ILPA Briefing House of Lords Committee Stage of the Immigration Bill on 18 January 2016: Part One

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations. ***For further information please get in touch with Alison Harvey, Legal Director or Zoe Harper, Legal Officer, on 0207 251 8383, Alison.Harvey@ilpa.org.uk; Zoe.Harper@ilpa.org.uk***

This briefing addresses amendments tabled. We do not have groupings at the time of writing. Given the volume of amendments it does not address them all, but only those of most concern to ILPA. We have repeated information provided in our briefings to proposed amendments where those amendments, or variations on them, have now been tabled.

We also provide commentary on the significant number of new Government amendments tabled for Committee stage in the House of Lords. The volume of these amendments, the late stage of their introduction and the time available means that both ourselves and the House will be limited in our ability to provide the scrutiny that this detailed legislation requires. We note that new clauses introduced by the Government contain a range of new delegated legislation which will not have been subject to scrutiny by the Delegated Powers and Regulatory Reform Committee which reported earlier on the Immigration Bill. This Committee expressed disappointment at the quality of the memorandum submitted by the Home Office to explain the delegated powers in the Immigration Bill and found that in several instances it did not fully explain the purpose and likely use of the powers being conferred[1]. It is therefore particularly important that the Committee has the opportunity to scrutinise the new delegated powers inserted into the Bill at this advanced stage.

Clause 1 Director of Labour Market Enforcement

The purpose of the Director of Labour Market enforcement

ILPA supports **amendment 4 in the names of Baroness Hamwee and Lord Paddick** whereby the primary function of the Director shall be the protection of workers from exploitation. Along similar lines although less explicit is **amendment 5 in the names of Lord Kennedy of Southwark and Lord Rosser.**

[1] Delegated Powers and Regulatory Reform Committee, *17th Report of Session 2015/16: Cities and Local Government Devolution Bill [HL]: Commons Amendments, Education and Adoption Bill: Government Response, Immigration Bill* at: http://www.publications.parliament.uk/pa/ld201516/ldselect/lddelreg/73/73.pdf, para 12

In both its background briefing to the Queen's Speech, Explanatory Notes to the Bill and fact sheet on this Part of the Bill, the Government has stated that the new labour market enforcement agency would be established to protect people against being exploited or coerced into work.

The Government's background briefing to the Queen's Speech states:

> *Work: We will create a new enforcement agency that cracks down on the worst cases of exploitation. Exploiting or coercing people into work is not acceptable. It is not right that unscrupulous employers can exploit workers in our country, luring them here with the promise of a better life, but delivering the exact opposite, and the full force of the State will be applied to them. A new single agency will have the scale and powers to do this*[2].

The Explanatory Notes to the Bill state:

> *Migrant workers are particularly vulnerable to labour market exploitation and may find themselves living and working in degrading conditions.*
> *[...]*
> *The government believes that labour market exploitation is an increasingly organised criminal activity and that government regulators that enforce workers' rights need reform and better coordination. The Conservative Party Manifesto also committed to introduce tougher labour market regulation to tackle illegal working and exploitation. The Bill establishes a new statutory Director of Labour Market Enforcement, responsible for providing a central hub of intelligence and facilitating the flexible allocation of resources across the different regulators*[3].

The Government's fact sheet on this part states:

> *The UK has a strong legal framework in place to ensure that minimum standards are met for workers. There are three main public bodies responsible for enforcing these requirements: a team in HMRC which enforces the National Minimum Wage; the Gangmasters Licensing Authority; and the Employment Agency Standards Inspectorate.*
>
> *However because of an increase in organised criminal activity engaging in labour market exploitation, we believe that there is exploitation in the labour market that none of the enforcement bodies is designed to deal with. This kind of worker exploitation often appears to involve vulnerable migrant workers*[4].

Immigration Minister the Rt. Hon. James Brokenshire MP is cited in the fact sheet as stating:

> *"Exploiting or coercing people into work is not acceptable. It is not right that unscrupulous employers can force people to work or live in very poor conditions, withhold wages or mislead them into coming to the UK for work."*

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[2] Cabinet Office and Prime Minister's Office, *Queens Speech 2015: Background Briefing Notes*, 27 May 2015, at: https://www.gov.uk/government/publications/queens-speech-2015-background-briefing-notes
[3] *Immigration Bill Explanatory Notes*, Bill 74-EN, p.4 paras 3 and 4.
[4] UK Visas and Immigration, *Immigration Bill 2015-16 Factsheet- Labour Market Enforcement (clauses 1-7),* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461712/Immigration_Bill_Factsheet_-_labour_market.pdfhttps://www.gov.uk/government/uploads/system/uploads/attachment_data/file/461712/Immigration_Bill_Factsheet_-_labour_market.pdf

This amendment makes this protective function of the Director of Labour Market Enforcement explicit on the face of the Bill. This recalls the 2007, report of the Trades Union Congress' Commission on Vulnerable Employment *Hard work; hidden lives*[5] which proposed a "Fair Employment Commission" with "an advisory role at the highest level of government" which would have "*permanent responsibility for promoting cross-government awareness of the problem of vulnerable employment, and taking strategic action to ensure a coordinated and comprehensive response."*

The Director's remit, an uncomfortable mixture of protection and enforcement, does not have a protective function as wide as that envisaged by the Trades Union Congress' commission. While it takes in the Gangmasters' Licensing Authority, the Employment Agency Standards Inspectorate and the National Minimum Wage Commission it does not cover the Health and Safety Executive or local authorities with their statutory responsibilities for the enforcement of health and safety legislation (mainly in the distribution, retail, office, leisure and catering sectors) and for the rights of children at work.

The Minister said in the Public Bill Committee appeared to support the approach the amendment takes to the primary purpose of the Director.

> *We intend the director's remit to cover labour market breaches, not immigration offences. The director and the enforcement bodies will work closely with Home Office immigration enforcement wherever labour market breaches are linked to illegal immigrants or people working in breach of their visa conditions, but that is an adjunct and not the purpose of the director*[6].

Pressed on why he declined to accept the amendment given that he did not appear to disagree with it the Minister said "I simply do not think it is necessary[7]." ILPA disagrees. The Director has a large and a wide-ranging role and no promise of adequate resources. It will be necessary for him/her to be ruthless in setting priorities and a primary purpose may assist in so doing.

The Minister however gave cause for concern when he went on to say

> "*The provision is not intended to stray into the separate issues of immigration enforcement, but if cases of people who are here illegally are highlighted, the director would be duty-bound to report that and to pass on intelligence through the hub that is being created*.[8]"

A primary purpose would assist in ensuring that where protective and enforcement functions conflict, the Director prioritises a protective approach.

The Minister undertook at Commons' Report to continue to reflect on whether the provision for the Director is appropriately framed[9] and the amendment provides an opportunity to press for the result of that reflection.

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[5] Available at http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf (accessed 20 September 2015)
[6] 27 October 2015, am, col 163
[7] Ibid., col 166.
[8] Ibid.
[9] HC Deb 1 December 2015 col 208

ILPA's response to the consultation on the role of the Director can be read at http://www.ilpa.org.uk/resources.php/31617/ilpa-response-to-department-for-business-innovation-and-skills-consultation-tackling-exploitation-in

Clause 2

Amendment 7 in the names of Lord Rosser, Lord Kennedy, Baroness Hamwee and Lord Paddick

ILPA supports this amendment which requires the Director of Labour Market Enforcement to assess the threats and obstacles to effective labour market enforcement and the remedies secured by victims of non-compliance in the labour market.

The Director of Labour Market Enforcement should have specific responsibilities to review the way in which structural barriers undermine attempts to protect those in exploitative employment.

Examples of existing structural barriers to protection from labour exploitation identified by the Anti-Trafficking Legal Unit, which provides advice and representation to victims of labour exploitation and trafficking, include:

- Maintenance of the "family worker exemption" to payments of the National Minimum Wage;
- The restriction introduced by the Deduction from Wages (Limitation) Regulations 2014 preventing back payments of wages owed to victims of long term exploitation;
- The effects of funding cuts to legal aid provision, including the removal of most employment law from the scope of legal aid, and their impact on the availability of specialist advice to victims of labour exploitation and their access to justice;
- The effect of raised employment tribunal fees and the significantly increased civil court costs which prevent victims of exploitation seeking compensation for large sums owed to them and their employers being held to account. As an illustration, a claim for £200,000 as back payment for National Minimum Wage (not unusual in trafficking claims) would attract a fee of £10,000.

It is also important that the Director of Labour Market Enforcement monitors the extent to which victims of non-compliance in the labour market are able to access remedies, as these play an important restorative function for victims, not only in terms of providing the financial support to promote recovery but also in terms of providing recognition of their abuse and ensuring justice. These remain lacking however. It is unclear, for example, whether Her Majesty's Revenue and Customs has undertaken enforcement action to secure reimbursement of the national minimum wage for victims of trafficking for labour exploitation. The Anti-Trafficking Legal Unit has identified that the average HMRC recovery for an individual has varied between £147 and £231 over the last five years[10] indicating that awards may not be being made for victims of trafficking or modern slavery (where an award is likely to be significantly higher due to the length of exploitation or the amounts owed).

