE) to enforce certain labour market offences; and the Employment Agency Standards Inspectorate which monitors employment agencies. The fourth body, which is not in my remit, is the Health and Safety Executive.

Within enforcement there are two broad approaches: compliance and deterrence. The most effective enforcement approach will be some mix of the two.

Compliance theory is premised on the idea that violations of employment regulations are the result of employer ignorance and incompetence. Section 2 sets out some remedies. These include: provision of information, education and support; promoting worker rights; supporting awareness and access to enforcement.

Deterrence theory emphasises deliberate violations and various approaches are documented in Section 3. The interventions include: risk of inspection; use and size of financial penalties; reputational penalties; prosecutions and Orders and Undertakings; and prohibition.

Achieving fuller compliance in firms down the supply chain and possible extension of licensing attracted considerable attention in stakeholder evidence and meetings (Section 4). On supply chains I recommend: that the head of the supply chain takes joint responsibility for its suppliers down the chain; a power to embargo ("hot") goods supplied by a non-compliant subcontractor; and alterations to the public procurement template. On licensing I recommend some limited pilot studies for car washes and nail bars.

There are some serious gaps in labour market enforcement (Section 5):

- There is effectively no state agency enforcing holiday pay regulations (and evidence suggests that the unpaid amount – what in the US is called “wage theft” – is as large as non-compliance with the minimum wage). I recommend HMRC, or another state body, be given responsibility for regulating holiday pay;
- HMRC and EAS must try to ensure umbrella companies and payroll intermediaries are abiding by the regulations, and EAS should monitor the Swedish derogation;
- lack of, or inadequate, records is often a serious impediment to enforcement. A recent change in the policy guidance now encourages HMRC to prosecute this as a standalone offence. I urge HMRC to pursue this with vigour.

I am conscious that some stakeholders would have wished that I made stronger recommendations in some areas. Let me deal with three such areas.

The Trade Unions Congress (TUC), and some individual unions, suggested during the consultation meetings that I recommend unions be given access to non-union workplaces. It would carry me long past my remit to make such a proposal. Instead, at many points in this report, I emphasise the key role that unions play in labour market enforcement (as I did in my academic research two decades ago) and the need for the enforcement bodies to treat with our trade unions and gain from their expertise.

Next, concerning supply chains, some NGOs and unions advocated joint and several liability. This is an adversarial approach to achieving compliance. Instead, I have gone for a more cooperative approach involving joint responsibility. It should be remembered that there will be further iterations of the enforcement strategy and, should the cooperative approach fail, then the adversarial could be recommended.

Finally on licensing: there were calls to extend licensing to, for example, employment agencies, the garment trade, construction employers, and firms in the security industry. These were not normally accompanied by evidence on either the costs and benefits of such licensing or its practicability. Rather, typically there was a simple assertion that licensing would improve matters. I am not hostile to licensing – I recommend pilots for nail bars and car washes in the coming year. I shall look forward in 2018 to meeting stakeholders keen on extending licensing in particular sectors to learn of its potential benefits and practicalities of implementation.

I wish to pay tribute to public officials and stakeholders for their gracious, constructive engagement. And to my small high quality secretariat for their analytical, policy, writing and administrative skills; Tracey Affat, Emily Eisenstein, Michael Flynn, Tim Harrison, Bethan Hunt, Rashmi Panigrahi, Kelly Scott and Christine Stone.



**Professor Sir David Metcalf CBE.**

This Strategy was first submitted to the Home Secretary and the Secretary of State for Business, Energy and Industrial Strategy on 26 February 2018

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# Summary of recommendations

## Compliance theory and approach

### Report section 2.3 Supporting employers to be compliant

1. BEIS/HMRC should review the guidance around NMW in collaboration with stakeholders to identify and improve problem areas such as pay averaging and salary sacrifice.
2. HMRC NMW/NLW team should develop a more supportive approach when companies ask for advice in order to be compliant.

### Report section 2.4 Promoting worker rights, supporting awareness and access to enforcement

#### *Information on rights:*

3. A statement of rights should be made mandatory for all workers from within week one of employment commencing. The Government should develop a template for the written statement of employment to ensure transparency in information provided, and to reduce the burden on business.
4. Clear and accessible information on employment rights should be provided to workers through a number of channels, including via:
  - a. Use of targeted social media campaigns;
  - b. Development of a web portal linking all enforcement agencies;
  - c. Workplace notices detailing rights and how to enforce them should be mandatory similar to the Health and Safety notices.
  - d. Payslips, and payslip software and apps, should include NMW/NLW rates guidance, information on the enforcement agencies and details of how to report a breach.
  - e. The education system should use opportunities and existing resources to inform young people of their rights as they prepare to enter employment.
  - f. Information should be included with National Insurance notification letters and other government communication.

### **Payslips:**

5. The right to a payslip should be extended to all workers.
6. For hourly paid workers, there should be mandatory inclusion of total hours worked and hourly rate of pay on payslips.
7. In the longer term hours and hourly earnings should be captured in Real Time Information data returns to HMRC.

### **Improving complaints channels:**

8. Simplify the entry channel to seek help on employment rights and how to seek redress. There needs to greater clarity on the internet about where to go for help and how to complain. In the next year:
  - a. The three agencies should improve their websites to make clearer what complaints to direct to them and how, and who to direct other types of complaints to. These should link with the web-portal recommended above.
  - b. EAS should raise its profile and have an easy to find webpage on Gov.UK with contact details for people to make complaints.
  - c. Acas should review their communications and marketing promoting their service, and ensure it is accessible to workers.
9. Acas should build on the links with the three bodies to ensure that staff training, referral processes and data sharing are promoting their service to maximise access to workers.

## **Deterrence approaches: Investigations and penalties**

### **Report section 3.1 Risk of inspection**

10. I recommend an increase in resources for EAS, both to promote their ability to enforce current regulations and due to my proposal to expand its remit. I do not recommend an increase for GLAA or HMRC NMW/NLW as these bodies have recently had an increase in resources. Over the coming year I will be monitoring the efficiency of how these resources are used.

### **Report section 3.2 Size of financial penalty for employers**

11. BEIS and EAS should investigate the potential for EAS being given the powers to impose civil penalties on non-compliant employment agencies as an alternative to prosecution.
12. I recommend that, where appropriate, employers found to be non-compliant should be charged a fee for intervention to allow the enforcement bodies to recover some of their enforcement costs.
13. I recommend the use and imposition of much more severe financial penalties to act as a greater deterrent against non-compliance. The NMW penalty multiplier should be reviewed and increased again to a level that would ensure that there is an incentive to comply with the legislation.
14. I recommend that revenue from higher penalties should be recycled into the enforcement system as additional resource.

### Report section 3.3 Reputational penalties

15. I recommend evaluation of the BEIS Naming Scheme to assess its impact.
16. I recommend that further information is provided within the Naming Scheme to highlight the average arrears per worker, that case studies are provided to increase both the deterrence and compliance effect, and that opportunities are taken to engage with specific sectors to educate other employers on potential areas of non-compliance.

### Report section 3.5 Undertakings and orders

17. There should be greater use of – and publicity for – prosecutions, and undertakings and orders, to help increase the deterrent effect.
18. The Home Office and GLAA should work to explore and clarify the role and powers of Labour Abuse Prevention Officers (LAPOs), within the overarching framework of labour market enforcement.

### Report section 3.6 Prohibitions

19. The three enforcement bodies should work with Insolvency Service to crack down on phoenixing by directors seeking to avoid labour market penalties.

### Report section 3.7 Prioritisation of inspections: proactive vs reactive

20. The three bodies should continue to shift to more proactive enforcement methods. This will necessitate a more efficient way of responding reactively to complaints.

### Report section 3.8 Use of intelligence and joint working

21. The three enforcement bodies should continue to work positively with the Information Hub and Strategic Coordination Group (SCG) to build on the good progress made over the past 12 months by:
  - a. refining the systems and processes for intelligence-sharing, exploring all possible legal gateways and identifying any potential barriers, including developing intelligence requirements to ensure the appropriate information is being collected;
  - b. learning from shared experience to ascertain best practice for joint working, ensuring the best enforcement tools are applied to each case;
  - c. continuing to build relationships with other enforcement agencies to promote more joint working where different powers, additional resources, or enforcement tools can be of benefit;
  - d. looking to build partnerships with business, trade unions, trade bodies, and other industry experts so that these partners may feed in intelligence to the bodies in such a way that is actionable;
  - e. operating a feedback loop with each other, with those that submit intelligence to them, and to their respective complainants.
22. Different forms of partnership working should be piloted and evaluated, primarily through the support of:
  - a. Newham's proposal to target NMW/NLW (testing joint working between HMRC and local authority); and
  - b. Leicester's proposal to target the garment trade through focused, highly visible joint enforcement (testing partnerships with local agencies and businesses).

## Improving labour market enforcement

### Report section 4.1 Accountability and leverage through the supply chain

23. To help ensure compliance throughout supply chains, joint responsibility measures should be introduced where the brand name (at the top of the chain) bears joint responsibility for any non-compliance found further down its own supply chain. Where non-compliance is found, follow-up action by enforcement agencies in conjunction with the brand name and supplier would be undertaken in private to provide an opportunity to correct the infringements within a given timeframe. Failure to correct could result in public naming of both the brand name and supplier.
24. Provisions should also be made to enable the temporary embargo of ‘hot goods’ to disrupt supply chain activity where non-compliance is found.

### *Public procurement*

25. An assessment should be made of the effectiveness of the Welsh Government’s new Code of Practice, to inform further development and to determine whether national roll-out would be beneficial.
26. Procurement templates should be amended to explicitly compel compliance with labour market regulations in public contracts.

### Report section 4.2 Licensing and other models of regulation

27. The 2012 GLAA licensing standards should be reviewed to ensure they reflect current worker rights and employer obligations.
28. Two pilot schemes should be run and evaluated to test the feasibility and impact of GLAA licensing of businesses in different sectors. These should be done on a geographically limited basis and cover:
  - a. Hand car washes
  - b. Nail bars.

### Report section 4.3 Continual assessment and improvement

29. The three bodies should further develop and embed an evaluative approach to their own processes and systems, making best use of data and information to assess their performance and impact, ensuring they align with strategic enforcement principles, especially in terms of increasing the deterrence effect.
30. An independent evaluation should be undertaken, by independent academics or consultants, to investigate the overall impact of the three bodies on tackling labour market non-compliance.

## Current enforcement gaps

### Report section 5.1 Holiday pay

31. HMRC, or another appropriate state body, should be provided with the powers and remit to take responsibility for the enforcement of holiday pay for all workers, including mechanisms to recover holiday pay arrears.
32. In the interim, EAS and GLAA should make use of their existing enforcement frameworks to investigate holiday pay as a matter of priority.

### Report section 5.2 Intermediaries and umbrella companies

33. Current EAS powers should be expanded to include intermediaries to enable them to follow up on cases of worker exploitation as they would for employment agencies. Their resources should be increased in line with the additional requirements to do this.
34. The GLAA, EAS and HMRC NMW/NLW team should work closely with the other relevant HMRC tax enforcement teams to share information of non-compliant intermediaries that they identify through their enforcement work. The relevant teams in HMRC should take effective action against such organisations, ensuring that successes are widely publicised to demonstrate that the enforcement environment is changing.
35. EAS and HMRC should work together to develop the options for enforcing regulations around intermediaries, assessing the likely impact, costs and benefits of each.

### Report section 5.3 Swedish Derogation

36. The Swedish Derogation should either be properly enforced or abolished. EAS remit should be extended to cover the enforcement of compliance with the Agency Worker Regulations 2010 (including the Swedish Derogation), with the additional necessary resource to do this.

### Report section 5.4 Lack of documentation

37. HMRC should take advantage of the recent change in policy guidance and pursue more prosecutions for standalone non-record keeping offences.

# 1. Introduction and context

## 1.1 Role of Director of Labour Market Enforcement

### **Immigration Act 2016 and remit of Director**

The Immigration Act 2016 provided for the appointment of a Director of Labour Market Enforcement to bring together a coherent assessment of the extent of labour market exploitation, identifying routes to tackle exploitation and harnessing the strength of the three main enforcement bodies.

Broadly, my role is:

- i. to produce an annual labour market enforcement strategy, endorsed by BEIS and Home Office Secretaries of State, to set priorities for the three main enforcement bodies;
- ii. to develop the Information Hub;
- iii. and to write an annual report setting out for Ministers how, collectively, the enforcement bodies performed relative to the Ministerially-agreed strategy.

I was appointed in January 2017 and published my introductory report in July, setting out the picture of non-compliance across the labour market and the role of the Director (DLME, 2017). This document is my first full annual Strategy. I issued a consultation document in July 2017 and consulted extensively between August to October 2017. I held over 80 meetings with stakeholders across England, Wales and Scotland and received written evidence from 56 stakeholders (listed in Annex C).

My remit stretches across the whole labour market, covering direct employment as well as labour providers. It covers the entire spectrum of non-compliance, from accidental infringement to serious criminality and modern slavery. I am seeking to build on the excellent work of the three main enforcement bodies.

A key early task is to develop the Information Hub. The Immigration Act 2016 gave the Director, the three enforcement bodies and other institutions the power to routinely share data and intelligence, formalising current information sharing practices to a certain extent. The hub is currently still under development. In the next year it will increasingly provide a mechanism to coordinate information exchange to facilitate joint working, and collect anonymised and/or aggregated data in order to understand the scale and trends of non-compliance in areas of the labour market where workers are at risk of exploitation.

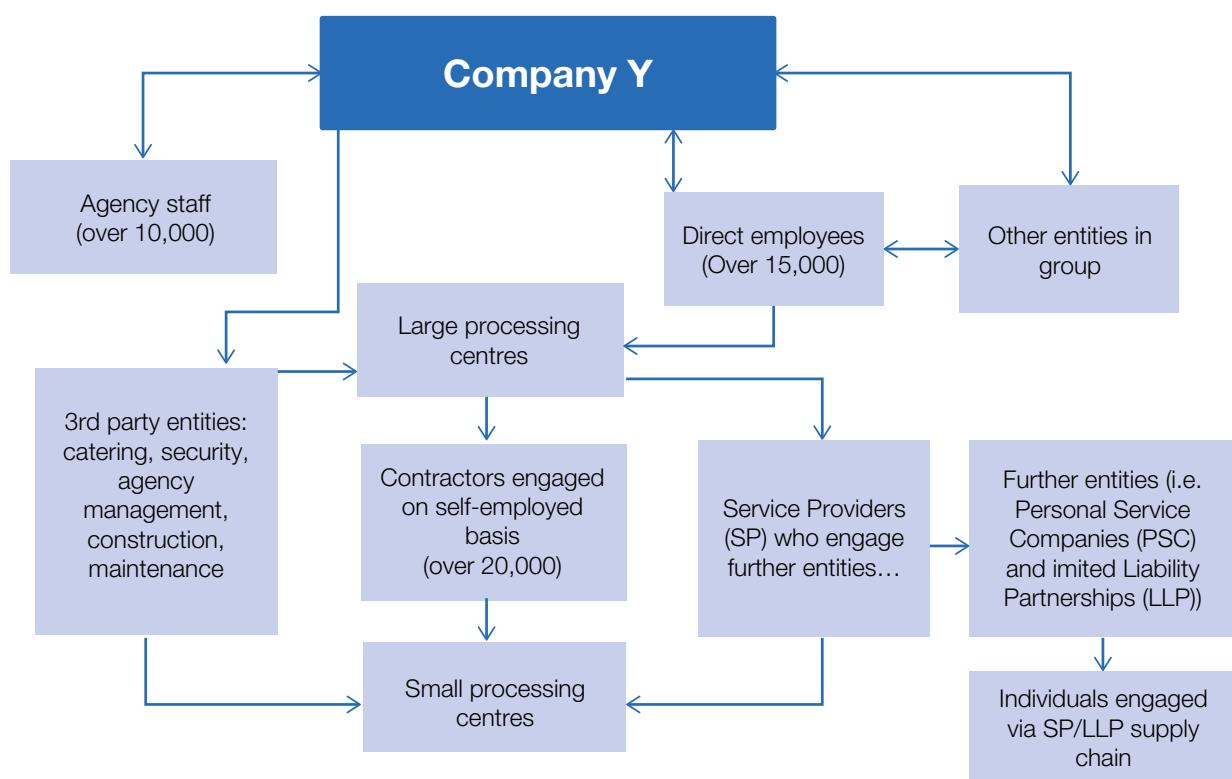
## 1.2 Changes to the labour market

The current trends and levels of non-compliance and exploitation within the labour market have been facilitated by some profound changes that have occurred in the last four decades: the employment relationship has fissured; workplace size has shrunk; the composition of the workforce has altered; trade union membership and collective bargaining coverage have plummeted; labour's share in national income has dropped sharply; and the proportion of the workforce born abroad has more than doubled. These will be considered in turn.

Relationships between the worker and employer are increasingly complex. Weil (2008) described this as the **fissuring** of the employment relationship. Employers have contracted out, franchised, subcontracted and devolved many functions that were once done in-house.

Figure 1, provided to my Office by HMRC to illustrate the complexities of the cases they investigate, demonstrates such fissuring. This firm 'company Y' has over 15,000 direct employees, but these are dwarfed by the agency staff (over 10,000) and those working from an app (over 20,000). Add in third party vendors (e.g. catering, security), service providers, personal service companies etc., and the picture becomes more complicated. It is no wonder some workers do not know who their employer is.

**Figure 1: Example of fissuring in the labour market and complex employment relationships**



Hand-in-hand with this fissuring **workplace size** has contracted. Looking at workplaces with 20 or more employees, in 1980 half had 50 or more employees but by 2011 these larger workplaces accounted for only 38 per cent (Brown et al. 2009; Van Wanrooy et al. 2013).

**Workforce composition** has adjusted. Part-time work and self-employment are more prominent (see Table 1). It is important to understand that the growth of self-employment does not necessarily reflect a burst of entrepreneurial activity. Self-employed people with employees have fallen in recent years. Rather it is individuals switching from employee/worker status to self-employed status that has driven the increase in numbers. Not all such switching is legitimate

and sometimes the person does not even realise s/he now has self-employed status. The gig economy (e.g. Uber, Deliveroo) has also grown rapidly in the last decade. One consequence of these changes is that the distinction between employees, workers and self-employment is increasingly blurred. This impacts on clarity around rights and enforcement of these rights (Taylor et al., 2017).

**Table 1: Changes in the Labour Market**

Indicator	Late 1970s	Around 2016
Self-employed: millions, (% of employed) (Van Wanrooy et al 2013; Machin 2017)	2.0 (Approximately 8%)	4.8 (15%)
Workplace size: workplaces with over 20 workers, % with 50+ (Brown et al., 2009)	50	38
Employees covered by collective bargaining (BEIS, 2017a)	9-in-10	<3-in-10
Labour's share in national income (%) (Haldane, 2015)	68	53
Working age population born abroad (%) (LFS)	7	16

Middle skill level jobs have fallen relative to skilled and unskilled jobs over the last two decades. This is the hollowing out of the labour market. Jobs such as bank teller and semi-skilled manufacturing operative are in relative decline. Less skilled jobs in hospitality and care have increased relatively, as have skilled jobs in, for example, finance and health.

In the academic literature **trade unions** are often described as having a “vested interest” effect – their impact on pay, productivity and profits – and a “sword of justice” effect. The latter concerns the unions’ role in lowering wage inequality and enforcing labour market standards and regulations. It is very noticeable that the decline of unions has gone hand-in-hand with concern about lack of enforcement of labour standards. Trade union membership peaked in 1979 at 13 million. In 2016 membership was under half the peak figure at 6.2 million. In the private sector only 13.4 per cent (2.6 million) of employees are union members. Indeed, if the ex-public sector are excluded e.g. utilities, steel, telecommunications, rail and air, union density in the private sector is well below 1-in-10.

Possibly even starker is the fall in the number of employees whose pay is affected by collective bargaining. In 2016 a quarter (26 per cent) of employees’ pay was affected by collective bargaining. The corresponding figure for the private sector was 15 per cent and the public sector was 59 per cent. By contrast in the late 1970s 9-in-10 employees’ pay was affected by collective bargaining.

The division of our national income between labour (pay) and capital (profits) matters greatly. For much of the twentieth century **labour’s share** in national income gradually rose, to over two thirds in the late 1970s. Since then it has fallen to just over half. The shares of national income going to labour and capital are notoriously difficult to estimate. These numbers are from a trusted source, the chief economist at the Bank of England (Haldane, 2015):

*“...labour’s share of the national income pie has fallen since 2009, from around 58% to 53% [...] Had UK wages tracked productivity since 1990, the median worker would be 20% better off. Unlike earlier phases of rapid technological change, labour has not shared equally in the fruits of recent great leaps forward.”* (Haldane, 2015)

This represents a huge change in income distribution. It is surely a contributory element to concerns that labour standards must be rigorously enforced.

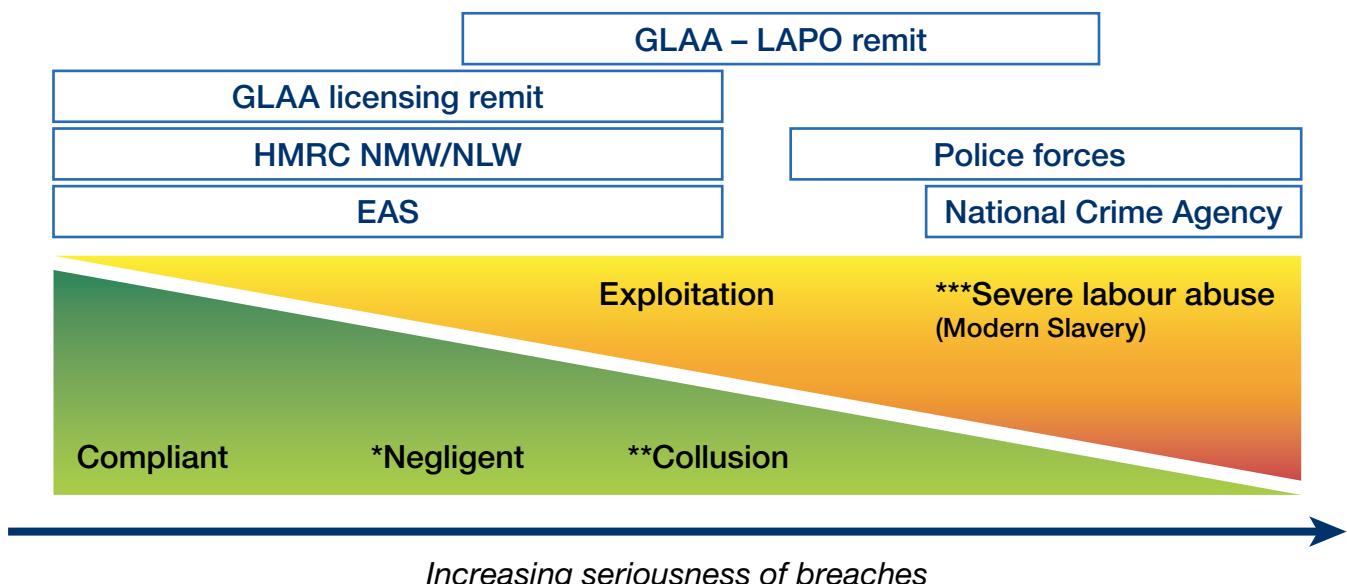
The fraction of the **working age population born abroad** more than doubled from 7 per cent in the late 1970s to 18 per cent in early 2017. In absolute numbers, 4.7 million (11 per cent of the UK population aged 16-64) were from non-EU countries, compared to EU-born totalling 2.9 million (7 per cent of the UK population aged 16-64). Many of those born abroad are highly skilled, but at the other end of the spectrum, many are vulnerable: they may have poor English and not fully understand their rights and responsibilities. This adds a further dimension to the importance of ensuring firms comply with labour standards.

## 1.3 The spectrum of labour market non-compliance

As I set out in my Introductory Strategy in July 2017, my remit covers the whole spectrum of labour market non-compliance, ranging from a basic lack of understanding and application of labour rights and regulations through to criminal exploitation on a large scale which goes beyond worker exploitation.

Figure 2 below sets out a broad representation of this spectrum of non-compliance and shows how the three labour enforcement bodies together operate right across this spectrum from low level to the most severe offences, albeit with varying focus, powers and penalties. This diagram includes illustrative examples of the types of breaches found at each level.

**Figure 2: The Compliance Spectrum**



\*Low-paid retail staff have the cost of their uniforms unlawfully deducted from their pay, bringing them below the national minimum wage.

\*\*As part of an arrangement with the employer, warehouse workers accept pay below the national minimum wage, but claim to work fewer hours than they actually do in order to still claim state welfare benefits.

\*\*\*Workers receive very low rates of pay and work in poor conditions, but are too afraid to leave due to lack of alternative or credible threats of violence.

Some examples of the sort of mistreatment workers can face and the span of illegal behaviour by employers and employment operatives include:

- agencies charging their workers fees for finding work, withholding payment of wages or employers deducting pay for items such as uniforms and the remaining wages for employees being below NMW/NLW;
  - workers' holiday pay being withheld;

- working conditions and facilities, including housing and transport, that are unsanitary and unsafe;
- employers deliberately paying employees below NMW/NLW or requiring long hours above the lawful maximum;
- employers and agencies incorrectly treating workers as self-employed with the intention of evading National Insurance (NI), Pay As You Earn (PAYE) and other financial obligations;
- employers withholding workers' passports and other identity documents;
- threats and physical and mental mistreatment, including forced labour, i.e. modern slavery.

For direct employment the main risk is non-compliance with the NMW/NLW and non-payment of holiday pay (Clark and Herman, 2017). For labour providers, gangmasters and employment/recruitment agencies the main exploitation risks are non-compliance with NMW/NLW, holiday pay, unlawful deductions for services such as transport and charging fees for finding jobs.

With agencies and other employment intermediaries, including the gig economy, the key issues are related to increasingly indirect employment relationships: who is responsible for working conditions and correct pay? Then there is the most severe end of the spectrum where abuses extend to serious labour exploitation within modern slavery.

The purpose of the Strategy outlined below is straightforward. First, to protect vulnerable workers. Second, to try to ensure that the majority of good, compliant firms and other organisations are not undercut, and possibly driven out of business, by unscrupulous non-compliant competitors.

## 1.4 Evidence of scale of labour market non-compliance

One of the requirements under the Immigration Act 2016 is that my Strategy makes an assessment of the scale and nature of non-compliance in the labour market, both last year and for the following three years<sup>1</sup>.

As I set out in the Introductory Strategy published in July 2017, currently, there exist a number of sources of information on the scale and nature of non-compliance:

- Office of National Statistics (ONS) on earnings, specifically the Annual Survey of Hours and Earnings (ASHE). This is particularly helpful for identifying the approximate scale of potential NMW/NLW non-compliance;
- management information on enforcement activity from the three bodies;
- bespoke studies and research from academia and research organisations; and
- intelligence data and analysis from enforcement agencies and industry, including the use of compliance test inspections (see Box 1).

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<sup>1</sup> Immigration Act 2016, Section 2 (2) (a) (i) and (ii).

## Box 1: Compliance Test Inspections for Agricultural Wages Enforcement in Scotland

The Scottish Agricultural Wages Board (SAWB) is an autonomous body established under the Agricultural Wages (Scotland) Act 1949 for the purpose of setting minimum rates of pay and other conditions of service for agricultural workers employed in Scotland. The SAWB is responsible for producing Agricultural Wages Orders which contain the detailed legal requirements for the calculation of minimum pay, holidays and other conditions of service for agricultural workers. A new Order is normally produced annually at the discretion of the Board, coming into force on 1 April.

During our consultation I met with officials from the Agricultural Wages Enforcement Team and was told about the use of Control Test Inspections (CTIs) carried out by the Agricultural Wages Inspectors (AWIs). CTIs are required by Section 12(1) of the Agricultural Wages (Scotland) Act 1949. Approximately 120 CTI visits are undertaken each year from a random selection of agricultural businesses provided by the Enforcement Team. These visits are carried out across the eight Rural Payments and Inspections Division (RPID) area offices in Scotland.

AWIs report back to the Agriculture Wages Enforcement Team within 10 days with their findings in terms of compliance with the Wages Orders, any other relevant information, and a recommendation as to any further action, which may be required.

As well as leading to follow-up action of any identified breaches of the Wages Order(s), CTIs also provide a sample for measuring the degree and nature of non-compliance regarding the terms and conditions of the worker's employment generally.

Together these data sources help paint an overall picture of non-compliance, but each has its, often severe, limitations and none provides the complete picture. By its very nature information on non-compliance can be hard to get at, meaning that arriving at a full and comprehensive picture across the whole labour market is a challenge, particularly around unreported or hidden non-compliance. Bringing together these disparate sources of information will be a continuing part of the work of my Office, and will be a focus over the coming year (see Section 6 on my work plan for 2018/19 and beyond).

Furthermore, extreme care will be needed in how some of this information and data are interpreted: for instance, any expansion of remit or resources for one or more of the enforcement bodies is, by its very nature, likely to uncover a higher absolute level of non-compliance. As an example, it is possible that the policy aim of increasing the NLW to 60 per cent of median earnings (expected by around 2022) will result in more identified non-compliance. Equally, if EAS is given more resources – as I recommend later in this Strategy – then it is likely that employment agency inspectors will find more non-compliance in that sector. Therefore I see it as a key part of my role going forward, not only to improve information and data collection, but also to ensure such data are presented clearly and responsibly.

This section considers for now some existing evidence on the scale of wage underpayment but there is significantly more work to be done to overcome the data gaps in this area. The Information Hub serves to bring together the intelligence from the three bodies and has produced a strategic threat assessment on this basis which has helped to inform this Strategy.

### **Wage underpayment**

The main formal source of information on wages is ASHE. ASHE is, in principle, a 1 per cent sample of employees and workers. The typical sample size is around 180,000 people.

According to the ONS (2017) there were an estimated 342,000 jobs paid below the National Living Wage (NLW) in 2017. This is 1.2 per cent of all jobs held by employees aged 25+ (some of such underpayment is lawful because of the accommodation offset). These estimates are derived from the Annual Survey of Hours and Earnings (ASHE) and indicate a marginal fall in minimum wage underpayment between 2016 and 2017<sup>2</sup>.

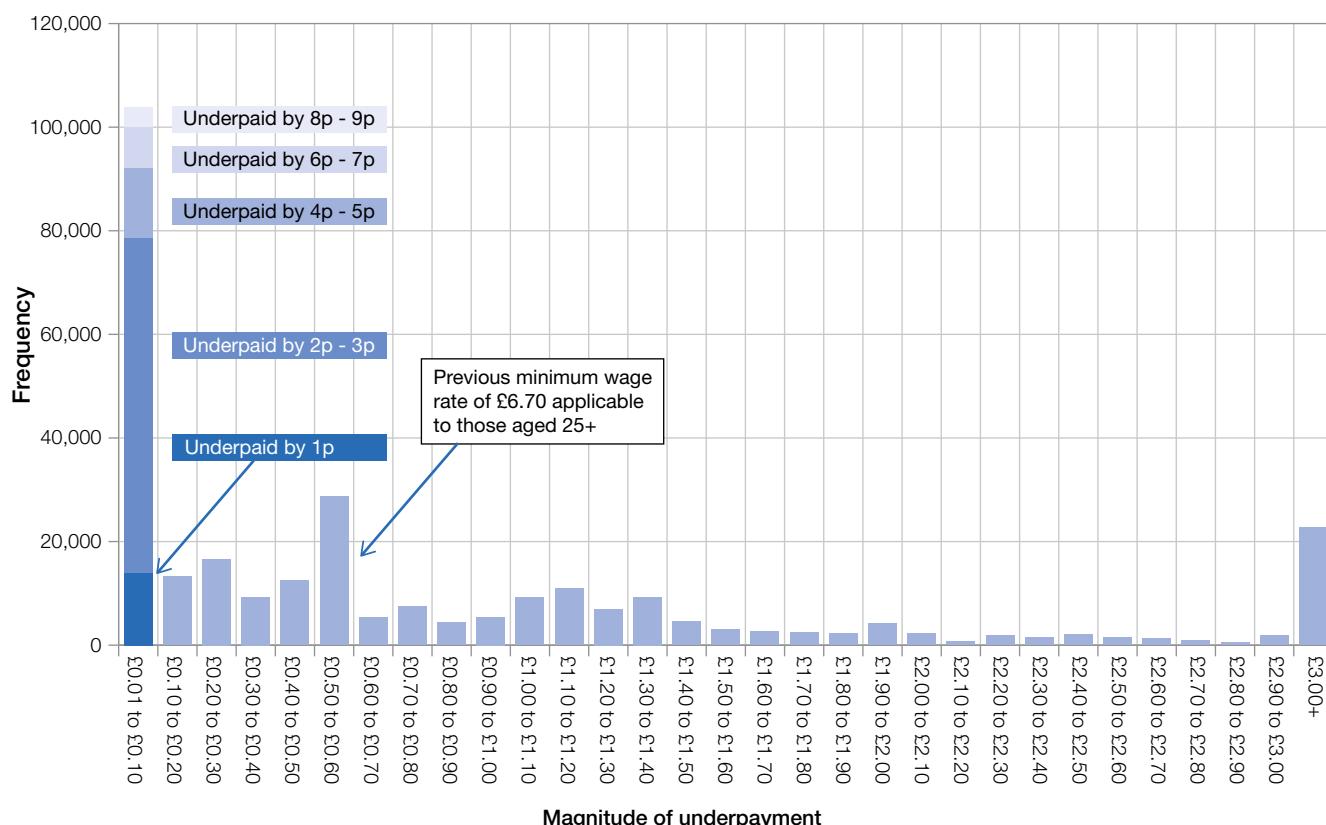
The Low Pay Commission (LPC) defines a low paid job as being paid up to 5 pence above the NLW. Around a fifth of all low paid jobs held by those aged 25+ in 2016 are estimated to be below the NLW<sup>3</sup>.

There is evidence to suggest that certain types of workers are more at risk of NLW underpayment. The LPC (2017) concluded that “*the majority of underpaid workers are female, part-time and hourly paid*”, though it was suggested that this is skewed by the disproportionate prevalence of these types of worker in low-paid jobs. The age profile of underpaid workers was found to be very similar to all other workers.

Figure 3 provides some evidence from BEIS, presented to the LPC, on the level of underpayment experienced by individuals who are not paid the NLW. While over 100,000 people are underpaid by less than 10p per hour, it demonstrates that over half of those underpaid were 50p or more below the NLW (BEIS 2017b).

Recent research suggests apprentices are particularly at risk of being underpaid (BEIS, 2017c). Overall nearly 1-in-5 (18 per cent) are not paid their correct minimum wage. If we compare the mean pay of the non-compliant with the appropriate minimum wage, the gap is 52p for 16-18 year olds, rising to over £1 per hour for those aged 19-24. Hairdressing and childcare are prominent sectors in underpaying apprentices.

**Figure 3: Underpayment of the NLW (£7.20) for those due the 25+ rate in 10p pay bands**



Source: BEIS (2017b)

2 According to ASHE 2016, there were an estimated 365,000 employees paid below the NMW/NLW. This represented 1.3 per cent of all employee jobs.

3 Again, there was a slight fall between 2016 and 2017 from 20.6 per cent to 18.3 per cent.

Underpayment varies by sector. Table 2 describes the sectors with a high number of jobs below the NLW/NMW and/or which account for a high fraction of low paid jobs. Hospitality, retail and childcare are prominent.

**Table 2: Jobs paid below NLW/NMW**

Sector	Number of jobs paid below NMW/NLW	Number of jobs paid below NMW/NLW as a proportion of low paid jobs in the sector
Hospitality	55,700	17.3%
Retail	50,500	15.3%
Childcare	20,000	33.5%

Source: BEIS (2017b)

One way of looking at the overall scale of underpayment of wages is to consider it as a percentage of the wage bill.

Clark and Herman (2017) have estimated the total of unpaid holiday pay and other forms of unpaid wages. 1-in-20 (4.9 per cent) workers report they received no holiday pay. Using conservative assumptions Clark and Herman estimate the value of unpaid holiday pay to be at least £1.8 billion. The additional income tax collected on this basis would equate to £300 million. Other forms of unpaid wages are also estimated to be £1.3 billion. So total unpaid wages (what the US literature refers to as “wage theft”) are estimated to be £3.1 billion in 2016.

Assume the workers affected are in the bottom three deciles of the wage distribution. Their total wage bill is around £77 billion, so Clark and Herman’s £3.1 billion is around 4 per cent of the wage bill. The £3.1 billion figure is equivalent to around £470 per worker for the 6.6m workers in the bottom three deciles.

It is well recognised that employment agencies and intermediaries are a particular risk both for underpayment of workers and underpayment of tax. I received evidence from a Director of the employment agency Extraman, who estimates that in this sector £4.5 billion is misappropriated mainly from workers but also from HMRC. He stated that the annual turnover of this sector is £30 billion. Thus the loss to workers/HMRC is 15 per cent of total turnover. I have not been able to corroborate this evidence but the Director of Extraman derives the £4.5 billion as follows.

- First, consider holiday pay. Using a sector turnover figure of £30 billion, 12.07 per cent should be paid as holiday pay. It is estimated that 70 per cent is not paid, equivalent to £2.5 billion. Non-payment is via: not informing workers they are entitled to holiday pay; not allowing workers to carry it forward between holiday years (which is unethical but legal); underpaying; making calculations too difficult to follow; and failing to pay accruals with the P45.
- Second, under the Agency Workers Regulations 2010 (AWR) temporary workers are entitled to receive the same wage as a permanent worker for the same job after 12 weeks. Using the Swedish derogation this right can be waived in lieu of “pay between assignments”. Many workers waive their rights but never receive any pay between assignments. The estimated unpaid wage is put at £1 billion per annum.
- Finally, umbrella and related schemes (see Section 5.2) are estimated to cost workers/HMRC £1 billion per annum through a number of schemes.

Estimates such as these can always be debated and improved, but the assumptions both from Extraman and Clark and Herman do not seem unreasonable given the evidence I have reviewed, the information received through the Information Hub, and what I have heard during consultation with partners.

## Scale of Modern Slavery

The extreme end of labour market exploitation and wage underpayment is modern slavery. As well as labour exploitation, modern slavery can also include trafficking for sexual exploitation or criminal exploitation. Estimates vary but Her Majesty's Inspectorate of Constabulary, Fire and Rescue Service (HMICFRS) recently reviewed the evidence and concluded:

*"Government estimates previously suggested there were between 10,000 and 13,000 potential victims of modern slavery and human trafficking in the UK in 2013. However, the true number is likely to be far higher, because many victims are unable or reluctant to engage with authorities (or may not be recognised as victims of this kind of offending if they do)" (HMICFRS 2017)*

Statistics published by the NCA for the third quarter of 2017 demonstrate that referrals to the National Referral Mechanism (NRM)<sup>4</sup> have increased from 899 in Q3 of 2016, to over 1,300 for Q3 of 2017. Labour exploitation accounted for 48 per cent of these referrals. This is a significant increase: total NRM referrals rose by 10 per cent in this quarter, but labour exploitation referrals increased by 30 per cent within the same period. This increase is largely driven by a rise in NRM referrals for minors (accounting for 41 per cent of all referrals), particularly those of Sudanese, Vietnamese, Eritrean and UK nationality, the latter now comprising over 80 per cent of all UK national labour exploitation referrals. There is a suggestion that these trends are partly driven by a shift in practice by first responders who are increasingly making NRM referrals for county lines drugs runners, especially minors, treating them as victims of modern slavery rather than including them in prosecutions.

