LABOUR MARKET ENFORCEMENT IN THE 21ST CENTURY: SHOULD WHISTLEBLOWERS HAVE A GREATER ROLE ?

INTRODUCTION

Labour market enforcement can be achieved through a variety of mechanisms, including proactive, targeted inspections conducted by a well – funded agency, self-regulation by employers and the encouragement of workers to report concerns.[1] On the basis that inspectorates in the UK have been under-resourced historically and that reliance on self-regulation is particularly objectionable in sectors that have a record of providing low pay and poor working conditions, this article will explore the potential for using whistleblowing by both workers and non-workers as a method of enforcing labour standards. However, the author's view is that, in principle, policing should be conducted by inspectors working in conjunction with union or other labour representatives rather than relying on individual workers to raise concerns.[2] This is particularly important in industries where small firms are prevalent and individuals may feel particularly vulnerable to retaliation if they speak up about the work environment.[3] Nevertheless, given the low likelihood of government inspections and low levels of unionisation in the private sector, it is suggested that enhancing the protection given to whistleblowers who report suspected wrongdoing might deter employer non-compliance and prove cost effective.[4] Although such a move might encounter objections, it is worth

[1] See generally Fine and Gordon(2010).

[2] See Quinlan (2014).

[3] See Croucher (2013).

[4] This may be the case even if rewards are offered for information. On whistleblowing as an economically efficient way of enforcing the law see Givati (2016).

noting that current UK legislation already endorses vigilantism in the public interest. [5]

1. WHAT IS WHISTLEBLOWING AND WHY IS IT RELEVANT TO LABOUR MARKET ENFORCEMENT?

Researchers often refer to the following definition of whistleblowing: "The disclosure by organisation members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action" (Near and Miceli,1985). This covers the use of both internal and external channels of communication as well as anonymous reporting but does not coincide with the statutory definitions in the UK or elsewhere. For example, voluntary workers might be regarded as organisation members but such people are not 'workers' for the purposes of Part IVA of the UK Employment Rights Act 1996 (ERA 1996).[6] Indeed, who should be treated as workers has been a hotly contested issue in the new gig economy and case law has demonstrated that the distinction between employees, workers and self –employed has become blurred.[7]

Whistleblowing has been analysed from a range of perspectives, for example, the human right to free speech (Wragg 2015); organisational citizenship (Organ 1988); principled organisational dissent (Miceli, Near and Dworkin, 2008); the risk society (Beck 1992) and as a form of employee "voice" (Hirschman 1970). However, a 'power resources' approach (Skivenes and Trygstad,2015) seems particularly relevant when considering the potential role of whistleblowing in

[5] In addition to the Health and Safety at Work etc Act 1974 and the Employment Rights Act 1996 Part IVA which apply to workers, there are counter-terrorism and money laundering statutes which require persons to report concerns about suspected wrongdoing.

[6] Part IVA was inserted by the Public Interest Disclosure Act 1998. 'Worker' is defined in Section 230 ERA 1996

[7] See Taylor Review (2017) and *Pimlico Plumbers Ltd v Smith [2018] UKSC 29*

the context of labour market enforcement. Many of those covered by minimum labour standards are undertaking precarious work and may not speak up owing to ignorance of their rights, duress or fear of reprisals etc. Those protected by the statutory provisions on human trafficking/modern slavery may also feel vulnerable for other reasons, for example, the fear that their right to remain in the country may be questioned. In these circumstances people may feel powerless to complain or raise a concern about wrongdoing either within their organisation or externally. Thus it is argued here that, unless statutory whistleblowing protection is extended, non-workers who suffer violations of labour standards will have to rely on proactive investigations by the enforcement agencies or others raising concerns are their behalf. Given the inadequate resources currently devoted to such investigations, this article argues for more consideration being given to the role of whistleblowing.

One feature of whistleblowers is that they do not necessarily possess evidence of wrongdoing but merely a suspicion or belief. Although witness protection may available in certain circumstances,[8] whistleblowers are not always witnesses to wrongdoing. To some extent both the National Minimum Wage Act 1998 (NMWA 1998) and Part IVA of the Employment Rights Act 1996 (ERA 1996) deal with retaliation by offering compensation to workers who suffer unlawful detriment or dismissal.[9] There are clear signs that labour market enforcement bodies are aware of the value of receiving information about possible non-compliance from third parties (for example, other agencies). Indeed, section 6 of the IA 2016 allows people to disclose information to the

[8] According to the Serious Organised Crime and Police Act 2005, witness protection is generally directed to people who have provided crucial evidence and against whom there is a substantial threat. This definition does not preclude police forces and law enforcement agencies from offering protection measures to witnesses and others at risk.

[9] It should be noted that neither of these statutes protect whistleblowers from discrimination at the point of hiring.

Director of Labour Market Enforcement (DLME) to enable him or her to exercise their functions and the DLME can share this information with the persons specified in Schedule 1 to the IA 2016. [10] However, there appears to have been little discussion about measures that might be taken to protect non-workers who are willing to raise concerns about suspected violations of labour standards.

2. THEORIES OF ENFORCEMENT

Deterrence and compliance are the two main approaches to enforcement. While deterrence focuses on deliberate violations, compliance theory is based on the notion that breaches of the law may be unintentional and may arise from an employer's lack of knowledge and/or competence (Weil 2008). It is the author's view that whistleblowing can contribute to both approaches. In terms of compliance, whistleblowers may be able to provide evidence that labour standards are not being adhered to as a result of an employer's lack of awareness. Formal complaint channels are important in this respect but it should also be noted that some people want to raise concerns about their own treatment or that of others rather than lodge a personal grievance or general complaint.

By way of contrast, deterrence theory assumes that many infringements of labour rights result from the intentional acts of employers. This can be regarded not simply as a personal problem for those suffering violations but as a matter of public interest since a labour market 'free –for –all' can result in employers experiencing unfair competition as well as the flouting of the human rights of workers. Thus it is argued that the low level of inspections in

[10] IA 2016,s7 deals with restrictions on data sharing.

the UK [11] means that employers may be willing to take the risk of non-compliance i.e. the expected costs of investigation are insufficient to cause organisations to comply voluntarily.[12] The willingness of workers and non-workers to disclose information about alleged wrongdoing may be important if it increases the chance of employer exposure to reactive interventions by relevant agencies and/or reputational damage. As the DLME notes "the perception of the risk of inspections is as important to deterrence as their actual frequency". [13] However, for a variety of reasons, many people will feel unable to raise concerns and will therefore rely on proactive enforcement, which itself can have a strong deterrent effect.[14]

The DLME asserts that the most effective approach to labour market enforcement will be the adoption of both the compliance and deterrence theories. Thus the interesting question becomes how should the balance between the two be struck? To some extent the answer will depend on whether the primary goal is to safeguard labour rights or to protect employers from over -burdensome intrusions into the way they run their organisations. It goes without saying those affected by the negative impact of non –compliance will not care whether this results from intentional or unintentional employer behaviour, unless greater compensation is awarded where intentional wrongdoing is established. We now turn to the role of the specific authorities and will return to the theoretical approaches in the conclusion.

