Written evidence submitted by The Work, Informalisation and Place (WIP) Research Centre to The Employment Rights Public Bill Committee (ERB63).

Make Work Pay: Employment Rights Bill Inquiry

Submission of written evidence to the Business and Trade Committee from Ian Clark, Darryl Dixon, Rich Pickford, James Hunter and Nidhi Sharma at the Work, Informalisation and Place (WIP) Research Centre, Nottingham Trent University.

Our responses to the submission call are laid out in accordance with the terms of the call under the three headings cited therein.

WIP is one of the UK's foremost research centres that examines labour market non-compliance, workplace coercion and exploitation, and the associated potential for modern slavery. The Arts and Humanities Research Council, the then Department of Business, Energy and Industrial Strategy, the Home Office the National Crime Agency's Modern Slavery and Human Trafficking group and the TUC employment rights section have each funded recent research projects undertaken by WIP.

WIP provides methodologically innovative interdisciplinary studies with a specific focus upon the spatial dimensions of contemporary work and employment in sectors such as hand car washes, nail bars, and small-scale garment manufacturing. Work in these sectors tends towards casualisation and informalisation where workers operate under business models that embed patterns of labour market exploitation. Exploitation includes wage theft, under payment of the national minimum wage through to modern slavery where employer coercion centres on work for favours, labour bondage and tied labour in unsafe workplaces.

In this submission we are concerned with the implications of the Bill for operations, scope, and remit in terms of investigation powers and sanctions, of the Fair Work Agency (FWA). This includes aspects where we have concerns over potential unintended consequences of potential drafting shortcomings in the Bill. We have produced more detailed assessments on the key issues, which cannot be included here due to word limitations. Details can be found on our webpage in the 2024 publications section- https://bit.ly/WIPh

We are also currently working in partnership with the Rights Lab of Nottingham University on a joint assessment of the Bill to fuse our respective areas of expertise, covering the informal economy and modern slavery. Whilst we have undertaken to provide separate responses to this inquiry we have shared expertise and insights and will continue to do so through the course of the employment rights bills legislative process.

Protecting workers

- **Does the Employment Rights Bill adequately safeguard the workers it seeks to protect?**

  In theory the provisions in the Bill will improve employment protection for workers particularly those precarious workers who may fall under the auspices of the Fair Work Agency enforcement bodies but should go further.

  Recommendation: *Protection of workers should be consistent throughout the UK. This requires the creation of a Fair Work Agency that can uniformly discharge an enforcement function in all jurisdictions of the UK. The impact assessment for the creation of the FWA illustrates the current 'patchwork quilt' nature of the different jurisdictional remit of the enforcement bodies that will amalgamate to form the FWA. Whilst we recognise that introducing legislation that requires changes in the devolved administrations is complex it will be a lost opportunity, to improve worker protection by the new enforcement body, if this is not addressed.*

  The civil inspection power of entry (clause 79) partially consolidates the powers of the three bodies but leaves inspection powers in relation to gangmaster issues in Northern Ireland in a much-amended 2004 Gangmasters (Licensing) Act. Additionally, EAS has no authority in Northern Ireland, where the same function is exercised by a small equivalent body.

  Recommendation: *Greater consistency would be achieved by consolidating the legislation into a single power of entry for the whole of the UK under the authority of the FWA.*

  The FWA will inherit the GLAA's current police powers to investigate Forced labour offences from the Modern Slavery Act 2015. The GLAA currently does not have the power to initiate criminal investigations for the similar forced labour offences in the separate Northern Ireland and Scotland Acts. Nor will the FWA.

  National Minimum Wage regulations, include enforcement of NMW to offshore activities. Forced labour offences are also known to occur in UK coastal waters. The FWA should also be provided with maritime investigation powers, as an extension of the Modern Slavery powers in Part 3 of the 2015 Act.

  Recommendation: *A consistent approach and better protection and reporting of victims will be created by extending the FWA's authority to investigate the forced labour offences in the devolved administrations and UK waters All FWA staff should be classed as first responders, in any jurisdiction they operate in, not just specialist investigators, to ensure all potential victims are identified and referred to the NRM, and the "duty to notify".*

- **Are there weaknesses or loopholes in the Bill that could be exploited or have unintended consequences?**
  We believe there are. This could undermine the appropriate and proportionate sanctioning of non-compliant businesses and remove current guidance to those who may be affected by enforcement action, disabling their understanding of action that

can be taken against them. The 2016 Act introduced the labour market enforcement undertakings regime of alternative sanctions to prosecution in appropriate cases. The Employment Rights Bill will remove the sections in the 2016 Act and introduce them in the Bill.

