THE INSTITUTE OF EMPLOYMENT RIGHTS

Rolling out the Manifesto for Labour Law

edited by K D Ewing, John Hendy & Carolyn Jones

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The policy proposals contained in this report are presented to the labour movement as a collective contribution from the experts listed. The IER would like to thank all those involved for giving so freely of their time in developing and refining the ideas contained therein.

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Rolling out the Manifesto for Labour Law

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by John McDonnell,
Shadow Chancellor

Power in society, and in the workplace, has become increasingly concentrated in the hands of an elite few at the expense of the many. Today, the vast majority of workers have no say over their pay, conditions and the hours they work.

The world of work has changed dramatically in the last few decades, particularly in the last few years. But the reality is there is very little difference between workers queuing up forty years ago, hoping to get a day's work, and the people waiting for a text from their agency hoping for a shift for that day.

The main difference is that today there is a whole industry which has exploded to formalise, professionalise and profit from insecure work. The rise of the gig economy – insecure, precarious work with few of the rights and protections afforded to traditional workers – is evidence of just how our economy and our labour market is failing millions of people.

It is working people who have paid the price for years of labour market deregulation and anti-union policies, recognised as 'the most restrictive in the Western World.' We have a legal framework born out of 19th century conditions. It ignores today's economic and workplace realities and is not fit for purpose in 21st century Britain.

Over the past four decades there has been a steep decline in the share of national income going to wages, and a rise in insecure work, low pay and worsening terms and conditions. The UK has experienced one of the sharpest declines in union density in Europe – density in the UK fell from a high of 49.9% in 1981 to a record low of 23.2% in 2017. The result is that two thirds of our children living in poverty are in families where someone is in work.

Trade unions are the collective voice of workers. They play a vital role in determining not only what portion of national income goes to wages, but also in securing workplace rights and in ensuring safe working conditions. But with the restrictions on trade unions, collective bargaining coverage in the UK has fallen from 80% in 1979 to just 26% in 2017.

It is time for the law to change. As a Government in waiting, the Labour Party is committed to transforming the world of work. We want to develop not just secure, well-paid and fulfilling jobs, but to transform the working world so that everyone, regardless of their background, has a right to a healthy work/life balance, family time and personal

"We want to develop not just secure, well-paid and fulfilling jobs, but to transform the working world so that everyone, regardless of their background, has a right to a healthy work/life balance, family time and personal development."

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development. Whether you work in the care sector or the retail trade, in hospitality or agriculture, all workers – young and old – can benefit from a set of agreed sectoral standards below which no worker should be allowed to fall and in which everyone is protected from exploitation.

That's why I welcome this carefully thought out report from the Institute of Employment Rights. It provides a detailed analysis of how a willing Government could roll out the proposals set out by the Institute in its 2016 *Manifesto for Labour Law*. It also builds on the policy commitments in the Labour Party's 2017 Manifesto, *For the Many Not the Few* and sets out possible ways of implementation.

The detailed policy proposals contained in the report, drawn up by a specialist group of 26 of the UK's leading labour law experts, explains precisely what is needed to adapt the law to create fair, just, secure, democratic and productive conditions of work.

I want once again to thank the IER for its sterling work on behalf of our movement and state very clearly that we will continue working closely so that a Labour Government will work for the many, not the few.

John McDonnell

Shadow Chancellor

introduction

I

1.1 In the UK, the dismal plight of those who work (or seek to work) and their families is the subject of regular reports from the Office for National Statistics (ONS), comparative studies by international organisations such as the Organisation for Economic Cooperation and Development (OECD) and the International Labour Organization (ILO), and in frequent research papers by economists and other academics. Though this material is little-reported, the workers themselves, those who seek work, and their dependents are well aware of the bitter experience of working life in the UK today.

1.2 The UK workforce contains 32.34 million of our fellow citizens (another 1.42 million are looking for work). The conditions of life for them and the millions more who are their dependents are deeply affected by the depressed level of earnings of those in work, the limited amount of free time they have available for their families, and the impact on family life of their feelings of insecurity, lack of status and dissatisfaction with their working lives. And lurking in the shadows is the prospect (or the fact) of virtual penury for those who fall out of work.

1.3 The median wage is currently £23,200 annually. By definition, this means that more than 16 million workers earn less than that. Indeed, 20% of workers earn £15,000 or less. The real value of wages has not increased in a decade and, save for the highest earners, is not expected to rise for at least another decade (in the EU real wages have risen every year since 2013).[1] Wages are so low that most people receiving state benefits in the UK are actually in work. Children living in poverty in working families has increased in number from 3.1 million a decade ago to 4.1 million today.

1.4 The gross inequalities in earnings between the many and the few and between men and women in the UK significantly outstrips that on the continent. The proportion of GDP going to profits has increased year-on-year for nearly 40 years, a mirror image of the diminishing proportion going to wages (65.1% to wages in 1976, falling to 49.5% in 2017 – and this includes CEOs and professional footballers). More British workers are falsely self-employed, on zero-hours contracts, or work through agencies than are Europeans. 3.9 million workers are in insecure work, with precarious hours and precarious income.

1.5 The average British worker works longer hours per week, for more weeks per year and for more years before retirement than her European counterpart. Yet paradoxically, millions of UK workers do not work enough hours per week to make ends meet and are desperate for more hours. Unlike their counterparts in Western Europe, the vast majority of UK workers are excluded from any participation in decision-making about the conditions of their working lives. This democratic deficit in one of the principal activities to which humans devote much of their lives is not acceptable.

II

1.6 The grim reality is that British workers feel insecure, and most are dissatisfied with work. There is a lack of dignity and respect at the workplace, inadequate support for the disabled and those caring for children and an almost universal lack of opportunity for education, training and career progression. Most importantly, and a prime explanation for the miserable situation described above, collective bargaining in the UK has steeply declined for 40 years under relentless legal and policy assault. In 1976, 86% of workers had one or more terms of employment fixed by a collective agreement; coverage today is certainly no more than (the BEIS estimate for 2017 of) 26% but in reality probably closer to 20%.

1.7 The level of collective bargaining coverage in the UK has declined from being one of the highest in the world to now being one of the lowest in the EU (Lithuania is lower) and well below the 60+% EU median. This is not to celebrate the current position in the EU, where collective bargaining procedures are now also under sustained attack as a result of initiatives being undertaken by the European Commission.[2] It is one of the ironies of Brexit that on social policy, the EU is moving more in the British direction than vice versa.

1.8 Brexit, of course, introduces a new dimension to an already urgent situation. Despite the government's

promise that EU-derived workers' rights will be retained, it failed to provide any legal underpinning to this promise in the European Union (Withdrawal) Act 2018. But although Brexit thus puts at risk the European legacy of employment rights, it also provides opportunities under a different kind of government to be free of some of the labour law constraints imposed by the EU (such as the subordination to business freedoms of the human rights to collective bargaining and to strike, as shown in the *Viking* and *Laval* cases). However, a new government will then have to be astute to avoid labour law restraints inherent in the array of proposed bilateral trade deals.[3] That said, we do not under-estimate the problems of Brexit.[4]

1.9 One of many consequences of the collapse of collective bargaining has been that problems at work have ceased to be resolved by collective negotiation. In its absence, workers' only real alternative is to resort to the law. But that option is expensive, difficult, unpredictable, confrontational and exposes the individual to victimisation. Access to courts and tribunals is expensive for workers, unions and employers (even after the Tories' imposition of fees in tribunals was reversed by the Supreme Court), employment law is both highly complex and flawed in coverage, with odds stacked against workers, arbitrary limits on compensation and, even for the successful, many never receive the compensation they have won. Whilst rights are important, litigation is not the magic solution to solve the crisis of industrial relations.

1.10 The only benefit for workers from 40 years of neo-liberalism is that unemployment has reduced to the level of the mid-1970s. But that achievement is marred by the appalling quality, and the poor terms and conditions of the new jobs created. And the fact is that successive governments long ago abandoned the goal of full employment, preferring a policy of a permanent pool of unemployed so as to keep wage pressure down. As already pointed out, there are currently 1.42 million people over 16 who are unemployed and actively seeking work (580,000 of them unemployed for more than six months) – a huge wasted national asset.

III

1.11 There is no question but that the world of work in the UK is in crisis. The effect of this is a level of unhappiness, powerlessness, subservience, and loss of dignity which is reminiscent of the Victorian era. A transformation of working life in the UK is clearly crucially needed. The need to transform the depressing state of what commentators call the 'labour market'[5] led the Institute of Employment Rights ('a think tank for the labour movement') to assemble in 2015 a formidable team of eminent labour lawyers to create its *Manifesto for Labour Law: towards a comprehensive revision of workers' rights*, which was published in June 2016.

1.12 This was not the first time the Institute had reviewed UK labour law; it published *Working Life* containing a wide range of radical proposals for reform in 1996. Both publications were a recognition of the fact that the laws which regulate work, workers, unions and employers were largely responsible for the misery of workers and the inefficiency of the UK economy. A carefully calibrated revision of labour law is therefore capable of making a major contribution to the improvement of the conditions of life of millions of workers and dependants and to a thriving and fairer economy.

1.13 Many of the ideas in the *Manifesto for Labour Law* were subsequently picked up in the Labour Party's election manifesto for the June 2017 election, *For the Many not the Few* (FMNTF). The Green Party too adopted a number of the *Manifesto's* proposals. Since 2016, the Institute's team of expert authors (increased in number) have been working on developing some of the *Manifesto* proposals into a coherent, workable and attractive set of measures for a new industrial relations framework which, to adopt the Labour Party slogan, will work for the Many not the Few.

1.14 The particular areas covered are: the creation of a new government department to represent the interests of workers in government; a new system of economic governance that puts trade unions at the heart of decision-making at work; a new framework for sectoral collective bargaining to enhance the regulatory role of trade unions; better enterprise democracy and workplace recognition laws to boost the representative role of trade unions; and the radical reform of workers' rights, relating specifically to the employment relationship, zero-hours contracts, equality at work, health and safety regulation**,** and enforcement of workers' rights.

1.15 These proposals will involve a radical reconstruction of the architecture governing the work place which is a major contributor to the present unhappiness. Nonetheless, despite the right-wing media's anticipated characterisation of them, these measures are essentially a reversion to the post-war consensus that held sway in the UK, Europe and most of the developed world for much of the 20th century and which led to the most equal decade in history: the 1970s. The contents that follow are thus founded in the social-democratic tradition not only to advance social justice (being intended to redress injustice), but also on progressive economic theory (to serve the many not the few).

IV

1.16 The proposals in this book are intended to be compliant with the Conventions of the ILO, in particular those ratified by the UK. These are the minimum labour standards of the world thrashed out in the UN's tripartite organisation of governments, employers and workers, which celebrates its centenary in 2019. We propose that a progressive government should review the entirety of UK labour law to ensure compliance with ILO standards and to examine ways of embedding relevant ILO Conventions into national law so as to secure continued compliance in the future. Consideration should be given to the ratification of further ILO Conventions (starting with those denounced by previous UK governments over the last 40 years).

1.17 The authors are conscious that although the proposals in the pages that follow are wide-ranging, they are not exhaustive. It has not been possible to deal with every aspect of the law at work, for example, the law on internal trade union regulation, whistleblowing, blacklisting and the right to take industrial action. Nor is there detailed treatment of unfair dismissal law, though our proposals for a single worker status, the increasing role of sectoral collective bargaining for the resolution of disputes, and the radical overhaul of enforcement mechanisms will address most of the problems arising in that field, while other issues are addressed in the *Manifesto for Labour Law*.

conclusion

1.18 The pages that follow develop the principles and proposals set out in the *Manifesto for Labour Law*. We intend to return to deal with the issues that remain outstanding in what is a progressive and dynamic project.

CHAPTER TWO

a new government department

introduction

2.1 The re-creation of a 'Ministry of Labour' was envisaged by *The Manifesto for Labour Law* as an essential tool in bringing about the new architecture of the law at work. Without the driving force of a dedicated government department, these radical proposals cannot succeed. To be effective, the new department must play a prominent role at the heart of government and be led by a strong Secretary of State for Labour.

2.2 *The Manifesto for Labour Law* refers to the creation of a 'Ministry of Labour', a proposal that has been widely adopted by others. A Ministry of Labour was first created in this country in 1916,[6] before giving way to the Department of Employment, and being abolished by the Thatcher government. In the British constitutional system, little appears to hang on the name of a government department. We have a Home *Office*, a *Department* for Work and Pensions and a *Ministry* of Justice (performing work previously undertaken by the Lord Chancellor's *Department*).

2.3 We appreciate that the title of a department is ultimately a political matter, so for the purposes of this document we adopt the neutral term 'new government department' and leave it to government to decide whether it will be styled the Ministry of Labour or follow other countries with a Department of Labour, or indeed a Ministry of Employment, or perhaps a Department of Work.

functions

2.4 The proposed new department will be responsible for the implementation of the radical revision of labour law proposed in these pages in conformity with the UK's international obligations, thereby newly creating fair, democratic and economically progressive and productive arrangements between the UK's workers and their employers.

Amongst other things this will include the following tasks:

a To **roll out sectoral collective bargaining** coverage at industry-wide and at local level; to that end it will be responsible for the passage of a Collective Bargaining Act which will provide the framework within which the department will establish multi-employer, sector-wide bargaining machinery to negotiate minimum terms and conditions of employment and other matters of mutual concern and to ensure that they are observed.

b To encourage and **promote collective bargaining** at enterprise and workplace level without derogating from that which has been agreed at a higher level.

c To oversee all aspects of the UK's **industrial relations system** to ensure that it works fairly and efficiently for the benefit of workers, employers and the public interest, and where necessary take measures to avoid or resolve industrial disputes.

d To consult and make recommendations for legislation to provide a fair and simple **legal status** for workers and the rights they should enjoy.

e To establish a Commission of Experts to make recommendations for new legislation to protect **health and safety** at work (see Paragraph 8.30 below).

f To share responsibility for aspects of **National Insurance**, including the Industrial Injuries Advisory Council and the Social Security Advisory Committee.

g To take all necessary steps to facilitate the use by employers of **technological innovation** (including artificial intelligence) and to ensure that the community and, in particular, workers share in the benefits of increased leisure time (i.e. reduction of normal hours of work) without loss of pay or employment (rather than by enforced mass redundancies).

h To take measures to **improve work/life balance** and hence the quality of life outside work.

i To **reduce under-employment** on the one hand, **and address excessive hours** of work on the other.

j To **reduce**, as far as possible, **insecurity of income and jobs**.

k Through the roll-out of collective bargaining and other measures, to **increase the incomes** of the many (and hence increase demand in the economy).

l To **diminish inequality** of income in the workforce and to redress the proportion of GDP given to profits as against that given to wages.

m To **increase employment** in good and fulfilling jobs and to seek to eliminate unemployment.

n To supervise and make effective arrangements for the efficient matching of workers and vacancies through **Jobcentres**, employment businesses and **employment agencies**.

o To make arrangements with the Department for Education (DfE) for the provision and funding of **apprenticeships, and vocational training and qualifications**.

p To ensure that **private pension schemes** for workers are properly and fairly administered and are secure.

q To take measures including the introduction of **legislation to achieve equality** of treatment at work, equal pay for equal work, and the elimination of the gender pay gap; to ensure full and equal participation in work of those with disabilities, those from ethnic minority backgrounds, and those of differing sexual orientation.

r **Planning to eliminate skill shortages and surpluses** in consultation with unions, employers and other departments, and to ensure that the workforce has the skills, qualifications, education, training, apprenticeships and flexibility to grow a long-term successful economy in the UK and so improve the quality of work and life for all.

s To supervise, monitor and improve **international and UK labour standards** and laws (and labour standards and laws in other countries where they may affect industrial relations within the UK).

t To maintain a unified and properly resourced **Labour Inspectorate**, to ensure the full scope of workers' rights are enjoyed and enforced universally.

u To **encourage investment in efficiency, productivity, innovation, research and development** and to inhibit competition between employers by the exploitation of lower earnings and worse conditions of work.

v Participate with the Treasury and the Department of Business, Energy and Industrial Strategy (BEIS) in the creation of a **National Economic Forum** and a **National Joint Advisory Council** on which representatives of government, employers, unions and independent experts will sit to advise on and to promote measures which will create and sustain a fair, efficient and productive economy for the benefit of all in the UK.

w To promote the **policies and the legislation** necessary to achieve the above objectives (including enforcement powers in criminal law, attaching conditions to the award of public contracts, grants, exemptions and licences), and to intervene where appropriate so as ensure those objectives are met and continue to be met.

x To liaise with the Office of National Statistics to ensure full **statistical metrics** in relation to work are available.

y To **oversee the operation of National Joint Councils (NJCs)** to ensure efficient functioning – though the autonomy of the parties will be respected, as is the international requirement for voluntary collective bargaining. Apart from anything else it will be important to ensure that sectoral NJCs in which, for example, there is a high representation of part-time women workers do not operate to preserve an enclave of low pay and bad conditions.

z To establish a Commission to consider various aspects of employment law including (but not limited to) unfair dismissal, blacklisting and whistleblowing and a Commission to review the law on health and safety at work.

establishing the new government department

2.5 The creation of a new department can be achieved by the exercise of prerogative powers (powers vested in the Crown and exercisable by government without the need for legislation or even Parliamentary scrutiny), as well as statutory powers. The creation of the department and the appointment of a Secretary of State are prerogative acts. Other matters are governed by statute. These include the transfer of functions to the new department, the legal status of the Secretary of State, the transfer of property to the new department, the adaptation of any legislation relating to the work of the department, and the substitution of the new Secretary of State as a party in current legal proceedings.

2.6 The relevant statute for this purpose is the Ministers of the Crown Act 1975, (which expressly preserves the prerogative powers such as those referred to above). The 1975 Act authorises these different matters (such as the transfer of functions to the new department) be dealt with by secondary legislation in the form of Orders in Council. Except in cases of dissolution of departments (where draft Orders must be tabled), this is a straightforward procedure with the Order being laid subject to annulment by either House. The legal process of creating a new department is thus fairly straightforward involving a prerogative act with incidental matters dealt with by secondary legislation. There is no need for primary legislation, which is helpful for governments concerned about time and the risk of parliamentary obstruction. It does, however, mean that a new department can be abolished with relative ease.

2.7 In order effectively to carry out the various functions outlined above (some of which are novel but many of which are currently performed by other departments or agencies) there will be (i) a transfer of functions from a number of existing departments, with these departments shedding their labour-related responsibilities; and (ii) the need for liaison machinery created to deal with overlap between departments in other situations. The latter include the Home Office, the BEIS, the Department for Education (DfE) and the Department for Work and Pensions (DWP). In other cases, there will be close liaison between departments on Cabinet Committees and elsewhere, where responsibilities overlap, as in the case of the Treasury, BEIS, the Home Office and the Ministry of Justice (MoJ).

2.8 Apart from a transfer of functions from various departments to the new government department, there will also be a transfer of ministerial responsibility for a number of arm's length bodies, should it be decided that these bodies are to continue to perform the functions currently assigned. These include ACAS, the Central Arbitration Committee (CAC) and the Certification Officer (for employers' organisations and trade unions). But this too can be done with a minimum of legal formality. The major issues are thus political not legal: (i) in determining the boundaries of the new department, where there is overlap with existing departments; (ii) which functions are to be transferred to the new department; (iii) which functions are to be subject to joint determination; and (iv) where there is joint determination, which department is to have 'lead' status.

transferred functions

2.9 A key feature of the new government department is obviously to roll out sectoral level collective bargaining. This will require persuasion, indirect leverage and legislation. NJCs will be established in each industry. This will require strong teams from the new government department to consult apparently representative bodies and then to encourage and cajole employers' organisations and trade unions to meet together, agree scope, procedure, terms, application and enforcement. The NJCs will also be available for Ministers to consult as forums for forward industrial and economic planning.

Although not intended to be exhaustive, the following are examples of the functions that we would expect to be transferred to the new department:

International standards

The supervision of international labour standards and the monitoring of developments in other countries such as in relation to labour standards in supply chains would require a unit in the new

government department to liaise with the Department for International Trade, the Foreign & Commonwealth Office (though we understand that it has little responsibility for trade nowadays) and BEIS. The anticipated requirement of certification of relevant standards for goods, services and transport coming into the UK and the attachment of conditions to licences would also require such liaison units.

Low pay and labour statistics

The new department would appear to be the natural home for the Low Pay Commission (LPC) currently in the BEIS, should the LPC continue to be required in the new architecture. Likewise the Office of Manpower Economics (also currently in BEIS) should be in the new department, which will also need a unit to liaise with the Office for National Statistics to ensure that it has access to data from the Labour Force Survey, Workplace Employment Relations Survey and other relevant data. Amongst other things, it will wish to ensure that economic data by sector matches the sectors in which collective bargaining will take place.

Unemployed workers

Jobcentres currently come under the DWP mantle. They too might be better under the new department (where they started). So might increased supervision of employment businesses and employment agencies. Amongst other things, the department could ensure that only sectorally agreed rates and conditions were advertised by prospective employers or accepted by workers. The new department might then also take responsibility for units to assist in finding new employment for people leaving the armed services (currently the Ministry of Defence's responsibility) and those leaving prisons and mental health institutions, and homeless people seeking work (much of which currently is the responsibility of the Home Office).

Occupational pensions

Pensions are now under the DWP. There is a demarcation line between state pensions and private pension schemes on the one hand, and corporate pension schemes on the other. The removal of corporate pension schemes to the new department might be the best way forward, given that it is hoped that collective bargaining will resolve many of the current controversies which arise in relation to employers' pension schemes. State pensions would remain with the DWP. But consideration needs to be given to the transfer to the new government department from the DWP of a number of pensions oversight and regulatory bodies, notably the Pensions Advisory; the Pensions Regulator; the Pension Protection Fund Ombudsman; and the Pensions Ombudsman.

Labour Court, Labour Inspectorate, labour standards

The complementary creation of a Labour Court would be in the hands of the MoJ, although liaison between the new government department and the MoJ over jurisdiction, enforcement, and appointments would be essential. The proposed unified Labour Inspectorate would need to combine under its umbrella the following:

- Health and Safety Executive (currently in the DWP),
- National Minimum and Living Wage Enforcement Teams (currently HMRC, Treasury),
- Gangmasters' and Labour Abuse Authority (currently Home Office),
- Independent Anti-Slavery Commissioner (currently Home Office),
- Employment Agency Standards Inspectorate (in BEIS), and
- Director of Labour Market Enforcement (BEIS, it is understood).

The new department would also need a specialist prosecution arm, independent of the Crown Prosecution Service (CPS) and the police, to carry out prosecutions of offences found by the Labour Inspectorate.

The Rail Accident Investigation Branch, Air Accidents Investigation Branch, and Marine Accident

Investigation Branch are all currently in the Department for Transport. It would make sense if the state's investigators of unfortunate events in these industries were in the same section so as to share knowledge and expertise. Virtually every accident investigated by these branches involves workers. The Labour Inspectorate would be an appropriate home.

relations with other departments

2.10 It is proposed that the new department will also create national level, cross-sector architecture to involve unions and employers in the development and delivery by the department of employment policy and labour standards and to form the basis of the National Economic Forum. Of course, these structures will hopefully link with the industrial strategy being developed by BEIS and the economic strategy being developed by the Treasury. But the unique selling point ('USP') of the new department is that it will be the natural place where the representatives of workers and employers meet, discuss and reach agreement. A liaison unit within the new government department to work with BEIS and the Treasury on strategic issues is therefore proposed.

Again, without intending to be exhaustive, other key liaisons between the new department and existing departments include the following:

Training and apprenticeships

The new department will need a dedicated unit to liaise with the DfE over training and apprenticeships – important aspects of which should be the subject of sectoral collective bargaining, including defraying the costs thereof by the relevant industry with the burden distributed in a fair way by agreement and the approval of the new department which, of course, will be concerned about prospective workforce planning. On the other hand, the DfE, with its responsibility for universal oversight of education from cradle to grave, must be involved in every question which may have implications for state funding or the use of public educational facilities.

There are clearly issues as to how specialist vocational training needs to be provided before the obligation to fund and provide facilities for it should pass from the state to the user industry. Nonetheless, the presence of the Construction Industry Training Board and the Engineering Construction Industry Training Board both currently in the DfE seems anomalous and might be better transferred to the new department. Whether the Institute for Apprenticeships is better to stay with the DfE or come to the new department is moot.

Social security and pensions

The DWP is responsible for social security, including universal credit. This latter has been catastrophic and the ethos of the DWP (captured in *'I, Daniel Blake'*) is perceived to be to save Treasury resources by imposing penal sanctions and impossible hurdles to claim benefit. The DWP should be re-named and its culture changed. Perhaps the 'Department of Social Security' (as it was once called) would better serve. It should focus on ensuring that those who need state support receive it.

National Insurance should be at its heart, as Beveridge planned. The DWP should thus retain the Industrial Injuries Advisory Council and the Social Security Advisory Committee, though the new department will have an interest in both. The new department will need a strong unit to liaise with the DWP since both have a mutual interest in incomes rising high enough to eliminate the payment of in-work benefits. Collection of National Insurance is a matter for the HMRC under the mantle of the Treasury.

Redundant functions

The proposals that follow relating to collective bargaining in particular will not only create new functions for and the transfer of functions to a new government department. They will also render some existing functions of government departments redundant, and will invite a review of whether some agencies and public bodies should survive.