[11] According the DLME Strategy Document 2018/9, the average employer can expect an inspection around once every five hundred years.

[12] The economic costs here being calculated by multiplying the probability of inspection by the penalties that might be imposed if infringements are found. See Becker (1968).

[13] Strategy Document 2018/9

[14] Such effect cannot be adequately measured since it is not directly observable.

3. THE ROLE OF THE ENFORCEMENT AUTHORITIES AND TRADE UNIONS IN THE UK

According to the Home Office, sections 1-33 of the Immigration Act 2016 (IA 2016) were introduced 'to improve the effectiveness of the enforcement of certain employment rights to prevent non-compliance and the exploitation of vulnerable workers, via an intelligence –led, target approach'. (Home Office;2016) [15] Prior to the IA 2016 workplace rights could be exercised by individuals at Employment Tribunals (ETs) and a range of bodies was responsible for enforcing legislative obligations.[16] Section 1 of the IA 2016 created the role of DLME with a view to co-ordinating the work of the three 'enforcement authorities': namely, the HMRC National Minimum Wage/National Living Wage (NMW/NLW), the Gangmasters and Labour Abuse Authority (GLAA) and the Employment Agency Standards Inspectorate (EASI). [17]

Chapter 1 of the IA 2016 gave stronger powers to the new GLAA (the only enforcing authority whose remit covers all "trigger offences") [18] and also introduced labour market enforcement undertakings (LMEU's) and orders (LMEO's) . LMEU's can be sought where an enforcing authority believes that a person is committing a 'trigger offence', that existing civil sanctions will not prevent or stop non-compliance and prosecution is not deemed appropriate. Thus they are 'not designed to replace the use of current sanctions to punish breaches and seek redress and should be used alongside these' (Home Office

[15] IA 2016, s 3 defines the terms 'non-compliance in the labour market,' 'labour market enforcement functions' and 'labour market offence'.
[16] This included the Health and Safety Executive (HSE), Her Majesty's Revenue and Customs (HMRC), the Gangmasters Licensing Authority, local authorities etc.
[17] IA 2016,s 14(5).
[18] These are listed in IA 2016, s 14(4).

and DBEIS; 2016) .[19] Significantly, a notice seeking an LMEU cannot be imposed on a business: 'the business determines whether or not to give the undertaking'. Thus service of the notice triggers a negotiation period during which the recipient has the chance to 'propose alternative means of achieving compliance' (Home Office and DBEIS; 2016). [20] It is envisaged that an enforcing authority will apply for an LMEO where an undertaking has not been given within the negotiation period or it thinks that an undertaking has been breached. LMEO's can be made by a court and a two- year custodial sentence and/or an unlimited fine is available where such an order is breached. [21] It almost goes without saying that such breaches might be detected by an enforcement authority, by a worker currently protected by legislation against retaliation or a person not so protected.

Historically, the enforcement authorities responded to complaints but, according to the DLME, they are 'now adopting a broader- based enforcement model which looks to expand and optimise the use of intelligence from wider sources to expose cases of hitherto hidden exploitation' (Director of Labour Market Enforcement; 2017a). Section 41 of the Modern Slavery Act 2015 (MSA 2015) requires the Independent Anti-Slavery Commissioner (IASC) 'to encourage good practice in the prevention, detection, investigation and prosecution of modern slavery offences and the identification of victims' and suggests some things that that IASC might do. These include the provision of education and training; consulting with and making recommendations to any public authority; [22] and undertaking or supporting research. Given that his

[19] Paragraph 16. IA 2016, s 25 provides that the enforcing authorities must have regard to the Code of Practice.
[20] Paragraph 23.
[21] IA 2016, s18.
[22] MSA 2015,s43 requires public authorities to comply with an IASC request to co-operate.

Annual Report for 2016-17 gives top priority to 'improving victim identification and care' (Independent Anti –Slavery Commissioner; 2017), it seems appropriate to consider the following two questions: (1) what role can trade unions play in dealing with the exploitation of workers? (2) do victims or others who are aware of slavery or trafficking need more protection if they are to be encouraged to report?

According to the Ethical Trading Initiative (ETI), modern slavery lies at the extreme end of a continuum in which respect for workers' rights and their ability to claim those rights lie at the opposite end. Hence it can be argued that slavery will not be removed until action is taken to deal with exploitation and vulnerability more generally. The ETI believes that 'the single biggest factor that can contribute to ending extreme labour exploitation is to recognise workers' rights to organize: to collectively negotiate terms and conditions of work and to have the freedom to leave abusive employers. The risk of modern slavery dramatically decreases in workplaces where trade unions are encouraged to operate' (Ethical Trading Initiative; 2018). [23] In the UK, trade unions are an important channel of communication within the workplace and are likely to have some experience of dealing with industry regulators. Unfortunately, modern slavery is often concentrated in sectors that are difficult to organise and might not be of strategic importance to over-stretched unions. [24] Another barrier to union engagement at grassroots level that is particularly relevant to our discussion is the absence of enforcement powers which might allow unions themselves to take action.[25]

[23] Trade unions are likely to have experience of dealing with regulators and enforcement agencies.
[24] See Ford (2015).
[25] See Anderson and Rogaly (2005).

Section 2 of the IA 2016 requires the DLME to publish a strategy that includes how the enforcement functions should be exercised (including education, training and research)[26] and the activities the DLME proposes to undertake in relation to the establishment of an information hub. [27] In his July 2017 strategy document [28] the DLME refers to changes in the previous thirty years which have created challenges in the enforcement of legislation. In addition to the steady reduction in union membership, he points to the increase in contracting out and outsourcing as well as the nature of work in the gig economy. However, even if the uncertainties about employment status are somehow resolved, for example, by deeming all dependent staff to be workers, the question of how to encourage and protect members of the public who have no workplace connection but wish to raise concerns will remain.