The Modern Slavery Helpline, operated by the NGO Unseen, was launched in October 2016 and provides a confidential 24/7 helpline providing information, advice and guidance on all modern slavery related-issues. Their latest statistics show that in the month of September 2017 they received 372 calls to the helpline and 82 online reports. The helpline regularly analyses and assesses the information it receives on each call to provide strategic level data to partners and stakeholders recognising that coordination and collaboration is key to tackling labour abuse and exploitation. The helpline has recognised a growing number of labour abuse calls, and now tracks these calls to obtain information about the location, the situation, the employer or recruitment agency involved, the type of abuse being experienced and can refer to the GLAA, HMRC for national minimum wage complaints, or EAS.

The evidence base around the scale and trends in modern slavery is very much in its infancy, but is receiving increasing attention by the network of bodies that come into contact with victims and perpetrators. As the Director of Labour Market Enforcement, I see modern slavery as the extreme end of a continuum of non-compliant behaviour. I am keen to ensure that the links between modern slavery and other forms of labour market exploitation (both in terms of the individuals involved and the conditions that enable it to happen) are recognised so that the whole spectrum of behaviour can be tackled in a coherent and effective manner.

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<sup>4</sup> The National Referral Mechanism (NRM) is the framework by which frontline public sector bodies, including enforcement agencies, identify potential victims of all forms of human trafficking and modern slavery in the UK, and ensure appropriate support is provided.

## 1.5 Effective enforcement

A major influence on approaches to labour enforcement in recent years has come from the work on strategic enforcement by Professor David Weil (2008, 2010 and 2014). This has already helped shape labour enforcement in the US, Australia and, most recently, in Ontario, Canada (Mitchell and Murray, 2017).

Recognising the changes in the workplace (outlined above), Weil argues that “*challenges facing labour inspectorates... transcend the number of inspectors available to enforce laws*” (Weil, 2008). Instead, he argues, “*inspectorates must go beyond calls for more inspectors by adopting a clear strategic framework for reacting to incoming complaints and targeting programmed investigations in order to maximise effectiveness in the use of their overstretched resources.*” (Weil, 2008).

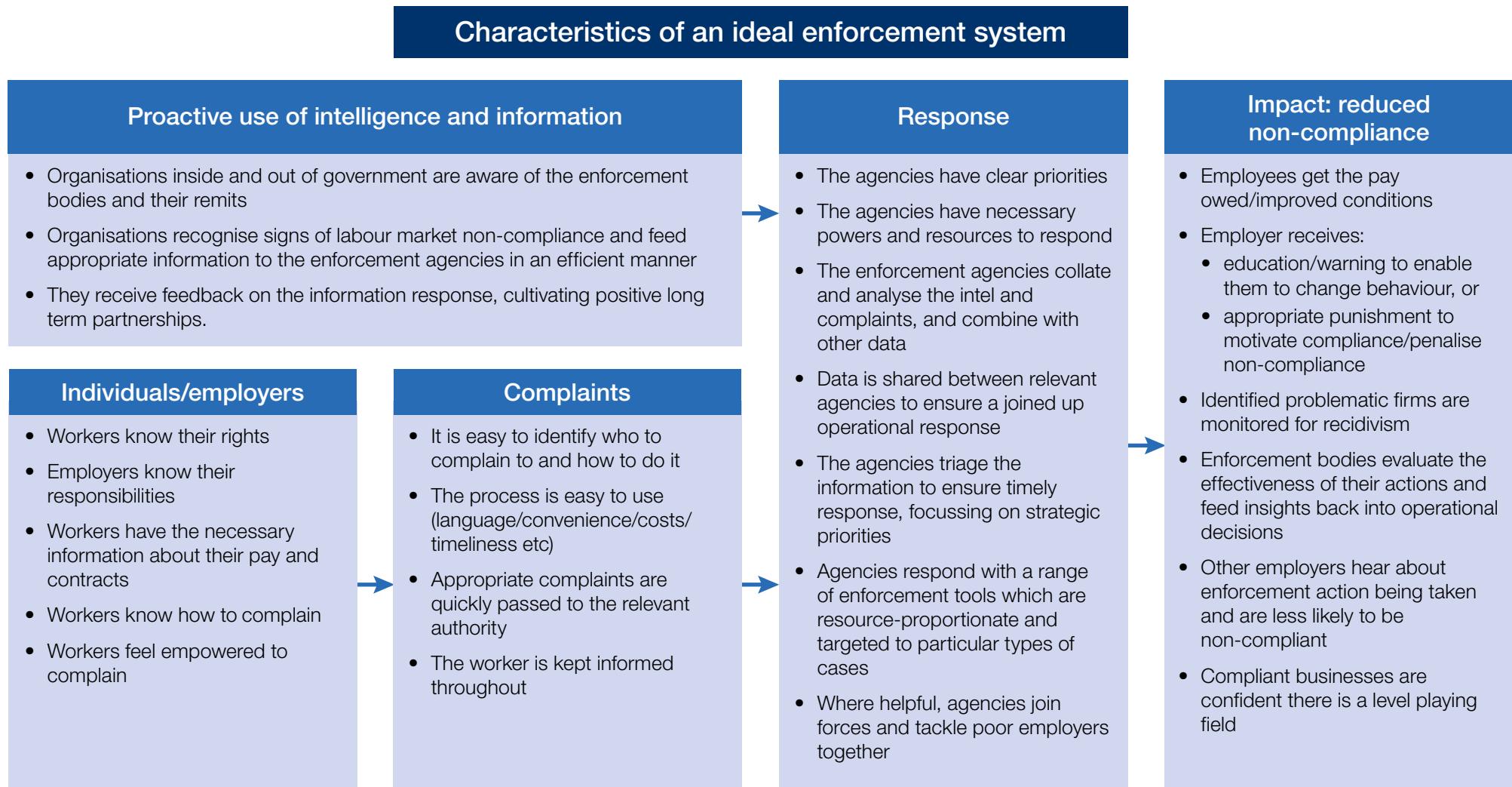
To achieve this, Weil sets out four principles underpinning effective enforcement:

- **Prioritisation:** action from enforcement bodies needs to be informed by an understanding of the probable severity of problems across sectors; both frequency and level of harm
- **Deterrence Effect:**
  - the threat of investigation and enforcement must act as a deterrent to employers to proactively spur change in compliance more widely than only those directly inspected
  - this relies on the perceived probability of investigation and the expected level of penalty
  - Increased labour market enforcement presence should deter rogue employers and encourage a more level playing field for compliant businesses
- **Sustainability:** enforcement must have a long term effect on employer behaviour and lead to low rates of recidivism and lasting compliance
- **System-wide impacts:** influencing behaviour through each layer of an industry sometimes using sector-specific levers.

Applying these principles to the different elements of the enforcement system in the labour market can help us to think through what an ideal system would look like in practical terms: What would workers need to ensure they can complain? How would intelligence and information on non-compliance be treated and shared? What would characterise an effective response from enforcement bodies? What would be the resulting impact of the system for the different players? What behaviours or resources from Government, employers and consumers would support effective enforcement?

Figure 4 brings some of these characteristics together. This not only starts to provide a framework for the enforcement bodies, and the Director, to work towards, but also a potential way of assessing the current state of, and improvements in, different parts of the system.

**Figure 4: Characteristics of an ideal enforcement system**



**Government:** ensures the guidance on employment regulation is clear and easily accessible. Policies coherently create incentives for firms to be compliant, and removes environment in which non-compliance can be part of a business model. Evaluates policy and activity.

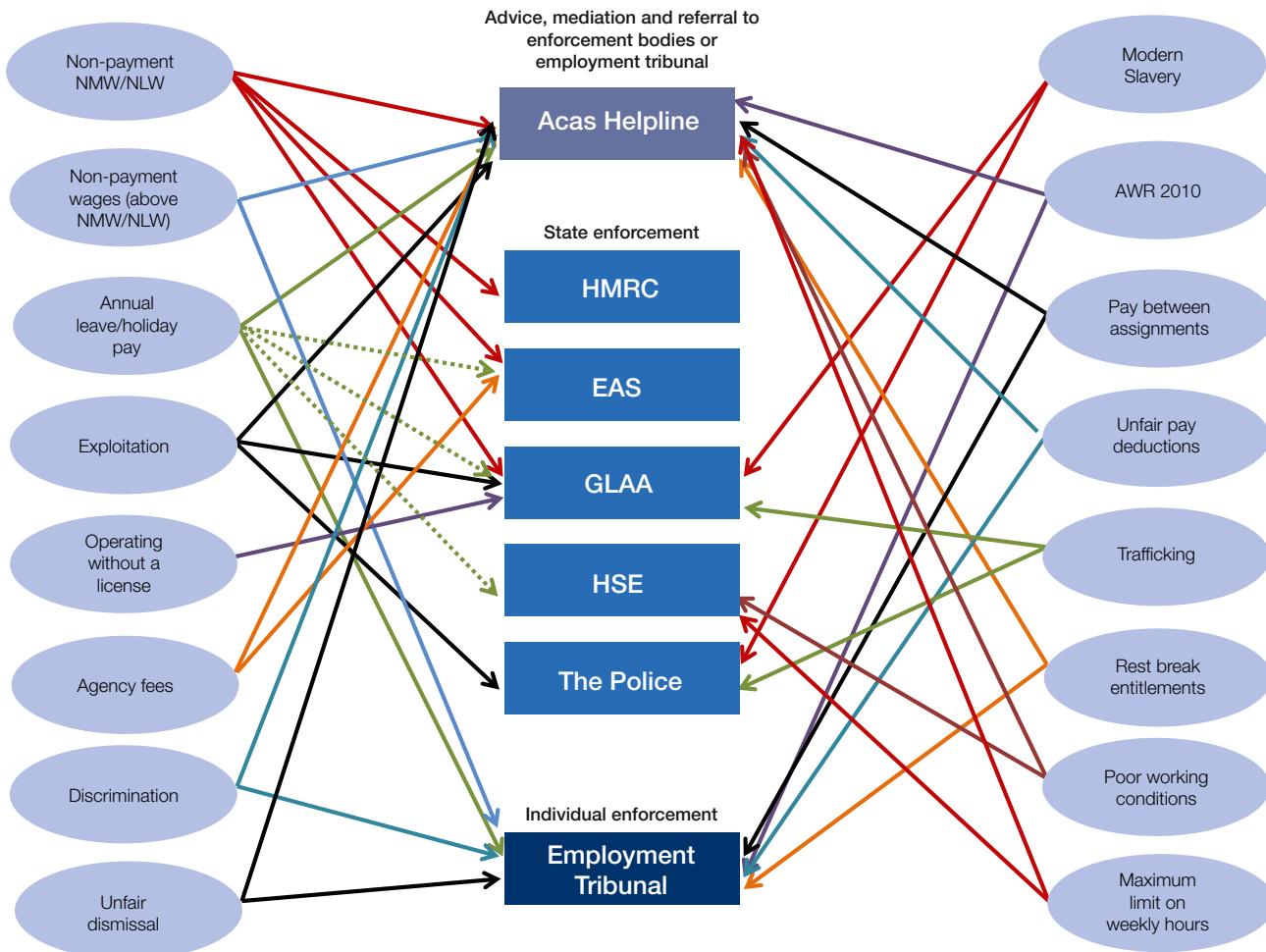
**Major retailers/contractors:** Monitoring of labour standards by main contractors is effective and non-compliance is not tolerated, even where price competition is high.

**Consumers:** are well informed and demand retailers use ethical suppliers/ labour and avoiding employing dubious labour themselves.

## 1.6 The current labour market enforcement system

The enforcement of non-compliance in the labour market is severely fragmented, indeed this is one of the reasons that the post of Director of LME was set up, to provide coordination and strategic oversight between the three main state enforcement bodies. This fragmentation is demonstrated in Figure 5 below.

**Figure 5: Fragmentation of labour market enforcement system**



It is a two-tier system with cases pursued either:

- at an individual level at employment tribunals, or
- via state enforcement bodies.

The latter includes the three enforcement bodies falling under the Director's remit, as well as the Health and Safety Executive (HSE).

With a plethora of organisations operating in this space, it can be difficult for individuals experiencing employment violations to know where to go for help. Added to this, often these violations can span more than one area of employment law, meaning that remedies may need to be sought via more than one of these routes (see Section 2.4).

*"Among people who didn't seek redress, our survey found that 32% didn't do this because they thought it would be too difficult and complex. [...] it] can be particularly confusing for workers considering the fact that many people experience more than one workplace problem at the same time."* Citizens Advice response to DLME consultation

This complexity is also a problem for enforcement bodies in terms of coordinating their activities and intelligence to deliver effective and efficient enforcement. It has become increasingly clear that there are also significant gaps in enforcement, which are the result of the patchwork of legislation and regulations governing behaviours in the workplace.

During the consultation, several stakeholders have raised the view that a single, joined up labour inspectorate would be the solution to this complex situation.

*"a single organisation dedicated to the public enforcement of workplace rights should be created – the Fair Work Authority"* Citizens Advice response to DLME consultation

*"A single consolidated agency would be more efficient for ensuring compliance and deterrence."* Professor Judy Fudge response to DLME consultation

While this option is attractive at a theoretical level, and indeed exists in several other countries, this is a substantial step from the current system. The practicalities, time and resources required to bring together the three organisations would be significant and I do not believe it would be appropriate at this stage. The Government considered the options in 2015 and opted for a combination of expanding the role of the GLAA and creating the coordinating function of the Director of Labour Market Enforcement to deal with this problem, and I therefore do not recommend any merger of the enforcement bodies at the current time.

### **Current remit and resourcing of three enforcement bodies**

The three bodies over which the Director has oversight differ greatly in remit, status, resourcing and scope (see Annex D for further information on the powers of the three bodies). These differences are reflected in some of the challenges that they have in working together on joint cases. For example, EAS has 12 staff, GLAA has just over 100 while HMRC has over 400 staff working on NMW/NLW enforcement. This means their capacity and also their organisational infrastructure is very different, impacting on their approach to enforcement.

**Table 3: The Enforcement Bodies**

Enforcement body (Responsible department)	Funding (£m)	2017/18 FTE staff	Focus and Scope	Key sectors covered	Geographic locations covered	2016/17 cases
<b>HMRC NMW/NLW (BEIS)</b>	2017/18: 25.3 2016/17: 20	399+	All employers and workers in scope, covering around 2m workers in low-paid jobs*	All sectors	UK	2,674 closed, 2,775 opened
<b>GLAA (Home Office)</b>	2017/18: 7.1 2016/17: 4.8	104	Over 1,000 licensed labour providers, supplying around 0.5m workers  Modern Slavery: estimated 10-13,000 victims***	Agriculture; horticulture; shellfish gathering; food processing and packaging	England, Scotland, Wales and by order in Northern Ireland	247 licensing cases ****
<b>EAS (BEIS)</b>	2017/18: 0.75** 2016/17: 0.5	12	18,000 Employment Agencies, covering 1.1m workers	Employment agencies	England, Wales, Scotland	142 targeted inspections; 750 complaints cleared, 828 complaints received

Source: NMW/NLW: BEIS (2017b), GLAA: management information, EAS: EAS (2017).

\* Low paid jobs refer to those paid up to five pence above the relevant NMW/NLW rate based on ASHE 2016 estimates

\*\* The increase of £0.25m in 2017/18 was a one off increase for capital investment and does not reflect an increase in core budget.

\*\*\* Based on an estimate of there being between 10,000-13,000 potential victims of Modern Slavery in the UK (in 2013) (Silverman 2014). The Immigration Act (2016) gave GLAA a much broader role addressing labour exploitation across the entire labour market, including Modern Slavery offences. The new activity is carried out by Labour Abuse Prevention Officers (LAPOs). LAPOs have powers to: investigate labour market offences; arrest suspects; enter premises; search and seize evidence.

\*\*\*\* comprising: 109 Licence Applications, 39 Compliance Inspections, 16 Compliance New Business inspections, 16 Change of Principal Authority inspections, 51 Enforcement cases, and 16 "Others". Note: in addition to this caseload in 2016/17, the GLAA also handled 37 informal resolutions, 17 change of business cases, 157 calls to the language line, and 2,867 unique intelligence submissions

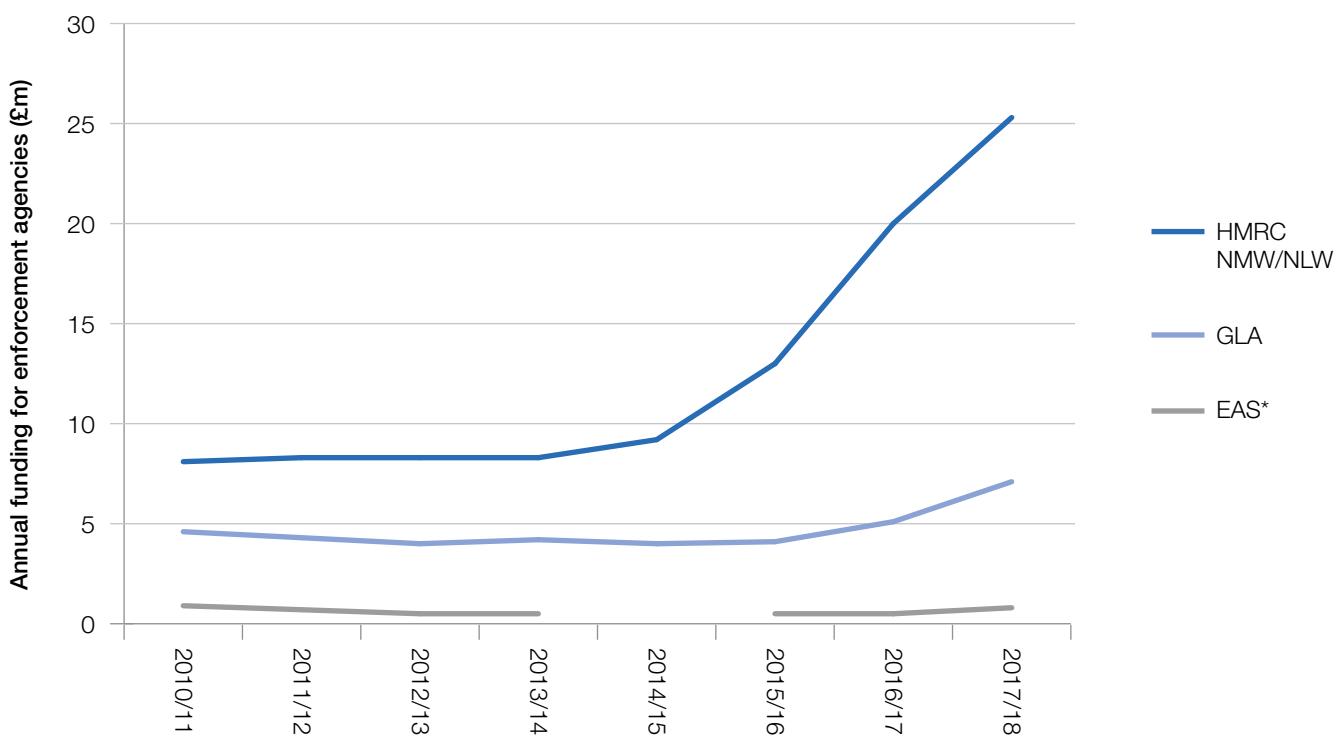
As can be seen from Figure 6, the resourcing for both HMRC NMW/NLW and for GLAA has increased in recent years. For HMRC this reflects the increase in the NLW rates which will almost inevitably result in a greater number of complaints and cases of non-compliance to be investigated. The Low Pay Commission (LPC) estimates that the projected increase in NLW to £9.00 an hour by 2020 would raise coverage from around 5 per cent of the work force in 2015 to around 14 per cent by 2020 – 3.3 million workers by 2020, up from 2.3 million – with clear implications for the enforcement task for HMRC NMW/NLW team (LPC 2017).

The GLAA's resources have been increased to enable them to carry out their extended remit to tackle labour exploitation across the economy and the introduction of Labour Abuse Prevention Officers (LAPOs) has provided new powers.

EAS resources have remained at a similar level, with a small increase in 2017/18 representing a one-off increase for capital investment.

In contrast, HSE – the other main labour market enforcement body – has had a significant reduction in resources over the past few years, from net operating costs of £230 million in 2009/10 to almost £100 million less (£133 million) by 2016/17.<sup>5</sup> While some of that decrease has been due to changing remit (for instance the Office for Nuclear Regulation becoming a statutory public body in 2014/15), the bulk has been managed through a combination of economies, efficiencies and income growth (cost recovery and commercial).

**Figure 6: Changing funding for enforcement agencies**



Sources: GLAA: Home Office management information. EAS: management information, Parliamentary Question (2017). HMRC: Parliamentary Question 2015, BEIS 2017b

Note: The EAS budget was held at a higher level of aggregation and managed across a number of different programmes, so a specific EAS figure for 2014/15 is not available.

Currently the three bodies can use a variety of powers and penalties. These range from financial penalties (fines), to regulatory disclosure (so-called naming and shaming) to criminal prosecution and prohibiting employment agencies and labour providers from operating. Employment law violations investigated by the three enforcement bodies can be pursued as civil actions, criminal prosecutions or as both. The most severe breaches are more likely to lead to criminal prosecution.

<sup>5</sup> Source: HSE annual reports and accounts, for example HSE 2017.

## HMRC NMW/NLW

HMRC (a non-ministerial department) enforces the National Living Wage (NLW) and National Minimum Wage (NMW). In 2016/17, its enforcement budget was £20m. This was increased for 2017/18 to £25.3m, with a consequent increase in staff numbers. While its scope covers all workers and employees, in practice the focus is on the 2.3 million workers earning at the level of NMW/NLW or just above. The NMW/NLW team is part of HMRC (and therefore accesses HMRC information and intelligence resources) but acts on the basis of a Service Level Agreement (SLA) with BEIS (agreed annually with a mid-point review).

In 2016/17, the NMW/NLW team:

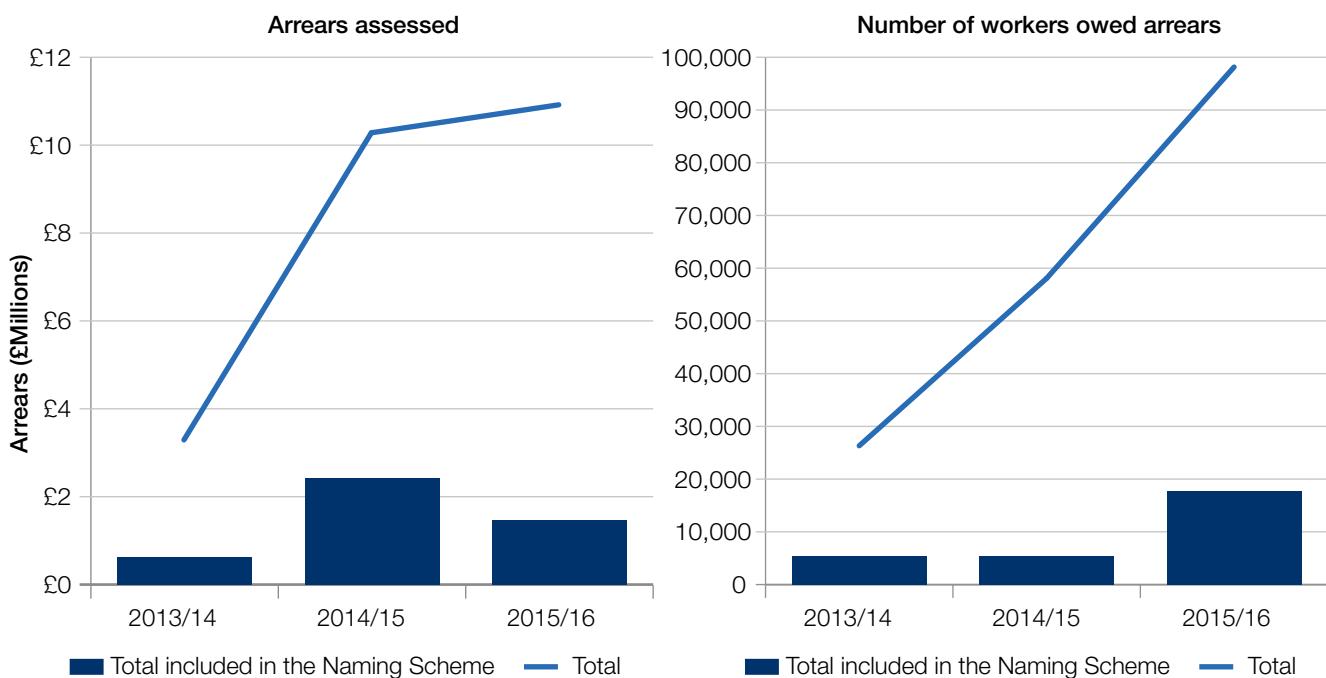
- closed 2,674 cases;
- issued 821 penalties to a total value of £3.9m;
- identified pay arrears in excess of £10.9m for over 98,000 workers;
- completed four successful prosecutions.

HMRC may allow employers to address NMW/NLW problems discovered as part of an audit through performing a self-review so that workers are paid quickly. In certain circumstances HMRC may apply discretion to allow the employer to self-correct. Self-corrected amounts are not included on a Notice of Underpayment (NoU). Only the arrears included on a NoU are subject to penalties and referred to BEIS for inclusion in its Naming Scheme. It is possible, though, for a firm found to be non-compliant to have both a NoU and to self-correct other arrears. Self-review and arrears paid through self-correction are subject to audit and sample assurance checks. As shown in Figure 7 below, self-correction accounts for a significant proportion of the NMW arrears identified by HMRC. Of the £10.9m arrears identified in 2016/17, £6m was self-corrected arrears, applying to 64,000 workers (BEIS, 2017b).

HMRC take civil action to recover **wage arrears** for workers by issuing a Notice of Underpayment to the employer. A civil penalty is also imposed on employers for NMW/NLW breaches. From 1 April 2016, this underpayment penalty is 200 per cent of the value of the arrears, capped at a maximum of £20,000 per worker. The penalty is reduced by half if the unpaid wages and the penalty are paid within 14 days.

Employers who are issued with a Notice of Underpayment and owe arrears over £100 in wages are publicly “**named**” as part of the BEIS scheme introduced in 2011 (unless they meet one of the exceptional criteria). In 2016/17, there were two iterations of the list, in which a total of 556 businesses were named and shamed. Lists are now published approximately quarterly with the thirteenth, and latest iteration at the time of writing, published in December 2017 naming another 260 businesses. Overall 1,539 employers have been named since the scheme’s relaunch in 2013. The named employers have been identified by HMRC as owing around £8 million in arrears for around 58,000 workers, and fined approximately £5 million.

**Figure 7: NMW Arrears assessed by HMRC: Totals and those included in the Naming Scheme**



Sources: BEIS (2017b); and published Naming Scheme figures from BEIS

HMRC refer the most serious and persistent cases of non-compliance to the CPS for **criminal prosecution**<sup>6</sup>. The Crown Prosecution Service (CPS) will consider the evidence and determine whether it is in the public interest to prosecute. If prosecuted and convicted, the fine for a NMW Act offence is capped at the statutory limit of £5,000 for breaches committed before 12 March 2015. Offences committed after this date carry potentially unlimited fines following the removal of statutory limits by section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Since the introduction of the NMW Act 1998, there have been 14 prosecutions; all of which have occurred since 2007. In 2016/17, four employers were prosecuted for non-compliance with NMW/NLW regulations. So far in 2017/18 one employer has been prosecuted.

With its increase in resources, the HMRC NMW/NLW have restructured (in Spring 2017) to include a tiered approach to enforcement:

- a ‘Promote’ team deals with early interventions and raising awareness of worker rights and employer obligations;
- National teams provide a first point of contact for complainants and determine the handling of a case, often using nudging letters to ensure compliance in straightforward cases;
- Regional teams which deal with small to medium size firms and undertake interventions and investigations, including targeted enforcement;
- Serious non-compliance teams, which investigate serious non-compliance and identify potential criminal offences, often working in partnership with other agencies.
- Special enforcement teams, responsible for investigating complex businesses and supply chains and managing the most sensitive cases.

<sup>6</sup> In England and Wales only.

## Gangmaster and Labour Abuse Authority (GLAA)

GLAA's enforcement role in the labour market is two-fold:

- Firstly, under the Gangmasters (Licensing) Act 2004, it licenses gangmasters in agriculture, horticulture, food processing and the shellfish industry sectors and investigates the activities of unlicensed gangmasters and those using their services.
- Secondly, since the implementation of the 2016 Immigration Act the GLAA also has a much broader role in addressing labour exploitation across the entire labour market by using its new powers under section 114B of the Police and Criminal Evidence Act 1984 (PACE).

Its 2016/17 budget was £4.8m, increasing to £7.1m in 2017/18. The GLAA now employ over 100 staff. The GLAA is a Non-Departmental Public Body (NDPB) reporting to the Home Office. It is not a government department or part of one, and accordingly operates to a certain extent at arm's length from ministers.

It is an offence to provide labour in the licensed sectors without a valid GLAA licence. There are around 1,000 licence holders supplying 0.46m workers. The GLAA can **refuse or revoke the licence** of a non-compliant licence holder who has failed to meet the required licensing standards<sup>7</sup>. Revocation may occur if a licence holder has failed to respond to low-level resolution procedures or where the breach is severe. In 2016/17, 101 new licences were granted, 16 were refused and 18 gangmasters had their licence revoked for breaching licensing standards.

GLAA can refer a case to the CPS for **criminal prosecution** where labour providers have operated without a licence or obstructed officers, or where labour users have used an unlicensed gangmaster. If prosecuted and convicted on indictment, the maximum penalty for those operating without a licence is 10 years imprisonment and/or a fine. A labour user convicted of entering into arrangements with an unlicensed gangmaster can receive a penalty of up to six months imprisonment and/or a fine. In each of the past three financial years, the GLAA have taken five prosecutions. These have all been under Section 12; acting as an unlicensed gangmaster or being in possession of false documents.

The body was rebranded as Gangmasters and Labour Abuse Authority in April 2017 to reflect its new remit and powers conferred by the Immigration Act 2016. The extended GLAA remit is carried out by LAPOs. As of December 2017 the GLAA had 29 operational LAPOs. LAPOs are authorised to use investigatory powers under s.114B of PACE in England and Wales when investigating certain labour market offences (as listed below). They are able to take immediate and effective action against rogue employers operating in any sector. LAPOs have the power to:

- investigate labour market offences under the National Minimum Wage Act 1998, Employment Agencies Act 1973, the Gangmasters (Licensing) Act 2004 and parts 1 and 2 of the Modern Slavery Act 2015 related to worker exploitation;
- to enter premises under a court warrant where they have a reasonable belief that labour market offences are being committed; arrest a person for a labour market offence if necessary; and
- to search and seize evidence of breaches of labour market regulations.

The GLAA is predominately targeting their new powers under PACE on the more serious cases of labour exploitation, such as modern slavery offences or where multiple labour market offences have been committed. At the time of writing the GLAA has not yet pursued any prosecutions under the new powers, but they have been involved in a number of police-led investigations which have been presented to the CPS. There is a time lag, due to court processes, before it would be expected to see prosecution outcomes from the operations involving new powers.

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<sup>7</sup> Further information on licensing standards is given in Section 4.2.

## Employment Agency Standards (EAS)

EAS enforces regulations covering employment agencies. In 2017/18 its budget was £0.75m, increased from £0.5m in 2016/17. Its core budget however remains the same, as this additional £0.25m represents a one-off IT investment. It has 12 staff, of which nine are inspectors. There are estimated to be 18,000 employment agencies with over one million agency workers. The EAS does significant work considering the limited resources at its disposal; in 2016/17 it cleared 750 complaint cases and undertook 142 targeted compliance inspections (EAS, 2017).

EAS is a team within BEIS operating directly within a government department which means they are subject to BEIS protocols on how they function, particularly impacting on their public communication. For instance, they are unable to have a standalone website or a separate webpage on GOV.UK dedicated to their team. These restrictions limit EAS's ability to publicise success stories on their enforcement action, constraining their capacity to raise awareness of their activities for employers and workers alike.

The main legislation underpinning the EAS is the Employment Agencies Act 1973, along with the Conduct of Employment Agencies and Employment Businesses Regulations 2003. Examples of offences investigated by EAS include placing false advertisements for jobs, employment businesses failing to pay wages and holiday pay to workers and providing additional services to work-seekers for a fee before providing any work-finding services.

The body takes an educative approach with the majority of employment agencies with which it engages. Where an employment agency has failed to respond to a **formal written warning**, EAS can pursue a **criminal prosecution** through the Insolvency Service's Criminal Enforcement Team. If successfully prosecuted and convicted a **fine** will be imposed. This fine may be capped at £5,000 for some summary offences committed before 12 March 2015, although after this date the fine is potentially unlimited.

EAS can also ban non-compliant individuals from running an employment agency for up to 10 years by seeking a **Prohibition Order**. This action may be taken after a prosecution, or on the basis of information gathered during an investigation. Any breach of a Prohibition Order is subject to criminal prosecution and a fine on conviction.

Prosecutions are rare with only one prosecution and one prohibition for the reporting year 2016-2017. Currently 12 individuals are listed by EAS as prohibited from running an employment agency or employment business due to misconduct or unsuitability.

## Other Stakeholders

There are many other stakeholders connected to labour market enforcement in the UK. The Director and the three enforcement bodies are acutely aware of the need for joined up policies and operations to ensure effective enforcement, not least because organisations which are non-compliant in one area are often likely to be non-compliant in other areas of regulation as well.

**Table 4: Some other key stakeholders for the Office of the Director of Labour Market Enforcement**

Government departments (policy)	Government organisations (operational)	Trade Unions	Trade bodies/ accrediting bodies	NGOs/Charities	Firms
Department for Business, Energy and Industrial Strategy (BEIS)	Local Authorities National Crime Agency Police Forces	Trade Unions Congress UNISON UNITE	Confederation of British Industry British Retail Consortium	Ethical Trading Initiative Focus on Labour Exploitation Citizens Advice	Large multinationals Small and Medium-sized Enterprises (SMEs)
Home Office HMRC	Home Office Immigration Enforcement Health and Safety Executive Local Authorities The Insolvency Service Security Industry Authority The Care Quality Commission (CQC) HMRC tax teams	National Association of Schoolmasters Union of Women Teachers (NASUWT) National Education Union (NEU) Independent Workers Union GB Union of Shop, Distributive and Allied Workers Nautilus International	Association of Labour Providers Recruitment & Employers Confederation (REC) Freelancer & Contractor Services Association (FCSA) British Cleaning Council British Hospitality Association	Traidcraft Stop the Traffik Shiva Foundation Amnesty International Oxfam SAFERjobs Unseen	Small independents

This table is by no means exhaustive; the office has built strong relationships with many stakeholders not listed and other organisations including professional bodies, academics, think tanks, trade unions, embassies and corporate foundations.

Our stakeholders play a major role in supporting the enforcement of labour market regulations and promoting a strong ethos of compliance. Trade unions, as an example, have been instrumental in raising awareness of exploitation in high risk sectors, such as UNISON's campaign for care sector workers' rights and UNITE's focus on the construction industry. I have observed trade associations becoming active in disseminating appropriate guidance to their members, advocating adherence to legislation and policy, and highlighting how to avoid regulation breaches.

All three enforcement agencies work jointly with other public sector bodies to better coordinate enforcement operations, targeting sectors where non-compliance is likely to be found across a broad range of areas. Concerns have been raised by some of our stakeholders around the nature of the relationship the Office of the DLME, and by default the three enforcement bodies, have with Immigration Enforcement (IE) in Home Office. This is of particular note when IE accompanies the enforcement bodies to conduct joint operations.

Some stakeholders expressed concern that the presence of IE deters vulnerable workers, both undocumented workers and documented migrants who are less secure or aware of their immigration status, from speaking out against illegal practices by their employer for fear of deportation.

*"Close working with immigration enforcement could lead to workers being dissuaded from making complaints. Labour exploitation will not be effectively addressed if it is closely linked to immigration enforcement."* TUC response to DLME consultation

*"joint operations with the UK Border Force, which enforces immigration controls, will likely have a detrimental impact both on intelligence gathering and enforcement. Undocumented workers who are at risk of labour exploitation will be unwilling to come forward to report violations of labour standards if they fear that they will be penalized for 'illegal working'."* Professor Judy Fudge response to DLME consultation

The Government has taken significant steps to reassure EU nationals living in the UK that they will have an accessible means of securing their future in the UK if they wish to remain, yet I heard that many people are concerned that their right to live and work in the UK after the UK has exited the EU will be more precarious.

Some stakeholders called for a 'firewall' to be established between labour market enforcement bodies and immigration control/enforcement to mitigate the risk of vulnerable workers remaining in an abusive situation to avoid deportation.

It is of paramount importance that stakeholders are clear on my remit: the role of the Director of Labour Market Enforcement is to focus on improving enforcement of labour market regulations. My focus is on targeting and penalising unscrupulous **employers**, and protecting and providing effective redress for workers whose rights have been abused. **Immigration enforcement therefore does not fall directly within this remit.**

## 1.7 Good work: the Taylor Review of Modern Working Practices

One of the important developments within labour market policy over the past year is the publication in July 2017 of Matthew Taylor's report *Good work: the Taylor Review of Modern Working Practices* (Taylor et al., 2017).

The review was initiated by concerns over employment status, zero hours contracts and the gig economy. Its emphasis was on work quality rather than quantity, making over 50 recommendations for improvements in this area.

Many of the issues of non-compliance in a number of sectors are closely linked with employment status. Our discussions with stakeholders often included issues on self-employment and the gig economy. Throughout the past year I have liaised with Matthew Taylor's review team and the relevant BEIS policy team, to keep each other abreast of progress, but it was agreed early on that my Office would deliberately not explore issues around employment status which was the focus of the review. That said, there is inevitably some cross over, and where our recommendations echo those in the review I have indicated this.

Government published a response to the Taylor Review in February 2018, summarising its decisions for accepting, progressing, dismissing or consulting on each of the recommendations outlined (BEIS, 2018a). Four separate consultation documents have been launched requesting stakeholder views on the implementation of the recommendations and in some cases seeking additional evidence before taking further action. These consultations cover: employment status, transparency, agency workers and enforcement, and the respective focus of each is summarised below.

### Employment status consultation

Developments in the modern labour market, such as the increase in use of online platforms, have made employment relationships more complex. While the Government agrees with the review's assertion that the three existing categories of employment status remain relevant in today's labour market, it has acknowledged that for some the current employment status framework does not provide the clarity required to effectively determine an individual's level of rights or required tax and NI contributions. The Government has stated that it is committed to taking action in this area if necessary, and this consultation document seeks stakeholder views on how the current

framework works and how best to increase clarity and certainty on employment status for both employment rights and tax. Future decisions and actions on this issue may have implications on enforcement as people may become increasingly aware of the employment protections to which they are entitled and, therefore, more likely to assert those rights.