The agencies in question were created in a different climate for purposes that may cease to exist. Notable examples are the large number of pay review bodies in the public sector. These include the Police Remuneration Review Body (Home Office), the Teachers' Pay Review body (DfE), the Prison Service Pay Review Body (MoJ), the NHS Pay Review Body and the Review Body on Doctors' and Dentists' Remuneration (both Department for Health), the School Teachers' Pay Review Body (DfE), which may all be abolished in favour of restored collective bargaining in those sectors.

There are services (like the military) where politics dictate that the right to strike should not be restored. In these services, a disputes procedure ending, at the request of either side, in independent, impartial, speedy, binding arbitration by an agreed arbitrator in which both sides have confidence (these are the requirements of the ILO) should be imposed, supervised by the new department.

conclusion

2.11 The purpose of a new department is to give workers a voice in government and to plan for the future workforce. Under the current structure of government, workers' interests are represented by BEIS. This is clearly unacceptable. But the purpose is also to meet a clear policy need, which will be to drive forward a radical programme for economic restructuring and the extension of workers' rights. Although the foregoing provisions of this chapter have been concerned with technical legal questions, these questions need to be addressed if this progressive programme is to be delivered.

CHAPTER THREE

economic governance: sectoral collective bargaining

introduction

3.1 The Institute of Employment Rights has advocated for the re-introduction of sectoral bargaining for many years.[7] It was, after all, the dominant form of industrial relations for three-quarters of a century in the UK. It remains the dominant form in Western Europe, particularly in the most successful economies such as Germany, Norway and Sweden. It was the crucial device which extricated the capitalist world from the Great Crash of 1929 and the depression in the 1930s which followed.

3.2 At the 2017 general election, the Labour Party manifesto, *For the Many not the Few*, undertook to 'roll out sectoral collective bargaining – because the most effective way to maintain good rights at work is collectively through a union'. It was not explained how the roll-out would be achieved. The IER *Manifesto for Labour Law* in 2016 had, of course, proposed the roll-out of sectoral collective bargaining. It also suggested how it might be implemented. Heartened by the support of Labour and other political parties for the restitution of sectoral collective bargaining, this chapter enlarges the proposals in the *Manifesto for Labour Law*. We have also been encouraged by the fact that some bodies formerly supportive of deregulation of labour standards seem now to have recognised value in collective bargaining.[8]

3.3 The *Manifesto for Labour Law* sets out as 'four pillars' the reasons why it is essential for the UK to improve collective bargaining coverage and to do so by a system of sectoral bargaining (on which enterprise-level bargaining can be built).[9] Below, we only touch on these reasons in passing. They are:

- to achieve democracy at work;
- to rebalance justice at the workplace;
- to create economic efficiency at establishment level and for the economy as a whole;
- to conform to international law.

3.4 Instead, we focus on the question of how the proposal for sectoral collective bargaining can be 'rolled out' in practice. We propose a new Collective Bargaining Act and consider the issues which the proposed new government department would have to address to make this proposal effective and the features of the legislation necessary to make it work.

sectoral bargaining

3.5 Collective bargaining is the process of negotiation between representatives of a trade union (or several) on the one hand and representatives of an employer (or several) or an employers' association (or several) on the other. The two sides sit down together to negotiate and try to agree the terms and conditions on which employer(s) will employ, and the workers concerned will work.[10] The tradition (in the UK and most countries) is that the collective agreement which results is applied to all the workers concerned, whether or not they are members of the union.

3.6 Collective bargaining can take place in respect of one workplace or one employer (enterprise-level bargaining) or several employers or across an entire industry (sectoral bargaining). Sectoral collective bargaining is collective bargaining in which representatives of the workers and of the employers across a particular sector or branch of the economy negotiate the minimum terms and conditions to apply in that industry. Obviously, it is crucial that those terms and conditions are binding on all employers and all workers in the sector. Sectoral collective bargaining is an easy concept to understand but has become, over the last 40 years, unfamiliar to many as government policy has swept away many previous industry-level agreements.

3.7 Sectoral collective bargaining does not remove the desirability of enterprise-based bargaining. The latter, of course, also fulfils the need for worker voice and the members of the bargaining unit are usually much closer to the negotiators than is often the case in sector-level bargaining. Enterprise-level bargaining can usefully build on the base of minimum levels set sectorally. So sector-level and enterprise-based collective bargaining work well in tandem. But it has to be recognised that bargaining on all aspects of terms and conditions, enterprise by enterprise, is more demanding of resources. It also has the disadvantage that (without sectoral minima) it fails to prevent employers seeking to compete with each other by undercutting wages. The prevention of undercutting is an important attraction for many employers as is the fact that sector-level bargaining is (as economic research shows) the only way of raising the value of real wages on a sufficient scale to reinvigorate the economy and significantly reduce inequality. It is the destruction of sectoral collective bargaining that has led to the fall in the real value of wages over the last decade and a half.

3.8 Nor does sectoral collective bargaining remove the need for minimum standards set down in legislation. It builds upon these statutory standards and ensures the floor does not become the ceiling. We propose (see below) that a wide variety of aspects of the employment relationship should be the subject of sectoral collective bargaining (from pay to pensions, from hours to holidays, from equal opportunities to dismissal procedures, from numbers of apprenticeships to permissible forms of employment relationship). This should diminish the need for the vast array of legislation currently regulating work and it certainly will diminish the number of cases in which workers are forced to litigate in order to seek to obtain that to which they are entitled.

sectoral bargaining and a progressive economy

3.9 It is a fact that the continuing fall in the real value of wages, driven by the austerity doctrine of neo-liberalism, has depressed the economy. It has also led to the rise of in-work state benefits to subsidise low wages whilst at the same time diminishing the tax generated from working class wages. These consequences of low wages are amongst the principal reasons for the increase in the government deficit which the neo-liberals proclaimed their policies would reduce. Collective bargaining in contrast raises wages (the so called 'union premium'). This expands demand, invigorates the economy, decreases state expenditure on benefits and increases state revenue through tax. This is beneficial for employers as a whole, as well as, of course, for workers and the state, a thesis now generally accepted and supported by economic rese arch over many years.[11]

3.10 Another of the most obvious yet profound effects of sectoral collective bargaining is that it diminishes the risk of competing by undercutting wages and associated benefits. While it is true that sectoral bargaining will lead to terms and conditions being set only at minimum levels, it is also true that the impetus to save on wages and with it the threat of undercutting is most acute at the lowest wage levels. Hence, minimum rates set at sectoral level help to create a fair rate and a level playing field below which no employer in the sector may fall. This was the argument which persuaded employers and Parliament to extend Wages Councils over a century ago. One consequence of this is that as competing by use of low wages is discouraged, employers will tend to compete by investing in efficiency, productivity, research and development.

3.11 Low wages encourage workers to leave one job in order to exploit any slight benefit offered by another job (even one on lower wages if it is offset by other incidentals such as lower travel costs). This is a disincentive to expenditure on training, and mirrors workers' lack of loyalty, commitment and self-worth in low-paid jobs. Lack of investment is one of the principal reasons for the flat-lined productivity of the UK compared to all major competing nations. Sectoral collective bargaining thus helps make for a more stable and committed workforce.

3.12 Another important consequence of sectoral collective bargaining is that the commercial advantage in importing (and sometimes trafficking) cheap labour from abroad is eliminated since all workers are entitled to the same minimum rate for the same job irrespective of nationality. This would diminish one of the irritants tending to racism in UK society.

3.13 The collective bargaining dividend is thus high: fair standards, discouraging undercutting and the race to the bottom, and higher productivity. As much evidence also shows, extensive collective bargaining coverage additionally reduces inequality of income.[12] Higher inequality is bad for the poor but as Richard Wilkinson and others have shown, inequality is bad for the rich as well.[13] It tends to be associated with lower and less sustainable growth in the medium term. This is also true of the effect of the damaging and morally unacceptable gender pay inequality (differential rates of pay for work of equivalent value) and the gender pay gap (long-term differential earnings between women and men of initially equivalent qualifications, reflecting lack of promotion by reason of child-rearing). Long periods of rising inequality can increase the risk of economic crises, as they may induce the poor to over-borrow from the rich. Inequality diminishes social mobility and hence restrains meritocracy and it perpetuates the inefficient use of the human resources of society.

sectoral collective bargaining in the past

3.14 In the UK, high levels of collective bargaining coverage were achieved in the 20th century by a variety of measures promoted by consistent government policy. Before that, especially towards the end of the 19th and in the early 20th century collective bargaining had been achieved sectorally at district and then at national level (as well as at enterprise level) as a consequence of often bitter industrial disputes. The avoidance of such disputes (such as between 1910 and 1913) and the object of setting terms and conditions on a sector-wide basis then became government policy, particularly reinforced by the need for cooperation in production for the war effort between 1914 and 1918.

3.15 Early intervention by the government in the form of the Fair Wages Resolution of 1891 and the Trade Boards Act 1909 were concerned with the question of 'sweated labour', that is to say what might be referred to today as the worst forms of exploitation. The state was also concerned to resolve industrial disputes – see the Conciliation Act of 1896. After the end of the First World War, the focus of government turned to building machinery for the setting of terms and conditions of employment voluntarily by trade unions and employers together. The principal means was to be through the establishment, driven by government policy, of National Joint Industrial Councils (JICs) following the Whitley Committee Reports of 1917 and 1918 (part of post-First World War reconstruction), and again from 1934 as part of the response to the then global economic crisis.

3.16 The development of sectoral regulation was far from unique to the UK. Other than in the Soviet Union and Nazi Germany, sectoral collective bargaining was one of the principal means adopted by many countries to respond to the challenges of the Depression and subsequently the Second World War. In Europe, the United States and Australia, sectoral regulation was promoted and established by government policy, sometimes by legislation (as in Ireland, Australia and the US), sometimes by a national collective agreement (as in Norway and Sweden). Sector-wide collective agreements remain the norm in Western Europe with high levels of collective bargaining coverage. As a consequence of these policies, by the mid-1970s over 80% of workers in the UK were covered by collective agreements, most by sectoral agreements. Many of those covered enjoyed terms and conditions which were enhanced by enterprise-level agreements.

3.17 This system of industry-wide collective bargaining came under great pressure from the 1960s onwards, as a result of pressure for different reasons from governments, employers and trade unions. But an important factor in the move towards a decentralisation of collective bargaining from the sector to the enterprise was the pressure from inward investing corporations, unwilling to engage in multi-employer activities, preferring (in the case of US companies in particular) to apply the industrial relations practices in the UK that they were familiar with in their home state. For the American companies, this meant enterprise-based bargaining, which gave the individual employer more control over the process and its outcomes. Since the early 1970s, public policy has typically supported this demand, with legislation designed to facilitate bargaining at enterprise rather than sectoral level. From 1980 onwards public policy ceased to support collective bargaining at any level (save for the introduction of the flawed recognition machinery in 1999).

sectoral bargaining and Wages Councils

3.18 In the present context, Wages Councils merit a particular mention. This was collective bargaining imposed by legislation. Wages Councils were originally known as trade boards and not renamed until 1945. As we have seen, they were initially designed to deal with sweated labour (in four trades only), until they were revamped in 1918 as a conscious underpinning of the sectoral collective bargaining arrangements through JICs. The Minister of Labour was given statutory power to establish a Wages Council in a particular sector in which there appeared to be no or no effective voluntary collective bargaining, typically low-pay sectors where unions had little or no presence.

3.19 The scope of collective bargaining in Wages Councils was statutorily defined and did not extend much beyond setting wage rates (such as standard hourly rates for the various grades and occupations; differential rates for night work, overtime, waiting time, and travel; hours of work; holidays and holiday pay; permitted deductions for housing; and other basic issues). Each Wages Council consisted of an equal number of employers' and union representatives plus three independent members. The industrial parties negotiated terms and conditions for the relevant industry. Only if agreement could not be reached could the independent members cast votes, which would thus resolve disagreement between the arguments of the two sides.

3.20 The agreement reached in each council in each year was made into an Order by the Minister and it was a criminal offence not to abide by it. A worker could also make a civil claim for failure to pay the appropriate rates.[14] By 1954, 3.5 million workers were protected by Wages Councils. That figure had not changed a decade later, and in 1980, some 11% of the workforce was covered by a Wages Council. Thus, collective bargaining and Wages Councils combined reached some 82% of British workers in 1980, a figure which had remained fairly stable since the end of the Second World War when the joint coverage was reported as being 86%. In 1993 the Conservatives abolished all but the Wages Councils in agriculture, after having denounced ILO Convention 26 which had imposed an obligation under international law on previous governments to maintain collective minimum wage-fixing machinery.

3.21 At the same time, the Conservatives also revoked the Fair Wages Resolution, which had been revamped in 1946 to require government contractors more clearly to follow collective agreements in determining terms and conditions of employment. This regulatory cull left one Wages Council in existence in England and Wales, this being the Agricultural Wages Board. This in turn was abolished by the Coalition government in 2013, with the effect of significantly increasing rural poverty and employer exploitation of trafficked workers in particular. The Agricultural Wages (Scotland) Act 1949 (now a devolved matter) continues to function, and by the Agricultural Sector (Wales) Act 2014 the Welsh Assembly used devolved powers to create an Agricultural Advisory Panel for Wales, thus demonstrating the continuing value of such structures.

collective bargaining today

3.22 The practice over recent decades, promoted by government policy, has been:

- to abolish Wages Councils;
- to eviscerate sectoral agreements in the public sector;
- to encourage derecognition of unions in the private sector;
- to remove all the supports (statutory and policy-based) to collective bargaining;
- to decentralise any remaining collective bargaining to the level of the company; and
- to impose statutory restraints on trade unions to preclude their ability to resist derecognition or to extend or enforce collective bargaining.

3.23 Public ownership and a planned economy, though tolerated in times of war, were anathema to a group of thinkers who, in 1949, planned a neo-liberal resurgence. Renewed emphasis was given to traditional neoclassical economists' arguments that collective bargaining and labour rights violated the natural law of the market and caused serious economic damage.

3.24 Three decades later, the neo-liberal revival moved from theory to practice in the UK when in 1979 the newly elected Tory Government adopted it (as did the Reagan administration in the US). Since then, macro-economic policy has been dominated by monetary control targeted at inflation, whilst responsibility for industrial performance has been increasingly delegated to the market. To increase labour market flexibility and to allow employers to focus on the reduction of wage costs in order to increase price competitiveness, full employment was abandoned as a policy objective, out-of-work benefits were reduced, legal regulation of minimum labour standards was relaxed, collective bargaining was systematically dismembered and trade unions were increasingly regulated – so weakening their ability to resist. In contrast, product markets and businesses were deregulated and taxation of business and the rich were cut to 'encourage enterprise'.

3.25 In consequence, the level of collective bargaining of the UK workforce has suffered catastrophic destruction from some 86% in 1976 (82% in 1979) to just over 20% today. This decline, even after the introduction of the statutory recognition procedure of 1999, has not reversed, halted or even slowed. Nevertheless, there remain sectors where there are still (or have recently been) functioning sector-wide collective bargaining arrangements. This is true of much of the publicly provided services sector where sector-wide arrangements are or were in place until recently. However, it is notable that government, local authorities, NHS employers and other public employers have sought to undermine collective bargaining structures, refuse to negotiate various matters (such as pay) and seek to impose variations to terms and conditions without agreement. In some public sectors, government has effectively displaced collective bargaining on pay by instituting pay review bodies as well as by the imposition of the public sector pay cap.

3.26 As a consequence of privatisation and out-sourcing, many public services are nowadays operated by private companies. Here, the sectoral agreements have largely ceased to have application.[15] In the case of the private sector more generally, much sector-level bargaining has been destroyed but examples remain. One such is the National Agreement for the Engineering Construction Industry (NAECI), which sets comprehensive terms and conditions of employment for hourly-paid engineering construction workers throughout the UK. Terms are negotiated in a National Joint Council between, on the one side GMB and UNITE, and on the other the Engineering Construction Industry Association, the Electrical Contractors Association of Scotland and the Thermal Insulation Contractors' Association. Other examples are the Electrotechnical Joint Industry Board (JIB) (which comprises several sub-sector agreements) in electrical contracting; and the Paper Making Partnership agreement in the paper making industry. There are national agreements in several other industries, for example, professional football and in film, theatre and TV production.

3.27 The legal architecture proposed by IER – a new government department, sectoral collective bargaining and high labour standards properly enforced – provide a machinery by which the major issues facing industrial relations can be faced in the 21st century. Apart from income inequality and the gender pay gap, one such problem is that of the impending explosion in the use of artificial intelligence (AI), algorithms, new technology and so on. Unless planning is undertaken and provision is made, the consequence of the spread of AI will be to cause massive redundancies and a dramatic climb in the number of unemployed. Collective bargaining under the watchful eye of the new government department can ensure that the consequence of automation is a significant decline in working time to the benefit of humanity – and the avoidance of political instability, which may threaten those who would otherwise exclusively reap the benefit of technology replacing humans.

3.28 It is in this context that the proposals in this paper, elaborating on those in the *Manifesto for Labour Law,* must be seen. From an economic perspective, the programme here proposed has two primary objectives: one productive and one protective. The productive role is in creating the conditions in which the capabilities of working people are fully developed and used to secure the highest possible level of economic and social well-being. The protective role is in preventing the abuse of power both by private interests and the state which, by concentrating the costs of change on workers, and especially the most vulnerable amongst them, destroys the basis for realising the full productive potential of workers and work organisation. Of course, these two roles are inextricably linked. They require:

- New forms of economic governance and the re-establishment of the rights of collective bargaining over the terms and conditions of employment and the organisation of work;

- The restoration of sector-wide agreements, with guaranteed autonomy and independence from the state (save in relation to the enforcement of agreed terms);
- The development of forms of participatory work organisation based on the close involvement of workers at all levels in the organisation and management of production;
- A new settlement of workers' and trade union rights to rectify the imbalance in power in the enterprise and in the organisation of work.

3.29 Such measures have, as indicated above, significant benefits for employers and the state. Apart from being mechanisms to secure the cooperation of workers and to achieve efficient production, they mitigate, by imposing minimum standards on all relevant employers, the distorting impact of competition between employers seeking to undercut labour costs (in terms of pay and conditions). Sector-wide standards also protect against the pressures on management of dominant suppliers, banks, regulators – and government. As a mechanism to prevent what the Europeans call 'social dumping' (i.e. undercutting lower wages and conditions), extensive sectoral collective bargaining increases consumer spending, which in turn increases demand in the economy, decreases the take up of in-work benefits (state subsidy of low wages), and increases the tax take of the state as incomes rise.

3.30 The new industrial relations programme, of course, cannot be seen in isolation from other economic strategies which are necessary for productive efficiency and social inclusion. But it will play a crucial role.

conclusion

3.31 The roll-out of sectoral collective bargaining can only be achieved by law and sustained government policy; it cannot be left to the 'labour market.' This is the experience of the past (see above). To achieve collective bargaining and agreements on a sectoral basis, therefore, we propose a 'Collective Bargaining Act.' In each sector of trade and industry, we propose that the Secretary of State for Labour will arrange for the representatives of the two sides to form a joint committee to negotiate and set minimum terms and conditions across the sector. Each will be called, as in the past, 'the National Joint Council for the [insert] Industry]' (NJC). Each would be a committee consisting of equal numbers from both sides of industry (with the possible inclusion of three members appointed by the Secretary of State – see below).

3.32 The primary responsibility of NJCs will be to:

- Establish collective bargaining machinery;
- Negotiate substantive collective agreements;
- Administer collective agreements;
- Resolve disputes in their sector between employers and trade unions, and between workers and employers; and
- Represent the interests of the sector to various government departments, not least the new government department.

3.33 The first task of an NJC would thus be to negotiate a procedural collective agreement for the particular industry to govern how the NJC will work for the future. Thereafter, the NJC will negotiate the substantive sectoral collective agreements which will set the minimum terms and conditions for the sector.

CHAPTER FOUR

a collective bargaining act

introduction

4.1 The tasks facing the new government department are daunting, particularly in the context of Brexit and an economy in which manufacturing, investment, productivity, research and development have been downgraded over 40 years of neo-liberalism. The roll-out of sectoral collective bargaining will require determined leadership, persuasion and diplomacy from the new department supported by a dedicated team of civil servants, Labour Inspectors and a Labour Court. But where persuasion and diplomacy are insufficient to establish functioning collective bargaining in a particular industry then the powers which the Collective Bargaining Act will provide must be sufficient for the Secretary of State to impose a fully functioning and representative National Joint Council (NJC). A number of issues arise.

setting up an NJC

4.2 We propose that the Act would place the primary responsibility for establishing a statutory NJC on the Secretary of State. In deciding to set up an NJC she could act:

- on her own initiative; or
- at the joint request in the sector in question of a trade union or a group of trade unions and an employer or an employers' organisation; or
- at the request in the sector in question of a trade union or an employer.

4.3 We envisage that the legislation will enable an NJC to be established if the Secretary of State is satisfied that either:

- no effective collective bargaining takes place at sectoral level; or
- such collective bargaining as takes place in the sector is not sufficient to establish minimum terms and conditions for the sector as a whole in relation to the mandatory matters (specified below).

4.4 Without in any way constraining the identification of sectors in which an NJC should be instituted, we think that in making initial decisions about where to establish an NJC, the Secretary of State would wish to give particular consideration to sectors where:

- A significant proportion of workers are in households receiving state benefits (i.e. where it appears the state is subsidising low wages);
- The level of median earnings has significantly fallen below the RPI;
- A significant proportion of employers (in terms of numbers employed, market share, turnover) receive state subsidy;
- A significant proportion of operations in the sector are licensed by the state;
- A significant proportion of economic activity in the sector is in consequence of public contracts.

4.5 As noted above, where an existing sectoral arrangement is in place but some important aspect of collective bargaining (having regard to the list of mandatory subjects below) is excluded from bargaining, the Secretary of State may consider intervening to persuade and ultimately to require that the item in question is added to the list of matters to be the subject of bargaining.

4.6 **The Secretary of State will be anxious, however, not to take steps which may prejudice sophisticated collective bargaining arrangements built up over many years with which trade unions and employers are content**. Obviously, where there already exists successful sector-wide bargaining, there will be no need for intervention by the Secretary of State for Labour. Where, however, sectoral agreements exist but fail to deal with important matters, such as pay, the legislation we propose will provide powers for the Secretary of State to intervene to ensure fully effective collective bargaining. In such a situation, it is envisaged that this will usually only be at the request of one or both industrial parties.

seats at the table

4.7 NJCs should be composed of equal numbers of worker and employer representatives. The former should be nominated by trade unions and the latter by representative employers' organisations.[16] The size of the NJC will be a matter for the new department so some may be larger than others in order to accommodate the diversity of circumstances in the sector. Appointments should be for a fixed, though renewable term, and removal should only be permitted by the appointing side unanimously or by the NJC by a two-thirds majority. The Secretary of State should not have the power of removal save for bad behaviour (i.e. the same standard as for the removal of Judges).[17]

4.8 In relation to new NJCs, the Secretary of State will decide whether it is desirable to include three independent members, appointed by the Secretary of State and consisting of a chair and two assessors – one representing the employers in the sector and one the workers. The chair would be drawn from a panel jointly agreed by the two sides in the sector.

4.9 If independent members are to be consulted by the Secretary of State, they would only have a vote in the event of deadlock between the representative members of the NJC. They would thus act as a form of arbitration which would, at sectoral level, resolve all disputes. The Secretary of State would also have the power to impose the three independent members in existing (voluntary) NJCs. This would be rare and only in extreme circumstances.

employer non-engagement

4.10 What happens if the parties refuse to cooperate? In truth, this is a problem most likely to be encountered with employers: history records few instances of trade unions refusing to engage in collective bargaining. The answer to this problem is that employer representatives would be elected, selected from or nominated by employers' associations where they exist, failing which representative bodies of employers in the sector would be invited to nominate appropriate persons. In the event of employers in any sector refusing to cooperate, it would be necessary for the new department to have the statutory power to appoint persons it considered representative of employers in the sector. It is unlikely that employers would refuse to take part in a process where the alternative was the imposition of terms and conditions over the content of which they had no say.

4.11 Employers' associations are defined as bodies whose 'principal purposes include the regulation of relations between employers of that description or those descriptions and workers or trade unions'.[18] The Certification Officer currently records 91 registered employers' associations and 39 unregistered. We do not take this as evidence of a decline in the capacity on the employers' side to engage with initiatives of the kind considered here. There are dozens of employers' organisations in almost every conceivable sector of industry formed for mutually beneficial purposes such as lobbying government. These organisations would be well capable of adapting to take on collective bargaining functions.

4.12 The state also has leverage over employers which could be exercised to ensure that employers cooperate. The state can impose conditions on the issue of licenses and franchises to provide public services, as well as in the conditions in public procurement contracts with government departments, local authorities and all other public bodies. This leverage could also be applied along the length of the supply chains relating to these licensees, franchisees and contractors. It would be a term of the licence, franchise or contract that the party in question is required (a) to participate in and abide by sectoral bargaining arrangements; and (b) take supply chain responsibility to ensure that contractors and subcontractors do the same. The Collective Bargaining Act would make provision for this.

trade union competition

4.13 A converse issue is in relation to trade union representation where more than one trade union operates or wishes to operate in the sector in question.[19] In other words, there is the possibility of the old problem of inter-union competition and rivalry, a problem faced and dealt with under the old Wages Councils. The issue arose also at the time the statutory recognition procedure was introduced in 2000, with several unions potentially seeking recognition from the same employer. But it is clear that fears that this would be

a significant problem were misplaced, though the TUC Disputes Principles and Procedures were revised in anticipation of any problems that were likely to arise.

