

Consultation:

Good Work Plan: Establishing a new single enforcement body for employment rights

Submission to the Department for Business, Energy and Industrial Strategy by Focus on Labour Exploitation (FLEX)

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About Focus on Labour Exploitation (FLEX)

FLEX is a United Kingdom based charity that works to end human trafficking for labour exploitation, both in the UK and worldwide. To achieve this, FLEX conducts research and policy advocacy to prevent labour abuses, protect the rights of trafficked persons and promote best practice responses to human trafficking for labour exploitation. Further information on FLEX's work and all of our research publications and policy briefings can be found on our website at www.labourexploitation.org.

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Summary

1. FLEX welcomes the opportunity to respond to this inquiry regarding the establishment of a Single Enforcement Body (SEB) and other provisions regarding labour rights and corporate accountability.
2. We consider that current UK labour market enforcement is not effective at protecting the rights of at-risk workers. Whilst we do respond to the consultation questions regarding the SEB and consider its potential establishment to be an opportunity for positive change, we note that many of the changes we recommend could be made under existing infrastructure to the benefit of workers.
3. Overall, we consider that the effectiveness of a SEB in improving labour market enforcement will be thoroughly contingent on its design, including the principles on which it is based, its resourcing and adjacent measures to address structural issues that foster abuses.

Responses to Questions

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

1.1 FLEX notes the use of the phrase ‘vulnerable workers’ a number of times throughout the consultation document. This term is not defined within the document and FLEX recommends the Government ensures clarity over what it means by this term, as understandings of vulnerability should shape enforcement priorities and decision-making.

1.2 Notwithstanding this point, FLEX does not consider the current system effective in enforcing the rights of workers who are a) at high risk of abuse and exploitation or b) currently in situations of abuse or exploitation. A considerable body of evidence demonstrates this, as shown by two illustrative examples from our own research and from the Latin American Women’s Rights Service respectively. Our research on London’s construction sector, ‘Shaky Foundations: Labour Exploitation in London’s Construction Sector’ (2018)¹, found that within the London construction workforce:

- 50% of workers surveyed had no written contract
- 36% of workers surveyed reported not being paid for work completed
- 53% of workers surveyed were made to work under dangerous conditions
- 33% of workers surveyed had experienced verbal or physical abuse while at work¹

During the course of the interviews for this research, FLEX spoke with workers who were unclear about their employment status and did not know to whom they could complain about abuse. Recently published research² from the Latin American Women’s Rights Service (LAWRS) provides insight into feminised labour sectors, specifically cleaning, hospitality and

¹ This research was comprised of 17 worker interviews and a survey completed by 134 workers. The workers interviewed or completing the survey were Romanian or Polish and therefore this is not representative of the whole London construction workforce.

domestic work. Their report analysed 326 cases of women supported by the service and found that:

- Over half of the workers faced breaches to their contracts
- 46% of cases had experienced unlawful deduction of wages
- 20% had experienced illegal underpayment of the National Minimum Wage
- 21% were not provided with written contracts
- 28% were not allowed to take time off for being unwell (paid or unpaid)
- 17% were denied annual leave to which they were legally entitled

These two pieces of research, which show endemic abusive practices in markedly different sectors, demonstrate clearly that the current system is ineffective, at least in part.

1.2 FLEX considers this ineffectiveness is due to the following issues:

- i) *Fragmentation and associated lack of clarity*

The current labour inspectorate landscape in the UK is highly fragmented. As Table 1 in the consultation document shows, there are seven bodies playing a role in labour market enforcement in the UK today. Whilst not an inspectorate itself, from a worker-centred perspective, one could also add Advisory, Conciliation and Arbitration Service (ACAS) to this list as another 'brand' to which a worker might go when experiencing abuse. Citizens Advice, which helped 380,000 people with employment-related enquiries in 2015-16, describes "a confusing and often poorly resourced set of enforcement bodies" leaving workers "unaware of, unsure about or unable to enforce their rights".³ The consultation document acknowledges that the complexity of this situation "can be a difficult landscape for both workers and employers to navigate" and FLEX agrees. For example, workers experiencing underpayment of wages could find it logical to contact ACAS for advice, the GLAA if it is a sector licensed by them, or HMRC. Support for workers who have low levels of English language knowledge is further impacted by the lack of one clear portal with multilingual support: ACAS does provide such support but the worker must first click and read through substantial amounts of English language information before accessing the helpline and asking for support in another

language. This complexity is compounded by the plural nature of how remits are split: they are not only split according to the specific labour abuse issue, but also according to i) severity (e.g. the GLAA's remit for severe exploitation that may contain within it instances of lower level abuses that would be dealt with by other bodies) and ii) sector (e.g. the GLAA's three licensed areas, in which infractions may be present that would otherwise be addressed by other bodies). We are currently undertaking research into a several high-risk labour sectors and our interview findings to date are illustrative of the lack of clarity for workers regarding seeking help from enforcement bodies, such as the following example of a hotel housekeeper:

Interviewer: [Are you aware of] any agency that checks employment rights?

Worker: No.

Interviewer: Do you know of any helplines that can help with situations at work?

Worker: No [...]

And from a kitchen porter:

Interviewer: And if you ever had a problem at work, like a serious one, with your management or the wages, do you know where you could go with that, where you could look for support?

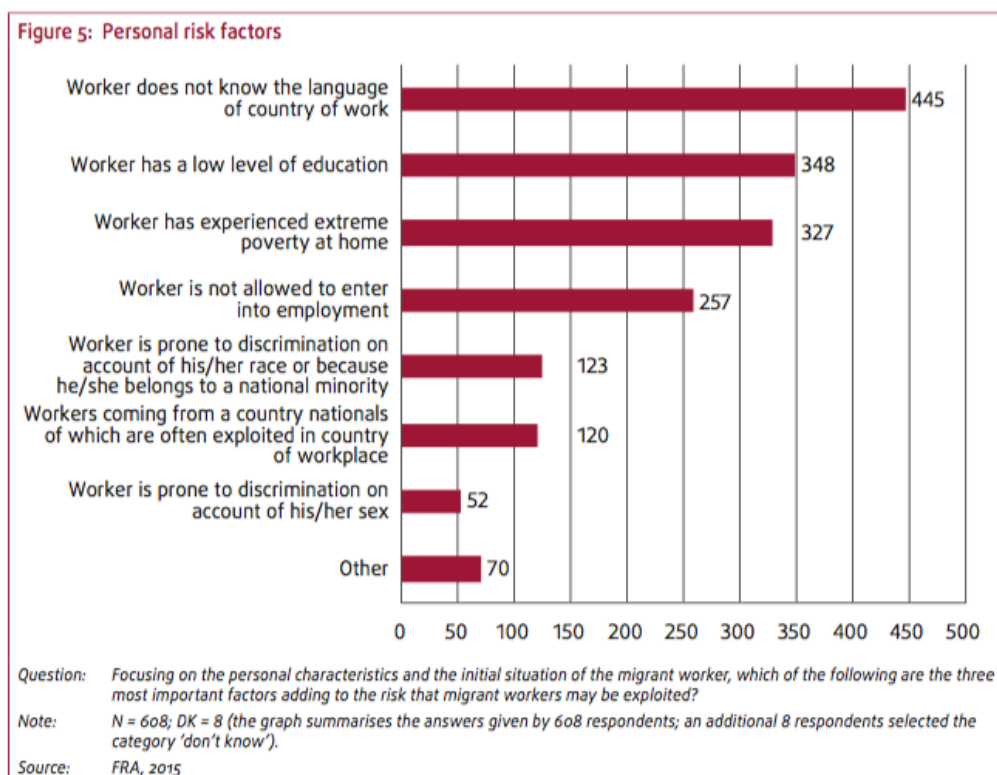
Worker: Well, first I would try to speak with the managers or the owners directly but obviously, if the problem comes from them, I would go to the Citizens Advice Bureau and try to sort it out from there.

