



## **‘Choice’ and ‘voice’ in modern working practices; an evidence informed response to the Taylor Review**

Dr. Katie Bales, Prof. Alan Bogg and Prof. Tonia Novitz (University of Bristol)

## Background: the context, purpose and approach of the Taylor Review

In July 2017, 'Good Work: The Taylor Review of Modern Working Practices' (the Taylor Review) was published<sup>1</sup>. The review was prompted by growing concerns about seriously exploitative practices in the 'gig economy', and a determination on the part of the Conservative Party to reposition itself as the 'workers' party'. While the specific problems of 'sham' self-employment and exploitation in the 'gig economy' provided the specific political impetus, there are also recognised to be serious medium and long-term challenges faced by the UK labour market in the light of low productivity and wages, long-term disadvantage experienced by particular groups such as female and younger workers, the threat to jobs posed by automation, as well as the challenges of migration. (See the Taylor Review at pp 30-31).

### Methodology of the review:

The Taylor Review follows on from previous 'Commissions' reviewing labour practices in Britain, the most well-known of which was the Royal Commission of 1968 led by Lord Donovan. As a Royal Commission, it was set up to examine the structural difficulties of the UK's collective bargaining system, in the light of public concerns about unofficial strike action, low productivity, and inflation. The 'Donovan Commission Report'<sup>2</sup> preferred a vision of industrial relations, still governed predominantly

The UK labour market faces serious medium and long-term challenges in the light of low productivity and wages, long-term disadvantage experienced by particular groups such as female and younger workers, the threat to jobs posed by automation, as well as the challenges of migration.

by collective bargaining with some legal protections regarding, for example, unfair dismissal. Since 1979, however, an alternative vision was reshaped by subsequent Conservative governments, followed by Tony Blair's 1998 White Paper, Fairness at Work. The Taylor Review continues in this vein. This is unsurprising, given that the lead author, Matthew Taylor, was previously Director of Blair's New Labour No. 10 Policy Unit.

<sup>1</sup> Available at: <https://www.thersa.org/globalassets/pdfs/reports/good-work-taylor-review-into-modern-working-practices.pdf> accessed 25 September 2017 (hereafter the Taylor Review).

<sup>2</sup> Royal Commission on Trade Unions and Employers' Associations 1965 – 1968 Chairman: The Rt Hon. Lord Donovan Report, Presented to Parliament by Command of Her Majesty June 1968 – the Donovan Commission Report (London: HMSO, 1968).



In many ways, the scale of the challenges examined by the Taylor Review dwarfs those being examined by Donovan. This has not been reflected in the public resources devoted to the Taylor Review. The Donovan Commission was composed of experts drawn from across the political spectrum, and it included a diverse representation, including leading trade unionists and academic experts. The depth of research in the final Donovan Report, accompanied by separate independent research studies and transcripts of public hearings, has not been replicated in the Taylor Review. The Donovan Commission heard evidence, received extensive submissions and commissioned independent research over a three year period, which was carefully documented and remains on public record. The Taylor Review held public meetings and invited online submissions over a period of less than a year but these are not readily accessible other than extracts from them appearing in odd parts of the Report.

## Neglect of international labour standards and fundamental human rights

Fundamental human rights seemingly have not influenced the content of the Report.

The Taylor Review makes reference to 'good work' but neglects the comprehensive standards developed by the United Nation's International Labour Organisation's (ILO), of which the UK is a member. In particular, there is no mention of the significance of the ILO 'decent work agenda' set out in the 2008 Declaration on the Social Dimensions of Globalisation. The four pillars of 'decent work' elaborated there encompass: standards and rights at work; creation and enterprise development; social protection; and social dialogue. The ILO is also currently engaged in a project devoted to 'The Future of Work' (in response to global trends in precarity and exploitation) to which the Taylor Review does not refer.

In Britain, rights at work are also protected under the Council of Europe's European Convention on Human Rights and the European Social Charter both of which remain binding after British Exit of the European Union (Brexit).