4.14 The answer we propose to the problem of inter-union conflict is (a) a statutory requirement that before acquiring representative status, trade unions seek to resolve any competing claims (for example by agreeing joint representation); and (b) a revamping of the TUC Disputes Principles and Procedures to enable sectoral bargaining representation issues to be arbitrated effectively. The latter should not give rise to any problems, given that the existing TUC principles and procedures have their origins in the TUC Conference at Bridlington in 1939, when sectoral bargaining in National Joint Councils was being actively promoted by the then Ministry of Labour.

4.15 Where, in the same sector, different unions organise different categories of worker, some problems of representation can be avoided by the NJC establishing sub-sector councils to deal with the different categories. Thus, in the print media there would be likely to be separate sub-sectoral bargaining for the print workers, for the administrators and for the journalists. In other NJCs, the trade unions concerned might reach agreement as to joint representation.[20]

4.16 Ultimately, however, in the event of irreconcilable disagreement on either the employer or the union sides, the Secretary of State would have the statutory power to appoint (no doubt after involving ACAS) persons who appeared to the Secretary of State, after consultation, to be most appropriate as representative of one side or the other.

identifying a sector

4.17 Setting the boundaries of a sector is a thorny question that will have to be addressed by the Secretary of State after consultation with all the unions, employers and bodies which seem relevant to her in that potential sector. A 'sector' will thus be a trade, industry and/or occupation or parts of a trade, industry and/or occupation which is so designated by the Secretary of State after consultation with those parties which appear to her to be representative.

4.18 In terms of templates for this purpose

- One possible starting point would be the formal categorisation of sectors used by the government for various purposes, such as by the Office for National Statistics (ONS) for trade statistics, or the Standard Occupational Classification (SOC) of jobs, which is used for the Annual Survey of Hours and Earnings (ASHE) and the Labour Force Survey (LFS). However, the risk with adopting a categorisation devised for other purposes is that it may bear little relationship to industrial organisation.
- An alternative would be to start with the existing structure of trade unions and employers' associations. Though it is to be noted that few are exclusively sector-based, many do not follow a neat industrial logic and some cut across several sectors (though with, typically, sectoral structures operating within them). Nonetheless, the organisation adopted by industrial parties may be a useful guide in some cases to producing a rational framework.

4.19 It is to be noted that after nearly 40 years of privatisation, most sectors which provide for public services will contain both public and privately operated services. Thus, many sectors will contain both public and private employers.

4.20 That said, there will be a measure of urgency in relation to some sectors where it is likely that early decisions will need to be taken. It is thus clear that certain sectors, by reason of the public interest in protecting vulnerable workers and ensuring stability in economically precarious industries, will be at or near the top of the list of NJCs to be created as a matter of urgency. Obvious examples are: the adult social care sector;[21] the childcare sector; delivery riders and drivers; hotel and catering (especially fast food) sector(s); the retail sector; agriculture in England; taxis and private hire vehicles; and cleaning. No doubt many more will come to the mind of the Secretary of State. It will be inevitable in terms of resources (as well as politically prudent) that sectoral collective bargaining be introduced in these priority sectors before rolling it out more widely. Universal coverage will take many years. It may also be prudent to include in the priority sectors at least one where there is a strong union presence. The postal

and delivery sector might be one such.[22]

4.21 Inevitably, there will be arguments about whether a particular economic activity should be within one sector or another. Likewise, controversy can arise as to whether a worker carrying out an incidental activity which appears to fall into a different sector to that of the employer's major activity should be subject only to the sectoral collective agreement of the major activity or should be subject instead to, or as well as, the sectoral agreement governing the incidental activity. An example would be the gardener in an industrial complex. Likewise, there will inevitably be arguments about whether a worker or a group of workers falls within the scope of apparently overlapping sectors.

4.22 It is to be hoped that many such controversies will be resolved by the NJCs categorising all classes of workers within the sector for the purposes of determining the terms, conditions and remuneration applicable to each – and there may be many categories and gradations (a point of important distinction from the National Minimum Wage and Living Wage).

4.23 Undoubtedly, as was the case under the Catering Wages Act 1943, there will need to be sub-sector negotiations in many NJCs but we propose that sub-sector agreements will need the approval of the full NJC.[23] We believe that the good sense of the NJC in the relevant sector under the watchful eye of the new government department will create the necessary architecture. Wages Council experience suggests that there should not be geographical sub-sectors, though the devolved nations will express their own preferences. Localised pay is to be avoided at all costs since its effect is to hold down wages in poor areas. On the other hand, cost of living allowances for the extra expense of life in large cities might well be justified.

subject matter of collective bargaining

4.24 There are currently several statutory definitions of the subject matter of collective bargaining ranging from a narrow definition in the Wages Councils Act 1979, a slightly wider identification of 'pay, hours and holidays' under the recognition machinery of Schedule A1 of the Trade Union and Labour Relations (Consolidation) Act 1992, to the wider definitions in s. 178 and other parts of the 1992 Act.

4.25 For our purposes, however, recognising that collective bargaining ought, as far as possible, to be an autonomous self-governing process, the starting point should be the broad definition of the ILO so that jurisdiction should be conferred on NJCs to deal with:

- any matter relating to or arising out of work relationships in the sector including, of course, the terms and conditions of the workers (including prospective and former workers);
- any matter agreed by the members of the NJC to be within its jurisdiction.

4.26 We accept, however, that it is essential that the breadth of these general propositions needs to be underpinned by an obligation to seek to negotiate an agreement or agreements on a number of mandatory matters if the purposes of this initiative are not to be frustrated. We do not consider that this infringes the principle of free and autonomous collective bargaining since the content of terms agreed under these headers will be freely negotiated.

4.27 We also accept that because of this autonomy, it is not realistic to suppose that every subject will be subject to detailed negotiation. It is, we accept, likely that discussion on some subjects may result in agreement to abide by the minima currently provided by statute.

4.28 The objective of the list of mandatory matters is to initiate discussion and negotiation over matters which hitherto were exclusively within management prerogative or were not within the consideration of either side. The list will, it is hoped, stimulate wide-ranging and creative bargaining to resolve many underlying issues.

4.29 The range of the mandatory subject matter goes beyond that traditionally covered by UK collective agreements. One of the principles which lies behind the re-introduction of sectoral collective bargaining is that industrial relations should be governed by the industrial parties and should, where possible, avoid

the need to legislate or litigate to maintain minimum standards. There remains a place for legislation and litigation but the role of both should be minimised by extensive collective bargaining.

4.30 We propose that the Collective Bargaining Act should empower the Secretary of State to publish both a model sectoral procedure agreement and the list of mandatory subjects for determination at sectoral level. Where mandatory matters overlap existing employment rights already protected by legislation, it is to be hoped that the collectively agreed terms will be more beneficial. But statutory minimum rights will be preserved for any worker claiming that the collectively agreed term failed to provide at least equivalent protection.

4.31 With all this in mind, the **mandatory** items would comprehensively address terms and conditions of employment and related matters, including the following

(i) Pay, including rates for piece-work, overtime, enhanced, penalty and anti-social hours rates, rates for night work, weekend work, waiting time, stand-by and on-call time, and travel time, and for any other non-standard circumstances, allowances, supplements and bonuses;

(ii) Pay progression;

(iii) Pay rate variations by reference to categories of work, qualification and/or experience;

(iv) Hours, including sector-wide reduction of normal hours, in particular in anticipation of or as a response to automation and roboticisation;

(v) Working and rest time, breaks and holidays;

(vi) Time off in lieu (where work has been done in what would otherwise be a rest period);

(vii) Policies and procedures for the introduction of new working practices, new technology, new equipment and new techniques (including consequential reduction of hours – see above);

(viii) Pensions, including employer and employee contributions, and pension fund management, worker representation, rules for investment, and protection of funds;

(ix) Non-financial benefits (e.g. car parking permits, canteen facilities, etc);

(x) Conditions and entitlement to maternity, paternity, parental, bereavement leave and other time off (with or without pay);

(xi) Staffing levels;

(xii) Standardised job titles and descriptions;

(xiii) Strategic and operational issues, including investment, research and development, productivity, efficiency, skills planning, distribution of profit, the allocation of resources that have workforce implications, reorganisation of staff, relocation of workplaces, closure and all issues likely to affect job prospects or job security;

(xiv) Permitted restrictions on and conditions of use (if permitted at all) of employment agencies and the terms and conditions of agency workers;

(xv) Permitted restrictions on and conditions of use (if permitted at all) of non-standard form contracts, such as fixed-term and irregular or flexible-hours contracts;

(xvi) Permitted restrictions on and conditions of use (if permitted at all) of self-employment and 'letter-box' companies;

(xvii) Policies and procedures for advancing equality, diversity, dignity and respect and for the avoidance and elimination of discrimination; for ensuring the participation of mentally and physically disabled people, black and ethnic minority workers and women; for enforcing equal pay for equal work; and for the elimination of the gender pay gap;

(xviii) Pay audits for equality purposes;

(xix) Measures to protect and promote part-time working for those that wish for it;

(xx) Apprenticeships (including the requirements for industry-specific training, the number required, equalisation of the burden of apprenticeships in the sector, pay rates, length and conditions for

completion of apprenticeship, certification and recognition of qualifications, liaison with the Department for Education, and so on);

(xxi) Time off for, and encouragement and support for participation in, education, both vocational and unrelated to work;

(xxii) Policies and procedures for the training, development, progression and promotion of staff and allocation of work;

(xxiii) Policies and procedures for the recognition of qualifications and experience;

(xxiv) Grievance, disciplinary and dismissal (termination of engagement) procedures including appeal procedures (see below);

(xxv) Recruitment, redeployment, redundancy policies and procedures;

(xxvi) Flexible working;

(xxvii) Policies and procedures for out-sourcing, contracting, franchising, and TUPE and for bringing contracted-out work in-house;

(xxviii) Redundancy consultation procedures;

(xxix) Trade union access to, and facilities in, the workplace and time off for union representatives;

(xxx) The provision of information to union representatives;

(xxxi) The protection of trade union representatives and legitimate trade union activities;

(xxxii) Use of internal communications systems by union representatives;

(xxxiii) Data collection, use and storage and surveillance of workers;

(xxxiv) Intellectual property, inventions and encouragement and use of suggestions by staff;

(xxxv) Measures to protect and enhance health, safety and welfare at work, the appointment of safety representatives, the establishment of safety committees, rights of workplace access for trade union safety officials, procedures for the safe introduction of new technologies and substances and their safe use thereafter;

(xxxvi) The physical and environmental conditions of work;

(xxxvii) Measures to diminish adverse impacts on the environment;

(xxxviii) Oversight, interpretation and enforcement of agreements reached;

(xxxix) Extension of the application of agreements to other employers and workers;

(xl) Dispute resolution procedures (including oversight of them);

(xli) Derogation from sectoral standards.

4.32 As noted, it will be possible for either party to raise any matter relating to employment conditions as a bargaining issue. It is expected, and we regard it as essential, that the NJCs develop sector specific strategies to improve and encourage productivity, investment, research and development, efficiency, and skills, as well as the means for implementing these strategies. Given the impending impact of the widespread introduction of artificial intelligence and other technological changes, we consider it vital that every NJC negotiate mitigation measures in respect of such changes. As noted above, we have in mind that in particular there should be negotiated reductions in hours of work (with the well-established consequences of enhancing productivity and reducing stress and injury at work) so that the benefits of technological change are balanced between employers and workers rather than simply resulting in increased profit on the one side and job losses on the other.

dispute resolution

4.33 In those NJCs where three independent members have been appointed as tie-breakers, the NJC has its own in-built dispute resolution system. However, even here the parties are likely to want a dispute resolution mechanism which allows for the elevation of disputes from firm level through to national

level. Where there are no independent members, a dispute resolution system will be essential both to regulate the reference of disputes upwards from firm level and to deal with failures to agree at national level. A disputes procedure will be mandatory in every NJC established by the Secretary of State. Disputes procedures are usual in collective agreements at all levels and we anticipate that the industrial parties will have no difficulty in creating and agreeing one.

4.34 Nonetheless, we think that it would be helpful if the Secretary of State drew up a model disputes procedure which the parties to an NJC could adopt or modify. It would set out tight time limits and would seek to resolve any issue at each level up to national level. It should avoid unnecessary disturbance of any existing disputes procedures at local levels and provide for speedy escalation of any unresolved failures to agree from workplace to national level, passing through any intermediate levels for which the NJC architecture provided. It would require, until exhaustion of the procedure, the maintenance of the status quo as it was before the challenged act or omission.

4.35 Apart from the most obvious area of disagreement (over a proposed new or variation of a term or condition of employment), there will be a number of other areas of potential dispute to be considered. These include:

- Refusal by an employer or a trade union to engage in collective bargaining in a meaningful, constructive and cooperative way;
- Disputes about the meaning of a provision in a relevant collective agreement or contract of employment;
- Failure by an employer or a trade union to comply with the procedural terms of a collective agreement;
- Failure by an employer to comply with the substantive terms of an applicable agreement in the sector;
- Disputes about which is the most appropriate agreement to apply where there are sector-wide and/or enterprise agreements operating simultaneously;
- Disputes as to whether a particular sectoral collective agreement does or does not apply to a particular worker or employer or should or should not be applicable;
- Disputes arising from collective bargaining or the lack of it at enterprise level;
- Appeals by a worker against enterprise-level discipline, dismissal or other form of penalisation or unresolved grievance.

4.36 The model disputes procedure should be designed to ensure that most disagreements are resolved by the parties so that litigation becomes a rarity. To this end it should provide, in the event of exhaustion of all stages, for resort to ACAS (assuming the latter had not already had exhaustive involvement),[24] and in appropriate cases to the Central Arbitration Committee (CAC). If resolution by CAC arbitration is the way forward, the CAC will need to be given the statutory power to order an offending party to cease and desist the challenged act or omission, and to make any other form of order it considers appropriate to resolve the dispute, including ordering financial compensation. In particular, the CAC could make a report to the Secretary of State for her to make an Order varying the terms and conditions of employment applicable to employers and workers in the sector and, if necessary, altering the terms of the procedure agreement. The CAC would also have the power to make a declaration (such as stating the proper interpretation of any agreement).

4.37 We also propose (in accordance with chapter seven on equality at work) that either side of an NJC should have the power to refer to the CAC for investigation any allegation that a term in a relevant collective agreement constitutes discrimination or inequality by reference to any of the protected characteristics (as expanded in that chapter). Where discrimination or inequality is upheld, the CAC should have full power to rectify any such discrimination or inequality, including a power to require the parties to rewrite the offending terms of the agreement, or ultimately the power itself to rewrite the offending terms of an agreement. Any disagreement with the CAC's intervention on this or any of the other matters considered in

this chapter would entitle the applicant party to seek a formal Labour Court hearing (by way of appeal on a question of fact or law) which would have the power to impose, revoke, or amend the CAC action, as the case may be.

4.38 As to individual disputes, the new department will wish to ensure that the procedure provides for negotiation (escalating in level from the particular workplace up to the NJC), and for conciliation, mediation and ultimately arbitration by a jointly agreed arbitrator (or resolution by way of the independent members of the NJC). In relation to a dismissal contested on grounds of fairness, we propose that the procedure will ensure that the test is objective fairness from the perspective of both workers and employers, that the primary and usual remedy is reinstatement, and that if compensation is necessary that it reflects the full measure of loss. The Labour Inspectorate will have a role in immediate intervention to maintain a fair status quo, making interim decisions on merits until the exhaustion of the procedure, and mediating at local level. It is important that as many disputes as possible – both collective and individual – should be addressed through procedures of this kind, not least because these procedures are likely to be more effective and cheaper (for both sides) than litigation.

enforcement of sectoral agreements

4.39 As noted, the purposes of sector-wide bargaining include broadening the coverage of collective agreements, diminishing economic inequality, increasing productivity, preventing undercutting on labour costs, promoting efficiency, improving working conditions, and creating greater security in and stability of employment. It is thus essential that the terms of any sector-wide agreement should apply by operation of law to all workers and all employers in the sector in question. We would emphasise, however, that although it is essential that collective agreements should have universal application, there should be no expectation that trade unions are obliged to represent non-members who have a dispute relating to the agreement.

4.40 We anticipate that most agreements reached will be applied by all within the relevant sector. It has been common practice for employers to follow the terms and conditions collectively bargained by others even where they are not parties to the agreement or to any participating employers' association. It is often regarded as less burdensome and less creative of friction, particularly for smaller employers, to follow and apply prescribed rates than to have to negotiate them directly. Nonetheless, an enforcement mechanism will be essential.

4.41 The mechanism for enforcement that we propose is as follows. The terms and conditions agreed by an NJC would be published on its website and formally reported to the new government department, which would keep a register of all agreements, both the sectoral procedural agreements and the substantive agreements fixing terms and conditions. The register, too, would be published on the new department's website.

4.42 As under the wages council legislation, we think it important that agreements, when reached, are published for a short while before coming into effect so that any objections (from employers, unions, workers, and the Secretary of State) may be sent to the NJC, which would be under a duty to consider, but not necessarily to accept, the objection. Strict time limits will be required in order to prevent objections intended simply to delay the coming into effect of newly agreed terms and conditions.

4.43 Once the finalised agreement comes into effect. it will be binding (under the legislation) on all the employers and workers in the sector to which it applies (bearing in mind that some provisions will only apply to specified categories of work or worker).

4.44 Enforcement of NJC agreements would primarily be by way of the disputes procedure of the NJC. In addition:

- The Labour Inspectorate will have a roving brief to investigate compliance with sectoral agreements with the right of access to all workplaces to inspect for that purpose;

- An official of a union representing a member would also have the right, under reasonable conditions, to inspect her workplace to ensure compliance (as proposed later);
- Officials from any signatory union or employers' association would have the right to call on the Labour Inspector to investigate a potential or suspected non-compliance.

4.45 However, where a disputes procedure failed to resolve the issue or was inapplicable or stalled, and any intervention by the Labour Inspector was not successful, then proceedings before the Labour Court could be commenced.[25] That right, we think, should not be permitted to take effect unless prior failure to resolve the issue through the disputes procedure or by intervention of the Labour Inspector within a reasonably short time could be demonstrated.

4.46 Such Labour Court proceedings could be brought by:

- The NJC itself;
- The union side;
- The employers' side;
- A union or employers' association signatory to the agreement;
- A union (whether or not a signatory) representing one of its members;
- An employers' association representing an employer member (whether or not the association was a signatory to the agreement);
- An affected worker or affected employer; and
- The Labour Inspector.

It is to be observed that an employer or employers' association may well wish to enforce the agreement (as in the past[26]) to prevent undercutting by another employer (as well as against a union or workers).

4.47 In light of the foregoing, we do not see the necessity of expressly stipulating that the terms of the Order are implied into the contract of employment or engagement of every worker in the sector, though it might be worth doing so as 'belt and braces'. It appears to us that it is enough to say that any engagement of any worker covered by the sectoral agreement must comply with all relevant terms of all relevant agreements. This would avoid current sterile debates about whether the terms of the agreement are 'apt' or suitable for incorporation into the contract of employment, which has been a major problem for workers in enforcing collectively agreed terms. Given the dispute resolution machinery, which the NJCs are expected to provide, and given the new role to be played by Labour Inspectors, it appears likely that the volume of litigation over workplace matters will dramatically decline with significant cost savings to government, employers, unions and individual workers.

4.48 Under the Wages Councils Act 1979, every agreement which revised rates of remuneration etc. had to go to the Minister to be authorised by way of a Wages Order in the form of a Statutory Instrument. In contrast, under the legislation we envisage, the Secretary of State would only need to approve the sectoral bargaining procedure agreement which would be reproduced in an Order, whereas the substantive agreements reached (fixing terms, conditions and wages in the sector) would simply be published by the NJC and registered by the new government department. Sectoral collective agreements outside the NJC system would also be registered with the department. Registration would be effective to ensure that 'posted workers' (under the legislation derived from the EU) received the benefits of the terms and conditions of the relevant sectoral agreement.

inderogability

4.49 It is likely that in some instances there may be more than one collective agreement covering the same field in the same sector: a sector-wide agreement and an enterprise agreement. The principle should

always be that where there is more than one collective agreement in force, the one most favourable to the worker should apply (the principle of 'inderogability'). The Collective Bargaining Act should thus provide that though an enterprise-level agreement (and, even perhaps, private contract, or arrangement between employer and worker) may vary the terms of a sectoral agreement, such variation must be at least as favourable to the worker as the sectoral level minimum term. We propose that any variation from the sectorally agreed terms will require the approval of the NJC.

4.50 It is, however, accepted that *less* favourable terms may sometimes be necessary and acceptable to workers in exceptional circumstances in defined extreme or emergency situations affecting the viability of the business and consequently the future of jobs. Such situations might involve short-time working or lower wages in order to keep the place of work open. Such derogation should only be permitted by collective agreement at enterprise level and never by agreement with an individual worker(s). Such a derogation should only be permitted as a temporary measure and would need, we suggest, the approval of the NJC.[27] Given that such decisions would need to be taken urgently, the NJC would need an emergency sub-committee to deal with approvals for derogations. Such derogations would also be required to be registered with the new department.

conclusion

4.51 The Collective Bargaining Act will be the centre-piece of the programme to revitalise economic governance and to expand the coverage of collective agreements. It will not, however, be the only initiative to this end, and well-established enterprise bargaining activity is intended to be both maintained and encouraged. Trade unions should be engaged horizontally in setting the terms for the industry, but also vertically in setting the terms for the enterprise, where it is expected that enterprise-based collective agreements will improve on the sectoral terms. Subject to the prior application of the dispute resolution machinery in the sectoral collective agreement, the terms set by all these collective agreements too would be enforceable in the Labour Court at the suit of any affected employer, employers' association, union or worker in the sector concerned or by the Labour Inspectorate, without the necessity to prove that the terms were incorporated into the contract of employment or engagement.

CHAPTER FIVE

enterprise democracy and worker voice

introduction

5.1 The new economic governance arrangements with sectoral collective bargaining at their core is the proposed centre-piece of labour law reform. But although this will impose obligations on all employers, it does not exhaust what is necessary to achieve a measure of workplace democracy. In this, it is important that the trade union voice extends horizontally across sectors, but also vertically within firms, from the shop-floor and the workplace to the boardroom and the company meeting. To this end, we deal here with:

- Trade union access to employers' premises;
- Trade union recognition and enterprise-based collective bargaining to complement sectoral arrangements under the Collective Bargaining Act;
- Corporate governance reforms giving workers through their trade unions a louder voice in corporate decision-making; and
- Worker voice through their accumulated capital.

5.2 It goes without saying that the law relating to the right to trade union membership should be strengthened, in particular relating to blacklisting (which should be a criminal offence carrying severe penalties including imprisonment). Thereafter, a feature of the legislation we propose in order to facilitate collective bargaining at every level will be a statutory right for an official of an independent trade union to gain access, under reasonable conditions, to workers at their workplaces. This right will apply to full-time officers of the union and to lay representatives of the union employed by the firm.

5.3 We consider that the right of access (on reasonable conditions) would be available where a union could show that one of its members in the workplace or in the grade, category or proposed bargaining unit identified by the union had requested access by an official of that union (whether or not employed by the employer in question). We propose that any dispute be resolved by the CAC. In respect of any worker seeking to exercise the right of access by a union official the legislation would need to provide for anonymity for anyone who required it and, in any event, to protect against victimisation by the employer. (The access condition that the union is responding to a request from a member would help to avoid any unnecessary legal obstacles arising potentially under the European Convention on Human Rights, article 8.)

5.4 By 'access' we mean both physical and electronic (such as by email or social media) access. The purposes of such access would be:

- Recruiting members;
- Representing members (including but not confined to disciplinary and grievance matters);
- Carrying out health and safety inspections;
- Encouraging workers in relation to a recognition (or derecognition) application (and prior to making such an application);
- Consulting members over proposed and ongoing negotiations;
- Ensuring that existing relevant collective agreements are being observed; and
- Determining whether workers' statutory rights are being observed.

5.5 So the rights of worker accompaniment in ss. 10–13 Employment Relations Act 1999, should be broadened so that workers have the right to be accompanied or represented by their trade union representative (full-time or lay) either individually or collectively on any issue relating to work.

worker voice, trade union recognition and collective bargaining

5.6 It is widely thought that the statutory machinery for enterprise-level bargaining set out in Schedule A1 of the 1992 Act is defective. It will need to be recast if it is to achieve its original objective: enterprise and establishment-level collective bargaining. One of the main problems with enterprise-based legislation of the kind operating in the UK and elsewhere (in the mainly English speaking world) is the problem of employer hostility to trade unions and resistance to collective bargaining.

5.7 Some employers go to great lengths to exclude trade unions, gaming the legislation and hiring lawyers and union busters for this purpose. The OECD has suggested that this problem is greatly reduced where sectoral bargaining takes place. This is partly because sectoral bargaining helps to embed trade unions and trade union influence within the industry, with many of the objections to dealing with trade unions disappearing as hostile employers are bound by trade union agreements.

5.8 Nevertheless, in order to ensure that enterprise bargaining legislation operates efficiently, amendment of the current recognition legislation is necessary to remove some of its inordinate complexity, which provides multiple opportunities at a number of stages in the procedure for employers to frustrate its underlying purpose of encouraging collective bargaining.