### **Transparency consultation**

A number of Taylor's recommendations request improved transparency in the contractual arrangements between the individual and the employer. In the Transparency consultation document, the Government has accepted some of these recommendations and is seeking views on how to take this forward, such as with the proposal to extend the right to a written statement to workers, or 'dependent contractors', as well as employees. In Section 2.4, I have similarly recommended a written statement of employment be made available to workers, within a week of commencing work, stipulating the Government take the lead in developing a standardised template for businesses to use.

The Government will also consult around extending the break period to qualify for continuous service and the holiday pay reference period, rights to request more stable contracts, and examine the effectiveness of the Information and Consultation Regulations in improving employee engagement, including consideration of extending the Regulations. The Government accepted the requirement to raise awareness of holiday pay entitlements but is rejecting the proposal for workers to receive holiday pay in real time, also known as 'rolled-up holiday pay'. It is seeking views on other potential measures to ensure that atypical workers can automatically receive their holiday pay entitlement. I discuss the need for a better system to address this issue in Section 5.1. While I do not go as far as Taylor in recommending rolled-up holiday pay, given the EU rulings decreeing such practices as unlawful, I am pleased to see the Government are consulting on this issue to identify appropriate and workable options.

### **Agency Workers consultation**

Taylor's recommendation to amend legislation and improve transparency in information to agency workers on rates of pay and deductions has been accepted by Government. Government is requesting stakeholder views on how to implement this. I have covered some examples of how this could be achieved in Section 2.

The Agency Workers consultation document also seeks views on Taylor's recommendation that I, as Director of Labour Market Enforcement, should consider extending EAS's remit to cover intermediaries and umbrella companies. To note: this proposal is included in this strategy (see Section 5.2). The questions in the Agency Workers consultation document focus on exploring whether EAS regulating these types of organisations would result in improved working conditions.

The document also invites stakeholders to submit evidence on proposals that the EAS cover enforcement of Agency Worker Regulations (AWR) including the 'Swedish Derogation', or repealing the legislation. I discuss this in Section 5.3. The Government response following this consultation will impact hugely on state-led enforcement in the recruitment sector as acceptance of the proposals would lead to EAS playing a major role in enforcing employment rights, which were previously left to individuals to pursue alone.

### **Enforcement consultation**

The Enforcement consultation document focuses primarily on recommendations around the employment tribunal process and state-led enforcement of core employment rights, namely sick pay and holiday pay.

The Government is not currently taking forward Taylor recommendations around reversing the burden of proof in employment tribunals disputing status and allowing individuals to ascertain an authoritatively determined employment status at a preliminary hearing without paying a fee,

but it is taking forward other key enforcement recommendations. This includes consulting on how to improve the enforcement process for employment tribunal awards, how to implement a naming scheme for employers who do not pay employment tribunal awards – similar to that of the Naming Scheme used for employers who fail to pay NMW/NLW – and how to extend existing sanctions to tackle employers who repeatedly ignore the decisions of tribunals. The Government also announced that it will raise the aggravated breach penalty maximum limit from £5,000 to £20,000 as soon as practicable.

Any future assessment of the impact such schemes may have on behavioural change in employers would be of interest to my Office, both through the effect of reputational penalties and the recommendation to increase financial penalties as an incentive for employer compliance. It is also helpful to see the Government accepting the case for the state taking responsibility for enforcing holiday pay and statutory sick pay for the most vulnerable workers. Although I have focussed on the enforcement of holiday pay entitlement, I am pleased to see the Government accepts there is merit to ensuring this statutory duty is enforced by the state, rather than left to individuals who may not be aware of their rights or lack the courage and resources to enforce them.

Other responses to Taylor's recommendations with implications for this strategy include widening of the Low Pay Commission's (LPC) remit to work with stakeholders, including myself, to make recommendations around good quality work. Government has instead proposed delegating such tasks around quality of work to the Industrial Strategy Council.

## 1.8 Independent Anti-Slavery Commissioner

Modern slavery has been rising in the public's awareness and political priorities, especially since the Modern Slavery Act was passed in 2015. One of the main provisions of the Act was the creation of an Independent Anti-Slavery Commissioner (IASC), Kevin Hyland OBE. His role is to promote best practice and drive crucial improvement across the anti-slavery response, both in the UK and internationally. This includes encouraging better practice by commercial organisations in identifying and tackling instances of slavery and human trafficking, as well as establishing appropriate prevention mechanisms throughout their supply chain.

The remits and interests of the IASC and the Director of LME are closely aligned. The labour exploitation element of modern slavery is the extreme end of the continuum of labour market non-compliance and an important part of the LME enforcement strategy, but the factors facilitating non-compliance that is short of that most severe end are also highly intertwined with extreme exploitation. The relationships and dynamics between exploitative and non-compliant employers, organised crime groups, trafficking and modern slavery are only beginning to be mapped out, and will be a key area for ensuring the strategies of the police, NCA, GLAA, HMRC and EAS are all aligned and working to a common goal of prevention, detection and prosecution.

The IASC and Director of LME hold different types of positions, and each exercise their influence differently, but there is much scope for joint working between the two (and their teams), as well as with the Modern Slavery Unit within the Home Office. There is currently a good working relationship between the teams, with regular discussion about the information and evidence being obtained.

In the next year I look forward to continued joint working, particularly as we start to look in detail at specific sectors, and work together to fill gaps in evidence and knowledge around labour exploitation.

## 1.9 House of Commons Joint Select Committee

As a number of the recommendations Matthew Taylor made in his review cross over into improving enforcement activities, the Director of Labour Market Enforcement was invited to provide evidence on the Taylor Review to the Work and Pensions and Business, Energy and Industrial Strategy Committees on 25 October 2017.

This Joint Select Committee announced their inquiry into the Taylor Review of modern working practices on 11 October 2017, primarily focussing on the impact the ‘gig economy’ is having on workers’ rights and working practices across the UK.

The Select Committee members were keenly interested in enforcement issues during their questioning, both in areas where Taylor has recommended action be taken, such as HMRC assuming responsibility for enforcing holiday pay, and in areas more specific to the Director’s remit, such as the future shape of the Director’s office, encouraging joint proactive working amongst the three enforcement bodies and ensuring resourcing and powers across the bodies is sufficient. These issues are addressed later in the report.

The Joint Select Committee published a report with their full recommendations in November 2017 (House of Commons, 2017). Their report included a strong focus on effective enforcement, particularly around deterrence and proactive enforcement. In their recommendations they called on the Government to:

- set out how it sees the powers and resources of the Director developing over the next five years, with the aim of producing a real deterrent against non-compliance;
- provide additional resources to the enforcement bodies and the Director to help adopt a more pro-active approach to enforcement and for industry ‘deep dives’ to better evidence the scale and nature of labour abuses. Resources should be funded through significantly higher fines on non-compliant employers.

The Committee also supported naming and shaming of employers, including those who tolerate exploitation in their supply chains.

The Government response to the Taylor Review also published responses to the Joint Select Committee recommendations (BEIS, 2018a). The request from the Committee for appropriate funding of the Director of Labour Market Enforcement office, as well as the three enforcement bodies, was recognised by the Government with their response suggesting they would be guided by proposals on resourcing outlined in this Strategy and future reports. Significantly, Government has confirmed its intention to commission the LPC to investigate the impact of establishing a higher NMW rate for non-guaranteed hours – a recommendation put forward by Matthew Taylor.

## 2. Compliance theory and approach

### 2.1 Compliance and deterrence theory

The intended aim of enforcement tools is to encourage compliance and deter employer non-compliance. However, enforcement relies as much on persuasion and influencing decision-making as it does on punishment. Within enforcement there are two broad approaches: **compliance** and **deterrence**. The most effective enforcement approach is likely to be some mix of these two.

In her submission to our consultation, Professor Judy Fudge described how compliance and deterrence theories are based on fundamentally different assumptions about the causes of legal violations and their normative significance. The following summarises her explanation.

## Box 2: Compliance and deterrence theories

Applied to questions of workplace regulation, **deterrence theory** is premised on the idea that a substantial proportion of labour standards violations, including non-payment of wages, are caused by the **intentional** actions of employers who have determined they are better off not complying with their legal obligations. Therefore the goal of the law should be to alter employers' behaviour by raising the risk of being caught and/or increasing the penalties for breaching the law.

An emphasis on this goal will generate specific and general deterrence thereby shaping the future behaviour of both the employer found to be in violation and of employers generally. Moreover, deterrence theorists make the normative claim that wage violations should not be treated as a private problem resolved by compensating the individual for her or his loss, but rather should be viewed as a serious social hazard that not only harms individual employees and their dependents but that also contributes to a climate in which processes of evasion, erosion and abandonment could lead to a gloves-off labour market in which public decency is sacrificed to the drive to maximise profits at any cost.

In contrast, **compliance theory** is premised on the idea that violations, including presumably breaches of the duty to pay, are the result of **employer ignorance and incompetence** rather than intentional behaviour.

The primary strategy for improving employers' performance of their legal obligations, therefore, is to provide information and compliance assistance on the assumption that most employers will respond by becoming law-abiding citizens. Those employers who do not respond to compliance measures will then be isolated and subject to deterrence measures. This approach is seen to be particularly appropriate in the employment context, where regulations apply to individuals and corporations engaged in beneficial economic activities. As a result, non-payment of wages, for example, is principally framed as an instrumental problem rather than one for which punishment is merited.

Through our discussions with the three bodies, it is clear that they each have different enforcement approaches, reflecting the implementation of compliance and deterrence based theories:

- EAS take an educative (compliance) approach to all but the most severe non-compliance, focusing on supporting employers to become compliant. Transgressions are on the whole rectified through enforcement letters and phone calls and a low number of cases are taken through to prosecution stage. EAS deem not having to pursue an employment agency beyond the written warning to be a success in behavioural change. This supportive approach in the early stages of engagement has been largely successful in averting largely unintentional transgressions and educating recruitment agencies who want to be compliant.
- GLAA take a mixed compliance and deterrence approach; largely compliance-based for licensed labour providers, with a proportionate approach to infringements, but deterrence focused when tackling investigations into modern slavery and exploitation outside of their licensed sectors, reflecting the greater severity of cases. Their approach for tackling non-compliance that is not at the most severe end of the spectrum is still developing.
- HMRC treat identified non-compliance with a deterrence-based approach, explicitly not differentiating between deliberate and accidental non-compliance, although it should be noted that two thirds of wage arrears recovered last year resulted from self-correction. They do have some teams focused on preventing non-compliance through the 'Promote' workstream, and this is developing further (discussed in Section 1.6), but the penalty regime applies to all non-compliance, regardless of intent or scale.

Taking the theory and different practices of the three bodies into account, the following section focuses on compliance-based approaches. Deterrence-based approaches are then explored separately in Section 3.

## 2.2 Intent and recidivism

As illustrated in Figure 2 in Section 1.3, labour law violations can range from the accidental to the deliberate. Following compliance and deterrence theory, distinguishing between the two is important in terms of determining the most appropriate type of intervention pursued by public enforcement bodies. For the more serious and/or repeated violations, the stronger sanctions suggested by deterrence theory should apply. However, where employers may have breached labour laws unintentionally – and sometimes because of a technical breach – then it is arguable that a compliance based approach is more appropriate in seeking to guide and educate the employer towards being compliant in the future (while of course ensuring that workers receive quickly any unpaid wages they are due). Indeed, the HSE sentencing system has a tiered approach that enables them to vary the penalty imposed depending on the **culpability** of the organisation and **level of harm** of the breach. Culpability is assessed by the Sentencing Council (2015) as:

- Very high: deliberate breach of, or flagrant disregard for, the law
- High: offender fell far short of the appropriate standard, serious and/or systemic failure within the organisation to address risks to health and safety
- Medium: offender fell short of the appropriate standard, systems were in place but these were not sufficiently adhered to or implemented
- Low: offender did not fall far short of the appropriate standard, failings were minor and occurred as an isolated incident.

The question of intentionality and repeated non-compliance was raised with us during the consultation by a number of stakeholders, in particular in relation to HMRC enforcement of NMW/NLW. The EAS and GLAA licensing enforcement is more compliance-based, therefore stakeholders did not raise concerns about their approaches in this regard.

NMW/NLW regulations are fairly complicated and often breaches are quite technical in nature – e.g. pay averaging over a given period for NMW. I heard repeatedly both from HMRC themselves and from stakeholders that a large proportion of NMW/NLW infringements are made in error rather than being a deliberate strategy to increase profits. Supporting this assertion, LPC research highlights how non-compliance falls over the year following the introduction of new minimum wage rates, suggesting employers become gradually more aware of their minimum wage obligations.

I accept that a proportion of non-compliance is not deliberate, but also note the evidence from BEIS analysis of ASHE (Figure 1 in Section 1), showing that a relatively high proportion of those paid below NMW/NLW are at least 50 pence below the hourly rate, which suggests a level of underpayment unlikely to be accidental.

This aside, accepting that there is a lack of intent in many cases of NMW underpayment, compliance theory suggests that one effective enforcement approach will be to concentrate on providing information, education and support to prevent these mistakes. Yet, stakeholders fed back that this is not how they experience NMW/NLW enforcement.

Both during our meetings and through their responses to our consultation stakeholders, including British Retail Consortium (BRC), the Beer and Pub Association and PricewaterhouseCoopers (PwC), expressed concern that those found to be non-compliant with NMW/NLW will face the same sanctions regardless of whether the infringement was accidental or deliberate.

Simultaneously they felt there was little support from HMRC for employers who were actively trying to be compliant. Employers complained of a lack of quality guidance (see Section 2.3) and/or constructive interaction by HMRC NMW/NLW teams to help them be compliant. Some believe that HMRC sometimes focus on technical breaches by employers who are trying to be compliant and keep good records as this is simply easier than pursuing the rogue employers who are deliberately underpaying their staff. They also felt the Naming Scheme inevitably (and, in their view, unfairly) focused media attention on larger employers and household names as they are likely to have larger total underpayments, even if this is a small sum per employee.

*"There is a growing sense that HMRC are targeting unconscious breaches of the regulations, from employers who take all reasonable steps to comply. The opportunity to self-correct in these cases is an important one for retailers. But it has been noted that HMRC's approach of late has been inconsistent regarding self-reporting leaving some retailers in a difficult position. The retail industry would like to see a more consistent approach taken which supports, rather than penalises, companies who are seeking to rectify instances of accidental non-compliance."* BRC response to DLME consultation

HMRC's lack of distinction between deliberate and inadvertent breaches of NMW/NLW by employers stems from the recognition that, intentional or not, the negative impact felt by the worker at the time of the non-compliance is largely the same. However, they argue that their enforcement processes do provide a nuanced approach towards offending in terms of how they triage and risk assess cases that come into the team, and the offer of self-correction for cooperative employers.

HMRC argue that if it were to differentiate the penalties for non-compliant employers based on intent, valuable investigative resource would be taken up determining whether the breach was to be deemed deliberate or accidental, and their impartiality could be undermined.

I have sympathy for this argument but also believe that persistent use of the cane may not be the most effective approach to improving compliance, particularly where a business is genuinely ignorant of their responsibilities.

*"All behaviour change does not arise from coercion, however, and regulators can call upon other tools to improve compliance. Sometimes employers simply need information—not the threat of penalties—to move them in the desired direction. An intervention that raises awareness and explains methods of complying will lead to desired outcomes more effectively than playing 'cops and robbers'."* (Weil, 2007)

The following section sets out how I believe the enforcement bodies can improve their support and education of employers to reduce 'accidental' non-compliance. For HMRC and BEIS, this will include placing greater emphasis on developing a supportive and compliance-based approach to enforcement via:

- Continuing to develop and refine their methods of risk assessing and triaging cases;
- Improving guidance for employers;
- Having a more supportive approach to employers seeking help and advice;
- Using the Naming Scheme to explain how otherwise compliant employers were found to not be paying the appropriate NMW/NLW rates with an aim to educate other employers and prevent similar non-compliance (see Section 3.3).

## 2.3 Supporting employers to be compliant

As shown in Figure 4 (section 1.5), increasing employers' understanding of their responsibilities and supporting them to be compliant must be a key element of a successful approach to reducing non-compliance. Enforcement bodies and the government more widely should proactively extend their educational and outreach activities to provide prospective employers with relevant guidance on their responsibilities and supportive advice when help is being sought.

*"...most businesses if given sufficient information and 'nudged' in the right direction want to be compliant."* Association of Professional Staffing Companies (APSCo) response to DLME consultation

*"In some cases, employers are also unaware of the full extent of their workers' rights, often until somebody takes out a tribunal claim against them."* Union of Shop, Distributive and Allied Workers (Usdaw) response to DLME consultation

There are three main issues in this area:

- clarity of publicly available guidance and sometimes of the regulations themselves;
- knowledge and availability of guidance; and
- approach to employers seeking support.

### Lack of clarity on guidance

During the consultation, there was little feedback from stakeholders about guidance from GLAA. The GLAA generally has more proactive communications than the other enforcement bodies. They told us that they have a number of ways in which they publicise guidance to labour providers, including their GLAA Brief series, which are developed with the industry. They also liaise with their stakeholders through Labour Provider and Worker Liaison Groups, run regional Pop-Up seminars, the GLAA training programme for supply chains, and have an annual conference. Recently they have been working on protocols with the textile and construction industries. This is part of a strategy aiming to raise confidence and encourage businesses that they should approach the GLAA if they have concerns about compliance, to assist them, and not take enforcement action unnecessarily.

In contrast, in relation to guidance and general accessibility, EAS was criticised for having very poor web presence and general lack of public profile (discussed further later in this section), related to its limited resource and location within a Government department.

Stakeholders most strongly asserted that there is a lack of clarity in the guidance for employers around technical aspects of NMW/NLW. Stakeholders argued that this made it difficult for employers who want to be compliant.

For instance, in December 2017, BEIS named Primark Stores Limited as failing to pay £231,973 to 9,735 workers. On average this equates to £24 per worker. This breach related to a change in workwear policy that was deemed by HMRC to qualify for a staff clothing allowance, thus pushing staff paid at the minimum rates slightly below the legal threshold. Primark are not the first high street brand to commit a technical breach through issues with uniforms, as Monsoon, another fashion retailer, was named two years previously for a similar breach. Despite this, it does not appear that either HMRC or BEIS have provided any updated guidance or educational case-studies to help other employers avoid a similar pitfall.

Getting clarity on guidance can be difficult even for companies with substantial human and legal resourcing available to them:

*"In designing UKHCA's National Minimum Wage Toolkit, our solicitors had to resort to the Freedom of Information Act in order to obtain guidance which HMRC's inspectors used to establish compliance with National Minimum Wage. We believe that this is an extraordinary approach for an inspectorate to take."* UK Homecare Association (UKHCA) response to DLME consultation

Furthermore, partners such as Low Income Tax Reform Group (LITRG) noted that unclear guidance aimed at workers may allow some deliberate non-compliance to go undetected.

The BRC requested sector-specific guidance be developed, in partnership with the retail sector to resolve common technical issues around NMW/NLW. Guidance on **salary sacrifice schemes** and **pay averaging** are two particular areas that have been highlighted by employers as being overly complex and unfit for purpose.

*"The CBI understands that some employers that pay staff on a system of annualised hours or similar pay averaging arrangements are falling non-compliant of NMW/NLW. These types of arrangements are permitted under the regulations, however its ambiguous wording and HMRC's narrow interpretation of 'salaried hours work' has led companies being advised that they are in breach of the law. The CBI recommends that HMRC and BEIS review NMW/NLW legislation to remove ambiguity and anomalies in the conditions under which these arrangements can be used as a matter of urgency."* Confederation of British Industry (CBI) response to DLME consultation

BEIS are responsible for NMW policy and Government guidance, with HMRC undertaking activity to improve the reach and accessibility of that guidance through their 'Promote' activity. Although the Government guidance is reviewed, as required by BEIS, clearly stakeholders still feel issues remain. If, as HMRC suggest, a high percentage of non-compliant NMW behaviour is unintentional, then investing in improved and more detailed guidance for employers on GOV.UK should significantly boost compliance in this area. The guidance also needs to be readily available and easy to find for employers seeking information.

**In the next year I expect to see further collaborative work between HMRC, BEIS, trade unions and sector specific groups to improve areas of the guidance that are ambiguous or difficult to apply, in order to facilitate compliance.**

### Box 3: Overnight sleep-in shift pay for social care workers

The question over appropriate pay for sleep-in carers made headlines in April 2017 when the Employment Appeal Tribunal ruled against the disability charity Mencap, upholding the decision of the Employment Tribunal that the care worker was “working” simply by being present. She was therefore entitled to the NMW for the entire shift, as opposed to the £22.35 flat rate provided plus one hour at £6.70 (the correct NMW rate for 2015/2016 and before implementation of NLW) for a nine hour sleep in shift – which equated to £29.05 total and averaged only £3.23 per hour for the entire shift. This practice of paying a set amount below NMW for such shifts was not atypical in the social care sector. Carers may be paid hourly rates during the day that are above NMW, thereby potentially allowing care providers to average out day and overnight payment to meet NMW requirements over the relevant pay reference period.

Over time, Court and Employment Appeal Tribunal judgments have clarified the position on what constitutes “work” in connection with sleeping time and therefore when the NMW is payable for sleep-in shifts. Updates made to Government guidance in February 2015 included clarification from those judgments that, if a care worker may not leave the place of work during a sleep-in without facing disciplinary action, they are likely to be classed as working for the entire sleep-in period and therefore entitled to the NMW/NLW for the entire shift. It was acknowledged by Government that guidance provided before 2015 on payment for sleep-ins may have been potentially misleading. Employers who have underpaid their staff for sleep-in shifts may be subject to enforcement action from HMRC and required to repay their workers any arrears of pay to which they are legally entitled.

The issue of NMW payment for sleep-in shifts has had a huge impact on both social care workers and care providers alike, with some providers fearing they would struggle to cope with paying workers monies owed for up to 6 years and financing penalties for breaching NMW regulations. Some care providers have indicated that they face bankruptcy as a result of significant financial liabilities. The Government is engaging with the social care sector to strengthen the evidence base for Government support.

The Government recognised that the cumulative financial liabilities for arrears owed by care providers could pose a significant risk to the social care sector. As a consequence, HMRC enforcement on this area of non-compliance was temporarily suspended from July to October 2017. Furthermore, the Government announced that financial penalties would be waived in connection with “sleep-in” shifts that took place before 26 July 2017. The waiving of penalties does not change workers’ legal entitlement to any arrears of pay. On 1 November 2017 the Government launched the Social Care Compliance Scheme (SCCS); a time-limited, sector-specific scheme allowing eligible care employers up to 12 months to carry out self-reviews and then three months to pay all arrears to their workers, provided this is no later than 31 March 2019. Care providers clearing all arrears within that timescale will not be subject to financial penalties or eligible for naming. However, employers who decide not to opt-in to the SCCS, or opt-in and then leave or are removed, will be subject to the usual HMRC investigative process, and may be liable to pay arrears and penalties and be eligible for naming.

In the meantime, the Government is holding discussions with the European Commission and considering potential options for providing further support for the care sector.

## Employers seeking support

During our consultation, I heard that employers who are actively seeking advice from HMRC NMW/NLW teams to ensure they are compliant feel that they have often not been able to get definitive answers, leaving them at risk of being at technical fault. Others told us that the attitude of some HMRC NMW/NLW inspectors was seen as particularly aggressive with employers who were being cooperative. This contrasted stakeholder experience of other teams within HMRC who were willing to provide advice and guidance, and were more supportive in their approach.

*"The experience of our members is that HMRC can devote considerable resources into investigating large businesses with no evidence of non-compliance. In many instances these teams are trying to create non-compliance through a variety of different scenarios. We believe it would be more effective to agree a common set of guidance for the sector that all operators can understand and that the HMRC investigators can then use this to ensure that they are taking a consistent approach."* Association of Licensed Multiple Retailers (ALMR) response to DLME consultation

This apparent reluctance to engage with HMRC on the part of employers, coupled with unclear guidance, also allows rogue employers to claim that a breach is involuntary.

HMRC have only recently configured their NMW/NLW teams into their current structure (around March 2017) therefore they are still establishing their ways of working. The team does seem to be establishing a sensible structure where cases are triaged and dealt with by appropriate teams, using a range of enforcement techniques from 'nudge' letters and phone calls to multi-agency criminal investigations. **However, I wish to see a more supportive and educative approach being introduced into some of their interactions with employers over the course of the next year.**

The onus of implementing such changes would not lie singularly with HMRC but, rather, in conjunction with other government departments, including the Government Digital Service, the Cabinet Office and BEIS. Nevertheless, **I would recommend that Government make some more immediate improvements to the online guidance** so that NMW/NLW compliance can be clearly observed by both employers and workers alike ahead of the scheduled increase in the NLW rate in the 2018/19 financial year.

Similar to reaching out to workers to increase their awareness, Government should also proactively extend its outreach in providing prospective employers with relevant guidance on their responsibilities through dissemination at points of interaction with the Government, such as following registration of their business with Companies House.

## Recommendations

1. BEIS/HMRC should review the guidance around NMW in collaboration with stakeholders to identify and improve problem areas such as pay averaging and salary sacrifice.
2. HMRC NMW/NLW team should develop a more supportive approach when companies ask for advice in order to be compliant.

## 2.4 Promoting worker rights, supporting awareness and access to enforcement

The decline in union membership and collective bargaining coverage noted in Section 1 has resulted in a shift to a model of employment rights being predominantly enforced on an individual rather than a collective basis. As the three bodies rely to a varying extent on individual complaints rather than proactive investigations, the role of the worker is key to being able to find and deal with non-compliant employers.

Consequently, it is fundamental that workers are aware of their rights and that employers know their responsibilities (as illustrated in Figure 4 in section 1.5). In particular, workers need to be able to:

- easily access information about their employment rights,
- understand how to seek help and advice; and
- feel empowered to pursue complaints against their employer if necessary, without fear of reprisal.

Increasing awareness, knowledge and confidence in the systems can serve to both empower workers and act as a deterrent for non-compliant employers. Conversely, lack of access to information on employment rights leads to an imbalance in power between workers and employers and acts as a barrier to addressing labour exploitation. As noted by the Ethical Trading Initiative (ETI) in their evidence to my Office “*...awareness raising is not a solution on its own but can complement other prevention or enforcement activities.*”

Yet, evidence gathered during our consultation suggests that current awareness levels amongst workers and employers of rights, responsibilities and public enforcement are relatively low. For example, a Citizens Advice report on holiday pay in May 2017 (Citizens Advice, 2017) discovered half of zero hours contracts workers and two in five of those on temporary contracts did not know they were entitled to holiday pay.

*“In our oral evidence sessions this year we heard of cases of workers being unaware of their rights to make a request to inspect their pay records (under section 10 of the 1998 National Minimum Wage Act) and those that make those requests being refused. This is despite this being an offence to do so.” Low Pay Commission response to DLME consultation*

Similarly, Acas (the Advisory, Conciliation and Arbitration Service) (2015) reported:

*“Our analysis shows that agency workers were often:*

- *unaware of their rights, particularly around holiday pay, notice periods and, critically, the ‘twelve week threshold’. One caller to the helpline had been working on the same assignment for over four years and didn’t know they were entitled to the same pay as an equivalent permanent employee*
- *afraid of asserting their statutory rights due to the perceived imbalance of power in the employment relationship. One caller working in a care home had flu and, concerned for the health of the clients he worked with, rang in to say he could not work his shift that day. He was fined £50. [...] he was worried [...] that ‘the agency would stop giving him work if he made a fuss’” (Acas, 2015)*

This lack of knowledge and confidence to report issues, and the consequent vulnerability of workers, is not surprising given the complexity of different rights and employment statuses, combined with the fragmented enforcement landscape (as discussed in Section 1.6).

Those workers at higher risk of exploitation are also often those who are more likely to be unaware of their rights, face additional difficulties in making a complaint and be less confident to do so. Evidence suggests that women are less likely to make a complaint than men (LPC, 2017) and that migrant workers do not always report exploitation through fear of jeopardising their immigration status (Focus on Labour Exploitation, 2017). For those most vulnerable to exploitation, “*the danger of losing employment, or even a reduction of hours, as a result of complaining may be too significant to risk making a complaint*” (FLEX, 2017). For this reason investigations must not be solely complaint-driven, as vulnerable workers who are unable to complain often rely on proactive enforcement for redress.

In terms of assessing the degree of awareness of employment rights, the government has not carried out a comprehensive study of employment rights awareness for a decade (BEIS last carried out a comprehensive survey 2008, see Fevre et al (2009)). Therefore our knowledge and understanding of this area of enforcement is both dated and incomplete. Ideally, for the future work of the Director’s office similar research would be undertaken to better understand the public’s awareness of employment rights.

### **Information on rights**

An issue which came up repeatedly during the consultation in relation to information on rights was that of employment status. Clearly, when people are unsure of their employment status, they cannot be sure of their rights or how to enforce them. This is a significant problem. The Taylor Review has looked into these issues and, in February 2018, the Government responded by launching a consultation seeking views on how to increase clarity in this area. I therefore do not go into issues of employment status in this report.

I also heard from several sources that uncertainty around the status of EU nationals in the UK following Brexit has created conditions for vulnerability, opening up the doors for unscrupulous employers to take advantage. I have not explored these issues in this report as the terms of Brexit in regards to employment rights is as yet unknown.

I heard from a number of stakeholders that accessing information on employment rights can be difficult. This is not surprising given the complexity of the regulatory and enforcement framework.

All three bodies are making efforts to promote information to workers including:

- HMRC/BEIS run campaigns targeting low-paid sectors around NMW, for example recently targeting seafarers (BEIS, 2018b), specifically when NMW/NLW rates change each year, helping to educate workers and prevent non-compliance:
 

*“...the Government’s recent communications campaign around the April 2017 upratings was welcome. Our analysis suggests that this campaign may have led to lower underpayment following the introduction of the National Living Wage (NLW) than otherwise would have been the case.”* LPC response to DLME consultation
- EAS stated in their annual report 2016-2017 (EAS, 2017) that the proactive awareness raising activities undertaken may have contributed to the 10 per cent increase in complaints they received. Activities included distributing information leaflets to those running employment agencies and those using their services; setting up pop-up stalls in key businesses, such as supermarkets, in priority sectors and geographical areas known to have a substantial agency worker population; updating and refreshing guidance on employment agency issues on GOV.UK; and working with partners in the Romanian and Bulgarian Embassies in London to improve upstream communication with agency workers intending to come to the UK.
- GLAA produce awareness-raising material for both workers and employees. Leaflets and posters on workers’ rights, covering issues such as NMW, annual leave and sick pay, are available in up to 20 different languages. Informative videos and leaflets on how to identify and

report modern slavery have also been targeted at employers. They also have a more proactive media presence than the other two bodies and make use of social media. The GLAA has developed links with the Bulgarian and Romanian labour attaches, offering advice and participating in community events, and is supporting upstream activity by the Home Office and Foreign and Commonwealth Office in Poland and Lithuania.

Good practice in awareness-raising can also be found in campaigns led by non-governmental organisations, for instance trade associations. The Recruitment and Employment Confederation (REC) have produced an ‘Agency Worker Rights Factsheet’ and APSCo provides support through a legal helpdesk, training programme, member events and website resources.

Through our consultation and discussions with the three bodies, I have identified several opportunities for improving the information for workers on their rights.

### **Statement of rights in week one**

Currently, an employer must provide all employees with a written statement of employment particulars within two months of starting work, if their employment contract lasts for at least one month. Section 1 of the Employment Rights Act 1996 sets out the legal requirements for this statement, which must include details on pay, hours of work and holiday entitlement, including holiday pay. Workers do not currently have an equivalent right to a written statement, meaning that many workers have little understanding of their employment terms and conditions.

Agency workers have an entitlement to certain statutory information prior to commencing work that must be provided by their employment agency as outlined in the Conduct of Employment Agencies and Employment Businesses Regulations 2003:

*“Regulations 14 and 15 of the Conduct Regulations state that an agency worker should receive information relating to: The length of notice they will be entitled to; The rate of pay they will receive; [and] How much holiday leave they will be entitled to. This information should be given to an agency worker in a written document.”* TUC response to DLME consultation

Unfortunately, these rights are often not enforced due to lack of knowledge and difficulties in complaining. This makes it a challenge for workers to recognise and enforce their rights.

**I endorse the Taylor Review recommendation that employers should provide all workers and employees with a written statement as a statutory duty.** Taylor suggested this should be on day one. I feel this may be overly difficult for businesses and, therefore, recommend that such a statement must be provided within the first week.

*“A day-one statement of a worker’s pay, conditions and hours would be a step forward in terms of worker awareness of rights at work.”* UNITE response to DLME consultation

This statement should raise awareness of individuals’ rights as well as reiterate the responsibilities of the hiring firm to their workforce. **The Government should develop a template/format for the written statement of employment to ensure transparency in information provided, and to reduce the burden on business.** Information outlining contact details for Acas where people can seek advice and conciliation, and the three enforcement agencies where workers can report non-compliance or breaches of employment regulations should also be included.

I am pleased to see that in its response to the Taylor review, Government has accepted the recommendation on a statement of rights and is seeking views on how to take this forward in its ‘transparency consultation’ (see section 1.7 above).

## Role of trade unions

Trade unions are often the main source of information on workers' rights for their members. I acknowledge the crucial role that they, and other organisations such as NGOs, play in providing a strong platform for employee/worker voice, educating vulnerable workers on their rights and supporting the exploited in achieving redress. Gaining access to non-unionised workplaces to promote awareness of worker rights has been requested by unions as a means of empowering workers at risk of exploitation. It is beyond the scope of the Director of Labour Market Enforcement to make such a recommendation. However, there is clear benefit in the three enforcement agencies working more closely with the trade unions, using their expertise to reach the most vulnerable in a variety of sectors.

Examples of possible endeavours include engagement with UNISON, who possess a wealth of knowledge in the social care sector, and with UNITE to tackle exploitation in construction supply chains and in the hospitality sector. I explore how the Information Hub in my Office can better engage with trade unions in Section 3.8.

*"Unite officers in hospitality [...] are identifying non-compliance practices involving agencies handling housekeeping work that would never have been identified by HMRC in normal circumstances and that have only come to light because of the officers' depth of knowledge and relationships built over time and with trust with workers."* UNITE response to DLME consultation

## Web guidance and presence of enforcement bodies

The complexity of the institutional employment law landscape in the UK is exacerbated by poor and fragmented public information for workers and employers alike. Better access and much clearer guidance on the GOV.UK website are necessary to provide workers in the UK with an effective understanding of their rights and employers with sufficient knowledge of their responsibilities. The EAS has barely any meaningful web presence, while HMRC-NMW, as noted earlier, seemingly has no mechanism to publicise the enforcement work it is doing and is hence missing opportunities for wider deterrence impacts.

While each of the organisations working in this area will have their own web presence, a major boost in terms of accessibility would be to **establish a web portal** (on GOV.UK), **which would act as a single channel of information for both workers and employers holding key guidance on employment rights and responsibilities**. The web portal should contain links to appropriate enforcement bodies, with clear signposting for users to help them navigate towards relevant information. In addition, there should be links through to Acas and some third sector organisations such as Citizens Advice and the Modern Slavery Helpline.

Once such a portal has been established, government will also need to carry out publicity campaigns to help raise awareness and help brand this as a 'one-stop shop' for employment advice and help.

## Social media

The technological landscape is transforming at a fast pace and both compliant and non-compliant businesses are using modern technology to target workers in new ways. I believe the Government should tap into this and use online apps and social media to reach out to vulnerable workers. The Government could also make better use of the online information forums to reach out to at-risk groups.

#### Box 4: Example of the potential to utilise social media

STOP THE TRAFFIK is a campaign coalition in human trafficking prevention. Their Centre for Intelligence-Led Prevention (CfILP) gathers intelligence from multiple sources to identify global hotspots and trends. Sources include their smart phone STOP APP; open source intelligence; data shared with them by partners; and community intelligence.

Once hotspots have been identified, they create geo-located and demographically targeted Facebook campaigns focused on the locally relevant issues and trends. The key objectives are to raise awareness, mobilise communities to take action, and facilitate collaboration amongst local organisations and agencies. Information received is shared with relevant stakeholders. For example, they ran an information campaign targeting certain groups in Leicester following its identification as a hotspot for human trafficking by their CfILP. The posts appeared on people's online newsfeeds, explaining the nature of modern slavery in Leicester, spotting the signs and how to report it. Evidence of abuse in Leicester has been found by the Stop the Traffik campaign in the garment industry, construction sector and on cannabis farms.

The Leicester campaign reached 174,478 people; 47 per cent of the target population. A click-through rate of six per cent was achieved, which is far greater than the average of one per cent for commercial marketing campaigns as reported by Facebook. Ten pieces of intelligence were shared with Leicestershire Police's Modern Slavery Team and Crimestoppers reported an increase in calls as a result.

To ensure sustained impact, STOP THE TRAFFIK has developed a proposal for a Modern Slavery and Exploitation Response Coordinator in Leicestershire. This has been formed with input from multi-sector organisations and agencies in the area. STOP THE TRAFFIK has already embedded coordinators in Manchester, Colchester and Hastings with advanced plans to create similar roles in London and Liverpool.

#### Boosting communication on rights

There are opportunities where information about rights and how to enforce them could be distributed to workers. Suggestions include that key information is included:

- **when National Insurance notification letters are sent out.** Fifteen-year-olds about to enter the labour market could be targeted with information on NMW/NLW rates, while new migrants coming to the UK to work could additionally get information on rights and how to contact Acas, as both these groups are more at risk of exploitation and underpayment. HMRC have also set up an online system allowing people to login to their personal tax account to check records and manage details which could provide additional opportunities to communicate employment rights.
- **on the back of paper payslips and within electronic payroll systems.** For instance when a young person logs in to view their payslip close to their birthday, they could be reminded to check they are being paid the correct NMW. Other information could also be available using easy to follow links and FAQs on payslip software and apps.
- **within the education system,** when young people in schools and further and higher education are beginning to enter employment. As well as informing young workers of their rights, the educative sessions could have the added benefit of aiding children of vulnerable workers in spotting if their parents, or other family members, are having their rights abused. I do not wish to add to the burden on teachers through the creation of new schemes of work

as I recognise that employment law is complex and can be challenging to manoeuvre, let alone teach. However, there are available resources on GOV.UK using a Key Stage 4 BEIS training package that can easily be adapted to suit many classrooms (BIS, 2010a).

- **statutory posters in workplaces should be introduced**, to be prominently displayed, providing information on labour market regulations and who to contact if workers have concerns. This is already done for health and safety information. Failure to provide such key information should be dealt with in the same way that HSE currently do so – in isolation it is not sufficient for a sanction but is taken into account within an investigation and may be taken as a trigger sign that the firm needs further scrutiny.

