THE IMMIGRATION ACT 2016

This note considers the labour law provisions of Part 1 (sections 1-38) of the Immigration Act 2016. These have received relatively little critical attention, perhaps because of the focus on the Trade Union Act 2016, which was going through Parliament at much the same time. The labour law provisions of the Act fall into four main groups: the creation of the new office of Director of Labour Market Enforcement (LME), reforms to the Gangmasters Licensing Authority (GLA), the creation of LME undertakings and orders (with a criminal offence for breach), and the amendment of criminal offences relating to illegal working. Most of these provisions enter into force from 12 July 2016, with the exception of those relating to LME undertakings and orders, which have not yet been given a commencement date. These powers are to be used in accordance with a statutory code of practice which has not yet been drawn up.

The Act implements the Conservative Party manifesto commitment to 'introduce tougher labour market regulation to tackle illegal working and exploitation' (Conservative Party manifesto 2015, p 31). It was introduced into Parliament in September 2015, at which time it only included provisions about the Director of LME and the illegal working offences. In October 2015, the Home Office and Department for Business, Innovation and Skills published a joint consultation paper entitled *Tackling Exploitation in the Labour Market*, inviting comment on the proposed Director of LME, reforms to the GLA, and a criminal offence of 'aggravated labour law breach'. The government published its response to this consultation exercise in January 2016, at which point the proposals ultimately enacted in the Immigration Act 2016 took shape. The GLA reforms and the regime of labour market enforcement undertakings and orders were introduced into the Bill as government amendments during its passage through the House of Lords. The Bill was controversial in the Lords in particular but eventually received Royal Assent in May 2016.

The remainder of the Act, which will not be examined here, contains a variety of provisions intended by the government to disrupt the day-to-day activities of migrants who are not lawfully present in the UK, for example, by making it easier for landlords to evict them (s. 41), and by creating a criminal offence of driving whilst an illegal migrant (s. 44). These provisions build on the Immigration Act 2014. The Act enhances the powers of immigration officers in various ways (Parts 3 and 6) and extends the scope of application of the highly controversial 'deport first, appeal later' rule in the Nationality, Immigration and Asylum Act 2002, s. 94B, to a wider range of cases (s. 63).

During the passage of the Bill through Parliament, an amendment was successfully introduced requiring the Secretary of State to 'make arrangements to relocate to the United Kingdom and support a specified number of unaccompanied refugee children from other countries in Europe' (s. 67) in response to the refugee crisis.

1. Director of Labour Market Enforcement

The Act creates a new position of Director of LME (s. 1). The Director is to have oversight of three enforcement agencies: the Employment Agency Standards Inspectorate (which is part of the Department for Business, Innovation and Skills), the Gangmasters Licensing Authority (renamed the Gangmasters and Labour Abuse Authority (see below)), and the National Minimum Wage compliance team within Her Majesty's Revenue and Customs. The scope of the Director's activities is defined in s. 3 to encompass the full range of enforcement powers of these agencies.

The Director's role has three main components. The Director will act as an 'intelligence hub', gathering information from the enforcement agencies to 'form a coherent view of the nature and extent of exploitation and non-compliance in the labour market' (*Tackling Exploitation*, p 23, and s. 8 of the Act). This is facilitated by data-sharing provisions in ss. 6 and 7 of the Act. Using this information, the Director will formulate an enforcement strategy for the three enforcement bodies (s. 2). This will set out the priorities for enforcement and identify targets for each body, and will allocate the overall budget as between the three of them (s. 2(3)). This strategy will be presented to ministers. Once they have approved it, it will be laid before Parliament (s. 5). Provision is made for the strategy to be amended during the course of the year (s. 2(4)). The enforcement bodies are under a statutory obligation to 'have regard to' the strategy (s. 2(6)) (though the duty on the GLA appears to be stronger, because new s. 1(3A) Gangmasters (Licensing) Act 2004 requires the GLA to carry out its functions 'in accordance with' the strategy). At the end of each financial year, the Director will submit an annual report in which he or she will evaluate the agencies' achievements against the targets (s. 4), which must be laid before Parliament (s. 5). The Director is barred from making any recommendations in relation to an individual case by s. 9 of the Act, though he or she may address general issues arising out of individual cases in the course of performing his or her functions.