5.9 With 172 separate paragraphs, the 1999 Act is a poor model of accessible drafting. The new provisions on recognition would therefore aim to be short in length and written in a language which is readily understandable by those union representatives who will be involved in asserting the right to recognition. The new legislation would replace in its entirety TULRCA Schedule A1, reflecting the need to rebalance industrial power to prevent employers seeking to frustrate the process.

making applications

5.10 We propose that a trade union should submit a claim for a declaration of statutory recognition to the CAC. It must be submitted in writing by a registered, independent trade union or by a listed, independent trade union. The current requirement that the employer should have a minimum of 21 workers should be removed. With the fragmentation of employers in recent years there appears no rational basis for excluding small employers where the workers wish to bargain collectively rather than individually.

5.11 In order to bring a claim to the CAC, it should be enough that the union demonstrates that 10% of workers in a proposed bargaining unit indicates, either through membership or in writing, that they support recognition. A union will be required to notify the employer in writing that it intends to seek statutory recognition, though it will be sufficient that it does so at least 7 days before submission to the CAC. The trade union will need only to prove that it has issued the notification, and will not need to prove that the employer has received the notice.

5.12 There will be no requirement that the trade union has sought voluntary recognition prior to making the statutory claim. However, the employer may, in response to the notification, offer a voluntary recognition agreement which the union has the right either to accept, negotiate upon or reject. If the union adopts the last option, it may proceed instead for a statutory declaration of trade union recognition. If a union has 10% support, it will have a wider right of access in addition to the general right of access above. This will include the right to communicate with all workers in the bargaining unit proposed by the union by meeting with them (either individually or collectively as it chooses) and by distributing materials physically or electronically, both to campaign for recognition and to recruit (as well as for the other purposes set out in 5.4 above).

5.13 Where more than one independent trade union submits a claim for statutory recognition the unions in question will have a duty to seek agreement as to which or whether both jointly will advance the claim. A failure to reach agreement will then require the CAC to identify which union has the largest membership or declaration of support in the bargaining unit and advance its case alone. Conversely, where one independent union is already recognised, no other union may submit a claim for recognition unless it can demonstrate that it has a majority of the workers in the existing bargaining unit in membership. In such a case, the CAC will hold a ballot to test which union is the most representative and award recognition to it.

managing applications

5.14 In accord with the principle of encouraging collective bargaining, the bargaining unit selected by the trade union will be the unit for which recognition is granted (if the application is successful). The CAC will not have the power to impose a different bargaining unit. The employer will no longer have the defence of arguing that the proposed bargaining unit is not in accord with effective management. Only if it can show that unless a different bargaining unit is selected the impact on industrial relations will be unmanageable, may it advance that different unit. If the employer does advance an alternative bargaining unit on that ground the union may accept it with the consequence that recognition will be automatically awarded without the need to demonstrate either the 10% support threshold (para 5.11 above) or the majority support requirement (para 5.15 below).

5.15 Otherwise, where the CAC is satisfied by the evidence that a recognition claim is likely to be supported by a majority of the bargaining unit (expressed by union membership or in another convincing way), the trade union will be entitled to a declaration of statutory recognition. An award of statutory recognition by the CAC will cover any issue that the union or its members wish to raise including all those matters listed as mandatory in chapter four above.

5.16 There may be scope for arguing that where a union has demonstrated majority support under the recognition procedure, it should be a permissive subject of collective bargaining that all workers in the bargaining unit must either join the union or pay a 'fair shares' fee to cover the costs of the union in providing the negotiating services provided by it. Although now under sustained attack from the courts in the US, such arrangements should be permitted in this country provided any potential objections under the European Convention on Human Rights can be overcome.[28]

5.17 In order to protect trade unions and workers when a union is organising in an enterprise or seeking recognition therein, it should be unlawful for an employer to engage in anti-union practices designed to frustrate either (a) organising, or (b) recognition activity.

- Such anti-union practices should be 'unfair labour practices', defined to arise where the employer has intimidated, threatened, harassed or subjected to detriment one or more workers (including threats that jobs are at risk, or by awarding or promising a benefit to one or more workers which it withholds or will withhold from others in the event of an award of recognition).
- The onus should be on the employer to prove to the CAC that conduct alleged to be an unfair labour practice (as defined above) was not. A claim of unfair labour practice will be heard exclusively by the CAC. Where such a claim is upheld the CAC will award statutory recognition with no further requirement to demonstrate membership support.

5.18 At the end of five years, recognition will be renewed unless the employer can show that the bargaining unit has ceased meaningfully to exist or unless another independent union makes an application for recognition for that unit, as above. Moreover, an award of statutory recognition will continue regardless of any change of employer, whether through a TUPE transfer or by any other restructuring or reorganisation.

other support for collective bargaining

5.19 Apart from the Collective Bargaining Act discussed in chapter four and the recognition provisions discussed above, other steps will also be required to support collective bargaining. Most of these other measures will be addressed to encouraging and supporting enterprise-based initiatives. These will begin with a raft of repeals to legislation introduced over the last 40 years, to restore the 'props' to collective bargaining which that legislation systematically removed. Amongst these are the following:

- Reinstatement in Trade Union and Labour Relations (Consolidation) Act 1992, s. 209 of the duty on ACAS to promote collective bargaining;
- Repeal of the 1992 Act, s. 184 which renders void a term in a contract for the supply of goods or services which requires a party to recognise or negotiate with a union(s); and

- Repeal of the 1992 Act, s. 187 which prohibits refusal to deal with a supplier on the ground that it does not recognise or negotiate with a trade union(s).

The second and third bullet points are important because the current law prevents companies from using commercial leverage to require suppliers and others to recognise a trade union. Their right to do so should be restored.

extension of collective agreements

5.20 Two other measures will be required. The first relates to the extension of collective agreements. Where one (or more) collective agreements appear to the Secretary of State to be effective and set a precedent for the sector concerned (or engaged in ancillary or related activities and/or in the same locality), statutory powers will enable her, after appropriate consultation, to register the existing agreement and extend it to all (or a sub-sector of) other employers (and hence to their workers) in the sector. In this way, the integration of all the employers in the sector into a single collective bargaining arrangement may ultimately be achieved. Extension of an existing agreement may require expanding representation in the negotiating body.

5.21 The extension of collective agreements is common in jurisdictions across the world and is particularly common in Europe.[29] The mechanisms for doing so must avoid the flawed model adopted in the UK in the 1970s. One possible precedent is the example of Quebec where the legislation provides that a dominant collective agreement in a sector which affects a substantial number of workers may be rolled out by Ministerial Order to all employers and workers in the sector. The Quebec legislation is not a perfect fit for the UK, but it could be adapted to ensure that a large employer with a good collective agreement is not undercut by competitors observing less favourable terms. Such extensions will be a useful device in the years before complete coverage of the British workforce by sectoral agreements.

5.22 We also consider that the Secretary of State should have the power to encourage the parties to adapt their agreement in other ways to take account of its wider application. To preserve the parties' autonomy we do not suggest that she should have powers to impose such changes.

public procurement

5.23 The roll-out of sectoral collective bargaining along the lines proposed in the Collective Bargaining Act will reduce the need for a modern reiteration of the Fair Wages Resolution to compel all contractors for publicly funded work (together with their parent companies, subsidiaries, franchisees and all the contractors and subcontractors in their supply chains) to abide by and to support collective agreements in the sector in which each operates. This is because everyone in the sector will, in due course, be covered by the relevant sectoral agreement anyway. However, it will take time to roll out sectoral bargaining across all economic activities and, in any event, there may still be issues about workplace representation and trade union recognition. So we believe that what is nowadays referred to as 'public procurement' still has an important role to play.

5.24 To this end the trade union recognition legislation should contain provisions requiring all tenderers and contractors (and subcontractors) of public services to recognise a trade union, as well as comply with all relevant collective agreements at all levels. This would apply also to any employer who trades on the basis of a licence or franchise granted by the state or enjoys any other government or local authority benefit. This appears permissible under the current EU Public Procurement Directives and can, in any event, be imposed if the UK ceases to be bound by such EU laws. The collective bargaining and trade union recognition legislation could contain these provisions, failing which a separate Public Procurement Act could deal with these and other conditions for public contracting (such as in relation to blacklisting, whistleblowing and equality issues).

worker voice and corporate governance

5.25 To reform corporate governance, the *Manifesto for Labour Law* made three main proposals for worker participation in companies. This was, of course, secondary to the principal mechanism of sectoral collective

bargaining to attain worker voice. The proposals were:

- To require that directors owe duties to 'enhance and protect the interests of workers' as they currently do in relation to 'shareholders';
- 'Every board should have worker directors' who 'should be appointed by recognised trade unions (or, in the absence of representative unions, elected worker representatives)'; and
- 'Workers through their trade union... Should have a minimum percentage of the vote in general meetings of the company'.[30]

5.26 The *Manifesto* left for later consideration the 'detail of the proportions, exemptions and application to related entities.'[31] Here we describe the policy choices in such consideration in relation to votes for company boards, in different types of enterprise, especially the public sector, and in votes in pension funds (workers' capital). The purpose is to open the next chapter of democratic society by enhancing democracy at work.

5.27 Today, votes in the businesses follow a 'one pound, one vote' norm. Voting is therefore monopolised by shareholders. In turn, asset managers and banks for the most part exercise the right to vote attached to shares, all with 'other people's money'.[32] They bear no risk in insolvency, and their preferences do not necessarily (or even usually) reflect those of their clients. From most political perspectives, this is wrong and should be stopped.[33] To make recommendations as to how this might be achieved is, however, beyond the scope of the labour law proposals in this book.[34] That said, it is notable that diverse proposals for votes at work have been repeatedly made by every major political party.[35] The proposals in the Bullock Report of 1977 failed because it suggested equal representation on boards: it could not please all supporters, in the face of organised opposition. In particular, there was 'unremitting hostility' from the City. We suggest that it would be better to tolerate smaller representation on the board with a guaranteed significant voting presence in the general meeting.

votes for workers and worker representation

5.28 First, we recommend votes for workers in their employing organisations. If workers had votes in company affairs on the basis of 'one person, one vote' (as the true investors of capital as they might be described) it is likely that those votes might be directed to the long-term interests of their employing organisation as well as their own interests in such things as a more equal society, with full employment, leisure, and a living planet. If votes were attached to workers rather than to shares, democracy would advance into the economy just as it once advanced into politics.[36] While most European countries require a minimum number of board seats allocated to workers or unions, these laws always mean workers are in a permanent minority on boards.

5.29 We propose a minimum (amendable upwards by the Secretary of State by regulation) of two worker directors on company boards, directly answerable to the workforce. Clearly, the broadest concept of 'worker' would be necessary in this context to allow workers to vote in the parent or other entity that exercised real control over their employment. The new definitions of 'worker' and 'employer' proposed in the chapter on the employment relationship may be sufficient but may need to be further expanded in the context under discussion to prevent company structures designed to evade worker democratic input. Two directors, rather than one, are less likely to be isolated or ignored. But the critical reason why workers will be listened to is that they will have, under the proposals below, the right to vote in the general meeting for *every* director on the board.

5.30 Workers should be registered as company 'members'. The Companies Act 2006 today presumes that a 'member' has voting rights. There is no requirement to have shares to be a member. Under ss. 170-177 directors owe duties to the company to avoid conflicts of interest, be diligent, and act in its interests, with particular regard to members. In fact, directors owe no duties to 'shareholders'. That word is simply not in s. 172. 'Shareholder value' is a cultural, not a legal norm.[37] So, if workers are recognised as members they could (1) have the right to vote, on a one person, one vote basis, but also (2) have the right to enforce directors' duties. Workers could participate in amending company constitutions (usually with a 75% majority) and would have legal rights to enforce the company constitution (usually the Articles and Memorandum of Association) in court.

5.31 As between themselves, the proposal is one worker, one vote. But shareholders' votes are not distributed on an individual basis, and a workforce of 500 hundred workers would be easily outgunned in a company with half a million shares. The proposal is therefore that the workers in the company should have the collective right to cast the votes of 20% of total registered votes in company general meetings. This initial percentage could be altered subsequently by powers vested in the Secretary of State. If preferred, different percentages could be introduced for small and large companies. The most important thing for the future is not the initial percentage, but to establish the principle.

which companies?

5.32 Some countries, notably Germany, require worker directors only in companies employing prescribed statutory thresholds. Sweden, Norway and Denmark require worker directors where a company employs over 25, 30 and 35 staff. We propose that in *every* company workers will have 20% of voting capacity of the general meeting. This would be far better than any Enron-style employee share scheme, and bring to every enterprise an element of a worker cooperative. The 'Model Articles' of companies should be amended accordingly so that people's basic expectation is they have votes at work. We propose in the first instance that companies with fewer than 250 staff could opt out. This would still enfranchise just over half the UK workforce.[38] The threshold should be amendable downwards by the Secretary of State, and decreased over time.

5.33 As to the legal form of employing entities, in principle everyone should have votes at work, no matter what legal form of enterprise they work for. As well as public and private companies (plc, Ltd) and companies limited by guarantee (often charities) all regulated by the Companies Act 2006, there are other forms including: partnerships (regulated by the 1890, 1908 and 2000 Acts); trusts (which include some businesses and many charities); entities regulated by the Friendly Societies Act 1992 and the Co-operative and Community Benefit Societies Act 2014; sole traders; European companies; and a multitude of entities from other EU member states exercising freedom of establishment in the UK. We consider that the reforms proposed could easily be drafted to apply to these entities. For EU and other foreign entities, UK law can require the foreign entity to have votes at work if it operates in the UK.

5.34 In publicly owned enterprises and in some entities in which the public has a special interest (such as NHS bodies, universities, banks, the media, trains, water, gas and electricity) the government has the power, by legislation or by other leverage to insist on the representation of workers. In such bodies there is also a strong argument that the interests of the public should be taken into account beyond the imposition of a regulator requiring accountability to (e.g.) patients, students, licence-fee payers, or passengers. There is a case to be made for citizens to have a voice in the governance of these public interest entities. This *was* the direction for the NHS, until the Health and Social Care Act 2012, and it *is* in principle the governance model of some universities. Such considerations are beyond the scope of this book but could be the occasion to set a new model of democracy in enterprise.

role of trade unions

5.35 The *Manifesto* proposed that worker directors and votes in the general meeting should be channelled through trade unions, or elected representatives where there are none. There are reasons of history and democracy for empowering union candidates to represent workers on boards, and for union delegates to organise votes in general meetings. This would achieve consistency with policy for the role of trade unions in future.

5.36 There are many models for union engagement. In Germany, every worker has an individual right to vote for works councils and for company board representatives, but may always delegate their votes to union representatives. In companies with over 8,000 staff, worker votes for company boards are cast by default by the union, unless the worker opts to cast his or her own vote.[39] This system fosters spectacular engagement: for instance, in works council elections the *average* turnout in 2010 was 79%.[40] Union candidates usually succeed because they are better organised. Though non-union candidates sometimes win minority representation on a works council (not board seats), this system has been embraced by German unions and faces no calls for change.

5.37 Second, in Sweden, where unions are far stronger in membership and presence, its board representation system is comparatively neglected. There, board representation only operates by trade union delegates. In many firms, the option of board representation is simply not taken up.[41] A possible reason is that workers feel distant from the board representation system, leading to disengagement among Swedish workers. In choosing a model, we propose that the UK should take from the best of both the Swedish and German models: it can retain board seats on one-tier boards, empower every individual worker to have the right to vote in general meetings, but enable those votes to be delegated to their trade union.

worker voice and workers' capital

5.38 The huge assets of workers' accumulated 'deferred wages' in pension funds should also be the subject of worker voice. Whilst those funds have been accumulated by former and present workers, it is the latter, in the first instance, to whom we turn for democratic participation.

- First, the Pensions Act 2004 currently requires that one-third of pension trustees are 'member nominated' (elected by employees or appointed by the trade union). The Secretary of State has the power to increase this to one-half. There is no reason why this should not be done immediately.
- Second, the National Employment Savings Trust (the public-option fund manager for many people with automatically enrolled pensions) has a temporary exemption from the member nominated trustee rules. This could also be removed immediately by the Secretary of State.
- Third, the legislation should be amended to clarify that the right to member nominated trustees applies regardless of the legal form of a pension (whether trust or so called 'contract' pensions).

5.39 Pension funds' share of the overall UK stock market stopped growing and went into rapid decline since the 1990s because of the collapse of collective bargaining. When collective bargaining is revitalised, pension funds can again become an important segment of capital markets. With workers having democratic voice in their pensions, we will move towards a far more democratic economy. Furthermore, if pension funds were to be democratically controlled, coalitions would be likely to form with the workers voting in company general meetings. We would expect trade unions to be the channel to organise the voice of both.

conclusion

5.40 The introduction of sector level bargaining will help encourage enterprise level bargaining which will build on the minimum standards imposed at sector level. But for enterprise bargaining to operate effectively, the legislation by which trade unions are recognised needs urgent revision and simplification. Similarly, change is needed in corporate governance to ensure workers' voice is heard in the boardroom, in company meetings and as pension funds trustees.

the employment relationship

introduction

6.1 Workers gain access to the labour rights associated with employment depending on the type of employment relationship that links them to their employers or principals. Typically, the condition that determines the application to employees of the employment protection provisions contained in UK labour law statute is the existence of a 'contract of employment' with an 'employer' (as defined by the Employment Rights Act (ERA) 1996, s. 230(1) and (4)). Workers who offer their work or services to their employers or principals under different types of work contracts or relationships are likely to fall outside the scope of application of UK employment protection legislation, or receive a more limited set of protections, for instance if their status is that of an s. 230(3)(b) 'worker', or that of an 'employee shareholder' as defined by s. 205A ERA 1996.

6.2 The consequences of these shortcomings in the legal framework sustaining the regulation of the employment relationship are sobering. Millions of workers, many of them defined by their contracts as self-employed, are trapped in insecure forms of work that do not allow them decent working and living standards. These insecurities inevitably affect workers' voice, their enjoyment of individual and collective labour rights, and their participation in society as active citizens. A lack of legal certainty and predictability in the formulation of work and business contracts for a growing number of workers, employers, and customers alike, has generated its own insecurities and, often, extensive litigation costs.

6.3 The economy is increasingly experiencing a long tail of businesses thriving on low-paid, often precarious, labour. These businesses feel disinclined from investing in productivity-enhancing technologies or in training an insecure workforce with few ties of loyalty. Inequalities and poverty are rising, engendering their own individual and social costs. Rising inequality and poverty also contribute to the falling proportion of wages compared to profits, one effect of which is to reduce demand in the economy. These employment practices also have fundamental implications for the way the welfare state is funded and operates, and there are growing concerns about false self-employment shifting the burden of safety net support from the employer to the welfare state at the same time as reducing tax revenue.

6.4 Reform is clearly necessary. Changes are proposed in this chapter which would strengthen the employment relationship, define it more clearly, and promote legal certainty and decent working conditions for the many. These are changes that could be adopted in the very short period, within 100 days from the election of a government minded to implement them. These changes are tax and social security 'neutral', that is to say they do not imply or require changes in the current social security and tax arrangements for workers, but do not exclude them either.

underlying statutory principles

6.5 It is proposed that seven overriding principles be applied to all personal work contracts and relations. In particular to their: formation, performance, variation, termination, and interpretation. The relevant principles are:

- Labour is not a commodity;
- Parties to work relations shall deal with each other in good faith;
- Every worker has the right to dignity in his/her work relations;
- The presumption that all employment rights are to have universal application and apply to all workers;
- The presumption that all employment rights are designed to be effective in their application;
- Any term or condition of employment which is inherently ambiguous or capable of carrying more than one meaning shall be interpreted and applied in the manner that is most favourable to the worker;
- All terms and conditions of employment shall be interpreted in such a way as to give effect so far as is practicable to relevant international treaties ratified by the UK.

6.6 These seven principles should be introduced in the opening sections and paragraphs of ERA 1996, and their application progressively extended to the other main labour and equality law statutes and secondary instruments. There would be an obligation on the part of the courts to give effect to these principles not only in the construction of contracts but also in the construction of legislation. The last principle in particular should apply also to the Trade Union and Labour Relations (Consolidation) Act 1992.

6.7 It goes without saying, however, that these principles should inform the substance and content of employment protection legislation itself, as well as its operation in practice. The statutory embrace of the first principle in particular (a feature of international law in its own right recognised by the ILO Declaration of Philadelphia) would give us confidence to re-assess the legality of contemporary practices which are symptoms of the commodification of labour, such as temporary agency work and zero-hours contracts.

6.8 We would expect that the recognition in statute of the principle that labour is not a commodity would empower and indeed oblige the new government department not only to review and stamp out practices that subvert this principle, but also take steps proactively to prevent them arising in the first place. This reinforces our view that labour law should (i) cover all those engaged by another to provide labour, and (ii) ensure working and living conditions that guarantee to workers and their families a free and dignified existence.

universal protection: workers' rights and definitions

6.9 The issue of who is, and who should be, protected by employment protection legislation has become more and more complex because of the increasingly widespread phenomenon of workers falling through labour law's safety nets due to one or a combination of the following factors:

- The concept of a 'contract of employment' is too narrow;
- The tests used by employment tribunals to define and identify 'employees' or s. 230(3)(b) 'workers' are inadequately or ambiguously articulated so that these concepts have become unclear;
- The employment relationship is disguised into one of false self-employment;
- The relationship is objectively ambiguous, giving rise to doubts as to whether or not a contract of employment, or any contract at all, really exists;
- The employment relationship clearly exists but it is not clear who the employer is, what rights the worker has and who is responsible for providing or ensuring them; and
- Lack of compliance and enforcement.

6.10 The inadequacies of the existing legal framework have encouraged the emergence of casual forms of work, such as zero-hours contracts and false self-employment, which shift all or most of the risks attendant on the making and executing of arrangements for the doing of work, including the burden of earnings risk, to workers. Technological advances, and the emergence of digital platforms acting as intermediaries between workers and their principals or customers, have further fragmented an already complex modern labour market, rendering the classification of workers as employees with a contract of employment an exceedingly arduous and unpredictable task. A key reform priority is thus to clarify, simplify, and expand the personal scope of application of UK labour law statutes. We propose a single status for working relations, with the sole exception of individuals in business on their own account.

a new definition of 'employee' and 'worker'

6.11 As a first step in this reform agenda, we propose the substitution of the current s. 230 ERA 1996 with a new section where the terms 'employee' and 'worker' are retained but defined by reference to the following formula:

'In this Act "worker" or "employee" means an individual who—

(a) seeks to be engaged by another to provide labour;

(b) is engaged by another to provide labour; or

(c) where the employment has ceased was engaged by another to provide labour; and

(d) is not genuinely operating a business on his or her own account.

A similar definition was included in the Workers' Definition and Rights Bill 2018, drafted by the IER on behalf of Chris Stephens MP (see Appendix).

6.12 This new definition means that all those providing their labour to another party would be put in a position to enjoy all the rights and protections contained in the ERA 1996 (and in other labour law statutes and secondary instruments), regardless of the way their contracts or work relations define their particular employment status. This means not only the minimum wage and paid holidays, but also redundancy and unfair dismissal protection. The only exception will be for the individual running a genuine business undertaking on their own account and offering their labour to a number of clients or customers as part of that business. Any statutory provisions which conflict with the above definition will need to be amended accordingly.

6.13 Anyone providing their labour to another will be presumed to fall within the scope of ERA 1996, unless the end user or the service provider can demonstrate that the person providing the labour is performing a genuine entrepreneurial activity on their own account (i.e. a rebuttable presumption). Where it is possible, on a reasonable construction of the relationship, for a tribunal or court to characterise the person as a worker, then it should be understood that the employer will not be able to rebut the presumption. This will require the addition of a new subsection to s. 230 ERA 1996 providing that where in any civil proceedings any question arises as to whether an individual qualifies or qualified at any time for the status of 'worker' or 'employee', it shall be presumed that the individual qualifies as such unless the other party to the arrangement establishes that the only possible construction of the engagement is that the individual was not providing labour as a 'worker' or 'employee'.

6.14 The new 'worker' and 'employee' definitions are broader than the existing concept of 'employee' and, in many ways, broader than the existing concept of 'worker'. The new definition is broader than the existing concept of employee in that it does not require the existence of mutual obligations of a contractual character, as long as a personal work relation can be ascertained from the reality of the situation. Crucially, the absence of a 'control' or 'subordination' requirement in the new definition means that the new status will also include those who are currently classified as 'self-employed people who provide their services as part of a profession or business undertaking carried on by someone else'.[42] Those, formerly excluded, individuals will thus gain the benefit of employment rights.

6.15 The definition will also cover other workers currently classified or misclassified as self-employed, on the basis of a variety of contracts for services, as long as they are not genuinely operating a business undertaking on their own account. The definition is, however, specifically intended to exclude those operating a genuine business and providing services to a plurality of clients or customers by means of substantial tangible or intangible assets. If the assets are not substantial but marginal, or if they are ancillary to what is essentially a provision of personal work or services for an employer, then the person will be deemed to be a worker. Plainly, the new definition will exclude those in business on their own account who employ other workers for the purpose of their business undertaking. But it will be for the defendant in legal proceedings to overcome the statutory presumption to the contrary.

6.16 This new 'single status' definition will have to be rolled out by Act of Parliament, which will need to amend other labour and equality law provisions. Some of these amendments may be possible to achieve by conferring power on the Secretary of State to issue statutory instruments. The personal scope of the statutory instruments regulating working time, part-time work, fixed-term work, and agency work will require amendment so as to reflect the new 'single employment status' definition. That said, a statutory template for this purpose now exists in the Workers' Definition and Rights Bill 2018 referred to above, the text of which is reproduced as an appendix to this document.

a new definition of employer

6.17 We expect that the introduction in s. 230(1)-(3) ERA 1996 of a much broader employment status concept will in many ways simplify the complexities currently arising for workers whose employment relationship clearly exists but where, hitherto, it has not been clear who the employer is, what rights the worker has, and who is responsible for them. However, such complexities will not disappear altogether and may in fact

increase in the future as a consequence of the further development of on-line platforms intermediating between workers and the final users of their work and services.