Surprisingly, the work of the Equality and Human Rights Commission is only mentioned briefly on two occasions towards the tail end of the Taylor Review (at pp. 94 and 107).

**The Taylor Review overlooks international (or European) understandings of 'good' or 'decent work', preferring 'the British way', in which the current labour market works.**

## The Taylor Review's treatment of 'choice' and 'voice'

Overall, the Taylor Review overlooks international (or European) understandings of 'good' or 'decent work', preferring 'the British way', in which the current labour market works (p.7).

The Review refers to the CBI's enthusiasm for rating of the UK 'as having the 5th most efficient labour market in the World Economic Forum's Global Competitiveness Report 2016-17, behind only Switzerland, Singapore, Hong Kong and the United States' (at p.17).

The scope for 'job-creation' generated by current forms of 'flexibility' is seen as beneficial, even if these jobs are often in precarious work or self-employment. A picture is drawn of those in 'jobs' desiring and exercising individual 'choices', which legislation ought to facilitate rather than obstruct, to the extent that this is also good for business (p.33).

The role of collective choice and action is overlooked. Instead, the Taylor Review proposes limited legal reforms and is extremely cautious about imposition of restrictions that might be bad for business. It does so without providing any empirical support for its assumption that more intervention would be unable to promote good work effectively.

The Review argues that individuals should be given greater choice (p. 15) including the option to make 'trade-offs', between the more secure employment status of 'employee' or the lesser option of being a 'dependent contractor' (to replace the term 'worker' as indicated at p. 35 et seq). The person offering their labour could also choose the status of 'independent contractor' (see chapter 10, discussed further below).

In relation to women, the review argues that it is in the interests of business to treat pregnant workers well, and that employers can themselves be expected to appreciate this so that there is no need for legislative intervention, even though they do not act on this basis at present (at pp. 95 – 97). In this respect, it is the choice of employers that is given priority.

Trade unions are not treated as necessary to the collective voice of workers, the focus being on information and consultation as opposed to collective bargaining.

## Exploring the reforms - responses to the proposals:

Stakeholders identified the insecurity of their income. In this policy brief, we consider three key facets of the Taylor Review:

- the treatment of employment status, which can be linked to the 'choices' available to those engaged in work;
- the flexibility presented by zero-hours contracts; and
- the role envisaged for collective 'voice' in the contemporary workplace.

### a) Employment status

Employment status is one of the central areas of reform identified by the Taylor Review. An 'employee' has superior rights, including important access to protection from dismissal at common law and under statute. All employees are also 'workers' who can claim statutory rights such as, for example, the national minimum wage and working time rights. However, there are some workers – described under legislation as limb (b) workers – who, although not 'employees' as strictly defined, are also given access to such entitlements under legislation.

The Taylor Review considers the current status framework 'difficult to understand' and confusing for all those in the workplace. Those working in atypical ways (such as Uber drivers who use app technology to engage in the labour market) are seen as particularly disadvantaged by the current system which fails to address the needs of people working outside of the traditional employment law model (p.26). The Taylor Review attempts to address this by putting forwards numerous recommendations.

This section responds to the recommendations relating to the codification of status in legislation and changes to worker status. These proposals form the primary focus of the Taylor Review's chapter 5 on status.

### i) Codifying employment status tests in legislation

The Taylor Review emphasises that determination of employment status should be clear and simple, providing employers and workers with a degree of certainty with regards to their rights and obligations, an aim which few would disagree with. It suggests that the best way of achieving this is to include definitive employment tests and an outline of their principles in legislation.

Defining employment status tests within legislation and providing a key outline of their principles would likely limit the scope of the courts in dealing with novel situations which do not fit a tick box exercise.

