

Good Work Plan: establishing
a new Single Enforcement Body
for employment rights

Answers from Thompsons Solicitors
to Consultation Questions

1. Is the current system effective in enforcing the rights of vulnerable workers?

No.

Enforcement is too fragmented and the underlying legislation that frames industrial relations in the United Kingdom is not fit for purpose. There are intersecting areas of law and policy including, but not limited to, universal credit and immigration policy, which create a large vulnerable and precarious workforce. Trade unions are the most effective institution for enforcing the rights of vulnerable workers but they have been under decades of attack from government policy, culminating in the Trade Union Act 2016.

That said, the lack of effective enforcement of the rights of vulnerable workers is more directly attributable to the failure of the institutions of the state mandated to protect them, such as the enforcement bodies listed in page 9 of the consultation. By way of example, the enforcement of the national minimum wage by HMRC is shockingly poor despite having the advantage of multiple sources of information (benefits, tax and national insurers) to make employers pay.

There is too much of an emphasis on flexibility of the workforce at the expense of security within the UK labour market. This is exacerbated by the poor regulation of employment agencies by the EAS and employers exploiting the ambiguity of zero hour contracts. This regulation gap has been institutionalised in an era of austerity and a harsh benefit regime laden with unjustifiable sanctions and/or delays in payment. There is a knock on effect for workers unsuccessfully seeking secure housing without the capacity to achieve secure employment.

In the experience of those of our lawyers who come from, or volunteer at, law centres, a frequent expectation from clients is that there would be some kind of employment rights 'policyperson' who could go into employers and tell them what they were doing wrong and make them do it right. There is a widespread misapprehension that ACAS are that body.

Furthermore, the employment tribunal system does not provide effective remedies for vulnerable workers even when they are successful in their legal claims.

The Gangmasters and Labour Abuse Authority has been ineffective in preventing growing cases of modern slavery and other abusive labour practices in the UK.

2. Would a single enforcement body be more effective than the current system?

Yes.

In principle, this should be a good thing. However, as alluded to in Answer 1, we are concerned by:

1. the underlying institutional framework for industrial relations;
2. the conspicuous lack of any new funding in the consultation paper;
3. an absence of reference to engagement with trade unions; and
4. a lack of clarity over where current powers not absorbed by the new body will reside.

In the absence of effective trade union representation and, more importantly, protection of the right to collective bargaining under the standards of European and international labour law, centralised funded enforcement for individuals who would otherwise be excluded (access, language, poverty, fear, mental distress) from the normal dispute resolution mechanisms (courts and tribunals) sounds attractive.

Equal pay campaigners (such as Fawcett) argue for a direct enforcement mechanism. However, the experience of the 1960s race relations legislation, EOC and CRE, was that central enforcement had limited effect.

Central enforcement only really works when there are clear cut rights about which there can be very little dispute. It is not a dispute resolution mechanism where there is a genuine dispute, unless it adopts the continental model where the central enforcement body takes the workers' claims to a tribunal. For example, statutory sick pay (SSP) used to have a central enforcement mechanism with a separate tribunal system for disputes if the worker thought that the decision of the central enforcement mechanism was wrong. The difficulty was that it was almost unknown, and it worked in a very similar way to tax tribunals when recipients of SSP didn't have city lawyers and accountants on tap to try every trick in the book.

In 1975, HM Factory Inspectorate was replaced by the Health and Safety Executive which which was a centralisation and whilst there were certain improvements in enforcement, an important function of enforcement of health and safety for vulnerable workers was compartmentalised, in part due to insufficient joined-up thinking within government policy circles.

If a single enforcement body were to be introduced it would need to be underpinned by well-known, easily understood and enforceable rights under International Labour Organisation standards (at a minimum), proper trade union representation and collective bargaining, and an effective dispute resolution mechanism in addition to any central enforcement mechanism.