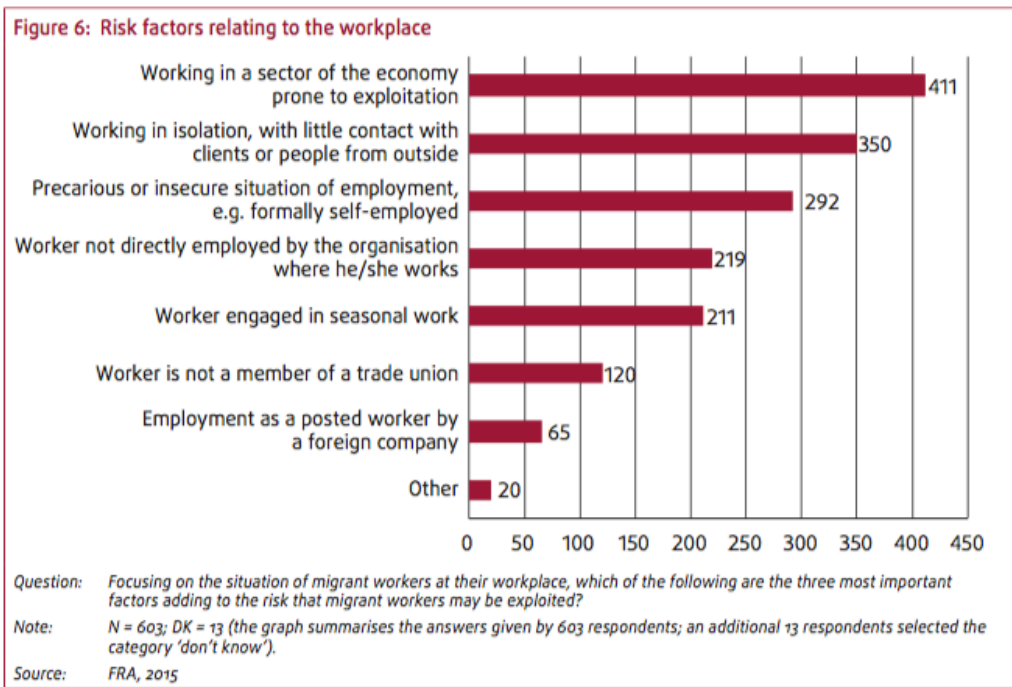
ii) *Failure to reach most vulnerable workers*

As the research cited in 1.2 demonstrates, there is a failure to reach the most vulnerable workers, particularly migrant workers. In our 2017 report, 'Risky Business: Tackling Exploitation in the UK Labour Market', FLEX identified a range of indicators that make a worker more at-risk of labour-based abuse or exploitation. These included characteristics of the individual worker, such as their migrant status and associated factors (no or limited right to remain; restrictions on rights to work and access to public funds; registration requirements and visa characteristics); whether or not the worker is unionised; and whether or not the

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worker has community ties in the UK. It also noted key characteristics of the work they undertake, such as the nature of their contract (zero hours; short hours; work undertaken as part of extensive subcontracting); and the nature of the status accorded to them in the labour market (self-employment; agency work; part-time work). This echoes the work of the EU Agency of Fundamental Rights (FRA) which has distilled personal and workplace risk factors that make a worker more vulnerable to exploitation (see figures 5 and 6 below from ‘Severe Labour Exploitation: workers moving within or into the European Union.’⁴)





These risk factors should be used to identify high risk sectors and to select appropriate enforcement responses; however, research demonstrating endemic labour abuses in high risk sectors – such as that cited in 1.2 – suggests this is not currently taking place sufficiently. Domestic work provides a salient example of this failure and is a clear blind-spot in the current enforcement landscape. The International Labour Organisation recognises domestic workers as “among the most vulnerable groups of workers”⁵ due to the often informalised and isolated nature of the work. It has found that globally domestic work makes up the largest share – almost a quarter –in cases of forced labour where the type of work was known.⁶ This vulnerability was also recognised by James Ewins in his Government-commissioned review of the Overseas Domestic Worker visa.⁷ Charities working with domestic workers have repeatedly and consistently raised issues of labour abuse and exploitation, including servitude, within this labour sector and yet the enforcement response has been negligible.

iii) *Distrust from migrant workers*

Our research, and that of others, has consistently noted that joint working between labour inspectorates and immigration enforcement in the UK undermines the efficacy of UK labour market enforcement with regard to migrant workers.⁸ The UK has ratified ILO Convention

81, 'Labour Inspection Convention', which states in Article 3 that "any further duties which may be entrusted to labour inspectors shall not be such as to interfere with effective discharge of their primary duties".⁹ Evidence shows that joint working does indeed interfere with the primary duties set out in the Convention and prevents effective protection of a migrant workers' rights. This is because, as the EU Agency for Fundamental Rights has noted, "victims of severe labour exploitation who are in an irregular situation of residence are discouraged by their status from reporting to any public authority"¹⁰. Their report also provides fear of having to leave the country as the main reason victims did not report exploitation.¹¹ This means, in practice, that victims are not identified and supported because they cannot come forward and that their exploiters are not identified and pursued to justice. It also hands perpetrators or would-be perpetrators a tool with which to control their victims: the threat of immigration enforcement. This is supported by findings of the Labour Exploitation Advisory Group, a group of ten experts working to end human trafficking for labour exploitation that is coordinated by FLEX. Drawing on the experiences of these experts and their work with at-risk workers, the LEAG position paper, 'Labour Compliance to Exploitation and the Abuses In-Between' (2016)¹², found that fear of immigration authorities is a major barrier to reporting abuses for undocumented and documented migrant workers, the latter being unaware of, or insecure in, their migration status. It noted that,

"The threat of reporting to police or immigration authorities is routinely used by unscrupulous employers to hold workers in abusive situations. Even if the threat does not come directly from the employer, undocumented workers often will not report abuse as they are afraid of coming to the attention of authorities and being deported."

This has been further compounded by Brexit. The LEAG 2017 paper, 'Lost in Translation: Brexit and Labour Exploitation',¹³ found that uncertainty around Brexit and how it would impact workers' migrant status was being used by unscrupulous employers to impose or perpetuate abusive working conditions on workers.

FLEX is currently undertaking research into several high-risk labour sectors to understand the nature of abuse and exploitation taking place. Whilst our results will not be published

until 2020, excerpts from interviews already undertaken with migrant workers are illustrative of the problem:

Excerpt 1:

Interviewer: How do they [employers] know that people have no documents?

Worker: When I was recommended to this role, they asked it and said to my friend that they liked people without secure status.

Interviewer: Why do you think that is?

Worker: Because if we are illegal here we have no rights to complain or report.

Excerpt 2:

Interviewer: Suppose you decide to stay in the UK, would you trust that you are able to raise a complaint about issues you've been experiencing at work?

Worker: If I was protected in some way...

Interviewer: What type of protection?

Worker: Against deportation [...] I don't want government money, I don't want benefits. We are used to suffering. [...] When there stops existing illegal workers [sic], employers will stop exploiting people. It's so much suffering...

Excerpt 3:

Interviewer: When you were here without documents, was it very different from when you got documents?

Worker: Yes. Once I had documents, I could choose the job that I wanted to do. Before, without documents, you are depending on someone else. If you receive your money in someone else's account, you depend on that person to give you your money back. You're always hiding, you're always scared. When you see the police you think, "oh, they'll come for me". You get paranoid.

Interviewer: And if bad things happened at work, what would you do? Did you have any options if they didn't pay you, or?