#### Our response:

*Although it is desirable that all those at work understand the scope of the rights that they can claim, the problem is not so easily solved by a simple test. The tests developed through the common law (and applied to statutory status) reflect the fact that **employment relationships are often complex, circumstantial and subject to continuous development in line with economic demand**. The complexity of the employment relationship is reflected in the evolving case law and status tests which are modified to accommodate new and complex relationships, such as those in the case of *Pimlico Plumbers v Smith*<sup>3</sup> and *Aslam v Uber BV*<sup>4</sup>.*

*Defining employment status tests<sup>5</sup> within legislation and providing a key outline of their principles would likely limit the scope of the courts in dealing with novel situations which do not fit a tick box exercise. It might also provide signposts for employers looking to circumvent the legislation through the use of contractual boilerplate in standard form contracts. Given the complexity of employment relations, drafting the legislation would also be an extremely difficult task, even for the best of Parliamentary draftsmen.*

3 [2017] EWCA Civ 51, Court of Appeal (CA).

4 [2017] IRLR 4, Employment Tribunal (ET).

5 Such as the current common law tests of control, mutuality of obligation and personal service.

### **i) Codifying employment status tests in legislation - Our response (cont.)**

Amended legislation would remain subject to interpretation by the courts. It is therefore unclear why legislative change is regarded as necessary, rather than guidance for employers and workers using the established case law. Given the potential uncertainty this legislation could cause, and with such uncertainty more litigation, this change seems highly impractical and likely to operate to the detriment of workers.

### **ii) Changes to worker status**

Perhaps the most radical proposals put forward by the Taylor Review regarding status are those on worker status (as set out in s230(3) Employment Rights Act 1996), including: changing the title of 'limb b workers' (i.e. those workers that are not employees) to that of 'dependent contractor'; removing the requirement of personal service from the worker status test; and placing greater emphasis on control in determining worker status.

#### **Proposal (1): Changing the title of 'worker' to that of 'dependent contractor'**

The justification for changing the title of limb b workers to 'dependent contractors' rests upon distinguishing between those workers who enjoy both worker and employee status and those that are simply workers – limb b workers (p.35). The Report notes that this distinction is confusing.

#### **Our response:**

Amending the term 'worker', which draws on common law, as well as extensive legislation and guidance through case law, would create unnecessary complication and confusion.

The term 'dependent contractor' denotes a degree of subordination which, at present, is not a necessary requirement for categorisation as a worker – see below<sup>6</sup>.

#### **Proposal (2): Removing personal service as a status test for workers**

The Review also proposes removing the requirement of personal service from the status test of worker on grounds that unscrupulous employers often utilise substitution clauses to classify workers as independent contractors to avoid the heightened accountability attached to worker status.

Taylor writes that at present 'an individual can have almost every aspect of their work controlled by a business, from rates of pay to disciplinary action and

still not be considered a worker if a genuine right to substitution exists'.

#### **Our response:**

The courts are alert to this issue and will only allow a substitution clause to defeat the requirement of personal service if the power is (i) genuine (*Autoclenz*)<sup>7</sup> and (ii) unrestricted (*Pimlico Plumbers v Smith*)<sup>8</sup>, meaning that the power to send substitutes should be unfettered. As a result, this requirement is not usually problematic for those seeking recognition as workers.

We regard removing personal service as unnecessary, yet our central concern rests with the suggestion that personal service should be replaced with a control test.

6 Cf. the controversy generated by *Jivraj v Hashwani* [2011] UKSC 40 which imported 'subordination' into the worker test under the equality legislation. See Mark Freedland and Nicola Kountouris, 'Employment Equality and Personal Work Relations—A Critique of *Jivraj v Hashwani*' (2012) 41(1) ILJ 56.

7 *Autoclenz Ltd v Belcher* [2011] ICR 1157, SC. See, for discussion, Alan L. Bogg, 'Sham Self-Employment in the Supreme Court' (2012) 41(3) ILJ 328.

8 See n.3 above.



© Laura Elizabeth Pohl, CC BY-SA 2.0, <https://commons.wikimedia.org/w/index.php?curid=14124920>

**Proposal (3): Importing the control test in determining worker status**

In replacement of the personal service test for worker status, the Taylor Review proposes greater emphasis on control within the working relationship.