[10] *Response of the Anti-Trafficking Legal Unit to the Consultation on Tackling Exploitation in the Labour Market*; data sourced from HMRC End of Year Compliance Reports 2009/10 – 2013/14

Amendment 11 in the names of Lord Rosser and Lord Kennedy

Engagement with civil society and voluntary organisations is a necessary part of the role of the Director of Labour Market Enforcement as groups such as anti-trafficking organisations, migrant communities and legal representatives are likely to have a detailed understanding of the needs and difficulties faced victims of non-compliance who have been fearful of approaching statutory agencies for assistance.

Amendment 8 in the names of Baroness Hamwee and Lord Paddick

ILPA supports this amendment which would empower the Director of Labour Market Enforcement to assess the resources required to ensure an effective strategy for labour market enforcement. It is so far unclear what resources will be available to the Director and whether these will be sufficient to fulfil the role required. The Government has stated in its response to the Consultation on Tackling Labour Market Exploitation that the Director will be able to 'pool' resources between labour inspection authorities, however, these authorities are already significantly underfunded and there is a risk that funding may be diverted from existing effective work.

Whilst James Brokenshire announced a further £4million to support the work of HMRC on the National Minimum Wage at Report in the House of Commons[11], this must be seen in the context of the evidence of Sir David Metcalf of the Migration Advisory Committee before the House of Commons committee that:

> *I think that successive Governments have put more resources in—certainly into HMRC, but less so with the Gangmasters Licensing Authority. One understands the difficulties with the public finances, but we probably do not have sufficient resources. In the low-skilled report, we calculated that you would get an inspection from HMRC once every 250 years and you would get a prosecution once in a million years. Funding remains an issue, particularly for the Gangmasters' Licensing Authority*[12].

Resources are a particular concern in relation to the Gangmasters' Licensing Authority, where the US State Department Trafficking in Persons Report 2015 has recorded concerns that funding and staffing for the Gangmasters' Licensing Authority had decreased and recommended that the UK Government increase funds for this agency[13]. The proposed measures aimed at increasing the role of the Gangmasters' Licensing Authority in investigating and prosecuting criminal conduct in relation to labour market non-compliance are likely to place even heavier demands on resources.

Clause 3

Government Amendments 16, 17 and 24 to Clause 3

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[11] Hansard, 01 December 2015, column 208 at: http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151201/debtext/151201-0002.htm#15120141000002

[12] Public Bill Committee, House of Commons, 20 October 2015, Q37 at: http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/151020/am/151020s01.pdf

[13] US State Department, *Trafficking in Persons Report 2015, Country Narratives: United Kingdom,* http://www.state.gov/documents/organization/243562.pdf

These Government amendments provide a definition of *'non-compliance in the labour market'* with reference to the relevant labour market enactments (the National Minimum Wage Act 1998 and the Gangmasters' Licensing Act 2004).

However the Government has retained the provision which includes within this definition *"failure to comply with any other requirement imposed by or under any enactment and which is prescribed by regulations made by the Secretary of State"*. This is an extremely wide provision that would allow for the focus of the Director of Labour Market Enforcement to be directed to concerns that fall outside labour market breaches.

In statements to the Public Bill Committee, the Minister appeared to support the position that the primary purpose of the Director is to focus on breaches of labour market legislation:

> *We intend the director's remit to cover labour market breaches, not immigration offences. The director and the enforcement bodies will work closely with Home Office immigration enforcement wherever labour market breaches are linked to illegal immigrants or people working in breach of their visa conditions, but that is an adjunct and not the purpose of the director*[14].

The definition of non-compliance in the labour market should therefore make it clear that it relates to breaches of labour market legislation. ILPA supports **Amendment 25 in the names of Baroness Hamwee and Lord Paddick** which would clarify the text of the provision to specify that it relates to the failure to comply with any other requirement by or under any *enactment relating to the protection of workers*.

Government Amendments 27, 29 and 30 to Clause 3

These Government amendments define *'labour market offences'* with reference to the relevant labour market enactments, including the Employment Agencies Act 1973, the National Minimum Wage Act 1998, the Gangmasters' Licensing Act 2004 and the Modern Slavery Act 2015.

However the Government has retained the provision that includes within this definition *"any other offence prescribed by regulations made by the Secretary of State"*. This is an extremely wide provision that would allow for the focus of the Director of Labour Market Enforcement to be directed to concerns that fall outside labour market breaches.

In statements to the Public Bill Committee, the Minister appeared to support the position that the primary purpose of the Director is to focus on breaches of labour market legislation:

We intend the director's remit to cover labour market breaches, not immigration offences. The director and the enforcement bodies will work closely with Home Office immigration enforcement wherever labour market breaches are linked to illegal immigrants or people working in breach of their visa conditions, but that is an adjunct and not the purpose of the director[15].

The definition of labour market offences should therefore make it clear that it relates to breaches of labour market legislation. ILPA supports the **Amendment 28 in the names of Baroness Hamwee and Lord Paddick** which would clarify the text of the provision to specify that it relates to *any other offence relating to the protection of workers*.

[14] 27 October 2015, am, col 163
[15] 27 October 2015, am, col 163

Amendment 35 in the names of Lord Rosser and Lord Kennedy of Southwark

The definition of worker set out in the Employment Rights Act 1996 at section 230 is used in Clause 3. The relevance of the definition of a worker in this clause is that it forms part of the definition of a "labour market offence" in subclause 3(4)(e) which describes a labour market offence as an offence, under section 2 *Human Trafficking* or section 4 *Committing offence with intent to commit offence under section 2* of the Modern Slavery Act 2014, committed in relation to a "worker".

A different definition is used in Clause 9 of the Bill, the new s 24B(9) of the Immigration Act 1971 which would create an offence of illegal working.

Section 230 of the Employment Rights Act 1996 so far as material, states

> 230 (3) In this Act *"worker"*(except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.

Attempts were made in the Public Bill Committee to tease out the implications of this. The Minister said[16]

> *The clause and the proposed amendment do not redefine "worker" for the purposes of the Employment Agencies Act 1973, the National Minimum Wage Act 1998 or the Gangmasters (Licensing) Act 2004. The coverage of those respective Acts continues to apply. That means that the Employment Agency Standards Inspectorate and the GLA will still tackle non-compliance by employment agencies, businesses and gangmasters, regardless of whether the affected workers have the right to be or to work in the UK.*
>
> *We see the director as being focused on improving the way we enforce labour market and employment law rules. The Bill is not about extending labour protections to illegal workers, and we think that the director's focus should be on making sure that workers who are properly here are better protected.*
>
> *…We think the balance is right. The director's role is focused on workers who are here legally, although he can include in his plans action against forced labour as well. Trafficking people from around the world to work in brothels in the UK is an absolutely unacceptable crime, but we judge it is right for the director of labour market enforcement to tackle those aspects that are within the remit outlined in the Bill.*

[16] Col 183 to 184

> ***Keir Starmer:*** *… Is the Minister saying that an amendment along the lines of amendment 64 is simply unnecessary because the individuals will be fully included within the protection, or that, contrariwise, they are not fully included, but that hopefully the strategy will include action that would protect all workers in the broader sense? …*
>
> ***James Brokenshire:*** *I think it is the latter of the two points that the hon. and learned Gentleman has articulated. …for the purposes of defining the specific role, it is about lawful entitlement to be within the UK. For the reasons that I have outlined, there are other mechanisms and ways in which the issue is being addressed.*

This exchange suggests that the Director will not be focused on some of the employers who most exploit workers, those who exploit persons in the UK without lawful leave and hold them as slaves.

A different definition again of a worker is provided in section 25 of the Immigration, Asylum and Nationality Act 2006, which is concerned with the civil penalty for employers.

> **25 Interpretation**
> In sections 15 to 24—
> … (b) a reference to employment is to employment under a contract of service or apprenticeship, whether express or implied and whether oral or written,

Without the wider remit the Director will not be in a position to be effective against the worst employers, who may be employing some persons without leave and some with, or employing only persons without leave.

The Minister promised to reflect on the drafting of the clause[17] and this is an opportunity to identify what have been the results of that reflection. He indicated that he would write to Sir Keir Starmer on the matter[18].

Clause 4

Amendment 36 in the names of Lord Rosser and Lord Kennedy

ILPA supports this amendment which requires the Director of Labour Market Enforcement to include in his/her annual report information on the extent to which non-compliance in the labour market has been addressed, the extent to provision of remedies for victims has improved and the extent to which threats and obstacles to effective labour market enforcement have been overcome. We address the importance of these issues above in our commentary in support of **Amendment 7 in the names of Lord Rosser, Lord Kennedy, Baroness Hamwee and Lord Paddick** and consider that monitoring these concerns within the formal annual report of the Director for Labour Market Enforcement provides an essential accountability mechanism.

After Clause 7

[17] Public Bill Committee, 27 October 2016 pm, col 193.
[18] Public Bill Committee, 27 October 2016 pm, col 193.

Government Amendment 61: New Clause – Regulations under sections 1 to (*Interpretation*)

This amendment broadens the regulation-making powers conferred upon the Secretary of State.