## Payslips

Payslips provide the basic information that enable people to know whether they have been paid correctly, yet strangely, workers are not currently legally entitled to one. Only employees are legally entitled to a payslip from their employer, upon which earnings before and after deductions and the details of any such deductions must be presented. **This right should be extended to workers.**

Currently it is not compulsory for an employer to state the hours or the hourly earnings upon which the pay is based, though I have heard that many do so voluntarily. For those on an hourly wage – which is especially prevalent in low paid jobs – the number of hours worked over the period is critical to knowing whether the pay calculations are correct. **Hours should therefore also be included on payslips for hourly paid workers.**

Both of these issues were acknowledged to be significant problems by stakeholders during the consultation and there was widespread support for taking action to improve the situation (including from the CBI, the Union of Shop, Distributive and Allied Workers, the Low Income Tax Reform Group, UNISON and Association of Labour Providers). Indeed this is already being taken forward following similar recommendations by the LPC in 2016.

*"We recommend that the Government reviews the current obligations on employers regarding provision of payslips and considers introducing a requirement that payslips of hourly-paid staff clearly state the hours they are being paid for."* (LPC, 2016)

In its response to the Taylor Review, Government has supported this recommendation and proposes to extend the statutory right to receive a regular payslip to all workers in the labour market (BEIS 2018a). Under this policy, all workers will receive information on their gross and net pay on their payslips, and for time-paid workers, the number of hours they are being paid for. These regulations should come into force in April 2019.

I would like to go further than the LPC and **recommend that the hourly rate of pay should also be included on payslips.** I understand that this may be more complicated where workers have variable rates of pay; however, I believe that the additional transparency is essential for ensuring workers know if they have been paid at the correct rates.

In the longer term, it would be very beneficial for hours (and hourly earnings) to be captured in Real Time Information (RTI) data returns to HMRC to enable better proactive enforcement of the NMW/NLW.

I acknowledge that verifying the hours worked is also relevant for many low-paid salaried workers who may also be victim to underpayment of NMW/NLW through working longer hours than specified in their agreed terms and conditions.

*"low salaries and/or excessive hours can result in the effective hourly rate of pay falling below the National Minimum Wage. The LPC's recent report on minimum wage non-compliance estimated that, based on ASHE data for 2016, 44% of those thought to be"*

*paid less than the NMW were salaried, rather than hourly paid, leading them to conclude that “low-paid salaried workers are at particular risk of underpayment” (LPC 2017). Evidence from *Unpaid Britain: wage default in the British labour market*, November 2017*

While this recommendation on hours will not provide much help for these workers, low paid salaried workers are a group that I will return to in a future strategy.

### Improvement to complaints channels

Routes leading to the enforcement of labour market issues are complex, adding to the difficulty of workers complaining. Stakeholder responses to the consultation affirmed that there is a lack of clarity about who workers should contact when their employment rights have been breached.

*“As an example, an internet search on “complaints in recruitment” will currently identify amongst others; Acas; Agricultural Wages Helpline; Citizen Advice Bureau; DirectGov; Employment Agency Standards Inspectorate; Equality and Human Rights Commission; GLAA; Health and Safety Executive; HM Revenue & Customs; Home Office – UK Border Agency; National Minimum Wage Helpline; Office of the Immigration Services Commission; TUC. Assuming you were a concerned worker which one would you contact?” The Employment Agents Movement (TEAM) response to DLME consultation*

In their response to our consultation, Citizens Advice quoted a survey they had conducted which found 45 per cent of workers who experienced unfair treatment did not try to enforce their rights, as nearly a third (29 per cent) had not heard of any enforcement agency.

### Acas

Acas is intended to be the main portal through which employees and employers can seek advice. Acas took over the call topics that were previously dealt with by the Pay and Work Helpline in April 2015 in an arrangement described in Parliament as a “...‘one-stop shop’ service for employers and employees who will be able to contact Acas for free and confidential advice on all employment rights and workplace issues.” (BIS, 2015)

In 2016/17, Acas answered 887,000 calls (13.6 per cent of these on NMW and other wage queries), received over 11.8m visits to their website (an increase of 20 per cent on the previous year) and their online guidance was accessed 8.4m times (Acas, 2017). Where appropriate, complaints received of non-compliance with employment regulations are triaged to the relevant labour enforcement agency. Workers and employers are usually signposted to the helpline only where it is necessary, as the preference is for most to find answers to more basic and routine queries using the guidance provided on the Acas website.

Acas told us that it raises awareness of its online guidance and services through campaigns and activity, providing updates on a range of employment law topics, such as the introduction of gender pay gap reporting and best practice for managing mental health in the workplace. Its campaigns use a variety of digital channels and they report they are constantly improving search engine optimisation for issues that employers and employees are looking for online.

Stakeholders were positive about the work of Acas but gave the view that the service and signposting to the helpline could be improved. For example, doing a simple Google search does not return the helpline as a top hit.

Stakeholders have suggested that rebranding could help to improve understanding of Acas’ activities and increase awareness of its existence:

*“Acas [helpline] should be renamed and rebranded with a name that is clear to all such as “The Employment Helpline”. This would be a renaming and rebranding exercise and no legal or structural changes should be required.” Association of Labour Providers (ALP) response to DLME consultation*

Stakeholders also raised concerns that, as a conciliation body, Acas may not be the most appropriate conduit to tackle worker grievances as its primary objective is to encourage employee/employer resolution, and not to escalate complaints.

There have also been concerns raised with us that Acas was not always forwarding cases to the relevant body. Acas do not keep records of phone calls received that are not triaged as complaints to the enforcement agencies. This raises the risk of key information, which could support proactive intelligence-led activities by the agencies, not being collected.

EAS has recently provided training events to two Acas centres, one in Glasgow and one in Newcastle. Following the training, Acas calls forwarded to EAS increased seven-fold compared to the two months previously. These results, along with feedback from Acas advisors and managers on these events, suggest that the training made an immediate difference in the awareness and behaviour amongst Acas staff. EAS have also recently developed a podcast for Acas advisors to support their knowledge and this will form part of their training toolkit.

The GLAA is also currently developing plans with Acas for training events covering trafficking awareness, 'Spotting the signs' and victim management.

Responses to our consultation identified "*the lack of publicity and promotion of the NMW and the helpline*" (TUC response to DLME consultation) as one of the main factors restraining Acas. As an organisation, Citizens Advice may well be often better recognised than Acas. I understand that there is already a high level of cooperative joint working between the two bodies and therefore I would encourage further strengthening of this relationship.

### **Direct reporting to enforcement bodies**

As well as going through Acas, an individual can also go direct to the relevant enforcement body to make a complaint.

In January 2017, a Pay and Work Rights online form was introduced on GOV.UK on which workers can make a complaint that is then triaged to all three enforcement bodies, as well as the HSE and the Rural Payments Authority that deals with agricultural wages complaints.

HMRC have reported to me that since they introduced the improved Pay and Work Rights form, the number of complaints made by workers around NMW/NLW has increased without decreasing the volume of complaints received via Acas<sup>8</sup>. HMRC reported that there were around 3,000 online complaints reaching the NMW/NLW team in 2017, with little change in the volume of Acas helpline complaints received between 2016 and 2017. This suggests that they are tapping into previously unmet demand and reaching new groups, such as vulnerable workers who cannot openly speak about their concerns. The fact that the form can be submitted 24 hours a day, 7 days a week was cited as important for facilitating complaints.

As demonstrated in Figure 6 (section 1.6), HMRC have received a substantial increase to their enforcement budget following the introduction of the NLW. The NLW will, in due course, be set at 60 per cent of median hourly pay, so more workers will be covered by the NLW than were by the NMW. In turn, HMRC is likely to receive more complaints of underpayment. With these additional resources HMRC have developed their multi-tiered triage process for handling complaints. The team reported that this new structure allows for a more streamlined and effective allocation of resource to different types of case, resulting in a better response to complaints. Having such processes in place is crucial as the volume of complaints has continued to rise in 2017/18 following a slight downturn in 2015/16.

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<sup>8</sup> HMRC NMW/NLW team have a phoneline for employers seeking advice, but employees and workers must either use the online form, or contact Acas, if they wish to make a complaint.

As a Non-Departmental Public Body, the GLAA can operate their own website independent of GOV.UK. Their helpline is prominently displayed at the top of each webpage on their website and email addresses, as well as a free text online form, are available for people who wish to provide information of potential labour market breaches. The GLAA will assess the reliability and level of risk of information received to determine priority cases for action, whether the individual provides their personal contact details or wishes to remain anonymous.

Information for agency workers on their rights and routes to complain is more noticeably absent as the EAS has a very poor web presence. This is constrained by wider government web site policy because EAS sits within a government department. As a result, it is almost impossible to find any information on the internet about the EAS and its contact numbers are not well known. However, it should be recognised that if this situation did improve, one would expect a significant increase in demand for their support, which under current resource levels they would not be able to provide.

*“While the National Minimum Wage unit has a relatively high profile due in part to the Name and Shame process, and the GLAA is well known in the sectors it licenses, much more work has to be done to raise the awareness of EAS and the GLAA more widely.”*

REC response to DLME consultation

*“it is difficult to find out how to seek redress against an employment agency, despite the existence of EASI, as their contact details are not obvious on the gov.uk website.”*

Freelancer and Contractor Services Association (FCSA) response to DLME consultation

Overall, current communications on how to complain seem disjointed, with the three enforcement bodies and Acas not effectively promoting all the channels available. As an example, only the NMW/NLW Enforcement team on GOV.UK have a link to the Pay and Work Rights online form on GOV.UK. The GLAA have made much progress in publicising their extended remit, but their website only provides a link to Acas, not the other two bodies (although other organisations such as Citizens Advice and the Modern Slavery Helpline are listed). On the Acas website, if a worker seeks the appropriate channel to complain about their employer, all roads lead back to Acas. There is no acknowledgement that an individual may approach an enforcement body directly.

For workers, it can be bewildering and confusing to establish which enforcement body can help with their complaint. Therefore, as well as establishing a ‘one-stop shop’ web portal for employment matters, there also clearly needs to be better links between each of the relevant advice and enforcement bodies too.

### Third party and anonymous complaints

It has been suggested that it would reduce barriers to reporting non-compliance if enforcement bodies were to accept and actively pursue third party and anonymous complaints. This was mostly in relation to reporting NMW non-compliance to HMRC. This is of particular interest in certain sectors, such as seafarers, where third party complaints through unions are often the only method by which non-compliance is reported.

*“...an absence of non-compliance cases or first party complaints does not automatically mean that an industry is fully compliant.”* Evidence from National Union of Rail, Maritime & Transport Workers

The LPC has previously called for a third party protocol to make the process clear.

As well as potentially increasing the number of complaints, third party and anonymous information could also provide valuable intelligence that might help inform the enforcement approach to different sectors.

Currently, HMRC NMW/NLW commits to considering every “worker complaint” as agreed by the BEIS/HMRC SLA. HMRC can take a complaint on NMW/NLW and conduct an investigation offering to maintain the complainant’s anonymity to their employer as far as possible, with the acknowledgement that the court may order the person’s details to be disclosed. However, if a person chooses not to submit their personal information to HMRC, their evidence is not considered a “worker complaint” and, hence, there is no requirement to review it in the same way.

Third party information and anonymous complaints are assessed based on the details sent and their format, and then acted upon as appropriate. Although there is no requirement on HMRC to pursue these cases, the information could be used to inform targeted investigations.

Two examples below illustrate the different ways in which third party information can be treated by HMRC NMW/NLW team:

- a. A person calls in to complain that their friend is not being paid NMW:** This is third party information and sometimes the friend may not have enough information for HMRC NMW/NLW to make a case for investigation. Without the worker talking to HMRC themselves it is not a “worker complaint” so there is no requirement to consider further. Instead, this will be recorded and filed. The information can be drawn upon to build evidence in a case against a firm, but is not enough on its own.
- b. Unions submit information regarding a number of workers:** Usually unions are well-versed in what information is required and, therefore, HMRC would be more likely to conduct an investigation based on intelligence received by unions, as long as there is enough evidence to build a case.

There are two issues to consider here. I appreciate that having to make a complaint with personal information attached can be difficult for workers in some situations, and may lead to under-reporting of exploitation by some of the most vulnerable in the workforce. However, there is also the risk of opening the door to vexatious and false complaints.

Now that the expanded NMW/NLW team and triage processes are established within HMRC, over the next year I will be asking for evidence on how third party and anonymous complaints are dealt with, and investigate whether there is the potential to pursue a more proactive policy around these reports of non-compliance.

I will also be encouraging the enforcement bodies to create partnerships with unions and Non-Governmental Organisations (NGOs) to ensure that they have mechanisms to feed in intelligence, and receive feedback on information they provide where possible. This is covered in section 3.8.

## Recommendations

### Information on rights:

3. A statement of rights should be made mandatory for all workers within week one of employment commencing. The Government should develop a template for the written statement of employment to ensure transparency in information provided, and to reduce the burden on business.
4. Clear and accessible information on employment rights should be provided to workers through a number of channels, including via:
  - a. Use of targeted social media campaigns;
  - b. Development of a web portal linking all enforcement agencies;
  - c. Workplace notices detailing rights and how to enforce them should be mandatory, similar to the Health and Safety notices;

- d. Payslips, and payslip software and apps, should include NMW/NLW rates guidance, information on the enforcement agencies and details of how to report a breach;
- e. The education system should use opportunities and existing resources to inform young people of their rights as they prepare to enter employment;
- f. Information should be included with National Insurance notification letters and other government communication.

#### **Payslips:**

- 5. The right to a payslip should be extended to all workers.
- 6. For hourly paid workers, there should be mandatory inclusion of total hours worked and hourly rate of pay on payslips.
- 7. In the longer term, hours and hourly earnings should be captured in Real Time Information data returns to HMRC.

#### **Improving complaints channels:**

- 8. Simplify the entry channel to seek help on employment rights and how to seek redress. There needs to be greater clarity on the internet about where to go for help and how to complain. In the next year:
  - a. The three agencies should improve their websites to make clearer what complaints to direct to them and how, and who to direct other types of complaints to. These should link with the web-portal recommended above;
  - b. EAS should raise its profile and have an easy to find webpage on GOV.UK with contact details for people to make complaints;
  - c. Acas should review their communications and marketing promoting their service, and ensure it is accessible to workers.
- 9. Acas should build on the links with the three bodies to ensure that staff training, referral processes and data sharing are promoting their service to maximise access to workers.

### 3. Deterrence approaches: Investigations and penalties

Having considered compliance-based approaches in the previous section, I now focus on **deterrent-based enforcement interventions**. In doing so, I consider the following five interventions, ordered by degree of severity:

- **Risk of inspection;**
- **Use and size of financial penalties;**
- **Reputational penalties;**
- **Prosecutions, and Orders and Undertakings; and**
- **Prohibitions.**

I then discuss the important question of **prioritisation** of inspections between reactive (complaints driven) and proactive (intelligence driven). Lastly I examine how **information sharing and joint working** can be used more effectively to tackle non-compliance.

Deterrence was identified in Section 1 above as one of the four principles underpinning effective enforcement. Deterrence works where the threat of investigation produces a change in employer behaviour towards greater compliance. As Weil (2008) says:

*“deterrence is related to the perception that the expected costs of investigation (in the most simple case, the probability of investigation multiplied by the penalties associated with violations) are significant enough to lead firms to voluntarily comply”.*

Achieving labour law compliance through deterrence is therefore essentially a trade-off between the level of enforcement resources (and the ensuing **likelihood of an inspection** for each employer) and the **size of the financial penalty** an employer might face if found to be non-compliant.

*“As the probability of investigation decreases, the expected penalty should increase exponentially. Specifically, this means that if the typical employer in an industry underpays workers by \$1,000 for the relevant pay period, the expected penalty for violation should equal \$2,000 if there is a 50 per cent probability of investigation; \$4,000 if there is a 25 per cent probability and \$10,000 if there is a 10 per cent probability. Given that the probability of investigation in most industries [in the US] is far below 10 per cent, the theory of deterrence suggests that ...penalty policies are far too low.”* (Weil 2010)

Furthermore, Weil (2010: p.81) also highlights that deterrence theory argues that it is more efficient to increase the expected cost of violation rather than the probability of investigation.

Deterrence theory therefore suggests that businesses are rational and calculative in how they perceive – and react to – the risks and the costs of being found to be non-compliant. The deterrence effect is assumed to work both on the non-compliant employer and to generate broader ripple effects among employers, particularly those operating in the same industry or geographic area (Weil, 2010).

However, there is also some emerging evidence (Hardy and Howe, 2017) that the general deterrence effects of enforcement activities do not necessarily fit this model. Again it is also important to recognise other employer motivations for complying with labour regulations:

*“A number of other studies of compliance motivations, including those emerging from behavioural studies, suggest that businesses often seek to comply with the law from a sense of social or legal duty or obligation as distinct from a fear of punishment, and are therefore not motivated by fear of detection and sanction. Rather, corporations are increasingly sensitive to moral or ethical pressures and this helps explain why many firms nowadays regard ‘overcompliance’ with regulatory obligations as a good business strategy. It also assists in understanding why there may be high levels of compliance in situations where the likelihood of detection and sanction is relatively remote.”* (Hardy and Howe 2017)

We must therefore recognise that there is likely to be a spectrum of employer attitudes to – and behaviours towards – compliance with labour laws and that the appropriate instruments and interventions be used accordingly. That said, from our consultation and intelligence assessment, it is clear that for a certain proportion of employers, a non-compliance calculus does form part of their ongoing business models. In such cases, I believe a strong deterrence approach is appropriate.

**The practical question that the Strategy must address is: should there be an increase in enforcement resources and/or an increase in the level of penalties?**

### 3.1 Risk of inspection

Consider first of all the deterrent effect of the risk of being inspected. Taking HMRC NMW/NLW enforcement as an example, in 2016/17 it completed nearly 2,700 investigations. With 1.3 million employers in the UK this suggests that the average employer can expect an inspection around once every 500 years (employers divided by closed cases in Table 5 below). When considering the range of low-paid sectors, the chances of being inspected vary from once every 200 years in accommodation and food services to once every 2,800 years in professional, scientific and technical activities (Table 5 below).

Similarly, EAS undertook 892 cases in 2016/17 across an estimated 18,000 employment agencies in the UK. This implies that the average agency might be investigated once in approximately every 20 years.

In practice as all complaints are investigated and other investigations are intelligence based, the probability of a non-compliant firm being investigated will be higher than that of a compliant firm which would be rated low risk. We should also recognise that both HMRC NMW/NLW and GLAA have seen substantial increases in their resourcing in recent years and so the chances of being inspected should also increase accordingly.

Nevertheless the once in 500 years figure, on average, illustrates the resources point and demonstrates that the likelihood of inspection is low enough to have only a weak deterrence effect.

**Table 5: Likelihood of HMRC-NMW investigation by sector, 2016/17**

SIC Division	SIC Division or Group Name	ASHE April 2016 Jobs paid at or below NMW	Closed Cases	Closed Cases with Arrears	Number of Employers	Employers/Closed Cases (probability of inspection)	Employers/Closed Cases with Arrears
All	All	1,768,000	2,674	1,134	1,325,485	496	1,169
<b>Section A</b>	Agriculture, Forestry and Fishing	16,900	21	8	53,525	2,549	6,691
<b>Sections B, D, E</b>	Mining and Quarrying; Electricity, Gas and Air Conditioning Supply; Water Supply; Sewerage, Waste Management and Remediation Activities	5,500	*	*	7,635	*	*
<b>Section C</b>	Manufacturing	124,500	121	45	87,875	726	1,953
<b>Section F</b>	Construction	32,700	132	50	157,650	1,194	3,153
<b>Section G</b>	Wholesale and Retail Trade; Repair of Motor Vehicles and Motorcycles	413,900	280	132	241,995	864	1,833
<b>Section H</b>	Transportation and Storage	34,700	58	23	39,615	683	1,722
<b>Section I</b>	Accommodation and Food Service Activities	374,800	649	272	129,175	199	475
<b>Section J</b>	Information and Communication	13,700	31	12	75,650	2,440	6,304
<b>Section K</b>	Financial and Insurance Activities	6,800	16	8	21,105	1,319	2,638
<b>Section L</b>	Real Estate Activities	12,200	43	13	41,105	956	3,162
<b>Section M</b>	Professional, Scientific and Technical Activities	45,900	65	29	183,645	2,825	6,333
<b>Section N</b>	Administrative and Support Service Activities	265,000	285	110	110,835	389	1,008
<b>Section O</b>	Public Administration and Defence; Compulsory Social Security	7,800	*	*	*	*	*
<b>Section P</b>	Education	90,100	60	34	18,630	311	548
<b>Section Q</b>	Human Health and Social Work Activities	198,000	258	154	62,770	243	408
<b>Section R</b>	Arts, Entertainment and Recreation	59,400	52	16	25,085	482	1,568
<b>Section S</b>	Other Service Activities	66,100	578	220	69,195	120	315

Sources: 'National Living Wage and National Minimum Wage; Government evidence to the Low Pay Commission on compliance and enforcement', Department for Business, Energy & Industrial Strategy, July 2017

'Business Population Estimates 2016', Department for Business, Energy & Industrial Strategy, October 2016

Notes: The estimated number of employee jobs at or below NMW is based on Standard Industrial Classifications (SIC 2007) codes from ASHE 2016 and uses those paid within 5 pence of the NMW/NLW rates.

Values are missing where data are not publicly available, or where observations have been suppressed to protect low employer self-identification. Section T (Activities of households as employers; undifferentiated goods- and services-producing activities of households for own use) and Section U (Activities of extraterritorial organisations and bodies) are not presented due to all values being suppressed.

Importantly, the perception of risk of inspections is as important to deterrence effects as their actual frequency. During our consultation, many of our stakeholders expressed concerns about the responsiveness of HMRC as an enforcement body. It was suggested that HMRC do not always respond to complaints or make use of intelligence referred to them, as stakeholders have not seen any action being taken as a result.

HMRC NMW/NLW team insist that they respond to 100 per cent of complaints and have processes to manage referrals and third party intelligence. They are however constrained in their ability to give feedback on investigations. This suggests the issue is, at least in part, due to lack of communication with those providing information on non-compliance. Whatever the reason, the impact is a lack of confidence from partners that there will be enforcement action if they report non-compliance.

Across the three enforcement bodies, the length of the process to bring non-compliant businesses to justice varies but can be extensive. For example, NMW investigations average 215 days (based on case start dates and closure dates for all cases in 2016/17). For the GLAA, prosecutions take significant amounts of time, although licence revocation can be swifter at excluding a non-compliant firm from operating in the licensed sectors.

I recognise that many factors contribute towards the time taken to complete an investigation, including the complexity of some cases, employer cooperation and the judicial process that must be manoeuvred. But such lengthy procedures do nothing to deter the non-compliant employers and may, inadvertently, add to the ease with which some directors are able to liquidate assets and “phoenix” companies before prosecution can be brought against them.

### **Increasing enforcement resources**

The Immigration Act 2016 stipulated that within my Strategy I must comment on the level and allocation of funding available to exercise labour market enforcement.

I am mindful that the current pressures on the public purse make an expansion of resources for enforcement difficult. Additionally, as my work as Labour Market Enforcement Director has just begun, I am keen initially to ensure that the existing resources for the three labour enforcement bodies are being used to their fullest effect.

Both HMRC NMW/NLW and the GLAA have recently had an increase in resources to enable them to meet their expanded remit. The new roles and new operational structures resulting from that increase in funding are still in development and over the next year I will be keen to see whether these resources are being put to best use. Therefore I do not – at the current time – suggest an increase in enforcement resources for GLAA or HMRC.

**I do however recommend an increase in resources for EAS, both to promote their ability to enforce current regulations and due to my proposals to expand its remit.**

As covered in other sections of this report, EAS is a very small team within BEIS with only 12 staff to cover 18,000 employment agencies. While they are an efficient team and have achieved an impressively high throughput of cases with that resource, it is clearly not enough to implement the proactive and joint working approach that I wish to see delivered in future. As they increase their presence and access to the public, I expect to see their workload increase and I also wish to see their information gathering and analysis function grow to enable them to take on more proactive investigations.

### **Recommendations**

10. I recommend an increase in resources for EAS, both to promote their ability to enforce current regulations and due to my proposal to expand its remit. I do not recommend an increase for GLAA or HMRC NMW/NLW as these bodies have recently had an increase in resources. Over the coming year I will be monitoring the efficiency of how these resources are used.

## 3.2 Size of financial penalty for employers

Unlike the HMRC NMW/NLW team the GLAA and EAS do not currently have powers to issue civil penalties (fines not resulting from prosecutions) for non-compliance. EAS enforcement action escalates at present from a formal warning letter, to the use of the new undertakings and orders regime in appropriate cases, and finally to prosecution and prohibition (discussed in Sections 3.4 and 3.6 below). This is a rather polarised approach and, with only the most serious breaches warranting prosecution and prohibition, little punitive action can be taken further down the spectrum of offending.

**I recommend that BEIS and EAS explore the potential impact of EAS gaining the ability to impose civil penalties** in order to bolster enforcement tools and to elicit a more proportionate response to non-compliance. The GLAA has already received additional powers under their extended remit and therefore I do not at this point recommend that powers to issue civil penalties should be extended to them.

For civil penalties imposed by HMRC, according to the current rules, the penalty value is directly linked to the value of the arrears. For non-compliance with NMW, beyond the repayment of wage arrears to the worker, employers also face a penalty of up to 200 per cent of the arrears. In 2016/17, the average wage arrears was £110 per worker, which would imply an employer penalty of just £220 per worker.<sup>9</sup> This may be further reduced if the employer reimburses the employee speedily. This amount does not suggest a strong incentive to comply.

Firms may also receive a financial penalty when they are prosecuted which could be higher than the civil penalties (although in practice are often lower) and this is explored in Section 3.4. Given there are so few prosecutions for any labour market offences, the size of the penalty awarded by a court is not likely to have a significant deterrent effect either.

As such, I conclude that both the chances of being inspected and the size of any civil penalties are both far too low.

### Increased penalties

To improve enforcement, I favour a significant increase in the size of civil penalties for the non-compliant. These are simply too low and, as such, act as too weak a deterrent.

For increasing penalties, there may well be a case for emulating the model used elsewhere in public policy, where enforcement plays a major role. This centres around the use of so-called ‘turnover taxes’, which link the value of the fine directly to the company’s turnover (see Box 5 below). This model has the potential to generate substantial penalties – for instance the HSE can now fine large organisations in excess of £10 million on conviction for the most severe offences – and can provide an option for a more graded response to fines. A key point to note is that such penalties are linked to turnover rather than profit, and that criminal fines cannot be insured or indemnified against, maximising the potential impact of the penalty on the non-compliant company. Financial penalties could also be adjusted by firm size too.

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<sup>9</sup> The penalty rate applicable is directly linked to the pay reference period (PRP) in which the arrears fell due. This means that the change in penalty calculation did not have an immediate effect on all arrears identified. For example the arrears identified in 2016/17 could relate to arrears due in pay reference periods as far back as 2011 (and covered therefore by a different penalty rate). The average value of penalties per employer levied in 2016/17 was £4,741.

## Box 5: Financial penalties linked to company turnover

### Health and Safety Executive (HSE)

Sentencing Council guidelines (2015) came into effect in February 2016 to allow fines to be linked to the offending company's turnover. Under these guidelines, large organisations (with a turnover in excess of £50 million) can be fined a minimum of £3,000 for the lowest level health and safety offences. The fines increase on a graded scale, depending on levels of culpability and harm, reaching up to £10 million for the most severe offences.

Micro-organisations (with a turnover of no more than £2 million) have a starting fine of £50 for the lowest level health and safety offences, increasing to up to £450,000 for the higher culpability and harm category offences.

For the most severe offence of corporate manslaughter, micro-organisations can be fined £180,000 whereas the fine for large organisations can exceed £20 million.

### Competitions and Markets Authority (CMA)

The CMA can enforce interim measures while it considers the implications of a merger between two companies. If breached, the CMA can issue civil penalties of up to **5 per cent** of annual global turnover of the enterprises owned or controlled by the person subject to the penalty.

### The EU General Data Protection Regulation (GDPR)

From May 2018, the EU's GDPR will come into force, introducing stronger financial penalties than the current UK Data Protection Act 1998. Organisations in breach of the GDPR can be fined up to **4 per cent** of their annual global turnover or €20 million, whichever is greater.

An alternative approach would be to recover the costs of enforcement action or prosecution, either as part of, or in addition to, the penalty. For example, HSE has been able to issue a Fee for Intervention (FFI) since October 2012 in order to recover the costs of carrying out its regulatory function and enforcement actions from those found to be in material breach of the law. Under regulations 23 and 25 of the Health and Safety (fees) Regulations 2012, the non-compliant duty holder is charged an FFI of £129 per hour to cover the cost of the inspector's time for any on-site visits, writing of notifications of contravention and reports, preparing improvement/prohibition notices and any follow up work including telephone calls and emails. A duty-holder can dispute an FFI invoice, but if an independent panel upholds the HSE's decision, the duty-holder will have to pay an additional fee for the panel considering the appeal. This shifts some of the cost of health and safety regulation from the HSE and the public purse to those in breach of the law.

Charging a fee for non-compliance will fit better with some models of enforcement than others and each agency would need to consider how it would sit within their approach and array of penalties. **I recommend that, where appropriate, employers found to be non-compliant should be charged a fee for intervention to allow the enforcement bodies to recover some of their enforcement costs.**

There are no statutory limitations on the potential scope of civil fines in the UK. This means that there is scope to increase the civil penalties for labour offences, where the legislation governing the offence itself has imposed an upper limit. For instance, under s.21 of the NMW Act 1998, the BEIS Secretary of State is able to amend the multiplier by which the civil penalty for non-payment of the minimum wage is calculated. The multiplier was amended by secondary legislation in 2014 from 50 per cent of the wage arrears to 100 per cent, and again in 2016 to 200 per cent.

Ideally, the revenue from these higher penalties should then be recycled to fund the enforcement effort. This would be in addition to the current funding. The enforcement bodies rely on having stability and predictability of their budgets to enable them to plan and develop their workforce. This recommendation should therefore be seen as providing resource for additional projects and developments and not as part of core funding. It could also help fund the relatively high costs of taking prosecutions (discussed in Section 3.4 below).

**I recommend that the NMW penalty multiplier is reviewed again and increased to a level that would ensure that there is an incentive to comply with the legislation.**

**I recommend that revenue from higher penalties should be recycled into the enforcement system as additional resource.**

### Compensation for exploitation

In addition to the direct civil financial penalties, some stakeholders suggested that employers should also be liable for paying compensation to those workers affected by the non-compliance. Indeed, Focus on Labour Exploitation (FLEX) raised the point that some compensation may in fact be payable in trafficking and labour exploitation cases, but also stated that the law remains unclear here. The Union of Shop, Distributive and Allied Workers (Usdaw) argues that increasing the financial impact on the employer would also increase the deterrent effect.

*"Usdaw believes that workers who are underpaid should not only be entitled to arrears, but also to compensation. [...] An individual can demand compensation for distress and inconvenience caused by, for example, an unfair bank charge, but would not receive any such payment where their employer has failed in one of its most basic duties towards them."* Usdaw response to DLME consultation

*"The EU Directive on Trafficking emphasises the right of victims to compensation. However, the link between unpaid wages and exploited workers' compensation is unclear both in government procedures and statistics. Not only does the Criminal Injuries Compensation Scheme (CICS) not record information relating to trafficking for labour exploitation, additionally HMRC does not record how many workers owed unpaid wages are actually repaid by employers."* FLEX response to DLME consultation

I do not recommend any such compensation in this iteration, but this may be an area I return to in future strategies.

### Recommendations

11. BEIS and EAS should investigate the potential for EAS being given the powers to impose civil penalties on non-compliant employment agencies as an alternative to prosecution.
12. I recommend that, where appropriate, employers found to be non-compliant should be charged a fee for intervention to allow the enforcement bodies to recover some of their enforcement costs.
13. I recommend the use and imposition of much more severe financial penalties to act as a greater deterrent against non-compliance. The NMW penalty multiplier should be reviewed and increased again to a level that would ensure that there is an incentive to comply with the legislation.
14. I recommend that revenue from higher penalties should be recycled into the enforcement system as additional resource.

### 3.3 Reputational penalties

Since 2011, BEIS has used reputational enforcement – *naming and shaming* – in an effort to achieve greater compliance with the NMW/NLW. Since 2017 this occurs every three months. From when the scheme was revised in 2013 to December 2017, over 1,500 employers have been named and shamed in this way, associated with over £8 million in back pay for 58,000 workers (see Figure 7, Section 1.6). Although there is the possibility of self-correction in certain circumstances, once a Notice of Underpayment of over £100 has been issued, there are very few grounds for exceptions to the naming policy, only: where there may be a risk of personal harm to the individual or their family; where there are national security risks associated with naming; and where it is not in the public interest to name the employer or company.

As discussed above, the publicity arising from the naming rounds can often focus on the larger, household-name employers as BEIS lists employers who have failed to pay minimum wages in descending order of total wage arrears. However, this often masks the relative financial severity of the non-compliance taking place for individual workers. Taking the December 2017 naming round as an example, the Best Connection Group topped the list and owed £469,000 in unpaid wages, equating to £183 per worker. Across the 260 employers named in this round, a total of £1.764 million was owed to around 16,400 workers, averaging less than £108 each. In fact, almost 11,000 workers were owed less than £50 each. By contrast, five workers had each been underpaid by over £11,000 and a further 15 by over £3,000 (BEIS, 2017e).

**Table 6: BEIS Naming Round December 2017 – top ten non-compliant employers by total arrears owed (BEIS 2017e)**

Name of Employer	Arrears	No. of workers	Average per worker
The Best Connection Group Limited	£469,274	2,558	£183
Qualitycourse Limited	£310,302	1,421	£218
Primark Stores Limited	£231,973	9,735	£24
SportsDirect.com Retail Limited	£167,036	383	£436
Edward Mackay Contractor Ltd	£51,404	4	£12,851
Payerise 72 Limited	£29,979	130	£231
Mr Percy John Puddepha, Mrs Rosemary Puddepha, Mr Brian Puddepha and Ms Diana Puddepha	£20,558	15	£1,371
Ramside Estates Limited	£17,537	8	£2,192
Bedruhan Hotel Limited	£14,216	22	£646
First Rate FX Limited	£11,802	4	£2,951

During our consultation I was told repeatedly by stakeholders that companies fear for their public reputation, which suggests that this means of enforcement should have a strong deterrent effect, at least for those employers with a high public profile.

Yet, respondent views on the use and effectiveness of naming and shaming were mixed. Some stakeholders were supportive of the scheme overall and even suggested its extension to other areas of labour market enforcement:

*“Our impression in the homecare sector is that Government’s naming policy for NMW non-compliance has promoted a significantly higher awareness of the requirements to pay NMW.”* United Kingdom Homecare Association (UKHCA) response to DLME consultation

*"The TUC supports the Naming and Shaming scheme operated by HMRC... A similar scheme could be run targeting rogue employment agencies and gangmasters."* Trade Union Congress response to DLME consultation

By contrast, others were more sceptical – as indeed was Taylor (2017). Criticisms from stakeholders centred on:

- a perception that larger companies could negotiate with HMRC to escape being named, and that therefore smaller and medium-sized companies were disproportionately affected (although HMRC refer all employers issued with a notice of underpayment over £100 for naming regardless of size);
- that the threshold is too low and the list is therefore too long to really have an impact;
- that there is no differentiation between accidental and deliberate non-compliance.

*"It is FSB's view that HMRC's current 'naming and shaming' policy is ineffective. The lists are long, diluting the value of a public list, and the £100 threshold is too low. The best practice in exercising this power has been demonstrated by The Pensions Regulator, which names and shames only the most egregious non-compliant actors. This adds to the effectiveness of the list and does not punish employers that unintentionally erred."* Federation of Small Businesses (FSB) response to DLME consultation

*"In our experience employers are most concerned about the "naming and shaming". Given the low threshold for being publicly named, and HMRC's new focus on the UK's larger employers, we believe that the impact this has will quickly reduce as it becomes widely accepted that the NMW regulations, as interpreted by HMRC, are difficult to ensure full compliance with. As a consequence most employers in certain industries will be named and shamed."* PwC response to DLME consultation

*"...we remain concerned about the naming and shaming process that treats accidental non-compliance in the same way as blatant disregard for the law. Efforts to redress past errors are not sufficiently recognised either."* ALMR response to DLME consultation

Reputational enforcement might be expected to affect a company's share price, its ability to recruit (good quality) staff and consumer loyalty. For smaller employers the reputational effects may be more localised but no less damaging. Media coverage of course can play a significant role here.

There is little evidence on the impact of naming and shaming for NMW/NLW. BEIS has not undertaken any evaluation of this policy tool and its potential deterrent effect. **I would very much like to see more research carried out here on this policy intervention.** However, I do acknowledge the point made by the LPC that it will be a challenge to measure the impact of changes in the penalty regime when there have been so many policy changes taking place at the same time, as has been the case recently.

While not condoning any degree of minimum wage underpayment, I think that the Naming Scheme is an opportunity to provide some distinction between the smaller (per worker), possibly technical and accidental breaches and the larger (for each worker), deliberate and more serious violations. As explained in Section 2.2, I do not recommend varying the financial penalties between employers who have been found non-compliant in different ways. However, reputational penalties could be tailored to greater effect, **increasing both the deterrence and compliance effect.**

Greater emphasis should be placed on the serious, deliberate abuses, and take the opportunity to educate employers on potential mistakes where ‘accidental’ breaches have been uncovered. This could be achieved by;

- including average arrears per worker which gives a different perspective on the list;
- providing more information in case study form on a selection of cases:
  - The most grievous breaches per worker in order to increase the reputational damage and highlight the extremes of non-compliance; and
  - Where the underpayment breach could be used as an educational tool to prevent other employers from doing the same. This should include an explanation of the type of breach the employer was found to have committed, a statement of what should have been done, and a link to guidance on that specific issue for other employers to access.
- using the examples to engage with sector specific trade press to ensure the message gets out to businesses that:
  - a. the practice is non-compliant;
  - b. that guidance and support is available to help them get it right;
  - c. that HMRC is looking at that sector and will be aware of the potential for this type of non-compliance; and
  - d. now that this potential problem area has been publicised and explained there will be no excuses for future non-compliance.

## Recommendations

15. I recommend evaluation of the BEIS Naming Scheme to assess its impact.
16. I recommend that further information is provided within the Naming Scheme to highlight the average arrears per worker, that case studies are provided to increase both the deterrence and compliance effect, and that opportunities are taken to engage with specific sectors to educate other employers on potential areas of non-compliance.

## 3.4 Prosecutions

To date, employer prosecutions for failure to pay the correct NMW/NLW have been few and far between – only 14 prosecutions since the NMW was introduced in 1999 (all of which have taken place since 2007, though we note that there were four successful prosecutions in 2016/17). There was only one successful EAS prosecution in 2016/17. GLAA led five prosecutions in 2016/17 and has taken a total of 84 prosecutions since 2008/09.

