

FLEX Briefing: Immigration Bill Part One - January 2016

Focus on Labour Exploitation (FLEX) works to end human trafficking for labour exploitation. To achieve this, FLEX works to prevent labour abuses, protect the rights of trafficked persons and promote best practice responses to human trafficking for labour exploitation by undertaking research, advocacy and by building awareness in this field. Through this work FLEX: Builds understanding of how best to prevent and identify cases of trafficking for labour exploitation; Increases focus on labour rights and labour standards in anti-trafficking policy and practice; and Enhances understanding of legal rights and obligations relating to trafficking for labour exploitation. FLEX is a registered charity based in London, UK. For further information please contact Caroline Robinson, Policy Director on 020 3752 5516, carolinerobinson@labourexploitation.org

This briefing covers three key areas relating to Part One of the Immigration Bill

- 1. The Director of Labour Market Enforcement**
- 2. The Offence of Illegal Working**
- 3. New Government amendments in response to the Consultation - 'Tackling Exploitation in the Labour Market'**

Summary

The perpetrators of modern slavery use vague employment arrangements as well as hidden costs, fees and debts to trap workers in vulnerable situations, preying on the precarity that pervades many UK employment sectors. As a result workers are exploited for their labour in the restaurants we visit, hotels we stay in, care homes we rely on and on the construction sites all around us.

This FLEX briefing relates to three core aspects of Part One of the Immigration Bill: The Director of Labour Market Enforcement; The Offence of Illegal Working; and new amendments on the Gangmasters' Licensing Authority.

FLEX believes that labour inspection and enforcement is key to preventing modern slavery. Whilst FLEX supports the establishment of a Director of Labour Market Enforcement to coordinate labour inspection efforts, the central role of the UK labour inspectorates in preventing exploitation risks being undermined by a politically motivated Director who lacks a clear mandate.

The victims of modern slavery with whom FLEX works express deep fear and distrust of authorities as well as a real concern for immigration repercussions should they come forward. The Clause 8 Offence of Illegal Working will exacerbate such fears and play in to the hands of traffickers who seek to exploit and coerce vulnerable individuals in to exploitation.

Finally the Gangmasters' Licensing Authority is recognised as a best practice model worldwide. The Government is now proposing reducing its licensing role by introducing 'flexibility' in licensing despite just 19% of respondents to a recent Government consultation on labour exploitation supporting such moves. Further amendments requiring the GLA to carry out its functions in accordance with the Director's strategy mean that its role as a Non-Departmental Public Body and the expertise it has developed as an independent authority is severely threatened.

I. Director of Labour Market Enforcement

Key issues

a) Need for a clear purpose for the Director of Labour Market Enforcement

The primary activity of the Director is to produce a Strategy that covers non-compliance in the labour market ranging from labour abuses to serious labour exploitation and which includes ‘any other enactment prescribed by regulations made by the Secretary of State’. A role so broad requires a clear set of priorities, to ensure that vulnerable workers are central to work conducted by the Director. The presence of this post in an Immigration Bill and the possible breadth of scope of the role raises concerns about overlap between immigration control and labour market enforcement.

Comparable roles in the UK have a clear mandate set out on the face of the Act that created them: the Independent Anti-Slavery Commissioner has his ‘general functions’ set out in Section 41 of the Modern Slavery Act 2015; the Commissioner for Victims and Witnesses has general functions of which the core purpose is to promote the interests of victims and witnesses set out in the Victims Act 2004; and the Children’s Commissioner has a ‘primary function’ promoting and protecting the rights of children in England set out in the Children and Families Act 2014.

The Director should have their purpose as the protection of vulnerable workers clearly set out in Clause 1 on the face of the Immigration Bill.

b) Unclear relationship between the Director and the labour inspection authorities

The relationship between the Director and the governance of each of the three labour inspection authorities that fall within the Director’s remit should be made clear in legislation. In particular the GLA as a Non-Departmental Public Body (NDPB) should be able to operate at an ‘arms length’ from Ministers and the relationship between the Director and Secretary of State and the GLA should reflect its role as a NDPB.