Sub-clause 4 allows regulations made under section 3 (functions in relation to labour market) and those made under new clause (power to request Labour Market Enforcement undertaking) to amend, repeal or revoke any provision of any enactment, including the part of this Immigration Bill dealing with the Director of Labour Market Enforcement (to be renamed '*Enforcement of certain legislation relating to labour market'*). **Government amendment 110** to clause 2 makes a consequential amendment providing that such regulations will be subject to the affirmative.

The Delegated Powers and Regulatory Reform Committee examines with particular care powers that enable an instrument to delegate legislative power and that there should be an explanation from the Government as to why these exceptional powers are thought necessary[19]. The Government memorandum said of the original delegation:

> *13. The powers in clause 3(3)(d) and 3(4)(f) are subject to the negative procedure. We believe this is an appropriate level of scrutiny because this is not a power to create new labour market regulation or to create a new body, but instead is simply a power to extend the Director's responsibility to assess non-compliance and run an intelligence hub to include additional labour market legislation or offences.*
>
> *14. A similar power, also in the area of labour market enforcement, exists in section 1(2)(f) of the Gangmasters (Licensing) Act 2004. That power allows the Secretary of State to give additional functions to the Gangmasters Licensing Authority and this power is, by virtue of section 25(6) of that Act, subject to the negative procedure[20].*

This justification no longer holds for the expanded powers, nor has the Government provided any examples of where it might be necessary to amend primary legislation to achieve what this clause sets out to achieve.

Government amendment 77: new schedule: Consequential and Related amendments

This creates a new Schedule which defines the relationship of the Gangmasters' Licensing Authority with the Director of Labour Market Enforcement.

Paragraph 13 of the proposed Schedule inserts a requirement that the Gangmasters' Licensing Authority '*must*' carry out its functions in accordance with the strategy of the Director of Labour Market Enforcement. However the functions of the Gangmasters' Licensing Authority should more appropriately be set as currently by its independent board, with the Director of Labour Market Enforcement playing a strategic and co-ordinating role. The Gangmasters'

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[19] Delegated Powers and Regulatory Reform Committee, *17th Report of Session 2015/16: Cities and Local Government Devolution Bill [HL]: Commons Amendments, Education and Adoption Bill: Government Response, Immigration Bill* at: http://www.publications.parliament.uk/pa/ld201516/ldselect/lddelreg/73/73.pdf, para 18

[20] http://www.parliament.uk/documents/lords-committees/delegated-powers/Immigration_Bill_Delegated_Powers_Memorandum.pdf

Licensing Authority is likely to be able to be more responsive to changing risk where it can react appropriately in the areas where it is specialised. It would be more effective for the Gangmasters' Licensing Authority to be required to *'have regard to'* the strategy of the Director of Labour Market Enforcement in order.

ILPA is supportive of the extension of the remit of the Gangmasters' Licensing Authority into other sectors of employment which paragraph 15 of the new Schedule facilitates. However, it is important that any expansion of the remit of the Authority is accompanied by sufficient resources in order to enable it to undertake its activities effectively.

The US State Department Trafficking in Persons Report 2015 has recorded concerns that funding and staffing for the Gangmasters' Licensing Authority had decreased and recommended that the UK Government increase funds for this agency[21]. The proposed measures aimed at increasing the role of the Gangmasters' Licensing Authority in investigating and prosecuting criminal conduct in relation to labour market non-compliance are likely to place even heavier demands on resources. The House of Lords Committee Stage provides an opportunity to seek information and commitments on resourcing for the essential work of the Gangmasters' Licensing Authority.

The Government states in its explanation of the amendments that they enable to the licensing criteria to be set out in guidance rather than in secondary legislation. The effect of paragraphs 16 and 21 of the Schedule are to limit the authority of the Gangmasters' Licensing Authority to make rules and remove parliamentary scrutiny of those rules. Currently, under the Gangmasters' Licensing Act 2004, the Gangmasters' Licensing Authority is empowered to make 'such rules as it thinks fit' and consult with the Secretary of State only where it is making rules about fees. These rules must be laid before parliament. Under the proposed new schedule, the Gangmasters' Licensing Authority would be required to consult with the Secretary of State in order to make all rules and those rules would have parliamentary scrutiny. This limits the Gangmasters' Licensing Authority to make rules as an independent body at arms length from Government and have these subject to independent parliamentary scrutiny and undermines its role.

Government amendments 73: New Schedule: Functions in relation to labour market

Paragraph 2 of this proposed new Schedule empowers the Secretary of State to appoint officers from any Minister of the Crown, government department or a body performing functions on behalf of the Crown to operate in relation to the labour market for the purposes of the Act. This would enable the Secretary of State to appoint immigration officers or members of other services to carry out labour market functions creating a risk of overlap between the functions of labour inspection and immigration enforcement.

The fear of the consequences of being identified with an irregular immigration status is a significant obstacle to seeking protection from labour exploitation as identified by the Special Rapporteur on the Human Rights of Migrants:

[21] US State Department, *Trafficking in Persons Report 2015, Country Narratives: United Kingdom,* http://www.state.gov/documents/organization/243562.pdf

> *57. The fact that a migrant is in an irregular situation does not deprive him/her of human rights protection. The human rights treaties, including the eight ILO Fundamental Conventions, apply to everyone, without discrimination. However, irregular migrants are frequently victims of labour exploitation. Due to their precarious situation, they often accept working for lower wages than regular migrants and nationals, and in dirty, difficult and dangerous conditions. Additionally, they regularly have difficult access to social services and health care, and live in constant fear of being detected, arrested, detained and deported, if they seek to improve their working conditions. Fear of drawing attention to their immigration status thus prevents many irregular migrants from organizing and from seeking protection from the authorities for their rights as workers, including in case of non-payment or late payment of their salaries, or implementation of health and safety regulations*[22].

The Gangmasters' Licensing Authority has been able to operate effectively through gaining trust as an independent body focused on licensing and labour protection. The association of labour market inspectors with the immigration service would act as a deterrent to those with insecure immigration status in exploitative situations approaching the authority and escaping their abuse.

The UN Special Rapporteur on the Human Rights of Migrants has stated:

> *62. Labour inspections are an important tool to combat human rights violations committed against migrants in the workplace and can, if undertaken properly, prevent such violations from occurring. However, the criminalization of irregular entry and stay and the emphasis on immigration control has in some countries led to cooperation between labour inspection and immigration enforcement and/or imposition of immigration control duties on labour inspectors. The result impedes effective protection of all migrants under labour law, and also intimidates migrants from denouncing abusive working conditions and from cooperating with labour authorities. A migrant who is either irregular and fears detection and deportation, or who has a precarious legal status and fears losing his/her job and subsequently becoming irregular, will be very reluctant to report workplace violations to labour inspectors, unless there is a "firewall" in place which prevents labour inspectors from communicating information about potentially irregular migrants to immigration enforcement*[23].

The International Labour Office Labour Inspection Convention 1947 (No.81), which the UK ratified in 1949, states that the function of labour inspection is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers, to provide information and advice to employers and employees on complying with the provisions and highlighting abuses not covered in law[24]. The Convention further states that any additional duties should not prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers[25].

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[22] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Labour exploitation of migrants,* A/HRC/26/35, 03 April 2014 at: http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf

[23] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Labour exploitation of migrants,* A/HRC/26/35, 03 April 2014 at: http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf

[24] Article 3(1), International Labour Office Labour Inspection Convention 1947 (No.81), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312226

[25] Article 3(2), *ibid*

The International Labour Office Committee of Experts on the Application of Conventions and Recommendations, the body responsible for examining States' adherence to international labour standards, has stated that the primary duty of labour inspectors is to protect workers and not to enforce immigration law[26] and that the objectives of labour inspection can only be met if the workers covered are convinced that the primary task of the inspectorate is to enforce the legal provisions relating to conditions of work and protection of workers[27].

Government amendment 41: New Clause Pace Powers in England and Wales

This clause creates a wide range of new police-style powers to reform the role of the Gangmasters' Licensing Act in order to enable it to undertake investigative and enforcement activity in tackling labour exploitation.

The Government's consultation document on *Tackling Exploitation in the Labour Market* explained the reason for introducing these powers:

> *The GLA can only investigate a narrow set of criminal offences relating to licensing, and it can only do so in the sectors that it regulates. The GLA has a good record of identifying exploitation in these sectors but it faces two significant operational hurdles:*
>
> *• Its role is limited to licensing labour providers in sectors where a statutory licensing scheme is in place.*
>
> *• Even where it uncovers criminal abuse, the GLA relies on other law agencies, especially the police, to accompany GLA staff or be available at short notice to take the necessary enforcement action. The GLA cannot arrest individuals for the criminal offences that are associated with worker exploitation and it lacks ordinary police powers to seek and use warrants, and to search premises after arrests to secure crucial evidence[28].*

It is important, however, that the remit and powers of the Gangmasters' Licensing Authority are not expanded simply to cover deficiencies in responses by other law enforcement agencies. Labour exploitation will be tackled more effectively through partnership working between the Gangmasters' Licensing Authority and the police, with a clear delineation of roles and responsibilities.