By comparison, we note that the HSE achieves in excess of 500 prosecutions leading to conviction each year. Even allowing for its greater size and funding, this is proportionately a much higher prosecution rate. This seems to me to be an underutilised intervention in the labour enforcement arena. I do of course recognise the lengthy and sometimes costly process involved. HMRC told us that even the less complex cases cost at least £50,000, with the more complex ones costing considerably more. If anything, this adds weight to my recommendations for higher financial penalties and the recycling of some of this money to help fund more prosecutions (see Section 3.2). Overall, if used more frequently and with wider publicity, greater use of prosecutions could act as a much more powerful deterrent.

A number of stakeholders also raised the issue of the limited use of prosecutions. The Low Pay Commission has consistently called for greater use of this enforcement tool by HMRC (see, for example, LPC, 2017).

The potential scope of financial penalties for summary offences (those prosecuted in the magistrates' court) has changed in recent years. Before March 2015, summary labour market offences generally carried a statutory maximum fine of £5,000. In March 2015, Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force, removing the upper penalty limits in the magistrates' court. This means that all labour market offences now carry potentially unlimited fines upon conviction, as has always been the case for more serious indictable offences (those tried in the crown court).

Table 7 sets out the amounts awarded in fines, costs and compensation for each of the 13 successful HMRC NMW prosecutions between 2007 and 2016. The fines levied upon conviction have often been paltry and in many cases do not reflect the losses incurred by workers. In 2008 for example, David Jackson of 'Jackson's Butchers' was prosecuted for non-payment of NMW (s.31(1)), failing to keep or preserve records (s.31(2)) and making false entries to records (s.31(3)) under the NMW Act 1998. Whilst the judge awarded compensation of £9,065 to be paid to the workers, the fine on conviction stood at just £700.

**Table 7: Details of successful HMRC prosecutions between 2007-2016**

Name of employer	Area	Offence	Fine	Costs	Compensation	Date
T Aguda t/a Rascals Day Nursery Ltd	Walthamstow	31 (5) (a)	£2,500	£500	N/A	28/08/2007
Torbay Council	Torquay	31 (5) (b)	£1,000	£500	N/A	01/10/2007
R Singh t/a Pound Mania	Nottingham	31 (5) (b)	£500	£150	N/A	30/04/2008
David Jackson t/a Jackson's Butchers	Sheffield	31 (1); 31 (2); 31 (3); 31 (4).	£700	£100	£9,065.85	02/07/2008
Pauline Smout t/a Jackson's Butchers	Sheffield	31 (1); 31 (2); 31 (3); 31 (4)	£100	£100	£2,009.74	02/07/2008
Zaheer Ibrahim t/a The Jewel in the Crown	Nottingham	31 (5) (b)	£3,500	£100	N/A	21/07/2008
Ahmed Yassine t/a The Phenix Hotel	Rotherham	31 (2); 31 (5) (b)	£2,250	£500	N/A	13/02/2009
B G Optical	Manchester	31(1); 31(2); 31(3); 31(4); 31(5)(a); 31(5)(b)	£3,696	£820	N/A	23/06/2010
Widescope Security	London	31(1); 31(5)(b)	£1,000	£1,000	N/A	26/02/2013
Amanda Barrett t/a Amanda's Precious Bubbles Day Nursery Ltd	Birmingham	31(1); 31(2)	N/A	N/A	£3,247	11/05/2016
Richard Hunt t/a The Rock Hotel (Weymouth) Ltd	Weymouth	31(5)(a); 31(5)(b)	£500	N/A	N/A	13/05/2016
L.UK/Euro (Brighton) Ltd t/a 3D Telecon	Oldham	31(1); 31(5)(a)	£5,000	£1,860	£9,300	04/08/2016
Dida Brothers Car Wash	Southampton	31(1); 31(2)	£14,000 or face possible 12 month jail term	£2,000	£4,403	08/12/2016

*"We wish to see changes introduced so that firms take the threat of penalties and prosecution seriously. The naming of non-compliant firms is unlikely to have the desired impact if it is not backed up with the real prospect of a fine or prosecution. It was reported earlier this year that not one of the 700 employers 'named and shamed' for paying below the minimum wage since 2013 has been prosecuted."* Communication Workers Union (CWU) response to DLME consultation

The importance of prosecutions is not only to affect the people directly involved but also to be a highly visible element of enforcement, setting a legal precedent which has the potential to change the behaviour of other firms and individuals, thus having a potentially major effect on non-compliance. Given the cost and resource required for prosecutions, it is important where possible to use case judgements to the maximum effect across the labour market.

I believe that greater publicity around prosecutions in the more severe cases of labour violations can have a powerful deterrent effect across the wider labour market. It is possible that HMRC's focus on recouping wage arrears may mean they are not making the most of the reach their enforcement work could be having in the public domain. Indeed, the LPC commented in their consultation response that qualitative research they had commissioned suggested that the message of an increased focus by HMRC NMW on compliance was not reaching all employers.

During our consultation we noted the contrast in approach between HMRC NMW/NLW and GLAA to publicising enforcement successes. Whereas GLAA makes extensive use of press releases and social media announcements, HMRC NMW/NLW is virtually absent in this space. EAS have neither the resource, nor the platform, to publicise their activity. While I have not seen any evaluation of the impact of GLAA's publicity work, this does seem to me to be a communications strategy that should be explored further and whose wider deterrence impact should be examined.

*"Usdaw believes that a clear strategy for prosecution in the worst cases of non-compliance needs to be adopted. The extremely low number of prosecutions may well be motivated by pragmatic reasons (for instance the speed of receiving arrears, and providing value for taxpayers' money), but it does not send out the right message to employers. Where there has been a deliberate failure to pay staff their legal entitlement, and there is a good chance that a prosecution would have a successful outcome, prosecutions ought to be pursued. This would demonstrate to employers and to workers that the rights of low paid workers are to be taken seriously."* Usdaw response to DLME consultation

### 3.5 Undertakings and orders

The Immigration Act 2016 introduced a new regime of labour market enforcement undertakings (LMEU) and labour market enforcement orders (LMOE) to complement existing powers and processes. The introduction of LMEU/Os is a welcome development to increase the enforcement tools available to the bodies. It is still too early to assess their effect, but this is an intervention on which I will report in future labour market enforcement strategies. The following paragraphs set out the scope of LMEU/Os and some limitations and difficulties that have been flagged in the early stages of implementation.

LMEU/Os are intended to tackle serious and persistent non-compliance where existing penalties are failing to stop recidivism. Each enforcement body can make use of LMEU/Os and the GLAA is able to use them to tackle trigger offences across the remit of each body.<sup>10</sup> This new regime enables the enforcement bodies to investigate and prosecute for persistent breaches of a LMEU

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<sup>10</sup> "Trigger offence" is defined in section 14(4) of the Immigration Act 2016 and means an offence under the Employment Agencies (EA) Act 1973 (other than one under section 9(4)(b) of that Act), an offence under the National Minimum Wage (NMW) Act 1998 or an offence under the Gangmasters (Licensing) (GL) Act 2004 including secondary and inchoate offences.

and LMO. A breach of an LMO is punishable by a custodial penalty of up to two years. In theory, this gives authorities more robust sanctions in cases where they would only previously be able to levy a fine.

*“Assessing future risk rather than past conduct is a key strength of the Undertakings and Orders regime. [...] it targets employers that pose the greatest risk of labour exploitation while minimising the burden on the majority of compliant businesses”.* CBI response to DLME consultation

An LMEU is a voluntary but binding undertaking to comply with any requirements or restrictions as set out by the enforcement body. Failure to accept the proposed undertaking or a subsequent breach will escalate the process to a LMO. There are two distinct types of LMO:

- Order on application (s.18): where an undertaking has been refused/breached the court can grant an order to compel compliance with the same terms. If breached the employer can be prosecuted.
- Order on conviction (s.20): where an individual is convicted of an LME offence the court can issue an order on conviction in addition to the sentence already imposed.

In the first year of these measures coming into force an undertaking or order has not yet been successfully secured by any of the enforcement bodies. I recognise that this is not through lack of effort on the part of the three enforcement bodies, who have worked hard to put this regime into practice, but rather that it has been very difficult to identify a suitable test case. The inability to find a suitable case over the past year raises concerns as to whether this new regime is fit for purpose in its current form as a supplementary enforcement measure.

Several limitations of the LMEU/O regime have been identified during efforts to make use of this new enforcement tool. Firstly, the enforcement bodies have had difficulty seeing where the new powers fit into the current processes and penalties. For example, there is some concern that LMEU's carry out the same function as a formal warning letter for EAS. Yet an LMEU is the more cumbersome option, as it requires the body to be prepared to escalate the process to an LMO if breached, in order to uphold the deterrence effect inherent to the process. Similarly, for the GLAA in the licensed sectors, the LMEU/O regime only applies to offences concerning one's status as either licensed or unlicensed, rather than applying to the licensing conditions which detail labour market obligations, limiting opportunities for their use.

As a consequence, the enforcement bodies have somewhat prioritised the pursuit of orders on conviction, with the GLAA being in the process of securing the first use of this order (at the time of writing in February 2018). The difficulty with orders on conviction however is that LMEU/O's have effect for a maximum of two years. This means that an order on conviction becomes redundant where the sentence imposed is in excess of this time period. It would also only apply to the very small number of individuals who are prosecuted for labour market offences, whereas I believe that the value added by LMEU/O's to the enforcement spectrum is the possibility of a custodial sentence where this has not previously been an option (i.e. before prosecution).

A pilot scheme based in Nottingham has been planned to test the LMEU/O regime in 2018. This is a welcome opportunity for the three bodies to establish the necessary processes for prosecuting LMOs and to develop specialised knowledge of the court process for a wider roll out. **I strongly encourage this pilot scheme to begin as soon as is practicable, and for a full evaluation to take place in due course.** I see particular merit in the provision of HM Courts and Tribunals Service guidance afterwards to inform good practice for future use of this regime.

The process of applying for LMOEs in Scotland is different than in England and Wales. Rules of court must be requested by the original legislators and considered by the Scottish Justice Council who meet six times per year. This process is scheduled to begin alongside the Nottingham pilot. It is important that this process is pursued as a matter of priority, as the potential number of cases to which LMOEs can be applied is reduced in the meantime.

**I strongly encourage the enforcement bodies to identify appropriate test cases to trial LMEU/O's and to use the Nottingham pilot as an opportunity to clarify the processes.**

I would particularly like to see a focus on securing undertakings and orders on application in the coming year, in order to test how this new regime can best supplement existing enforcement mechanisms. It is also important that rules of court for application in Scotland are pursued as soon as is practicable. I will address any emerging or ongoing issues with the LMEU/O regime in the next strategy.

### **Labour Abuse Prevention Officers (LAPO): PACE powers**

Since 30 April 2017, specialist GLAA officers known as LAPOs have been able to use powers under the Police and Criminal Evidence Act 1984 (PACE) to investigate offences occurring under the umbrella of much labour market legislation, including: the National Minimum Wage Act 1998; Employment Agencies Act 1973, the Gangmasters (Licensing) Act 2004 and the Modern Slavery Act 2015 (sections 1 and 2 relating to forced labour and human trafficking). Following successful completion of the seven-week specialist training programme, the officers are able to exercise investigatory powers under s.114B of the Police and Criminal Evidence Act 1984 (PACE). This includes powers to apply for a warrant to enter premises, to search for and seize documents, to search suspects on the premises without arresting them first and the power to arrest suspects without warrant. By mid-February 2018 the GLAA had recruited and trained 31 LAPOs.

While it is encouraging to see evidence of an increasing GLAA presence in the unlicensed sectors, for understandable reasons, new LAPO powers have predominately been used to date to target the more severe end of the enforcement spectrum, with a clear focus on modern slavery. In order to maximise compliance, I would like to see LAPOs addressing the *entire* range of labour market offences within their remit. In particular, it is important that LAPOs make full use of their powers to tackle cases where there have been breaches of more than one of the Acts within their remit, but where this does not necessarily involve severe exploitation amounting to modern slavery. For example, this may be where instances of offending have occurred under both the NMW Act 1998 and Employment Agency Act 1973. Shared intelligence to tackle multiple offences across the entire range of Acts in scope is the best use of enforcement resources and where I believe value is added by the creation of LAPOs within labour market enforcement.

The role of LAPOs is completely new within the labour market enforcement space. The ways in which they are being used at both an operational and strategic level are still in the early stages of development. The PACE powers are beginning to be tested for the first time, including how they complement and add to the enforcement powers of the other two bodies. I am very keen for the LAPO roles to be further developed to their full potential, maximising their enforcement impact.

**I recommend that Home Office and GLAA work to explore and clarify the role and powers of LAPOs within the overarching framework of labour market enforcement.** This should include reviewing and updating the memorandum of understanding between the enforcement agencies to reflect the use of PACE powers, and a clear protocol on the circumstances in which LAPOs are able to tackle broader offending or when a case should be referred to the relevant authority. Once the LAPOs have been operating at full strength for six months, the Home Office and GLAA should review where and how LAPOs have added value and where they have encountered barriers to their operational work. I will re-visit any emerging issues with LAPO powers in future strategies.

## Recommendations

17. There should be greater use of – and publicity for – prosecutions, and undertakings and orders, to help increase the deterrent effect.
18. The Home Office and GLAA should work to explore and clarify the role and powers of Labour Abuse Prevention Officers within the overarching framework of labour market enforcement.

## 3.6 Prohibitions

A key challenge for labour market enforcement is the issue of ‘phoenixing’. This is where directors dissolve their company in order to avoid having to pay fines or arrears only to re-emerge soon afterwards under a different legal company but usually operating the same problematic business model. Where this is used as a tactic to continue non-compliance, there is an argument to make the law stronger in this area to tackle it.

*“...non-compliant firms continue operating until such a time as they believe they might be under scrutiny, at which point they discontinue and resurrect in another form. Such “phoenixing” is well known and needs to be dealt with”. FCSA response to DLME consultation*

Currently, of the three enforcement bodies, only EAS has the powers to prohibit individuals from running or acting as an agency. This can be for up to 10 years by application to an Employment Tribunal. Prohibition can be sought based on information obtained during an investigation or after the successful prosecution of an agency either by EAS or other enforcement bodies. Once an individual has been prohibited, they cannot be involved in the running of an agency during their prohibition period and any breach of this order could lead to criminal proceedings being taken against the individual. A public list of disbarred individuals is maintained by EAS<sup>11</sup> on the GOV.UK. As of 16 January 2018, the names of ten prohibited persons, plus two with special conditions (e.g. spouses of prohibited persons) were published on the prohibited persons list.

Under its licensing regime the GLAA has the power to deny or revoke licences indefinitely, but there is no obstacle to labour providers operating in unlicensed sectors. Both the EAS and GLAA should be sharing information with each other when individuals are denied licences or are prohibited from running employment agencies to make sure that rogue employers are not able to move between licensed and unlicensed sectors.

One angle I am keen to explore further is how the labour market enforcement bodies can work with the Insolvency Service, with a view to targeting individual company directors to bar them from this sort of phoenixing activity and thereby help to promote compliance by closing this loophole in current regulations (although without preventing the growth and regeneration of businesses more generally).

Indeed, the Association of Labour Providers called for this in their response to our consultation and suggested wider measures to tackle the “controlling hands” that sit behind business operations who may already have been disqualified from acting as company directors. They suggested that:

- non-payment of civil penalties should be able to be set against the personal assets of Directors;
- criminal prosecution for those exploitative employers who will seek to adopt evasive measures to avoid paying such as liquidating and phoenixing their businesses;
- enable the Proceeds of Crime Act 2002 provisions to apply against the personal assets of exploitative employers; and

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<sup>11</sup> [www.gov.uk/government/publications/list-of-people-banned-from-running-an-employment-agency-or-business](http://www.gov.uk/government/publications/list-of-people-banned-from-running-an-employment-agency-or-business)

- a new criminal offence to enable enforcement action to be taken against the architects and “controlling hands” of worker exploitation, including the advisors and accountants that devise and facilitate the delivery of exploitative employment models and those that sit behind purportedly legitimate businesses and bankroll and profit through money laundering from the operations of these businesses.

My team and I will explore these suggestions with the Insolvency Service and the three bodies during 2018 and come forward with proposals in a future strategy.

## Recommendations

19. The three enforcement bodies should work with Insolvency Service to crack down on phoenixing by directors seeking to avoid labour market penalties.

## 3.7 Prioritisation of inspections: proactive vs reactive

As highlighted in Section 1, prioritisation is one of the four key principles of effective enforcement. In part this is driven by the resource limitations faced by labour inspectorates generally and exacerbated by public finance pressures following the 2008 recession (Weil 2008). Indeed, the International Labour Organisation (ILO) set a benchmark of one labour market inspector per 10,000 employed persons (ILO, 2006). The UK falls a long way short of this with, in 2017, only 1 per 20,000 employed persons, including HSE inspectors (ONS, 2018). Therefore, although significant improvements have been made over the last few years, the UK currently still only has half the ILO benchmark ratio of inspectors.

Effective enforcement is driven by the approach taken by the bodies to tackle non-compliance. Weil (2008) argues that:

*“What is required is a more strategic approach to labour inspection, measured against a different set of criteria from those by which workplace agencies are normally judged”.*

Aside from the question of whether enforcement resources would practically allow for the investigation of all complaints, Weil (2008) highlighted that relying on complaints information only risked skewing the measurement and understanding of the true scale and nature of non-compliance. Indeed, recent research by the LPC (2017) highlighted that, although two-thirds of those underpaid NMW are women, they represent a much smaller proportion of those likely to raise complaints. Whether this is due to lack of awareness or fear of reprisal from employers, the end result is that the complaints data alone may not provide an accurate picture of where non-compliance is really taking place. **In essence, the most vulnerable workers may not make a complaint. Thus, they need proactive enforcement to protect their interests.**

Therefore, our focus here is on the relative use by the three bodies of proactive (intelligence-led) and reactive (complaint-led) enforcement. There is a clear balance to be struck between having a system that deals with, and achieves justice for, each individual case, yet also succeeds in identifying and tackling the wider systemic issues around non-compliance. Proactive enforcement itself can have a strong deterrent effect:

*“Proactive inspections are critical not only for uncovering violations, but they also have a substantial deterrent effect, especially among businesses in the same region and industry of the inspected workplace.” Response to DLME consultation from Professor Judy Fudge*

## Reactive versus proactive enforcement in practice

Each of the bodies has a different prioritisation for their individual investigations. Due to their very different remits and resources, it is not appropriate to directly compare the three enforcement bodies.

### *(i) GLAA*

The majority of GLAA licensing activity could be considered reactive in nature, as the GLAA responds to licence applications or reports of potential non-compliance within their regulated sectors with inspections, but they also conduct a number of enforcement cases which are more expressly intelligence-led. Other than for licensing application inspections, GLAA does not undertake inspection activity without a justifiable reason to meet their commitment to not being an unnecessary burden on business. The GLAA reported that in 2016/17, they handled more than 50 proactive investigations, representing around one fifth of their caseload for the year.

Since the introduction of the new GLAA PACE powers in the Immigration Act 2016, the GLAA remit has extended to cover labour exploitation across all sectors of the economy. As such, the volume of intelligence being received by the GLAA has increased substantially, with relatively little change in the licensing activity. Consequently, the GLAA's approach to their investigations has become increasingly proactive.

The GLAA follows the National Intelligence Model (NIM). All intelligence they receive is treated, triaged, and fed into their full tasking and coordinating process where they take decisions on the actions going forward. This is the basis for their proactive cases, which range from enforcement activity in the regulated sectors right up to their targeted investigations into labour exploitation. The GLAA already works closely with law enforcement partners but, with growing numbers of GLAA inspectors trained as LAPOs with the police-style PACE powers, the GLAA is able to independently undertake more and more proactive investigations outside of their regulated sectors.

### *(ii) HMRC NMW/NLW*

During our consultation I visited the HMRC NMW/NLW operations team in Salford. HMRC manages all complaints through a multi-tiered triage process and handled by the appropriate NMW/NLW enforcement team (see Section 1.6). The policy set out in the Service Level Agreement (SLA) means that HMRC responds to every complaint received. While this is a largely reactive method of enforcement, the increase in budget and staffing over the last year has allowed HMRC to invest more time and resource into proactive, targeted investigations. In 2016/17, targeted enforcement cases represented 55 per cent of cases closed by HMRC, an increase of 13 percentage points from 2015/16.

I was encouraged by discussions with the operational staff in Salford who clearly explained the process for triaging complaints as they came in, using a variety of approaches from nudging phone calls and letters to small employers, to investigations managed by the national or regional teams, and to the complex criminal investigations dealt with by Serious Non-Compliance Teams. I understand that the structure is new and still developing and I will be interested in seeing how it beds in over 2018/19.

HMRC has invested in behavioural insights analysis to better understand the underlying drivers to achieve greater compliance. HMRC also makes extensive use of 'nudge' letters as a first response to remind employers with straightforward affairs of their NMW obligations when individuals make a complaint.

HMRC has made significant improvements to their proactive enforcement activity in the last year, including the recruitment of staff with investigative backgrounds. In particular, HMRC is now making more extensive use of the wealth of data and information held centrally to look at how

they undertake proactive investigations. This is often in collaboration with other specialist teams within HMRC, and can lead to multi-agency joint operations. Notably, HMRC has recently started to tie in NMW cases with more serious instances of serious non-compliance. The benefits of this joined-up approach will need to be evaluated but it should lead to better intelligence on how these non-compliant businesses operate.

This trend towards more proactive investigations by HMRC has received a mixed response from stakeholders. During our consultation, I heard some specific concerns that HMRC is perceived to be targeting large businesses over technical breaches as opposed to safeguarding workers from the more egregious offenders (see Section 2.2). In contrast, the LPC was complimentary of HMRC's proactive approach, acknowledging the importance of such investigations to those workers that are not empowered to report non-compliance.

*"...we welcomed the shift to a more pro-active approach by HMRC and noted that not only has the hit rate improved substantially for these cases but that the pro-active approach can counteract the reluctance or inability to complain that some groups of workers may have."* LPC response to DLME consultation

BEIS policy for EAS and HMRC is that all complaints must be followed up. This policy means that currently the proactive, intelligence-led investigations are, by definition, comprised of the residual resource. Currently this is substantial with around 55 per cent of investigations in 2016/17 being proactive, but I am concerned that, in the face of larger and more complex caseloads which will no doubt result from the increasing proportion of labour market covered by NMW/NLW, the resource available for proactive investigations will be squeezed to the detriment of labour market enforcement.

### (iii) EAS

The EAS policy is also to investigate all complaints received. With limited resources, the EAS is in this way bound to a predominantly reactive caseload, though they continue to commit available resource to proactive investigations outside of their complaints-driven work. In 2016/17, the EAS conducted 142 targeted inspections alongside the 828 complaints they received. Thus, proactive investigations represented approximately 15 per cent of their enforcement activity in 2016/17.

In their latest annual report, the EAS states that assessing risk and intelligence to carry out proactive investigations "enabled EAS to deploy its resource more efficiently, meaning that it carried out fewer visits but achieved higher outcomes per visit" (EAS, 2017). EAS is already actively engaging with law enforcement partners and other interested stakeholders, including the Pensions Regulator and Immigration Enforcement, to conduct further joint operations under this targeted approach.

EAS is looking at ways of improving how they proactively target non-compliant employment businesses. For instance, EAS is investing in a case management software system to improve efficiency and increase the operational capacity of frontline staff. EAS is also looking to extend their intelligence gathering and utilisation capabilities that would facilitate more proactive investigations.

*"[the case management software solution] will decrease the amount of time inspectors use to deal with administrative duties thus increasing the capacity of inspectors to conduct more investigations to ensure compliance and work more closely with industry."* (EAS, 2017)

## Stakeholder views on reactive versus proactive enforcement

Our stakeholders had mixed views about the balance between reactive and proactive enforcement. I heard that not following up every complaint would result in the bodies undermining their own authority and that workers would be discouraged from reporting non-compliance.

*"In our view, enforcement bodies must continue to be reactive to all individual complaints. Worker confidence in the enforcement bodies would be damaged if the commitment to respond to all complaints were to be scaled back. Workers already may feel they are taking a risk when they make a complaint, and if they believe that it will not be pursued or taken seriously, it will discourage others from coming forward. Above all, individual complaints are vital sources of intelligence on non-compliance."* UNITE response to DLME consultation

Many were in favour of proactive, intelligence-led investigations but only on the condition that this was not to the detriment of the complaints-led investigations. All support for a targeted approach stemmed from recognition of the many barriers to workers complaining, and that concentrating solely on complaints skews the enforcement efforts away from those who are likely to be the most at risk.

*"...HMRC should also be able to maintain and develop its targeted enforcement work, since it is clear that many underpaid workers have been unwilling to complain. In some cases this may be due to lack of awareness of their rights and how they are enforced. But it is also clear that many workers justifiably fear how their employers will react to a complaint."* TUC response to DLME consultation

*"Proactive risk profiling work is vital to the low-paid. Perhaps too much of the current enforcement framework relies on workers complaining about their engagers. [...] Low-paid workers tend to be disproportionately female, they may also be migrant workers, have low levels of formal qualifications, and a weak collective voice. Bearing in mind these characteristics, it is easy to envisage some workers being afraid of reporting their engager to the authorities..."* LITRG response to DLME consultation

To account for worker inability or unwillingness to report non-compliance, LITRG told us in their consultation response that proactive work should have *"at least as much focus on, if not more than, reactive work"*. Focus on Labour Exploitation (FLEX) took this further by supporting the World Bank's recommendation that the majority (60 per cent) of investigations be proactive.

*"Labour inspection authorities should set a goal of at least 40 percent reactive and 60 percent proactive inspections, whilst ensuring worker complaints receive adequate responses."* FLEX response to DLME consultation

It is difficult in both theoretical and practical terms to prescribe a specific ratio of proactive to reactive investigations. I recognise that proactive investigations rely on the capture and consumption of sufficient intelligence. As mentioned previously, each of the bodies have invested more into their intelligence capabilities in the last 12 months, which will facilitate proactive interventions, but significant intelligence gaps and requirements remain.

Nevertheless, **I would like to see a continued shift to more proactive enforcement methods.** This will necessitate a more efficient way of responding reactively to complaints.

## Recommendations

20. The three bodies should continue to shift to more proactive enforcement methods. This will necessitate a more efficient way of responding reactively to complaints.

## 3.8 Use of information and joint working

One of the central reasons the Director's post was set up was concern about the silo working of the different enforcement bodies. There is increasing acknowledgement that joint working and sharing of information are crucial for improving enforcement across the scale of non-compliance – see, for instance, DCLG (2016), *Better Business Compliance Partnership Evaluation*. A holistic, multi-agency approach is often required to deal with persistent and deliberate non-compliance. This is especially true given that the labour market is becoming increasingly complex, with new scams and schemes constantly emerging to profit from workers and HMRC. As businesses that are non-compliant are likely to be so in several different ways, it is critical that the overlapping powers of the enforcement bodies are used in tandem.

An important part of my remit as Director of Labour Market Enforcement is to facilitate joined up working between enforcement bodies and other organisations, and to ensure that different types of evidence, information and intelligence are being used to maximum benefit. Playing a pivotal role supporting these objectives is the Labour Market Enforcement Information Hub, as outlined in the Immigration Act 2016. In its first year, the Information Hub has prioritised the analysis of operational intelligence on non-compliance; hence, it is often dubbed the 'Intelligence Hub'. Over the next year, the Hub will be looking to include data and information from other, wider sources, with a particular view to bring together research from across a number of organisations, methods and backgrounds.

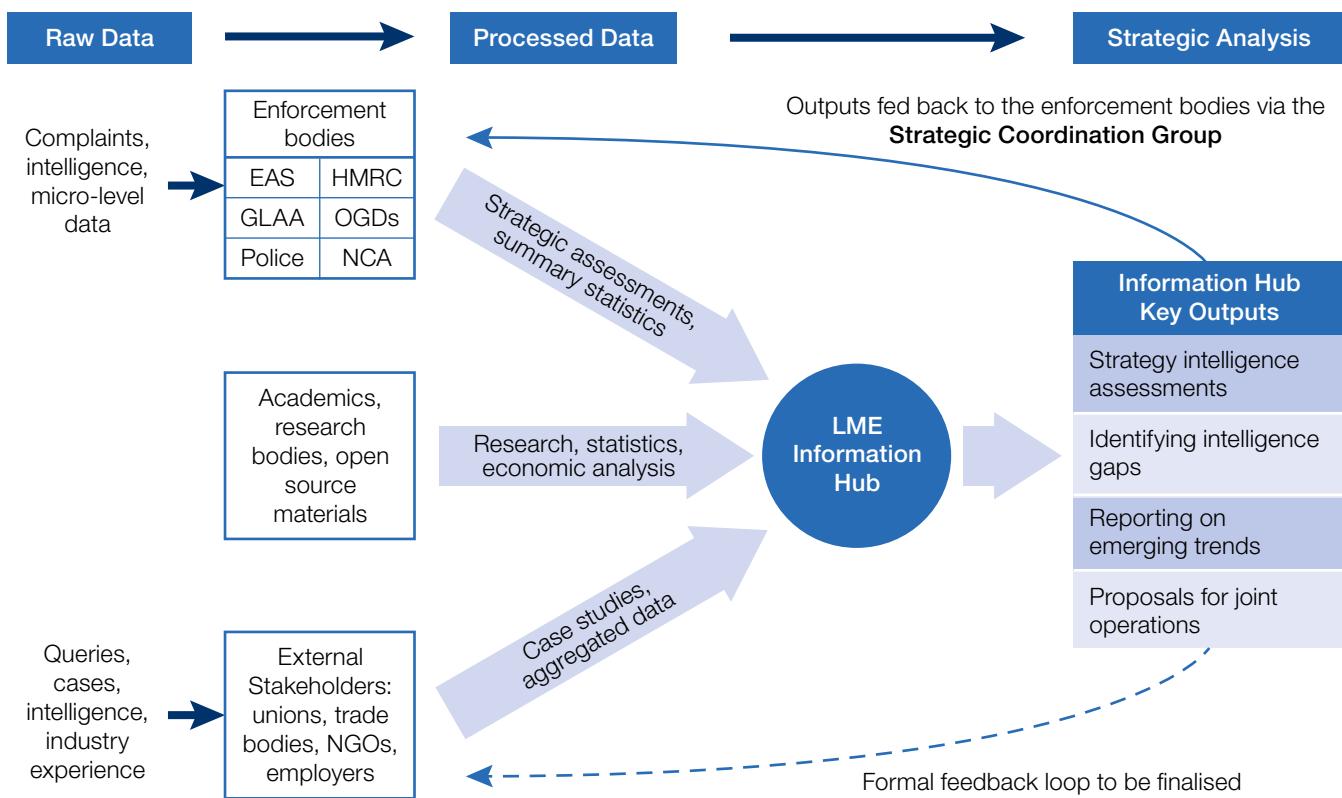
In the past year, there have been important improvements in the use of intelligence and joint working between the enforcement bodies. This section:

- presents the progress made since setting up the Information Hub, including an overview of its latest strategic intelligence assessment;
- describes the coordination role and success of the Strategic Coordination Group (SCG); and
- gives an assessment of improvements and areas of activity to be taken forward in the next year.

### The Information Hub

The Immigration Act 2016 set out provisions for the establishment of an Information Hub through which the Director '*must gather, store, process, analyse and disseminate information relating to non-compliance in the labour market*'. I set out in my Introductory Strategy (ODLME, 2017) that work was underway to build the capability of the Hub, with a view to it being fully operational by 2018. I am pleased to report that good progress has been made in this respect over recent months.

The Information Hub consists of intelligence analysts and economists, including support from specialists within other government departments. Its role is not to receive information on individual cases and certainly not to task enforcement agencies on their response to these (although, as set out within the Immigration Act, the Director can consider individual cases and draw conclusions from them). Instead, its role is to collate and analyse summary level information from stakeholders that receive intelligence on labour market exploitation. That is, the Information Hub gathers only aggregated or anonymised data and information from partner bodies and law enforcement agencies, and then produces a strategic overview of this information. Figure 8 below illustrates this process.

**Figure 8: The flow of information through the Information Hub**

The success of the Information Hub in building a strategic overview of labour market non-compliance is dependent upon regular and robust feeds of inputs from partner agencies. In the past 12 months, following extensive stakeholder engagement, the volume of information coming into the Information Hub has increased significantly, with evidence including formal intelligence assessments and case studies, as well as open source and academic work. Intelligence has been submitted by a diverse range of partners, though the majority comprises of submissions from HMRC, Home Office, and GLAA.

Though the intelligence received incorporates a wide variety of topics, there remain extensive intelligence gaps which the Information Hub will be looking to address. The critical gap recognised across the labour market enforcement landscape is the chronic underreporting of breaches. As discussed elsewhere in this Strategy, there is a myriad of reasons for workers choosing not to report their employer's non-compliance, ranging from a lack of awareness, understanding, or regard for their own rights, to a fear of reprisal for action. Understanding these factors is crucial for effective enforcement and the introduction of successful preventative measures and, therefore, will be a priority for the Hub going forward.

Much of the summary intelligence received to date has been focused on modern slavery and human trafficking, as this has been the focus of many of the enforcement agencies. A notable contributor to this part of the intelligence picture has been the National Crime Agency (NCA) and the Joint Slavery and Trafficking Analysis Centre (JSTAC) with whom the Hub has been developing a fruitful relationship. The Hub has also been liaising with existing networks within the police to tap into their knowledge around labour exploitation, which makes up a significant proportion of their modern slavery investigations.

Intelligence from these bodies provides the Hub with a greater understanding of this more severe labour exploitation. Conversely, the analysis conducted within the Hub provides insight into the less severe end of the labour market spectrum that is, nevertheless, intrinsically linked to the work of the NCA, JSTAC, and the police. This has improved the flow of intelligence between bodies and helps to ensure a consistent approach across agencies. For example, sharing details of identified information gaps can lead to improved data collection which, in turn, may improve understanding

of the scale and nature of labour exploitation. Fostering links such as these with law enforcement partners has been an important part of the growth of the Information Hub and should, in time, change the labour market enforcement landscape for the better.

### LME Information Hub Strategic Intelligence Assessment

From the information that the Hub has so far received from partners, threats have been identified, catalogued, and then assessed using the Measurement of Risk in Law Enforcement (MoRiLE) strategic matrix. MoRiLE is an industry-standard approach used throughout police forces, the National Crime Agency, and Immigration Enforcement. MoRiLE marks the threat against a set of criteria, and then calculates a final score based on harm, likelihood, and organisational status. While the Hub actively engaged with the enforcement bodies and relevant partner agencies in order to undertake this assessment robustly, the results primarily represent a strategic view from the centre.

The outcomes of this analysis have been captured as labour market enforcement strategic intelligence assessments, which act as a baseline for what is the current intelligence picture of labour exploitation across the labour market. These assessments contain sensitive operational information and intelligence and therefore are not for publication. Nevertheless, the table below presents a high-level view of the key risks, ranked by seriousness, which emerged from the most recent assessment.

**Table 8: Sectors identified as key risks of labour exploitation by the Hub to date**

<b>Sector Description</b>	
<b>Car washes</b>	Organised crime groups are exploiting workers with threats, debt bondage and withholding travel documents to control workers. Many more in the sector are also not receiving NMW.
<b>Agriculture</b>	Organised crime groups are exploiting workers with threats, debt bondage and withholding travel documents to control workers. Many more in the sector are also not receiving NMW.
<b>Care</b>	Many workers in the sector not receiving NMW.
<b>Nail bars</b>	Organised crime groups are exploiting workers with threats, debt bondage and withholding travel documents to control workers.
<b>Shellfish Gathering</b>	Workers forced to gather in dangerous conditions, with particular hazards around unlicensed activities at unclassified beds. Some evidence of workers also not receiving NMW.
<b>Hospitality</b>	Many workers in the sectors not receiving NMW.
<b>Construction</b>	Organised crime groups are exploiting workers with threats, debt bondage and withholding travel documents to control workers. Some workers in the sector are also not receiving NMW.
<b>Poultry &amp; Eggs</b>	Some workers in the sectors not receiving NMW.
<b>Factories &amp; Warehousing</b>	Organised crime groups are exploiting workers with threats, debt bondage and withholding travel documents to control workers. Many more in the sector are also not receiving NMW.

As outlined earlier, the strategic assessment summarised above is based on the themes and cross-cutting threats identified from strategic reports undertaken by our partner enforcement agencies as the Hub does not receive or process raw or micro-level data. Due to the nature of MoRiLE scoring, the outcomes from this assessment should be considered with caution and the following caveats noted:

- Given the underreporting of breaches, this assessment cannot be fully representative of the scale of non-compliance, which may have adverse effects on the strategic assessment. An identified threat or at-risk sector for which there are more information gaps may have a lower MoRiLE score than one for which there is more supporting intelligence. For example, the high scores of agriculture and shellfish gathering will reflect both the ongoing threat of harm in these industries as well as the GLAA's established reporting mechanism for abuses.
- Some sectors are considered a priority for one or more of the enforcement bodies due to historical data collected and/or a high volume of complaints about low harm breaches, such as hairdressing for the HMRC NMW/NLW team. In this case, the sector would not necessarily score highly on MoRiLE but should, nevertheless, remain an operational focus through complaints-led investigations. Conversely, sectors such as construction are ranked as a high priority despite a low volume of intelligence due to the prevalence of high harm behaviours in the sector.

Despite these caveats, the outcomes of this strategic assessment present some interesting insights into the issues being faced by workers in the UK. At the time of writing, the intelligence picture indicates a concentration of labour market exploitation across sectors that are typically low-paying, low-skilled, and/or have unsociable working hours. A key judgement from our assessment is that non-compliance and exploitation have become part of a "business model" in many of the sectors identified above, the exact nature of which seems to vary by industry:

- Some employers demonstrate overt exploitation through long hours, physically demanding labour, and high financial harm to the workers; all of which has been observed in industries such as hand car washes and nail bars.
- A few nefarious employers in sectors including construction and the poultry and eggs industry have been found to use more surreptitious and complex practices, for example to avoid paying NMW and/or the correct contributions in tax, National Insurance, and the like.
- There is some evidence of workers being collusive with their employers' non-compliance, accepting "cash in hand" pay below the NMW and supplementing their income with state benefits. Though these workers – for example, in factories and warehousing – are "victims" of NMW offences and other more serious forms of exploitation, they do not report the non-compliance.
- Another model that has been observed in sectors such as construction, care and hospitality involves exploitation conducted within the supply chain, making the breaches that much more difficult to identify and tackle. This is exacerbated by a lack of clarity around how much the end user realises what is happening in their supply chain.

I must stress that this is an initial intelligence assessment from my small team based on the information available to date. The key risks that have been identified here represent both an assessment of their level of seriousness – such as the most serious end of the spectrum, found in car washes, agriculture and care – and also a reflection of the continuing threat from those low-paid, low-skilled sectors in which there is a continued demand for cheap labour. Future work will explore specific business activities within each of these sectors on a more granular level, allowing for an ever more targeted enforcement approach when it comes to disrupting these harmful operating models.