One of the four principles of enforcement highlighted by the DLME is 'deterrence effect' [29] and he points to reliance on 'the perceived probability of investigation and the expected level of penalty' (DLME, 2017b). Similarly, the Independent Anti-Slavery Commissioner's (IASC) second priority is 'boosting the law enforcement and criminal justice response' (IASC, 2017). In this respect it might be argued that the ability and willingness of whistleblowers (whether they are workers or not) to raise concerns about wrongdoing might also promote employer compliance with the law which is regarded as vital to ensuring a level playing field in a market economy.[30] Indeed, the DLME identifies the question of whether reporting non-compliance should be made

[26] IA 2016,s 4 requires the submission of an annual report to the Secretary of State which includes an assessment of the extent of education, training and research carried out.
[27] IA 2016,s 8 provides details about the purpose of the information hub.
[28] Issued under IA 2016,s2.
[29] The others are: prioritisation; sustainability and system -wide impacts.
[30] Non -compliance is unfair to compliant employers and can push some compliant businesses into non-compliance. See, for example, Confederation of British Industry (2017).

easier as an issue that is common to all enforcement bodies. Before discussing whistleblowing to selected regulators who are not directly concerned with the labour market (see below), we will discuss its potential role in relation to the bodies concerned with the NMW/NLW, modern slavery, health and safety, gangmasters, and employment agencies.

4. THE APPROACH OF LABOUR MARKET BODIES TO PARTICULAR ISSUES.

5.1 The NMW/NLW

Compliance with the NMW/NLW is important both for ensuring the incomes and rights of workers and dealing with undercutting by rogue employers in a competitive market. The fact that intentional non -compliance [31] may be associated with forced labour emphasises the need for the DLME to liaise closely with the Independent Anti-Slavery Commissioner. According the Low Pay Commission (LPC): 'Our best estimate suggests that, at its peak in the year, underpayment affects between 300,000 and 580,000 people' (Low Pay Commission, 2017). However, there is no an accurate estimate of non-compliance with the minimum wage provisions so it is difficult to assess the effectiveness of HMRC enforcement activities over time.

One mechanism for private law enforcement is the right given to workers by the NMWA 1998 to sue for underpayment [32] and to seek compensation for detriments suffered as a result of exercising the right to the minimum wage .[33] Unfortunately, legal aid is not available for ET cases and, partly as a result of

[31] On non-compliance as a business model see Clark and Herman (2017).
[32] To avoid retaliation workers may be tempted to claim only when they have left an underpaying job.
[33] See NMWA 1998,ss 17 and 23.

the fee regime in existence until 2017,[34] the number of claims has fallen in recent years. While trade unions have no formal role in enforcement, they sometimes fund ET claims brought by members. However, a lack of resources means that they have to be selective in supporting legal proceedings. Indeed, however attractive the ET system may seem in principle, it seems highly unlikely that it will ever return to the original vision of being informal, easily accessible, speedy and inexpensive. More important, perhaps, is the willingness of union officials to raise concerns with employers and the enforcement authorities about underpayment in relation to both members and non-members. In these circumstances union officials are likely to be protected from victimisation on the basis that they were engaging in union activities within section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992). [35]

HMRC enforces the NMWA 1998 on behalf of the Department of Business, Energy and Industrial Strategy via a service agreement and its current policy has three main strands: investigating complaints from workers to the Advisory, Conciliation, and Arbitration Service (ACAS) helpline; [36] pro-active investigations and campaigns designed to raise the awareness of employers and workers. The number of workers for whom HMRC obtained NMW arrears

[34] The Supreme Court declared the existing regime unlawful in *R v Lord Chancellor [2017] IRLR 911* but a replacement scheme may well be introduced.

[35] Industrial action to enforce the NMW/NLW could be lawful if all the ballot and notice requirements of the TULRCA 1992, Part V are satisfied.

[36] The HMRC has its own Fraud Hotline. The information report form advises: 'For your own safety you shouldn't: try to find out more about the fraud; let anyone know you are making a report….' https://www.tax.service.gov.uk/shortforms/form/TEH_IRF
In addition to Crimestoppers (discussed below), there are also 'hotlines' for benefit fraud, immigration enforcement, customs and anti-terrorism. Feedback is offered in relation to immigration or customs crime in some cases and not all report forms allow those supplying information to remain anonymous.

was 98,000 in 2016/17. [37] Even with the removal of ET fees it would seem that the most vulnerable workers [38] are going to find it difficult to use ET's and will need their rights enforced by HMRC officers who are empowered to present complaints on behalf of workers in certain circumstances.[39] Indeed, the Low Pay Commission (LPC) suggests that the HMRC's 'more pro-active approach to investigations may be helping to compensate for the reluctance or inability to complain that some groups of workers may have' (Low Pay Commission, 2017).[40] Such inability may result from a lack of awareness of wage entitlements [41] and a person's reluctance to enforce the NMW/NLW may stem from the fear that this may cause the business to fold or their status as illegal workers or benefit claimants will be exposed.

The LPC's recommendations in the September 2017 document (Low Pay Commission, 2017) underline the role of information both in raising awareness of NMW/NLW rates and in reducing underpayment . Although the goal of increasing the number of formal complaints made by workers to the ACAS

[37] According to the Low Pay Commission (2017), this amounted to just over £10million in both 2015/16 and 2016/17. Four employers were prosecuted in 2016/17 for non-compliance with the legislation.

[38] According the Low Pay Commission (2017), underpaid workers tend to be women, part-time and hourly paid but salaried and public sector worker appear over-represented. Although there is little difference across different sized firms, those working for the smallest businesses have an above average chance of being underpaid.

[39] NMW 1998, s19D(1) provides: "If a requirement to pay a sum to a worker contained in a notice of underpayment is not complied with in whole or in part, an officer acting for the purposes of this Act may, on behalf of any worker to whom the requirement relates— (a) present a complaint under section 23(1)(a) of the Employment Rights Act 1996 (deductions from worker's wages in contravention of section 13 of that Act) to an employment tribunal in respect of any sums due to the worker by virtue of section 17."

[40] See also Department of Business, Innovation and Skills, (2014).

[41] In their Spring Report 2016 , the LPC recommended that all medium and large employers be required to include the pay rate and total number of hours worked for NMW/NLW purposes on pay slips (LPC, 2016). It almost goes without saying that it would be helpful if payslips also identified the current NMW/NLW rates.

helpline is identified,[42] no mention is made of concerns being raised by others who suspect non-compliance, for example, competing employers, family, friends, welfare rights advisers.[43] In addition to calling for efforts to increase the number of prosecutions [44] and publicising those that take place, the LPC sees value in the naming of recalcitrant employers.[45] Not only might 'naming and shaming' serve as a reputational deterrent but drawing the public's attention to non-compliance may encourage individuals to come forward with information about their own treatment or that of others. Again, if the HMRC's policy of targeting certain sectors is to work, it needs to receive as much information as possible about problem areas. The LPC points to the opportunities for HMRC to gather intelligence from other Government bodies and discusses the apparent difficulty in handling third party complaints. Quite rightly, it suggests that the issue of confidentiality can be dealt with by formally nominating someone to act as a personal representative.[46] However, it omits to mention the potential supply of information from those who are neither complainants themselves nor acting on behalf of a complainant but nevertheless have a concern that an employer is non-compliant.