6.18 To avoid this, the current definition of 'employer' contained in s. 230(4) ERA 1996 requires reform, especially, though not exclusively, for work relations performed through an intermediary entity. With some minor exceptions, existing legislation offers very scant guidance to people working through intermediary entities and seeking to identify the real employer. A noteworthy exception is contained in the similarly worded s. 34 National Minimum Wage Act 1998 and reg. 36 Working Time Regulations 1998, in respect of agency workers. Both provisions establish, in effect, a presumption of employer status for whichever entity 'is responsible for paying the agency worker in respect of the work; or […] if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work'.

6.19 Another broader formulation of the 'employer' concept can be found in s. 43K(1)(a) ERA 1996 (dealing with protection of whistleblowers), which provides that where a worker's terms of employment are 'in practice substantially determined … by the person for whom he works or worked, by the third person or by both of them' then the worker may be considered as employed by whichever of the two entities played a greater role in setting those terms (and potentially by both of them if both have 'substantially determined' the terms of engagement and employment). We believe that s. 43K(1)(a) ERA 1996, offers a reasonable and practicable way of resolving the 'who is the employer' question and propose that this approach should be followed in respect of a wider range of labour rights, beyond whistleblowers' protection.

6.20 This would mean that the identification of an employer of a worker would turn on whether the former substantially determines the terms on which the worker worked. It is our intention that where more than one party is so responsible (and regardless of whether one party is more responsible than the other, as long as both are 'substantially' responsible), the worker may address a claim against either or both putative employers. So this definition of employer is not an 'exclusive' definition, and can in effect result in a 'joint employer' status arising in respect of multiple employing entities. This would help where the worker is engaged by, paid by and has a contract with an intermediary (e.g. an agency or a contractor) but the terms, such as hours of work or wage rates, are set by the end user or head contractor. It would also benefit workers in the so-called collaborative or 'gig-economy' who are offered work through digital platforms or other on-line intermediaries.

universal coverage

6.21 Currently, a number of key labour rights are subject to long qualifying periods of continuous employment with the same employer. This effectively deprives large numbers of vulnerable, precarious, and casual workers from the very protections they need. This situation is compounded by the fact that large segments of the workforce derive their rights from statute, rather than from collective agreements, the coverage of which has declined dramatically in recent decades. The proposals discussed in this chapter have to be seen in the context of the radical revision of the law at work which we propose in this book as the principal means of reconstructing UK working life after the devastation of four decades of neo-liberalism, and in particular, alongside the reforms we propose to restore collective bargaining as the central source of regulation of working conditions, with statute offering a genuine floor of rights. We propose that all statutory employment rights should be applicable to all workers from day one of the employment relationship, regardless of the number of hours worked.

6.22 A first priority would be to repeal the following provisions subjecting a number of fundamental labour rights to various qualifying periods of continuous employment. In particular:

- Sections 92(3), 108, 155 of the Employment Rights Act 1996;
- Regulation 7 of the Agency Workers Regulations 2010;
- Regulation 30(1)(a) Statutory Shared Parental Pay (General) Regulations 2014/3051;
- Regulation 13(1)(a) The Maternity and Parental Leave etc. Regulations 1999.

6.23 Shorter 'probation periods' may be set through sector-level collective agreement and should be capped by ERA 1996 to a maximum of three months. Such probation periods would be applicable only to the

question of the worker's ability to do the job and shall not be used to terminate contracts for any other reason. Other qualifying periods of employment (right to make a request for flexible work; paid time off to look for work or to arrange training when being made redundant) shall be reduced following consultation with the social partners. The words "two months" in s. 1(2) ERA 1996 shall be replaced with the words "on or before the first day of employment".

zero-hours contracts and shift workers

6.24 A further priority is to reform and improve the existing, scant, rules on 'zero-hours' and on-call and shift workers.[43] In line with the Workers' Definition and Rights Bill 2018 drafted by the IER and appended to this document, we propose that the law should:

- Require contracts to specify a minimum number of regular hours of work for each week worked, and this should be a 'day one' right;
- Specify how these hours will be distributed during a week in which work is done, and specify shifts, rotas and the like (the variation of which would require giving reasonable notice of at least seven days). This would allow some regulated flexibility to both workers and businesses;
- Provide that additional hours over the regular hours specified in the contract may be agreed but will not exceed an addition of 20% to the regular hours;
- Provide additional compensation in the form of 'premium rates' for any agreed extra hours beyond the regular hours specified in the contract. We recommend an additional premium pay rate amounting to 200% of the normal rate.

6.25 In addition, where regular hours or agreed extra hours are cancelled, a similar premium rate ought to apply to each cancelled hour, with due consideration for any additional expenses or loss incurred because of the cancellation. This is to reflect the financial dependency and vulnerability of the low variable hours worker. Collective bargaining between employers and independent trade unions should be allowed to modify some of the limits and rates applicable in this context so as to provide a better fit for workers and businesses in particular sectors.

6.26 Finally, workers should be protected (i) against requests to work additional hours beyond those specified by the law or collective agreements and (ii) against any detriment for failing to agree to work such additional hours. These provisions would introduce an incentive for employers to take a realistic view of their business needs, but without discounting altogether their ability to deal with sudden peaks in demand for goods and services. But above all they would give effect to the statutory principle referred to above that labour is not a commodity, as well as the worker's right to dignity in his or her work relations.

fixed-term and agency workers

6.27 Another priority is to reduce the qualifying period for the right to become a permanent employee on the renewal of a fixed-term contract from the current four years to two years (reg. 8(2)(a) and 8(3)(b) of The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002). The revival of sector-level collective bargaining ought to bring to fruition the hitherto untapped potential of Reg. 8(5) of those Regulations which permits a collective agreement to alter various provisions relating to successive fixed-term contracts. There is in addition a need to address the specific insecurities affecting temporary agency workers, and agency workers more broadly. Having removed the qualifying period for the application of the equal-treatment principle, and having expanded the scope of application of the latter, the regulation of agency work should replicate the regulation of fixed-term work, to limit abuses arising from the repeated renewal of temporary assignments with the same hirer.

6.28 More specifically, the Agency Workers Regulations 2010 would have to be amended in order to reflect the new concepts of 'worker' and 'employer' contained in the revised s. 230 ERA 1996. Reg. 7 on the 'qualifying period' should be repealed and replaced with a new Regulation essentially reproducing the reformed Reg. 8 of the Fixed-term Workers (Prevention of Less Favourable Treatment) Regulations 2002. Where a temporary assignment between a worker and the user is not renewed beyond these two years, and a

relationship is therefore not transformed into a bilateral and open-ended one, an adequate 'compensation payment' ought to be paid to the temporary worker by the agency. Permanent contracts providing for pay between assignments (and currently opting out of the equal treatment principle) should also be subject to the equal treatment principle.

6.29 Sector-level collective agreements may set an upper limit of the share of workforce employable through temporary and on-call forms of work in individual companies, industries and sectors, with a view to limiting the spread of such forms of work overall. While it is recognised that, under certain circumstances, some forms of non-standard work can provide some benefits to both workers and employers, the regulatory framework should treat these forms of work as an exception to the rule of well-protected, adequately remunerated, open-ended and regular employment relationships, which should remain the general form of employment relationship between employers and workers.

unfair dismissal

6.30 It is clear that many other rights at work need revision and improvement. One obvious example is the law of dismissal and in particular the removal of the 'band of reasonable responses' test for determining whether a dismissal is unfair. This should be changed to require the tribunal to determine whether objectively, viewed both from the perspective of the reasonable worker as well as the reasonable employer, the tribunal considers the dismissal to be fair (just as courts decide whether reasonable precautions have been taken in a negligence claim). But a review of all workers' rights would require a very long book and we propose the appointment of a Commission to examine workers' rights for the 21st century.

6.31 Some of the other concerns about unfair dismissal law will be addressed by the new definition of employee which will expand the number of workers who will be protected, as will the removal of the two-year qualifying period for bringing a claim. That said, we believe that two other reforms we propose will have a more dramatic effect on unfair dismissal law as it currently operates. The first of these is the proposal for an effective Labour Inspectorate, with powers to prevent dismissals and order the timely reinstatement of employees. This will address the lamentable failure of reinstatement as a statutory remedy, and the disgraceful failure of the state to ensure that unfair dismissal compensation payments are paid.

6.32 The other proposed change that will have a big impact on unfair dismissal is the introduction of sectoral collective bargaining along the lines recommended above. Part of the ambition is to move as many disputes as possible out of an expensive and hitherto largely ineffective judicial process and into an industrial relations process, which we anticipate will operate more speedily and more effectively without being burdened by the legalism which has now engulfed the employment tribunals. The expectation is that industry-wide disputes procedures will offer a better forum for dispute resolution in the manner outlined in paragraph 4.38 above. That said, we do not under-estimate the importance of the statutory scheme (a) as a fall-back and (b) to inform the operation of the industry procedures.

conclusion

6.33 In the longer term, it is suggested that a wholesale revision of workers' rights would be necessary, partly to enhance the protective potential of UK labour laws, and partly to rationalise and simplify employment legislation, in a way that would assist both workers and employers. Such a revision should also revise, coordinate and integrate statutory and common law doctrines,[44] so that – for example – illegality of contract can no longer be used as a defence by employers to evade statutory employment rights.[45]

6.34 This wholesale revision may be accompanied by targeted revisions to tax and social security legislation in order to ensure that the principle of universal access to social security and labour law entitlements is supported by a sufficiently broad and resilient tax base, and in order to guarantee that recruitment decisions are dictated by objective reasons pertaining to the productive needs of the business, rather than by an actual or presumed indirect fiscal premium attached to particular forms of labour.

6.35 We believe that the Treasury will have scope for such alterations since it is widely accepted that with the spread of sectoral collective bargaining the real value of wages will rise thus increasing the tax take from wages as tax thresholds are passed. Likewise, the rationalisation of employment status that we propose

will decrease the extent of false self-employment and increase true employment so that more tax and National Insurance contributions will be paid by both employers and workers.

equality at work

introduction

7.1 The law relating to equality at work is found for the most part in the Equality Act 2010 (EqA) which made significant improvements to the previous patchwork of primary and secondary legislation. The 2010 Act is generally fit for purpose, though it suffers from the same shortcomings as other provisions as regards the scope of its application, which needs to extend to a broader category of workers than at present including (i) precarious workers, (ii) platform workers and others in the gig economy, (iii) workers with multiple employers, and (iv) self-employed workers.

7.2 Also of enormous significance to workers across the UK is the question of enforcement; there is limited purpose in having even the most advanced equality-related rights if workers cannot enforce them in practice. Other proposals in this book go a long way to address both the issue of covering all workers and that of effective enforcement. Other changes required to the EqA are set out below, as are the implications of Brexit, which has been a source of much comment by equality lawyers in particular in view of the role played by the EU in this field.

7.3 Before they are discussed, however, it is important to note that the Act does not apply to Northern Ireland which, further, has no equivalent in terms of a comprehensive piece of legislation regulating discrimination. It is imperative that this be remedied by the enactment of Northern Ireland's own comprehensive Equality Act which upgrades the current provisions to the standards set in the 2010 Act and reflects the special circumstances of Northern Ireland in how it addresses issues such as fair employment, police recruitment etc.

Brexit

7.4 The urgent need for action to improve equality-related rights at work is even greater now than it was at the time of the publication of the *Manifesto for Labour Law* in 2016. This is because the strides that have been taken over past decades to reduce workplace inequality are significantly under threat as a result of the impending withdrawal of the UK from the EU. The EU has, for many years, provided the substantive underpinning to much (though not all) of the statutory framework regulating discrimination in work.

7.5 At present, EU law is binding on the UK Parliament, and can in some cases be enforced directly in UK courts even where it is in conflict with domestic law. After withdrawal there will be no obstacle to the repeal or undermining by Parliament of the provisions of the Equality Act 2010 (in Britain) and other related legislation (including in Northern Ireland) which provide some measure of protection in relation to equality and non-discrimination in the workplace as elsewhere. Importantly, the EU Charter of Fundamental Rights will cease, on withdrawal from the EU, to be part of domestic law.

7.6 Of particular concern in this context are the so-called Henry VIII clauses in the European Union (Withdrawal) Act 2018 ('the Withdrawal Act') which will provide the executive with sweeping powers to amend primary legislation without full Parliamentary scrutiny. The survival of the current equality provisions post-withdrawal is far from assured, many on the right having expressed hostility to provisions such as those (i) guaranteeing job-related protection for pregnant women and parents, and (ii) imposing proactive equality-related duties on public authorities. Other likely targets for a right-wing government unconstrained by EU law would be the remedies available to those who succeed in establishing unlawful discrimination.

7.7 One possible counter-balance to the likely attacks on equality law post withdrawal from the EU would have been the inclusion in the European Union (Withdrawal) Act 2018 of a non-regression clause to protect employment rights generally and equality guarantees in particular. But a statutory undertaking has been rejected by the government. In addition, it will be vital to ensure that specific provisions be placed in all trade agreements to make adherence to equality standards a requirement of the treaty. This, however, will be a matter for negotiation with other countries, not all of which will be prepared to accept provisions of this kind.

7.8 That said, Brexit may provide an opportunity for public authorities to deploy conditions on public procurement more extensively than at present, so allowing public spending to be harnessed in the interests of equality.

protected characteristics

7.9 Economic disadvantage is a key factor in both the cause and consequence of discrimination. We propose that s. 1 of the EqA should require public authorities 'when making decisions of a strategic nature about how to exercise [their] functions, [to] have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage'. Factors such as race and religion cut across socio-economic class such that some groups defined by these and other characteristics are particularly likely to suffer from socio-economic disadvantage.

7.10 This being the case, **socio-economic status** should be added to the list of protected characteristics in the EqA. It has become clear both in the UK and elsewhere that socio-economic disadvantage has proven particularly intractable. It has been much easier for individual litigants to win legal victories requiring (for example) the recognition of same-sex partnerships, gender reassignment or formal sex or race equality than it has been to dismantle the patterns of disadvantage (particularly socio-economic disadvantage) associated with membership of discriminated against groups. The prohibitions on discrimination related to gender and race, in particular, have allowed some indirect challenge to this but the relationships between socio-economic status and life chances are such that any serious commitment to a reduction in inequality must involve the taking of measures to prohibit discrimination on grounds of socio-economic class.

7.11 The EqA should also be revised to replace the protected characteristics of 'marriage and civil partnership' and 'gender reassignment' with, respectively, **'family status**' and **gender identity**. The former should be protected symmetrically (at present, only those who are married or in a civil partnership, rather than those who are not, are protected from discrimination on the basis of these characteristics). 'Gender identity' is defined by the Yogyakarta Principles,[46] which were adopted in 2007. These apply to an individual's 'deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerism'.

7.12 The prohibition of discrimination because of gender identity would be a significant improvement. The current approach to protection against discrimination in relation to gender reassignment maintains a binary approach to gender which is without justification, tied as it is to a model of 'transition' which leaves unprotected those who are non-binary or intersex. It is important, however, to stress that protection from gender identity-related discrimination does not require that individuals be recognised as having any particular gender identity (specifically, male or female) simply by virtue of their claiming that identity. In other words, there is a distinction between prohibiting discrimination against someone who is biologically male but presents as female, and providing that the individual is entitled to be treated as a woman for all purposes.

7.13 Further, it should be recalled that the EqA contains exceptions which permit discrimination to be justified, the nature of the justification being subject to scrutiny by the courts. We see no reason to change this aspect of the law, with the result that the defence of justification should remain. These permitted exceptions may have to be extended, however, if the Gender Recognition Act 2004 were to be amended to facilitate self-identification as female (or male). Exceptions permitting justifiable discrimination are necessary in order to maintain the protection of women-only spaces (real and virtual), the purpose of which is to promote gender equality. The legislative tweaking which might have to follow from amendments to the Gender Recognition Act 2004 is not a reason to deny protection under the EqA to those whose identities challenge traditional notions of gender.

7.14 Otherwise on the question of protected characteristics, there are three other matters that need urgently to be addressed:

- *Religious discrimination:* The decision of the Court of Justice of the European Union (CJEU) in *Achbita v G4S*[47] indicated that EU law allows a wide scope for discrimination on grounds of religion or belief by employers. That decision was at odds with the general approach of the domestic courts, and consideration should be given to the amendment of the EqA to make it clear that the desire of an employer such as G4S to have a "neutral" workplace should not permit the prohibition of hijab or other religious dress.
- *Disability:* The UN Convention on the Rights of Persons with Disabilities should be fully implemented in the UK, with consideration being given to the changes this would require to the EqA. We propose that disability should be the subject of separate legislation with a distinct enforcement body within the enforcement machinery we propose below.
- *Caste as an aspect of race*: Both the Coalition (2010-2015) and Conservative (2015 -) governments have failed to implement s.9 of the EqA, which since 2013 has required an order to be made to include caste as an aspect of race. This Statutory duty needs to be exercised as a matter of urgency, taking into account the fact that the victims of caste-based discrimination are predominantly Dalits, discrimination against whom is well-documented.[48]

discrimination and equality

multiple discrimination

7.15 The provision made in the EqA for the regulation of 'dual discrimination', which has not been implemented, should be amended to cover multiple discrimination, i.e. discrimination on more than one ground simultaneously (sometimes referred to as intersectional discrimination). This should cover indirect as well as direct discrimination and be brought into force. The absence of legislation regulating this overlapping discrimination creates real difficulties for those who are disadvantaged by reason of more than one protected characteristic (Muslim women, for example, disabled older women, or gay black men), and who would be served better by the law if they could challenge with precision the combined nature of the discrimination they face.

gender segregation

7.16 The EqA currently prohibits race segregation as a form of discrimination. It needs to be strengthened expressly to regulate gender segregation, and to impose positive duties to reduce segregation on this and other protected characteristics, except and to the extent that such segregation is compatible with the promotion of equality. The creation of single sex spaces may be a positive good where it allows 'safe spaces' in the workplace, facilitates network building among the under-represented or less-powerful in particular contexts, or in the meeting of gender-related needs. This must be addressed with care: gender segregation also has the potential to entrench patterns of unequal power, and to reinforce gender stereotypes. Similar arguments apply to segregation on other grounds.

harassment-free workplaces

7.17 The endemic nature of harassment, in particular sexual harassment, has been a particular focus of public attention in recent months. Such harassment creates toxic working environments which are profoundly damaging to women's working lives, and prevents them reaching their full potential. We recommend the imposition of an obligation on employers to create harassment-free workplaces. Such a duty (extending to the processes of recruitment) will not only assist women workers and women seeking work but will help to eliminate the harassment that women especially suffer as customers, clients, free-lancers and co-workers. The current model of legal liability for harassment fails to protect many women from harassment by co-workers not employed by the same employer, from clients and from customers. A duty to create and maintain a harassment-free workplace remedies this deficiency.

positive measures

7.18 The Public Sector Equality Duty should be strengthened. This duty requires public authorities to have 'due regard' in the exercise of their functions to the need to eliminate discrimination, advance equality and

foster good relations between persons of different groups defined by reference to the various protected characteristics. At present it is a duty of process only. It should be strengthened to require that public authorities provide a reasoned justification for decisions which further disadvantage disadvantaged groups defined by reference to protected characteristics, or which otherwise damage rather than advance equality. We also consider that public authorities and other bodies should be required to take positive action to ameliorate disadvantage and reduce inequality.

positive action

7.19 At present there is reasonably generous provision for positive action generally, but very limited scope for such action in relation to recruitment and promotion, in which context employers are limited to allowing a protected characteristic to operate as a 'tie break' factor between equally qualified applicants where this favours the candidate from the under-represented group. The fact that individuals disadvantaged by factors such as ethnicity or sex may not be recognised as 'equal' operates significantly to reduce the potential impact of this permission, and employers are understandably reluctant to risk unlawful action by taking a generous approach in determining that candidates are 'equal' in any particular case.

- It is possible to frame legislation so that an employer avoids the risk of a claim by a more advantaged candidate where it has favoured a disadvantaged candidate who fulfils the qualifications for a position where there is significant under-representation within the relevant workforce.
- Better still, if employers were required to take proportionate positive action in cases where there was significant under-representation, this would counter the legal concerns that might otherwise deter such action, and indeed would provide an incentive to do so.

achieve or explain

7.20 It is worth underlining here that positive action provisions could challenge the disadvantage experienced (for example) by white working-class males as well as by other groups defined by reference to protected characteristics. The obligation need not (in fact should not) be a hard-edged requirement for quotas, rather a requirement to 'achieve or explain'. This self-explanatory obligation could be imposed by legislation on all employers, though thought needs to be given as to the manner of its implementation, and remedies in the event of failure to achieve or explain. The obligation should also be imposed as a condition for the award of public sector contracts, under public procurement rules (which would need to be adapted to permit this). The obligation could also be imposed by the sectoral collective agreements we have proposed in chapter four above.

equal pay

7.21 Equal pay provision needs to be overhauled to move away from a comparator-based model which requires the claimant to point to a man doing (essentially) similar work. The problem is that while the current model allows 'equal value' claims these are very difficult to establish, particularly given the continuing lack of transparency which characterises much pay. The legislation should be overhauled to allow pay claims based on disparities between women and men working for different employers within supply chains, particularly where such men and women are working in the same workplace and/or on similar projects. Much research has shown that the sectoral collective agreements we propose in imposing industry-wide rates for the job will tend to reduce inequalities of pay between men and women (or people from other disadvantaged groups) doing similar work.

7.22 The current requirements for the publication of gender-pay information have succeeded in raising awareness of organisational gender pay gaps, and already in some cases have provoked action by women. These transparency requirements do not, however, apply to enough employers and the information required to be published is not sufficiently detailed. On the one hand, the employer's justification that large gender-pay gaps are the result of the concentration of men at more senior levels of the workforce can provoke questions as to why this is the case in the enterprise in question. On the other hand, it is also the case that the published headline figures do not allow an analysis of the relative pay of men and women who do work which may be categorised as equivalent, or of the proportionality of pay gaps between male and female jobs.

7.23 We propose that the pay transparency should be extended to cover employers having 50 or more employees (rather than the current 250). They should also be enhanced to require fuller pay auditing and to oblige employers to devise and implement plans to eradicate pay inequalities tainted by race, sex and/or disability. We have proposed these as mandatory subjects for sectoral collective bargaining, above. Pay auditing and plans to eradicate pay inequalities should be subject to oversight by trade union representatives in workplaces in which unions are recognised, otherwise by equality officers in the workplaces in question (though we recognise that this will be a challenging role where there is employer hostility). That oversight should not relieve employers of the duties to carry out these processes. There is much to be learned in this area from Canada in which mandatory auditing has been in place for decades in several provinces.

7.24 It may be unrealistic to expect that this type of process would bear much fruit in industries in which sectoral collective bargaining has not yet been implemented or in workplaces where no union is recognised and in which equality officers may neither have the training nor the resources to hold employers to account. But we believe that the process of pay auditing, certainly if it was coupled with an obligation to publish and to include in company accounts, which would themselves be subject to audit, would increase transparency even in unorganised workplaces. Failure to comply with the reporting and auditing procedures should be discouraged by removing the 'material factor' defence from employers in default. This would make it more difficult for employers to resist equal pay claims in litigation.

7.25 To emphasise: the sectoral pay bargaining which is proposed in chapters three and four above would also do a great deal to tackle the gender pay gap; all the evidence is that the gap is greatest where pay determination is individualised. In our view structural changes of the kind proposed (underpinned by law) are potentially as important as other more direct statutory interventions designed to deal with pay equity. In addition to pay determination by sectoral bargaining, we propose above that collective agreements should be equality proofed and measures introduced to enable discriminatory collective agreements to be challenged before and if necessary amended by the Central Arbitration Committee (CAC). In these cases, the composition of the CAC panel should be adapted to include a person nominated by the Equality and Human Rights Commission (EHRC) with special expertise in the area of sex discrimination and equal pay in particular.

maternity, paternity and related rights

7.26 Despite government claims to the contrary, the UK currently lags behind much of Europe as regards the generosity of paid provision for time off attendant on the birth of a child, while discrimination against pregnant women and those returning from childbirth is rife. We consider that employers, unless they have obtained prior authorisation from an external authority, must be prohibited from dismissing women who are pregnant or have recently returned to work. Even with this protection there is every reason not to incentivise employers to discriminate against women on the basis that they may have children. Accordingly, increasing emphasis has to be placed on encouraging non-birth parents to share birth-related leave.

7.27 One of the mechanisms by which this can be achieved is an increase in the period of leave on full pay; because many fathers earn more than mothers, the possibility of fully paid leave is likely to encourage the sharing of such leave. So we propose that:

- In addition to existing paid and unpaid maternity leave, workers should be entitled to full pay for a minimum of one month of paternity leave;
- There should be a period of 2-3 months flexible parental leave on full pay on a "use it or lose it" basis to be taken by the mother or father or partly by both;
- Such leave could be taken when the child was a little older, possibly after a period of lower-paid leave being taken by the main user of the maternity leave.