**Our response:**

Control is already considered as part of the worker test (in deciding whether the individual works for a client or customer), yet while subordination to the employers’ control is an aid to distinguishing between workers and independent contractors, it is not a necessary element<sup>9</sup>. The case law thereby conflicts with the Review’s suggestion that emphasising control would not require ‘a significant departure from the approach currently taken by the courts’ (p.36).

Aside from the potential confusion that could be caused to workers and employers, adopting the control test as determinative of worker status would have numerous disadvantages:

- It would exclude those in shareholding companies who at present can effectively be one’s own boss and still be a ‘worker’ (*Bates van Winkelhof v Clyde & Co*)<sup>10</sup>;
- It would complicate the situation for individuals on zero-hour contracts who can accept or reject work at their choosing, which, following *Windle v Secretary of State for Justice*<sup>11</sup>, is a relevant factor when assessing whether there is subordination;

- It would cause complications for agency workers who are often directly controlled by the end user rather than the agency (*Bunce v Postworth Limited Trading as Skyblue*)<sup>12</sup>;
- It could cause issues for professionals who are granted a degree of independence in performing their duties. See the considerations taken into account by the Court of Appeal in *White v Troutbeck*<sup>13</sup>.
- It could destabilise the boundary between ‘employee’ and ‘worker’, given that a sufficient degree of control is identified as a necessary element of employee status

**b) Flexibility: zero hours and agency work**

Chapter 6 of the Taylor Review addresses ‘one-sided flexibility’, exemplified by those employed on zero-hours contracts (ZHCs), short-hours or agency contracts (p 43).

In March 2017, the Labour Force Survey reported that women made up the majority of those on ZHCs, while younger workers aged 16 to 24 are also over-represented<sup>14</sup>. This suggests that other constraints on their time or even forms of social stigma affect their ‘choice’ to take up this kind of work.

9 In *Bates van Winkelhof v Clyde & Co* [2014] ICR 730 Lady Hale explicitly rejects using the ‘mystery ingredient of “subordination”’ as definitive of worker status, noting there is not a ‘single key’ to unlocking the statute (para 39).

10 Ibid.

11 [2016] EWCA Civ 459.

12 [2005] EWCA Civ 490.

13 [2013] EWCA Civ 1171.

14 See <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/contractsthat-donotguaranteeaminimumnumberofhours/mar2017> accessed 25 September 2017.



Photo © Nick Saltmarsh (https://creativecommons.org/licenses/by-sa/2.0)

**b) Flexibility: Zero hours contracts and agency work (cont.)**

ZHCs are part of a wider picture in which workers do not have fixed, guaranteed hours. The Office of National Statistics (ONS), using a definition of ZHCs as meaning contracts which permit workers to be offered no hours of work, estimates there are between 1.7 million and 900,000 workers employed on ZHCs, depending on whether employers or households are surveyed<sup>15</sup>. Both of these figures are almost certainly under-estimates<sup>16</sup>.

There is also a problem of minimal hours contracts. For example, the recent enquiry into Sports Direct revealed employees who were only guaranteed 336 hours a year (amounting to less than nine weeks' work based on a 40-hour week)<sup>17</sup>, and Santander recently offered contracts in which only 12 hours were guaranteed annually<sup>18</sup>.

Moreover, it is perfectly possible for workers to be engaged under contracts in which the employer guarantees no work in a particular week but the worker is not entitled to refuse it if offered<sup>19</sup>.

According to the Taylor Review, the issue is that these ZHC workers often have to be available for work without any work being guaranteed, making it hard for them to manage financial obligations such as mortgages. To redress this unfairness, the Report makes five proposals, examined below.

**Proposal (1)**

The first proposal is that the Low Pay Commission should 'consider' the impact of awarding a higher

NMW rate for non-guaranteed hours (p.44). The aim is to 'nudge' employers into guaranteeing more hours, achieving a degree of fairness in one-sided flexibility.