Further, the resources available to the Director have not been made clear. In the Government’s response to the Consultation on ‘Tackling Exploitation in the Labour Market’ and as set out in Clause 2 (3) it is stated that the Director will be able to act to ‘pool’ resources between labour inspection authorities. Given the shoe-string budget on which labour inspection authorities currently operate the potential for diversion from existing good work is high.

The Director should have the power to set funding requirements and not the budgets of the labour inspection authorities.

c) Civil society engagement with the Director of Labour Market Enforcement is key to their success

It is important that the Director of Labour Market Enforcement engage with civil society, including anti-trafficking organisations, migrant community representatives,

trade unions, businesses and homeless organisations, in the development of the labour market enforcement strategy.

Given the lack of a clear remit for the Director, a statutory duty to engage is important to ensure that priorities are rooted in the needs of those vulnerable to exploitation and those seeking to prevent exploitation.

Government amendments to Clause 3

Amendments on the Director of Labour Market Enforcement tabled by the Government on 12/01/16 add certain specified labour legislation breaches to the Director's remit, whilst leaving open the possibility of adding 'any other requirement imposed by or under any enactment and which is prescribed by regulations made by the Secretary of State'

FLEX does not support the extension of the Director's focus to include 'any other requirement' but believes it should be clearly defined on the face of the Bill to maximise resources and to ensure clarity for the three labour inspection authorities who will be guided by the Director's strategy.

Opposition amendments to Clauses 1-3 on the Director

FLEX supports the following opposition amendments on the Bill

Liberal Democrat amendments

Clause 1 to seek to clarify both the line of command for the Director and the primary function of the Director as the 'protection of workers from exploitation'

Clause 2

1. for the Director to make an assessment of the resources required within their annual strategy including available and further funding required.
2. To ensure that individual labour inspection authority governance structures retain control over their operational strategies, whilst having regard for the Director's Annual Strategy.

Clause 3

1. To limit the legislation that can be included within the remit of the Director to that which relates to the protection of workers;
2. To ensure that all workers are included within the remit of the Director regardless of status

Labour amendments

Clause 2

1. To broaden the focus of the Director's strategy to include an assessment of obstacles to labour market enforcement and remedies available to victims;
2. To ensure engagement between civil society and the Director in the preparation of their annual Strategy.

Clause 3

1. To ensure that all workers are included within the remit of the Director regardless of status

Clause 4

1. To ensure that the Director's annual report reviews the success of the Annual Strategy in addressing non-compliance in the labour market; to provide remedies for victims; and to overcome threats to labour market enforcement.

2. The Offence of illegal working

Key issues

a) The illegal working offence will make victims of modern slavery more vulnerable to exploitation

Vulnerable individuals in exploitative work will be marginalised and rendered powerless to threats and coercion by this provision. The referral form for the UK National Referral Mechanism for victims of modern slavery lists a series of indicators for modern slavery. These include indicators directly linked to the abuse of an individual's status in order to control and coerce them in to exploitation, namely: #1. Distrustful of authorities; #9. Passport or documents held by someone else; and #16. Threat of being handed over to authorities.

Imposing fines on undocumented workers will serve to increase their economic precarity and thus their vulnerability to exploitation. The focus of this offence on vulnerable and exploited workers as criminals, could leave the UK at risk of breaching Article 4 of the European Convention of Human Rights due to a failure to prevent, identify and protect victims and potential victims of modern slavery.