We endorse the proposals regarding labour inspection in the Institute of Employment Rights' Manifesto for Labour Law and ultimately support the creation of a Single Enforcement Body for employment rights. This includes, but is not limited to, the following measures:

- The UK to have an institutional approach to include a Ministry of Labour, Labour Court (with High Court jurisdictional powers) and a Labour Inspectorate, as well as ratifying Part 2 (Labour Inspection in Commerce) of C081 - Labour Inspection Convention, 1947 (No. 81) and ratifying P081 - Protocol of 1995 to the Labour Inspection Convention, 1947. It should adhere to R081 - Labour Inspection Recommendation, 1947 (No. 81).
- The UK to ratify the European Social Charter (Revised) 1996. Failing that, the right to work under Article 1 of the European Social Charter 1961 should override the Home Office's UK Visas and Immigration Employer Checking Service for suspected visa over-stayers pending regularisation of their immigration status (ideally an amnesty). This requires an inversion of the Home Office's current conception of the 'right to work'.
- The Labour Inspectorate should be able to fine and, where appropriate, prosecute directors for breaches of directors' duties (which would require relevant amendments to the Companies Act 2006).
- Reform of the benefits system (generally) but in this context for those off work due to industrial injuries and health and safety failings, including stress, to have benefits paid by default or by interim payment by employers pending compensation.

- Chain liability for companies complicit in modern slavery overriding the corporate veil, we consider the current regime of ‘transparency’ and volunteerism in reporting or ‘naming’ is wholly insufficient. This should include exploitation in multinational companies or the supply chains in other jurisdictions. On 21 February 2017, the French Parliament adopted a law (the “Corporate Duty of Vigilance Law”) that creates novel corporate supply chain liability. Specifically, the Corporate Duty of Vigilance Law imposes a duty of vigilance on large companies to prevent serious violations of human rights and fundamental freedoms and serious environmental damage in their supply chain. If government were serious about the issue, this type of law would be applicable to child labour and slavery in the supply chain of the UK’s diamond and fashion industry.
- Power for the Labour Inspectorate to issue civil compensation to victims of modern slavery and fines on companies in any investigation or successful criminal prosecution. An injunction to force a business with a turnover of £36 million to merely produce a modern slavery statement is manifestly inadequate.
- Reintroduction of legal aid for employment matters to help ensure enforcement of rights where this is not done by a Labour Inspectorate.
- Inspection mechanisms to ensure that asylum seekers are able to work whilst awaiting the outcome of their applications (a policy change in itself) and for this to continue to be overseen for those who are granted refugee status (a further iteration of the right to work).
- The Labour Inspectorate to absorb the powers of the Pensions Regulator where workers’ rights are affected.
- Reform of the insolvency legislation to prevent phoenix companies rising again having not paid workers’ wages (and the power for a Labour Inspectorate to intervene in an administration to prevent insolvency practitioners colluding with companies that pick up businesses for an undervalue in a pre-pack).
- The UN Guiding Principles on Business and Human Rights (which are voluntary) to be enacted into legislation to ensure rights enforceability by a Labour Inspectorate.
- The Labour Inspectorate to ensure enforcement of tribunal awards if the tribunal continues not to have enforcement powers (though a Labour Court should have these powers).
- HSE to be incorporated into a Labour Inspectorate to ensure consistency and effective enforcement.
- Appointment of Social Partners to the board of the Labour Inspectorate.
- The Labour Inspectorate should include a unit of dedicated police officers (similar to the GLAA’s Labour Abuse Prevention Officers) to identify and prosecute incidents of modern slavery, people trafficking and criminal negligence regarding serious health and safety breaches.
- The Companies Act 2006 should be amended to include a requirement for companies to refer in their annual reports to their modern slavery statement.
- Section 54 of the Modern Slavery Act should be amended to impose a similar duty on non-listed companies that meet the £36 million threshold but would not be captured by the Companies Act 2006 reporting requirements.
- Failure to fulfil modern slavery statement reporting requirements or to act when instances of slavery are found should be an offence under the Company Directors Disqualification Act 1986.