The creation of the Director of LME is one of the more controversial elements of the government's proposals, with only 48% of respondents to the consultation supporting the idea. There are at least four causes for concern. First, there is clearly a worry that the Director might simply be another layer of bureaucracy: resources will be expended on the Director that might otherwise be used to tackle exploitation in the labour market. The government seems to take the view that the cost of having the Director will be outweighed by the benefit of greater co-ordination between the enforcement agencies. The new role is also presented as being preferable to the cost and disruption of a formal merger between them, though it may pave the way for such a merger in the future. Second, the fact that the Director will be able to allocate resources between the agencies may create conflict and competition between them, rather than promoting the co-operation the government is seeking to achieve. Third, the Director is not independent of government in the sense that his or her proposed strategy is subject to ministerial approval. The government argues that this is necessary to reflect ministers' accountability to Parliament for the work of the enforcement agencies, but it has the consequence of making the Director's task more complex, since he or she will have to navigate political sensitivities in formulating the enforcement strategy. Fourth, although the new regime brings together three enforcement bodies, it is far from comprehensive when one considers the variety of perspectives from which exploitation in the labour market might be addressed. Outside the specific area of data-sharing, it is not clear how the Director will interact with other relevant bodies, such as the police or the Independent Anti-Slavery Commissioner.

2. Reforms to the Gangmasters Licensing Authority

The GLA was set up in 2006, in response to the deaths of a number of Chinese migrant workers who were collecting cockles in Morecambe Bay. Its remit extends only to the agriculture, food processing and shellfish sectors, and its main function is to run a licensing scheme for agencies or 'gangmasters' who supply workers in those sectors. The Modern Slavery Act 2015, s. 55, placed the Secretary of State under a duty to publish a consultation paper on the GLA. This duty was met by the *Tackling Exploitation* consultation paper and the ensuing reforms are contained in the 2016 Act.

The most obvious change is the proposed extension of the GLA's remit to cover all sectors of the labour market. This is reflected in a new name – the Gangmasters and Labour Abuse Authority (hereafter GLAA) – effected by s. 10 of the Act. According to the explanatory notes on the Lords amendments, the continued reference to 'gangmasters' in the name is intended to retain the organisation's 'international reputation'. It appears that the substantive extension of the GLAA's remit to new sectors will be brought about by secondary legislation enacted under an amended s. 3(5) of the Gangmasters (Licensing) Act 2004. There is also a more general power to give new functions to the GLAA by secondary legislation under s. 11(2) Immigration Act 2016.

The extension of the GLAA's remit to sectors outside agriculture is welcome. The old GLA proved to be highly effective in its own sector, but there was always a worry that similar problems existed in other sectors outside the GLA's remit, and indeed that rogue gangmasters and others might be drawn to those sectors in order to avoid the additional scrutiny associated with the GLA. However, an obvious concern about the new GLAA's wider role is how it will be resourced. The government has indicated that it is considering this issue (*Government Response*, para 17), and the Director of LME will have power to alter the distribution of resources between enforcement bodies, but it remains to be seen whether the GLAA will have sufficient funds to be effective across the labour market as a whole.