**Our response:**

*The extent to which this proposal results in higher guaranteed hours, and hence improves workers' ability to obtain mortgages and plan their financial affairs, is currently unknown and requires research.*

*Nevertheless, such a measure will only incentivise those employers who pay at the level of the national minimum wage. This limited reach is inconsistent with the proposal's logic: fairness requires all workers should receive enhanced pay for non-guaranteed hours<sup>20</sup>.*

**Proposal (2)**

A well-known problem for workers on ZHCs is continuity of employment, necessary to accrue the rights to unfair dismissal or a redundancy payment. Typically, workers on ZHCs are employees while working<sup>21</sup> but any week when no work is done breaks continuity, unless one of the statutory 'bridges' in section 212 of the Employment Rights Act 1996 (ERA) applies.

15 See ONS, Contracts that Do Not Guarantee a Minimum Number of Hours: May 2017. Curiously, the Report relies only on the Labour Force Survey Data, based on household surveys, in its estimate of 900,000 workers on ZHCs and ignores the fuller data in the ONS surveys: see Report p 25 and footnote 22.

16 For example, the data based on surveying businesses excludes contracts where no work was provided in the fortnight of the survey, and workers may not realise their contract allows them to be provided with no hours: see Douglas Pyper and Jennifer Brown, Zero-Hours Contracts (House of Commons Briefing Paper No. 06553).

17 See BEIS Committee Report, Working Practices at Sports Direct (22 July 2016), at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/inquiries/parliament-2015/working-practices-at-sports-direct-inquiry-16-17/> accessed 25 September 2017.

18 See <http://www.independent.co.uk/news/business/news/santander-one-hour-month-contracts-staff-zero-hours-plus-a7651921.html>

19 See BEIS Committee Report, n.17 above, at paras 13-14. NB. This contradicts the Taylor Review's assertion that 'in theory' individuals on ZHCs have the right to turn work down (p 43).

20 This is recognised in Article 4(2) of the European Social Charter of 1961, to which the UK is a signatory, requiring increased remuneration for overtime work (which is what, in effect, are non-guaranteed hours).

21 Though cf. Windle n.11 above.



Mari Buckley (https://creativecommons.org/licenses/by-sa/2.0), via Wikimedia Commons

The Report appears to make two proposals: (i) to increase the gap which breaks continuity from one week to a month and (ii) to consider widening the circumstances in which the statutory bridges apply.<sup>22</sup>

**Our response:**

*Increasing the minimum break period to one-month is superficially attractive, but it will create an incentive on employers to engineer gaps of more than this length, thus exacerbating precisely the problem of unreliable, low income which the Report highlights. Changes to the statutory ‘bridges’ are equally vulnerable to such strategies.*

**Our recommendations:**

- The law should be amended to remove or greatly reduce qualifying periods (currently two years); or
- Any week in which a person works qua employee counts towards continuity, and periods of non-employment do not break continuity at all<sup>23</sup>.

*A statutory provision applying ‘umbrella contracts’ should also be introduced to offer genuine employment protection<sup>24</sup>. This will avoid the ongoing problem that, if the contract states that the employee is casual as required and this is not a ‘sham’, statutory continuity will not help; the employer can simply refuse to rehire at any time up to acquisition of the continuity requirements, for example, relating to unfair dismissal or redundancy<sup>25</sup>.*

**Proposal (3)**

The third proposal concerns pay transparency of agency workers (at p.46). This issue is wider, because not just agency workers have problems understanding their pay. It is best dealt with by conferring a right on all workers to a written statement from day 1, including full details of pay, as proposed in chapter 5 of the Report.

**Proposal (4)**

The fourth set of proposals relate to the vexed issue of holidays and holiday pay (p.47). The Report identifies the problem of agency and ZHC workers not being aware of their entitlements to paid annual leave or being afraid to take it and suggests that awareness of the right should be increased<sup>26</sup>.