FLEX believes that this offence means that vulnerable individuals in exploitative work will be marginalised and rendered powerless to threats and coercion. This offence would mean:

- a) that many victims of modern slavery in the UK would not risk referral in to the UK national referral mechanism if a negative conclusive grounds decision could mean imprisonment; and
- b) that traffickers would use this new offence as a threat by which to coerce victims in to exploitation.

b) Low likelihood and high cost of enforcement

The Crown Prosecution Service Guidance on Proceeds of Crime highlights a need to prioritise the recovery of assets from serious organised crime and serious economic crime. Pursuing undocumented workers with few assets will not be a priority. Additionally the undocumented workers who are working for little money and living a subsistence existence will have very limited realisable assets. The Guidance says that 'If a financial investigation has revealed that a suspect has few or no realisable assets, then it may not be a proportionate use of resources to pursue confiscation'. Therefore there will be few cases in which it will be cost effective or in the public interest to pursue confiscation proceedings.

Evidence from Italy demonstrates the impracticality of attempts to seize undocumented workers' assets. Under an 'irregular migration offence' provided for in the 'Bossi-Fini Law 2002' undocumented workers could be fined for working without documents in Italy. This offence was ultimately repealed in 2014, one of the reasons for which was the heavy bureaucracy and limited success associated with gaining financial penalties from undocumented workers.

Opposition amendments to Clause 8 on the Illegal Working Offence

FLEX supports the Labour amendment to oppose the question that Clause 8 stand part of the Bill.

3. New Government amendments in response to the consultation - 'Tackling Exploitation in the Labour Market'

On 12th January 2016 the Government published their response to the BIS/Home Office consultation on Tackling Exploitation in the Labour Market that ran from 13 October – 7 December 2015. The consultation proposed an expanded role for key UK labour inspection agencies, including a move to criminal powers exerted across the labour market. It also proposed a more 'flexible' approach to licensing and a possible shift away from licensing towards voluntary schemes. In total there were 93 respondents including from industry, charities, trade unions and academia. In its response the Government proposals include:

- Considering how key stakeholders can be involved in the preparation of the Director's Annual Strategy
- Creating a new type of 'enforcement order' for businesses committing labour market offences;
- Reforming the Gangmasters' Licensing Authority's mission, functions and powers to 'prevent, detect and investigate worker exploitation across all labour sectors'.
- Reflecting its new role, the Gangmasters' Licensing Authority (GLA) will be transformed into the Gangmasters' and Labour Abuse Authority (GLAA); and
- Introducing a more 'flexible' licensing system, with hints towards removing businesses that demonstrate consistent compliance from 'regulatory burden'.

Key issues

a) The GLA's remit should not be extended without increasing resources

Whilst labour inspection authorities have seen steep declines in budgets since the 2010 Spending Review – including more than 20% cut to the GLA – this consultation concludes that they should do more on less. The GLA will not only see its remit extended to the whole labour market but will receive new criminal powers of investigation and enforcement that could absorb huge resources and distract from core licensing and monitoring functions. No clear commitment is made in the Government's response to the Consultation for extra resources to support the GLA's reformed role. Instead there is a suggestion that the Director of Labour Market Enforcement will help to 'pool' resources between labour inspection authorities. However, given the shoestring budget on which they each operate it is difficult to see how such pooling could ensure the proposed heavy increase in work is adequately funded.

b) 'Flexible' licensing should not mean a reduction in licensing

Reforms to make the licensing regime more 'flexible' that result in a reduction in the GLA's license application and compliance inspection work will make workers more vulnerable to abuses. Of all 93 Consultation respondents, just 19% supported the proposal for a more flexible approach to licensing. In addition the Association of Labour Providers biennial survey on the GLA shows 93% of labour providers surveyed were in favour of licensing. There is overwhelming support for licensing across the board as a means of raising standards and preventing exploitation, rather than a more flexible approach that would see the GLA divert attention towards perpetrators of severe exploitation.

Reducing licensing and monitoring of the labour market and weakening the GLA by extending its remit without providing the resources to facilitate such an extension will provide the perfect conditions in which rogue gangmasters might operate. Such measures severely threaten efforts in the Modern Slavery Act 2015 to protect vulnerable workers from exploitation and to reduce cases of modern slavery. Without an effective and adequately resourced labour inspection and enforcement system that includes licensing, exploitation will flourish in the UK.