This assessment is a first attempt to make a detailed description of the threats. Bringing in stakeholder evidence and open source, academic research into the Information Hub will be vital to improving our understanding of the overall threat (see Section 6 for future plans). In the following year, I want the bodies to continue to work with the wide range of partners to develop this intelligence picture and the Information Hub will continue to monitor these and any emerging threats going forward.

## **Response from wider stakeholders**

The stakeholder response towards the introduction of an Information Hub for labour market enforcement was overwhelmingly positive.

*"Usdaw welcomes the introduction of an intelligence hub to share data between enforcement bodies. A central point for gathering evidence on breaches of employment rights would be extremely helpful in planning enforcement strategy and focusing resources."* Usdaw response to DLME consultation

I was pleased that this widespread support for the Information Hub was often backed with active contributions. As part of their written submissions of evidence, a number of stakeholders provided anonymised case studies to illustrate unscrupulous practices and non-compliance they had experienced in their sectors. Contrasting dubious operating models with sectoral good practise provides us with a deeper understanding of the labour market and evidence for potential solutions.

*"Whilst recognizing the importance of more comprehensive evidence on non-compliance, we would recommend gathering also information on good practice which should help in design of solutions and replication of effective solutions across industries, sectors etc."*  
ETI response to DLME consultation

As the Information Hub develops, the hope is to increasingly include aggregated and/or anonymised intelligence from industry and third parties. This can shed light on complex problems faced by individuals every day in the UK labour market and I hope that stakeholders continue to provide this invaluable insight into the Information Hub. A number of stakeholders are already sharing a regular feed of anonymised case studies directly into the Hub, and I would welcome conversations with any stakeholders that may wish to contribute in a similar fashion.

I understand that some stakeholders may feel apprehensive about sharing information with a network of enforcement bodies, including issues of confidentiality and data security. However, data provided to the Information Hub need not contain personal, identifiable information. That which is held by the Information Hub is mostly exempt from disclosure under the Freedom of Information Act 2000, and may also be subject to exemption under other UK legislation; therefore, the Information Hub is unlikely to share personal or confidential information without the express permission of the individual. As noted previously, the Information Hub only handles anonymised information at present, but security protocols are nevertheless adhered to with all intelligence held.

Stakeholders were largely in agreement that they would wish to see a formal feedback loop between the Information Hub and its contributors.

*"Unless it is operationally sensitive, ETI would recommend creating a mechanism for sharing the resources of Intelligence Hub with all the stakeholders working on modern slavery/labour rights issues. [...] ETI proposes to organize a regular (quarterly) forum involving all stakeholders to facilitate effective information and intelligence exchange."*  
ETI response to DLME consultation

*"Introduce a mechanism to privately notify businesses via the Intelligence Hub where risks and issues have been identified in their supply chains so that businesses can act as an informed client towards their supplier."* CBI response to DLME consultation

As the Information Hub starts to receive increased volumes of information from industry partners, I shall look to introduce a formalised feedback loop and/or forum. Over the next 12 months, I would also be keen to see the three enforcement bodies operating a feedback loop in a similar vein, not just with each other through the SCG but also directly with their respective intelligence contributors and complainants.

I have heard from stakeholders on multiple occasions that, having alerted HMRC to non-compliance issues, they did not feel that action had been taken as no feedback was provided. Often the issue is that enforcement bodies are unable to share information on operations and investigations, which creates a communication gap. Providing feedback where it is practicable to do so would likely improve the reputations and relationships of the enforcement bodies with individuals and industry.

## The Strategic Coordination Group

My role is to provide strategic recommendations to which the bodies must pay due regard. I cannot make recommendations in relation to individual cases. Thus, the bodies maintain operational primacy in terms of their enforcement responsibilities, meaning that each of the bodies set their respective priorities individually.

The Strategic Coordination Group (SCG), started in October 2016, is a group set up and facilitated by my Office to bring together operational and strategic expertise from HMRC, GLAA and EAS. Its role is to identify potential joint enforcement activity involving the three enforcement bodies, and address issues that may affect closer cooperation. It also facilitates operational delivery by coordinating activity from cross-agency operations and learning lessons from these. As the SCG has developed over the last year, the membership of the group has expanded to include other government departments and agencies that have a particular interest in the operational activity being developed.

In the past year, the operational relationships among the enforcement bodies have developed significantly, as has the approach to coordinating and planning joint operations. More is being made of existing intelligence to ensure efficiency and the effectiveness of the operations. The agreed SCG approach requires the bodies to work collaboratively in sharing intelligence, information, and expertise, and to establish primacy and management early on within joint operations.

Better coordination brings benefits in terms of efficiencies and focus, not only for the enforcement bodies but also for business. Coordinated activity means higher visibility coupled with much less disruption for employers and workers rather than multiple days of activity being undertaken by different bodies. Further, by combining multiple investigations into a single operation, undertaking joint operations in this way represents a more efficient and cost-effective use of the limited available resource.

There were seven joint operations emerging from the SCG in 2017 and these have been evaluated and fed into the developing intelligence picture. The overarching view is that there have been more breaches found on those operations than would have been expected, including more serious non-compliance and multiple incidents of non-compliance that cross over with other bodies. The SCG members have agreed to develop a schedule of planned operations in the next year based on current priorities, subject to new assessments or any new trends. Examples of joint operations that were coordinated via the SCG include:

- **Leicester Garment Industry**

HMRC have been involved in a joint operation with partner agencies in this area and have uncovered evidence of serious non-compliance which is being investigated fully. Discussions are ongoing with their Fraud Investigation Service and where there is sufficient evidence they will look to prosecute on a criminal basis. Four businesses were part of the operation

and serious non-compliance was uncovered in two. They also found 11 illegal workers. The intelligence gathered will be used to form the basis for further joint operations including the three enforcement bodies.

- **Major sporting event**

EAS led an operation in partnership with HMRC's NMW/NLW team, which looked at the staffing supply chain to a major sporting event. The operation looked at recruitment agencies supplying catering and hospitality staff to this major sporting event, as well as a sample of other agencies supplying in these sectors at the same time as the event. They found a higher percentage of breaches in those businesses that were supplying to the event than the sample of other businesses: 22 businesses were visited and all received warning letters reminding them of their requirements to comply with the law. In the region of 11,350 workers were protected by the intervention of the two bodies. The teams worked in partnership with both the management of the event and the main contractor before and after the event to ensure that there was no abuse of workers in their supply chain. EAS will continue to work with the event and their contractors to ensure compliance.

Through the SCG, each of the enforcement bodies has brought operational activity to the table and, where appropriate, proactively sought joint-working. The processes of the SCG have been refined throughout the year in recognition of the different ways of working and responsibilities of the three bodies. The discussions and joint activity have helped the group to establish good practice around the feasibility and undertaking of joint visits for different types of case. Similarly, the SCG is also a forum that has improved the understanding and application of the best enforcement tool in the circumstances. For example, where there is a range of labour market trigger offences, the GLAA may be able to maximise effectiveness with their new PACE powers.

As a central point of contact, the SCG enables a diverse range of partners to be invited to join where appropriate, not only for the most serious labour market offences e.g. modern slavery, human trafficking, and/or illegal working, but across the spectrum. The three bodies have noted that joint working has increased the accountability of organisations through increased visibility of responsibility, resources, outcomes and ownership. Stakeholders also made the point that a joined up approach increases public awareness and perception of the efficacy of labour market enforcement, which acts as a deterrent to non-compliance in itself. Furthermore, joint working allows for all the bodies to learn from the experiences of each other's operations, leading to improved future decision-making and deployments.

## Future developments

Though the SCG has improved communication and information flows amongst the enforcement bodies, a number of barriers to sharing remain. Areas for improvement include:

- **Gateways to information sharing:** Through the work with the three bodies over the past 12 months, initial barriers around gateways and processes between them and the Information Hub are now largely resolved by way of a Memorandum of Understanding (MoU). Yet, due to complications arising from the Data Protection Act (1998) as well as some institutional reluctance, there remains a challenge around the sharing of sensitive information from one body to another.
- **Inconsistency in systems:** At the time of writing, EAS do not have a case management system, though steps are being taken to rectify this situation in the coming months. In contrast, since their remit expanded into the rest of the labour market, the GLAA have had to make significant changes to their systems to account for the increasing volumes of data and information. Meanwhile, the HMRC system is so expansive that thorough exploration of the data comes with some resource constraints. The continuing challenge for HMRC and GLAA is to identify all the possible incidents of labour exploitation within their information sources.

There needs to be a way of identifying these, so that the bodies can provide assurances that any pertinent information is shared with the relevant bodies and done so in a manner that can be measured.

- **Culture of sharing:** Since the Information Hub and SCG have been set up, there has been a marked shift in information sharing and the bodies are now actively looking for opportunities to work jointly to improve their visibility and results. In addition, the Information Hub has acted as a single point of contact on labour exploitation, and made significant strides in building relationships with external stakeholders, including NGOs, the charity sector, and partners from across Government. This said, there is still more to do to ensure this culture of sharing is embedded across the network of enforcement organisations.
- **Different priorities and performance frameworks:** Each enforcement body has its own priorities and performance framework which shapes their approach and operational choices. The Service Level Agreement (SLA) with BEIS sets out the framework for HMRC NMW/NLW, and HMRC determines how best to deploy their resources through risk modelling and intelligence. The EAS receive a strategic framework from BEIS but they have worked on developing their intelligence and proactive capability. The GLAA have their strategic priorities reviewed by their board and agreed by the Home Office, whilst operational assessments, set against their strategic priorities, are determined through intelligence analysis, with a tasking process used to identify their key priorities. The mechanics of incorporating an overarching strategy into this picture, and dealing with the potential conflicts will be one of the challenges for the next year.

As previously stated, I do not determine how the enforcement agencies respond to individual cases, or how they deploy their operational resources day-to-day. Yet within this framework, they must pay due regard to this Strategy. The strategic intelligence assessment is the first joined up assessment of a number of different intelligence and information sources, including stakeholders in business and trades unions. The SCG is the forum that can ensure the bodies have the opportunity to consider this assessment and consider how they reflect that in their operational plans for the next year.

Looking ahead, developments over the next year should include the introduction of an agreed programme of joint operations that links into the wider government response to tackling labour exploitation. In practice, this would include:

- Launching discrete, high profile joint investigations into persistent or emerging areas of concern; and
- Conducting a series of high visibility joint compliance visits to priority sectors, effectively bringing other partners along to the “business as usual” inspections conducted by each of the bodies.

Outcomes from both of these will need to be fed back into the Information Hub and the SCG in order to establish good practice in joint working and to further develop the understanding of the scale and nature of non-compliance in the identified sectors. As outlined earlier, the SCG has already had some success conducting discrete joint investigations. The SCG members have agreed to work towards adding this additional layer of the “business as usual” joint working in the next year. This approach should make the launch of joint operations that much easier and less burdensome for the bodies, while also addressing the issue of enforcement visibility raised by stakeholders. Though the primary focus for this would be on the three enforcement bodies, the aim would be to involve other SCG partners where appropriate.

## **Wider joint working**

Of course, the Information Hub and SCG are not the only mechanisms through which joint working can be promoted. In the forthcoming year, I expect the three bodies and the Information Hub to look to extend joint working to an even broader range of stakeholders and areas of labour exploitation.

A key consideration for the bodies should be to increase links with established strategic partnerships set up by law enforcement agencies. Despite criticising the police response to the Modern Slavery Act 2015, Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) praised Greater Manchester Police's work on tackling modern slavery through an effective joined-up approach (HMICFRS, 2017). Linking in with established police networks such as that of Greater Manchester, South Wales, and West Midlands, or the London Modern Slavery Partnership Board may provide the bodies with access to the intelligence and expertise of law enforcement partners, Local Authorities (LAs) and other relevant bodies involved in tackling modern slavery and, hence, labour exploitation. HMRC and GLAA already have colleagues embedded in JSTAC but the links between the enforcement bodies and police partners would benefit from further development.

There are also opportunities to develop greater working between national and local bodies. For example, HMRC, GLAA and EAS are all working with law enforcement partners to find ways of identifying how best to use the data and information they hold to target Houses in Multiple Occupation (HMO), which pose a high risk of exploitation. LAs will be key partners in this given their role in licensing HMOs and their responsibility for Trading Standards.

The bodies may wish to consider further developing their intelligence flows with LAs to ensure efficient and effective data gathering on the ground. This could lead to drastic improvements in the determination of levels of non-compliance and labour exploitation and the assessment of high priority areas for the enforcement bodies. Such work would, of course, be of significant value to the Hub in developing geographical insight and establishing priority "hotspots". It has been noted, though, that it is challenging to build links with LAs, primarily due to the sheer number of authorities across the UK. The other main challenge is the number of different IT systems, with inconsistent data sets and the ability to obtain this information in a useful format.

As part of my Strategy for the coming year, I am keen to see the bodies undertake some joint working activity with local authorities in an effort to improve the effectiveness of labour market enforcement in those areas and to seek to address what appear to be long-standing non-compliance issues. During our consultation, stakeholders made a number of suggestions for joint working projects with LAs, many of which had a lot of merit. **I would like the enforcement bodies to consider testing such joint working relationships through the use of local pilots, such as the examples presented below (see Boxes 6 and 7).** This would present an opportunity to evaluate the effectiveness of methods and partnerships that have, perhaps, been overlooked. Though a potentially steep learning curve, conducting pilots in this way could offer considerable insight into best practice and efficacy of enforcement for the bodies.

## Box 6: Pilot of joint working: NMW enforcement in Newham

Research from the London Borough of Newham, using data collected from the Newham Household Panel Survey in 2015, suggests that around a fifth of employed residents in the London borough of Newham earn less than the NMW (19 per cent), with an estimated £38.2m lost per year in unpaid wages. Newham Council has proposed an innovative pilot to test a new local partnership model of NMW enforcement. They propose to use local data and local intelligence to proactively target rogue employers likely to be non-compliant with NMW legislation, backed up by joint enforcement activity between local authority enforcement and HMRC.

Newham has a data warehouse tool that brings together data from across the council, which could be used to build a predictive model to identify and target rogue employers based on key risk indicators. This includes intelligence on those businesses that are falling below the expected standards in other key areas, such as in licensing conditions, council tax arrears, non-payment of business rates and environmental standards.

Newham is in a good position to test such a model as the council already adopts a multi-agency approach to enforcement in other areas. For example, Newham are currently using a similar model to target criminal landlords in the enforcement of their private rented sector licensing scheme, working in partnership with police and Immigration Control and Enforcement. As a result, in 2015/16 Newham delivered 70 per cent of all landlord prosecutions in London.

The aim of the proposed pilot is to improve enforcement outcomes by testing an area-based approach for partnership with local authorities in non-compliance hotspots. While HMRC would be key to enforcing NMW, the pilot proposes to take a holistic view of non-compliance and work with a variety of agencies to deal with a range of problems posed by rogue businesses. This approach seeks to build a full case against the worst offenders by uncovering wider illegal activity.

I very much support the idea of such a local pilot and **recommend that BEIS and HMRC work with Newham on this project, making the required resources available to test this approach.**

## Box 7: Pilot of joint working: Leicester textiles and garment factories

The UK garment industry is seeing a significant upturn, is being promoted within the Industrial Strategy, and has considerable economic potential. Many national fashion retailers are keen to bring production back to the UK and to source more locally using cities such as Leicester, with its long history of textiles and garment manufacturing, to exploit consumer demand for “fast fashion”.

Leicester has the second largest concentration of textiles manufacturers in the UK with Leicester City Council estimating that over 1,500 garment manufacturing businesses and 10,000 textile workers operate within the city. However, the industry in this area also has the unenviable reputation for lack of compliance, both with labour market regulations and others such as health and safety, payment of tax, etc. This has been highlighted a number of times in the national press<sup>12</sup>, and raises questions of why this has not been more proactively tackled by the enforcement agencies. I was invited to visit some of the compliant garment factories used by retail brands keen to see improvement in ethical practices in supply chains in Leicester. Whilst it was encouraging to see brands and manufacturers cooperating to support compliant business models within the area, it was disappointing to see other manufacturing businesses thrive within the area seemingly without significant intervention from the enforcement bodies.

Large retailers and suppliers state this situation undermines their confidence to re-shore manufacturing to the UK as they would like to do, as ethical compliance throughout the supply chain is an essential pre-requisite for re-shoring to be a success. Indeed, the BRC told us that several large brands were at the point of giving up trying to use contractors in this area as they could not guarantee compliance with labour and health and safety regulations.

To tackle the issue, in October 2017, Leicester City Council convened a meeting of over 40 representatives from national regulators and public sector bodies including the DLME office, retailers and sector bodies to discuss how ethical compliance can be maximised. This event concluded that tackling exploitation in the textiles supply chain requires not only effective intelligence sharing between national regulators, but also the effective translation of this intelligence into coordinated action at the local level. Visibility of this action is also key, to send out a clear message of the consequences of non-compliance.

While some enforcement action has been undertaken in this sector and city over the last few years, this has clearly not had an effective impact on overall compliance. Considering the economic potential of this sector, the case for coordinated action is compelling.

**I recommend that a pilot take place over the next 12 months to test how joint working between enforcement bodies including HSE, the City Council, industry bodies, suppliers and end users can help change the perceived culture of impunity for this business area.** This should involve highly visible targeting of non-compliant garment businesses in Leicester, based on shared intelligence and an agreed enforcement strategy that maximises the use of the different powers across enforcement bodies. Leicester Council has made clear they are keen to host such a local task force pilot and believe it would also provide valuable learning for other areas on how to tackle this important issue.

12 For example: <https://www.theguardian.com/sustainable-business/sustainable-fashion-blog/2015/feb/27/made-in-britain-uk-textile-workers-earning-3-per-hour>

## Recommendations

Increased intelligence sharing and joint working is one key pillar to improving enforcement and compliance within the labour market, especially for the persistent and deliberate offenders. This will entail continued development of the Information Hub – which is still in its infancy – by increasing its capacity and capability to analyse information and intelligence in order to understand the scale and trends in labour market exploitation.

21. The three enforcement bodies should continue to work positively with the Information Hub and Strategic Coordination Group to build on the good progress made over the past 12 months by:
  - a. refining the systems and processes for intelligence sharing, exploring all possible legal gateways and identifying any potential barriers, including developing intelligence requirements to ensure the appropriate information is being collected;
  - b. learning from shared experience to ascertain best practice for joint working, ensuring the best enforcement tools are applied to each case;
  - c. continuing to build relationships with other enforcement agencies to promote more joint working where different powers, additional resources, or enforcement tools can be of benefit;
  - d. looking to build partnerships with business, trade unions, trade bodies, and other industry experts so that these partners may feed in intelligence to the bodies in such a way that is actionable;
  - e. operating a feedback loop with each other, with those that submit intelligence to them, and to their respective complainants.
22. Different forms of partnership working should be piloted and evaluated, primarily through the support of:
  - a. Newham's proposal to target NMW/NLW (testing joint working between HMRC and local authority); and
  - b. Leicester's proposal to target the garment trade through focused, highly visible joint enforcement (testing partnerships with local agencies and businesses).

# 4. Improving labour market enforcement

## 4.1 Accountability and leverage through the supply chain

One of the most prominent manifestations of the fissured workplace over recent decades has been the growth of supply chains. Often these supply chains operate globally, where goods sold in the end user country are very often the result of a chain of production located overseas. Usually the driver for such a business model is to reduce the costs of production. The risk is that, in doing so, labour standards may be compromised.

Transparency in global supply chains is one of the five key priorities for the UK's Independent Anti-Slavery Commissioner (IASC) with whom my secretariat and I have been working, and will continue to work, closely. Through the Modern Slavery Act 2015, the UK has shown leadership globally in seeking to tackle this growing phenomenon. For instance, Section 54 of the Modern Slavery Act 2015 requires that any commercial organisation in any sector which supplies goods or services, and operates a business or part of a business in the UK with a turnover above £36m, must produce a modern slavery and human trafficking statement for each financial year. The statement must set out what steps the organisation has taken during the financial year to ensure that modern slavery is not occurring in any part of their supply chains, whether in the UK or overseas.

The remit of the Director of LME focuses on the enforcement of labour law in the UK only. Here too there is the challenge of ensuring compliance within supply chains where both the producers and the sellers are located in the same country. If anything, emerging industrial business models, such as in fast fashion, necessitate greater within country proximity throughout supply chains. The evidence I have seen during the course of my consultation highlights the very real threat to labour standards that exists here in the UK.

I believe that UK labour law has failed to keep up with new business models and that some changes are necessary in this area to improve labour enforcement.

*"...supply chain risk is not confined to the parts of the supply chain that extend abroad. Parts of the supply chain within the UK are also at risk of exploitation."* Business Institute of International and Comparative Law (BIICL) response to DLME consultation

Unlike in the area of global supply chains, there has been little research carried out on tackling labour abuses in domestic supply chains either generally or specifically relating to the UK. However, one of the few recent studies (Crane et al., 2017) does in fact highlight similarities between global and domestic supply chains in terms of the challenges around combating labour

exploitation. The conclusions of the wider literature examining the effects of private governance initiatives – for instance, corporate codes of conduct, supplier audits and capability-building initiatives – are that these are insufficient in themselves for raising labour standards.

According to Richard Locke, one of the world's leading researchers in this area, "*After more than a decade of concerted efforts by global brands and labor rights NGOs alike, private compliance programs appear largely unable to deliver on their promise of enforcing labor standards in the new centers of global production.*" (Locke, 2013)

This evidence suggests therefore that the state must play a greater role here and accordingly I set out my recommended approach below. What I am proposing is often based on tried and tested methods used in other countries and I believe that there is much to learn here.

### **Joint liability/Joint responsibility**

The literature on, and growing practice in, strategic enforcement of labour standards recognises the power of leverage within the supply chain. That is, by linking the actions of suppliers down the supply chain to the brand name at the top, improvements in compliance can be achieved throughout the chain. Inherent in this approach is that the brand name must bear some responsibility for ensuring compliance among its suppliers. Many businesses already take this responsibility seriously and act to ensure the necessary compliance among their suppliers. Equally, it is all too easy for the brand name to turn a blind eye to what is happening further down the supply chain or indeed to actively indemnify themselves to avoid this responsibility altogether.

*"Joint liability regimes operate to overcome the dilution of responsibility and deterioration of working conditions that occurs in labour supply chains involving significant subcontracting."* FLEX response to DLME consultation

There are a number of international examples of the use of joint liability in the labour market. For example, in Australia the Fair Work Ombudsman (FWO) takes around 50 labour cases to court each year. Increasingly these litigations include action against both the employing entity and a third party who, the FWO believes, is involved in the alleged contravention (Fair Work Ombudsman, 2017).

Within the European Union (EU), a number of member states operate some form of joint liability, for instance in the construction sector and in some cases these provisions date back to the 1960s. In 2014, the EU itself adopted the EU posted workers enforcement directive (2014/67/EU), which sought to strengthen joint liability in the European construction sector (see Box 8 below).

## Box 8: Joint liability in the European construction sector

Variations of joint liability can be found across Europe for the construction sector. These joint liability regulations were introduced against a backdrop of illegal practices within the construction industry, as a mechanism to protect the worker and to safeguard competition by preventing non-compliant companies from undercutting their law-abiding counterparts.

**Germany** has a long history of joint liability legal frameworks. Between 1999 and 2001, Germany introduced joint liability regulations for the non-payment of the minimum wage in construction supply chains. These provisions are said to protect Germany's Small and Medium-sized Enterprises (SME) against the unfair competition of subcontractors from 'cheap wage countries', by ensuring compliance and levelling the playing field.

**Italy** has a widespread system of subcontractor liability, with joint liability measures featuring in almost every field of Italian law. Italy passed legislation in 2006 which holds those at the top of the supply chain jointly and severally liable for the wages and social security contributions of the subcontractor's employees. Employees can bring direct action against both their immediate employer and those at the top of the supply chain for a breach of employment law. The threat of joint liability has resulted in increased vetting of the supply chain, leading to clients and contractors conducting reliability and compliance checks on potential subcontractors prior to appointment.

The **European Union** (EU) strengthened joint liability in the construction sector in 2014 by issuing the EU posted workers enforcement directive (2014/67/EU). This directive established subcontracting liability in the construction sector by allowing posted workers to make a claim against their employer's contractor for unpaid wages, in addition to or in place of their direct employer. This variation of joint liability is restricted to the contractor immediately above the direct employer in the supply chain.

For the **United Kingdom**, the implementation of the EU enforcement directive in June 2016 was the first time that joint liability in the supply chain has ever been established in UK law. The UK's transposition of this directive took a "light touch" approach in comparison to other member states, in order to balance worker rights with the burden on business. UK regulations allow a posted construction worker to bring an individual claim for unpaid wages against either the employer or the contractor in an employment tribunal, but not against both. The contractor's liability is limited to the national minimum rates of pay rather than all contractual pay, and the contractor is able to rely on the defence of due diligence when appointing the subcontractor. The UK government chose not to extend joint liability beyond the minimum requirements of the EU enforcement directive, as it was considered that the current enforcement regime is appropriate and effective. Beyond posted construction workers therefore, UK workers can only seek redress for employment law breaches directly from their employer.

Source: Houwerzijl, M and Peters, S (2013); Heinen, A; Müller, A and Kessler, B (2017)

Within UK legislation, the Finance Act 2016 established joint and several liability for operators of online marketplaces (e.g. Amazon, eBay) where overseas sellers on those platforms are failing to comply with VAT requirements. If HMRC identifies an overseas seller as being non-compliant and issues a notice to the online marketplace operator, the operator must either secure the seller's compliance or prevent the seller from offering goods for sale through its platform. If the operator fails to do so, they can be held jointly liable for the amount of VAT payable in respect of all taxable goods sold through the online marketplace in the period for which the notice has effect.

Joint liability is here considered to be an effective way to target non-compliance by making online marketplaces part of the solution to the problem. Online operators seem to be receptive to acting upon their new responsibilities. Between September 2016 and November 2017, HMRC issued 862 joint and several liability notices, and all of the non-compliant sellers were subsequently removed from the online platforms by the operators.

While some non-compliant sellers may choose to move to less well-known platforms rather than pay VAT, recent figures would suggest that these measures have encouraged compliance in order to secure access to the most popular platforms. The number of overseas online sellers registered for VAT increased from 700 at the end of 2015 to 17,537 at the end of August 2017. The extent to which this is a result of increasing ‘front-ended’ VAT checks by the operators is unknown. HMRC has said that it will try to adopt a more informal collaborative approach to rectifying non-compliance, known as a pre-notification period, before issuing a joint liability notice.

I believe that these examples from both the UK and internationally demonstrate how joint liability could be an effective tool for improving compliance throughout the supply chain.

Many stakeholders highlighted the general merits of joint liability and supported its implementation:

*“We believe that if hiring firms have more responsibility for ensuring good working practices throughout the supply chain it would effectively stamp out exploitative behaviours as only compliant firms would be engaged in the supply of labour.”*  
FCSA response to DLME consultation

*“The TUC believes that the law needs to change to ensure that companies and organisations at the head of supply chains are accountable and responsible for maintaining minimum employment law standards throughout their supply chains.”*  
TUC response to DLME consultation

*“The possibility of joint liability exposure would be a powerful external incentive for companies to ensure that their supply chains are compliant”.* BIICL response to DLME consultation

On the other hand, several stakeholders raised concerns over the implementation of joint liability regarding both its effectiveness and the unintended consequences for suppliers:

*“In practice we would expect many employers at the ‘head of the chain’ to seek to indemnify themselves against any liabilities provided by their suppliers”.* PwC response to DLME consultation

*“Our concerns on joint liability focus on the likelihood of stronger contractual partners simply passing liability down the supply chain in the form of indemnities.”*  
APSCo response to DLME consultation

*“...it is important to recognise that additional bureaucracy will be passed to small and micro businesses within the supply chain. [...] Any additional measures must be proportionate and take account of the lack of resources and specialists within small firms”.*  
FSB response to DLME consultation

*“...the suggestion of ‘joint liability’ is likely to result in unintended consequences for producers... For example, we are particularly concerned that retailers may seek to push costs associated with demonstrating their own compliance down their supply chains and on to producers who are much less able to afford this additional cost burden”.*  
National Farmers Union (NFU) response to DLME consultation

My proposal for joint liability is to implement a form of **joint responsibility** in the first instance. This would work as follows:

- Where non-compliance is identified down the supply chain, the enforcement body tells the supplier to put its house in order. Simultaneously it notifies the head of the chain and instructs them to resolve the problem within a given time period (say, for illustration, three months). The aim here would be to incentivise corrective action by the supplier rather than to simply terminate their contract. Importantly this stage would be carried out in private with the involvement only of the respective parties;
- Following the three month notice period, the enforcement body follows up to ensure the corrective action has taken place. If not, then both the supplier and the brand name can be publicly named as jointly responsible for the breach. Relevant financial penalties would still apply to the supplier, but I do not suggest any such penalties for the head of the supply chain.

My recommendation here falls short of establishing joint and several liability in a strict legal sense, but rather seeks to facilitate a more active, responsible and ethical relationship between companies and their supply chains. This is a cooperative approach rather than adversarial. This model addresses some of the main concerns of our stakeholders, highlighted above, as the head of the supply chain would be unable to indemnify themselves against joint responsibility in the same way as joint and several liability. By operating in private in the first instance, end users are more likely to work in partnership with the non-compliant part of their supply chain to resolve the problem rather than simply terminating the contract. This helps to ensure that the burden is not passed entirely onto suppliers.

The CBI has endorsed our approach to joint responsibility:

*"Businesses would welcome the Director introducing a mechanism to privately make companies aware of risks and issues identified in their supply chain. This would be valuable both as a contribution to ongoing due diligence and because these companies could then apply pressure or offer suppliers support in good governance that may lead to issues being resolved. The CBI does not believe that this disclosure should be public because that is likely to push the company at the top of the supply chain towards terminating their relationship with the supplier in which the issue has arisen, rather than acting as a positive force for improving working conditions."* CBI response to DLME consultation

Those end users implicated in a sustained supply chain breach where the problem has not been rectified, having been informed about the problem, could be publicly named after the specified corrective period. Naming is already used in cases of underpayment of NMW/NLW. As outlined in an earlier section, much criticism of the NMW Naming Scheme comes from the lack of differentiation between accidental and deliberate breaches. In the case of joint responsibility, end users would have sufficient time to rectify any issues, meaning that naming would be a clear indication of an unwillingness to maintain a compliant supply chain.

Naming schemes are used elsewhere too. For instance, the Financial Conduct Authority (FCA) can publish a public censure (a statement of misconduct) to name a financial provider rather than impose a financial penalty, under s.205 of the Financial Services and Markets Act 2000. There are a number of criteria that the FCA will consider to determine whether a public censure is appropriate, such as whether a public censure would more effectively achieve deterrence.

Joint liability provisions would also apply to public sector purchasers. This has important implications, for instance in areas such as social care, where local authority commissioning of care services could play a powerful role in helping to improve compliance in this sector.

## 'Hot goods'

Another approach, which also draws on international precedent, is the embargoing of goods where non-compliance is detected in the supply chain. In today's business models where speed of turnaround and supply are critical to responding to consumer demand (again, as in fast fashion for example), embargoing goods can have a significant disruptive and costly effect. The threat of embargo could then act as a major incentive to help ensure compliance in the supply chain.

*"Such provisions can be effective in preventing the distribution of, and profiting from, these tainted goods, but can also be used as a tool to compel the payment of owed wages or other forms of remediation". FLEX response to DLME consultation*

The concept of hot goods has been pursued in the USA through the Fair Labor Standards Act 1938. These provisions allow for the restriction of the shipment of certain goods that have been produced in violation of child labour, minimum wage and overtime regulations. After 30 days the hot goods are said to have "cooled" and can then be shipped, so this is not necessarily an indefinite seizure but causes delays and potentially lost business (Donovan and Shimabukuro, 2016). Hot goods provisions in the USA have also been targeted regionally and at a particular sector, as shown by section 344 of New York Labour Law which allows a court to stop the shipping, delivery or sale of apparel made in breach of minimum wage requirements.

A key element of this approach has been to apply pressure on apparel manufacturers with the threat of embargo to leverage the introduction of compliance programmes (see Box 9 below). These compliance programmes were then monitored by the Wages and Hours Division (the labour enforcement body in the US Department of Labor). Subsequent analysis of three different measures of non-compliance (the percentage of contractors with no minimum wage violations; the incidence of minimum wage violations per 100 employees; and the scale of minimum wage back pay owed per worker per week) found that contractors with some form of monitoring had significantly better compliance than those without monitoring (Weil, 2010).

### Box 9: Operation of the Hot Cargo Provision in the USA

*"In response to the agency's inability to appreciably improve compliance in the [apparel] industry despite devoting to it a relatively significant amount of resources, the WHD [Wages and Hours Division, US Department of Labor] began to alter its regulatory model substantially in the mid-1990s [...] The WHD shifted its enforcement focus from targeting individual contractors to exerting regulatory pressure by invoking a long-ignored provision of the FLSA [Fair Labor Standards Act], Section 15(a). Under this section ("the hot cargo provision"), the WHD can embargo goods that have been manufactured in violation of the Act. Although this provision had limited impact on the traditional retail-apparel relationship, when long delays in shipments and large retail inventories were common, invocation of the hot goods provision today (given the short lead times of retailers) potentially raises the costs to retailers and their manufacturers of lost shipments and lost contracts. The embargo of goods may create consequences for FLSA violations that quickly exceed the costs of back wages and CMPs [civil monetary penalties] owed. In effect, the ability to stop the flow of goods creates significant private penalties associated with the market-based costs of failing to deliver orders in a timely manner.*

*As a vital part of this policy, the WHD used the threat of embargoing goods to persuade manufacturers to augment the regulatory activities of the WHD. It did so by making the release of embargoed goods contingent on the manufacturer's agreement to create a compliance program for its contractors and subcontractors as well as to assure that back wages owed to workers are paid (either by the contractor or the manufacturer). Under the compliance program, the manufacturer agrees to sign two types of agreements: one between the manufacturer [...] and the DOL [Department of Labor]; and another between the manufacturer and its contractors. The agreement between the DOL and the manufacturer stipulates the basic components of a monitoring system that will be conducted by the manufacturer. The provisions of this agreement include explicit top management commitment: to uphold the FLSA; screen new contractors concerning prior history of FLSA compliance; establish a monitoring system; guarantee back wage payment and a formal remediation process; and inform and train contractors regarding their responsibilities under the law.*

*The second set of agreements is between the manufacturer and all of its contractors. These agreements set out the specific FLSA requirements; clearly define the terms and methods of computing wages and overtime [...]; establish specific procedures for tracking payroll records, time cards, and the use of time clocks; and lay out other administrative procedures related to the contractor's compensation policies."*

Weil (2010) p.29-30

In Finland, the payment of unacceptably low wages to posted workers is a criminal offence (as set out in the penal code), which may lead to confiscation by the state of the illegal benefit gained by paying the illegally low wages.

There are also precedents in the UK, where HMRC has the power to forfeit goods. Under the Customs and Excise Management Act 1979, Customs can seize goods entering the UK from an individual if VAT, Customs Duty or Excise Duty has not been paid on the items. This applies to a range of items including postal packages, goods, cars and other vehicles. The loss of the goods may be in addition to fines and prosecution. Customs will either destroy or sell anything it seizes.

An embargo of ‘hot goods’ was generally supported by both business and worker representatives:

*“The TUC supports the proposal that goods from non-compliant producers could be embargoed (so called ‘hot goods’). This would create pressure on the ultimate purchaser/lead contractor to ensure that contractors in their supply chains adhere to minimum employment law standards”. TUC response to DLME consultation*

*“...embargoing the goods of non-compliant suppliers could have a significant impact as it would have commercial effect in real time. We assume that any impounding would be at the supplier rather than the end user, as this would be easier to enforce. [...] it will be important that such a sanction is only used in extreme cases given the long term damage it could inflict on a supplier’s relationships with end users.” PwC response to DLME consultation*

I recommend that provisions are made to enable the **temporary embargo of goods produced in contravention of labour market regulations**, in order to disrupt and deter non-compliant supply chain activity. A ‘hot goods’ provision must however be designed in a way that is proportionate to the severity of the offence committed.

## Public procurement

Public procurement plays a significant role in the UK economy with approximately one third of all government spending going on the procurement of goods and services. In 2013, for example, around £250 billion was spent on public procurement, which represents 31 per cent of all government spending that year and just over 14 per cent of total Gross Domestic Product (GDP) (OECD, 2015).

I believe that the public sector can take a lead here in ensuring that, in terms of commissioning its own suppliers, it is doing all it can to ensure compliance with labour standards and promote ethical supply chains. The Welsh Government has recently launched a code of practice to guide procurement in the Welsh public sector, covering issues such as false self-employment, the unfair use of umbrella companies and payment of the living wage. While this is one example of good-practice, more should be done nationally to strengthen labour market obligations in the public procurement process. In the first instance, **I recommend that the Welsh Government evaluates the effectiveness of its new Code of Practice** to inform any further developments of this toolkit that might be made by the Crown Commercial Service (CSS) in collaboration with the Welsh Government, and to determine whether wider roll-out would be beneficial.

The vast majority of stakeholders responding to our consultation identified public procurement as a key area in which to bolster good working practices:

*“ETI strongly supports public sector leading by example embedding ethical trade principles into their procurement policy and practice. [...] Public institutions should be drivers of change and set the standard for the private sector in terms of respect of labour rights.” ETI response to DLME consultation*

*“It is crucial that the UK Government lead by example and use its purchasing power to effect change in the private sector...” BIICL response to DLME consultation*

*“Public Sector procurement should be leading the way on good practice and so their adoption of stronger measures in ensuring compliance and implementing good governance procedure, will have a ripple effect throughout supply chains across all sectors.” Chartered Institute of Procurement & Supply (CIPS) response to DLME consultation*

The Crown Commercial Service (CCS) provides model terms and conditions for public procurement contracts for use across all government departments. These contracts compel compliance with ‘any law or obligation applicable’ to suppliers and contain clauses stating that contracts may be terminated for non-compliance with obligations in the fields of environmental, social or labour law. I believe, however, that more can be done to demonstrate the Government’s commitment to securing labour market compliance and to thereby maintain a level playing field within public procurement. It is for this reason that I would like to see public procurement contracts explicitly highlight the importance of compliance with employment laws, such as payment of the national minimum wage. This approach is already taken for other areas of compliance such as for health and safety and equality laws. **I therefore recommend that the public procurement contract templates are amended to include an emphasis on employment law obligations.**

In the current public procurement process, bidders are required to demonstrate that they comply with the law and that they have no previous convictions for non-compliance. Bidders are required to self-certify that they meet the relevant criteria in the supplier selection stage in order to proceed further with the bidding process. This certification process should place greater emphasis on evidencing compliance with basic labour market regulations, such as payment of the national minimum and living wages. For example, in Germany, a potential supplier or subcontractor must prove its reliability in order to be awarded a public procurement contract, including proof of compliance with labour laws such as the payment of social insurance contribution, tax charges and employee wages.