Worker: Once, I was working for one guy and I was doing cleaning and ... he didn't pay me. I was working for him and I had to chase him a lot for the money and he never paid me.

Interviewer: So then you can't really go to the police or the labour inspectorate...

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Worker: No, you can't! Actually, they said "that guy needs someone to work" so I went there and I started doing the job and the first month, well I had to chase him for the money. He only put £100 in my bank account and the second money was the same as well, in the end I said "if he doesn't... I need the money right now, so he didn't answer the phone again he did nothing. I even still have the keys for the job, but he didn't answer so I didn't carry on with the job because well, I was working for free!

Excerpt 4:

Interviewer: Has anything changed at work or in other areas of your life since the Brexit vote?

Worker: Now they are always threatening us with Brexit, that we are going to be expelled, that this is all over, that there'll be only English workers.

This is not a new issue and it is not in line with international understandings of prevention of modern slavery nor of the UK's aims on the global stage. The 2013 report, 'It Happens Here', published by the Centre for Social Justice and widely recognised as a major influence in shaping the eventual Modern Slavery Act and general government thinking on this issue, notes that people may be "trapped in modern slavery through threats related to their immigration status";¹⁴ yet this practice perpetuates. In situational crime prevention theory, we can understand modern slavery crimes as occurring when there are three constitutive elements present: 1) a vulnerable potential victim; 2) a motivated offender, and; 3) the absence of a capable guardian, with guardian being understood to include "duty bearers with formal roles in enforcing laws and standards"¹⁵ amongst others. The role of labour inspection is therefore vital in preventing and identifying modern slavery and yet, by joint working with immigration enforcement, there is a failure to recognise that this constructs a psychological barrier for workers to report violations and ensures that the 'guardian' role cannot be performed adequately. This notion has been recognised this year in a report from the United Nations Special Rapporteur on Trafficking in Persons which recommends that states "establish firewall protections for undocumented workers so that they may come forward to raise complaints or avail themselves of other opportunities to approach certain authorities, without fear of investigations or reprisals from immigration authorities."¹⁶ Finally, the UK has committed itself

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to seeking to achieve the Sustainable Development Goals (SDG). It states that “the most effective way to do this is by ensuring that the Goals are fully embedded in planned activity of each Government department”. SDG 8.7 includes the aim to “take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking”. FLEX does not consider continued joint working as commensurate with truly seeking to meet this aim or embedding it within the planned activities of the Department.

iv) *Failures in remediation*

FLEX is concerned that remediation pathways are failing workers most in need of them. For example, Resolution Foundation’s recent publication, ‘From rights to reality: enforcing labour market laws in the UK’¹⁷, demonstrates that employment tribunals are not being accessed by workers at higher risk of specific labour market violations. This may be due to complexity: in response to the Director of Labour Market’s 2018/19 strategy consultation, Citizens Advice noted, “among people who didn’t seek redress, our survey found that 32% didn’t do this because they thought it would be too difficult and complex...”.¹⁸ Other barriers are elucidated by the report, ‘Unpaid Britain: Wage Default in the British Labour Market’, which describes workers viewing the idea of making a wage claim at tribunal or County Court “with great caution” due to fear of job loss and the obstacle of fees.¹⁹ Even where workers do take cases to tribunal, it has been reported that claims are taking an average of eight months to be heard, which may also be deterring claims from being made in the first place.²⁰

Additionally, most employment tribunal claims must be started within 3 months less one day from the date of the act about which the worker is making a complaint. Section 111 (2) of the Employment Rights Act 1996 does make provision for an extension regarding unfair dismissal claims, stating that a complaint may be considered “within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”²¹ Whilst case law has established illness and unforeseen delays (such as postal and electronic) as legitimate grounds for an extension, lack of employment rights knowledge is not considered sufficient

grounds. However, under Section 123 (1) of the Equality Act 2010, which allows for an extension on the basis that the tribunal thinks it “just and equitable”, lack of rights knowledge is considered more likely to succeed.²² Nonetheless, FLEX recommends there needs to be more robust recognition of lack of rights knowledge as grounds for extension, particularly with regard to migrant workers who may face language barriers and lack local networks for advice and support.

Additionally, FLEX notes that employees in the UK have no protection against unfair dismissal until they have been working for the employer for a period of two years. This time period leaves many workers without recourse to justice and remediation as they experience unfair dismissal prior to this threshold. This issue will become more problematic under current post-Brexit labour migration plans: the December 2018 immigration white paper, ‘The UK’s future skills-based immigration system’²³, outlined plans for three temporary labour migration programmes:

- ***Seasonal Workers Pilot***

This pilot will bring 2,500 workers per year to the UK from outside the EU to work on farms within edible horticulture on six-month long visas. Workers will not be allowed to return to the UK under the same route for a period of six months (‘cooling off period’). The pilot is already operational, having been introduced under Immigration Rules on 11 December 2018 and is referred to within the Immigration White Paper under Section 6. Workers will be tied to a sponsoring operator company who will then send them to an employer farm.

- ***12-month short-term visa***

This proposed new route would allow workers at any skill level to come to work in the UK for a maximum period of 12 months. This would be followed by a 12-month cooling off period during which the person cannot reapply under the scheme. Workers will not be tied to any specific employer, operator or sector. It will be open to people from “low risk” countries only. These countries have not yet been specified by government.

- ***UK-EU Youth Mobility Scheme***

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This would be a continuation of the already-existent Youth Mobility Scheme (YMS) though would be amended to take into account “EU specificities”. The current YMS allows individuals aged 18 to 30 from eight countries to come to the UK to work or study for up to two years. The visa is non-renewable. To date, the YMS has not been a major source of UK migrant labour.

Those working in the UK under the Seasonal Workers Pilot and the 12-month scheme will therefore not be able to address unfair dismissal. Many workers in abusive situations describe being threatened with firing as a method of control, given that they rely on the income from the work they do, this can be effective. Failing to provide protection for unfair dismissal therefore curtails the ability of workers to speak out against abusive or exploitative workplace practices. FLEX recommends that unfair dismissal provisions are made for those who are only able to work in the UK for under two years.

v) *Under resourcing*

FLEX has consistently noted that UK labour inspection is severely under-resourced. The ILO’s recommended ratio of inspectors to workers is one to 10,000. The UK is vastly below that ratio, with approximately 0.4 inspectors per 10,000 workers.²⁴ In 2017/18, the Gangmasters and Labour Abuse Authority had 101 staff²⁵ to oversee not only the inspection and licensing of three sectors but also to use police-style powers across the entire labour market in England and Wales to root out modern slavery. To put this into perspective, the Office for National Statistics estimates that for May to July 2019, 32.78 million people aged 16 and over were in employment within the UK; even with the proportions of this which pertain to Scotland and Northern Ireland, this remains a large task for an agency with 101 staff.²⁶ The Employment Agencies Standards Inspectorate (EASI) oversees around 18,000 employment agencies and around 1.1 million workers, yet in the same year had a staff of 13 and a budget of £725,000²⁷. Finally, as noted in the Director of Labour Market Enforcement’s ‘Strategy 2018/19’, HMRC’s minimum/living wage enforcement capacity is so under-resourced that “the average employer can expect an inspection around once every 500 years”.²⁸ FLEX considers this severe under-resourcing renders the current labour inspectorate system in the UK markedly less effective

than it both could and should be. A kitchen porter interviewed as part of ongoing FLEX research into high risk sectors, to be published in 2020, noted:

I think they should be a lot tougher on restaurants. There should be a lot more inspections on restaurant, work inspections, to see if everyone has the right contracts, work the right hours, things like that. I think it should happen a lot more. Because since I've been in restaurants, I've never seen a work inspection ... There should be people who come and speak with the staff because a lot of staff, they're not willing to go out of their way and speak with someone even if they need help. You know, every now and then, once a year, someone to come from the government or the council and sit down with people and say: "Ok, are you happy with what you're doing? Are you happy in the environment?" Or maybe have a survey, like send a survey and everyone needs to fill it. [Make it] mandatory at the restaurant chain: "Ok, are you happy? Do you get any abuse from anyone, psychological, physical? Are your working conditions or your contract conditions being met?"