The GLAA's powers are enhanced by the Act in four major respects. First, Schedule 2 gives the GLAA the power to enforce provisions of three other Acts: the Employment Agencies Act 1973, the National Minimum Wage Act 1998, and certain provisions of the Modern Slavery Act 2015 (the most important of which are s. 1, dealing with slavery, servitude and forced labour, and s. 2, dealing with trafficking, though the GLAA may enforce this only where there is a connection to the labour market, defined as trafficking which also involves slavery, servitude or forced labour, or people who are workers or work-seekers). The government argues that these powers will enable the GLAA to act more quickly and comprehensively when it identifies exploitation. Second, s. 12 of the Act provides a power to pass secondary legislation giving certain GLAA officers (referred to as 'labour abuse prevention officers') investigatory powers under the Police and Criminal Evidence Act 1984. These include powers of arrest, entry, search and seizure. The argument in favour of this move is that it will enable the GLAA itself more effectively to gather evidence to support possible prosecutions. Third, s. 13 of the Act gives the GLAA a power to request assistance from a chief constable, the Director of the National Crime Agency, or an immigration officer 'if it considers that the assistance would facilitate the exercise of any function by the Authority or any of its officers' (new s. 22A(2) Gangmasters (Licensing) Act 2004). A chief constable or an immigration officer may ask the GLAA to assist them. This is simply a power to request, so the obligation on the recipient is to 'respond to it in writing within a reasonable period' (new s. 22A(6) of the 2004 Act). This is perhaps the most controversial element of the proposals relating to the GLAA, since it links the GLAA more clearly to the activities of other bodies charged with immigration enforcement. The risk is that this may make it harder for the GLAA to perform its worker-protective functions, since workers may be afraid to seek help from the GLAA if they fear this might ultimately lead to their deportation. Fourth, the GLAA will be able to operate the new regime of LME undertakings and orders which I explain in greater detail below.

However, there is a fundamental uncertainty at the heart of the reforms to the GLAA: the future of the licensing scheme. A core function of the GLA as currently constituted is to grant licences to gangmasters or agencies operating in agriculture and other regulated sectors. It is an offence

to supply labour in the regulated sectors without a licence, or to source labour from an unlicensed operator (ss. 12-13, Gangmasters (Licensing) Act 2004). An operator's licence may be withdrawn if the licence conditions are breached. However, there has long been a concern that the mere grant of a licence after limited scrutiny is no guarantee that the operator will not exploit workers in the future, and that the licensing scheme is burdensome for legitimate businesses. The government seems to be suggesting that the licensing scheme will be retained and possibly extended to other sectors, though it appears that the views of the DLME will prove crucial in determining its fate:

> We recognise that licensing can be a valuable tool in tackling non-compliance and labour exploitation and that an effective licensing regime is one that can respond to, and pre-empt the risks of, exploitation. Many respondents agreed with this, although we know that others are concerned about the need to balance this with reducing burdens on compliant businesses. To do this, we will legislate to reform the licensing regime to ensure that it is flexible enough to respond to those changing risks in existing or new labour sectors, if the evidence supports its use. The Director will be given a critical role in recommending changes to the licensing regime to the Secretaries of State, as part of their overall strategy to tackle exploitation. We believe that this approach will provide a balanced, proportionate approach to the use of licensing. (*Government Response*, para 111)

It is unfortunate that this issue has not been addressed more clearly in the current round of reforms. Although it is true that licensing does not *guarantee* compliance, nor does any other regulatory regime. The importance of licensing is that it is the one mechanism that gives breadth to the GLA's enforcement capabilities. The GLA licence conditions as currently formulated deal with a range of different issues, including the payment of tax and national insurance, health and safety, and the provision of proper accommodation to workers. Without the licensing regime, the GLA would be confined to the policing of the list of criminal offences relating to agency work, the minimum wage and forced labour discussed above. This would transform the GLA from a body with the capacity to enforce decent working conditions in specific sectors to a body with the capacity to enforce a narrow range of serious criminal offences across the labour market as a whole: in effect, replacing depth with breadth.

3. Labour market enforcement undertakings and orders

Sections 14-30 of the 2016 Act create a new regime of LME undertakings and LME orders, supported by new criminal offences for breach of LME orders.