7.28 The effect of these proposals ought to be to encourage fathers to spend time caring for very young children and to discourage employers from equating childbirth-related leave with women as a disincentive to their employment. Flexible working must be further facilitated by substituting the current entitlement to *request* such work by an obligation on employers to *grant* such requests unless they involve disproportionate burden to the employer and/or other workers. We also propose an increase in the limitation period for bringing a claim connected with pregnancy, the current three-month limitation period is a barrier to the effective realisation of rights which has been recognised by the Justice Committee and the Fawcett Society among others.[49]

7.29 Workers should be free to bring a pregnancy-related claim at any time up to six months from the time of the alleged event.

enforcement

7.30 Here we foreshadow the proposals in the chapter on enforcement. Successive governments have drawn the teeth of the EqA by scrapping pre-claim questionnaires,[50] and the power of tribunals to make recommendations extending beyond the individual claimant.[51] The right to serve such questionnaires had proved to be a useful means of obtaining preliminary information in an area where evidence is notoriously hard to find. The power of tribunals to make general recommendations was also a useful and beneficial power (for example, that an employer trains its employees in general on equal opportunities). These changes need to be reversed.

7.31 More fundamentally, the almost exclusive reliance of the EqA on individual enforcement through tribunals is profoundly unsatisfactory. Even with the removal (for the present) of tribunal fees, the obstacles this places in the way of effective enjoyment of legal rights are enormous, and very few workers who litigate discrimination cases remain in their jobs throughout or after the litigation. Further, many equality-related issues including gender unequal pay, the longer-term gender pay gap, endemic sexual harassment and occupational and workplace segregation are collective matters which require collective redress.

7.32 For this reason, the introduction of a properly-resourced Labour Inspectorate would have profound implications of great importance in this area, as in others, and its role could be facilitated and reinforced by the imposition of a statutory requirement for equality officers elected from amongst the workforce who would be trained to recognise and assist workers facing unlawful discrimination and harassment, as well as to promote equality within workplaces. Equality officers would not have an enforcement role but could, rather, act as an additional resource through which unions could spread good practice in organised workplaces, and who would at least be entitled to statutory protection against victimisation connected with their role in unorganised workplaces.

7.33 The EHRC has been starved of funds as a result of the austerity policies of Conservative led governments since 2010. By 2020 it will have lost 70% of its 2010 funding (from £62M to £17.4M p.a.). This has hugely hindered the organisation's ability to carry out any enforcement role at a time when it has come under increasing pressure to take action in relation to gender pay inequality and sexual harassment, for example. The EHRC has recently called for, and should be granted, powers to require employers to provide information about recruitment practices and workforce demographics where complaints have been made. It should also have the power to issue enforcement notices or impose civil sanctions when companies fail to publish their gender pay gaps.

conclusion

7.34 The impact of equality officers, of the Labour Inspectorate, and of extended collective bargaining needs to be complemented by the imposition of statutory duties on employers to monitor their workforces and to carry out rigorous pay audits (see above). The creation of equal opportunities forums within workplaces would facilitate the discussion of equal pay audit information as well as other equality-related issues. These obligations should run in parallel with proposals for the introduction of the National Joint Councils (NJCs) which we propose in chapter four on sectoral collective bargaining, including a power to refer a provision in a relevant agreement to the CAC because of concerns related to discrimination or inequality by reference to any of the protected characteristics.

health and safety regulation

introduction

8.1 Too many workers and their families continue to suffer from the failure of their employing organisations to provide safe and healthy working conditions. Injuries, acute and chronic ill-health and death occur all too frequently, along with the emotional and financial costs they cause. Yet employing organisations are rarely held accountable for these outcomes. In fact, according to the Health and Safety Executive (HSE), the vast majority of the associated costs are borne by those harmed and their families, and by the taxpayer through the costs of paying benefits and providing health care.

8.2 It is also clear that the risks faced by workers vary not only in relation to the type of work they do but on what basis they do it. Temporary workers and those deemed to be self-employed are, for example, significantly more likely to suffer injuries. Indeed, while the self-employed constitute around 15% of employment, HSE figures indicate that they account for 30% of workplace fatalities. Those working in micro and small enterprises (MSEs) have similarly been found to experience proportionally greater serious injuries and fatalities than those working in larger enterprises. Furthermore, evidence suggests that this in part stems from how large, powerful purchasing organisations can undermine health and safety standards in their (often smaller) suppliers through the price and delivery demands they impose.

8.3 To add insult to injury, current government policy, in failing to comply with relevant ILO commitments, exempts from inspection workplaces in which millions of workers earn their living by arbitrarily deeming them to be 'low-risk' (for example docks). This means that some workers are more equal than others when it comes to the likelihood of their employer being held accountable for a failure to comply with their legal duties. Meanwhile, employing organisations are operating under less and less external oversight as the numbers of HSE and local authority inspectors have fallen and all forms of enforcement action have declined. This is neither acceptable nor inevitable. Changes to the current framework for health and safety could therefore alter it radically. All that is needed is the political will to take the necessary action.

8.4 Without doubt the changes we propose to the legal status of workers in the chapter on the employment relationship and our proposals for the re-establishment of widespread sectoral collective bargaining will have a significantly beneficial impact in the field of health and safety at work. However, changes to the law on health and safety are also required and they are necessarily wide-ranging. In particular, as detailed below, they must encompass reforming the central statutory duties of employers, enhancing worker representation, improving compliance with statutory duties through an inspection regime fit for purpose, and ensuring that those harmed as a result of their work activities have access to decent sick pay and the ability to obtain compensation where it flows from employer failures to comply with their legal duties.

changing the focus of health and safety duties

8.5 The core duties imposed under ss. 2 and 3 of the Health and Safety at Work (HSW) Act 1974 have been significantly undermined by two important developments:

- The first, already discussed in chapter six on the employment relationship, is the growth in various forms of 'non-standard' or 'atypical' employment.
- The second is the extent to which vulnerable workers tend to be concentrated in industries where lead firms determine the product market conditions within which their suppliers set wages and conditions.

8.6 The first of these means that a growing proportion of the workforce fall outside the scope of the duties imposed on employers for the protection of employees under s. 2. Meanwhile, judicial decisions indicate that the duty imposed on undertakings under s. 3 to ensure the health and safety of persons not in their employment fails adequately to address the protection of non-employees. As a result, health and safety standards in supplier organisations can be directly and indirectly undermined by the cost and delivery demands of powerful purchasers without fear of legal consequences.

8.7 Research shows that these changes act to disorganise and fragment the way in which health and safety is resourced and managed. They also serve to generate new and additional risks to worker well-being through the increases in work intensity and insecurity which often accompany them. This means that even after the redefinition of 'workers' and 'employers' proposed in the chapter on the employment relationship, core health and safety duties need to be revised to fit better with the world of work and apply more equally in protecting all workers whose health and safety is potentially affected by the actions of business undertakings. To do this we propose that no distinction should in future be drawn between the duties of 'employers' and 'undertakings'. Instead, statutory obligations to protect workers should be reformulated to (a) focus on those in control of businesses or undertakings and (b) equally encompass all workers directly and indirectly carrying out work for them.

8.8 In this way those in control of businesses and undertakings would possess protective obligations in relation to not only their employees but also those carrying out work for them, such as:

- A contractor or subcontractor;
- A worker of a contractor or subcontractor;
- A worker of an employment agency who has been assigned to work in an end-user's business or undertaking;
- A worker of a franchisee;
- A homeworker;
- An apprentice or trainee;
- A student gaining work experience;
- A volunteer.

8.9 Such reforms would provide another important way of addressing the adverse effects of employment precarity. In doing so, they would also reinforce the wider aim of ensuring that employment rights and protections apply universally and equally to all types of workers and work situations.

8.10 It is clear that reforms of this type are perfectly possible. In 2010 the Australian federal government adopted a model Workplace Health and Safety Act that reformed the legal framework along these lines. Under this legislation, a workplace for example, is defined as 'a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.' It is therefore made clear that the duties of businesses and undertakings apply to all those undertaking work for them regardless of whether this work is done at premises outside their control. In addition, given that such situations can give rise to more than one duty-holder owing a duty of care to a particular worker, the legislation imposes an obligation on these duty-holders to consult, cooperate and coordinate their activities. This duty mirrors those imposed by existing regulations in the UK covering sectors such as construction that have been shown to be successful in improving both arrangements for safety and health and their outcomes.

8.11 Such a framework clearly represents an advance on the current provisions of the HSW Act. The fact that it has been established in a national jurisdiction with a similar legal system to Britain additionally highlights that there are no fundamental legal challenges to the creation of a similar legal architecture in Britain. The proposed framework should be further developed in Approved Codes of Practice detailing the application of a primary duty to the various types of employment arrangements detailed above.

enhancing the rights of workers to participate in health and safety matters

8.12 Our proposals for the re-establishment of sectoral collective bargaining and enhanced rights to trade union recognition and representation will do much to enhance democratic voice over health and safety matters, as well as workplace issues more generally. Nevertheless, there will continue to be a need for rights of representation relating specifically to workplace health and safety. A growing body of international evidence points to the capacity of systems of worker representation and consultation to improve both health and safety management and outcomes. However, this evidence also indicates that the effectiveness

of these measures is dependent on the presence of a number of 'pre-conditions'. These include:

- the presence of a surrounding regulatory framework;
- employer commitment to a participative approach to health and safety management;
- supportive trade union organisation inside and outside the workplace; and
- well-trained and informed representatives.

8.13 Collectively, the international evidence undermines the utility of direct, non-representative and non-union forms of workforce representation and consultation. Unfortunately, it is also clear that as workplace union recognition for collective bargaining has fallen, so has the coverage of collective, union-based, health and safety representation. The result is that a key component of effective self-regulation is missing from most British workplaces, though we would expect this to be reversed by the proposals for sectoral and enterprise-based bargaining outlined in chapters four and five above. Meanwhile, however, in common with the current core duties discussed above, those relating to consultation remain problematically focused on employers and those they directly employ.

8.14 A variety of actions are required to remedy this situation. Since issues of health and safety are an integral part of the wider relations between workers and their employers they should also be encompassed within the proposed system of sectoral collective bargaining. Indeed, collective agreements arising from this system could provide helpful and specific details of matters such as the appointment of safety representatives, the establishment of safety committees, rights of workplace access for trade union officials, procedures for the introduction of new technologies and substances, and so on. Such collectively agreed measures should build on more general regulatory requirements and provide more detailed provisions which are relevant and appropriate to the sector concerned.

8.15 In addition, although our proposals for trade union recognition will simplify that process, we nevertheless also propose that trade unions should have the right to represent members in workplaces where they are not recognised, thereby aligning rights to safety representatives and committees with those proposed in respect of workplace union representation more generally. Other recommended actions in this vein include:

- Removing the current option to directly consult workers over health and safety matters in non-unionised workplaces
- Imposing the current duty to consult over health and safety matters on the 'controllers of businesses or undertakings'.

This latter recommendation is to replace the current duty limited to employers only, and would apply to all those undertaking work, directly or indirectly for them.

8.16 One final point here relates to the international evidence, which indicates that representatives are more effective when they have additional rights to require the cessation of work and rights to issue notices to employers requiring remedial actions to be taken. The right to require the cessation of work should be dependent on an assessment by the worker representative that a serious and imminent risk is posed to workers' safety or health. Such a right exists in sectors like mining in some countries, and more broadly in forward thinking EU member states like Sweden. The right to issue notices to employers requiring remedial actions to be taken is seen in the system of provisional improvement notices used in Australia. We propose that union safety representatives should have the right to issue 'provisional improvement notices' and to 'stop the job' in situations of serious and imminent danger.

creating a more rigorous regime of health and safety inspection

8.17 Evidence indicates that the capacity and willingness of employers to manage health and safety effectively and in line with the law is frequently problematic. Even large and well-resourced employers have been found to struggle to establish effective internal systems of management, while many smaller ones have little understanding of their legal obligations or a capacity to manage health and safety in

a legally compliant and effective way, even within high-risk sectors like construction. Indeed, many owners/managers of SMEs (small and medium sized enterprises) want and need contact with inspectors in order to act upon their willingness to comply with the law.

8.18 There is ample and long-standing evidence that workplace inspections do improve legal compliance and worker protection, both directly and indirectly. There is also research that indicates, perhaps unsurprisingly, that corporate compliance with the law is better when there is a real possibility of non-compliance being detected and penalised. These uncontroversial propositions highlight the value of establishing a Labour Inspectorate to proactively oversee and enforce compliance across the whole range of employment laws. Such a Labour Inspectorate is found in many countries, including almost everywhere in the EU.[52]

8.19 However, having an inspectorate is not enough. The consequences of cuts to the HSE and local authority budgets have been dramatic.

- On 1 April 2004, there were 1,483 'front-line inspectors' in HSE; by the same date in 2015 this figure had fallen by 34%, to 972.
- At the same dates, there were, respectively 1,140 and 736 full-time equivalent local authority Environmental Health Officers (EHOs) holding appointments under s. 19 of the HSW Act – a fall of 35%.

8.20 Against this backcloth, over the period from 2003/4 to 2015/16, proactive inspections undertaken by the HSE's Field Operations Division (FOD) fell by 69%, while in the case of EHOs total inspections fell by 69% and preventative ones by a staggering 96%. As a matter of urgency, HSE and EHOs therefore require substantial increases in funding.

8.21 If the number of inspections (18,000) carried out by HSE in 2015/16 is considered in relation to the number of premises for which its inspectors have enforcement responsibility (some 900,000), then the statistically average workplace can now expect an inspection once every 50 years. Current levels of enforcement activity cannot therefore be credibly argued to be compliant with the commitment under Article 6 of ILO Convention 81 (ratified in part by the UK) that: 'Workplaces shall be inspected as often and as thoroughly as is necessary to ensure the effective application of the relevant legal provisions.' The extent of successive government cuts to HSE and local authority inspection resources has thus weakened the capacity of the HSE and local authorities to carry out an effective safety and health inspection function almost to the point of non-existence.

8.22 The moral is that it is absolutely critical that inspection authorities are properly and securely funded. The collapse in the level of inspections was exacerbated and indeed institutionalised through the DWP's decision, in 2011, to identify whole sectors of economic activity as 'low-risk' and thereby prohibit proactive inspections at local authority and then at HSE level. No rationale for what constituted 'low-risk' was provided, and an analysis by *Hazards* magazine found that of the 258 reported worker fatalities in the 19 months which followed the change, 53% were in 'low-risk' sectors. This decision must be reversed. A renewed workplace inspection regime must be established as a matter of urgency. As a minimum, this should encompass:

- Establishment of inspection and enforcement regimes that are ILO compliant;
- Significantly increasing the numbers of HSE and local authority inspections (including those undertaken at random, rather than on (an alleged) "risk-based" basis);
- Provision of government funding to recruit enough inspectors to properly enforce the law;
- Abolition of the "Primary Authority Scheme," which allows large companies to avoid legal obligations;
- Repeal of policies prohibiting unannounced inspections to "low-risk" workplaces.

8.23 In view of our proposals for the radical reform of labour law, and to recreate a central government department with responsibilities for its administration and enforcement, the integration of protecting

workers' safety and health within that department is an obvious possibility. We propose for consideration that health and safety inspection and enforcement should be transferred from the HSE and local authorities into a specialist division of a new and wide-ranging Labour Inspectorate. Whatever institutional structure is adopted however, it is clear that a statutory process, independent of government control, needs to be put in place to determine the resources required to adequately carry out health and safety inspection and enforcement. It is simply unacceptable that the funding of this activity should be a plaything of successive governments.

penalties and compensation

8.24 Article 17(1) of ILO Convention 81 provides that '[p]ersons who violate or neglect to observe legal provisions enforceable by labour inspectors shall be liable to prompt legal proceedings without previous warning…'. The likelihood that non-compliance will no longer lead to prosecution and/or other enforcement action means that current arrangements cannot be claimed to meet this requirement. For example:

- in the case of HSE's FOD division, the period from 2003/04 to 2015/16 saw convictions fall by 24%; improvement notices by 14%; prohibition notices by 35%; and the combined total of all notices by 23%.
- Over the same period, in relation to local authority EHOs, convictions declined by 60%, improvement notices by 65%; prohibition notices by 28%; and all notices combined by 57%.

8.25 These declines mean that already low levels of enforcement action have been significantly reduced. For example, in 2015/16, there were only 696 prosecution cases instituted by HSE, notwithstanding the already noted evidence that employer compliance with health and safety laws is often problematic.

8.26 Moreover, even when prosecutions are successfully brought, the penalties imposed are low. The average penalty for all health and safety offences prosecuted under the 1974 Act in 2015/16 stood at just under £58,000, while that for those relating to fatal injury averaged £62,148.

8.27 We propose that action to address this situation should, at a minimum, include:

- Developing a scale in sentencing guidelines under which courts are advised to impose fines falling within specified percentages of turnover that differ, as with some forms of competition law, for differing sizes of company;
- Establishing a new tripartite standing body to review sentencing in health and safety offences and make regular and binding recommendations, which includes significant representation of all stakeholders, including business, trade unions, the new government department, workplace safety representatives, and representatives of communities with an interest in good health and safety practice;
- Increasing HSE (and local authority) funding and staffing sufficient to achieve the required expansion in enforcement activity and workplace inspections;
- Placing the health and safety inspection regime on a new constitutional footing that would make it harder for subsequent governments to reverse such increases;
- Development of an enforcement policy that places more emphasis on inspectors using their powers to issue enforcement notices and initiate prosecutions, including on indictment;
- Creation of a new, discrete unit within the Crown Prosecution Service solely responsible for considering cases of corporate manslaughter;
- Removal of the current requirement under the HSW Act for unions to secure permission to initiate private prosecutions where employers are failing to comply with their legal duties in relation to worker representation and other matters.

8.28 Finally, s. 69 Enterprise and Regulatory Reform Act 2013 removed the right of workers to bring a civil action for breach of the statutory health and safety regulations designed to protect them, a right which

had stood since the factories legislation in the 19th century.[53] This wholly unjustifiable measure, which benefitted only the insurance lobby, must be repealed so that workers may again seek compensation through civil actions for breaches of statutory duty. There is also a need to address situations whereby ill and injured workers all too often receive insufficient support to enable them to retain their jobs. Fewer than half of employers (and a much small proportion of private sector ones) operate sick pay schemes, with the result that most private sector workers receive, at best, Statutory Sick Pay of just £89.35 a week.

8.29 We propose that there should be:

- Universal entitlements to a level of sick pay which represents a substantial proportion of normal pay;
- New duties on employing organisations in respect of the rehabilitation and return to work of ill and injured workers.

conclusion

8.30 The reform agenda we propose for health and safety entails a combination of administrative, funding and legislative changes. While some measures will require more debate and deliberation than others, most of the identified changes could be implemented relatively speedily. We also suggest, given that the framework in law laid down by the HSW Act was established five decades ago in a very different world of work, that there is a strong case in the longer term for undertaking a comprehensive review akin to that undertaken over the period 1970-72 by the Robens Committee which led to the HSW Act. Like the Robens Committee, the review we propose should be undertaken by a combination of academic specialists and representatives from both industry and the trade union movement. It should also have an independent and highly respected chair – rather than, as with most recent health and safety reviews, a former or current politician or business person.

regulating supply chains

introduction

9.1 The widened definition of both 'worker' and 'employer' in chapter six on the employment relationship and the broadened spread of obligations in relation to equality at work and health and safety at work in those chapters will undoubtedly do much to ensure that decent labour standards apply to workers and employers in the UK. The re-establishment of sectoral collective bargaining advocated for in chapters three and four will impose minimum agreed terms and conditions across whole industries. But these measures may not capture all whose work contributes to the production of UK goods and services, particularly where the employer has arranged for the work to be done overseas.

9.2 In the latter case, it must be accepted that a sectoral collective agreement established in the UK may not be able to prescribe the minimum rates of pay (and conditions of work) agreed for work done outside the UK. Yet we consider that certain minimum standards will be enforceable along the entire length of supply chains which stretch overseas, just as they and more specific terms will be enforceable along purely domestic supply chains. The effective regulation of supply chains is thus an important feature of the prevention of undercutting which is one of the attractions to employers of the proposals in this document.

9.3 The organisation of production across chains or networks of firms, rather than within vertically organised firms, has proliferated in the form of outsourcing, joint ventures, public-private partnerships, and long-term agreements with suppliers and clients. A major objective of firms entering into inter-firm contracting, whether by outsourcing production activities or forging joint ventures or partnerships, is to raise levels of productivity. The problem is that in many cases, short-term productivity improvements are won mostly by cutting wages and other non-wage terms and conditions of employment.

9.4 There is no binding international treaty or ILO Convention which might regulate global supply chains for the protection of workers. The 2011 UN Guiding Principles on Business and Human Rights, which address the responsibility of business to respect human rights including labour rights, leave out the question of home state responsibility and are problematic in terms of their enforceability against corporations. Further, although there are corporations which voluntarily manage or monitor the practices of their supply chains by including corporate social responsibility clauses in supply contracts, such practices are not widespread and questions exist regarding their effectiveness and their impact on competition between employers.

9.5 Moreover, though trade liberalisation can create decent jobs, too often it permits the violation of basic labour standards and provides a poor quality of jobs. The fact is that labour standards in global supply chains are almost always excluded from free trade agreements (as for example in the recent – and controversial – Japan/EU agreement and that with Canada – the Comprehensive Economic and Trade Agreement (CETA)). Finally, at a domestic level, there is a lack of mandatory schemes for regulating supply chains for employment policy purposes. Instead, labour regulation continues to be predicated predominantly on the dominant 'employment paradigm', that is the presumption of a single employer directly employing employees at a single workplace.

9.6 Indeed, by provisions such as s. 186 Trade Union and Labour Relations (Consolidation) Act 1992, domestic law reinforces the problem by prohibiting mandatory trade union recognition throughout the supply chain. There are thus significant legal obstacles regarding corporate accountability vis-à-vis labour issues arising out of a relationship between UK-based firms and workers of suppliers based in other jurisdictions. The only exception here, the Modern Slavery Act 2015, has had so far questionable impact on global supply chains. Reasons for its limited effectiveness include the following: there is a high threshold for the application of the legislation (i.e. the Act is only applicable in respect of businesses with a total annual turnover of £36 million), the Act requires disclosure only of supply chain diligence already undertaken, it focuses on a narrowly defined set of human rights violations, and it lacks a robust liability regime.

9.7 These limitations of traditional governance approaches to labour law in the context of supply chains must be overcome. The proposals we develop below identify international best practice employed by

governments, companies, businesses and organisations to prevent labour abuses in supply chains. They rest on the assumption that labour provisions should be seen as a mix consisting of several different, but often interrelated, politically chosen mechanisms and measures that individually and often in combination hold the potential to generate, or contribute to, impact. Rather than relying on piecemeal public regulation attempts and/or soft law instruments, they draw on public and private tools of regulation with the explicit goal of strengthening public regulatory capacity, promoting compliance with labour standards and linking more effectively corporate social values to economic incentives so as to ensure that supply chain products and services are not made or produced at the expense of protecting human rights.

joint liability

9.8 The fissuring of the workplace presents serious challenges for employer non-compliance with labour standards. Civil remedy litigation is perhaps the most common form of supply chain intervention. Such intervention is usually premised on the principle of joint liability, namely that liability for breaches of labour standards is not confined to the immediate employer responsible but is shared by others in the supply chain, particularly by the contracting entity at the apex of the supply chain. This gives a huge incentive on that contracting entity to enforce standards throughout the supply chain. Empirical evidence from legal systems where such regimes operate, suggests they helped prevent the abuse of employees' rights and the evasion of rules, as well as combat undeclared work and illegal unfair business competition.

9.9 Joint liability should thus be considered as an initial step in the promotion of greater corporate accountability in supply chains in the UK. Under this model, the legislation we propose and describe below will stipulate that any natural or legal person (the superior contracting party) who, in the course of their business, entrusts the performance of work or part of work to another natural or legal person (the contractor) is jointly liable with the contractor to employees of the latter in respect of compensable loss in the jurisdiction in which the loss occurred (e.g. unpaid wages, pensions, holiday and other leave payments, discrimination, failures of health and safety and social security). In the case of assignment of the work or part of the work by the contractor to a subcontractor, joint liability shall lie with the contracting entity, the contractor and the subcontractor (and subcontractor's subcontractor etc.).

9.10 The legislation we propose will introduce a requirement on contractors who use subcontractors (and their subcontractors) to inform immediately the superior contracting party in writing and to submit the details to the Labour Inspectorate. Further, the contract for the award of work or part of a project should include a specific condition regarding the contractor's compliance with the provisions of local labour and social security legislation, including collective agreements applicable in the sector. The same specific term should be included in the contract entered into by the contractor with the subcontractor and so on down the supply chain. This form of liability will not require any degree of complicity or knowledge on the part of the superior contracting party; instead, the superior contracting party can be held jointly liable simply through association with the malfeasant subcontracting party.

9.11 The legislation will apply to each UK-based contracting entity that uses domestic or foreign subcontractors. Where there is a violation of labour legislation or collective agreements, aggrieved workers, either individually or collectively through a representative trade union, will have a right to bring legal action against a party in the supply chain, including the superior contracting party. The extended definition of the 'employer', set out in chapter six above should be sufficient to make the lead firm in a supply chain a joint employer, if it directly or indirectly has the power substantially to determine essential terms and conditions of employment (without the need to show actual control). A contracting entity may avoid liability if it can demonstrate that it exercised due diligence in relation to its obligations as contractor and in relation to any of its subcontractors to their employees. The requirements of due diligence will be met where the contracting entity:

- Requested satisfactory proof of the fulfilment of obligations directly and monthly from their (sub) contractors;
- Required the contractor and subcontractor, if available, to comply as soon as a failure to comply has been established; and
- Terminated the contract with the contractor in case of non-conformity.