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

2.1 FLEX agrees with the statement in the consultation document that "to carry out enforcement effectively, we need the right institutions in place". We go further than this: the institutions will only be 'right' if they are designed well, such as by being based on appropriate principles and resourced to the level necessary to provide effective enforcement. As such, a shift in type of institution does not necessarily equate to a shift in effectiveness.

2.2 FLEX recommends the Government considers a 'principles-based approach' to a single enforcement body. Professor David Weil's principles for effective enforcement (prioritisation, deterrence effect, sustainability, system-wide impacts) have been noted by the former Director of Labour Market Enforcement in his 2018/19 strategy.²⁹ FLEX recognises the merits of these principles but believes there is an additional need for clear principles to provide a values-based compass from which a SEB, if one is to be introduced, should be designed and operated.

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FLEX suggests the following six principles to underpin a SEB (or indeed, to underpin improvements to the continuation of the current multi-institutional situation) which would enhance and improve labour market enforcement in the UK:

PRINCIPLE	IN PRACTICE
Protected Reporting	<ul style="list-style-type: none"> • All workers have safe access to reporting abuse or exploitation, which means: <ul style="list-style-type: none"> - Workers will be protected from repercussions from employers if reporting violations. - Workers will not have their immigration status checked or considered as part of any reporting of complaints or during labour inspections.
Evidence Based Resourcing	<ul style="list-style-type: none"> • Resourcing is based on evidence drawn from the labour market, enforcement personnel and intelligence-based risk understandings. • Resourcing is based on regular assessments of labour market size and characteristics, risks present, and staffing and capital costs needed to undertake required activities. • Resourcing is cognisant of the need for both reactive (i.e. complaints-led) and proactive (i.e. targeted based on risk assessments) enforcement and the appropriate proportion of each.
International Standards	<ul style="list-style-type: none"> • International best practice is followed in resourcing and practices, such as the World Bank recommended ratio of 60% proactive versus 40% reactive inspection³⁰ and the ILO recommended ratio of 1 inspector per 10,000 workers.³¹
Fair and efficient remediation	<ul style="list-style-type: none"> • Workers' cases are dealt with fairly and efficiently, with remediation outcomes appropriate to meet workers' needs. • Access to compensation and other appropriate remediation is timely, straightforward and at no cost to the worker and, whatever the outcome for the worker, she will have experienced a clear and unbiased approach to her case. This could be evaluated by surveys of workers who have made complaints or been identified during the course of targeted enforcement.

<p>Gender sensitivity</p>	<ul style="list-style-type: none"> • Enforcement strategies and responses recognise that women workers face specific and distinct forms of violations and experience distinct risks. • A SEB, and its specific departments, should have a published gender responsive strategy with sector-specific strategies that are tailored to meet the needs of women workers and with appropriate training for staff. For more information on how labour inspection can take a gender sensitive approach, please see our report, ‘Women in the Workplace: Five Point Plan to Combat Labour Exploitation’.³²
<p>Worker voice</p>	<ul style="list-style-type: none"> • Workers themselves and/or their representative organisations, such as trade unions and migrants groups, are involved in the design of UK labour market enforcement, such as the structure of the SEB, changes to it and evaluations of it. • The statutory governance body of the SEB has a tripartite structure, including worker representative organisations. Schedule 2 of the Health and Safety at Work Act 1974³³ provides the requirement for a tripartite board for the governance of the Health and Safety Executive; a comparable approach should be taken to ensure this is in place on a statutory basis for a SEB.

2.3 Evidence from other country contexts finds that single enforcement bodies can work effectively and there is a growing trend towards amalgamating previously pluralist structures towards singular ones. In ILO Convention 81 on labour inspection, it states that “labour inspection shall be placed under the supervision and control of a central authority”. Many countries have adopted centralised models, including the Netherlands, Poland, Norway and Sweden. However, this is not without risks. Most obviously, there is a risk of loss of expertise and specialism in a SEB which would undermine aims to make UK labour inspection more effective. Additionally, a central body could risk creating a monolithic and opaque structure disconnected from workers on the ground. Several other countries have adopted models that combine a central office with regional/field offices. For example, Austria has five central offices and 19 field offices, enabling the inspectorate to specialise across different

industries and geographical areas. The Danish inspectorate has a single headquarters in Copenhagen and three regional offices and the Swedish approach combines one central office with 10 district offices. Belgium has taken a different version of this approach by dividing the inspectorate between national, regional and community levels.³⁴ FLEX recommends the Government explores the potential benefits of creating a devolved structure comprised of a central body with localised hubs. This would provide clearer access points for workers, for example in the form of a Local Enforcement Hub or Outreach Office. Such a structure would also benefit inspectors themselves by ensuring they have close localised knowledge of the labour market within the area, enabling speedier identification of hotspots and trends. These localised hubs should have properly resourced, specialised teams for dealing with potential cases falling under the Modern Slavery Act 2015.

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

3.1 A SEB has the potential to bring clarity for workers on where they should report violations. However, this benefit will be undermined if the body itself is not designed and resourced effectively.

3.2 One type of work-based violation is often symptomatic of other violations being present, so a SEB could ensure a more joined up approach to identification and remediation of abuses. FLEX research on the London construction sector³⁵ found workers faced multiple labour abuses at the same time. For example, of those being paid below the National Living Wage, all but one stated that they had not been paid for work at least once, while none had written contracts.

3.3 Currently, powers are fragmented not only across labour inspectorates but also within them (see response 20). This is clearly an inefficient approach. It also fails to recognise the nature of abuse and exploitation: rather than taking a binary approach to understanding 'labour abuses' (that is, violations of labour law, such as underpayment of minimum wages) versus 'modern slavery' crimes, it is well recognised that there is instead a continuum of abuse and exploitation.³⁶ This recognises not only that someone's

workplace experience may be plotted in a variety of places between decent work and forced labour at either extreme, but also that an individual's work situation may change and evolve over time, for example escalating from labour abuse to severe exploitation and forced labour. Labour inspection therefore needs to be flexible and able to use a range of powers commensurate with the situation presenting itself. In theory, a SEB could be positive in this regard if it is designed with a flexible array of powers such that inspectors can draw on labour or criminal or both types of law when addressing workplace issues.

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

4.1 As noted above, FLEX considers loss of expertise or specialism a major risk of creating a SEB. This would severely undermine the Government's aim to improve UK labour inspection. This is closely tied to the following point, as resourcing enables or hampers expertise.

4.2 Combining multiple parts into one is often seen as an exercise in making cost savings, i.e. cutting resources due to, for example, fewer administration staff being required. FLEX has already noted that the UK's current labour inspection regime is severely under-funded as compared with other countries' provisions and with international best practice. We also note that, historically, the movement from multiple institutions to one has seen budgets cut: the Equality and Human Rights Commission, which became operational in 2007, replaced three separate organisations – the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission³⁷. By 2014/15, its funding had been reduced from its 2007 levels to such an extent that it was close to the size of the former Disability Rights Commission, i.e. only one of three bodies formerly meant to undertake equality-related activities.³⁸ The recent report from the Women and Equalities Committee, 'Enforcing the Equality Act: the law and the role of EHRC inquiry', noted ongoing problems with the EHRC's activities.³⁹ If the introduction of a SEB is also used, over time or immediately, to cut costs, this will severely undermine any aims to improve labour inspection.