Firstly, the Bill does not retain the legislative requirement to issue a statutory Code of Practice on how the sanctions regime should be applied, providing accountability.

Secondly, the Bill removes the term 'trigger offence', and replaces it 'labour market offences'", where clause 112 defines the term, and refers to Schedule 4 for the legislation it relates to. However, as created in 2016, 'Trigger offences' are an intentional sub-set of 'labour market offences', which explicitly excluded modern slavery offences. These are so serious that where there is evidence of those offences' prosecution must be considered. By removing the use of 'trigger offence' the current Bill draft clauses on the LMEU technically create the potential for a person committing a modern slavery offence to be offered a LMEU. Not all legislation in Schedule 4 relates to specific offences. Therefore LMEUs could not be offered as an additional sanction in relation to any non-compliance identified in those cases. Consequently, if a person accepted a LMEU in those circumstances, and then did not comply this could not ultimately be escalated to prosecution for a criminal breach, because there was no original criminal offence to which a LMEU could be offered initially. Such situations would then appear to breach Articles 5,6, and 7 of the ECHR, contrary to the analysis in the Human Rights Memorandum that accompanied the draft Bill.

Recommendation: *Rectify drafting errors related to failure to apply a sanctions code of practice and in the use removal of the of trigger offence terminology.*

- **Are there areas of employment law not covered by the Bill that weaken workers' protections?**

  The decision not to provide employment protection for undocumented workers who are none-the-less working will enable and facilitate the continued engagement of such workers in legitimate firms and those that choose labour market non-compliance and associated coercion and exploitation as a form of competitive advantage. At-risk sectors include car washes, nail bars, care work, construction and small workshop garment manufacturing as well as criminalized employment in cannabis farms, sex work and drug dealing. In addition to these sectors undocumented workers may experience modern slavery in employment in domestic homes as servants etc.

  Recommendation*: The exclusion of undocumented workers from employment protection creates a hierarchy of coercion and exploitation with those beyond protection enduring coercion and exploitation without remedy.*

- **Can the measures in the Bill be adequately enforced? What are the barriers to setting up a Single Enforcement Body (Fair Work Agency) and how can these challenges be overcome?**
  WIP has examined these issues in detail in a report commissioned from us by the TUC. The key issue is that of enforcement. Further details can be explored online from

our report: https://www.ntu.ac.uk/__data/assets/pdf_file/0029/2504963/Expand,-Resource-and-Enforce-NTU-Report-on-the-SEB-for-the-TUC.pdf

Recommendation: *To make a difference from the light-touch regulation approach of the previous government this government must focus clearly on enforcement of employment rights in the workplace and an improvement in the level of enforcement.*

The barriers to enforcement are that the current regulatory and enforcement landscape is not fit for purpose. The distance between overseeing strategies laid out by the Office of the Director of Labour Enforcement (ODLME) and those enacted by enforcement agencies is too wide. This distance enables enforcement bodies significant levels of *strategic choice* to define their own operational environments that are often at odds with recommendations and directives laid out by the ODLME, for example, decisions made by enforcement bodies not to follow-up on ODLME directives for a mandatory licensing scheme for at-risk sectors such as car washes and nail bars but instead use a voluntary scheme – the responsible car wash scheme which failed to make any evidential difference to unlawful practice as reviewed by two WIP research reports which has let us to explore the viability of a mandatory licensing proposal for the sector.

Creating the new organisation will require transformation and re-structuring to, determine what specialist and field operational teams are required.

Recommendation: *Combining three bodies must not result in the creation of a body with internal barriers to cooperation and enforcement.*

As the FWA inspectors will discharge civil inspection compliance functions, as well as criminal investigation functions, and enforce legislation that some of its officers did not have a responsibility for before it will need to ensure a comprehensive training programme is implemented. All FWA staff need to understand all the enforcement legislation, and the limitations to what specific inspection staff can do in certain circumstances, dependant on their role. If there are to be specialist teams (e.g. those that may exercise the current police powers) the structure must ensure that it does not enable an inadvertent misuse of powers (i.e using civil inspection powers to inappropriately gather evidence where the use of criminal powers, and warrants, should have been used from the outset). Training must ensure the consequences of misuse of powers are understood, how to avoid that risk, and how use of powers is to be controlled. Otherwise judicial review and complaints of operating “ultra vires” may arise