9.12 The operation of joint liability would be complemented by the operation of sectoral collective bargaining. The legislation will permit sectoral collective agreements in the UK to specify terms and conditions applicable along the length of the supply chain. Whilst such UK agreements are unlikely to apply to pay, hours and holidays outside the jurisdiction they may well apply minimum standards in relation to matters such as redundancy, health and safety, discrimination and freedom of association (including an obligation to bargain collectively locally and to respect the right to strike). Codes of conduct agreed between parties to sectoral bargaining could be used, for example, to tailor some of these requirements to specific sectors in question. These could include, for instance:

- A contractual obligation on contractors and subcontractors in the chain to offer decent employment conditions to their own employees;
- Requiring as a contractual condition the duty on the part of contractors to recognise trade unions and/or designating dispute resolution mechanisms; and
- Restricting the layers of subcontractors and working with a regular chain of subcontractors.

9.13 As well as the introduction of joint liability, the legislation will also require worker representation in specific cases of supply chains, such as in the case of franchise networks, so as to counteract the fragmentation of employee voice.

9.14 There is a parallel here with the recently introduced French legislation on the introduction of a 'social dialogue committee' in franchise networks with at least 300 full-time workers on the condition that franchise agreements include 'clauses that have impact on work organisation and conditions in franchisee business' (Article 64 of the Labour Code). This would complement the work of sectoral bargaining arrangements and would have the additional benefit of creating networks on the workers' side. These in turn would be helpful collaterally in developing strategies for trade union recognition across a franchise or through a network, rather than in individual units of these franchises or networks.

9.15 Finally, with reference to the sacrifice of road haulage workers in the recent revision of the Posted Workers' Directive, we emphasise that the legislation should also embrace transportation and distribution services, which so far have not received the same attention as other sectors and services in the supply chain debate. The model of the Australian legislation, namely the Heavy Vehicle National Law 2012 (rolled out among a number of participating Australian jurisdictions) and the now repealed federal Road Safety Remuneration Act 2012, may provide a basis for reforms either in the form of joint liability or in the form of human rights due diligence, as outlined below. This legislation set out 'a chain of responsibility' for all parties (including firms packing, loading and receiving goods) involved in road transport work, even if they have no direct role as a driver or transport operator.

human rights due diligence

9.16 The proposals discussed above would address some of the current workplace problems in supply chains. However, it is likely they would be limited in promoting greater corporate accountability in the long-run and in addressing all the challenges associated with global supply chains. This is because joint liability is broadly reactive, seeking to address non-compliance with employment standards, and is generally limited in terms of its subject-matter, dealing predominantly with financial issues. It is also premised on the idea of control by one company over another, excluding from its scope labour abuses in supply chains where no such control is exercised.

9.17 A more sustainable solution in the long-term will require the adoption of Human Rights Due Diligence (HRDD) legislation. Similar requirements would thus be introduced to cover the process of importation (even temporarily) of goods/services (see also the analysis below).

9.18 Moving away from a purely disclosure-driven regulatory model, our proposal integrates three approaches to business rights:

- The UN Guiding Principles on Business and Human Rights;

- The UK Modern Slavery Act; and
- The recently enacted duty of care in French legislation.

9.19 The proposal involves the introduction of requirements for companies to prevent or respond to adverse human rights impacts of their operations or those of their subsidiaries, subcontractors and suppliers.

9.20 Similar to the design of the Modern Slavery Act, the form of the HRDD legislation will not rely on an extra-territorial application of state powers but will involve instead the exercise of intra-territorial legislative jurisdiction: domestic legislation will be used to regulate the actual arrangements between such a regulated firm and its suppliers or affiliates located around the globe. The proposed legislative scheme may be trialled in the textile sector, where most of the research has identified protective gaps and can then be extended to other sectors, including road transport, cleaning and social care. Or it could be introduced first in sectors where there is already strong associational capacity on the part of unions and employers alike as well as a history of regulating supply chains through voluntary negotiations or other initiatives, such as is the case in the construction sector.

9.21 Given the powerful impact that public procurement can have, the proposed HRDD legislation will include a requirement that public bodies undertake, report and act on due diligence in their own supply chains. Legislation should also include a provision that would prevent public bodies from procuring services from companies which have not elaborated a diligence plan if required to do so (see also proposals below on public procurement). This would have important implications, for instance in areas such as social care, where local authority commissioning of care services can play a powerful role in helping to improve compliance in this sector. In contrast to the Modern Slavery Act, which only requires companies provide information on existing diligence plans, HRDD legislation will impose a three-fold obligation on companies to elaborate, disclose and effectively implement a 'vigilance plan'. This is inspired by the recent French legislation. A vigilance plan will include:

> 'reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety of persons and the environment resulting from the activities of the company and of the companies it controls, either directly or indirectly, as well as the activities of subcontractors or suppliers.'

9.22 The UN Guiding Principles on Business and Human Rights (2011) acknowledge, albeit opaquely, the need for supply chain due diligence. Building on these principles, legislation should orientate companies towards prioritising their response by addressing the most severe risks and impacts first, even where the companies have no established commercial relationship with the suppliers or subcontractors that cause the harm. A way to facilitate this would be to require companies to examine their supply chains and determine whether there is a 'reasonable suspicion' that labour abuses may take place in each level of the chain. Under the three-fold model of duties in the HRDD legislative proposal, lead companies located in the UK should be required to generate and disclose on a regular basis to stakeholders, including the Labour Inspectorate, information that relates to the impact of their operations on any matter where the availability and accessibility of the information is critical for the effective enjoyment of human and labour rights.

9.23 Companies would be required to document the due diligence steps taken in compliance with the law with the express objective of preserving evidence in the interests of future claimants. Enforcement authorities can then utilise their legislative and contractually based powers to inspect all production sites without notice to check the accuracy of workplace records and locate the entire workforce. The most significant innovation of the legislation, however, would be the introduction of a requirement on companies to respond to their findings through a system designed to prevent and mitigate human and labour rights abuses. In this respect, processes should be introduced to tackle such abuses, resulting directly and indirectly from a company's activities and those of its subcontractors or suppliers. The vigilance plan is to be drafted in association with relevant stakeholders, including trade unions, and the plans, as well as the reports on their implementation, would be public and included in the company's annual report.

9.24 The legislation will also establish a robust mechanism to ensure effective compliance with the HRDD.

- First, any concerned party may require the company to establish the vigilance plan, ensure its publication and account for its effective implementation. The legislation will include penalties for either failing to establish or to report in accordance with the legislative guidelines or engaging in false, misleading or deceptive reporting.
- On top of this, victims of companies failing to comply with their vigilance plan or with an inadequate vigilance plan will be entitled to seek damages at civil law. Under the proposed HRDD legislation, if claimants can *prima facie* demonstrate that they have suffered harm and that this is likely to have been the result of the company's activities, the burden of proof will shift to the corporate defendant.

9.25 Legislation or collective agreements at sectoral level could go as far as providing for mandatory additions to contractual arrangements detailing action that the lead firm will take if they become aware of exploitation (e.g. termination of contract or liquidated damages). In order to ensure that claimants are able to use the domestic law which best enables claims against lead firms, the legislation will clarify that the HRDD legislation be considered an 'overriding mandatory' law so as to ensure its application irrespective of the law applicable under private international law.

'hot goods' legislation

9.26 Additional administrative/public law mechanisms should be considered, which can be combined with the civil options discussed earlier, to limit the protective gaps in supply chains. 'Hot goods' legislation, which prevents the shipment of goods produced in violation of labour provisions (see, for instance, the Wages and Hours Division (WHD) of the US Department of Labor), should be introduced to provide a mechanism for the prosecution of downstream activities ancillary to goods produced through supply chains (including importation and processing). The legislation should initially target specific sectors, such as textiles, or those with high risks, and sectors known to have widespread and systematic violations of international law, including human and labour rights abuses.

9.27 The 'goods' covered by the 'hot goods' legislation will include manufactured goods, agricultural goods or any other product sold or shipped to the UK. An item will be deemed to be 'hot' if it has been produced or processed in breach of the laws in the place where the item was produced or processed. This may therefore include environmental, planning, employment, workplace health and safety, as well as human rights and labour rights laws in force in the state of production or processing. The legislation will rely on the use of verification and certification schemes (e.g. the ILO's Better Work Programme or a Country Specific Guideline, where one is available), in order to ensure that imported goods are not illegally produced, including the requirement that businesses undertake 'due diligence' on certain regulated processes.

9.28 The same principles could apply to services utilised in the UK. Unlike the private law of HRDD, which would be enforced through private claims, the 'hot goods' legislation will be enforceable by the state through a variety of instruments. The UK regulator can deploy, among others, an embargo-like sanction, which will freeze the importation of any assets produced in contravention of minimum employment standards in the state of production or processing. This can be in addition to confiscation, fines and prosecution for the processing or trading in 'hot goods'. A question for consideration is whether goods should be declared hot if their production or processing breaches the ILO obligations of the country concerned but not its national laws.

public procurement and supply chains

9.29 Emphasis on cost savings in contracting by public authorities in the UK in recent decades has meant that public procurement practice has not been accompanied by improved labour standards. In acknowledging the state's role of 'lead firm' in the supply chain, we have proposed (in chapter five on enterprise democracy and worker voice) that trade union recognition, participation in collective bargaining arrangements, and observance of the terms of relevant agreements should be requirements for public tenders. Here we go

further and propose that compliance with minimum labour conditions throughout the contractor's supply chain should be required by public procurement contracts, and that procedures should be introduced for the monitoring and enforcement of such conditions.

9.30 Clear legal requirements and policies on the responsibilities of public bodies are necessary in connection with purchasing activities. These include the following eight steps, which address both the standards to be imposed and the means by which they are monitored:

- The redefinition of the concept of 'value for money' in order to prioritise labour, environmental and social considerations;
- Legislation should establish not just the possibility, as is currently the case, but also the obligation on contracting authorities to impose minimum labour, environmental and social standards linked to the subject matter of the contract. It will be up to the contracting authority to decide whether to include the conditions in the award criteria or as a contract performance clause;
- A provision should be introduced in the Public Contracts Regulations mirroring the so-called 'mandatory social clause' in Article 18(2) of the 2014/24/EU Directive on Public Procurement.

  (The latter requires member states to take appropriate measures to ensure that economic operators comply with applicable social and labour law, including collective agreements. The combined effect of the inclusion of a mirror provision to Article 18(2) in the Public Contracts Regulations and the restoration of collective bargaining at sectoral level will be to provide a stronger basis for the incorporation by contracting authorities of clauses in their procurement contracts requiring that economic operators must guarantee that the employment conditions of those carrying out the work are, at least as good as, applicable collective agreement(s). Such policies already exist in a number of other EU member states (e.g. Denmark, Germany and Finland) and are in line with the recent reform of the Posted Workers Directive, which expands the scope of employment terms that may be included as mandatory conditions under the EU framework on public procurement);
- Contracting authorities should be bound by HRDD legislation and contractors required to implement procedures to ensure that the production of goods is in compliance with human and labour rights and the contracting authorities' applicable codes of conduct;
- In addition, mechanisms for the establishment and implementation of procedures for verification of compliance should require the contracting authorities to conduct independent inspections;
- These will be complemented by provisions for ensuring corrective action in case of a breach of any contract conditions, incorporating the imposition of a liability for liquidated (fixed) damages (e.g. as in the case of the Minimum Standards Construction Charters);
- A provision should be inserted into the Public Contracts Regulations requiring that joint liability regarding compliance with applicable labour obligations must be applied in all contracts where there are subcontractors;
- The adoption of the policies described above should be accompanied by the ratification of ILO Convention 94, the Labour Clauses (Public Contracts) Convention 1949, and an undertaking to comply with the Labour Clauses (Public Contracts) Recommendation 84.

The latter instruments would provide a more effective framework for the incorporation of social issues, including via collective agreements, in the procurement process. ILO convention 94 was ratified by the UK in 1950 and 'denounced' by the UK in 1982.

international economic cooperation

9.31 Economic cooperation provides a central leverage point to promote opportunities for the development of improved labour standards and working conditions, including in supply chains, because of opportunities pre and post-ratification to implement them. However, economic cooperation between different countries should be framed under the goal of sustainable development rather than trade liberalisation, as is the case

with trade agreements at present. Specific mechanisms can be incorporated in such forms of cooperation to address the failures to guarantee decent work that exist in supply chains. To this end, there is an important role for labour institutions which promote decent work. The broad impetus should be towards mainstreaming labour issues in all forms of economic cooperation between countries.

9.32 In relation to global supply chains, agreements for economic cooperation will need to seek to advance workers' rights beyond the territories of the respective parties to the agreement. There are of course now many initiatives currently with labour standards commitments of various kinds, including multiple free trade agreements, the OECD Guidelines on Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights. Future agreements for economic cooperation should require the parties to 'promote worldwide' the implementation of core labour standards (as was the case in the EU proposal in the Transatlantic Trade and Investment Partnership (TTIP) negotiations – though TTIP was undesirable for other reasons). Provisions will have to be incorporated in such agreements which promote the inter-state and inter-firm mechanisms for tackling labour issues in global supply chains and making global supply chains more responsible.

9.33 Specifically, micro-based initiatives, explicitly stipulated in agreements, can target corporate conduct in order to promote decent work in the relevant supply chains. These may include, among others:

- The insertion of provisions in agreements that will require mechanisms of information gathering on working conditions at supplier level, which will then be made publicly available and shared with stakeholders;
- These may be complemented by the operation of multiple local councils composed of various interested parties, which will decide how to implement the provisions of the agreements' monitoring provisions and remedial goals.

9.34 The establishment of an independent monitoring and review body, which will examine corporate behaviour and will bring actions against those found in breach of rights specified in the agreement, is also required. The focus here will be on multinational companies that engage in production of goods and services at a global level.

9.35 A progressive UK government could also play a crucial role in the 'Working group on the issue of human rights and transnational corporations and other business enterprises' (also referred to as the 'Working Group on Business and Human Rights'), which was established by the Human Rights Council in 2011 (Resolution 17/4). This has as its key objective the implementation of the Guiding Principles on Business and Human Rights referred to above, implementing the UN's 'Protect, Respect and Remedy' Framework and elaborating on an internationally legally binding instrument on transnational corporations and other business enterprises with respect to human rights. This would be a reversal of the current UK government's opposition to the development of such a treaty. Although having been the first to produce a National Action Plan under these procedures, it is clear that the content of that Plan is woefully inadequate.

9.36 Given the lack of a clear appetite on the part of some states for a binding international instrument in the field of business and human rights, the ILO can be considered as a possible alternative avenue for related reforms. The UK should help shape policy developments there by supporting the development of a (cross-sectoral) ILO instrument promoting decent work in global supply chains. The ILO Maritime Labour Convention (MLC) 2006, which promotes decent work and fair globalisation, can serve here as a possible blueprint. The MLC addresses labour standards by guaranteeing effective compliance by ship-owners through an enforcement framework that involves the industry's key players: flag states, port states and labour-supplying states. An ILO Convention on Global Supply Chains based on the model of the MLC would help to ensure on the one hand fair competition between employers, and may be attractive to states, thereby making ratification plausible.

conclusion

9.37 The imposition of decent labour standards in supply chains can effect change at three interdependent levels:

- promoting human development and socio-economic cohesion;
- enabling economic growth; but also
- supporting democratic involvement as an end in itself.

9.38 Our proposals seek to strengthen the complementarities between different regulatory mechanisms in order to promote the positive relationship between labour standards and supply chains across these dimensions. This exercise involves, in the short term, improvements at domestic level in order to go beyond pure reporting requirements and promote instead more proactive approaches through the introduction of joint liability and human rights due diligence systems.

9.39 In the longer term, the exploitation of supply chains has to be addressed by strengthening regulation at the international level. As the sixth biggest economy in the world, the UK has the economic influence to lead by example. When it comes to economic cooperation, there is a need to go beyond the approach in existing EU and US free trade agreements so as to ensure the effectiveness of commitments on labour rights for workers in the UK, its trade partners and in global supply chains. Finally, a future UK government has the capacity to contribute to the developments at international level by lending support to international solutions, including a UN Treaty on the human rights obligations of multinational companies and an ILO Convention on Global Supply Chains drawing on the 2006 Maritime Labour Convention.

enforcement of workers' rights

introduction

10.1 The principal focus of our proposals in the *Manifesto for Labour Law* is to deliver decent standards at work via collective bargaining. An important role nonetheless remains for the law in setting minimum standards on wages, working time, equality, health and safety, dismissal and so on. A large body of evidence indicates that the system at present is failing to deliver the rights it ostensibly guarantees. Although fees for bringing employment tribunal (ET) claims have, for the moment, been abolished in the wake of the *UNISON* judgment of the Supreme Court,[54] much more needs to be done to ensure that legal standards are not mere statements of legal theory but are realised in practice for all workers – and that employers who abuse workers' rights do not gain an advantage over those who respect them.

international legal duties.

10.2 Almost all international labour standards to which the UK is a signatory recognise the importance of effective delivery and enforcement of social rights.

- The European Social Charter requires states to pursue 'by all appropriate means' conditions in which rights are 'effectively realised', and the individual provisions begin with the words 'with a view to ensuring the effective exercise of the right...'.
- Article 2 of the UN Convention on Economic, Social and Cultural Rights of 1966 requires states to take 'all appropriate means', using the maximum of its 'available resources' in order to achieve the full realisation of rights.[55]
- UN Conventions on anti-discrimination emphasise the high duty on states to eliminate discrimination,[56] while Article 6 of the European Convention on Human Rights guarantees a right of access to a court in relation to civil rights to ensure rights which are effective in practice.[57]
- The UK has ratified (save for Part II) ILO Convention 81, requiring a system of labour inspection in industrial workplaces in order to 'ensure the enforcement of legal provisions relating to conditions of work'.[58]

10.3 These obligations reinforce the point made by the Supreme Court in *UNISON* that the rule of law is undermined and the goals of employment legislation frustrated in the absence of effective means of access to justice in order to vindicate rights. We refer also to the ILO Declaration on Social Justice for a Fair Globalisation (2008), which acknowledges the need for labour law and institutions to be 'effective, including in respect of the recognition of the employment relationship, the promotion of good industrial relations and the building of effective labour inspection systems'.

the current system

10.4 At present, most employment rights can only be enforced by individual workers bringing a claim in the ET. This followed the proposal of the Donovan Commission in 1968 that all contractual or statutory disputes between employers and individual employees (except personal injury claims) should be directed to ETs (then called industrial tribunals), to ensure a hearing in a single court which was 'easily accessible, informal, speedy and inexpensive'.[59] What is clear is that the system at present often fails to deliver the legal rights it promises and has lost sight of the original objectives of the Donovan Commission. Empirical research consistently shows that many workers experience problems with rights at work but very few bring an ET claim.[60]

10.5 Especially vulnerable are employees with shorter service, those in lower-paid occupations, women and those who were disabled or who have long-term illnesses.[61] According to data from the Office for National Statistics (ONS) in April 2016 about 362,000 jobs (1.3% of all jobs), including 178,000 full-time posts, were paid less than the National Minimum Wage rate;[62] the Low Pay Commission report, *Non-Compliance and Enforcement of the National Minimum Wage* (September 2017) puts the figure at between 300,000 and 580,000 at its seasonal peak.[63] Recent research shows that discrimination against pregnant women is

widespread, with one in nine mothers reporting that they were dismissed, made compulsorily redundant or treated so badly that they felt they had to leave their job.[64]

10.6 There are many reasons for the gap between legal rights and legal enforcement: individuals often do not bring claims owing to a lack of knowledge of rights, a lack of legal advice, an absence of union support, the limited remedies, and many other reasons besides. Even where employees succeed in the ET, about a half do not receive their full compensation because of the lamentable enforcement system.[65] Yet without the credible risk of legal claims in the ETs and deterrent penalties where claims succeed, the inevitable result is a decline in labour standards for all workers. An employer, for example, has little incentive to pay the National Minimum Wage if all it risks is a potential claim for past under-payments (and no more) by some workers.

10.7 To a degree, there has been a partial recognition of this problem through the adoption of other forms of enforcement, but they are restricted in their scope and effect. Some of the current forms of state-backed enforcement are the following:

- Workplace personal injury claims have always been brought in the ordinary courts. As noted in chapter eight on health and safety, the previous coalition government removed the long-established right to a civil claim for breach of safety legislation. Now, health and safety regulations are enforced exclusively by criminal sanctions, coupled with inspections and enforcement by the HSE.
- Supplementing claims by individual workers in the courts or ETs, the National Minimum Wage Act empowers HMRC to bring claims to recover underpayments on behalf of workers, backed by financial penalties[66] and criminal prosecutions for the worst cases.[67]
- The principal means of enforcing 'gangmasters' and modern slavery legislation is state enforcement:[68] licensing, prevention orders, and criminal offences, overseen by the Gangmasters and Labour Abuse Authority (GLAA) and the Independent Anti-Slavery Commissioner.[69]
- The consultation, *Tackling Exploitation in the Labour Market,*[70] led to the creation of a Director of Labour Market Enforcement and a new system of labour market enforcement undertakings and orders for 'trigger offences' in Part 1 of the Immigration Act 2016 – principally the National Minimum Wage and modern slavery.

10.8 Yet state-backed enforcement is still the exception not the rule (mostly confined to those sectors of work seen as the most abusive) so that individual claimants bear the weight of bringing claims for themselves and other workers. The UK lacks a Labour Inspectorate responsible for enforcing labour standards in general; there has been much criticism of the resources allocated to the state agencies for enforcement; and there has been little attention to what in fact works. Nor is there much focus in UK law on positive duties imposed on employers (with the exception of some legislation in the equality sphere, with few sanctions for breach).[71] Much greater attention is needed on methods which in fact deliver labour standards, combining individual claims, positive duties on employers and state-backed enforcement.

short-term reforms and commitments

10.9 Against that background we propose the following immediate short-term steps should be undertaken to improve the current system:

- The statutory limits on unfair dismissal compensation should be repealed, as being inconsistent with the right to an effective remedy;[72]
- As proposed in chapter eight on health and safety at work, the right of workers to bring a civil claim for breach of health and safety regulations should be reinstated;
- The two-year limitation on unlawful deduction from wages claims in s. 23(4A) of the Employment Rights Act (ERA) 1996 should be repealed. It was only introduced, without consultation, to prevent claims for under-paid holiday pay; its effect is to penalise, above all, workers who have not been paid the National Minimum Wage;

- The statutory limits on unfair dismissal compensation should be repealed, as being inconsistent with the right to an effective remedy;
- In accordance with the original objectives of the Donovan Commission in 1968, the anomalous restriction of £25,000 for breach of contract claims in the ET should be removed;[73]
- As proposed in chapter seven on equality at work, there should be reinstatement of the right to serve a pre-claim statutory questionnaire for obtaining information about discrimination claims;
- Likewise, the power of ETs to make recommendations in discrimination cases which extend to the benefit of workers beyond the individual claimant should be reinstated;
- Finally, as also proposed in chapter seven on equalities, the limitation period for bringing a claim connected with pregnancy should be increased to six months.

longer term reforms

10.10 The above is only the starting point for a larger programme of reform of the system to ensure legal rights on paper become effective in practice. The focus should be on the effective delivery of rights, based on evidence and proper research, and effective remedies for breach, in accordance with the rule of law and the UK's international obligations. As outlined in the *Manifesto for Labour Law*, the steps should include the following.

Labour Inspectorate

10.11 In place of the existing patchwork of enforcement bodies, a properly-resourced Labour Inspectorate should be established, responsible for enforcing labour standards in all areas in accordance with international standards and the ILO *Declaration on Social Justice for a Fair Globalisation* (2008). The Inspectorate should have power to bring legal proceedings on behalf of workers, as well as issue enforcement notices requiring remedial action and bring criminal prosecutions against serious offenders.

10.12 The role of the Labour Inspectorate should be supplemented in some areas by representatives on the ground (building on the model used for health and safety, in which recognised unions appoint safety representatives). Employers (other than the very smallest) should owe a duty to appoint equality officers, trained to identify and to propose action to remedy unlawful discrimination and harassment, as proposed in chapter seven on equality at work. Proposals for strengthening the powers of health and safety representatives are set out in chapter eight on health and safety.

Labour Court

10.13 There should be a new Labour Court system, the first tier of which would be the ETs, the Central Arbitration Committee (CAC), and Certification Officer. The Labour Court would have exclusive jurisdiction to deal with all work-related claims. There would be an appeal from the Labour Court to the Labour Court of Appeal, in what would be a three-tier system.

10.14 ETs should return to their original tripartite constitution involving representatives of employers and unions, and their procedures should be based on the Donovan's Commission's objective of inexpensive, quick and accessible justice for workers. There should be a right of appeal to the Labour Court. Proceedings may be brought by workers, unions, employers or by the Labour Inspectorate (among others). In particular, unions would have power to initiate proceedings on behalf of members who had signified their agreement. Greater use should be made of representative actions, so that unions can bring claims on behalf of groups of workers.