4.3 Aside from this, the major risks are contingent on the design of the SEB. For example, a failure to involve worker organisations in its design, governance and ongoing evaluation will prevent it from being responsive and centred on the needs of workers themselves.

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 gangmasters?

5.1 FLEX has long advocated for the extension of licensing to labour provision in other sectors. Licensing provides a clear mechanism by which to monitor labour providers and through that, to ensure a level playing field both for workers and for businesses, as it prevents competitors undercutting them by behaving unscrupulously. Numerous cases have involved labour providers as a key pathway via which workers find themselves in abusive work situations, including forced labour, for example the three cases of modern slavery convicted in Nottinghamshire in 2017⁴⁰ and the more recent multi-victim modern slavery case known as Operation Fort, West Midlands. As Eurofound notes, “if the facilitation of labour through labour market intermediaries is not adequately regulated, workers run the risk of being exploited by fraudulent labour market intermediaries”.⁴¹

5.2 The licensing undertaken by the Gangmasters and Labour Abuse Authority has continuously been cited as an example of good practice, for example by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA). GRETA recommended that licensing should be extended to “sectors such as hospitality (including catering companies and hotels) and construction”, with resources increased to meet such new functions.⁴² FLEX, alongside the Centre for Social Justice and the Migration Advisory Committee, called for the expansion of licensing during the passage through parliament of the Modern Slavery Act 2015. Such an expansion would also support the UK to meet its obligations under the ILO Protocol to the Forced Labour Convention of 2014 which the UK has ratified and which states that:

measures for the prevention of forced or compulsory labour shall include... (c) undertaking efforts to ensure that: (i) the coverage and enforcement of legislation relevant to the prevention of forced or

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compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and (ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened.

Other countries require licensing for other sectors or more broadly than the UK. For example:

- **Norway**⁴³

The Norwegian Labour Inspection Authority operates a licensing system for the cleaning industry. All companies offering cleaning services must be licensed. A list of licensed cleaning companies divided by region is available on the Inspectorate's website. It is illegal to purchase cleaning services from providers that are not included in the register or that have the status 'not approved'. Companies offering cleaning services must apply for authorisation online.

They must meet the following criteria:

1. The company must be registered with an authorised occupational health service (these are licensed by the Inspectorate and a list is available);
2. Have an appointed safety representative and a working environment committee;
3. Written employment contracts must be in place for all workers;
4. Minimum wage requirements must be met; and
5. An insurance scheme must be in place.

Documentary evidence is required for each criterion and is evaluated by the Inspectorate. Cleaning service providers can be licensed without inspection, but should the company be inspected at a later stage and breaches found, the license may be withdrawn. The Labour Inspection Authority has noted that the health and safety procedures of several licensed companies are found to be insufficient upon inspection, leaving some to question the impact of the system of licensing without inspection on occupational health and safety.

- **Belgium**⁴⁴

In Belgium, employment agencies are subject to authorisation. The authorisation process is managed at the regional and community level and the criteria for authorisation vary between the regions. In the Flemish region, lists of licensed agencies are provided online. Agencies are required to apply for a license by completing an online form and providing documentation. The application covers tax payments, social insurance, the owner's background and other information about the company. Applications are considered monthly by an advisory committee with members including trade unions and employers' organisations, who are represented in equal numbers. Whilst other observers are part of the committee, only the trade union and employers' organisation representatives have the right to vote. A list of licensed companies is available on the website of the regional Labour Department.

5.3 Licensing should be expanded to other sectors and it should be done on a gradual, informed and adequately resourced basis. The sectors selected for licensing should be chosen on the basis of in-depth research based on risk indicators, including regard for evidence from civil society organisations and trade unions. FLEX notes the recent announcement of a new Policy and Evidence Centre for Modern Slavery and Human Rights and recommends that it could be considered as a logical home to undertake this research.⁴⁵ Based on our forthcoming research, that of organisations such as the Latin American Women's Rights Service noted earlier, and recent investigative work⁴⁶, we consider cleaning as an appropriate sector for early consideration. Licensing should be mandatory, not voluntary, as the latter would undermine its purpose and effect. Given new licensing schemes would take considerable time to implement and have working effectively, future projected licensing should not be seen as an alternative to improving current enforcement approaches and resourcing.

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?

6.1 FLEX suggests that improved enforcement of existing regulations should be undertaken regardless of whether expansion of licensing is intended. It is likely that improved enforcement would benefit all high-risk sectors but it would not create the clarity for monitoring of

standards nor include the strong deterrent of risking license revocation. Therefore, one should not be seen as a substitute for the other.

6.2 Licensing will be more important after Brexit under current labour migration proposals. These proposals include three temporary migrant work schemes which will see a churn of short-term workers coming to the UK for whom enforcement and remediation pathways may not work, such as the time threshold for unfair dismissal as noted above. It is highly likely that workers coming to the UK on the proposed 12-month scheme will present a high number of risk factors, both personal and in terms of the likely work places where they will find employment, such as precarious work (e.g. zero hours contracts), lack of unionisation, lack of English language skills or knowledge of local labour law. As such, licensing labour providers to sectors widely recognised as presenting a high risk – such as hospitality and cleaning – could be a useful method to protect workers and encourage compliance of employers.

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

7.1 The consultation document notes that, at present, there is no proactive enforcement of statutory sick pay. We welcome the suggestion that this may be addressed and, if a SEB is to be introduced, we consider it logical that this would fall within its purview based on the core remit proposed in the consultation document.

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

8.1 Regardless of addressing gaps in tools and approach of the EHRC, a SEB must have awareness of, and sensitivity to, discrimination and harassment integrated across all enforcement functions and strategies, rather than considered only a discrete element or as an add-on. Instead, awareness of the distinct forms of workplace abuse faced by women workers (e.g. pregnancy discrimination) and the ways in which gender interacts with experiences of other workplace abuses (e.g. women being concentrated in higher risk, lower

paid and more precarious sectors or feeling less able to leave abusive situations due to disproportionate care responsibilities) should be an integral part of the lens through which risks are prioritised and inspection targets set. It is extremely evident that this has been a missing piece in the enforcement landscape to date: in his oral evidence⁴⁷ to the Women and Equalities Committee inquiry on enforcing the Equality Act, then Director of Labour Market Enforcement, Sir David Metcalf was asked “To what extent has the Equality Act been part of your strategy for improving the enforcement of workers’ rights?” to which he responded, “Hardly at all...”. In the same session, he stated “although I know a little about the Equalities Act—not least because the wonderful secretariat managed to give a good briefing on it yesterday—I do not know very much about it.” The report resultant of that inquiry noted that “all enforcement bodies...should be using their powers to secure compliance with the Equality Act 2010 in the areas for which they are responsible... this would supplement the work of the EHRC.”⁴⁸ It recommends that any new enforcement body should have an “explicit mandate to secure compliance” with the Equality Act; FLEX agrees with this position.

FLEX, in partnership with the Latin American Women’s Rights Service, has submitted to the Government Equalities Office consultation on sexual harassment in the workplace which contains further views on this issue. The submission is available for download at www.labourexploitation.org/publications.

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

N/A

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

If yes, please explain your answer.

N/A.

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

11.1 Breaches in the areas of Health and Safety and discrimination and harassment may present in workplaces where breaches coming under the core remit are also present. As such, FLEX recommends that clear communications channels and memoranda of understanding are established between the core remit and the Equality and Human Rights Commission and Health and Safety Executive in order to ensure information is shared efficiently, such that it serves to protect workers, identify problematic employers and enable effective analysis of trends.