The government's consultation document originally proposed the creation of a new offence of 'aggravated labour law breach'. The argument was that this was needed to deal with unscrupulous employers engaged in a pattern of breaches of labour law that could not be tackled through existing offences or other mechanisms. It was proposed that the new offence would have three elements: commission of an existing offence within the Director's remit, 'the motivation for the offence… was the deprivation of a person's rights as a worker', and 'the employer has exploited the worker in connection with the commission of the offence' (para 92). The government suggested as an alternative or as a complement to this new offence the creation of some form of 'improvement notice' ordering the employer to change its practices.

Although there was some support in the consultation process for both aspects of the original proposal, the strategy pursued in the 2016 Act is, in fact, a version of the second option. The LME undertakings and orders represent a system of 'improvement notices', with criminal penalties for breach of the orders. The government explained this decision in terms of the practicalities of enforcement, arguing that it would be simpler to prove that an 'improvement notice' had been breached than to prove the employer's motivation beyond reasonable doubt for the purposes of the aggravated offence. The maximum sentence for breach of an LME order is

two years' imprisonment, which is a tougher sentence than that available under existing legislation.

Under s. 14 of the 2016 Act, where an appropriate authority (the GLAA, EASI or the NMW compliance team) believes that a person has committed a relevant offence (called a 'trigger offence') under the Employment Agencies Act 1973, the National Minimum Wage Act 1998 or the Gangmasters (Licensing) Act 2004 (or another offence specified in regulations by the Secretary of State (s. 14(4)(d)), that authority may give a notice to the person:

(a) identifying the trigger offence which the authority believes has been or is being committed;

(b) giving the authority's reasons for the belief;

(c) inviting the person to give the authority a labour market enforcement undertaking in the form attached to the notice.

Under s. 15(4) and (5), the authority may only invite the person to give an undertaking where it considers it to be 'necessary' for the purpose of:

preventing or reducing the risk of the subject—

(a) committing a further trigger offence under the relevant enactment, or

(b) continuing to commit the trigger offence.

The 'measures' contained in the undertaking must be regarded by the authority as 'just and reasonable' (s. 15(1)(b)), and must either be for the purpose of 'preventing or reducing the risk' of non-compliance or publicising the existence of the undertaking (s. 15(2)), or must fulfil requirements set out in secondary legislation (s. 15(3)). The undertaking may be for up to two years. The authority must release the subject from the undertaking if it ceases to be necessary.

If the offending firm or individual either fails to give the requested undertaking, or gives the undertaking but then fails to comply with it (s. 19), the authority may apply to the court for an LME order under s. 18. The order may be granted where the court is satisfied on the *civil* standard of proof that a trigger offence has been or is being committed, and where the court 'considers that it is just and reasonable to make the order' (s. 18(1)). It is also possible for an LME order to be made when a person is convicted of a relevant offence. The content of the order is determined by s. 21 and is broadly similar to the content of an undertaking under s. 15. The order may be in force for up to two years (s. 22), but may be varied or discharged by the court on the application of either the subject or the authority (s. 23). There is a right of appeal under s. 24. The Secretary of State is obliged to issue a code of practice to guide authorities in the exercise of their powers relating to LME undertakings and orders in accordance with s. 25. The breach of an LME order carries a maximum sentence of two years' imprisonment (s. 27).

This regime may serve to improve enforcement of the relevant offences because it enables action to be taken by an enforcement authority without the need to prove beyond reasonable doubt that an offence has been committed. As we have seen, the authority may request an undertaking based on its own reasonable belief, and may seek an order on the balance of probabilities. This may be particularly beneficial in situations of worker exploitation because the offending employer may have taken steps to conceal its wrongdoing, and because the affected workers may be too afraid to give evidence. If the employer denies any wrongdoing, it is, in effect, forced to prove its innocence by contesting the imposition of the LME order in court. Another possible advantage of the regime of LME orders is that the penalty for breach is a maximum of two years' imprisonment, which may have a stronger deterrent effect than the penalties for some of the

'trigger offences' under current legislation. For example, the maximum penalty for deliberate non-payment of the NMW is a fine (National Minimum Wage Act 1998, s. 31(9)). But this is not true across the board. For example, there are much tougher penalties under the Gangmasters (Licensing) Act 2004: acting as an unlicensed gangmaster under s. 12 attracts a maximum sentence of ten years' imprisonment.