It is important also that the role of the Gangmasters Licensing Authority does not overtake its necessary functions of inspections and licensing activity to enforce compliance with employment legislation. Labour inspections play an important role in the prevention of labour exploitation:

> *62. Labour inspections are an important tool to combat human rights violations committed against migrants in the workplace and can, if undertaken properly, prevent such violations from occurring[29].*

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[26] International Labour Office Committee of Experts on the Application of Conventions and Recommendations (CEACR), *General Labour Survey: Labour Exploitation*, 2006, http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-iii-1b.pdf

[27] *Ibid*

[28] Page 34, para 110

[29] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Labour exploitation of migrants,* A/HRC/26/35, 03 April 2014 at: http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf

It would be useful to explore whether police and criminal enforcement agencies are sufficiently resourced to support the Gangmasters' Licensing Authority in its work or whether there is a risk of resources from the Authority's necessary preventative work being diverted to cover gaps in these agencies.

There is a valuable role for the Gangmasters' Licensing Authority in prosecuting breaches of employment legislation and in taking immediate action to secure evidence, arrest suspects and rescue persons where it finds evidence of potential exploitation in the labour market without having to wait for other law enforcement agencies to act. However, the Government has also stated in its consultation document that it envisaged that the Authority should have the ability to investigate evidence of the most serious abuses of workers: slavery, servitude, forced or compulsory labour or human trafficking, which carry a maximum life sentence under the Modern Slavery Act 2015. The investigation of such serious offences is properly be conducted by the police and/or the National Crime Agency as the consultation document recognises. The extension of powers into the investigation of more serious offences may give rise to confusion as to where the duty to investigate suspected exploitation in any particular case lies. This may give rise to uncertainty both for workers and referring agencies and potentially also for the enforcement agencies themselves with the risk that no agency will take the action required. ILPA recommends that the powers proposed for the Gangmasters' Licensing authority should be more restrictively delineated.

In the consultation document *Tackling Exploitation in the Labour Market*, the Government stated:

> *As with the GLA, we want the new Authority to make effective use of powers under the Proceeds of Crime Act 2002 to investigate money laundering offences and to use the provisions for cash forfeiture and confiscation to remove assets from those that benefit from offences within their remit. We propose to ensure that the new Authority has access to these powers*[30].

ILPA strongly supports this aim which is an important means of securing the assets available for workers who are victims of labour market abuses to secure unpaid wages and compensation as a remedy promoting restitution and rehabilitation for workers who have been subjected to labour exploitation.

It would be useful to explore that the Government has indeed ensured that the Gangmasters' Licensing Authority has access to all relevant powers under the Proceeds of Crime Act 2002 and take the opportunity to close any gaps identified with this Bill.

Government amendment 42: New Clause - Relationship with other agencies: requests for assistance

ILPA opposes this amendment which enables the Gangmasters' Licensing Authority to ask assistance from 'relevant persons' (at 2(1)) which includes persons appointed as immigration officers (at (7)(d) and (e)) and which permits immigration officers to similarly seek assistance from the Gangmasters' Licensing Authority in its operations (at 2(4)).

[30] Page 37, para 122

The facility to conduct joint operations in this way creates a dangerous conflation of immigration control functions with labour market regulation, undermining the identification and protection of workers from exploitation under the protective labour market functions. Fear of repercussions related to irregular immigration status is a significant obstacle in persons leaving abusive situations and the association of the Gangmasters Licensing Authority with Immigration Enforcement Officers would deter some workers from approaching the authority for assistance. The UN Special Rapporteur on the Human Rights of Migrants has stated:

> *62. Labour inspections are an important tool to combat human rights violations committed against migrants in the workplace and can, if undertaken properly, prevent such violations from occurring. However, the criminalization of irregular entry and stay and the emphasis on immigration control has in some countries led to cooperation between labour inspection and immigration enforcement and/or imposition of immigration control duties on labour inspectors. The result impedes effective protection of all migrants under labour law, and also intimidates migrants from denouncing abusive working conditions and from cooperating with labour authorities. A migrant who is either irregular and fears detection and deportation, or who has a precarious legal status and fears losing his/her job and subsequently becoming irregular, will be very reluctant to report workplace violations to labour inspectors, unless there is a "firewall" in place which prevents labour inspectors from communicating information about potentially irregular migrants to immigration enforcement*[31].

The International Labour Office Labour Inspection Convention 1947 (No.81), which the UK ratified in 1949, states that the function of labour inspection is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers, to provide information and advice to employers and employees on complying with the provisions and highlighting abuses not covered in law[32]. The Convention further states that any additional duties should not prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers[33].

The International Labour Office Committee of Experts on the Application of Conventions and Recommendations, the body responsible for examining States' adherence to international labour standards, has stated that the primary duty of labour inspectors is to protect workers and not to enforce immigration law[34] and that the objectives of labour inspection can only be met if the workers covered are convinced that the primary task of the inspectorate is to enforce the legal provisions relating to conditions of work and protection of workers[35].

Government amendments 43 to 59: Labour market enforcement orders and offence

[31] Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Labour exploitation of migrants,* A/HRC/26/35, 03 April 2014 at: http://www.ohchr.org/Documents/Issues/SRMigrants/A.HRC.26.35.pdf
[32] Article 3(1), International Labour Office Labour Inspection Convention 1947 (No.81), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312226
[33] Article 3(2), *ibid*
[34] International Labour Office Committee of Experts on the Application of Conventions and Recommendations (CEACR), *General Labour Survey: Labour Exploitation*, 2006, http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-iii-1b.pdf
[35] *Ibid*

Government amendments 43 to 59 establish a new labour market enforcement regime under which employers who have committed certain labour market offences may be required to give an undertaking to comply with specific provisions aimed at preventing or reducing the risk of not complying with labour market requirements in the future. An application for a labour market enforcement order may be made to a Magistrate's Court, including where an employer does not choose to give an undertaking. Breach of the undertaking or order will be a criminal offence with a maximum two year prison sentence and/or fine.

This option is preferable to the alternative proposals put forward in the consultation document, *Tackling Exploitation in the Labour Market*, for tackling repeat and deliberate breaches; however the detail of the proposal gives rise to real concerns.

The undertaking may contain measures including a prohibition, restriction or requirement that the enforcing authority considers just and reasonable. However these measures or the description of these measures will only be set out in secondary legislation and so the nature of these measures, breach of which would lead to a criminal offence, remains undefined. Further, by operation of sub clause (4) of new clause *Measures in LME undertakings*, only one of the measures in the agreed undertaking is required to be aimed at preventing or reducing the risk of the individual committing or continuing to commit a further relevant offence, and so the nature and purpose of other measures that might be prescribed for an individual is unclear. This is a wider power to determine the measures with which an employer must comply than a Magistrate's Court has under new clause: *Measures in LME orders*. A court is also only able to review an undertaken given if a person is found to have failed to comply. It is unclear how a Court may assess compliance with an undertaking or an order if the measures are qualitative in nature or poorly defined.

ILPA is also concerned about the level of bureaucracy that will be involved in the making and monitoring of labour market enforcement undertakings and orders, both on employers and on the relevant enforcement agencies. Deficiencies have already been identified in the resources available to labour market enforcement agencies and it would be useful to explore the costs analysis, if any, that has been conducted and whether there will be sufficient resources available to the courts and labour market enforcement agencies to monitor and secure compliance.

Clause 8 Stand part

ILPA supports **Lord Rosser, Lord Kennedy of Southwark, Baroness Hamwee and Lord Paddick's opposition to Clause 8 standing part of the Bill.**

The provision has been opposed, inter alia, by Tony Smith OBE, Former Director General of the UK Border Force[36].

The Clause creates a new criminal offence of working without leave whether a person knows that they are doing so or not. Earnings can be seized. This is not, as has been suggested[37] a new

[36] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib05.htm
[37] Prime Minister's speech of 21 May 2015 available at https://www.gov.uk/government/speeches/pm-speech-on-immigration (accessed 20 September 2015)

departure. Criminal offences were created for Romanian, Bulgarian and Croatian workers working without authorization.[38] ILPA has asked the Home Office for statistics on the numbers of prosecutions for those offences, and also whether, when the employee was prosecuted, the employers were prosecuted or made subject to a civil penalty. This information has not been provided. It would assist in understanding whether offences have resulted in a displacement of enforcement activity, away from employers to workers.

As was raised by a number of speakers at second reading, the fear is that making it a specific crime to work without leave will drive the exploited and enslaved further underground. It strengthens the hand of the slave master against the slave. For example the employer of a domestic worker who had failed to renew their visa could tell them that they were a criminal and likely to be prosecuted if they presented themselves to the authorities.

It is already a criminal offence, under section 24 of the Immigration Act 1971, to enter the UK without leave when leave is required, to overstay or to breach a condition of leave (such as working when work is prohibited). Thus not a single person could be prosecuted under this clause who could not already be prosecuted under existing offences.