12 Should enforcement focus on both compliance and deterrence?

12.1 FLEX considers there is a role for both compliance and deterrence activities; however, a focus on compliance should not be prioritised as a point of principle at the expense of ensuring employers are sanctioned for failure to adhere to the law. We view current enforcement as too heavily weighted towards compliance activities, with an approach that employers are breaking labour laws due to lack of knowledge. This approach is not applied in other areas of law, such that lack of knowledge of the law is a reason for no action to be taken, and we see no reason for it to be applied to labour law. FLEX recommends that the appropriate strategies are deployed based on a risk assessment of sectors and the characteristics of workers who tend to work within them. On that basis, lower risk sectors could have compliance activities and higher risk sectors should have deterrent activities prioritised. Where deterrent activities are prioritised, FLEX recommends stronger sanctions, such as higher fines, to deter future violations more effectively.

12.2 Additionally, where compliance is selected as the appropriate course of action, there needs to be robust evaluation to assess whether employer behaviour has changed as a result of these activities.

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

FLEX is not responding to this question but notes the worker quotes included in Response 1.

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

FLEX is not responding to this question but notes the worker quotes included in Response 1.

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?

17.1 FLEX is responding to this question with regard to workers, not employers. Opportunities to provide workers with information about their rights are being missed. For example, the current Seasonal Workers Pilot, which sees 2,500 non EEA workers coming to the UK to work for six months on our farms, could have included the provision of guidance and labour rights information as part of the visa process or as a requirement on the two operator companies sponsoring the workers' visas. If this is not deemed feasible, Government could commission other providers, such as trade unions or migrant community organisations, to provide such guidance, which would have the additional benefit of ensuring the information given is not linked to an employment relationship and would give clearer access to support networks. Government needs to look closely at its avenues for communicating with workers, particularly those at higher risk, such as low-waged temporary migrants, and identify more opportunities to ensure they receive such information. The afore-mentioned post-Brexit proposals for three temporary migration programmes would be logical places to start.

17.2 Especially problematic in this context is the failure to establish information meetings for overseas domestic workers. As noted already, overseas domestic workers are at high risk of labour abuse and exploitation; not only are they at high risk, but the reports and testimonies of charities in the UK working with this grouping such as the Voice of Domestic Workers and Kalayaan show that this risk is translating into realities for many workers. The 2015 Government-commissioned ‘Independent Review of the Overseas Domestic Worker Visa’ recommended that Government introduce ‘information meetings’ for these workers in order to provide them with “a real opportunity to receive information, advice and support concerning their rights while at work in the UK”.⁴⁹ It recommended that these meetings be mandatory for all ODWs who remain in the UK for more than 42 days and that they be funded by increases in the visa fee. Government accepted this recommendation, yet to date and four years after the review publication, these meetings have not been established.

17.3 Aside from missed opportunities to provide workers with this information, there is also a lack of a single clear helpline to provide workers with appropriate advice. A telephone line, with a human response rather than automated, is a crucial part of any meaningful infrastructure to provide workers with guidance and support. In the UK today, there are three phone lines (ACAS, the GLAA hotline and the Modern Slavery Helpline) but these do not meet the needs of workers. FLEX considers that phone line provided by ACAS is not accessible to vulnerable migrant workers. The main barriers are its opening hours which are too short for workers working long hours to call and the difficulty of accessing advice in languages other than English. The helpline also lacks capacity: for example, during the course of our research for the report, ‘Risky Business: Tackling Exploitation in the UK Labour Market’, FLEX was advised that ACAS staff have told civil society support providers that they do not have capacity to deal with the calls that would result in the phone number being included on information cards handed out to migrant workers in the cleaning sector.⁵⁰ FLEX also notes the move from phone support to online support from ACAS: this will be much less accessible for migrant workers who may have low levels

of English language and may present complex cases. The GLAA hotline is a confidential hotline for reporting cases of labour abuse and exploitation. There is no separate budget or staffing allocated to this hotline, meaning that if it were to be communicated more widely to at-risk workers, capacity is likely to be under strain. Finally, the Modern Slavery Helpline is widely advertised but is intended as an advice service focused on modern slavery, rather than a wider array of labour abuses and as such, does not meet the latter need. FLEX continues to recommend that a centralised helpline is established with 24-hour opening and with access to multilingual support.

17.4 Whilst improving the areas noted above would be beneficial, providing information about rights is not the complete picture. To be meaningful, guidance about rights and laws needs to be actionable, i.e. workers need to be able to access agencies without fear (specifically of immigration status reprisals) and remediation pathways need to work fairly, efficiently and at no cost to the workers.

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

18.1 As noted in 17.3, there is a lack of provision of a labour rights advice helpline that is adequately resourced and designed in a manner to be accessible to, and provide meaningful support for, at-risk migrant workers. A SEB could host this helpline, and this advice should be i) multilingual ii) accessible at all hours iii) expert on the relationship between labour rights and different forms of immigration status and iv) protected from immigration enforcement. It should have its own sufficient budget and staffing with expert training.

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

19.1 Potentially, due to the clarity of having a single entity, but this is contingent on other factors which may not improve ease of complaint making for some workers. To work well for low wage and migrant workers, it would need to have in place a helpline as

described in responses 17 and 18 and would need to ensure there is no working collaboration between itself and immigration enforcement; otherwise, it would be ignoring key barriers to raising complaints. A single brand and website for a SEB that does not go further and address these issues will not be enough.

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

20.1 FLEX welcomes the implicit acceptance of the question that lower level breaches and forced labour are not distinct offences but instead are situated on a continuum of labour abuse and exploitation in which multiple forms of violation may be present, or where abuses may become cumulative and escalate over time to a situation of forced labour. As such, it is imperative that UK labour market enforcement has a range of powers that can be used flexibly depending on what sorts of violations present at a workplace.

20.2 The current enforcement picture presents a problem in this regard. The GLAA is the only body currently enforcing at the extreme end of this continuum. These powers were provided to it under the Immigration Act 2016 which gave it PACE powers across the whole labour market. Prior to that, section 17 of the Gangmasters Licensing Act 2004⁵¹ provided them with powers of inspection and entering premises for the sectors which they licence. However, FLEX has been advised that these powers are not able to be used interchangeably and that this is both inflexible and inefficient. FLEX's understanding is that if a GLAA officer enters a premises under section 17 but then realises upon investigation that they may be encountering a criminal level issue, they cannot move to using their PACE powers but instead have to swap staff to then use those powers. This misunderstands the nature of offending by assuming that only one or other type will be present. This is evident if we consider such well-known problematic sectors as hand car washes or domestic work. In both these sectors, there are recognised high levels of labour law violations, such as non-payment of minimum wage rates. There are also instances of forced labour. Ensuring any new body can address violations across the spectrum would more accurately reflect reality and be

more efficient. However, it should be noted that it is not necessary for a SEB to be introduced to improve this situation; this change could be made for the GLAA as it is currently constituted.

Private households are, in some instances, also places of work, such as those wherein a domestic worker is employed. Currently, the UK approach to inspections of private households does not serve the needs of domestic workers. FLEX's understanding is that the Employment Agency Standards Inspectorate can only enter domestic premises if they have reason to believe the premises are, or have been, used as an employment agency or business, and likewise HMRC may only enter a private dwelling if there is evidence the home is being used as a business and that business has not been notified to, or is being misrepresented to, HMRC. Most relevantly, the GLAA may enter a private property with a warrant using PACE powers to investigate labour market offences based on intelligence or complaints received, but may not do so without those intelligence or complaints. In practice, this appears to mean that proactive, targeted enforcement – that is, enforcement activities that are not complaints or intelligence led but instead based on a recognition that a sector, in this case domestic work, is at high risk for abuse and exploitation – cannot be undertaken. FLEX notes here that endemic labour abuses and exploitation are reported frequently amongst civil society organisations supporting this sector but, due to fear and distrust of authorities and immigration concerns, these issues do not get reported in ways that might provoke reactive enforcement. This creates a blind-spot regarding a highly vulnerable, at-risk population of the UK workforce.