Holiday pay under the Working Time Regulations is meant to equate to pay while working, to ensure no disincentive to take annual leave<sup>27</sup>. To address this, the Report proposes that the pay reference period for calculating holiday pay be changed from 12 weeks

to a year to 52 weeks. It also suggests that workers should have the ‘choice’ of rolled up holiday pay, namely being paid holiday pay at the same time as ordinary wages, so that when annual leave is taken the worker does not get paid at all.

**Our response:**

*First, rather than increasing workers’ awareness, increased state-backed enforcement and penalties for employers should be introduced.*

*Second, the European Court of Justice says national courts should base the calculation of holiday pay on an average over a representative reference period. A 52-week period is flawed in that it does not take account that work is actually done over 46.4 weeks, after taking account of 5.6 weeks’ annual leave. More fundamentally, the proposal risks workers receiving less in respect of annual leave than they would earn if working during the relevant week.*

22 The Report confuses (a) breaks in statutory employment with (b) the ‘bridges’, which are limited to 26 weeks and not one-month gaps as the Report appears wrongly to assume (pp 45-6).

23 See Zoe Adams and Simon Deakin, Re-regulating Zero Hours Contracts (Liverpool: IER, 2014), p. 33.

24 Once again, this is a solution already envisaged by the courts: Pulse Healthcare Ltd v Carewatch Care Services Ltd & 6 Others UKCAT/0123/12/BA.

25 Cf. O’Kelly v Trusthouse Forte plc [1983] ICR 728; and Carmichael v National Power [1999] ICR 1226, HL. 26 The Director of Labour Market Enforcement is consulting on this: see Informing Labour Market Strategy 2018-19: Summary of Issues.

27 See Lock v British Gas [2014] ICR 813.

Photo © Betty Longbottom (https://creativecommons.org/licenses/by-sa/2.0/)





**Zero hours and agency work: Proposal (4)****Our response (cont.):**

Suppose, for example, a ZHC worker takes holiday during a period of high demand, when if working s/he would be given many supplementary hours. The proposal thus risks exacerbating the unfairness in the relationship, as well as breaching EU law.

Third, rolled up holiday pay is unlawful under EU law and a worker who 'chooses' this option receives no real supplement to wages for holidays and has an incentive not to take annual leave<sup>28</sup>. These problems are especially acute for workers in precarious positions, such as those on ZHCs.

**Proposal (5)**

After 12 months' working for an undertaking, agency workers should have a right to 'request' a contract with the undertaking and workers on ZHCs should have a right to 'request' a contract guaranteeing them the hours they have in fact worked. The employer shall have the duty to consider the request 'in a reasonable manner' as envisaged by the Taylor Review (at p. 48).

**Our response:**

The right to request flexible working<sup>29</sup> has minimal effect in practice because of its lack of teeth. Rights to 'request' are only meaningful if the grounds upon which they can be refused are tightly circumscribed, for example, that the request can only be refused if the employer can show it cannot meet its business needs by such a contract<sup>30</sup>. Moreover, to be made meaningful, those hired through agency work and on zero hours contracts would have to be adequately protected from dismissal for making such a request, which by the very nature of their contracts is unlikely.

**c) Treatment of collective 'voice'****Proposal (1)**

The Taylor Review identifies 'voice' as one of the constituent elements of 'quality' work. In chapter 3, this is defined as 'consultative participation & collective representation' which includes, inter alia, 'direct participation..., consultative committees-works councils, union presence, union decision-making involvement' (p. 13). The discussion and specific proposals on voice are then set out in chapter 7 on 'Responsible Business'.