ILPA does not consider that the alternative **Amendment 63** proposed by Lords Rosser, Kennedy of Southwark and Paddick and by Baroness Hamwee, a defence to the offence, will cure the mischief of the Clause. A defence will not solve the problem of persons who are afraid to come forward. It is not clear what would be considered "reasonable cause" in such circumstances and to what extent it would ensure better protection that a defence of duress for a person subject to the worst forms of exploitation or how the defence would be established in practice.

Trafficked or enslaved persons could be liable for the criminal offence of working without leave to do so or in breach of conditions, contained in Clause 8. The Minister in the House of Commons stated that trafficked persons would have a defence under s 45 of the Modern Slavery Act 2015:

> ***James Brokenshire:*** *... There is always a balance to be struck, as was the case when framing the defence under section 45, and that balance applies to the defences that will operate under the Bill. …the statutory defence acts as an additional protection on top of guidance from the Director of Public Prosecutions on whether prosecution is in the public interest. It is also in a court's powers to stop an inappropriate prosecution for abuse of process. Although we need to think about the relevant section of the Modern Slavery Act, it is also important to bear in mind the DPP's guidance. The normal decisions that the Crown Prosecution Service takes are equally relevant to these issues.* [39]

The limitations of the s 45 defence were discussed at length during the passage of the Modern Slavery Act. But in any event, the defence only comes into play once a person is prosecuted, and we do not want that to happen to trafficked persons.

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[38] Accession (Immigration and Worker Authorisation) Regulations 2006 SI 2006/3317 regulation 13 http://www.legislation.gov.uk/uksi/2006/3317/pdfs/uksi_20063317_en.pdf and the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013SI 2014/1460 (accessed 20 September 2015)

[39] Public Bill Committee 6th session, col 216.

It may be that prosecutors will exercise discretion not to prosecute. But that has not always been the case, for example for young people exploited in cannabis factories. And in any event, the trafficked or enslaved person is not an expert on the exercise of prosecutorial discretion and cannot feel confident that discretion will be exercised in their favour.

In its summary for the Bingham Centre for the Rule of Law event on the Bill on 20 October 2015, Focus on Labour Exploitation (FLEX) said that the clause would mean that

> *"a) that many victims of modern slavery in the UK would not risk referral in to the UK national referral mechanism if a negative conclusive grounds decision could mean imprisonment;*
> *B) that traffickers would use this new offence as a threat through which to coerce victims in to exploitation; and*
> *c) that trafficked persons could be criminalised for initially abusive undocumented working that then deteriorated into a trafficking situation."*

FLEX argued that the deterrent effect of the could lead to breaches of Article 4 of the European Convention of Human Rights due to a failure to prevent, identify and protect victims and potential victims of slavery.

The Anti-Trafficking Legal Unit provided the following case in evidence to the Public Bill Committee:

> **"*Case A***
> *An African woman kept in domestic servitude and subjected to violence by her employer. Her employer knowingly misled her* [she was present under the old visa, not the new, tied visa] *that she was not permitted to obtain alternative employment; she was told that if she challenged the employer or sought to leave her employment she would be imprisoned. Her employer told her that the employer controlled the UK police.*
>
> *Following a beating, the victim was advised by a neighbour that in fact she could lawfully change her employer and that leaving the abusive situation would not render her unlawful. She then ran away from the abuser.*
>
> *She was still too scared to sustain a police complaint.*
>
> *However, after the intervention of a support organisation and ATLEU lawyers, she was reassured of her lawful residency. She was then able to reapply to the police to investigate her former abuser.*
>
> *The police refused to investigate the matter.* "

Had Clause 8 been law, then even when assured of her lawful residence, this woman might still have been fearful of being prosecuted because she had worked unlawfully.

The Office of the Children's Commissioner said in evidence to the Public Bill committee[40] that the provision could affect parents and also former unaccompanied children who are waiting for an appeal against refusal of a protection claim.

[40] http://www.publications.parliament.uk/pa/cm201516/cmpublic/immigration/memo/ib07.htm

The Migration Advisory Committee's July 2014 report *Migrants in low-skilled work Migration Advisory Committee Summary Report July 2014 The growth of EU and non-EU labour in low-skilled jobs and its impact on the* UK[41] is relevant to this clause. The Committee stated

> *The combination of non-compliance and insufficient enforcement can lead to instances of severe exploitation, particularly of vulnerable groups such as migrants.*

The report sets out

> *We were struck on our visits around the country by the amount of concern that was expressed by virtually everyone we spoke to about the exploitation of migrants in low-skilled jobs… migrant workers are more likely to be exploited than resident workers as they are not aware of their rights and are afraid they may be sacked/evicted/deported if they complain was raised on a number of occasions.*

The Labour MP on the Public Bill Committee, Sir Keir Starmer MP, himself a former Director of Public Prosecutions, cautioned against leaving the decision as to whether or not to prosecute to the discretion of the prosecutor:

> *I am not concerned about the defence under the Modern Slavery Act—we had that exchange earlier and I understand the position—but the wider point of when that defence is unavailable. …. Does the Minister accept that in such circumstances it is not right to leave it to the DPP's discretion? In other words, should not the DPP's discretion be exercised according to the known offence and known defences? …That is not to suggest that discretion does not operate in many cases, but if there is a proper case for having a defence, it ought to be for Parliament to write that into the Bill and then for the DPP to exercise discretion as to how it operates in individual cases. The alternative is the DPP effectively introducing a back-door defence, which has not been thought to be an appropriate use of guidelines.* [42]

In so far as the specific offence is needed to enable the Government to seize wages earned as a result of illegal working as proceeds of crime, the Crown Prosecution Service Guidance on Proceeds of Crime[43] says that it should prioritise the recovery of assets from serious organised crime and serious economic crime. Pursuing undocumented workers with few assets will not be a priority. Undocumented workers who are working for little money and living 'hand-to-mouth' will have very limited realisable assets. The Guidance says that "If a financial investigation has revealed that a suspect has few or no realisable assets, then it may not be a proportionate use of resources to pursue confiscation". There there will be few cases in which it will be cost effective or in the public interest to pursue confiscation proceedings.

A confiscation order must be proportionate to the aim of the legislation, which is to recover the financial benefit that the defendant has obtained from the criminal conduct (*R v Waya [2012] UKSC 51)*. The purpose of the legislation is not to further punish the offender by fining them, or to act as a deterrent. If the confiscation order is not proportionate then it will be a violation of

[41] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/333084/MAC-_Migrants_in_low-skilled_work_Summary_2014.pdf
[42] Public Bill Committee Cols 203 and 218
[43] p://www.cps.gov.uk/legal/p_to_r/proceeds_of_crime_act_guidance/

the right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the European Convention on Human Rights[44].

Amendment 64 in the names of **Baroness Hamwee and Lord Paddick** provides that the criminal off offence of illegal working set out in new s 24B(1) of the Immigration Act 1971 inserted by this clause does not apply to voluntary work or volunteering. We should not read the clause as applying to such work and therefore regard this as a probing amendment designed to elicit confirmation of this from the Minister.

Clause 9

It is proposed in the Bill to broaden the criminal offence (as opposed to civil penalty) for employing an illegal worker from the current "knowingly". The Clause proposes to broaden it to encompass "having reasonable cause to believe" that the person does not have permission to work**. Lord Rosser and Lord Kennedy of Southwark** have tabled **Amendment 66** to adopt a test of recklessness instead and **Baroness Hamwee and Lord Paddick** have tabled **Amendment 67**to similar effect.

Meanwhile Lord Bates has tabled **Government amendments 65, 66 and 68-70** to amend the clause. Lord Bates' **Amendment 65** does not alter the main thrust of the clause. The only difference it makes is that if, the person's leave does entitle them to work then the employer cannot be guilty of the offence of an employing an illegal worker. Even if the employer had reasonable grounds to believe that they were employing a person with no permission to work, if in reality they were not then they are not committing a crime. Lord Bates' **Amendment 69** deals with liability of a body corporate. The other Government amendments are essentially consequential on these technical changes.

Section 21 of the Immigration Act 2006, both in its current form and subsequent to Lord Bates **Amendment 65**, does not expressly provide protection for an employer who employs an asylum-seeker who has permission to work because it provides no protection for the employer unless a person has leave to be in the UK. Most persons seeking asylum do not have leave, they are on temporary admission while their application for leave as a refugee is considered. While ILPA is not aware that there have been any suggestions of prosecutions it would be sensible to tidy up the drafting while the clause is before parliament. ILPA has raised this matter with the Bill team. Schedule 2, paragraph 3 inserting new sub section 8A(9) into the Metropolitan Public Carriage Act 1869 makes special provision for those on "immigration bail" who have permission to work and could be used as a model for an amendment to this clause.) This is also a problem with **Amendment 66** in the name of **Lord Rosser and Lord Kennedy of Southwark**

The Explanatory Notes to the Bill give as the reason for broadening the offence that some employers deliberately do not check their employees' documents so that they cannot have the specific intent required to commit the offence of "knowingly" employing a person without permission to work. The difficulty is that the change proposed will catch not only such persons but a wider swathe of employers. While the threshold for commission of the offence is lowered, the maximum penalty is raised, from two to five years.