3. What do you think would be the benefits, if any, of a single enforcement body?

- Better protection of vulnerable workers.
- Streamlined enforcement.
- Transformation of industrial relations.
- A medium to long term boost to the productive capacity of the workforce.
- Greater confidence in business ethics.
- Virtuous circle of a race to the top in terms of standards.
- A business and human rights approach being internalised within business processes.
- A greater focus on sustainability in line with the UN's 2030 Sustainable Development Goals by filtering out unethical and environmentally unfriendly business practices.

4. What do you think would be the risks, if any, of a single enforcement body?

- Lack of funding.
- Lack of specialism.
- Lack of regulation of tax avoidance and other corporate excesses, such as group companies, phoenix companies and sham insolvency practices to avoid labour regulation.
- Lack of government commitment.

5. Do you think the current licensing scheme (for supply or use of labour) should be expanded to other sectors at risk of exploitation by gang masters?

Yes.

These are the areas, such as agricultural and construction work, where workers are most vulnerable and may not speak the language.

6. Are there any at risk sectors where you think enforcement of existing regulations could be strengthened to drive up compliance in place of licensing?

Yes.

As an alternative to licensing, the following are risk sectors that could particularly benefit from a strengthening of existing regulations, which are poorly enforced currently:

- Agriculture
- Construction
- Care sector
- Hospitality sector
- Security sector
- Transport sector

7. Should a single enforcement body take on enforcement of statutory sick pay if this process is strengthened?

Yes.

Employers regularly and casually breach their obligations to pay statutory sick pay through devices such as umbrella companies and zero hour contracts. Many of these are sham arrangements.

8. Should a single enforcement body have a role in relation to discrimination and harassment in the workplace?

Yes.

Where there is exploitation of vulnerable workers, discrimination and harassment is often part of the mix. These are cross-cutting issues, especially where migrant workers are exploited and do not have the capacity to enforce their rights. Discrimination and harassment in the workplace is different from such practices in other areas of life and requires a specific inspection regime and remedial approach.

9. What role should a single enforcement body play in enforcement of employment tribunal awards?

It should have wide-ranging powers, such as the power to charge the assets of employers that fail to pay awards.

10. Do you believe a new body should have a role in any of the other areas?

Yes.

Health and safety, especially the regulation of working hours and rest periods for night workers.

11. What synergies, if any, are there between breaches in areas of the 'core remit' and the other areas referenced above?

A virtuous circle is created by improving business practices. As the protection of migrant workers and women rise and their rights enforced (and seen to be enforced), the protection of all workers will rise. This prevents unscrupulous employers from undercutting ethical business practices. A healthier and safer workforce will save the NHS costs and the Treasury benefits costs.

12. Should enforcement focus on both compliance and deterrence?

Yes.

They are two sides of the same coin and enforcement is crying out for an institutional approach that is truly holistic. Deterrence will save the costs of enforcing compliance.

13. As a worker, where would you go now for help if you had a problem with an employment relationship?

Most of our clients are trade union members and will approach their trade unions in the first instance if they have a problem in the employment relationship.

14. As a worker, how would you like to access help?

N/a.

15. As an employer, where would you go now for support on how to comply with employment law?

N/a.

16. As an employer, how would you like to access help?

N/a.

17. Is there enough guidance and support available for workers/employers?

No.

This could be improved by a single point of contact through the proposed Single Enforcement Body. Serious consideration should be given to how unions might be represented on corporate boards to oversee enforcement of employment rights.

18. Should a new single enforcement body have a role in providing advice?

Yes.

There should be a 'lessons learned' approach where the Single Enforcement Body helps in the deterrence process and passes on the benefits of its institutional knowledge from successful enforcement actions.

19. Would having a single enforcement body make it easier to raise a complaint?

Yes.

If established with the powers we have proposed it would take an inquisitorial, fact-finding approach so that complaints could be dealt with more efficiently on the basis of evidence acquired during inspections. It would provide an objective presence to prevent employer intimidation and provide workers with safeguards from the stress of lengthy employment tribunal proceedings.

20. Would a single enforcement body improve the ability to identify the full spectrum of non-compliance, from minor breaches to forced labour?

Yes.