**Our response:**

The Report should draw upon a wider evidence base:

i) Fundamental human rights in international law are binding on the United Kingdom in respect of its policies and practices on worker voice. These include binding instruments under the framework of the International Labour Organisation, the European Social Charter and the European Convention on Human Rights. The implications of these should be referenced and analysed in a policy document such as the Taylor Review.

ii) Freedom of association, collective bargaining, and the right to strike are fundamental social rights, binding in international law. Although the Report refers to trade union representation through collective bargaining as a form of voice (p. 52), there is a 'representation gap' between those who would like union representation and for whom union representation is practically unavailable. The Review should therefore include specific proposals for enhancing legal support for collective bargaining.

iii) Participation in decision-making can be meaningful or nugatory, depending upon the design of participatory processes and the quality of worker representation<sup>31</sup>. The Report should elaborate on how 'voice' and the depth of worker participation might be measured.

**The right to request flexible working has minimal effect in practice because of its lack of teeth. Rights to 'request' are only meaningful if the grounds upon which they can be refused are tightly circumscribed.**

<sup>28</sup> See *Robinson-Steele v RD Retail Services* [2006] ICR 932.

<sup>29</sup> See s.80F ERA 1996.

<sup>30</sup> See the proposals of the Labour Party, summarised in Pyper and Brown, n.25 above, at p. 22.

<sup>31</sup> For an introduction to the significant literature on dimensions of 'voice', see Alan Bogg and Tonia Novitz, 'Investigating "Voice" at Work' (2012) 33 *Comparative Labor Law and Policy Journal* 324.

iv) *There is extensive comparative material on the implementation of ‘voice’, which points to a symbiotic relationship between union structures and works councils in well-functioning systems, such as the German co-determination system<sup>32</sup>. The focus on ‘the British way’ should be widened so that policies are appropriately informed.*

#### **Proposal (2):**

Chapter 7 of the Taylor Review proposes to enhance both the operation of the information and consultation mechanism in the Information and Consultation of Employees Regulations 2004 (ICER) (at pp 51-52). These Regulations specify the ‘trigger’ requirements under ICER that are necessary for ‘employees’ to initiate the negotiation process for an information and consultation procedure in undertakings of 50 or more employees (pp 52 – 53). That is, that at least 10% of employees (and a minimum of 15) are required to initiate the process (though the process can also be triggered by management). The Taylor Review proposes reducing the threshold to 2% of the workforce, and for the number to include ‘workers’ in its calculation. It claims that the low penetration of ICER is ‘a result’ of these thresholds, this being a view taken by some academics back in 2005 before the financial crisis and further reduction of trade union representation<sup>33</sup>.

#### **Our response:**

*The Taylor Review provides no contemporary supporting evidence for this reform<sup>34</sup>, although we acknowledge that it is a valuable first step in improving ICER. Although the empirical evidence on the operation of ICER is not extensive, which may in part be attributable to its limited practical influence on many workplaces, a more plausible explanation for the failure to trigger ICER is a lack of knowledge in the workforce about the existence of the legal procedures, especially in non-unionised workplaces. This problem of informational asymmetry will not be addressed by modifications of the thresholds.*

#### **Our recommendations are to:**

- *focus proposals on enhancing transparency, for example placing the employer under a legal obligation to inform its workforce of the ICER procedure on a regular basis;*
- *reduce the ‘employer size’ threshold of ‘50 employees’ threshold to ‘21 worker threshold’ – one that currently exists under the legal machinery for union recognition; and*
- *either, give independent trade unions a freestanding right to ‘pull’ the ICER trigger on behalf of the workforce, as under the German codetermination system<sup>35</sup>; or confer preferential rights of access for unions with a specific level of support in the workplace<sup>36</sup>.*

**The focus on ‘the British way’ should be widened so that policies are appropriately informed. Extensive comparative material points to a symbiotic relationship between union structures and works councils in well-functioning systems.**

#### **Proposal (3):**

The Taylor Review contains proposals for ‘sectoral’ strategies to address low pay and poor working conditions (p. 108), including ‘sector-specific codes of practice’.