[42] There were 4600 enquiries in 2016/17 which the LPC regards as a low figure in the light of estimates of the scale of the problem (Low Pay Commission, 2017).

[43] An online pay and workers' rights complaints form was introduced in January 2016 for reporting information relating to working hours, employment agencies, gangmasters as well as the national minimum wage. The relevant web page makes it clear that complaints can be made on behalf of someone else and that the HMRC will send the form to the appropriate regulator. https://www.gov.uk/pay-and-work-rights (last accessed 15th January 2018).

[44] There have been only 13 successful prosecutions since 2007. The LPC believes that "prosecutions are a very powerful deterrent and that they are currently underused" (Low Pay Commission, 2017).

[45] Employers must have broken the NMW/NLW legislation and owe over £100 in wages. By the end of 2017, over 1000 employers have been exposed in this way.

[46] The LPC recommends that 'Government communication efforts include better publicity around the third party complaints process'. See Low Pay Commission (2017).

Looking to the future, the LPC estimates that that the anticipated changes in NLW to £9 per hour by 2020 will increase coverage from about 5 per cent of the workforce in 2015 to about 14 per cent in 2020 (an estimated 3.3 million people). As the number of workers entitled to minimum rates rises it seems likely that the number being underpaid will also increase. The HMRC's budget has risen to £25million for the three years from 2017/18. However, the recent expansion of resources has not resulted in a significant rise in the number of investigations but to larger and more complex cases being taken on. In addition, the introduction of 'self-correction', which requires employers who have been caught underpaying to check if any other workers or former workers have also been underpaid, has allowed arrears to be identified without further expenditure by the HMRC. As well as prosecutions and the new labour market enforcement undertakings and orders regime, civil penalties can be imposed. If the arrears for a particular worker are less than £100 then a minimum of £100 applies. Otherwise, in addition to any back pay, the employer faces a penalty equivalent to 200 per cent of the arrears up to a maximum of £20,000 per worker. However, the penalty is halved if both the unpaid wages and penalty are paid within fourteen days. [47] To some extent this discounting might be regarded as inconsistent with the approach taken in paragraph 5 of the Code of Practice on Labour Market Enforcement Undertakings and Orders 2016 . This states that the new labour market enforcement regime 'is designed to ensure that employers are no longer able to treat fines as acceptable business overheads'.

As with other enforcement bodies, there will always be a question about the proportion of funds available that should be earmarked for responding to

[47] The average penalty in 2016/17 was £4,700.

individual complaints about non -compliance.[48] If HMRC chose to be more pro-active and give priority to risk-based enforcement, [49] how would it secure the information needed to assess risks other than by inspections? One answer would be for the enforcement bodies and other organisations to share information and, with this in mind, the DLME is keen to fully establish an intelligence hub using the latest technology by 2018.[50] Such a hub could draw on national statistics, academic research studies and reports from trade unions, employer organisations and civil society groups. However, there will always be an additional need to receive direct allegations or suspicions of non-compliance. Indeed, the encouragement of third parties to blow the whistle may be a useful tool in dealing with employers who appear unconcerned about the consequences of breaking the law because they believe that there is only a miniscule chance of being inspected and that their staff will not lodge a complaint or raise a concern.

4.2 Modern slavery and human trafficking

It is an offence to hold another person in slavery or servitude or to arrange or facilitate the travel of another person with a view to that person being exploited. [51] Importantly, in order to persuade people to come forward with information, section 45 of the MSA 2015 provides a defence for slavery and trafficking victims who commit an offence. Section 52 of the MSA 2015 obliges specified public authorities to notify the Secretary of State about any person in

[48] There were 399 enforcement officers in September 2017.

[49] According to the Confederation of British Industry: 'Using risk models to proactively target the enforcement agencies' powers on employers most at risk of non-compliance is supported by the business community as it minimises burdens on the compliant majority' (CBI. 2017). For a critique of a risk-based approach instead of regular inspections see James and Walters (2016).

[50] IA 2016, ss 6-8 refer to information gateways and an information hub.

[51] MSA 2015, ss 1& 2. MSA 2015 s3 provides a broad definition of 'exploitation'.

England and Wales who is suspected to be a victim of human trafficking or slavery. The information to be provided is set out in the Modern Slavery Act (Duty to Notify) Regulations 2015 [52] and the *Notification of a Potential Victim of Modern Slavery* form (MS1) allows the person making the referral to keep the potential adult victim anonymous.[53] Organisations that are not obliged to notify are encouraged to do so voluntarily and the author assumes that information would be welcomed from other sources, including individual whistleblowers.

Section 42 of the MSA 2015 provides for strategic plans which specify the IASC's priorities and intended activities. In his Strategic Plan 2015 -17, the IASC mentions the establishment of a 'fit for purpose modern slavery helpline'. Since this is intended to encourage 'proactive reporting' as well as supporting and assisting potential victims, this mechanism might also be described as a 'hotline' for raising concerns. However, empirical research indicates that people will only use 'hotlines' if they feel it is safe to do so and that the information they supply will be taken seriously. [54] Thus careful attention should be given to a range of issues including: accessability, confidentiality, anonymity, the training of recipients of concerns and the provision of feedback.

Section 49(1)(c) of the MSA 201 requires the Secretary of State to issue guidance about 'arrangements for determining whether there are reasonable grounds to believe that a person may be a victim of slavery or human trafficking'. Arguably, this might extend to the promotion of policies and

[52] 2015. S.I. 1743.
[53] An adult must not be identifiable if he or she has not consented to the referral. Children do not need to consent to enter the National Referral Mechanism (discussed below).
[54] See generally Brown et al (2014).

procedures which encourage both workers and the general public to report suspicions about slavery or trafficking. Indeed, a change in culture is needed whereby slavery and trafficking are regarded as socially unacceptable as domestic violence. Encouragingly, previous public awareness campaigns suggest that if the scale and importance of slavery and human trafficking are highlighted, rates of reporting may increase and incidences of exploitation may decrease.

Part 6 of the MSA 2015 deals with transparency in supply chains and section 54 of the MSA 2015 imposes a duty on commercial organisations over a certain size to make available a slavery and human trafficking statement for each financial year. This statement,which must be approved and signed off at a senior level, will reveal the steps the organisation has taken to ensure that slavery and human trafficking is not taking place or that the organisation has taken no such measures. The Secretary of State may issue guidance and section 54(5) of the MSA 2015 outlines six areas that such a statement might include. For example, the due diligence processes, the steps taken to assess and manage the risk of slavery and human trafficking taking place and the relevant training available to staff. It is suggested that such guidance might well encourage organisations to ensure that they maintain and publicise a speak- up/whistleblowing etc policy and procedure which encourages the reporting of suspicions about slavery and trafficking and that annual statements identify the number and type of concerns that have been raised and how they were dealt with. However, in January 2018 the IASC recorded that '2016's corporate modern slavery statements were patchy in quality, with some companies failing to produce them at all and others demonstrating little meaningful engagement with the issue.' (IASC, 2018). Unsurprisingly, it has been suggested that such statements should become part of an organisation's

annual accounts and thereby subject to audit. In addition, naming and shaming could put pressure on businesses to comply.