[44] See the discussion in Paulet v The United Kingdom; *Mouhid v. R. (Court of Appeal) (2014)*

The fear is that employers will be so afraid of being accused of this offence that they will be reluctant to employ anyone who does not hold a British passport or whom they regard as not looking, or sounding "British" or having a "British" name.

This risk can be reduced but the persons whom the clause is intended to target encompassed by it by changing the test to one of recklessness but given all the problems with the clause as drafted ILPA opposes its standing part of the Bill.

The Government's stated reason for resisting an amendment to change the definition to recklessness in the Public Bill Committee was

> *It would remain a subjective test and would require proof that the employer foresaw a risk that the person had no right to work, yet went on to take that risk and employ them. It is precisely the difficulties in establishing the state of mind of the employer that the Government are seeking to address in the Bill, by introducing an objective element to the test.*[45]

Given that the penalty is up to five years in prison ILPA considers it reasonable that the prosecutor be required to prove the employer's intent to the standard of recklessness; that the test is subjective rather than the objective test of "has reasonable cause to believe." The civil penalty regime for employers already exists to catch all wrong-doers regardless of their statement of mind. As part of the bureaucratic complexity introduced by this Bill, another civil regime, that of Labour Market Enforcement Undertakings, backed by criminal sanctions, is created.

Due to time constraints ILPA has not provided briefing on Amendment 72 in the names of Baroness Hamwee and Lord Paddick, the new Clause *Gangmasters Licensing Authority: powers of officers.* This is concerned with supply chains.

Clause 10 and Schedule 1 Illegal working in licenced premises.

The Secretary of State is added to the list of persons who must be notified when an application for a licence is made. She can object to the grant of the licence and this is to be taken into account by the licensing authority. She can appeal against a grant of a licence/refusal to cancel a licence despite her objection. All running licensed premises are affected by the additional bureaucracy. **Government Amendments 92 and 93** mean that the provisions on licence applications will apply only to applications made after the Bill comes into force. Anything else would be bureaucratically wholly unworkable.

The most striking thing about this Schedule is the new power where an immigration officer "has reasonable grounds to believe that any premises are being used for a licensable activity" to enter the premises "with a view to seeing whether an offence under any of the Immigration Acts is being committed in connection with the carrying on of the activity." This is a very wide power to search any licensed premises, with no need for a suspicion. It is extremely striking, when one consults the Home Office lists of illegal working penalties given out, how many pertain to small businesses that appear likely, given that they serve ethnic cuisines, to be run by ethnic minority owners[46](see https://www.gov.uk/government/collections/employers-illegal-working-

[45] Col 221

[46] See https://www.gov.uk/government/collections/employers-illegal-working-penalties (accessed 1 October 2015). The latest penalty lists date from 29 September 2015.

penalties#penalties) but is this because they employ illegal workers more frequently than other employers or because they are targeted more frequently for enforcement activity? If the latter, why?

For these reasons and because of the bureaucracy imposed, ILPA supports **Amendments 78 and 79** in the names of **Baroness Hamwee and Lord Paddick** which remove the provisions that make the Secretary of State part of the licence application process.

Amendments 80 and 83 in the names of Baroness Hamwee and Lord Paddick would mean that the Secretary of State's powers to issue a notice that the granting of a licence or a failure to cancel it were prejudicial to the prevention of illegal working, are not limited to exceptional cases. Thus they would extend the Secretary of State's powers to issue a notice.

Amendments 81, 82, 84 to 90 in their names would restrict the powers of relevant licensing authority to reject an application or to cancel an "interim authority notice" on the basis of the Secretary of State's notice to cases where this was 'necessary' for the 'promotion of the crime prevention objective' rather than 'appropriate' for the promotion of that same objective. Subsequent amendments inserting the word necessary are to similar effect. Thus they would restrict the circumstances in which the Secretary of State's notice resulted in a licence not being issued or being cancelled.

Amendment 90 in the names of **Baroness Hamwee and Lord Paddick** would remove the prohibition on a magistrates' court hearing an appeal against the removal of a licence considering the question of whether a person has, after the date of the decision appealed against, been granted leave to enter or remain in the United Kingdom.

Due to pressure of time and the volume of amendments ILPA has not provided briefing on **Clause 11 or Schedule 2 Private hire vehicles** etc. but we are happy to respond to questions on this.

Clause 12 and Schedule 3

Illegal working closure notices and illegal working compliance orders

The Bill would give immigration officers powers to close an employer's premises where "satisfied on reasonable grounds" that the employer is employing an "illegal worker" as defined, where the employer has been required to pay a civil penalty in the last three years, or has an outstanding civil penalty or has been convicted of the offence of knowingly employing an "illegal worker" or (under the amendments to be effected by this Bill) employing a person whom they have reasonable cause to believe is not entitled to work. The initial closure could be for up to 48 hours. The immigration officer can then apply to the court for an illegal working compliance order which can prohibit or restrict access to the premises for up to two years.

Any power to close premises should rest with the courts, with the role of the Home Office to make applications (whether *inter partes* or *ex parte* depending on the circumstances) to the court. This should be the case for an initial closure, which is rife with reputational risk, as much as for extensions. If this is left to immigration officers, there are risks of mistakes or inappropriate decisions and injustice as a consequence. Closures may have adverse consequences for others working on the premises, including separate businesses. The

government has not demonstrated why these measures required when criminal sanctions are available and the provisions do not contain adequate safeguards to ensure that they are not used in an oppressive manner. ILPA therefore supports Baroness Hamwee and Lord Paddick in their **opposition to Clause 12 and Schedule 3's standing part of the Bill**.

What records will be kept of the decision-making process by immigration officers that led to an initial closure? Will these be made available to the person whose premises are closed?

The **government amendments 136 to 145 and 147 to Schedule 3** have not been adequately explained. They remove all possibility of compensation for losses incurred as a result of an illegal working compliance order as opposed to as the result of an illegal working closure notice. The compliance order lasts for up to 48 hours, the closure notice for up to two years. The latter is imposed by a court. The Minister should be asked, if the Secretary of State has presented inaccurate information to the court that has led it to make an order that it would not otherwise have made, or has acted in a wrongful or oppressive manner, will the court have power to order the payment of compensation or damages? There needs to be provision for compensation/damages in these circumstances without having to start separate proceedings.

The **Government amendments** remove all possibility of compensation for losses incurred as a result of an illegal working closure notice that has been cancelled. Given that it seems likely that where a notice has been wrongfully issued the Home Office should move to cancel it, it is likely to be in the cases of the most egregious Home Office action that an employer or other occupier of the premises is prevented from by the Government amendments from applying for compensation. The amendment to page 86 line 35 removing the reference to a cancelled notice should be resisted.

The **Government amendments** also restrict the circumstances in which compensation is payable. They mean that compensation will only be payable where the employer was not employing a person who did not have permission to work or that the employer did not have a previous conviction or had not had a civil penalty imposed within the last three years. The reference to the court's determining that in all the circumstances it is appropriate to order compensation is removed. This restricts the ability to order compensation for the employer in question but also appears to restrict the circumstances in which compensation could be paid to third parties adversely affected by the order.

After Clause 12

Amendment 133 in the names of Lord Rosser, Lord Kennedy of Southwark, Lord Alton of Liverpool and Baroness Hamwee New Clause *Protection from Slavery for Overseas Domestic workers*

The amendment replicates that tabled to the Modern Slavery Bill 2015. It provides a chance to debate James Ewins' Independent Review of the Overseas Domestic Worker Visa. This is available at
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf

Mr Ewins takes as his fundamental question

> *"…whether the current arrangements for the overseas domestic workers visa are sufficient to protect overseas domestic workers from abuse of their fundamental rights while they are working in the UK, which includes protecting them from abuse that amounts to modern slavery and human trafficking."*

Thus his focus is on the minimum required to achieve this. He concludes that that minimum is

> *10. On the balance of the evidence currently available, this review finds that the existence of a tie to a specific employer and the absence of a universal right to change employer and apply for extensions of the visa are incompatible with the reasonable protection of overseas domestic workers while in the UK (see paragraphs 65 - 87).*
>
> *In particular:*
>
> *10.1. The review recommends that all overseas domestic workers be granted the right to change employer (paragraph 90) and apply for annual extensions, provided they are in work as domestic workers in a private home (paragraph 93).*
>
> *10.2. The review finds that such extensions do not need to be indefinite, and that overseas domestic workers should not have a right to apply for settlement in the UK in order to be adequately protected.*
>
> *10.3. The review recommends that after extensions totalling up to 2 ½ years, overseas domestic workers are required to leave the UK (paragraphs 99 - 106)…..11… this extension is the minimum required to give effective protection to those overseas domestic workers who are being abused while in the UK*

He emphasizes

> *12. Since this review finds that, in granting that right, it is both impractical and invidious to discriminate between seriously abused, mildly abused and non-abused workers, the consequence is that it must be granted to all overseas domestic workers.*