#### **Our response:**

*We support the proposal to take a sectoral approach to low pay and poor working conditions, but would go further than instituting ‘codes of conduct’, so as to require:*

- *sectoral collective agreements and wages councils with a statutory underpinning; and*
- *an overhaul of UK strike law, in particular, the ban on secondary industrial action due to its being in contravention of international law.*

32 Wolfgang Streeck, ‘Works Councils in Western Europe: From Consultation to Participation’, in Joel Rogers and Wolfgang Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (1995) 316

33 K.D. Ewing and G.M. Truter, ‘The Information and Consultation of Employees Regulations: Voluntarism’s Bitter Legacy’ (2005) 68 *Modern Law Review* 626.

34 Although there is an emerging research agenda in this area, see, e.g., Mark Hall et al, ‘Trade Union Approaches towards the ICE Regulations: Defensive Realism or Missed Opportunity?’ (2015) 53 *British Journal of Industrial Relations* 350.

35 See Bernd Waas, ‘System of Employee Representation at the Enterprise: Germany’ in Roger Blanpain et al, *System of Employee Representation at The Enterprise* (2012) 81 *Bulletin of Comparative Labour Relations*.

36 See P.L. Davies and Claire Kilpatrick, ‘UK Worker Representation After Single Channel’ (2004) 33 *ILJ* 121; Joel Rogers and Wolfgang Streeck, ‘The Study of Works Councils: Concepts and Problems’, in Joel Rogers and Wolfgang Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (1995) 6

## CONCLUSION

As we have sought to demonstrate, Taylor's Report makes highly problematic recommendations, which fail to tackle emergent, sometimes dangerous, British business practices.

The Taylor Review purports to offer choices for workers in a variety of ways, but only ways which do not have a negative impact on business. It is unlikely to give genuine opportunity to those at work to improve their situation. The further legislative regulation of employment status is likely to create confusion rather than greater certainty at work, while the regulation envisaged for flexible working is timid and impractical. Ultimately, employment promotion is emphasized at the expense of enforcement of labour rights, access to fair wages, job security and other basic entitlements. Any new legislation responding to the gig economy needs to recognise and address the constraints on the choices of those working within this new business model, so as to offer greater protections for example from irregular and long hours or assist workers who are pregnant or have other family responsibilities. This is not envisaged.

Under Taylor, scope for workers to participate in workplace decision making, and to voice opposition to unfair working practices is limited to technical changes to ICER, rather than fundamental reforms which would comply with international human rights or promoting genuine social dialogue in line with ILO norms. This would need to begin with the immediate repeal of the Trade Union Act 2016 and open opportunities for genuine sectoral regulation through collective bargaining.

The Taylor Review could have provided rigorous evidence-based policy reasoning to inform a wider deliberative conversation about the determination of decent work. Unfortunately, this opportunity was not taken. Instead, this document is methodologically unsound: its proposals are often based upon simplistic understandings of the relevant law and most of the discussion is detached from any consideration of the relevant academic literature on the regulation of work, international labour standards or fundamental human rights protections.



Photo © Jonathan Billinger (<https://creativecommons.org/licenses/by-sa/2.0/>)



## Acknowledgements:

We would like to thank our two reviewers for their extremely helpful comments on a previous draft of this report, as well as numerous colleagues in the School of Law at the University of Bristol.

## Contact details:

Dr. Katie Bales, Lecturer in Law, University of Bristol  
katie.bales@bristol.ac.uk, +44 (0) 117 33 15200,  
<http://www.bristol.ac.uk/law/people/katie-l-bales/index.html>

Prof. Tonia Novitz, Professor of Labour Law, University of Bristol,  
tonia.novitz@bristol.ac.uk, +44 (0) 117 954 5351,  
<http://www.bristol.ac.uk/law/people/tonia-novitz/index.html>

Prof. Alan Bogg, Professor in Law, University of Bristol,  
alan.bogg@bristol.ac.uk, <http://www.bristol.ac.uk/law/people/alan-l-bogg/overview.html>

## PolicyBristol: influencing policy through world class research

PolicyBristol aims to enhance the influence and impact of research from across the University of Bristol on policy and practice at the local, national and international level.