Nevertheless, the new regime does have some disadvantages. For an employer wrongly accused of committing a trigger offence, the road to proving its compliance is quite arduous. The choice on offer is between giving the undertaking (on the basis that it is already compliant) but facing the adverse publicity that may go with that, or attempting to prove in court that the undertaking is not 'necessary', with all the attendant expense. Another, rather different, concern is that the enforcement authorities may prefer the LME undertaking route even where it would be possible to prosecute an employer for an offence, with the result that there is a much-reduced level of vindication of workers' rights. In practice, of course, much will depend on two crucial factors: the resources afforded to the enforcement authorities to enable them to pursue LME undertakings and orders, and the extent to which the courts subject their actions to detailed scrutiny. Although the statutory formulations are largely subjective, it is not uncommon for the courts to 'convert' these formulations into objective requirements by requiring authorities to have reasonable grounds for their beliefs. While this offers greater safeguards to employers, it would make LME undertakings and orders more difficult to use. Finally, it is important to note that workers themselves do not benefit from this regime in the sense that it does not provide them with any redress for the harm they have suffered. The point that there ought to be mechanisms to provide exploited workers with redress was forcefully made (obiter) by Baroness Hale in *Onu v Akwiwu* [2016] UKSC 31, [2016] 1 WLR 2653, [34].

4. Criminal offences

Section 34 of the Act creates a new offence of illegal working, by inserting a new s. 24B into the Immigration Act 1971. At present, it is an offence under s. 24(1)(e) of the Immigration Act 1971 if a person with limited leave to enter or remain in the UK breaches any condition relating to his or her 'employment or occupation'. There is no specific offence of illegal working applicable to a person who either enters the UK unlawfully or overstays his or her leave, though of course these acts are offences in themselves under s. 24(1)(a) and (b) respectively of the 1971 Act.

The new offence applies when a person subject to immigration control works when he or she is knows or has reasonable cause to believe that he or she is not entitled to do so by reason of immigration status. The sentence is a maximum of six months' imprisonment or a fine (new s. 24B(3) and (4)). It is also possible for the prosecutor to seek confiscation of the individual's earnings under the Proceeds of Crime Act 2002. The concept of 'working' is extremely broad for these purposes. Under s. 24B(10) the person counts as working if he or she works:

(a) under a contract of employment,

(b) under a contract of apprenticeship,

(c) under a contract personally to do work,

(d) under or for the purposes of a contract for services,

(e) for a purpose related to a contract to sell goods…

As the government itself explains, this is intended to include 'informal arrangements that have no paperwork or contract' (Explanatory Notes, p 13). It is noteworthy that this definitional breadth can be achieved here, but seemingly not in the context of worker-protective statutes.

Section 35 of the Act amends the offence of knowingly employing an illegal worker under s. 21 Immigration, Asylum and Nationality Act 2006, by broadening the mens rea requirement to include having reasonable cause to believe that the individual does not have the right to work in the UK, and by increasing the maximum penalty from two to five years' imprisonment.

Section 38 gives effect to Schedule 6, which creates a new mechanism of 'illegal working closure notices'. This mechanism allows an immigration official to close a workplace for up to 48 hours where the employer is employing an illegal worker and has previously been convicted of an offence or required to pay a civil penalty under the 2006 Act. During the temporary closure, the official must apply to the court for an 'illegal working compliance order'. This may prohibit or restrict access to the premises (thereby extending the temporary closure), or make provision for the employer to conduct additional right to work checks or to be subject to investigation by immigration officials. The order may be for up to 12 months, though there is provision to extend it to 24 months by 6 month increments. The government argues that this mechanism, which is modelled on provisions permitting the closure of premises associated with disorder under Part 4 of the Anti-social Behaviour, Crime and Policing Act 2014, will help to ensure that employers with a history of employing illegal workers will not be able to continue to operate if immigration officials find evidence of further infringements.