The National Referral Mechanism (NRM) provides a framework for identifying victims of labour exploitation and ensuring that they receive support in accordance with the Council of Europe Convention on Action against Human Trafficking. It is also the means by which the National Crime Agency's Modern Slavery Human Trafficking Unit (MSHTU) collects data. The Home Office estimated that in 2014 there were between 10,000 - 13,000 potential victims of modern slavery in the UK yet only 2,400 were referred to the National Referral Mechanism. The most common matters currently reported by potential victims is sexual exploitation followed by labour exploitation, forced criminal exploitation and domestic servitude. Unfortunately 'very few modern slavery crimes come to the attention of police and criminal justice agencies, and very few offenders are caught and prosecuted' (IASC,2017). [55] Indeed, in his Annual Report 2016-17 the IASC states that 'the existing NRM has many flaws that have been allowed to operate for too long' and calls for complete reform of the system. A particular concern has been that police forces have waited for the outcome of an NRM decision before recording a crime.

5.3 Health and safety

The HSE's role is to protect the health, safety and welfare of workers and to safeguard others who may be affected by work activities. The HSE can deal with those who fail to comply with legal obligations by issuing warnings or

[55] In 2014-15 there were 130 convictions for human trafficking offences.

cautions, withdrawing approvals, varying licence conditions, serving improvement or prohibition notices and bringing prosecutions.[56] Its enforcement principles require inspectors to be 'proportionate in their decision –making and mindful in keeping the burden on business to a minimum' (Health and Safety Executive,2015). Unsurprisingly, one of the principles applied by the HSE is the targeting of enforcement action and, in order to establish priorities and use a risk-based approach, information has to be obtained by proactive inspections or other means. Annually HSE conducts about 20,000 workplace inspections, investigates over 6,000 incidents and considers over 10,000 health and safety concerns reported by workers or other people. Since the HSE can discover labour market abuse in the course of its work, it would seem vital to have effective communications with the other enforcement authorities mentioned above.

One effect of stating that 'Low risk activities will not, in general, be subject to enforcement unless actual harm has occurred' is that the HSE will not necessarily consider all issues of non-compliance. Indeed, some legal duties do not directly impact on the control of risk but still require compliance by the duty holder, for example, reporting incidents.[57] It is the role of union officials and safety representatives to ensure that employer duties are fulfilled and it goes without saying that different views might be taken about the levels of risk workers are exposed to. Confusion might arise because all workers can receive protection under Part IVA of the ERA 1996 if they disclose breaches of a legal

[56] Although widespread prosecutions might have a strong deterrent effect this would be very costly in terms of time and money. In practice, prosecutions are only brought where there is a combination of high risk and extreme failure to meet a clearly defined and obvious standard.

[57] These are referred to by the HSE as 'non –risk based compliance and administrative arrangements'. Clearly, the absence of compliance and administrative arrangements can undermine the operation of an effective health and safety system or indicate bad safety management.

obligation.[58] Indeed, if enforcement is unlikely to occur because low risk is perceived, what is the incentive to raise concerns with the regulator? In so far as the concern is dealt with by others (for example, management and unions) this may not be a problem but some will argue that, if it is to do its job properly, the HSE needs to be aware of persistent non –compliance. In this respect it is worth noting that the HSE website encourages anyone who wishes to report a health and safety 'problem' to use its online form for reporting 'concerns'. The other enforcement principles of consistency of approach, accountability and transparency are all tied to finite resources and 'the importance of fair treatment to all in promoting and sustaining economic growth' (Health and Safety Executive, 2015). However, it might be commented that the health, safety and welfare of workers and the general public is the prime purpose of the HSE rather than the protection of business enterprises.

It should also be noted that local authorities have responsibility for enforcing health and safety law in certain workplaces and their inspectors are obliged to adhere to the HSE's enforcement policy (see above). The sectors covered include: offices, shops, retail and wholesale distribution, hotel and catering establishments, residential care homes and the leisure industry. They also enforce a range of regulatory legislation which may indirectly bring inspectors in Environmental Health and Trading Standards divisions into contact with businesses employing migrant labour, for example, licensing, trading standards and animal health/ welfare.

[58] Defined by ERA 1996, section 43K. Additionally, in specified health and safety situations, employee representatives have the right not to suffer detriment or dismissal under ERA 1996, ss 44 and 100.

5.4 Gangmasters

According to the Introductory Report of the DLME (DLME 2017c), up to 2016 the Gangmasters Licensing Authority licensed labour providers in farming, food processing as well as shellfish gathering.[59] As a result of section 11 and Schedule 2 to the IA 2016, the GLAA has a much broader role dealing with exploitation across the entire labour market and Labour Abuse Prevention Officers (LAPOs) have the power to: investigate modern slavery where it relates to labour abuse and other labour market offences; arrest suspects; enter premises where they have a reasonable belief that labour market offences are being committed; and search and seize evidence of breaches of labour market regulations.[60] The main focus of the GLAA's licensing work is to respond to information received from both open and covert sources and its website asks people to provide information about labour providers who are exploiting the welfare and rights of workers .[61] It intends to focus on the more serious cases where multiple offences have been committed [62] leaving routine cases to be dealt with by other enforcement bodies.

5.5 Employment agencies

[59] In 2015-16, fourteen gangmasters (supplying 2,600 workers) had their licence revoked for breaching standards, for example, paying incorrect tax to HMRC or not paying the NMW/NLW.

[60] Its budget for 2016-17 was £4.8million and it had 70 staff.

[61] A report form is available in eight languages. Although there are circumstances in which confidentiality cannot be maintained, the form boldly states that: 'All information given is held confidentially and may be passed to other relevant government law enforcement agencies where it will also be held confidentially'. http://www.gla.gov.uk/report-issues/english-report-form/ (last accessed 15th January 2018).

[62] In 2015/16 the GLAA conducted 100 compliance inspections and 14 gangmasters had their licences revoked. Almost 3000 potential victims of labour exploitation were identified.