Mr Ewins goes on to say

> *13. … such essential changes to the terms of the visa referred to above can only be of practical help to overseas domestic workers if those workers are empowered and enabled to avail themselves of these and other rights. Therefore, overseas domestic workers must be given a real opportunity to receive information, advice and support concerning their rights while at work in the UK. …*
>
> *To this end:*
>
> *13.1. This review recommends the introduction of mandatory group information meetings for all overseas domestic workers who remain in the UK for more than 42 days (paragraphs 122 - 132).*
>
> *13.2. These meetings should be funded by an increase in the visa fee (paragraphs 133 - 134 and Appendix 5)*

He acknowledges a concern raised by ILPA and others

> *134. The review has heard concern that a £50 fee increase may well be visited indirectly upon the overseas domestic workers themselves. However, if the improved provision of information,*

advice and assistance are effective, then such a consequence is but one of the abuses that the overseas domestic worker will be empowered to prevent. Furthermore, it is considered that the relative benefit of the meeting outweighs this risk and sum involved. ILPA is concerned that fee increases might be passed on to workers and should welcome

Finally he holds

15. … with the introduction of entry/exit data from UKVI, it should be possible to collate such data with information drawn from overseas domestic workers visa applications, as well as applications to change employer and renew the visa as well as data from overseas domestic workers who enter the NRM. This review strongly urges the Government to collate and analyse such data to provide a clearer quantitative understanding of how the visa operates. 16. Further, implementation of this review's recommendations will provide data, information and intelligence which will enable the police, Immigration Enforcement or the proposed Director of Labour Market Enforcement, to take intelligence-led steps to investigate and pursue those who abuse overseas domestic workers with criminal, civil or immigration sanctions. Tasking such entities to take active steps to initiate enquiries into such abuse will require other measures beyond the scope of this report. However, it is the clear finding of this review that none of the basic protections of overseas domestic workers' fundamental rights should be conditional upon the worker initiating any such enquiry themselves, especially where the Home Office will have sufficient data to do so

Amendment 133 provides an opportunity to debate what provision should be made for overseas domestic workers. Since this can all be achieved by amendments to the immigration rules, the full range of options is open to the Government.

ILPA considers that Mr Ewins' recommendations, which he identifies as the minimum necessary to protect overseas domestic workers, should be implemented without delay as an essential first step toward comprehensive protection. We advocate going further and providing a route to settlement as best practice rather than implementing essential protection only. This the proposed new clause does, while also making provision for Mr Ewins proposals for mandatory group information sessions.

The amendments made by Statement of Changes in Immigration Rules HC 474 with effect from 15 October 2015 are the most restrictive possible implementation of the hard-won section 53 of the Modern Slavery Act 2015. Migrant domestic workers who have been recognized as victims of trafficking or slavery may have leave extended for up to six months (section 53 says "not less than six months"), but leave may be given in increments of less than six months. The worker has no recourse to public funds during this period and is permitted to work only as a domestic worker. The provisions provide little incentive to domestic workers to leave situations of abuse and risk their destitution when they fail to find gainful employment for such a short period.

The new leave is in addition to, not instead of, the existing leave. An overseas domestic worker is unlikely to opt for the new leave rather than the existing discretionary leave which the Government indicated in its letter to peers during the passage of the Modern Slavery Bill would be used in any event for those needing to stay more than six months.

An overseas domestic worker who is not persuaded to leave his/her employer by the protection previously in place is unlikely to be persuaded to do so by the provisions of the new rules. The chances of getting work if you can only stay in the UK for a maximum of six months

are slim indeed? And without work, how will you live without falling back into exploitation and abuse, when you have no recourse to public funds?

During the passage of the Modern Slavery Act, the Government's only argument against the proposed amendment was that if workers could change employer without reporting to the authorities, then the abuse would not be identified. But if a worker is obliged to report that they have changed employer to the Secretary of State, who can then chose to investigate further, either by interviewing worker or employer, if she chooses to do so then that argument is removed.

Perpetrators are free to perpetuate abuse, because workers are not persuaded to come forward with the offer only of six months limited protection. Only when they feel safe are workers likely to have the confidence to tell the authorities about what they have suffered. It places heavy demands upon a person in a situation of exploitation, enslavement and extreme poverty to reach sources of help, let alone where they do not speak English and are isolated and alone; let alone when they are undocumented, fear removal and are reluctant to jeopardise such income as they do receive and such status as they have.

Baroness Garden of Frognal heralded these changes at Committee stage of the Modern Slavery Bill in the Lords. She also described existing "safeguards" and process changes [47]

- *All individuals applying to come to the UK on an overseas domestic worker visa must also provide evidence with their application that they have agreed in writing the core terms and conditions of their employment in the UK…*
- *….the Home Office has started a trial, through the Border Force, of handing personally to workers as they come in the form that tells them what their entitlements are. These forms are not just in English… ".*[48]

Baroness Garden of Frognal was unconvinced by her own arguments

- *…. of course, I hear from around the Committee the concerns that these documents will not be adequately and legally kept to…*[49]
- *I agree that it is possible that they* [forms handed out at port] *are snatched away by the employers and put in a passport...*I[50]
- *… The power of the employer and the fact that people support family links back home make it extraordinarily difficult for people to complain about their employment….*[51]

The Home Office Entry Clearance Guidance and Instructions already makes provision for interviews:

> ***WRK2.1.8 Interviews***
> *Where an interview is appropriate, applicants should be interviewed on their own, at least on their first application, to establish that they understand the terms and conditions of the employment and are willing to go to the UK.*[52]

[47] Baroness Garden of Frognal, 10 December 2014, col 1866-1867.
[48] Baroness Garden of Frognal, 10 December 2014, col 1866-1867.
[49] HL Report 10 December 2014 col1866.
[50] *Ibid*. Col 1869.
[51] *Ibid*.

The guidance also makes provision about the minimum wage:

> ***WRK2.1.9 The National Minimum Wage***
> *Domestic workers must be paid at least the NMW unless they are subject to an exemption.*[53]

Signed statements, albeit in a different format, are already required. It is easy for an employer to present a contract of employment that promises the earth for the purposes of immigration control, then pay the domestic work nothing, force him or her to sleep on the floor and work long hours and subject him/her to beatings.

Evidential requirements do not remove the risks of exploitation. It is possible to produce evidence that money has been paid to a domestic worker but demand that money back with menaces.

The specialist charity Kalayaan, whose figures Ministers accept,[54] reports that 65% of the 120 domestic workers on the new visa that they saw between 6 April 2012 and 6 April 2014 did not have their own rooms but shared children's rooms or slept on the floor of communal areas, while 53% worked more than 16 hours a day. Sixty per cent were paid less than £50 a week.[55]

Those who attended the meeting convened by Baroness Cox in parliament at Lords' Committee stage of the Modern Slavery Bill heard overseas domestic workers describe how they did not get documents supposed to tell them their rights or how, when they did and told the employer that the employer had promised to pay them or to give them a day off, they were laughed at by employers who pointed out that there was nothing the worker could do about it.

Amendment 134 New clause after Clause 12 *Permission to work for asylum seekers after six months* in the names of Lord Rosser, Lord Kennedy of Southwark, Lord Alton of Liverpool and Baroness Hamwee

ILPA supports this proposed new clause. It amendment would provide for asylum seekers to be able to work if their claim is not determined within the Home Office target time of six months.

We reproduce below the briefing from Still Human Still Here which we follow with our comments on the debates in the Commons.

> **Briefing from Still Human Still Here[56]:**
>
> Allowing asylum seekers who have been waiting six months for a decision on their cases to work has several benefits:

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[52] https://www.gov.uk/government/publications/overseas-domestic-workers-in-private-households-wrk21/overseas-domestic-workers-in-private-households-wrk21--2#wrk218-interviews
[53] *Ibid*.
[54] See HC Report 4 Nov 2014 : Column 764.
[55] *Ibid*.
[56] Still Human Still Here is a coalition of some 80 organisations which includes nine City Councils the Red Cross, Crisis, the Children's Society, Mind, Citizens Advice Bureau, Doctors of the World, National Aids Trust, and the main agencies working with asylum seekers in the UK. For details, see: www.stillhuman.org.uk.

- It provides asylum seekers with a route out of poverty. More than 3,600 asylum seekers have currently been waiting more than six months for an initial decision on their cases and surviving on just over £5 a day.

- It reduces the burden on the taxpayer as asylum seekers who are able to work will not need to be supported for extended periods and instead can contribute to the economy through increased tax revenues and consumer spending. It also safeguards their health and prevents them from having to resort to irregular work.

- It avoids the negative consequences of prolonged economic exclusion and forced inactivity (e.g. poverty, detrimental impact on mental health and self-esteem, break up of marriages and families, etc.).

- Other EU countries allow asylum seekers to work after nine months and eleven of them grant permission to work after six months or less if a decision has not been made on their asylum application.

- For those asylum seekers who are eventually given permission to stay, avoiding an extended period outside the labour market is key to ensuring their long term integration into UK society and encouraging them to be self-sufficient.