The most worrying feature of this aspect of the legislation is the lack of concern it displays for the well-being of migrant workers (regardless of their status) and its disregard for relevant international norms. For example, ILO Convention 143, the Migrant Workers (Supplementary Provisions) Convention, 1975, which has not been ratified by the UK, is heavily focused on combating irregular migration and trafficking, but does not lose sight of workers' rights. Article 1 requires states to respect the 'basic human rights' of all migrant workers, including irregular migrants. Although not defined in the Convention itself, these 'basic human rights' include those detailed in the ILO's fundamental conventions and in the UN Convention on Migrant Workers (see ILO, *Promoting Fair Migration*, International Labour Conference 105th Session, 2016, chapter 5). Article 9 states explicitly that an irregular migrant should 'enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits'. The government's determination to ensure that any irregular migrant who works commits a criminal offence clearly conflicts with this. Taking pay as an example, if the worker is fortunate enough to receive remuneration for his or her work, this may be confiscated if he or she is later prosecuted for illegal working. If the worker is not paid, or not paid the NMW, his or her claim is likely to be barred by the common law doctrine of illegality (*Allen v Hounga* [2014] UKSC 47, [2014] ICR 847, [24]). The possibility of making a slavery and trafficking reparation order under s. 8 Modern Slavery Act 2015 is a rare example of a worker-protective measure in this context. As noted above, Baroness Hale in the *Onu* case called for this type of order to be made more widely available.

5. Discussion

There is much to say about these provisions, but for reasons of space I will focus on three main points here: the Act's identification of a set of 'core' provisions of labour law associated with tackling exploitation, the underlying focus on combating irregular migration, and what the Act tells us about the enforcement of labour law in more general terms.

The 2016 Act gives certain labour rights a special status in English law, in two respects. First, they are capable of being enforced by public enforcement agencies, in contrast to most labour rights, which are only capable of being enforced through litigation brought by the affected individual. Second, they are enforced – directly or indirectly – by means of the criminal law (though it is important to note that they are by no means the only uses of the criminal law in labour law) which sends out a particularly strong signal about the nature of the wrongdoing involved in infringing them. We can think about these special rights as constituting a 'core' of rights deemed necessary to protect vulnerable workers against exploitation although, as I will explain below, the Act itself is not presented in those terms.

So, what are these core rights? They are: the right not to be subjected to slavery, servitude or forced labour; the right to be paid no less than the NMW; and in very loose terms something approximating a right not to be engaged in work via an unlicensed agent (under the 2004 Act) or one subject to a prohibition order (under the 1973 Act). It is instructive to consider this core in the light of the ILO Declaration of Fundamental Rights at Work 1998, even though this is, in itself, not uncontroversial. The Declaration protects the right not to be subjected to slavery, servitude or forced labour, the right to equal treatment, freedom of association and collective bargaining, and a prohibition on child labour. Thus, we can see that the domestic core and the ILO core have one right clearly in common: the right not to be subjected to slavery, servitude or forced labour. The domestic core has the NMW, reflecting the fact that this has cross-party support and is relatively uncontroversial, whereas on the international stage, agreement about wages (or even wage-fixing machinery) is impossible because of states' concern to preserve their competitive advantage. The interesting gap is in relation to the other three rights included in the Declaration but not obviously reflected in the domestic core. The loosely-formulated right not to be engaged via an unlicensed gangmaster in fact references a range of other standards in the current GLA licensing conditions, including the right to join a trade union and the right to equal treatment. But we still do not know whether the extension of the GLAA's remit beyond agriculture to other sectors of the economy will simply apply to its powers to investigate criminal offences, or whether it will also involve an expansion in the requirement to hold a licence. The 2016 Act will only succeed in protecting a meaningful core of rights if the latter option is pursued.