EASI is a body in the Department of Business Energy and Industrial Strategy and enforces regulations covering 18,000 employment agencies totalling over one million workers.[63] Thus EASI investigates offences including the placement of false job advertisements, employment businesses failing to pay wages and providing additional services to work-seekers for a fee before providing any work-finding services. EASI inspectors initially contact an agency where a breach has been reported and conduct targeted inspections of high risk activities. Although the latest Enforcement Policy Statement (EASI 2018) provides that EASI 'acts pro-actively in carrying out targeted inspections', the Annual Report 2016/17 states that there were fewer 'visits' in 2016/7 but 'higher outcomes achieved' (EASI 2017). The Enforcement Policy Statement also indicates that, in addition to information from other related enforcement bodies, EASI's risk -based assessment process includes a weighting towards geographic areas 'where there is a higher than average number of complaints [64], or a pattern is emerging'. Interestingly, the word 'complainant' is used throughout the document and confidentiality is offered even though the statement recognises EASI's duty to disclose information under the Anti-Terrorism, Crime and Security Act 2001. As well as sharing intelligence, EASI engages in joint working operations with the GLAA, HMRC NMW/NLW, Immigration Enforcement, and the Health and Safety Executive (EASI,2017).

5. THE APPROACH OF AGENCIES NOT PRIMARILY FOCUSSING ON THE LABOUR MARKET.

6.1 The Care Quality Commission (CQC)

[63] In 2016-17 it had a budget of £0.5m and 11 staff.

[64] 828 complaints were received in 2016/7.

The CQC has enforcement powers under the Health and Social Care Act 2008 (as amended) to improve health and adult social care services and protect the health, safety and welfare of people who use them. Like the HSE, one of the principles that guides the use of its powers is proportionality: 'where appropriate, if the provider is able to improve the service on their own and the risks to people who use services are not immediate, we will generally work with them to improve standards rather than taking enforcement action' (CQC,2015). As with the NHS, it seems clear that workers will not be the only people to have concerns about non-compliance and there is potentially a wide range of other people with an interest, including patients, their families, visitors etc. Indeed, there is a website page entitled 'Report a concern if you are a member of the public' which deals with the issue of privacy. By way of contrast, the pamphlet entitled 'Raising a concern with the CQC' is aimed at health and care staff and the guidance for registered providers (CQC, 2013) [65] helpfully distinguishes between whistleblowing, complaints and grievances. Here whistleblowing is defined exclusively in terms of workers and others are required to use 'the service's complaints procedure'. Unfortunately, the guidance does not indicate what a person should do if they are not satisfied with the way in which their complaint has been handled by the service provider but refers readers to the CQC website. This states that 'the next step depends on the type of service and how your care is funded' and suggests contact with either the Parliamentary and Health Service Ombudsman or Local Government Ombudsman.

6.2 The Financial Conduct Authority (FCA)

[65] This covers such issues as how to raise a concern, where to get independent advice, anonymity and confidentiality and what the CQC will do with the information it receives.

The FCA requires firms' whistleblowing arrangements to handle disclosures from any person [66] and to appoint a whistleblowers' champion. It accepts that not all types of concern raised, for example grievances and customer complaints, need to be channelled through whistleblowing procedures. [67] However, it points out that when other routes have been exhausted or proved ineffective the whistleblowing arrangements can serve as a last resort. In contrast to the CQC, the FCA takes a wider approach to whistleblowing than Part IVA ERA 1996 and provides 'the same level of anonymity to all who disclose to us' (Financial Conduct Authority, 2015). Indeed, it seems that about half of the disclosures received come from employees of regulated firms who are not entitled to protection under Part IVA of the ERA 1996.

The FCA acknowledges the valuable intelligence provided by whistleblowers, especially in relation to financial crime.[68] More specifically, its website indicates that whistleblowing has helped the FCA in relation to: issuing fines and warning letters to firms and individuals; varying and withdrawing permissions and 'other kinds of early involvement like asking firms to change their business activities'.[69] There is a dedicated whistleblowing team which provides as much feedback as it can in the particular circumstances and records whether a whistleblower alleges that they have suffered a detriment as a result of making an internal disclosure to their firm.

6.3 The Environment Agency (EA)

[66] Similarly, the Australian Securities and Investment Commission welcomes reports of misconduct from members of the public. However, unlike the Fair Work Ombudsman, the Corporations Act 2001 does not protect anonymous whistleblowers.

[67] The US Securities and Exchange Commission provides an online complaint form for filing "a tip, complaint or referral."

[68] In 2014, 1367 people blew the whistle from which 1100 intelligence reports were produced. (Financial Conduct Authority,2015).

[69] https://www.fca.org.uk/print/firms/whistleblowing (last accessed 15th January 2018).

In its detailed enforcement and sanctions statement, the EA points out that it works closely with a wide range of bodies, including civil society groups and the communities it serves. Its main approach to securing compliance is the provision of clear advice and guidance but using enforcement powers is stated to be an important part of securing a better environment. As with other regulators, mention is made of engaging with business and giving 'proper consideration to the value of economic progress'.[70] The accompanying guidance describes the potential enforcement responses and, in discussing the public interest factor, the EA indicates that 'where the use of a sanction is likely to reduce future self-reporting of offences or non-compliance, a different sanction may be appropriate'. By way of encouragement to raise concerns, the EA operates both an incident and a flood telephone line. Although the relevant web page states that waste crime can be reported anonymously to Crimestoppers and some incidents should be notified to the local council or utility company, no mention is made of raising concerns in writing and an email address is not displayed here.

6.4 The Food Standards Agency (FSA)

According to its Annual Report and Consolidated Accounts 2016-17, the FSA's model for regulation is risk -based and proportionate, it aims to enhance public trust and puts consumers first (Food Standards Agency,2017). The FSA website offers an online form which can be used to report a food problem in the UK to a local authority. More specifically, the National Food Crime Unit's (NFCU) role is intelligence collection and analysis and in 2016 a facility was launched to enable information about food fraud or food crime to be reported

[70] The EA refers to the usual regulatory principles of proportionality, consistency, transparency, targeting and accountability.

confidentially or anonymously. Food crime is defined as: 'Financially motivated dishonesty relating to food production or supply,which is either complex or results in serious detriment to consumers, businesses or the overall public'. [71] Although potential whistleblowers may have difficulty in identifying motives and distinguishing serious from non-serious detriment, the NFCU website makes it clear that anyone with 'suspicions' can raise their 'concerns' via the Food Crime Confidential phone or on –line facility. This facility is particularly targeted at those working in or around the UK food industry. People with suspicions or information about food crime/fraud are encouraged to send this to the NFCU via a given email address or by completing a standard intelligence report form. However, this form uses the terms 'submitting officers' and 'protective marking' which may not be conducive to members of the public reporting.

6.5 Other crime reporting mechanisms

The role of the National Crime Agency (NCA) is to bring to justice those serious and organised criminals who pose the highest risk.[72] The NCA points out that is a prescribed body under the whistleblowing legislation but fails to mention that this only applies to workers and that anonymous disclosers cannot be protected. The National Fraud Intelligence Bureau provides an online reporting service, Action Fraud, which passes information to the police. Interestingly, specific mention is made of reporting 'on behalf of a victim who has not given their permission for you to do so'. Finally, Crimestoppers is available to those who do not want to be identified. This charity, which is independent of the police, sends a report to the relevant body with authority to investigate and

[71] There is a subtle difference between food crime and food fraud. The FSA also refers to food issues and food problems which may be taken up with local authorities.