Selected Government amendments in relation to the consultation findings:

FLEX is concerned about the following proposed Government amendments to the Immigration Bill tabled on 12 January 2016:

New clauses after Clause 7

- **‘Renaming of the Gangmasters Licensing Authority’:** This new clause seeks to remove the term ‘licensing’ from the title of the Authority, which will become the Gangmasters and Labour Abuse Authority. FLEX believes that the work the GLA conducts to license labour providers and monitor the compliance with licenses is essential to the prevention of severe labour exploitation. Without licensing as a core function of the GLA, serious labour abuses will be left to develop in to labour exploitation.
FLEX proposes opposing this new clause.
- **‘Functions in relation to the labour market’:** FLEX believes that this new clause confers a wide range of possible functions on to the GLA without the need for primary legislation. The GLA has been effective because it is a highly specialised body which has built strong relationships and trust with workers, this specialism should not be threatened.
FLEX proposes opposing this new clause.
- **‘Relationship with other agencies: requests for assistance’:** Consultation respondents were divided on the need for the GLA to engage more heavily with immigration officials. FLEX cited the real fear of immigration officials demonstrated by a great many modern slavery victims as a reason to limit any overlap between the GLA and immigration officials to ensure the trust between the GLA and vulnerable workers is retained. In subsection (7) this amendment seeks to include immigration officers in the work of the GLA. FLEX’s research in the Netherlands has demonstrated that the greater the overlap between labour inspection and immigration control the less likely victims of exploitation are to come forward for identification.
FLEX proposes opposing subsection (7)(d) and (e) of this new clause.

New schedules before Schedule 1

- **‘Functions in relation to the labour market’:** This new schedule proposes that the Secretary of State can arrange for any ‘body operating on behalf of the Crown’ to act for the purposes of the Employment Agencies Act 1973; and the National Minimum Wage Act 1998. FLEX believes that this has the potential to make the possible enforcement officers for these Acts too broad and could therefore lead to a confusion in oversight, to a reduction of trust between workers

and NMW teams and EAS officials and runs the risk of creating a dangerous overlap between immigration enforcement and labour inspection.

FLEX proposes opposing subsection (2)(a) and (b) and (5)(b)(a) and (b) of this new schedule.

- **‘Consequential and related amendments’:**

- This new schedule includes further updates to the name of the Gangmasters Licensing Authority to substitute it for the Gangmasters and Labour Abuse Authority.

FLEX proposes opposing amendments to the Gangmasters Licensing Act that seek to amend the name of the authority.

- This new schedule also binds GLA officers to the provisions of the Director’s labour market enforcement strategy. Given that the GLA is a NDPB, whilst it may have regard to the Director’s strategy, its primary functions and overarching strategy should be set by the GLA Board.

FLEX proposes opposing amendments to Section 1(3) of the Gangmasters Licensing Act to bind GLA officers to the labour market enforcement strategy.

- This new schedule also makes provision for the Secretary of State to add further labour sectors to the work to which the Gangmasters Licensing Act applies.

FLEX proposes amending this new provision to ensure that any extension is adequately resourced and extends the GLA’s crucial licensing role into any new sectors.

- This new schedule also places an obligation upon the Gangmasters Licensing Authority to seek approval of the Secretary of State when making rules – including relating to licensing. As mentioned above the GLA should be an ‘arms-length’ body not one which is governed by the Secretary of State in its decision making.

FLEX proposes opposing amendments to Section 8 (1) of the Gangmasters Licensing Act.

- This new schedule also seeks to remove the requirement for the Gangmasters Licensing Authority to make new rules, specifically in relation to licensing, by Statutory Instrument. Taken together with the previous amendment this provides the Secretary of State new power over who should and should not be included in the GLA’s licensing regime. It also excludes Parliament from democratic engagement in this power and therefore severely restricts accountability.

FLEX proposes opposing amendments to Section 25 of the Gangmasters’ Licensing Act.