Since 2006 legislative reform aims to set better regulation frameworks that bodies, classed as regulators, must adhere to in their operation. This led to the introduction of two statutory Codes: The Regulator’s Code; and The Duty of Growth Code. These place requirements on regulators designed to reduce burdens on business, but may undermine the ability to take enforcement action, which, if successful, could lead to compensation for exploited workers. For example, the growth code sets a requirement that a regulator must consider what the impact of enforcement sanctions would be on the offending businesses ability to grow economically. Businesses are given more protection than workers. This should be reviewed and amended where it would otherwise prevent enforcement action and protection of workers’ rights. In addition to

the brief commentary on our main concerns we also believe the Bill does not go far enough and have also set out further detail on our proposals in a report commissioned by the TUC. These are necessarily detailed and therefore beyond the word limits for this submission, however, you can find the detail via the publication section of our webpages.

***Recommendation**: There should be easements or amendments to the Regulators and Growth codes, and the FWA's adherence to them, where otherwise they restrict and could undermine robust investigation and sanctioning of labour exploitation*

- **Will the proposed trade union reforms improve working relationships between workers and businesses, and hence, productivity and enable voice at work?**

  The established literature in the employment relations/industrial relations field is clear. Good relations between management and workers adjudicated through a plural approach to workplace relations centred on collective bargaining is good for working relationships, productivity, and worker voice at work. There is plenty of survey research, case study research and comparative research that demonstrates this is the case. This is a different point to the often-ideological choice not to have plural workplace relations. This choice is often explained as an innovation effect associated with the diffusion of American multinational firms into the UK that prefer a strong centralised and standardised managerial prerogative rolled out on a unitary basis. This innovation became a best-practice template for many firms of any nationality.

  ***Recommendation**: This government should not pre-judge the utility of pluralist workplace relations just because Unitarist relations were the preference of the previous government.*

Impact on businesses

- **What impact will the areas covered by the Employment Rights Bill have on small, medium and large businesses?**

  The measures will have little adverse effect on large businesses because they have human resource or personnel departments which ensure compliance with legislation. The HRM/personnel management professional body, the Chartered Institute of Personnel and Development has raised few criticisms of the areas covered by the Bill in respect of larger firms. For smaller firms there will be some effects in terms of clarification of the regular use of zero hours contracts – this is too the case for large firms. Day one employment protection already exists for all employees who have protected characteristics in the workplace and because of this extension of day one rights to all workers is not in our view a significant reduction of the managerial prerogative, it may reduce precarious employment or as employers term it flexibility but only on the margins. The changes may affect agencies that provide zero hours workers and undermine the business model and margin in terms of delays in payment of wages. This is a good thing and will reduce the scale of precarious working and delayed remuneration.

- **What impact will these measures have on staff retention, hiring practices, probationary periods and wages?**

The evidence suggests if workers are engaged on permanent or clearly understood fixed terms contracts (not zero hours contracts or those provided via an employment agency) that they are likely to be retained by an organization longer than those who are not. This is the case because those on short-term fixed term contracts or zero hours contracts are often seeking to secure a more permanent engagement elsewhere. Therefore by association hiring practices may become more formalised than they currently are, particularly bearing in mind day one protections or if engagement was handled by an agency. Agencies will continue to provide labour to firms but they too will have to improve engagement policies bearing in mind the improved protections around zero hours contracts. Probationary periods are permissible for all employees and it is perfectly acceptable to dismiss or terminate workers who fail probationary periods as long as this is clearly laid out in a procedure and that it is communicated to the employee in a fair and reasonable way. That is, employers continue to possess a strong managerial prerogative in relation to performance and can avoid claims of discrimination, unfair or wrongful dismissal if it is clear that dismissal relates to performance.

Recommendation: *The Bill and subsequent legislation should make it a requirement for all employers to clearly lay out their duties and responsibilities to workers in a clearly accessible documentation.*

- **To what extent could the Employment Rights Bill cause businesses to offshore employment and continue with weaker workers' protections abroad?**

  This is the argument laid out by those who are against employment protection in the workplace. In those sectors that currently have the weakest protection for workers and the most exploitative workplace terms and conditions, for example, those in care work in care homes and those who care for those in their own home offshoring is not possible and therefore a false argument. This is an important point because as with the American economy going forward in the UK the care sector will be one of the largest areas of employment in the near future.

  Even in sectors where off-shoring was a dominant business practice such as in garment manufacturing re-shoring has occurred over the recent past as part of the fast fashion movement. It is the case though that re-shoring has not been without problems, for example, those investigated under *Operation Tacit* in Leicester.

  The Work, Informalisation and Place Research Centre team are happy to provide additional insights or material if asked and would be willing to provide oral evidence if so called.

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