[72] The NCA indicates that allegations of bribery and corruption should be reported to its International Corruption Unit.

this might be a regulator. Crimestoppers is fully aware that there may be further questions after information has been supplied and will help to create an anonymous login for those who are willing to remain in contact. An interesting feature of reporting to Crimestoppers is that a reward of up to £1000 can be paid if the information supplied is of significant use to law enforcement agencies.

6. DISCUSSION

In their article on the NMW, Croucher and White state that, following HMRC enforcement measures: 'Approximately half of those still working for the same employer said that their employer took retaliatory action against them' (Croucher and White,2007). This was despite the fact that section 23 of the NMWA 1998 is supposed to provide workers [73] with protection against retaliation [74] and that a broader category of 'workers' can invoke the whistleblowing provisions of the ERA 1996 if there is a criminal offence or breach of any legal obligation. As indicated above, some people who have evidence or who suspect infringements of the law will not be 'workers' within the meaning of either of these statutes so the question arises as to whether legislation should be extended in order to encourage members of the public to report infringements or raise concerns about potential non-compliance. It seems perfectly possible that some who are not classified as 'workers' could suffer retaliation relating to the labour market (for example, employers) or a specific hiring (for example, self-employed persons) but others would also

[73] Defined by NMWA 1998, s 54.

[74] '(1) A worker has the right not be to be subjected to any detriment by any act, or any deliberate failure to act, by his employer, done on the ground that – (a) any action was taken, or was proposed to be taken, by or on behalf of the worker with a view to enforcing , or otherwise securing the benefit of , a right of the worker's to which this section applies, ..'

benefit from protection against non -work- related reprisals. Indeed, in calling for legislative changes to be made, the author is mindful of the fact that section 13 of the Irish Protected Disclosures Act 2014 enables citizens generally to sue in tort for compensation if they suffer a detriment because someone made a protected disclosure .

There can be little doubt that both the DLME and the Independent Anti -Slavery Commissioner, unlike some other regulators, have given priority to deterring non -compliance rather than avoiding burdens on business. Nevertheless, they are constrained to work within the Regulators Code 2014 and have regard to its five principles of good regulation.[75] The first principle obliges regulators 'to carry out their activities in a way that supports those they regulate to comply and grow'. However, principles three and four focus on risk [76] and it would seem that regulators would be adhering to the Code if they facilitated the disclosure of information from whistleblowers (inter alia) about this. It could also be argued that more pro-active investigations would promote a level playing field for employers. However, it seems likely that the funding required will not be available and that enforcement bodies will remain dependent on flows of information from other sources. Indeed, the possibility of exposure by whistleblowers may put pressure on employers to comply with regulations where the risk of an inspection is very low. Even in the unlikely event that such bodies received sufficient resources to conduct pro-active inspections, they would still receive welcome information from others about

[75] See Legislation and Regulatory Reform Act 2008 ss 21-24 and the Legislation and Regulatory Reform (Regulatory Functions) (Amendment) Order 2014. S.I. 860.

[76] '(iii) Regulators should base their regulatory activities on risk; (iv) Regulators should share information about compliance and risk'.

compliance outside inspection times. Thus the question of how to facilitate the reporting of actual or suspected non-compliance will remain.

As mentioned above, there is a statutory duty on both employers and individuals to report activities related to terrorism, money laundering and specified breaches of health and safety legislation.[77] There is also a fiduciary duty on senior employees to report serious misconduct [78] and this might extend to informing a company board about non –compliance with statutory obligations. [79] However, imposing a legal duty on everyone to report suspected non-compliance with labour market regulations would not be feasible for at least four reasons. First, many people will not understand what obligations such regulations impose and therefore will be unable to determine whether or not there has been compliance. Second, it will often be unclear how suspected wrongdoing should be reported, to whom and when. Third, if a duty to report is imposed, people may be nervous about breaking it and raise concerns prematurely that prove to be unfounded. Fourth, what if many people fail to report in a particular situation? Is it a good use of funds to investigate and enforce this breach of duty as well as the failure of compliance that should have been reported? Thus it would seem preferable to allow people to choose whether or not to raise concerns but to encourage them to do so by extending the whistleblowing protection currently afforded to workers to the general public. In support of this it should be noted that freedom of speech is a human right afforded to all persons under Article 10 of the European Convention on Human Rights and other countries protect whistleblowing by citizens. [80]

[77] See Health and Safety at Work etc Act 1974,s 7 and specific regulations.

[78] See *Item Software (UK) Ltd v Fassihi & Ors [2004] EWCA Civ 1244*

[79] Companies Act 2006, Chapter 2 describes the general duties of directors.

[80] The Irish Protected Disclosures Act 2014 has been referred to above.

The DLME acknowledges that unreported or hidden non-compliance is arguably the biggest challenge so the question arises as to what people need to encourage them to raise concerns. It is suggested that, in order to maximise the flow of information, the DLME and IASC should include in their strategies the extension of whistleblower rights to non-workers as well as a willingness to afford witness protection. In addition to the existing protections available to workers under Part IVA of the ERA 1996, a new statute should: require all employers to maintain and publicise a whistleblowing procedure that complies with good practice; [81] protect people from discrimination at the point of hiring or in the provisions of goods and services; ensure that interim injunctive relief is available and make retaliation against whistleblowers a criminal offence. [82] Such legislation should oblige recipients of concerns to maintain confidentiality as far as possible [83] and offer anonymity as a last resort. Unfortunately, undertakings about confidentiality and anonymity do not necessarily prevent a person being identified in the particular circumstances, for example, the whistleblower might be the only one who could be aware of or affected by a breach. In addition, it is difficult to investigate the concerns of anonymous persons or to protect them from victimisation and for this reason anonymous 'hotlines' are less desirable than open reporting. Nevertheless, it may be better to receive anonymous concerns about wrongdoing as a last resort if the person reporting would otherwise remain silent about slavery or human trafficking.

[81] A Code of Practice should be produced for this purpose. The current British Standards Institute Code (British Standards Institute, 2008) is useful but needs to be updated.

[82] A European Directive on Whistleblowing is expected to be approved in July 2019. See European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law, 2018/0106 (COD).

[83] A statutory Schedule could detail the steps needed to be taken by recipients of concerns.