In its consideration of ILO Convention 189, Government has made it clear that inspection of private households is a key concern as it may infringe upon the employer's right to privacy⁵²; however, it does not seem to hold the same concern that *not* doing so undermines the worker's right to legal working conditions. Additionally, the UK Government representative in the ILO proceedings regarding the Convention stated: “we do not consider it appropriate, or practical, to extend criminal health and safety legislation, including inspections, to cover private households employing domestic

workers. It would be difficult, for instance, to hold elderly individuals, who employ carers, to the same standards as large companies”⁵³. However, this is a conflation of types of work: the Health and Safety Executive makes a distinction between domestic service and ‘domiciliary care’, with the former being “a wide range of personal services ordinarily offered to and in a household” and not being “tasks that are not ordinary domestic service, such as complex healthcare activities...[or] where the tasks require specialist training including qualified trained healthcare professionals”⁵⁴. As such, the example of elderly individuals who employ carers being problematically captured by ratification of the ILO C189 is not applicable.

FLEX recommends that a SEB have the power to inspect private households that are used as places of work without intelligence or complaints being received, and further recommends that the UK ratify the ILO Convention 189, ‘Domestic Workers Convention’, which provides specific protection for domestic workers to make decent work their reality.

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

21.1 Rather than considering specific types of breaches as ‘lower harm’, FLEX recommends a sectoral approach whereby sectors are risk assessed, based on intelligence received, expertise and engagement with worker-representative groups and migrants’ organisations, and can be ranked according to likelihood of levels and intensity of potential abuse or exploitation. This would recognise that breaches which may seem lower harm, such as underpayment of wages, are subjective; what is lower harm for one grouping of worker (based on indicators like economic background and safety nets, community ties, debt) are not lower harm for others. As is obvious, underpayment of wages will have a far bigger effect on someone earning the lowest wages or on low hours than someone not in this work situation. Likewise, breaches that may seem lower harm can accumulate over time to create a highly vulnerable situation for the worker, at times leading to forced labour. Instead, a sectoral approach would be able to apply

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different approaches dependent on the prevalence of breaches within each sector. Compliance should indeed be one tool used by a SEB for lower risk sectors but, as stated already, should not be seen as a replacement for deterrent activities; it is highly likely that in all sectors, a mix will be needed.

22 Which breaches should be publicised? None, only prosecutions, more serious breaches above a specified threshold, all.

22.1 FLEX considers that publicising, or ‘naming and shaming’, problematic behaviour is useful in two ways: prevention of violations due to the fear of reputational risk (usually only relevant to larger companies and public-facing brands, or those wishing to supply to them); and for civil society information, so that workers and groups can understand which employers are behaving unscrupulously. It is not a panacea for discouraging labour abuse nor does it work on all types of businesses across all sectors to deter such behaviour. FLEX supports the three suggested categories for publicisation (more serious breaches, individuals who have failed to pay a civil penalty and persistent offenders) and recommends the addition of employers who fail to pay compensation after a tribunal has ordered it.

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? Y/N, please explain your answer.

23.1 See responses 20.2 and 20.3.

24 Should civil penalties be introduced for the breaches under the gangmasters licensing and employment agency standards regimes that result in wage arrears? Y/N please explain your answer.

24.1 Yes – FLEX agrees with the consultation document that this would create more consistency across the enforcement landscape. Extending this would strongly deter employers from such behaviour, and would also incentivise workers to report abuse as they would know

they will not have to wait for a lengthy time period before receiving an outcome. This is the case elsewhere; for example, in Poland, orders to pay remuneration for work and other benefits due to an employee are immediately enforceable by the labour inspector.

25 If Y, do you agree with the proposed levels set out in the consultation? Y/N, if no, what level should these be set at?

25.1 Yes – though this should be an initial position taken in order to align the new penalties with those already in place. However, evaluation should be undertaken to assess the extent to which these levels have the desired deterrent effect and if they are found not to, they should be increased.

26 Should a single enforcement body have a role in enforcing section 54 of the Modern Slavery Act? Y/N, please explain your answer.

26.1 No, FLEX does not think a SEB should enforce section 54. The purpose of a SEB ought to be the protection of workers' rights and the investigation and remediation of violations. Section 54 is instead a corporate transparency reporting requirement and therefore an entirely different category. Section 54 is comparable to other corporate reporting requirements, such as the Gender Pay Gap requirement. This is overseen by the Department for Business, Energy and Industrial Strategy (BEIS) and it follows that either BEIS, as the department responsible for business concerns, or the Home Office, as the government department responsible currently for anti-slavery activities, is the natural home of enforcing section 54. FLEX also notes recent recommendations that the office of the Independent Anti-Slavery Commissioner undertake this role which may be a viable option, provided this is properly resourced as it would require a marked increase in the office's budget and staffing capacity. Regardless of which of these three entities takes on this role, consideration would be needed of the powers required to enforce sanctions for non-compliance.

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? Y/N, please explain your answer.

27.1 'Joint responsibility' is a soft version of joint liability, with the former being put forward by the Director of Labour Market Enforcement in his 2018/19 Strategy in response to the advocacy of stakeholders for the latter approach. FLEX was one of those stakeholder advocates; we recommend the introduction into UK law of joint and several liability for the payment of wage and other worker entitlements. We consider that full joint and several liability would be markedly more effective than joint responsibility in not only encouraging but *obliging* the top of supply chains to take active roles in tackling breaches throughout the chain. This addresses the dilution and obfuscation of responsibility that has occurred over recent decades due to globalisation and the trend toward subcontracting. Joint liability regimes are currently in place, in a variety of forms, throughout Europe, including in Austria, Belgium, Finland, France, Germany, Italy, the Netherlands and Spain, and additionally outside Europe, for example in the United States, the Philippines and Argentina.⁵⁵

For example, in Germany, there is broad and extensive chain liability for unpaid wages, in which the client, principal contractor, and subcontractors are all joint and severally liable. The German Minimum Wage Act provides that the client or principal contractor may be liable to pay the employees of subcontractors who have not received the statutory minimum wage, even if the client or contractor had no knowledge of this failure. In such a case, the employee may bring a claim directly against the client or principal contractor. The regulatory framework also includes due diligence requirements, under which the principal contractor should ask for written confirmation from the subcontractor that it and any other subcontractors in the chain will respect the requirements of the applicable collective labour agreement.⁵⁶

27.2 Notwithstanding this position, FLEX considers that joint responsibility would create an imperative for businesses at the top of supply chains to increase their visibility of their supply chain and undertake risk assessments of their suppliers which would be a positive outcome and would support improved section 54 reporting.

27.3 However, FLEX has concerns about how joint responsibility would work, and work well, in practice. We echo the concerns noted in the consultation document that such a framework may lead to companies severing business relationships with problematic suppliers, rather than working with them to improve practices and therefore the lived experiences of workers at the bottom of our economy. Likewise, we are concerned that businesses at the top would simply push the resource burden of improved practice, both financial and staffing, onto suppliers without providing useful assistance, financial or otherwise, whilst still requiring the same low-cost products or services. It is useful to consider the Bangladesh Accord on Fire and Building Safety (the 'Accord'). The Accord was established in 2013 after the Rana Plaza garment factory collapse tragedy in which 1,134 people were killed and 2,500 injured. Signatory companies to the Accord committed to ensure factories are provided with "financial support, in the form of increased prices, low-cost loans, or direct payments" to make the changes necessary to ensure safety for workers.⁵⁷ As such, if companies at the top of supply chains are going to take meaningful responsibility for the practices lower down, they need to support in concrete terms the improvement of those practices. This may mean direct payments or it may mean changes to procurement practices so that the costs of decent work are 'priced in' from the outset.

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? Y/N, please explain your answer.