Previous policy initiatives for UK public procurement have tended to focus on improving standards in relation to the end product, rather than the production process. For example, Department for Environment, Food and Rural Affairs (DEFRA) *Plan for public procurement* (DEFRA, 2014) in the food and catering sector outlined a number of qualities to be met by public sector food suppliers, with a focus on nutrition and locally-sourced produce. There has been a drive in recent years for suppliers to provide verification of good quality, by demonstrating the use of assurance schemes such as Fairtrade, the Red Tractor labelling logo or the BRC Global Standard scheme. It is my view that bidders must also be required to demonstrate compliance with labour market regulations and good practice in order to secure public procurement contracts. This should include a stronger focus on requiring bidders to demonstrate that they have taken appropriate measures to ensure compliance throughout their supply chain.

*“There should be sanctions against company directors and they should be barred from operating as company directors in the future. Procurement processes should bar companies and directors from accessing public money where they have previously been found to have breached NMW rates.” TUC response to DLME consultation*

Some international public procurement models are far more prescriptive than the UK’s when it comes to compliance with labour market regulations. In Norway, the ‘Oslo Model’ imposes additional rules on public procurement in the capital, requiring that at least 80 per cent of the supplier’s workforce are permanent employees and limiting vertical layers in the supply chain to two layers including the contractor.

There is presently scope under s.57(8)(a) of the Public Contracts Regulations 2015 to exclude a bidder at the discretion of the contracting authority if it can be demonstrated that the bidder has violated their environmental, social or labour law obligations. At present, it seems that suppliers are encouraged to self-regulate by deselecting themselves from the process when they become aware of the exclusion criteria. I would like to see authorities take a more active role in checking bidders for compliance and making use of this exclusion provision.

I would ideally wish the barring process be strengthened, for example by amending the Public Contracts Regulations to permit the exclusion of non-compliant companies from consideration for all public procurement contracts for a specified time period, where such action may be

proportionate. Currently these regulations and processes are constrained by the EU Public Contracts Directive (2014). In future, the Government may wish to consider alternative methods for strengthening exclusion provisions for public procurement.

Some of our stakeholders went further to highlight instances where the exclusion criteria could be extended to more strongly capture labour market regulations:

*"This principle should be extended to breaches of all employment, equality and health and safety standards in supply chains."* TUC response to DLME consultation

*"...there is no legislative requirement that the UK government exclude companies from contracting who have a history of labour rights abuses, or who have failed to report under s54 of the Modern Slavery Act and no requirement that labour standards be considered as part of procurement decision-making."* FLEX response to DLME consultation

### **Limiting layers in the supply chain**

Another option for mitigating non-compliance down the supply chain would be to restrict the number of subcontracting layers in the chain. This creates greater transparency in the supply chain and increases accountability by making it harder for those at the top of the chain to turn a blind eye to labour market abuse. For example, Spain limits the length of the subcontracting chain to three vertical levels in construction, which allows for greater control over basic employment standards. Where this limit would not be practical, for instance where specialised work is required, the legislation provides an exception to this rule.

Having considered this approach, I am not convinced that it would be workable in the UK or that it would strike the right balance between effective enforcement and the burden placed on business.

This was also the view reflected in the evidence submitted by stakeholders, who were strongly against limiting layers in the supply chain.

*"This measure would cause considerable detriment to the UK economy and small businesses, in particular. Imposing a limit on the number of layers in a supply chain would be near impossible, as many companies are unaware of the number of layers when transacting, while requiring companies to research this for every firm-to-firm transaction would be a considerable burden for any business, but nearly impossible for small businesses to handle".* FSB response to DLME consultation

*"The CBI does not believe that there is an enforcement challenge that warrants the Director's extreme proposal to limit the number of tiers in UK supply chains. Doing so would lead top-tier businesses to bring production in-house at a higher cost and result in capital flows to SMEs drying up, fundamentally threatening the UK's business ecosystem."* CBI response to DLME consultation

*"Providing incentives to companies to simplify their supply chains would increase visibility and facilitate compliance. However, mandating the length of the supply chain could have a huge and unintended impact on the economics of production placing UK businesses at a competitive disadvantage."* BIICL response to DLME consultation

### **Recommendations**

23. To help ensure compliance throughout supply chains, joint responsibility measures should be introduced where the brand name (at the top of the chain) bears joint responsibility for any non-compliance found further down its own supply chain. Where non-compliance is found, follow-up action by enforcement agencies in conjunction with the brand name and supplier would be undertaken in private to provide an opportunity to correct the infringements

- within a given timeframe. Failure to correct could result in public naming of both brand name and supplier.
24. Provisions should also be made to enable temporary embargo of ‘hot goods’ to disrupt supply chain activity where non-compliance is found.
  25. An assessment should be made of the effectiveness of the Welsh Government’s new Code of Practice, to inform further development and to determine whether national roll-out would be beneficial.
  26. Procurement templates should be amended to explicitly compel compliance with labour market regulations in public contracts.

## 4.2 Licensing and other models of regulation

In conversation with stakeholders, the term ‘licensing’ was used often but somewhat loosely, encompassing a number of different types of occupational regulatory models, from full mandatory licensing to registration or certification. It is important to be clear about the different models: mandatory or voluntary; and, state or sector enforced. These are set out in Box 10.

The commonality between the models is the concept of imposing minimum requirements for entry into occupations. Traditionally, such regulation has been implemented where there are high information or power asymmetries between producers and consumers, and significant risks associated with malpractice. Occupational regulation is also used to provide a minimum floor below which skills (and hence quality) in the occupation cannot fall.

In the context of labour market regulation, the entity being regulated can either be an **individual worker** (as in the case of doctors, accountants and private security personnel) or **companies/ individuals supplying workers**, as with the GLAA labour providers.

### Box 10: Types of Occupational Regulation

**Licensing:** A licence, provided and enforced by the state. Confirming that the licence holder meets prescribed standards of competence is mandatory for those engaging in specified range of activities for pay. E.g. doctors, solicitors, veterinary nurses, private security guards (by the Security Industry Authority (SIA)), gas installers, taxi drivers, heavy goods vehicle drivers, and labour providers within GLAA licensed sectors.

**Registration:** It is mandatory to register one’s name and address with the appropriate state regulatory body to practice in the sector/profession. Registration provides some form of legal barrier to entry, but an explicit skill standard is not provided. E.g. estate agents register with the Office of Fair Trading under regulations designed to prevent money laundering.

**Certification:** There are no restrictions on the right to practice in an occupation, but job holders may voluntarily apply to be certified as competent by a state-appointed regulatory body. E.g. fitness instructors (certified by the Register of Exercise Professionals) and security companies (certified by the SIA Approved Contractor Scheme).

**Accreditation:** An individual may voluntarily apply to be accredited as competent by a recognised professional body or industry association. The criteria governing accreditation and the procedures regarding enforcement are entirely the responsibility of the accrediting body rather than the state. E.g. chartered accountants (accredited by the Institute of Chartered Accountants in England and Wales), umbrella companies (accredited by FCSA or Prism) and recruitment companies (accredited by REC).

## Accreditation and certification

There is a plethora of voluntary certification and accreditation schemes across different sectors which, to varying degrees, include codes of conduct or standards around the treatment of workers and labour market exploitation (e.g. REC, FCSA, Professional Passport for umbrella bodies).

I heard from a variety of stakeholders that these schemes have helped to drive up standards among their members and ensure that compliant end users can have more confidence about their supply chains. They are used to spread good practice, support their members and represent their interests to Government, and provide a kite mark to help inform consumers.

*“There is an argument for an accreditation for recruitment consultants. It would do a great deal to raise standards and the quality of entrants into the industry”.* APSCo response to DLME consultation

A good example of an accreditation scheme that has been working very well is SAFERjobs (Safe Advice for Employment and Recruitment). SAFERjobs describes itself as a “self-sustaining ecosystem based on kite marking for recruiters and employers”. Online job advertising boards and recruitment agencies can join SAFERjobs and display the logo on their website to give confidence to users that the website has signed up to the SAFERJobs principles of good practice, is policing its adverts for common scams, and works to protect the rights of individuals.

The organisation is an unusual partnership of industry (employers, job boards, trade associations, etc.) and law enforcement/central government (MET police, EAS and Department for Work and Pensions (DWP)) working together to identify and take down online job adverts that are linked to fraud or non-compliant employers, and other forms of labour market abuse. Although a national group, it was created by the MET police as part of Operation Falcon. Current partners of SAFERjobs advertise the free service via their websites. The scheme is far reaching in terms of promoting worker rights, offering free advice and guidance, and generating worker-led intelligence which is used to improve standards in the labour market.

**I endorse SAFERjobs as an excellent example of public and private partnership to tackle exploitation. I encourage job boards to join the scheme and use the kitemark.** This is a scheme that I would like to look at in more detail over the next year to understand whether it is a model that could be used elsewhere in labour market.

However, both evidence of continued non-compliance and discussions with stakeholders demonstrate that voluntary accreditation schemes leave the “tail end” of non-compliant firms with no incentive to join the schemes or improve their practice. There is no enforcement or any repercussions for not joining; therefore, those who are already compliant improve but the non-compliant do not change their behaviour.

*“In sectors where there are currently high rates of non-compliance and a high risk of exploitation, voluntary certification of recruitment agents and labour providers will not be sufficient to identify and address labour abuses. In such sectors, a system of licensing or mandatory certification, that sets specific standards for working conditions and monitors and enforces these standards through regular inspections, is required.”* (FLEX 2017)

*“Retailers have been supporting private certification to fill the existing gap in regulation and enforcement, however it’s not had the industry-wide impact needed. A level-playing field is needed for manufacturers, which licensing can bring.”* BRC response to DLME consultation

## GLAA Licensing

The GLAA licensing of labour providers in agriculture, food processing and shellfish gathering has been seen as largely successful at raising standards and reducing exploitation of vulnerable workers since it was set up in 2005. I have not seen any independent assessment examining the effectiveness of the licensing system since the GLA review in 2008, or any research on the potential displacement of non-compliance into other less regulated sectors, but am aware that the GLAA is considering a review in the near future. Nevertheless, the GLAA licensing scheme does seem to have worked well.

### Box 11: Details of GLAA licensing scheme

The Gangmasters (Licensing) Act 2004 provided for a licensing scheme to regulate the supply of labour to agriculture, horticulture, shellfish gathering and food processing and packaging. A licence can be granted to any kind of legal entity, including individuals (sole traders), limited companies, unincorporated associations or partnerships. Application and renewal fees cost between £400 and £2,600, depending on the turnover of the organisation. First time applicants need to pay an additional 'inspection fee' of between £1,850 and £2,900. At present the GLAA licences around 1,020 labour providers.

The Licensing Standards (issued in 2012) used to assess labour providers are wide-ranging, including requirements for: appropriate registration for PAYE, NI and VAT; workers be paid at least NMW/NLW (or appropriate wages under the Agricultural Wages Order (AWO) with sufficient records to evidence this; annual, sick, maternity, paternity and adoption leave to be paid where workers are legally entitled; workers to be provided with itemised payslips; that workers are not subject to physical or mental mistreatment or threats; no restriction of a worker's movement, debt bondage or retaining ID documents; no withholding of wages from workers; good quality and safe accommodation where provided; good working conditions, including the right to join a union and a limit on the number of hours worked; appropriate health and safety standards including in transport; the charging of fees and additional services for workers; and subcontracting.

Compliance with the Licensing Standards is assessed using a points system. Those businesses scoring above a set number will normally have their licence refused or revoked. However, a licence may be issued with Additional Licensing Conditions where the GLAA determines that doing so would be proportionate.

While GLAA licensing is largely seen as effective, it is a concern that with the expansion of their remit, licensing should not become less of a priority for the organisation. The number of staff involved with licensing and appeals has remained constant, while the number of licensees has increased. There can be efficiencies made with online systems which may reduce the resource required for the licensing system but the GLAA must ensure that it is investing sufficient staff into supporting the licensing system. Currently, once a licence has been granted and the annual renewal fee is paid, provided that there are no complaints against a licensee, they will not receive an inspection visit from GLAA licensing officers. **This is an issue to which I will return over the following year to ensure that the licensing programme is adequately resourced and enforced.**

The licensing standards have not been updated since 2012, yet the labour market landscape has moved on in terms of legislation, working practices and the problem areas of non-compliance. The GLAA has highlighted holiday pay as one such area requiring a more refined focus in the licensing standards. It is important that the licensing programme keeps up with new developments in the

labour market and is frequently reviewed to maintain the confidence of licensees and end users. **The 2012 licensing standards should therefore be reviewed as soon as possible to ensure they reflect current worker rights and employer obligations.**

### Extending licensing

Many of the stakeholders who took part in our consultation were enthusiastic about extending licensing to different sectors including construction, social care, distribution centres, employment agencies, umbrella companies, nail bars and garment manufacturing.

*“...expanding licensing to high-risk sectors, such as apparel manufacturing and labour providers for all sectors, would benefit livelihoods of workers, proactively improve labour practices, level the playing [field] for all businesses, and gain lost tax revenues.”* BRC response to DLME consultation

*“UNISON agrees that GLA licensing model should be extended, particularly to sectors like construction, hospitality, cleaning, social care, warehousing and distribution...”*

UNISON response to DLME consultation

*“TEAM has long believed that the [employment agency] industry should be licensed [...] whilst most businesses might seek to reduce Regulation we believe that not only should the relevant bodies retain Regulation, if anything it should be widened and enforcement powers strengthened.”* TEAM response to DLME consultation

Similarly, several reports and reviews have also suggested that an increase in licensing is the best way to improve compliance in problematic sectors, including:

- In 2017, the Joint Committee on Human Rights and Business Committee recommended that GLAA licensing is extended to construction and possibly textiles (Joint Committee, 2017);
- The IASC recommended the consideration of licensing of nail bars (IASC, 2017a);
- The 2009 Rita Donaghy review of deaths in construction recommended licensing of gangmasters in construction (Donaghy, 2009).

One of the main reasons given by stakeholders for extending licensing is that it has worked well in the case of the GLAA and has led to improved standards. However, to follow that argument through, the particular history and scope of licensing by the GLAA must be taken into account to understand why and under what circumstances it has been successful. Key elements contributing to this include:

- **Model of licensing:** labour providers are licensed, not individual workers or end users.
- **Nature of the labour market:** the sectors licensed are partially seasonal but are largely reliant on the supply of temporary labour at times of peak demand.
- **Scope of licensing:** a number of regulatory areas are covered in the standards, raising the bar for the treatment of workers on health and safety and accommodation, as well as pay and working conditions.
- **Scale:** there are currently about 1,020 labour providers with licences with around 100-150 new licences granted annually, covering some 464,000 workers a year.
- **History and link with seasonal migrant workers:** Until 2013 the Seasonal Agricultural Workers Scheme (SAWS) provided a capped permit scheme for low-skilled workers from selected non-EU countries. SAWS operators who provided the labour of other organisations had to register with, and be inspected by, the Gangmasters Licensing Authority (GLA). They were also inspected by the UK Border Agency. The licence requirement and the SAWS requirements reinforced each other's regulatory requirements.

While not being hostile to licensing, before recommending that it be extended, one has to carefully consider the practicalities of such a scheme. What resources would be required? How exactly would it work? Are we proposing licensing or certification or accreditation? Would individuals be licensed or companies? What would be the licensing criteria? How do you enforce the new regime to avoid it becoming a box-ticking exercise, which adds to the administrative burden of the compliant, but fails to change the behaviour of the exploitative businesses? What rules or standards should be included in the licence, and if these are within existing regulations why are they not being enforced already?

*“Our information is that the GLAA regime is burdensome on legitimate businesses, those likely to infringe do not apply for a licence. The issue is more one of enforcement not licensing and the extension of the GLAA’s remit should be balanced against the burden on legitimate business.”* Association of Recruitment Consultancies (ARC) response to DLME consultation

*“There is a view that the construction sector is already heavily regulated and has very complex supply chains. It is necessary to consider whether current regulation such as [Construction Industry Scheme] can be better enforced, prior to considering licensing.”* APSCo response to DLME consultation

The practicalities of extending licensing to some of the sectors suggested by stakeholders needs careful consideration. In Leicester alone, there are around 1,500 garment workplaces. There are over 1 million workers in construction, most in very small businesses or acting as sole traders (84 per cent have no employees) (BEIS, 2017d).

There are estimated to be some 18,000 employment agencies in the UK covering 1.1 million workers. Interestingly, employment agencies were licensed from 1976 to 1995. Licensing was removed as the application process was found to not be robust enough to prevent refusal of applications, and the Government at the time thought licensing was a barrier to new businesses starting up. In addition, during EAS inspections of licensed agencies, infringements were found indicating that licensing did not necessarily mean compliance with the Act and Regulations.

The scale of the task to license all these organisations suggested by stakeholders and ensure sufficient enforcement would be bureaucratically vast and expensive. The labour market structure within each of these industries is also greatly different in each.

While licensing can generate income through fees which contributes to the cost of administering the schemes, there is likely to still be a cost to the public purse. For instance, the GLAA Annual Report and Accounts for 2016/17 gives the cost of licensing as £1.91m, and income from licensing as £918,000 (GLAA, 2018).

A licensing system also needs effective enforcement to avoid it becoming a paper exercise. There needs to be significant and rapid consequences for not having a licence, or not meeting the standard required. This requires repeat inspections, a mechanism to rapidly respond to complaints and penalties for non-compliance.

These are complicated matters that would have to be worked out on a sector by sector basis, with thought given to avoiding additional burden to already compliant businesses. It should be noted that although many stakeholders were keen to advocate licensing, there was a marked lack of detail in their evidence about both the likely impact of licensing on non-compliance in that particular sector, and the practicalities of how to do it.

For instance, during the consultation, I held discussions with the Security Industry Authority (SIA) who provide licensing for private security individuals and a voluntary scheme for firms, the Approved Contractor Scheme (ACS).

This is potentially an interesting area for testing licensing, not by the GLAA but by another existing public body with expertise in the sector (i.e. the SIA), especially given the element of public safety. Nevertheless, I have not yet seen a strong enough case demonstrating the need within the sector (i.e. figures or evidence of levels of non-compliance in this area) or the potential benefits of licensing (in terms of outcomes) which would lead me to make a recommendation for licensing a whole new sector across the country at this stage. I invite the SIA and Home Office to discuss the potential for such a move.

At this point, my Office and I have not had the opportunity to examine specific sectors in sufficient detail to be able to recommend a particular course of action on licensing these large sectors. However, over the summer I commissioned two expert labour market academics, Dr Amy Humphris and Dr Maria Koumenta, to look into cleaning, caring and construction. Their conclusions are summarised in Box 12 below. The full research report has been published alongside this strategy.

## **Box 12: Regulating the Three Cs: A report on how to regulate labour suppliers in Care, Cleaning and Construction (Humphris and Koumenta, 2018)**

**Cleaning:** Existing regulation is accreditation. As there is not a compelling case for improving public safety through regulating cleaning, **Humphris and Koumenta recommend the expansion of existing accreditation.** This will only be effective if accreditation becomes more desirable for end users and therefore demand is increased. Accreditation can become more attractive to end users through distributing liability based on accreditation. If a labour supplier is not accredited the liability of ensuring fair pay and working conditions lies with the end user. Only accredited labour suppliers are liable for matters of unfair pay and working conditions. This approach incentivises end users to seek accredited labour suppliers and thus incentivises more suppliers to become accredited.

The requirements set by the accreditation scheme should include presence of formal pay systems and appropriate working conditions. Any applicants who did not meet the requirements should be reported to the Information Hub.

**Care:** The Care Quality Commission (CQC) is responsible for licensing both individuals and organisations. As part of their requirements, organisations (labour suppliers) must have formal pay systems and provide adequate working conditions. However, the main focus of their efforts and inspections is on the quality of care provided by individuals and organisations. Whilst this is understandable, it means that the current licensing scheme is not addressing issues around pay and working conditions. **The research report recommends that the monitoring and reporting of organisations who are not found to be treating workers (including contracted workers) correctly should be delegated to the GLAA.** This allows the CQC to focus on the quality of care and the skill levels of workers and ensures working conditions are being monitored by a dedicated authority.

**Construction:** The existing regulation in this occupation is accreditation. Unlike cleaning, construction does have clear links to public safety. Therefore, **this research report recommends that legally enforced regulation is appropriate. However, the report does not recommend licensing** because there would be great difficulties in implementing the scheme across the whole occupation and monitoring members. Additionally, the report suggests that the burden for small labour suppliers, who use contracted workers on an ad hoc basis, would be too great.

Instead **Humphris and Koumenta recommend certification as a regulatory scheme.** The scheme can be set with parameters to target the areas of the occupation most likely to be treating contracted workers unfairly, medium to large commercial organisations, without risking unemployment and downsizing at the lower end of the occupation. The report suggests using the GLAA as the regulatory body but recommends further linking the certification scheme to the skill levels of workers. The report suggests that by requiring organisations to ensure a proportion of their workforce (including contracted workers) are accredited would indirectly encourage individual workers to become accredited and have an upskilling effect in the industry. This suggestion means that the GLAA could decide upon what accreditations they will recognise and that this can change over time to reflect market and customer requirements.

At this stage I am not in a position to endorse these recommendations as more in-depth work will need to be done, not least consultation with each of these sectors to understand their views. Over the next year, I plan to carry out a series of deep dives into particular sectors to better understand the issues and potential solutions, therefore the issue of extending licensing to other sectors is something that I will return to in the next annual Strategy.

In the meantime, I believe that a sensible approach is to **pilot licensing** on a smaller scale **in sectors and selective geographical areas** where the level of non-compliance is known to be high and licensing could be a solution to improve compliance in the longer term. These would be specifically set up to test the:

- feasibility of licensing in the sector;
- resource requirements;
- best practice in processes; and
- impact of licensing different types of businesses.

Doing this in specific geographical areas will enable the pilots to be evaluated using matched comparator areas as control groups.

I recommend that licensing by the GLAA is trialled, in two or three geographically defined areas, in the **hand car wash** and **nail bar** sectors. I have specifically highlighted these two areas as they are sectors where I have seen evidence of non-compliance both across multiple regulatory areas and also across the spectrum (from accidental contravention of regulations to organised crime and modern slavery). Licensing is potentially a way of simultaneously tackling several types of non-compliance, to deal with rogue employers, business owners and landlords in an effective manner.

### **Hand car washes**

Hand car washes have been highlighted by various sources including the GLAA (2017), the IASC (2017a), the intelligence strategic assessment produced by my Office, academics (e.g. Clark and Colling, 2016) and the media (e.g. The Independent, 2017) as an area of high risk, not only for labour market abuses (specifically NMW) but also linked to non-compliance on environmental (Environment Agency, 2014) and health and safety regulations, non-payment of tax (VAT, income tax and business rates), lack of appropriate planning permission, modern slavery conditions and poor housing.

It is difficult to measure the scale of the issue but Unseen, the charity which operates the Modern Slavery Helpline, reported that between October 2016 and August 2017, the helpline received 88 calls and 54 web forms regarding potential exploitation in car washes from the public and potential victims (Unseen, 2017a). These involved 36 different police force areas across the UK and culminated in 112 modern slavery cases where 692 potential victims were indicated. Ten cases involved minors. Only 1.8 per cent of cases (two cases) included calls from potential victims reporting their own situation. This is a much smaller percentage than the 15 per cent of calls received from potential victims in other types of modern slavery cases, suggesting that car washes are an area that would receive little enforcement based on worker complaints.

Car washes have a number of regulations to which they should be adhering, but currently the sector has no compulsory registration or licensing, although there are voluntary accreditation schemes such as Washmark.<sup>13</sup> To gain Washmark accreditation, an operator must comply with standards for all aspects of the car wash operation from insurance and planning consents to chemical handling and management of wash water.

Licensing on a limited geographical basis would be done by GLAA but will need to encompass a number of regulatory requirements that businesses would be required to meet, requiring partnership working with, for example, HSE, HMRC and the police, and with the support of industry. The relevant local authorities will also be particularly important given their knowledge

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13 [http://www.carwashadvisoryservice.co.uk/joining\\_the\\_cwas.php](http://www.carwashadvisoryservice.co.uk/joining_the_cwas.php)

on the ground, but also their interest in business rates, housing and planning. Additionally, there will have to be planning to ensure the identification and safeguarding arrangements for potential victims of modern slavery.

### Nail bars

Nail bars have also been highlighted as a labour market exploitation risk by multiple sources, namely the IASC (2017b), Unseen UK (Unseen, 2017b), the GLAA (2017b), academics (e.g. Morgan, 2017) and by the media (e.g. The Times 2013). In January 2018 there was a landmark judgement regarding the exploitation of teenage girls in nail bars, which was the first successful prosecution for child labour exploitation and trafficking under the Modern Slavery Act 2015 (Avon and Somerset Constabulary, 2018).

While it is again difficult to measure the full extent of the problem, Unseen UK reported in October 2017 that in the year since its launch the modern slavery helpline had received reports of modern slavery in nail bars from at least 18 cities across the UK. This indicated at least 70 victims, 11 of which were identified as children. The most common nationality of victims was Vietnamese. As a consequence, Unseen UK launched a targeted campaign in collaboration with the British Association of Beauty Therapy and Cosmetology (BABTAC) and nail salons across the country called ‘Let’s Nail It!’ which aimed to better inform the public about how to spot and report exploitation in this setting.

*“Analysis of NRM files has revealed how nail bars can become not only a place of illegal work but exploitation too... Of the 198 individuals who received a [positive conclusive grounds] decision from the NRM for labour exploitation, 15 experienced modern slavery in a nail bar. The majority of whom were exploited while minors...” (IASC 2017b)*

Representatives from BABTAC explained that the sector has no compulsory regulation, only voluntary accreditation or registration via themselves or the Association of Nail Technicians (ANT). As with car washes, nail bars are associated with a range of non-compliance, notably human trafficking and modern slavery, but also issues of client harm, improper training on the correct use of products, and the importation of illegal or unsafe products.

### Box 13: Independent Anti-Slavery Commissioner recommendations for nail bar licensing

In his report *Combating modern slavery experienced by Vietnamese nationals en route to, and within, the UK* (IASC, 2017b: p.64), the IASC recommended that:

*“Home Office to work with the Director for Labour Market Enforcement, GLAA and the Association of Nail Technicians (ANT) to implement measures to prevent modern slavery in this sector, using existing regulation and laws as well as to consider if specific licensing is required.*

*This kind of business and others considered high risk could be required to prove compliance with current regulations as part of a licensing scheme. This may include, for example:*

- *Health and Safety certificates*
- *Proof of business insurance*
- *Proof of training provision for staff*
- *Proof of HMIC compliance with respect to National Insurance contributions*
- *Provision of bank account details of staff – these can be verified with employees*
- *Certification of environmental compliance”*

I recommend that nail bars is another sector where licensing should be tried and tested on a limited geographical basis. The GLAA will need to work in close cooperation with BABTAC and the ANT, as well as with local authorities and police to develop a model of licensing that covers the various areas of non-compliance that need to be included. It will be important to work with IASC and other organisations to develop training and processes for recognising victims of trafficking and modern slavery when visiting these sites.

I am aware that asking the GLAA to license these two sectors is a departure from their current model of licensing labour providers. Licensing nail bars and hand car washes would involve licensing businesses themselves. This may well require legislation in order to provide the powers to do so, as would the enforcement of associated health and safety and environmental issues.

Given the current pressures on the legislative agenda, this is likely to create a delay in being able to implement the pilots. In the meantime, the Home Office and GLAA have suggested a voluntary scheme for both these sectors, where they could work in partnership with local authorities and other bodies to develop an accreditation scheme. I support this suggestion as it would serve to develop the evidence base of the problems in these two industries, and could help to inform arguments for introducing the necessary legislation. This is not however a substitute for the proposed licensing pilots.

### **Recommendations**

27. The 2012 GLAA licensing standards should be reviewed to ensure they reflect current worker rights and employer obligations.
28. Two pilot schemes should be run and evaluated to test the feasibility and impact of GLAA licensing of businesses in different sectors. These should be done on a geographically limited basis and cover:
  - a. Hand car washes
  - b. Nail bars.

## **4.3 Continual assessment and improvement**

There are two elements to continual assessment and improvement:

- Evaluation of specific policy interventions and processes; and
- Understanding the overall impact of enforcement on non-compliance.

The second of these is technically challenging and something that will benefit from an overview across the three enforcement bodies. Given the significant increase in resource and subsequent restructuring for HMRC NMW/NLW, and the increased remit for the GLAA, 2018/19 is a good opportunity to review both the approach and impact of the three bodies. Over the next twelve months, my Office will therefore look to develop a programme of research, acting in partnership with academics, IASC, Home Office Modern Slavery Unit and others.

The first element is something that I would expect the three bodies to be pursuing as part of business as usual. Specifically, I would expect them to be assessing their own policies and processes to understand the effectiveness, not only in terms of **outputs** (i.e. number of cases, amount of money recovered, number of prosecutions), but importantly in terms of **outcomes** (i.e. impact on level of non-compliance overall) in order to achieve maximum impact for the resource available.

Concentrating solely on outputs can distort organisational behaviour and priorities. For instance, is it a better use of resources to pursue companies with small number of employees who are deliberately and seriously non-compliant, or a single large organisation with thousands of employees for smaller technical breaches? The outputs are better for the latter, but would fail to tackle the worst exploitation.

To date, evaluation and self-assessment has been an area of weakness for the three enforcement bodies. Apart from the isolated examples of research and use of information described below, I have not seen any recent evaluations of enforcement activity from any of the bodies.

EAS do not currently have the resource either in terms of staffing or IT systems to evaluate their activities. Their case management processes have up until now been on spreadsheets and paper files. This allows them to monitor output, caseloads and case progress but severely limits what they can analyse in terms of trends or longer term impact of interventions, including on recidivism. The introduction of their case management system in the coming year should facilitate the investigation of their data but it will take some time for there to be sufficient data uploaded onto the system to do this.

They are keen to increase the number of repeat visits to those agencies found to have been non-compliant in the past to test for recidivism but, again, have up until now been restricted due to resources. **I strongly encourage EAS to pursue this in the next 12 months.**

The GLAA reviewed their performance monitoring framework and from early 2018 will report regularly on a large number of indicators linked to their strategic objectives. This should be a significant improvement on what has been available to date and I will be interested in monitoring developments over the coming year. They also reported that they plan to carry out a comparative review against the evaluation of the GLA which was conducted back in 2008 (Wilkinson et al, 2009).

Within HMRC, the 'Promote' NMW team has conducted randomised control trials into the effectiveness of differently worded mass emails and text messages to both employers and to people receiving tax credits, providing links to information on the rate changes on the NMW/NLW. They reported to my Office that, compared to a £1.75 cost per click associated with a previous paid-for communications campaign, the texts resulted in a 35p cost per click. I welcome these efforts to test different approaches of preventing non-compliance via improved awareness. I will also be interested to see the results of the predictive data models that HMRC have been developing with the enormous amount of data at their disposal.

## **Recommendations**

29. The three bodies should further develop and embed an evaluative approach to their own processes and systems, making best use of data and information to assess their performance and impact, ensuring they align with strategic enforcement principles, especially in terms of increasing the deterrence effect.
30. An independent evaluation should be undertaken, by independent academics or consultants, to investigate the overall impact of the three bodies on tackling labour market non-compliance.

## 5. Current enforcement gaps

### 5.1 Holiday pay

Statutory annual leave provisions entitle almost all full-time workers to paid holiday equivalent to 5.6 weeks per year (including bank holidays). If a worker has variable hours or leaves their job with annual leave untaken, their holiday pay is calculated as 12.07 per cent of their average pay.

Holiday pay is not always paid as it should be. During the consultation, I heard that workers are often not aware or informed of their holiday pay entitlement. Further, it was suggested that, in some cases, recruitment agencies are purposefully making it difficult for workers to claim it. Indeed, there is some evidence to suggest that the scale of holiday pay non-compliance rivals that of wage payment non-compliance. As described in Section 1.4, Clark and Herman (2017) state that ‘an estimated £1.3 billion of wages and a further £1.8 billion of holiday pay remain unpaid each year’.

*“Two very well connected figures within the [employment agency sector] have told me, independently, that only 30% of holiday pay is ever paid. That means approximately £2 billion per annum is retained by agencies, HMRC fails to see the tax payable on that amount.” Written evidence from Director of Extraman to House of Commons BEIS Committee on ‘The future world of work and rights of workers inquiry’ (Gregory 2017)*

As set out in Box 14, the holiday pay and annual leave entitlements conveyed by the Working Time Regulations 1998 (WTR) are not currently enforced by the state. Many workers are therefore directed to take individual enforcement action in an Employment Tribunal to secure holiday pay. There is some provision for EAS and GLAA to investigate holiday pay as a withheld wage issue under their current enforcement frameworks, as a result of the *HMRC v Stringer and others [2009] UKHL 31* judgement. This mode of redress is however limited as the bodies can only investigate in the sectors within their remit and do not have powers to recover unpaid holiday pay for workers. I have not seen evidence that enforcing holiday pay has been a priority for either organisation.

### Box 14: State enforcement of holiday pay

Holiday pay and annual leave entitlements are set out in s.13 of the Working Time Regulations 1998 (WTR), which transposed the EU Directive on Working Time into UK law. The WTR state that it is the duty of the Health and Safety Executive (HSE) to make arrangements for the enforcement of these rights. The HSE, however, clearly states on its website that it does not enforce paid annual leave entitlements. This leaves a significant gap in the enforcement of basic worker rights, which has resulted in many workers being directed to take individual enforcement action in an Employment Tribunal.

The 2009 *HMRC v Stringer and others* judgement has recently been interpreted as a basis for EAS and GLAA to investigate holiday pay within their existing enforcement frameworks. This judgment held that holiday pay can fall within the definition of ‘wages’ under the Employment Rights Act 1996 (ERA). EAS and GLAA have interpreted this to bring holiday pay into their remit as follows:

- **EAS:** regulation 12 of the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (the Conduct Regulations) prevents employment businesses from withholding any part of payment for work done.
- **GLAA:** regulation 13 of schedule 2 of the Gangmasters (Licensing Conditions) Rules 2009 prohibits licence holders from withholding any part of payment to workers.

While this development might allow EAS and GLAA to investigate holiday pay issues, the scope for redress in this context is limited. Intervention is restricted to the bodies’ existing enforcement frameworks and remit within the labour market. For example, EAS could seek to prosecute withheld holiday pay as a breach of the Conduct Regulations and potentially secure a fine against the employment agency in breach. The GLAA could investigate holiday pay in the licensed sectors and refuse or revoke the licence of a provider who does not meet the relevant licensing condition.

The bodies do not however have legal powers to recover outstanding wages and holiday pay owed to workers.

Taylor et al. (2017) covered holiday pay within their review and recommended that:

- *HMRC should take responsibility for enforcing the basic set of core pay rights that apply to all workers – NMW, sick pay and holiday pay for the lowest paid workers.*
- *Government should do more to promote awareness of holiday pay entitlements, increasing the pay reference period to 52 weeks to take account of seasonal variations and give dependent contractors the opportunity to receive rolled-up holiday pay.*

Taylor considered HMRC to be the appropriate body to enforce holiday pay due to its existing remit, information and expertise in calculating pay. BEIS is consulting on both holiday and sick pay in its Enforcement consultation document.

Stakeholders in our consultation generally agreed with Taylor’s suggestion, and felt that holiday pay enforcement naturally fell within HMRC’s existing enforcement remit.

*“Usdaw believes that HMRC should be given powers to investigate holiday pay, and to enforce it. This seems to be a common sense solution which would potentially help thousands of low paid workers to recover money that they are owed.” Usdaw response to DLME consultation*

The FSB supported Taylor's recommendation that HMRC's remit be extended in this way, but only for 'the lowest paid workers' so as to maintain their enforcement focus on workers on or around the NMW/NLW.

*"There is a clear rationale for expanding the remit of the NMW/NLW team within HMRC, but the Taylor Review was right to recommend limiting this extension to only 'the lowest paid workers' (i.e. workers receiving at or around the NLW/NMW). This reduced scope means that HMRC would not be faced with enforcing pay rights for a much larger proportion of the labour force, as their efforts would still focus on workers paid around the minimum wage."* FSB response to DLME consultation

Different views were expressed by Baker McKenzie LLP and the Recruitment & Employment Confederation (REC). These raised concerns that uncertainty in the law meant that HMRC were not suitably placed to determine holiday pay non-compliance.

*"...discussion of whether HMRC should enforce the payment of holiday pay [...] would seem premature when currently the regulations are not clear for agency workers. Instead we recommend, that once we have left the European Union, the Working Time Regulations should be amended through secondary legislation to clarify when agency workers are entitled to receive holiday pay. In the interim period, there should be clear guidance from the government for both agencies and agency workers about when holiday pay should be paid."* REC response to DLME consultation

It is my view that holiday pay entitlements should be actively enforced by the state. With support from the stakeholder evidence, I concur with the findings of the Taylor Review and, hence, **recommend that HMRC (or another appropriate state body) is given the powers to take responsibility for the enforcement of holiday pay.**

Considering the estimate from Clark and Herman (2017) of £1.8 billion in holiday pay going unpaid, should this be paid to workers and employees, HMRC would collect around £300 million in extra income tax. So even if HMRC's enforcement budget were to be doubled from £25 million to £50 million to reflect this new responsibility, the benefit to cost ratio would be very large.

I am not minded, though, to apply this to only low paid workers; holiday pay is a fundamental right and should therefore be enforced across the board. In the first instance, investigations into holiday pay would be a component of NMW/NLW investigations, and therefore, would in fact concentrate on low paid workers. From an enforcement perspective, having oversight of both NMW/NLW and holiday pay non-compliance will surely strengthen HMRC cases against unscrupulous employers and, potentially, increase the monies returned to the worker.

Having heard so much evidence of holiday pay non-compliance amongst recruitment agencies, **I would also encourage EAS to prioritise the investigation of holiday pay in the interim, in the context of withheld wages as discussed in Box 14.** Findings should be shared with HMRC (or the relevant state body) to improve understanding of issues around holiday pay. With HMRC NMW/NLW taking the lead responsibility and EAS bolstering the enforcement effort, this would be, in principle, no different to current NMW/NLW enforcement.

Equally, the **GLAA should also look to prioritise holiday pay as a licensing condition in the interim.**

Due to the extent of holiday pay non-compliance, I would further suggest that holiday pay policy is re-examined. One possible solution for ensuring that workers receive their paid annual leave entitlement is to permit rolled-up holiday pay in certain circumstances. That is, to inflate hourly wages by 12.07 per cent to reflect paid annual leave entitlements. There is some support for this within the Taylor Review and within our stakeholder evidence but this is not currently lawful in the UK.

In 2006 the European Court of Justice held rolled-up holiday pay schemes to be unlawful and contrary to the principles of the EU Working Time Directive (WTD) in the case of *Robinson-Steele v R.D Retail Services Ltd [2006] ECR C-131/04*. The WTD, transposed into UK law by the Working Time Regulations 1998, does not allow annual leave to be replaced by pay in lieu unless the employment relationship has been terminated. The rationale at the heart of this principle is health and safety, with the primary driver being to secure actual rest time for workers rather than just financial remuneration.