Ideally, the public interest test which currently has to be satisfied for a disclosure of information to be protected under Part IVA of the ERA 1996 would be dropped altogether on the grounds that the uncertainty it creates may deter disclosures of critical information.[84] However, its retention would not cause problems for those raising concerns about infringements of labour market regulations if it was explicitly stated that a disclosure about such matters was in the public interest. Indeed, such specification would be consistent with the call for the public interest to be defined for the purposes of Part IVA of the ERA 1996.[85] Thus the upshot would be that anyone who suffered reprisals for raising concerns based on a reasonable suspicion or belief that wrongdoing had occurred, was occurring or was likely to occur would be offered some protection. It is acknowledged that it is difficult to prevent retaliation from taking place but at least potential whistleblowers would be given the right to seek compensation for losses suffered. Informing the public about these new rights would require a serious publicity campaign and it is hoped that the DLME could liaise with relevant Government departments and other organisations to ensure that a better job is done than is currently the case in communicating the nature and purpose of the existing whistleblowing provisions. [86]

Even if the extension of statutory protection for whistleblowers does not take place,[87] the DLME should try to ensure that the regulators he is responsible for

[84] See the criteria set out by the Court of Appeal in *Chesterton Global Limited v Nurmohamed [2017] IRLR 837.*

[85] See Lewis (2015).

[86] See Public Concern at Work Annual Reports on the lack of awareness of ERA 1996, Part IVA.

[87] It is worth noting that the US Occupational Health and Safety Administration currently administers twenty -two whistleblower protection laws in areas such as workplace safety, food safety, financial reporting and waste, fraud, and abuse in government contracts. See Occupational Safety and Health Administration, Whistleblower Statutes Desk Aid, Occupational Safety https://www.whistleblowers.gov/sites/default/files/whistleblowers/whistleblower_acts-desk_reference.pdf [last accessed 21st December 2017]

provide the maximum amount of information to the intelligence hub that has been identified as being so crucial to effective labour market enforcement. As part of his co-ordinating role he might build on the experiences of other regulators as well as the private sector in order to disseminate best practices in promoting whistleblowing. As indicated above, this would include: policy statements which explain why whistleblowing is important and how it differs from a complaint or grievance;[88] the provision of user -friendly forms and 'hotlines' which are open to all and can facilitate two -way communications; emphasising that workers and non-workers only need to have a reasonable suspicion or belief about wrongdoing rather than hard evidence; undertakings about maintaining confidentiality and anonymity as far as possible; and the provision of feedback. It is not suggested that rewards should be more readily available as this might shift attention to the motive of the messenger rather than their message.[89] Nevertheless, the enforcement authorities might find it beneficial to make discretionary awards that recognise the contribution made by individuals who report alleged non-compliance in difficult situations. Indeed, award ceremonies provide an opportunity to demonstrate the value of the information received and encourage potential whistleblowers to raise concerns.

[88] See, for example, the website of the UK Civil Aviation Authority which states that 'safety concerns should not confused with a personal grievance or complaint'. In the US, the Inspector General Act 1978 s7 provides that an Inspector General 'may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety'. At the National Labor Relations Board, the Office of the Inspector General receives information anonymously or confidentially 'which may be characterised as a complaint, allegation or referral'. https://www.nlrb.gov/resources/faq/inspector-general#t37n3194

[89] Apparently, less than 1 per cent of those who could claim a reward via Crimestoppers do so.

The DLME should also note the empirical research in several countries which shows that potential whistleblowers are deterred by the belief that recipients of concerns often fail to deal with wrongdoing.[90] Arguably, there is little point in facilitating a greater flow of information if labour market bodies are unwilling or do not have the resources to make use of the enforcement powers available to them. However, the enforcement agencies need to have a strategic enforcement policy and, according to Weil (2009 p372), this "requires adjusting the way inspectorates respond to complaints so that they remain responsive to worker problems yet actively use those investigations to help achieve broader regulatory priorities rather than being forced into a purely reactive role".

7. CONCLUSION

In Section 3 above we identified deterrence and compliance as the two main approaches to enforcement and the author agrees with the DLME that a strong deterrence approach is need. However, it is also accepted that there are a number of factors likely to continue to inhibit extra pressure being exerted on employers. As Weil puts it (2008 p 350): " Changes in the workplace, from the growth of the informal sector and the fissuring of the traditional employment relationship to the decline of trade unions and emergence of new forms of workplace risk make the task facing labour inspectors far more complicated". Additionally, the lack of resources given to the enforcement agencies,as well as the dominance of neo-liberal thinking in the approach of politicians to policy matters means that public enforcement cannot be relied on. In these

[90] See generally Brown et al (2014)

circumstances it becomes increasingly important to consider private forms of monitoring. One way forward would be for enforcement agencies to use as many methods as possible to influence the behaviour of employers that they are unlikely to inspect.

The promotion of whistleblowing by workers and non-workers about possible infringements of labour rights might deal directly with what the DLME describes as a "chronic underreporting of breaches". [91] It could also be expected to affect both non –compliant and compliant employers. The former might respond positively to a realistic threat of investigation and/or reputational damage and the latter would benefit from the knowledge that competitors were under pressure to reject labour exploitation as part of their business model. Thus the author would extend Weil's (2008 p349) call for the adoption of " a clear strategic framework for reacting to incoming complaints" to a plea for a strategic approach to promoting the reporting of concerns about infringements of labour market regulations.

Finally, although it is sometimes suggested that giving rights to whistleblowers creates a risk of generating false allegations, there is no evidence in this country or elsewhere that such allegations are a major problem (Nyrerod and Spagnolo 2017).[92] More troubling is the fact that those who have concerns about labour market infringements may not raise them even when encouraged to do so. The willingness of people to speak -up may well depend on some form of cost/benefit analysis. On the cost side, there will be the risk of retaliation [93] as well as the cost of continuing employer non-compliance with

[91] Strategy Document 2018/9 page 72

[92] One possible reason for this is that those who knowingly supply false information expose themselves to a range of possible legal sanctions.

[93] This may well be reduced if there is a strong union presence at the workplace.

the law. This has to be weighed against the benefit to be gained (both for the individual and others affected) from employer compliance if the enforcement bodies take action. [94] However, other factors affecting power relations and worker voice may well result in enforcement agencies receiving a disproportionate amount of information from sectors or organisations where there are generally high levels of compliance with the law. [95] Thus it would be problematic to have an enforcement strategy that is over –reliant on information supplied by concerned individuals. Equally, it would seem rather short –sighted of the enforcement bodies if they do not exploit the potential that the promotion of extended rights for whistleblowing might offer.

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[94] The fact that collective/public benefits resulting from disclosing information are unlikely to be factored into individual decision-making makes it especially important that workplace representatives raise concerns in the collective/public interest. On the public goods aspect of compliance see Weil and Pyles (2006)

[95] In the US, Weil and Pyles (2006) found a significant gap "between the level of complaint activity and underlying violation rates".

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