28.1 Yes, but proportionality will be contingent on design. If a form of joint responsibility is to be introduced and is to be effective, it will need to be applicable to companies which have not rectified breaches in separate entities with which it has only an indirect relationship. This is due to the highly complex and diffuse nature of globalised supply chains. However, it would be both unfair and disproportionate to apply this without specific tests or thresholds which must be met in order for that indirect relationship to become one to which such a mechanism can apply. FLEX recommends a consultation is undertaken to determine what these specific tests or thresholds might be but warns against any thresholds which focus on requiring the

company at the top of the chain to have undertaken any specific forms of activities with suppliers. This can have problematic unintended consequences: in a study of the petrochemical industry, a series of major explosions and worker fatalities were found to be linked to the use of independent contractors. The major companies which had engaged these contractors had purposefully reduced their exposure to liability claims by distancing themselves from the training and supervision of the contractors, leading to tragic results.⁵⁸

29. Should joint responsibility apply to all labour market breaches enforced by the state? Y/N, please explain your answer.

29.1 No - FLEX recommends that a matrix is established of harm levels versus size of breach for each type of labour market breach and that this is used to determine which breaches are subject to joint responsibility i.e. those of highest harm and largest number of affected workers.

30. Would it be effective in all sectors? Y/N, if no, which, if any sectors would they be effective in?

30.1 No, it is not likely to be effective, or as effective, in all sectors, but would be most effective in sectors with a public reputation to protect, either through selling to consumers or through public procurement.

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? Y/N, please explain your answer.

31.1 Yes, a threshold is likely sensible, and government should consult on the appropriate nature and level. Business representatives would obviously need to be consulted but government should proactively include experts, such as academics with supply chain focuses, and worker organisations.

32. Do you think embargoing of hot goods would act as an effective deterrent for labour market breaches? Y/N, please explain your answer.

32.1 Yes – hot goods provisions can be effective in deterring labour market breaches and additionally, can be used as a tool to compel the payment of owed wages or other forms of remediation. The USA ‘hot cargo’ provision (section 15(a) of the Fair Labor Standards Act) provides an interesting example by “making the release of embargoed goods contingent on the manufacturer’s agreement to create a compliance programme for all of its subcontractors”, stipulating a monitoring system and making an agreement on the methods the manufacturer will use to monitor wage practices and related policies.⁵⁹ Another example comes from the lauded Fair Food Program in Florida, USA. This scheme has made remarkable improvements to the labour situation of tomato pickers, reducing labour abuses, sexual harassment and instances of human trafficking. There are several elements to the scheme; the relevant one in this context is that, if a supplier farm that is part of the programme has failed to adhere to its stipulations, the brands in the programme will not buy their tomatoes.⁶⁰ This is, effectively, a hot goods embargo but of an entirely privatised nature. Whilst both these examples demonstrate that hot goods embargoes are potentially powerful mechanism to have in place, it should be noted that the strategy shown here is to use legislation to force the creation of private monitoring of workplace standards. FLEX does not advocate for the replacement of the state responsibility for ensuring labour laws are observed with privatised solutions and, as such, would prefer an embargoing process which leads to state-based enforcement activities, rather than passing responsibility solely to companies and their actions.

32.2 FLEX recommends that Government explore the possibility of using a ‘hot goods’ provision to compel employers who have failed to comply with Employment Tribunals to pay them. The problem of enforcement of Employment Tribunal awards is widely recognised and, as such, FLEX recommends introducing this lever as one which would have real market consequences for non-compliance.

33. Would it be effective in all sectors? Y/N, if no, which, if any sectors would they be effective in?

33.I Yes – it would likely be effective *to some degree* in all sectors that produce goods. However it would be more effective in sectors reliant on timeliness for their produce (e.g. perishable food) or which have a business model premised on fast turnaround (e.g. fast fashion).

34. Should embargoing of hot goods apply to all labour market breaches enforced by the state? Y/N, please explain your answer.

34.I No – as with 29.I, FLEX recommends that a matrix is established of harm levels versus size of breach for each type of labour market breach and that this is used to determine which breaches are subject to an embargo i.e. those of highest harm and largest number of affected workers – although timeliness would also need to be considered with regard to this intervention.

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? Y/N, please explain your answer.

35.I Yes – there are several other measures that could and should be taken, as follows:

i) Penalties for non-compliance with section 54

FLEX has repeatedly called for penalties for non-compliance with section 54 of the Modern Slavery Act to be introduced. We were pleased to see the final report of the Independent Modern Slavery Act Review made the same call and we are pleased to see Government now consulting on this. We recommend that penalties are set at a level based on i) a benchmarking of analogous penalties and ii) an informed understanding of the level at which a deterrent effect will be had.

ii) Mandatory due diligence with penalties for non-compliance

Section 54 of the Modern Slavery Act requires companies only to report on what, if anything, they are doing to tackle modern slavery and human trafficking within their business and supply

chains. It does not, therefore, mandate specific activities regarding these issues. Other countries are moving towards this approach.⁶¹ FLEX recommends that Government undertake a consultation on the introduction of mandatory due diligence for companies in the UK which would ensure meaningful actions are being taken and therefore that heads of supply chains take a more active role in tackling breaches.

iii) Joint and Several Liability

See Response 27.

iv) Limiting supply chain tiers

The length and complexity of supply chains contributes to a dilution of responsibility for workplace practices which, in turn, leaves workers with a lack of clarity of where to complain or seek redress or what their rights are, and provides companies at the top of supply chains with a rationale for distancing themselves from workplace practices fundamental to the value they create. Limiting supply chain tiers is a powerful tool for re-consolidating responsibility, ensuring that companies view workplace practices as their own concern, rather than that of another entity separate to them. Norway has recognised this by introducing limits on the number of layers in supply chains in two sectors its government identifies as at high risk of labour exploitation, cleaning and construction. The region of Oslo has gone further by limiting supply chains to two layers only and requiring that at least 80% of employees in these sectors' chains must be hired on permanent or full-time contracts, thus tackling not only the dilution of responsibility but insecure contracts and lack of clarity around worker status too.⁶²

v) Repeal of the Trades Unions Act 2016

Trade unions are a crucial part of the UK's ecosystem for protecting workers from labour abuse and exploitation. They are a locus for workers to gain knowledge about labour rights, to seek advice and redress for breaches and their presence in a workplace acts as an incentive for businesses to behave in line with labour law. Ignoring the role of unions in protecting decent work is to ignore one of the most powerful tools we have to protect our labour market, and to fail to use one of the most powerful levers for ensuring employers take

responsibility for their workplace practices. One worker interviewed as part of our forthcoming research into several high-risk labour sectors described being told about the relevant trade union by a previous employer and stated:

I think all the companies should do that, because obviously people don't know. People don't know what to do. They don't get paid and people just leave the job. Because they don't know what to do, how to send an email and what to ask for. They just didn't get paid and now they don't know where to go to.

In the context of a severely under-resourced inspection regime (see Response 1) the role of trade unions becomes even more crucial. The Trades Union Act 2016 introduced several problematic provisions which hamper the effective working of unions, including complex new balloting and notice rules making it more difficult to organise industrial action, restrictions on picketing, restrictions on campaigning and a levy for unions to cover the cost of being regulated. All these provisions make it more difficult for unions to perform their role in our economy, which is to act as an effective counterweight to the profit motive at the expense of workers. The lack of such a counterweight allows labour market breaches to go unchecked and to escalate, undermining the aim to enhance brands' incentive to take responsibility for addressing them. FLEX recommends that these provisions are repealed.

¹ FLEX. 2018. Shaky Foundations: Labour Exploitation in London's Construction Sector. <https://labourexploitation.org/publications/shaky-foundations-labour-exploitation-londons-construction-sector>

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