This brief discussion of rights leads neatly to my second point: the absence of many references to workers' rights in the policy documents leading up to the legislation, and what the government's rhetoric tells us about its objectives. The consultation paper claims that while most firms comply with employment law, among the small proportion that do not, 'there has been a shift from individual abuses of employment regulation towards increasingly organised criminal activity amounting to labour market exploitation' (para 50). The concept of 'labour market exploitation' is defined as deliberate non-compliance aggravated by, for example, threats of violence or the withholding of pay. The government's choice of justification for tackling this exploitation is an interesting one. It is apparent from the terminology employed in the Act, and most obviously, from the creation of the new office of Director of Labour *Market* Enforcement. As the consultation document explains, 'Other businesses struggle to compete against rogue employers, distorting competition and reducing levels of employment over the longer term' (para 53). The concern is to tackle the undercutting of reputable, law-abiding firms by those who are engaged in exploitative or criminal activity. What is missing from the justification is any reference to more traditional labour law justifications such as the protection of workers' dignity in

situations of extreme inequality of bargaining power and vulnerability. Nor is there any reference to the vindication of workers' rights. Of course, these may be positive side-effects of regulating the functioning of the labour market, but it is interesting that the government opts not to mention them.

One consequence of this rhetorical focus on protecting 'good' employers rather than on protecting vulnerable workers is a tendency to build, rather than break down, connections between labour law enforcement and immigration enforcement. We saw above that the international instruments attempt to separate out questions around irregular migrants' fundamental human rights, and rights to remuneration and other benefits in respect of work in fact performed, from questions about their migration status. One way of achieving this in practice is to allow labour law enforcement agencies to go about their work without any obligation to report irregular migrants to the immigration authorities. But this strategy has been rejected in clear terms by the government, in a statement that is otherwise interesting for its ambivalence:

> We do not intend that preventing illegal working should be a focus of the Director or the labour market enforcement strategy. Where illegal workers are the victims of exploitation, we will still take action against the rogue businesses that are committing these crimes, and will continue to increase our efforts to support victims of modern slavery. However, the Government has concluded that it is still appropriate for labour market enforcement agencies to work with Immigration Enforcement (as they do now) to share information about illegal working. (*Response*, para 86)

There are two problems with this approach. One is that the effectiveness of the LME strategy (whatever its focus) may be much reduced in practice because irregular migrants will be too afraid to come forward. The other is that the LME strategy itself – despite the denials in the quotation – may eventually become subsumed by the immigration agenda. The government notes in the consultation document that migrant workers are at particular risk of exploitation (para 54), and this risk is clearly higher for irregular migrants because employers can use their fear of deportation as an additional means of increasing their vulnerability. It is hard to envisage the Director being able to put forward a coherent LME strategy that makes effective use of limited resources without making any reference at all to illegal working. The drafters' decision that the LME provisions were appropriate for inclusion within the scope of an Immigration Act is telling in itself.

A third and final point to note is what the Act means for the enforcement of labour law. It is by now well-known that the traditional method of enforcement, through individual litigation before the employment tribunals, is in a state of crisis after the introduction of fees. The number of claims has dropped by around 70% as a result (see, most recently, House of Commons Justice Committee, *Courts and Tribunals Fees*, Second Report of Session 2016–17, HC 167). Only the very highest-paid workers are now able to afford to litigate. The recognition that some workers are so vulnerable that it is not reasonable to expect them to enforce their rights through litigation can be traced back to the National Minimum Wage Act 1998. The 2016 Act continues this trend, by bringing together bodies with public enforcement roles and encouraging them (via the Director of LME) to pursue a co-ordinated enforcement strategy. This is to be welcomed. However, it is worth noting that we now have a labour law of extremes: individual litigation for the well-off, and public protection for the vulnerable. The enforcement options for people in between those two extremes remain very limited.

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