Alleviating destitution amongst asylum seekers

The Government has defended its current policy, which effectively prohibits asylum seekers from working, on the basis that asylum seekers are "provided with support and accommodation while we determine whether they need our protection and until they have exhausted the right of appeal."[57]

While it is true that asylum seekers are supported, it is highly questionable whether the level of support provided is adequate, as asylum seekers receive just over £5 a day to meet their essential living needs of food, clothing, toiletries and transport and to pursue their asylum application (housing and utility bills are paid for separately for those who need it).

At the end of June 2015, more than 3,600 asylum seekers had been waiting more than six months for an initial decision. An asylum seeker spends an average of around 18 months on Section 95 support.[58] Asylum seekers who have to survive solely on this level of support for extended periods of time will suffer a negative impact on their mental and physical health.

If the Government cannot take an initial decision on an application within its own target timeframe of six months, then it should give asylum seekers a route out of poverty and an opportunity to restore their dignity by providing for themselves, rather than leaving them dependent on handouts from the Government.

A cross-party parliamentary inquiry into asylum support for children and young people, which was chaired by Sarah Teather MP and included seven other parliamentarians, noted in January 2013 that "…asylum seeking parents are prevented from working, leaving families dependent on state support. This means parents are left powerless and lose their skills while children are left without positive role models. The government's own research has highlighted that this can lead to high levels of unemployment and under-employment once a family gains refugee status."

[57] Earl Attlee, House of Lords Hansard, Col. 30, 17 March 2014.
[58] House of Lords Hansard, 5 March 2013, Col. 1457

The inquiry based its findings on evidence from over 200 individuals and organisations, including local authorities and safeguarding boards and specifically recommended that asylum seeking parents and young adults should be given permission to work if their claim for asylum has not been concluded in six months.

Benefits for the economy and society

The potential financial savings from allowing asylum seekers to work include reduced asylum support costs and increased tax revenues. In addition, asylum seekers will have increased disposable income which can be spent in the wider economy. There will also be a number of indirect financial savings for statutory and voluntary agencies, including the avoidance of increased physical and mental health problems and the consequent financial costs to the NHS.

More than half of all asylum applicants are provided with protection in the UK, either after the initial decision or on appeal. The process of integration for these people begins when they arrive in the UK, not when the Government recognises them as a refugee and gives them permission to stay. An extended period of exclusion from the labour market can have a long term impact on refugees' ability to find employment.

Conversely, early access to employment increases the chances of smooth economic and social integration by allowing refugees to improve their English, acquire new skills and make new friends and social contacts in the wider community - all of which help to promote community cohesion. The vast majority of asylum seekers want to work and contribute to society and are frustrated at being forced to remain idle and dependent on benefits.[59]

It is also likely that allowing asylum seekers to work would reduce public hostility towards them, as many people are unaware that asylum seekers are effectively prevented from working. Surveys of public attitudes have shown that the majority of people think asylum seekers should be allowed to work: a survey by IPPR in 2005[60] found that 51 per cent of people thought asylum seekers should be allowed to work, with 29 per cent saying they should not. A more recent survey in 2011 also found that more people agreed with the statement that asylum seekers should be allowed to work while their claims are being processed than disagreed with it.[61]

Will permission to work be a pull factor?

The Government has stated that "The purpose of the current policy is to deter economic migration, because people would be able to come here, claim asylum and after a while be able to work. With this policy, we can deter economic migration through the asylum route and therefore properly determine the genuine cases."[62]

However, the Government has provided no evidence to support its claim that allowing asylum seekers who have not received an initial decision after six months permission to work would encourage "abuse of the asylum route by economic migrants".

On the contrary, all the available evidence suggests that permission to work does not act as a pull factor for asylum seekers. This is reflected in Home Office research and was confirmed by a

[59] Doyle L, *"I hate being idle: Wasted skills and enforced dependence among Zimbabwean asylum seekers in the UK,* Refugee Council, 2009.
[60] Lewis, M, *Asylum: Understanding Public Attitudes*, IPPR, 2005.
[61] Question in the British Social Attitudes survey, 45% responded positively (3,000 people surveyed, carried out in 2011).
[62] Earl Attlee, House of Lords Hansard, Col. 32, 17 March 2014

review of the 19 main recipient countries for asylum applications in the OECD in 2011[63] which concluded that policies which relate to the welfare of asylum seekers (e.g. permission to work, support levels and access to healthcare) did not have any significant impact on the number of applications made in destination countries.

Furthermore, eleven other EU countries already allow asylum seekers access to the labour market after six months or less of waiting for a decision on their claims. These countries are Austria, Belgium, Cyprus, Finland, Greece, Italy, Netherlands, Poland, Portugal, Spain and Sweden.[64] All these countries have had these policies in place for many years and none of them have had to change the policy because of any abuse of the asylum route by economic migrants. In fact, the great majority of these countries consistently receive less asylum applications than the UK.

The recast EU Reception Conditions Directive reduced the period when asylum seekers can be excluded from the labour market pending an initial decision on their claim to nine months. However, the UK has not signed up to this Directive, which means it will be one of the only countries in Europe where asylum seekers can only apply for permission to work after waiting for more than one year for an initial decision on their case. In this respect, almost all of the 27 EU states have a more generous policy than the UK.

Furthermore, in practice the UK Government effectively prohibits asylum seekers from working even after one year as they are only allowed to work in highly skilled "shortage occupations". Once again this is not the policy in many other European countries, for example Belgium, Latvia, Norway, Poland, Spain and Sweden all allow asylum seekers to work in any job, including being self-employed, once they are granted permission to work.

The Government's contention that granting permission to work to asylum seekers who have not received a decision after six months will "make it more attractive to seek asylum in the UK for those motivated by economic reasons"[65] is not plausible. Those motivated to come to the UK for economic reasons are unlikely to make an asylum application and bring themselves to the attention of the authorities on the basis that they might be able to apply for permission to work in six months time.

The Government's opposition to granting permission to work after six months is on the grounds that it *might* lead to an increase in unfounded claims, even though it generally accepts that it has no evidence to support this position. Indeed, the Government itself has conceded in responding to a previous amendment to allow asylum seekers permission to work that "it may be broadly true" that "there is little hard evidence that the change you propose (to allow asylum seekers to work after six months) would result in more asylum applications."[66]

Conclusion

Granting permission to work to asylum seekers who have been waiting for an initial decision for more than six months will help to avoid the negative impact on asylum seekers of prolonged forced inactivity and impoverishment and allow them to contribute to the economy. This will

[63] Hatton, T. *Seeking Asylum: Trends and policies in the OECD*, Centre for Economic Policy Research, 2011.
[64] Information taken from the European Commission, SEC(2008)2945 and from a more recent Ad-Hoc Query on access to the labour market for asylum seekers compiled by the European Commission on 14 February 2013.
[65] Letter from Earl Attlee to Lord Roberts, 31 March 2014.
[66] Letter from Earl Attlee to Lord Roberts, 31 March 2014.

deliver financial savings to the Government and the taxpayer as asylum seekers who are working will not need to be supported.

This policy is already in place in many other EU countries and was specifically supported by 132 MPs in the previous parliament as well as the cross-party parliamentary inquiry into asylum support for children and young people (January 2013). There is also broad based support for this policy outside parliament, as reflected in motions on this issue which have been approved by the General Synod of the Church of England, the Greater London Assembly and many City Councils, including Bristol, Bradford, Coventry, Oxford, Kirklees, Leicester, Liverpool, Manchester and Swansea.

ILPA comments

The Minister in Commons Committee defended the Government's decision not to opt in to the recast reception conditions directive requiring member states to grant automatic access to the labour market for asylum seekers after nine months, saying that it considered that the Commission's proposal could undermine the asylum system "by encouraging unfounded claims from those seeking to use the asylum system as a cover for economic migration.[67] He did not address that if the Home Office decided cases within its (already generous) six months target time no permission would arise.

He suggested that persons could manufacture delays by not engaging with the process[68] but this is not the case, as persons can be refused for non-compliance[69].

Mr Blomfield MP pointed out that if the Government met its targets then it would not be granting permission to work even if the amendment were passed[70]. Sir Keir Starmer MP identified that some 3600 cases are currently not decided within the Home Office target time of six months. The Government is working to reduce this number. So the cohort of persons who stand to benefit is small.

The Minister argued that if a person seeking asylum is given the right to work this denies a job to a person with permission to work in the UK, but this is an oversimplification. The person seeking asylum is allowed to compete for the job. They could be competing with, for example, an EU national for a job that British citizens and those settled in the UK do not wish to do. Such jobs are not highly skilled and do not appear on the shortage occupation lists to which persons seeking asylum are currently limited.

It was observed in the Commons' debate that the Minister was unable to point to any evidence in support of his fears that this would be a pull factor.

ILPA welcomes debate not only on the time limit but on the restriction to the shortage occupation lists. Currently persons seeking asylum who wait more than 12 months get permission to work, but are restricted to jobs on the shortage occupation lists. These are jobs they are unlikely to get given that their period of stay in the UK is uncertain. They are more likely to get low-skilled jobs that British citizens and those settled in the UK do not wish to do.

[67] Public Bill Committee Col 461
[68] Ibid.
[69] Ibid.
[70] Col 462.

If they work in those jobs then as well as the benefits to them it reduces the support budget, something the Government is aiming to do.