There is an inter-connection within the spectrum of non-compliance and minor breaches which can lead to a 'trail of inquiry' that could uncover more serious breaches.

21. What sort of breaches should be considered 'lower harm'? Should these be dealt with through a compliance approach?

Technical breaches that do not materially affect workers. A dynamic relationship with trade unions can educate management on the correct management approach to compliance. Union members have a unique understanding of risks in the workplace from their experience of being at the cutting edge of how the business works.

22. Which breaches should be publicised?

More serious breaches above a specified threshold should be publicised and those guilty should be fined with a requirement to display the fine prominently on their websites and promises for a minimum of 12 months whilst reform and change to address the fault should be expected and welcomed, and any attempt to belittle the findings of represent them other than in their factual form should be made subject to further sanction.

23. Do the enforcement powers and sanctions currently available to the existing enforcement bodies provide the right range of tools to tackle the full spectrum of labour market non-compliance?

No.

See our response to question 2.

24. Should civil penalties be introduced for the breaches under the gangmasters licensing and employment agency standards regimes that result in wage arrears?

Yes.

These are often among the most serious abuses of vulnerable workers. Civil penalties will ensure that employers take their concerns seriously. Workers' lives and their health and safety are not an externality.

25. Do you agree with the proposed levels set out in the consultation?

No.

There is no reason in principle why there should be a maximum penalty of £20,000 when the lives and health and safety of workers are at stake. Such a sum bears no relation to the human misery inflicted nor to the profits of the companies at fault.

26. Should a single enforcement body have a role in enforcing section 54 of the Modern Slavery Act?

Yes.

See our response to question 2.

27. Would introducing joint responsibility encourage the top of the supply chain to take an active role to tackle labour market breaches through the supply chain?

Yes.

This is vital to avoid regulatory arbitrage and a race to the bottom. It is one of the most important measures of enforcement that can be taken, especially in light of decades of de-regulation and light touch enforcement of employment rights. As stated in the ILO's Declaration of Philadelphia, Labour is not a commodity.

28. Do you think it would be fair and proportionate to publicly name a company for failure to rectify labour market breaches in a separate entity that it has no direct relationship with?

Yes.

Often the separate entity is deliberately used, or even created, by companies prepared to behave in this way to avoid regulation or direct association.

29. Should joint responsibility apply to all labour market breaches enforced by the state?

Yes.

The state has a responsibility to its workers and this may extend beyond its borders as a result of complex supply chains.

30. Would it be effective in all sectors?

Yes.

The economy is inter-related and there will be benefits for all society in ensuring joint responsibility for labour market breaches.

31. Do you think there should be a threshold for the head of supply chain having a responsibility for breaches at the top of the chain?

Yes.

The threshold should be harm to workers or the environment and not an artificial turnover figure capable of manipulation via tax arrangements and corporate structures of regulatory arbitrage.

32. Do you think embargoing of hot goods would act as an effective deterrent for labour market breaches?

Yes.

It has proved effective in the US and other countries for identifiable labour market breaches. It has a positive deterrent effect and raises standards.

33. Would it be effective in all sectors?

Yes.

All sectors where there is a supply chain of goods and services.

34. Should embargoing of hot goods apply to all labour market breaches enforced by the state?

Yes.

Blood diamonds and other abuses of the diamond supply chain (including child labour and modern slavery) are a good example of the capacity of the State to act. The supply chain in fast fashion is exploited in relation to foreign workers so this practice should not apply in relation to domestic goods only, as is suggested. Incidents such as the Rana Plaza disaster or the physical and psychological abuse of Chinese workers for cheap western electronics at Foxron is evidence of the corrosive effect of companies being allowed to feel that they are above the law.

35. Are there other measures that the state could take to encourage heads of the supply chain to take a more active role in tackling labour market breaches?

Yes.

Labour rights are human rights: British workers and consumers should not benefit from the outsourcing of labour market breaches. The business and human rights approach should be hard law and not a weak, soft law voluntary form of corporate social responsibility. The tax regime and corporate regulation should be adjusted to 'incentivise' employers to respect labour rights and penalise them for the breach of such rights.