The EU has allowed rolled-up pay schemes to continue in the interim whilst Member States implement appropriate measures to prevent their future use. The GOV.UK page on holiday pay states that an employer cannot include rolled-up holiday pay in the hourly rate, and that the use of rolled-up holiday pay in existing employment contracts must be re-negotiated.<sup>14</sup>

Whilst rolled-up pay schemes are considered at EU-level to be unlawful, I also note with interest the view expressed by the law firm Baker McKenzie on the practical use of rolled-up holiday pay schemes:

*“Another challenge employers face is how to calculate pay for workers/employees with no fixed working hours and/or pattern. This has become a particular issue following the ECJ’s judgment [...] that paying ‘rolled-up holiday pay’ is unlawful. In practice, there is no other practical way of paying holiday pay for workers whose working pattern is extremely variable.”* Baker McKenzie LLP response to DLME consultation

Including an amount for holiday pay in addition to the hourly rate should ensure that workers receive their annual leave pay entitlement. However, I recognise that, under certain circumstances, this could mean that workers simply do not receive the holiday period itself. I do not therefore go as far as to recommend rolled-up holiday pay as the solution but Government may wish to consider it among other options. I note that Government is not taking forward the Taylor Review proposal for workers to receive rolled-up holiday pay, but I am pleased to see that it is seeking views on other measures to ensure that atypical workers can automatically receive their holiday pay entitlement as part of the Transparency consultation.

## Recommendations

31. HMRC, or another appropriate state body, should be provided with the powers and remit to take responsibility for the enforcement of holiday pay for all workers, including mechanisms to recover holiday pay arrears.
32. In the interim, EAS and GLAA should make use of their existing enforcement frameworks to investigate holiday pay as a matter of priority.

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<sup>14</sup> <https://www.gov.uk/holiday-entitlement-rights/holiday-pay-the-basics>

## 5.2 Intermediaries and umbrella companies

The Freelancer and Contractor Services Association (FCSA) define intermediaries as “*the firm at the bottom of the supply chain that engages workers on behalf of a recruitment agency or the hiring firm. This term includes, but is not limited to, umbrella companies*”.

The use of intermediaries within low paid sectors is a major concern. While umbrella companies and employment intermediaries can offer a valuable service to higher paid freelancers by reducing their administrative burden and providing a permanent employer, for lower paid workers the benefits of using them are far less clear.

### Box 15: What is an umbrella company?

#### Compliant umbrella company model, adapted from FCSA

Umbrella firms employ freelancers under the terms of an overarching contract of employment. The umbrella employer provides full employment rights, and enables workers to undertake a number of temporary assignments, whilst having statutory benefits and continuity of employment. Additional benefits to the worker include having all their tax affairs managed centrally (rather than being responsible for this themselves with every change in contract) and the continuity of employment history which can be helpful if the individual is looking to access financial credit.

Umbrella employers benefit the end hirer or recruitment business by taking responsibility for all of the employment and tax risk on their behalf. This enables the contract to be fulfilled by a temporary worker without permanently increasing the hirer’s headcount.

The umbrella will have a contract in place with the agency or hirer and will invoice them the agreed assignment cost for the work carried out. The umbrella will then pay the worker directly (on a PAYE basis) after retaining monies including their margin, employer tax, employee tax and NI contributions.

#### Other types of intermediaries

There are a range of other types of intermediaries, which take a number of different permutations but typically do not employ people under a permanent contract of employment. Many require people to become self-employed and many disguise remuneration as something else (often loans) which artificially reduces the tax and NI contributions due. The key factor is that they are an additional organisational layer between the worker and the end user, and they are at the bottom of the supply chain, i.e. the firm that pays the worker.

Source: <http://www.fcsa.org.uk/resources/how-compliant-umbrellas-work-2/>

In their evidence, FCSA reported that they estimate there to be approximately 500 umbrella companies which employ around 500,000 contractors in the UK. Importantly, this does not include those who are involved in a scheme provided by other types of intermediary. These numbers are much more difficult to estimate given the changing nature of these organisations.

The main concerns around the use of intermediaries are that they can increase the vulnerability of low paid workers and potentially add financial burdens on to them. Employment agencies use intermediaries to effectively pass on costs to the worker, which would normally be paid by the employer, including employers’ NI contributions. Combined with high administration fees charged by the umbrella companies themselves, the worker can receive significantly less after

deductions than the rate they agreed upon when taking the job, and less than they would if they were workers or employees. In some cases, this can take the hourly rate received by the worker to below the NMW/NLW.

From discussions with stakeholders I understand that the behaviour of intermediaries ranges from:

*Completely compliant and ethical → unethical but not illegal → exploitative and coercive à illegal and fraudulent.*

There is a myriad of ways in which workers can be exploited through intermediaries. The details are not for me to set out in this report but in summary the issues are:

- **Misinformation:** the charges, tax implications and consequences of using an intermediary are not explained or made available to the workers. In particular the headline rate advertised for the job may not transparently reflect take home pay. Deductions may be made for receiving a payslip or other ‘services’ that workers did not pay previously, such as worthless and unnecessary insurance.
- **Reduced rights and employer responsibilities:** introducing an intermediary distances the end user from the people doing the work for them and enables them to avoid the responsibilities (both financial and on work conditions) of employers. Using intermediaries is another potential way for end users to reduce their costs and liabilities.
- **Coercion:** some workers are not given the choice about using an intermediary, or may even be unaware that they have been signed up to one.
- **Tax avoidance:** by various means intermediaries reduce the amount of tax paid to HMRC compared to if workers were employed directly. If HMRC investigates and the intermediary suddenly folds, workers are left exposed to a significant tax bill.

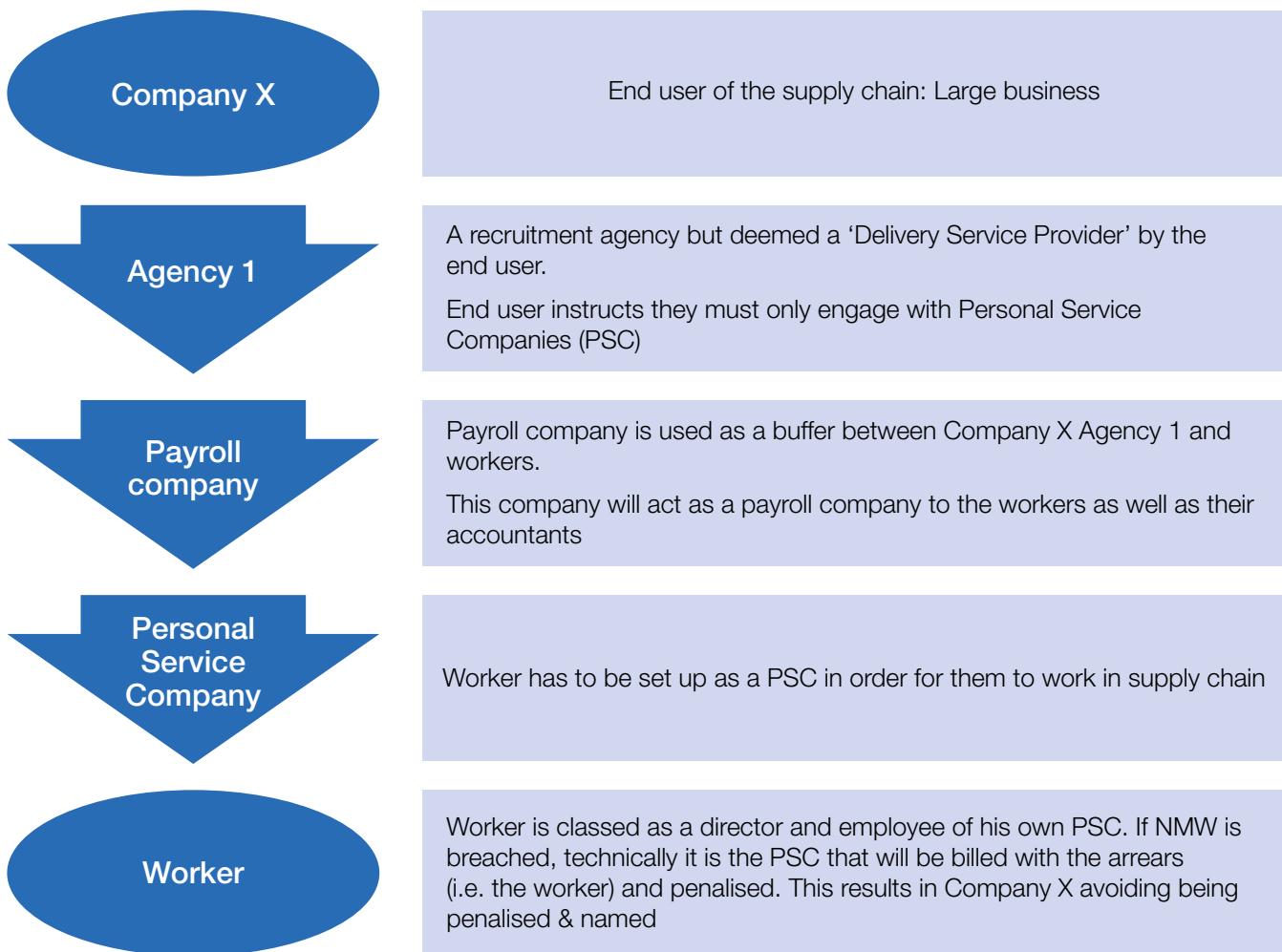
*“...some umbrellas claim to be able to pay workers at a higher rate than they would earn through an employment business payroll. [...] our understanding is that this could be achieved through a manipulation of NI and statutory paid holiday.”* Morgan Hunt UK Ltd response to DLME consultation

*“Some umbrella companies are showing a complete disregard for the rules, while others are encouraging workers to use personal service companies in an attempt to side-step them...”* LITRG response to DLME consultation

The impacts of these various behaviours on the workers are:

- reduced income once all the costs are taken into account, possibly taking them below NMW/NLW;
- lack of clarity on deductions and what charges are being applied;
- lack of clarity over who their employer actually is and with whom to raise a grievance, resulting in poorer working conditions and no recourse to remedy; and
- reduced NI payments may mean they become ineligible for certain state benefits.

As seen in Figure 1 (section 1), the layers that are being added to the employment relationship mean that the system becomes harder to enforce. Figure 9 below shows that same effect but from the perspective of the worker who, because of the use of intermediaries, has difficulty knowing who their employer ultimately is.

**Figure 9: Complexity of employment relationship from worker's view**

Source: HMRC, presented to DLME October 2017

Currently, there is very little enforcement of intermediaries. The compliant firms can join trade organisations such as Prism's Professional Passport or the FCSA to become accredited, but many do not and continue to bend and break regulations. One of the issues is that there are very low barriers to entry. Anyone can set up as an intermediary without qualifications or capital. Some of the role is very similar to that of a tax accountant, yet this is a much more regulated and 'barriered' profession. The result is highly variable levels of expertise and accountability within the intermediaries sector.

From the view of the enforcement bodies, there is lack of clarity as to who can enforce the different elements of non-compliance. EAS relies on 40-year-old legislation which does not cover intermediaries, and is therefore unable to enforce against these businesses for issues of workers rights and unfair deductions from wages as it does for employment agencies (although some of our stakeholders felt that the legislation did already cover intermediaries, highlighting the confusion in the sector).

*"The Employment Agencies Act 1973 (and its Conduct Regulations) is not fit for purpose in today's fast paced, online recruitment market."* APSCo response to DLME consultation

HMRC does have powers to investigate and can pursue those who are blatantly engaged in tax fraud/avoidance. This will only rarely be on issues of NMW/NLW but much more likely to be on issues of NI and VAT manipulation.

*"Asking questions of umbrella companies promoting the "Employment Allowance" scheme<sup>15</sup> that have approached us over the last year, their claimed revenue indicates over £100 million of lost tax, NI and VAT per annum. This is from just a few companies that have approached us, a small agency in London. It would be very hard not to believe that this figure is not multiplied many times over, throughout the UK. That scheme is only one of many being promoted by umbrellas. False self-employment, pseudo-outsourcing and other models are coming to the market on a regular basis. All umbrella schemes applying to lower paid workers make their money from tax and NI reduction, with some making extra from the workers. A £1 billion estimate might be a ridiculous under-estimate."*

Extraman response to DLME consultation

I understand from HMRC that intermediaries are in fact increasingly being seen as a priority (in terms of tax rather than NMW/NLW) and that a specialist unit has been set up to ensure compliance with tax laws by these organisations. This is encouraging and I strongly endorse an increased enforcement focus on these organisations. I urge HMRC to work together with EAS to understand where there is cross over and the potential to share information.

There appears to be widespread acknowledgement that a proportion of umbrella companies and intermediaries are problematic in a number of ways, often intertwined with issues of employment status. The question is what should be done to close the loopholes and the gap in enforcement which has allowed this exploitation to take place.

In the Taylor Review, it was recommended that I should:

*"...consider whether the remit of EAS ought to be extended to cover policing umbrella companies and other intermediaries in the supply chain." (Taylor, 2017: p.58)*

As described in Section 1.7, Government are consulting on how this could be taken forward in the Agency Workers consultation.

Many stakeholders, including BRC, REC, CBI, CWU and FLEX, agreed that this was a role for EAS. Others expressed the view that it should be HMRC that enforces the conduct of intermediaries (e.g. Association of Recruitment Consultants (ARC)). Others agreed that the sector needed increased regulation but preferred other solutions – the National Education Union (NEU) and APSCo stated that intermediaries should be licensed. Professor Judy Fudge stated that umbrella organisations should be abolished, or limited to certain professions and income levels where the benefit could be clearly demonstrated. Morgan Hunt UK Ltd proposed that ultimately the answer is to have a standard tax regime that applied to temporary staff across the board, thus removing any call for inventive tax mitigation models.

The divergence of the response reflects the complexity of the situation. I have heard that many of the difficult issues are the result of patchy legislation and regulations, and that changes such as those to travel and subsistence rules and the introduction of IR35 (a piece of legislation targeting tax avoidance through 'disguised employment') has led to ebbs and flows in the number of people using intermediaries. It must also be considered that while there are undoubtedly workers who are being exploited by umbrella companies, there are also those who are complicit, and even driving the behaviour of intermediaries.

*"It is important to note that [tax mitigation schemes promoted by some umbrellas have] been an almost entirely contractor-driven phenomenon. But it has been made possible by the lax rules that govern the conduct of umbrellas in the market place and umbrellas' willingness to devise increasingly aggressive tax mitigation schemes and employment business's willingness to engage with them, due to fierce market competition."* Morgan Hunt UK Ltd response to DLME consultation

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<sup>15</sup> Since 6 April 2014, this allowance enables employers to claim back up to £3,000 a year from their Class 1 National Insurance payments.

I have considered the situation carefully. At this stage, I believe that there are significant issues around intermediaries and that there is a gap in enforcement, both for protecting workers and around tax avoidance. However the solution is not clear-cut and expands into the remit of tax enforcement.

## Recommendations

33. Current EAS powers should be expanded to include intermediaries to enable them to follow up on cases of worker exploitation as they would for employment agencies. Their resources should be increased in line with the additional requirements to do this.
34. The GLAA, EAS and HMRC NMW/NLW team should work closely with the relevant HMRC tax enforcement teams to share information of non-compliant intermediaries that they identify through their enforcement work. The relevant teams in HMRC should take effective action against such organisations, ensuring that successes are widely publicised to demonstrate that the enforcement environment is changing.
35. EAS and HMRC should work together to develop the options for enforcing different regulations around intermediaries, assessing the likely impact, costs and benefits of each.

## 5.3 Swedish Derogation

The Agency Worker Regulations 2010 (AWR) transposed an EU directive that guarantees agency workers equal pay and conditions with employees in the same business (who do the same work) following completion of a qualifying period of 12 weeks into UK law. Evidence was presented to my Office that many employment agencies avoid their obligations under the AWR, denying agency workers their correct level of pay.

Awareness of these rights is poor and many agency workers are simply not given the appropriate salary uplift after 12 weeks. Another way this is achieved is by deliberately not providing a worker an assignment that lasts beyond 12 weeks.

*“...41% of supply teachers report that they are not made aware that after 12 weeks of working in the same workplace they are entitled to the same pay and conditions as permanent members of staff. Of even greater concern is the fact that the NASUWT has obtained evidence of the manipulation of the Regulations. For example, over a fifth (22%) of supply teachers reported that work had been cancelled on specific longer term assignments at or approaching the 12 weeks qualification period for AWR.” National Association of Schoolmasters Union of Women Teachers (NASUWT) response to DLME consultation*

Alternatively agencies ask or coerce the worker into signing up to the ‘Swedish Derogation’. The Swedish Derogation provides an exemption to the right to equal pay that an agency worker should receive under the AWR. Instead, the worker is eligible for Pay Between Assignments (PBA). Apart from the UK, only Hungary, Ireland, Malta and Sweden have signed up to this derogation.

It was reported to me that this loophole is frequently abused by recruitment agencies as workers are persuaded or coerced into signing up to the Swedish Derogation, accepting to be paid less than their permanent employee colleagues, but never getting pay between assignments. This is often because their jobs are long-term or have no gaps, or the agency offers inappropriate work placements between assignments which the worker cannot accept, which negates the right to PBA.

In 2015, BIS commissioned HOST Policy Research to undertake some research into the use of PBA contracts for agency workers. The study, *Qualitative Analysis of the use of Pay Between Assignment contracts for Agency Workers including the role of Umbrella Organisations* (Berry-Lound et al., 2015), confirmed that use of the Swedish Derogation is primarily driven by

the end user or recruitment agency/umbrella company, and not on request from the worker. Furthermore, findings from the qualitative interviews conclude that while most workers are not fully aware of the implications of signing up to the Swedish Derogation, they are explicitly informed that refusal to comply would result in no work being offered.

The BIS Impact Assessment 2010 for transposing the Directive suggests that at the time, the Government did not envisage wide scale use of the Swedish Derogation:

*"We assume the practice of pay between assignments involves a small number of agency workers in larger employment businesses who are generally well paid". (BIS, 2010b)*

However, I have seen evidence that the practice of requesting staff sign up to the derogation is widespread across a number of sectors, particularly affecting those in low paid jobs. For example:

*"Far from being confined to certain sectors, PBA contracts are used in a range of sectors and occupations and are particularly prevalent in low wage occupations. Whilst some agencies and umbrella organisations do not use PBAs, for others they are the contract of choice." (Berry-Lound et al., 2015)*

A study by Acas (2014) found that the Swedish Derogation was being used in a number of areas of the agency industry, such as warehousing, industrial and assembly-line work. This was being pushed by client firms but agencies were also complicit in their promotion. Interviews with agencies, unions and agency users found that derogation contracts were attractive to clients where large numbers of temps, sometimes involving headcounts in the hundreds, were being supplied on a long-term basis to clients. Here, the costs to the client of complying with the equal pay element of the regulations was particularly significant. The report concludes:

*"Whilst under derogation contracts, workers do benefit from some security through a minimum level of pay between assignments, this comes at the considerable cost of losing the right to equal treatment. This trade-off is particularly high and detrimental for the temp if he/she is being utilised on a long-term, continuous basis within a single client firm (i.e. the areas where the Derogation appears to be taking hold)" (Acas, 2014)*

In the Taylor Review, it was recommended that:

*"The Government should repeal the legislation that allows agency workers to opt out of equal pay entitlements. In addition, the Government should consider extending the remit of the EAS Inspectorate to include compliance with the AWR." (Taylor, 2017: p.59)*

The Work and Pensions and Business, Energy and Industrial Strategy Joint Select Committee concurred with this recommendation in their report published November 2017. BEIS have since responded to this by launching an Agency Workers consultation seeking stakeholder evidence to assess how best to address the issues of non-compliance where the Swedish Derogation is used and how to expand EAS' remit to cover AWR enforcement.

Some stakeholders expressed reservations that EAS was in a position to enforce the AWR.

*"...we do consider it inconsistent that EAS' current remit does not extend to the AWR. However, EAS in its current structure is not ready to take on the additional regulatory oversight of AWR." APSCo response to DLME consultation*

**I believe that EAS should be given the power to enforce the AWR, but that in order to do so, its resources will need to be increased to properly meet this extension of their remit.**

There is also a question of whether the GLAA should also be able to enforce the AWR. Of course, should the additional powers be written into the Employment Agencies Act 1973 then LAPOs would also have this power within the GLAA's extended remit. Whether this is an appropriate mechanism is an issue for further consideration.

## Recommendations

36. The Swedish derogation should either be properly enforced or abolished. EAS' remit should be extended to cover enforcement of compliance with the Agency Worker Regulations 2010 (including the Swedish Derogation), with the additional necessary resource to do this.

## 5.4 Lack of documentation

This section focuses on the issue of the lack, or poor quality, of documentation and records kept by some employers. I focus on HMRC as the other two bodies can already consider and take action on documentation issues within their regulatory frameworks (for example the GLAA will look at record keeping in compliance inspections in relation to Licensing Standard 7.3).

Until recently, HMRC has been discouraged from prosecuting employers for failing to keep or preserve records as a standalone offence, under s.31 (2) NMW Act 1998. Previous versions of the BEIS NMW guidance specified that in order to warrant criminal investigation, record-keeping offences had to be combined with another offence. During our consultation this was highlighted as a barrier to enforcement, as a significant number of employers inspected by HMRC either do not keep records or hold insufficient documentation to build a case for an underpayment offence.

In November 2017, the BEIS NMW enforcement policy was amended to remove the combined offence requirement, stating that HMRC will now refer cases to the CPS for prosecution where employers have failed to preserve wage records without good reason. If convicted, the penalty for failing to keep records is potentially unlimited, depending on the severity of the breach.

I welcome this policy guidance change. Most compliant firms will already be diligent in keeping payment records, therefore this offence targets those employers who seek to use inadequate documentation as a way to obstruct investigations into their pay arrangements.

### Recommendation

37. HMRC should take advantage of the recent change in policy guidance and pursue more prosecutions for standalone non-record keeping offences.

## 5.5 New technology and changing work practices

The modern labour market is dynamic and is seeing tremendous change in how technology is used in the recruitment, management, tracking and pay of work. It is clear that as new innovative systems emerge, enforcement bodies have to adapt to keep up. Most of their powers are based in legislation and regulations written years ago, long before these new systems, types of employment relationships and behaviours were developed. In short, employment legislation has struggled to keep up.

For instance, although they share the main characteristics of standard employment or recruitment agencies, many online recruitment companies consider themselves outside of the scope of The Conduct of Employment Agencies and Employment Businesses Regulations 2003. They do not label themselves as employment businesses or employment agencies.

Under current legislation, EAS' enforcement remit extends to recruitment apps that are based within the UK. However, if the online platform is based abroad, or does not have a physical presence in the UK and has more than one server, of which one is based outside of the UK, EAS are unable to enforce legislation where regulation breaches are found.

The rise in the use of online platforms has led to the relationships between workers, recruitment agencies and employers becoming more impersonal. Instead of face-to-face conversations and paper-based terms and conditions, increasingly decisions are made over the phone and online. This lack of the conventional paper trail can make it challenging for workers to prove

non-compliance or for enforcement bodies to verify where, and if, regulation has been breached. In addition, where a job board has their server traced to outside of the UK, redress may be hard to achieve even when a breach is identified.

While stakeholders were invited to comment on online recruitment apps in our consultation, I did not receive sufficient evidence to fully address these complex matters. As discussed in section 4.2, I have been impressed with the work of SAFERjobs and will be interested in continuing discussions with the organisation over the next year to find out if the model could be expanded further.

In the coming year I will conduct further research, in collaboration with EAS, on emerging issues arising from online platforms and new forms of employment driven by the use of technology, and how enforcement activity can evolve to effectively regulate recruitment websites.

## 6. Office of the Director – work plan 2018/19

The approach I have taken in this first full Labour Market Enforcement Strategy (following the Introductory Report published in 2017) has inevitably been wide-ranging. I have established the Director's Office from scratch this past year, including, importantly, the Information Hub. But, in addition, the myriad of institutions and complexity of the regulations around labour market enforcement have necessitated a broader view of the employment landscape in the UK beyond the three bodies which fall within my remit.

Our 2017 consultation and meetings with a variety of stakeholders have been invaluable in providing a wealth of information on labour enforcement problems and have helped shine a light on those areas of pressing concern.

Looking ahead to my Strategy for 2019/20, I want to set out here the approach I intend to take and the work the Director's Office will be focusing on. These include: working with the bodies and Government departments to begin implementing those aspects of this first strategy accepted by Government; outlining the scope and focus of my next consultation to inform the second strategy; plans for research and further development of the Information Hub to improve the evidence base and our understanding of labour enforcement issues; and fulfilling my other obligations as set out in the Immigration Act 2016.

### 6.1 Implementing the First Full Labour Market Enforcement Strategy (2018/19)

I am keen that those elements of this Strategy that are accepted by Government are implemented in a timely fashion. I believe I have identified recommendations where necessary and urgent action is needed to address problems and gaps in labour market enforcement. I recognise that some will require legislation – either primary or secondary – and that pressure on the parliamentary timetable, not least because of Brexit, will make this a challenge.

Other recommendations, though, should be simpler to take forward and I intend to be pro-active in working with the relevant Government departments and the three enforcement bodies in an effort to take these forward such that I can report on progress by the time of my next Strategy.

## 6.2 Consultation to inform the Labour Market Enforcement Strategy 2019-20

To inform my next Strategy, which I am required to deliver by the end of the 2018/19 Financial Year, I am proposing to undertake another public consultation in summer/autumn of 2018. The precise areas I will be focusing on have yet to be finalised and I will continue to engage with stakeholders in the spring of 2018 to help develop this.

What I am keen to explore in greater depth, though, during the consultation are enforcement issues in specific sectors. The sectors on which I would like to focus will be determined by the strategic intelligence work emerging from the Information Hub (see Section 3.8 above) as well as by further discussions with stakeholders. I would also like to take forward a programme of research (see below) to help inform this work.

## 6.3 Research and further development of the Information Hub

### **Development of the Information Hub**

In order for the Information Hub to develop over the next year, my team will need to focus on some key areas. Firstly, they will need to ensure that they have the legal gateways (MOU's) in place to receive and share information and intelligence from all interested bodies, including industry and third parties. The good work already done in building relationships with Law Enforcement should be strengthened to promote a truly collaborative approach in tackling labour exploitation. I see the Information Hub as pivotal in providing a strategic overview of non-compliance into wider Government forums.

With the Strategic Coordination Group (SCG) becoming more established, I want to be able to evaluate how well the strategic priorities – as well as opportunities for intelligence sharing and joint working – are being exploited by the bodies. Where possible, the SCG ought to build and develop links with other partners who have a shared interest in the Labour Market, both in terms of intelligence-sharing and joint operations, in order to establish enforcement best practice. Further to this work, I also want to develop the research capacity of the Information Hub. I plan to work closely with academics in the labour market and related fields over the coming year to develop a strong evidence base of the scale and nature of non-compliance.

### **Research**

There are a number of areas where I believe further research could add particular value to the evidence base on non-compliance and the enforcement of employment laws. These include:

- Improving how we measure non-compliance with labour laws and the number of workers affected;
- Assessing the degree of awareness of employment regulations for both workers and employers, including the role of social media in helping to raise awareness;
- Examining how the fissured workplace manifests itself at sectoral level and the impact this has on compliance;
- Analysing big data sets and making greater use of existing data sources (such as the information from the National Referral Mechanism); and
- Understanding the behavioural response of employers to compliance and deterrence effects of penalties.

I held an initial research workshop in January 2018 with partners from government and academia to begin to explore how we might take some of this work forward, commissioned either directly by the Director's Office or in collaboration with others.

Each of these projects is potentially significant if we are to derive robust and useful results. Ultimately our ability to take some, or all, of these forward, in the coming year and beyond, will depend on the budgetary settlement for FY 2018/19 for the Director's Office. My aim will be to commission research projects as soon as our financial settlement is agreed.

### Evaluation of the three enforcement bodies

One of the recommendations in this Strategy is that the three labour market enforcement bodies be subject to continual assessment. In particular I wish to better understand the overall impact of enforcement on non-compliance. As stated in Section 4.3, currently the three enforcement bodies go some way to reporting on their effectiveness but this is very often focused on outputs instead of outcomes.

As well as encouraging the three bodies to develop and embed an evaluative approach to their own processes, I am proposing that an independent evaluation be carried out to investigate the overall impact of the three bodies on tackling labour market non-compliance. Given the recent changes in scope and remit of HMRC-NMW and GLAA in this past year, the aim will be for any evaluation to also capture these effects.

I therefore plan to commission a two-stage project first, to identify an appropriate evaluation framework, and then to carry out a full evaluation such that its results can inform future strategies.

## 6.4 Further Immigration Act 2016 Obligations

Beyond the requirements to deliver an annual strategy and the establishment of the Information Hub, the Immigration Act 2016 (see Box 16 below) also requires me to produce:

- an annual report to the Secretary of State assessing the labour market enforcement activities of the three bodies; assessing how the Strategy impacted on the scale and nature of non-compliance; and a statement of the work of the Information Hub; and
- ad-hoc reports on labour market enforcement either commissioned by the Secretary of State or proposed by the Director.

Naturally I stand ready to fulfil both of these obligations. However, it should be noted that the 2018 Annual Report will not report on this current Strategy as insufficient time will have elapsed for it to have had its full impact. This Strategy will be assessed within the 2019 Annual Report, allowing the enforcement bodies a full year to act on my recommendations.

**Box 16: DLME Reporting Requirements under the Immigration Act 2016**

- (1) As soon as reasonably practicable after the end of each financial year in respect of which the Secretary of State has approved a strategy under section 2, the Director must submit to the Secretary of State an annual report for that year.
- (2) An annual report must include—
  - (a) an assessment of the extent to which labour market enforcement functions were exercised, and activities of the kind mentioned in section 2(2)(b)(ii) were carried out, in accordance with the strategy during the year to which the report relates,
  - (b) an assessment of the extent to which the strategy had an effect on the scale and nature of non-compliance in the labour market during that year, and
  - (c) a statement of the activities the Director undertook during that year in the exercise of his or her functions under section 8.
- (3) The Director must submit to the Secretary of State a report dealing with any matter—
  - (a) which the Secretary of State has requested the Director to report on, or
  - (b) which a strategy approved by the Secretary of State under section 2 states is a matter the Director proposes to report on, and must do so as soon as reasonably practicable after the request is made or the strategy is approved.

## Annex A: Acronyms

**Acas:** Advisory, Conciliation and Arbitration Service

**ACS:** Approved Contractor Scheme

**ALMR:** The Association of Licensed Multiple Retailers

**ANT:** Association of Nail Technicians

**APSCo:** Association of Professional Staffing Companies

**ARC:** Association of Recruitment Consultancies

**ASHE:** Annual Survey of Hours and Earnings

**AWI:** Agriculture Wages Inspectors

**AWO:** Agricultural Wages Order

**AWR:** Agency Worker Regulations

**BABTAC:** British Association of Beauty Therapy and Cosmetology

**BEIS:** Department for Business Energy and Industrial Strategy

**BIICL:** Business Institute of International and Comparative Law

**BRCA:** British Retail Consortium

**CBI:** Confederation of British Industry

**CfILP:** Centre for Intelligence-Led Prevention

**CCS:** Crown Commercial Service

**CICS:** Criminal Injuries Compensation Scheme

**CIPS:** Chartered Institute of Procurement & Supply

**CMA:** Competition and Markets Authority

**CMP:** Civil Monetary Penalty

**CPS:** Crown Prosecution Service

**CQC:** Care Quality Commission

**CTI:** Compliance Test Inspection

**CWU:** Communication Workers Union

**DEFRA:** Department for Environment, Food & Rural Affairs

**DLME:** Director for Labour Market Enforcement

**DOL:** Department of Labor

**DWP:** Department for Work and Pensions

**EAA:** Employment Agency Act 1973

**EAS:** Employment Agency Standards

**ECJ:** European Court of Justice

**ETI:** Ethical Trading Initiative

**FCA:** Financial Conduct Authority

**FCSA:** Freelancer & Contractor Services Association

**FFI:** Fee for Intervention

**FLEX:** Focus on Labour Exploitation

**FLSA:** Fair Labor Standards Act

**FSB:** Federation of Small Businesses

**FWO:** Fair Work Ombudsmen

**GDP:** Gross Domestic Product

**GDPR:** General Data Protection Regulation

**GLA:** Gangmasters Licensing Authority

**GLAA:** Gangmasters and Labour Abuse Authority

**HMIC:** Her Majesty's Inspectorate of Constabulary

**HMICFRS:** Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services

**HMO:** Houses in Multiple Occupation

**HMRC:** Her Majesty's Revenue & Customs

**HSE:** Health and Safety Executive

**IASC:** Independent Anti-Slavery Commissioner

**IE:** Immigration Enforcement

**ILO:** International Labour Organisation

**IS:** Insolvency Service

**JSTAC:** Joint Slavery and Trafficking Analysis Centre

**LA:** Local Authority

**LAPO:** Labour Abuse Prevention Officer

**LASPO:** Legal Aid, Sentencing and Punishment of Offenders Act 2012

**LITRG:** Low Incomes Tax Reform Group

**LME:** Labour Market Enforcement

**LMO:** Labour Market Enforcement Order

**LMEU:** Labour Market Enforcement Undertaking

**LPC:** Low Pay Commission

**MARAC:** Multi-agency Risk Assessment Conference

**MOU:** Memorandum of Understanding

**NASUWT:** National Association of Schoolmasters Union of Women Teachers

**NCA:** National Crime Agency

**NDPB:** Non-Departmental Public Body

**NEU:** National Education Union

**NFU:** National Farmers Union

**NGO:** Non-Governmental Organisational

**NI:** National Insurance

**NIM:** National Intelligence Model

**NMW/NLW:** National Minimum Wage/National Living Wage

**NRM:** National Referral Mechanism

**ONS:** Official for National Statistics

**PACE:** Police and Criminal Evidence Act 1984

**PAYE:** Pay As You Earn

**PBA:** Pay Between Assignments

**PwC:** PricewaterhouseCoopers

**REC:** Recruitment and employment confederation

**RTI:** Real Time Information

**SAFERjobs:** Safe Advice for Employment and Recruitment Jobs

**SAWB:** Scottish Agricultural Wages Board

**SAWS:** Seasonal Agricultural Workers Scheme

**SCG:** Strategic Coordination Group

**SIA:** The Security Industry Authority

**SLA:** Service Level Agreement

**SME:** Small and medium-sized enterprise

**TEAM:** The Employment Agents Movement

**TUC:** Trade Union Congress

**UKHCA:** United Kingdom Homecare Association

**USDAW:** Union of Shop, Distributive and Allied Workers

**VAT:** Value Added Tax

**WHD:** Wages and Hours Division, US Department of Labor

**WTD:** Working Time Directive

# Annex B: References

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## Annex C: List of organisations who responded to consultation

Anti-Slavery International

Association of Independent Professionals and the Self-Employed (IPSE)

Association of Labour Providers

Association of Licensed Multiple Retailers (ALMR)

Association of Professional Staffing Companies (APSCo)

Baker McKenzie LLP

Beer and Pub Association

British Institute of International and Comparative Law (BIICL)

British Retail Consortium (BRC)

Care Quality Commission (CQC)

Chartered Institute of Procurement & Supply (CIPS)

Citizens Advice

Communication Workers Union (CWU)

Confederation of British Industry (CBI)

East European Resource Centre (EERC)

EEF

Ethical Trading Initiative (ETI)

Extraman Ltd

Federation of Small Businesses (FSB)

Focus on Labour Exploitation (FLEX)

Freelancer & Contractor Services Association (FCSA)

Howbox

Jane Jefferson Cleaning

Judy Fudge (Fellow of the Royal Society of Canada), University of Kent  
Kalayaan  
King's College London  
London Assembly Labour Group (LALG)  
Low Income Tax Reform Group (LITRG)  
Low Pay Commission  
Middlesex University  
Morgan Hunt UK Ltd  
National Association of Schoolmasters Union of Women Teachers (NASUWT)  
National Farmers Union (NFU)  
National Union of Rail, Maritime and Transport Workers (RMT)  
National Union of Teachers (NUT)  
Nautilus International  
Newham Council  
Nottingham University  
Oxfam  
PricewaterhouseCoopers (PwC)  
Produce Ethical Network (PEN)  
Prospect  
Public and Commercial Services Union (PCS)  
Recruitment & Employment Confederation (REC)  
Security Industry Authority (SIA)  
TEAM  
The Association of Recruitment Consultants (ARC)  
Trades Union Congress (TUC)  
Union of Shop, Distributive and Allied Workers (Usdaw)  
UNISON  
UNITE  
United Kingdom Homecare Association (UKHCA)

Two additional respondents requested anonymity.

# Annex D: Further detail on the scope of powers available to the different enforcement bodies

## **HMRC NMW:** National Minimum Wage Act 1998

- Enter premises s.14(1)(d): officers can enter any relevant premises *at all reasonable times* in order to exercise any power. ‘Relevant premises’ includes premises at which an employer carries out business; and premises used in connection with business.
- Inspection s.14(1): officers can require access to records for inspection; to copy any part of them and to require any relevant person to provide any additional information to establish whether or not there is compliance.
- Require production of information s.14(3): Officer can, upon reasonable written notice, require a relevant person to produce records at a specified time and place, or to attend before an officer to explain or provide additional information.

## **EAS:** Employment Agencies Act 1973

- Enter 9(1)(a): officers can enter any premises connected with carrying out an employment agency function, at any reasonable time. An officer has to produce written evidence of his authority, if so required.
- Inspection 9(1)(b-d): officers can inspect premises, records and documents in pursuance of the act, require any person on the premises to furnish him with relevant information required and require a person upon written notice to produce a record at a given time and place.

## **GLAA:** Gangmasters (Licensing) Act 2004

- Enter premises(s16(1)(d)): officers can, at all reasonable times, request to enter premises in order to exercise powers – includes vehicle, vessel, aircraft or hovercraft, tent or moveable structures.
- Entry by force (s17): if admission is refused officers can obtain a court warrant to enter using reasonable force, if giving notice would defeat the object of entry, it is a case of extreme urgency or premises is unoccupied. The warrant enables officers to enter, search, and seize relevant material.
- Inspect and examine (s16(1)): officers have the power to inspect, examine and remove records from premises; to make copies of any part of records; to require relevant people to supply information/explanation about records or any additional relevant information.

- Require production of information (s16(2)): officers can, upon reasonable written notice, require a relevant person to produce records at a specified time and place, or to attend before an officer to explain or provide additional relevant information.

## **LAPOs: Police and Criminal Evidence Act 1984 (PACE), as amended by the PACE 1984 – (Application to LAPOs) Regulations 2017**

LAPOs can enter premises having obtained a court warrant, to search for and seize material involving wider labour market offences. Their powers once on the premises include:

- Powers of arrest (s.24): LAPOs can arrest a person for a Labour Market Offence, if it is necessary to: ascertain personal details; protect a vulnerable person; prevent damage to property. LAPOs can arrest but not detain, and must deliver the suspect to police custody as soon as practicable.
- Power to search a person on the premises: (s.1 with modifications applied to investigations conducted by LAPOs): LAPOs can search a person found on the premises if they have reasonable grounds to suspect that person may be concealing evidence of a labour market offence.



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