10.15 Pre-claim conciliation through ACAS should be optional, not compulsory as at present, where failure to take advantage of ACAS conciliation often operates as a barrier to justice, while workers should have access to some form of free legal advice on employment claims. ETs should have increased powers of investigation to ensure that unrepresented parties are not disadvantaged. Consideration should be given

to ETs expanding their jurisdiction to deal with discrimination law claims outside work, such as in the areas of services, premises, associations, and education. ETs have greater expertise and experience of discrimination law than the County Court, where these claims are currently heard.[74] This matter is currently the subject of work by the Law Commission.[75]

10.16 The system for enforcing ET awards should be greatly improved. Enforcement should be undertaken by the ET or the Labour Inspectorate (and not delegated to the ordinary courts, as at present); a failure to pay a tribunal award should automatically be treated as an aggravated breach of labour regulation (leading to financial penalties)[76]; and there should be criminal penalties for the worst offenders:

- As proposed in chapters six and nine, the introduction of joint and several liability up and down the supply chain and applying to parent, subsidiary and franchised companies would be a marked and really useful tool for the enforcement of rights.
- Employers should not be able to hide behind corporate structures to avoid paying awards; directors and, in some circumstances, shareholders should become personally liable where their actions have caused or contributed to the liabilities incurred by the company, particularly (but not only) where the company for any reason is unable to pay the award.

10.17 The CAC would retain its role in the simplified trade union recognition system, and would have a new jurisdiction to scrutinise discriminatory collective agreements. As pointed out in chapter four, under the Collective Bargaining Act, the Labour Court would have an original jurisdiction in relation to sectoral agreements. The role of the Certification Officer as a tier 1 Labour Court body should be reviewed. The Trade Union Act 2016 extended the CO's jurisdiction in an unwarranted way, and although the Act is likely to be repealed on a change of government, a more fundamental reappraisal is now required.

enhancing enforcement

10.18 In addition to the foregoing, a number of other steps could be taken to enhance compliance with employers' duties and workers' rights. We have already mentioned the important role of public procurement. In addition, we contemplate positive duties being placed on employers to demonstrate compliance with labour standards. Employers should be required to publish information in audits and elsewhere on pay levels (including on payment of the National Minimum Wage), pay differences, the gender pay gap and pay inequalities based on race, disability and other protected characteristics, in each case backed with proper deterrent sanctions for breach.

10.19 Companies should be under duties to ensure that their contractors comply with labour standards, building on the model used with posted workers and in the Modern Slavery Act 2015. The latter model in particular could be used as a template not only requiring companies to provide information relating to modern slavery but also compliance in the supply chain with obligations relating to all four ILO core principles, namely freedom of association, the elimination of discrimination, the abolition of forced labour, and the elimination of child labour. So far as the first of these is concerned, employers should be required to report on applicable collective agreements in the supply chain. These matters are dealt with more fully in chapter 9 on supply chains.

conclusion

10.20 While the widespread introduction of sectoral collective bargaining will diminish the need for legislation and litigation, the enforcement of a floor of individual rights will remain important. To strengthen the current enforcement regime, we propose a series of immediate reforms to ensure that workers are adequately protected and that employers are held to account if they fail to comply with the law. We also propose more extensive, longer term measures including the introduction of a Labour Inspectorate and a Labour Court.

DRAFT
Chris Stephens'
Workers' Definition and Rights Bill

CONTENTS

A

Bill

to

Introduce a single employment status, enhance worker security in relation to working time, and to increase worker protection in the event of unpaid wages.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Single employment status

(1) There shall be a single employment status for the purposes of employment rights.

(2) To this end, the amendments set out below shall be made.

(3) The Trade Union and Labour Relations (Consolidation) Act 1992, s 295 (meaning of employee and related expressions) and s 296 (meaning of worker and related expressions) shall be removed and substituted as follows -

295 Single employment status

(1) In this Act an 'employee' means an individual who
  (i) seeks to be engaged by another to provide labour,
  (ii) is engaged by another to provide labour, or
  (iii) where the employment has ceased was engaged by another to provide labour, and is not genuinely operating a business on his or her own account.

(2) In this Act a 'worker' means an individual who
  (i) seeks to be engaged by another to provide labour,
  (ii) is engaged by another to provide labour, or
  (iii) where the employment has ceased was engaged by another to provide labour, and is not genuinely operating a business on his or her own account.

(3) In this Act a person is an employer if he or she engages another or others to provide labour, whether directly or through another or others, and the person or persons providing the labour is or are not genuinely operating a business on their own account.

(4) In this Act 'employed' and 'employment' mean engaged (i) as an 'employee' under subsection (1) above, or (ii) as a 'worker' under subsection (2) above.

(5) It shall be for the respondent to show in any legal proceedings that the applicant is not an employee, a worker, employed, or in employment as the case may be.

(6) It shall be for the respondent to show in any legal proceedings that the respondent is not an employer.

(7) For the avoidance of doubt the foregoing provisions apply to employment for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown)

(4) The Employment Relations Act 1996, s 230 (employees, workers etc) shall be removed and substituted as follows

230 Single employment status

(1) In this Act an 'employee' means an individual who
  (i) seeks to be engaged by another to provide labour,
  (ii) is engaged by another to provide labour, or
  (iii) where the employment has ceased was engaged by another to provide labour,
  and is not genuinely operating a business on his or her own account.

(2) In this Act a 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who
  (i) seeks to be engaged by another to provide labour,
  (ii) is engaged by another to provide labour, or
  (iii) where the employment has ceased was engaged by another to provide labour,
  and is not genuinely operating a business on his or her own account.

(3) In this Act a person is an employer if he or she engages another or others to provide labour, whether directly or through another or others, and the person or persons providing the labour is or are not genuinely operating a business on their own account.

(4) In this Act 'employed' and 'employment' mean engaged (i) as an 'employee' under subsection (1) above, or (ii) as a 'worker' under subsection (2) above.

(5) It shall be for the respondent to show in any legal proceedings that the applicant is not an employee, a worker, employed, or in employment as the case may be.

(6) It shall be for the respondent to show in any legal proceedings that the respondent is not an employer.

(7) The Secretary of State may by regulations make any incidental amendments that require to be made to the 1996 Act, sections 171, 230, 232 and 233 arising from the foregoing.

2 Hours of Work

The Employment Rights Act 1996, Part 2A (Zero Hours Workers) shall be renamed Part 2A (Hours of Work)

3 Reasonable Notice of Shifts

The Employment Rights Act 1996, Part 2A (Hours of Work) shall be amended as follows

After s 27B insert

27C Reasonable Notice of Shifts

(1) This section applies where a worker may be requested or required by his or her employer to attend for the performance of work at the discretion of the employer.

(2) Where this section applies, an employer shall be required to give reasonable notice of

(a) any request or requirement to undertake a period of employment; and

(b) any cancellation of a period of employment already agreed.

(3) A period of notice shall not be reasonable if given less than 7 days before any period of employment referred to in subsection (2).

(4) If a worker accepts employment offered contrary to the requirements of subsections (2) and (3), the employer shall be required to pay the worker at a rate of 200% of the rate they would normally be paid for the period in question.

4 Payment for Shift Cancellations

The Employment Rights Act 1996, Part 2A (Hours of Work) shall be amended as follows

After s 27C insert

27D Payment for Shift Cancellations

(1) This section applies where an employer has cancelled a period of employment which a worker has already accepted.

(2) Where this section applies, the employer shall be required to pay for the period of employment in question, even though no work has been done.

(3) The amount of the payment shall be made up of—

(a) 200% of the rate the worker would normally be paid by his or her employer for the period in question; and

(b) a sum equivalent to any other monetary loss incurred as a result of the cancellation (including loss of wages caused by declining offers of employment elsewhere, child care arrangements, and advance travel costs).

(c) For the avoidance of doubt, payments shall be recoverable under subsection (3)(b) above whether or not the costs incurred are otherwise recoverable by or refundable to the worker.

5 Fixed and Regular Hours

The Employment Rights Act 1996, Part 2A (Hours of Work) shall be amended as follows

After s 27D insert

27E Right to Fixed and Regular Hours

Every worker shall be entitled to fixed and regular weekly hours on commencing employment.

27F Notice of Fixed and Regular Hours

(1) To this end, an employer shall be required to give a worker notice in writing of the hours of the worker's employment.

(2) The notice shall be given before the commencement of the employment. If it is given orally, the notice shall be given in writing within seven days from the commencement of the employment.

(3) The requirement under this section is without prejudice to the obligations of employers in respect of employees under section 1 of the Employment Rights Act 1996 (written particulars of employment).

27G Employer Request for Worker to Work Additional Hours

(1) An employer may request a worker to work additional hours in excess of the hours specified in accordance with s 27F above.

(2) Additional hours referred to in subsection (1) above shall not exceed by 10% the hours referred to in s 27F above, in accordance with a reference period of 12 calendar months.

(3) An employer may request a worker to work additional hours only if

(i) The worker has agreed in writing that such a request may be made;

(ii) The agreement referred to in paragraph (i) specifies the circumstances in which such a request may be made;

(iii) The agreement specifies the length of notice that must be given by the employer making the request, and the request complies with that requirement;

(iv) The agreement specifies that the worker shall be paid at least 200% his or her normal hourly rate were he or she to agree to the request, and the request expressly complies with that requirement;

(v) The agreement provides that should the request be rescinded, the worker shall nevertheless be entitled to be paid the sum referred to in paragraph (iv) and to recover any losses arising from having agreed to the request; and

(vi) The employer has complied with s 27F(1) and (2) above.

(4) An employer may otherwise request a worker to work additional hours in excess of the fixed and regular hours specified in accordance with s 27F above only in accordance with the terms of a collective agreement between an employer and an independent trade union recognized by the employer for the purposes of collective bargaining.

(5) For the purposes of subsection 4 above, the terms collective agreement, collective bargaining, employer, independent trade union, and recognized have the same meaning as in the Trade Union and Labour Relations (Consolidation) Act 1992.

27H Unauthorised Employer Request for Worker to Work Additional Hours

(1) This section applies where an employer requests a worker to work additional hours in excess of the hours specified in accordance with s 27F and s 27G above.

(2) Where this section applies, the employer shall be required to pay for the period of employment in question, even though no work has been done.

(3) The amount the employer shall be required to pay to the worker shall be 200% the normal hourly rate of the worker in question for the entire period to which the request relates.

(4) Any payment due under this section shall be recoverable as an unauthorized deduction from wages.

6 Liability for Unpaid Wages

The Employment Rights Act 1996 shall be amended as follows –

After s 207B insert

Liability for Unpaid Wages

207C Contractor Liability for Worker's Wages

(1) This section applies where the immediate employer (A) of a worker (B) is contracted to provide services on behalf of a third party (C).

(2) In the event of a failure on the part of A to pay wages legally due to B, B may bring proceedings for recovery of unpaid wages against C.

(3) For the avoidance of doubt, C shall be deemed for the purposes of this Act to be the employer of B jointly with A.

(4) For the purposes of this section 'wages' includes any sums payable to a worker by the employer in connection with the worker's employment, including any fee, bonus, commission, sick pay, maternity pay, holiday pay, redundancy pay, or other emolument referable to the employment, whether payable under contract or otherwise.

7 Short title

This Act shall be known as the Workers' Definition and Rights Act 2018.

ENDNOTES

1 Financial Times, 'Jobs, growth and budgets: how the EU is bouncing back', https://www.ft.com/content/718c3892-73c5-11e8-aa31-31da4279a601?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft:notification:daily-email:content, accessed 24 June 2018. In 2003, households on the lower half of incomes earned £14,900 in today's money, after inflation and housing costs. By 2016/17 this had declined to £14,800 (A Corlett, S Clarke, C D'Arcy, J Wood, *The Living Standards Audit 2018*, the Resolution Foundation, July 2018). At the other end of the pay spectrum the average remuneration of the FTSE 100 chief executive in 2016 was £4.5m, equivalent to 160 times the average earning or 262 times the Living Wage (CIPD and High Pay Centre, *Executive Pay; Review of FTSE 100 Executive Pay packages*, August 2017).

2 Under Title VIII of the Treaty of the Functioning of the European Union. See J Visser, S Hayter and R Gammarano, *Trends in Collective Bargaining Coverage: Stability, Erosion or Decline?*, ILO 2017.

3 J Hendy, 'Britain, trade union rights, the EU and free trade agreements' in C Jones (ed), *Europe, the EU and Britain: Workers' Rights and Economic Democracy*, IER and MML, 2017.

4 K D Ewing, 'Implications of the Post -Brexit Architecture for Labour Law' (2017) 28 *King's Law Journal* 403.

5 This objectionable term treats workers as commodities to be traded. It is therefore incompatible with the first fundamental principle of the International Labour Organization contained in its *Declaration Of Philadelphia*, 1944, Article I(a) of which reasserts that 'labour is not a commodity'.

6 New Ministries and Secretaries Act 1916.

7 See KD Ewing (ed), *Working Life*, 1995; KD Ewing and J Hendy (eds), *A Manifesto for Collective Bargaining*, IER, 2013; KD Ewing, J Hendy and C Jones (eds), *A Manifesto for Labour Law*, IER, 2016; L Hayes, *8 Good Reasons why Adult Social Care needs Sectoral Collective Bargaining*, IER, 2017.

8 See, e.g., the Royal Society of Arts in B Balaram and F Wallace-Stevens, *Thriving, striving or just about surviving? Seven portraits of economic security and modern work in the UK*, RSA, 2018 (at 70-71); the IMF in F Jaumotte and C Osorio Buitron, *Inequality and Labor Market Institutions*, IMF, 2015; *Collective Bargaining Through the Magnifying Glass: a Comparison between the Netherlands and Portugal,* IMF, 2017; A Vamvakidis, *Regional Wage Differentiation and Wage Bargaining Systems in the EU*, OECD, *Economic Outlook 2017*, (one quarter of the 200 odd pages is devoted to this subject); OECD, *Economic Outlook*, 2018; OECD and ILO, *Building Trust in a Changing World of Work: the Global Deal for Decent Work and Inclusive Growth Flagship Report 2018*, OECD and ILO, 2018. The European Commission, which has hitherto driven economic policies aimed at decentralising sectoral collective bargaining, has now proposed a new Posted Workers Directive which supports and recognises the legitimacy of sectoral collective agreements.

9 *Manifesto*, op cit, chapter 2.

10 See, e.g., *Collective Bargaining, A Policy Guide*, ILO, 2015.

11 Much of the literature is cited in the *Manifesto for Labour Law* at FN 40, 64-69. And see the material cited in Note 8 above.

12 See *Manifesto for Labour Law* FN 37, 49, 50, 56-58. And see J Berg, *Labour Markets, Institutions and Inequality: Building Just Societies in the 21st Century*, Edward Elgar and ILO, 2015; HS Farber, D Herbst, I Kuziemko, S Naidu, *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data*, MBER Working Paper 24587, 2018; D Vaughan-Whitehead, *Reducing Inequalities in Europe: How Industrial Relations and Labour Policies can Close the Gap*, Edward Elgar and ILO, 2018.

13 See the *Manifesto* at para.2.9.

14 See e.g. *Antuzis v DJ Houghton* [2017] EWHC 1376 (QB).

15 Not least as a result of cases such as C-426/11 *Alemo Herron v Parkwood Leisure Ltd* [2014] 1 C.M.L.R. 21; [2013] I.C.R. 1116; [2013] I.R.L.R. 744.

16 Whether or not currently falling within the statutory definition of an employers' association: s. 122 Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992 and hence qualifying for listing as such by the Certification Officer.

17 Senior Courts Act 1981, s. 11(3).

18 TULRCA 1992, s. 122.

19 We cannot see why unions which are not certified as independent by the Certification Officer should be regarded as representative, save in the rare cases where, like the police, a 'real' trade union is prohibited by law.

20 As happens, we understand, in the Netherlands and occurred in the Hotels Board set up under the Catering Wages Act 1942 where the NUGMW and USDAW split representation of establishments between them on geographical and types of establishment lines.

21 See L Hayes, *8 Good Reasons Why Adult Social Care Needs Sectoral Collective Bargaining*, IER, 2017.

22 This is a sector where union organisation in the biggest company (Royal Mail) is strong and terms and conditions are collectively agreed but are undercut by smaller competitors where union organisation is weak.

23 This is important not only to preserve internal consistency and balance of wages and conditions across the sector but also to avoid any tendency to the isolation of enclaves in which inequality by gender or other offensive reason arises or is preserved.

24 Exercising its wide powers under ss. 209-218 of the 1992 Act.

25 Amendment would be required to s. 179 of the 1992 Act since all collective agreements would, under these proposals, be enforceable unless the parties specifically excluded a provision from enforceability.

26 E.g. *Hilton v Eckersley* (1855) 6 Ellis and Blackburn 47; 119 E.R. 781.

27 The Paper Making Partnership collective agreement has such an 'exceptions' clause which requires the agreement of the union to come into effect and only for a limited period of up to one year.

28 We think that such a provision is more likely to be compatible with the Convention (as well as more acceptable to some unions) than a provision that required automatic enrolment of workers in a union unless they opted out, as some commentators have suggested.

29 See T Schulten, L Eldring and R Naumann, *The role of extension for the strength and stability of collective bargaining in Europe*, in G Van Gyes and T Schulten (eds) *Wage Bargaining Under the New European Economic Governance: alternative strategies for inclusive growth,* ETUI, 2015; S Hayter and J Visser, *Collective Agreements: Extending Labour Protection*, ILO, 2018.

30 *A Manifesto for Labour Law* p23, para 3.22.

31 *Manifesto* (2016) 79, endnote 97.

32 See A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V, ch 1, §107; and L Brandeis, *Other People's Money And How the Bankers Use It*, 1914.

33 In Switzerland, the so called 'People's Initiative Against Rip-Off Salaries' of 2013, with the second-highest ever vote banned banks voting as a financial intermediary, and placed a duty on pension funds to be active in casting their votes.

34 One suggestion would be that the Financial Services and Markets Act 2000 should state that no financial intermediary may exercise votes on other people's money, unless on the express voting instructions of the owner(s). This might significantly impede asset managers supporting high CEO pay, union busting, ignoring environmental considerations and so on.

35 See E McGaughey, 'Votes at work in Britain: Shareholder Monopolisation and the 'Single Channel'' (2017) 46(4) ILJ 444 (summary on LSE British Politics and Policy blog http://blogs.lse.ac.uk/politicsandpolicy/why-workers-votes-promote-good-corporate-governance/).

36 See the Representation of the People Act 1918 and the Representation of the People (Equal Franchise) Act 1928.

37 See S Deakin, 'The coming transformation of shareholder value' (2005) 13(1) Corporate Governance 11.

38 ONS, *Small and medium-size enterprises (SME) count, employment and turnover 2010 to 2017*: (a) 2.38m enterprises under 10 employees, employ 5.49m, (b) 231,715 enterprises of 10-49 employees employ 4.45m, (c) 40,530 enterprises of 50-250 employees employ 4m, and (d) 8,825 large enterprises employ 16.47m. Total 30.44m employees.

39 On this system's development, see E McGaughey, 'The codetermination bargains: the history of German corporate and labour law' (2017) 23(1) CJEL 135, 171 and C Kerr, 'The trade union movement and the redistribution of power in postwar Germany' (1954) 68(4) Quarterly Journal of Economics 535.

40 *Works Council Elections 2010: High Voter Turnout, Institut der Deutschen Wirtschaft Köln* (2011).

41 See T Berglund and M Holmen, 'Employees on Corporate Boards' (2016) 20(3) Multinational Finance Journal 237.

42 *Clyde & Co LLP and another v Bates van Winkelhof* [2014] ICR 730, para 25, per Lady Hale.

43 At the end of 2017, about 900,000 workers thought they were on zero-hours contracts whereas businesses reported 1.8 million zero-hours contracts: *Contracts that do not guarantee a minimum number of hours: April 2018*, ONS, 2018. The report explains that the discrepancy is likely to be largely because of a lack of realisation on the workers' part and the fact that many workers have more than one such contract.

44 For example, with the proposed new statutory principles, is there a need for the implied term of mutual trust and confidence with its judicially imposed limits?

45 Illegal conduct should, of course, be punishable – but as a separate infringement, if illegality has indeed occurred.

46 The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, adopted by the International Commission of Jurists in 2007.

47 *Achbita v G4S Secure Solutions NV* (C-157/15); [2017] IRLR 466.

48 The exercise of this power should not be done in such a way as to undermine its effectiveness, by invoking s. 9(5)(b).

49 See https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/167/167.pdf and https://www.fawcettsociety.org.uk/News/legal-system-failing-women-need-reform-says-fawcett-landmark-sex-discrimination-law-review.

50 Formerly found in s. 38 of the Equality Act 2010 (EqA) and abolished in 2014 as part of the 'red tape' agenda: see s. 166 Enterprise and Regulatory Reform Act 2013.

51 By an amendment of s. 124 EqA, again part of the deregulatory agenda.

52 Indeed, the European Commission has adopted a proposal (on 13 March 2018) for a EU Regulation establishing a European Labour Authority.

53 See *Couch v Steel* (1852) 3 E & V 402.

54 *UNISON v Lord Chancellor* [2017] UKSC 51.

55 See the CESCR General Comment No. 3 at http://www.refworld.org/docid/4538838e10.html.

56 See e.g. Articles 2 and 5 of the UN Convention on the Elimination of All Forms of Racial Discrimination; Articles 4, 5 and 13 of the UN Convention on the Rights of Persons with Disabilities.

57 See e.g. *Airey v Ireland* (1979) 2 E.H.R.R. 305.

58 Article 3.

59 *Royal Commission on Trade Unions and Employers' Associations 1965-1968* (Cmnd. 3623), paras 572-3. The Commission also proposed conciliation procedures to take place before tribunal hearings.

60 See e.g. J. Casebourne et al *Employment Rights at Work – Survey of Employees 2005* (DTI, 2005), finding that 42% of employees had a problem at work in the past five years, only 3% of whom brought an ET case as a result (4-5); R. Fevre et al. *Fair Treatment at Work Report: Findings from the 2008 Survey* (BIS, 2009), finding 29% of employees had a problem in the last five years with employment rights (63) but only 3% brought an ET claim (135-6).

61 *Fair Treatment at Work*, above, p 53.

62 https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/lowpay/apr2016.

63 https://www.gov.uk/government/publications/non-compliance-and-enforcement-of-the-national-minimum-wage-september-2017.

64 See the research for BIS and EHRC by IFF, *Pregnancy and Maternity Related Discrimination and Disadvantage: Experiences of Mothers* (2016), at https://www.equalityhumanrights.com/en/managing-pregnancy-and-maternity-workplace/pregnancy-and-maternity-discrimination-research-findings.

65 See the BIS research in 2013 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf.

66 See s. 19- 19H NMWA.

67 See the National Minimum Wage Act 1998, ss. 31-33 (offence to refuse or wilfully neglect to pay workers less than National Minimum Wage).

68 Gangmasters (Licensing) Act 2004 and Modern Slavery Act 2015.

69 Part 2 of the Modern Slavery Act 2015 (prevention orders) and ss. 6-11 of the 2004 Act.

70 BIS (October 2015) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471048/BIS-15-549-tackling-exploitation-in-the-labour-market.pdf (accessed 11 September 2017).

71 See e.g. s. 149 Equality Act 2010 and The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172.

72 The current administration is wavering on the matter, shown by the evidence of Dominic Raab to the Justice Committee on 19 December 2017 http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/employment-tribunal-fees/oral/76269.html.

73 See the ETs Extension of Jurisdiction Order 1994, Article 10.

74 See s. 114 EqA 2010.

75 See paras 2.14 and 2.16 of the *Thirteenth Programme of Law Reform*, at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/12/13th-Programme-of-Law-Reform.pdf.

76 Contrast s. 12A of the Employment Tribunals Act 1996, which is almost irrelevant in practice, resulting in only 18 awards in three years – Answer to Written Question 2414 from Caroline Lucas MP in House of Commons, 3 July 2017, at http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-07-03/2414/.

THE INSTITUTE OF EMPLOYMENT RIGHTS

About the Institute

The Institute of Employment Rights seeks to develop an alternative approach to labour law and industrial relations and makes a constructive contribution to the debate on the future of trade union freedoms.

We provide the research, ideas and detailed legal arguments to support working people and their unions by calling upon the wealth of experience and knowledge of our unique network of academics, lawyers and trade unionists.

The Institute is not a campaigning organisation, nor do we simply respond to the policies of the government. Our aim is to provide and promote ideas. We seek not to produce a 'consensus' view but to develop new thoughts, new ideas and a new approach to meet the demands of our times.

IER officers

For more information and a full list of IER members visit **www.ier.org.uk**

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THE INSTITUTE OF EMPLOYMENT RIGHTS

The IER's 2016 *Manifesto for Labour Law* garnered support from major unions across the UK, the Green Party, the Scottish Nationalist Party, and most of all the Labour Party. Indeed the Labour Party's popular and influential 2017 Manifesto *For the Many, Not the Few* adopted many of the IER's recommendations as a blueprint for future reform, included in the Manifesto's 20-point plan for workers' rights.

In response to the interest expressed across the labour movement, and Labour Party, for the further development of the *Manifesto for Labour Law,* we present *Rolling Out* as a guide to how our recommendations could be practically implemented. This includes proposals for a Collective Bargaining Act and other legislative reforms to protect workers both domestically and across the international supply chains that support the UK's economy.

At the heart of our proposals is a shift in the focus of labour law to the collective agreement of wages and conditions as opposed to statutory minimums that are outdated, difficult to enforce and inflexible in the face of a changing world of work. In this way, we seek to open the next chapter of democratic society by enhancing democracy at work.

The comprehensive recommendations detailed in this volume have been collaboratively authored by 26 leading labour lawyers and academics from some of the most prestigious universities in the UK. Taken together, they put forth a new framework for industrial relations and workers' rights designed to better-fit the needs of a post-Brexit, increasingly automated and fragmented workforce.

£10 trade unions and students

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