**From Mini to Maxi Jobs? Low Pay, ‘Progression’, and the Duty to Work (Harder)**

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**ABSTRACT**

The scale of low pay and in-work poverty affecting the bottom three deciles of the labour market highlights the weaknesses in the two main mechanisms for assisting the low-paid: the statutory minimum wage provided for by the National Minimum Wage Act 1998 and State in-work benefits, particularly Universal Credit (UC) as it operates under the Welfare Reform Act 2012 and Universal Credit Regulations 2013. Both mechanisms are failing badly. The paper argues for new approaches. On the Labour side of what may be called the Labour Law-Social Security Law interface these include reconstruction of the national minimum wage scheme in the 1998 Act so that there are two minimum wage floors: a primary floor based on the current national scheme; and a higher, secondary floor at sectoral level. Sectoral wage-setting, informed by support from a Low Pay Commission with an extended remit, could in time pave the way to wider-ranging, regulated sectoral collective bargaining and systems which align more closely and efficiently to what employers can afford, and relieve the growing fiscal pressures on in-work social security. On the Social Security side, remedial work on UC is urgently needed, particularly on the work allowances which set the earnings thresholds at which in-work State support starts to be withdrawn. If mandatory ‘progression’ requirements under the In-Work Progression scheme IWP are to continue - which is likely given the government’s concern that, without this, workers in low hours, low paid mini jobs will opt to stay parked in such highly subsidised work - then exemptions and protections need to be strengthened and put on a statutory footing (particularly for workers with family responsibilities). Introducing what would, in effect, be a ‘right not to work’ in prescribed cases - typically when requirements impact disproportionately on workers and their family members - would go some way to establishing the necessary safeguards. Clearly, both low pay mechanisms face a crisis of growing proportions: a crisis of coverage as dependence grows and newer groups look to the State for support; a fiscal crisis as cuts to support impact on its effectiveness; and a political crisis as support for UC and the wider low pay regime erodes.

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**1. INTRODUCTION**

Despite their lack of integration and co-ordination[[1]](#footnote-1) the Labour Law and Social Security Lawregimeshave been developing on parallel and complementary tracks since at least the Industrial Revolution. In doing so, the State has become both a regulator of the wage-work bargain and a substantial purveyor of the in-work ‘welfare’ that supports it. Nowhere is that complementarity clearer than in the way that measures like minimum wage-setting, equality interventions, and collective bargaining provide an earnings floor on which income from the Social Security side must then build. Between them, wages and benefits deliver the two most valuable sources of income within an overall wage-welfare ‘mosaic’[[2]](#footnote-2) for the estimated 20-25% of the workforce classed as ‘low paid’.[[3]](#footnote-3) As discussed in the next section, a growing number of low earning ‘self-employed’ labour participants must be added to that cohort, taking the figure closer to 30 per cent. The employment contract has facilitated both legal systems’ development and inter-action. In particular, it has been instrumental in allocating legal responsibility for wages, and maintaining earnings in periods of work interruptions, to employers; but also in channelling a wider range of risks and support systems through the workforce, social insurance schemes, and public welfare services.[[4]](#footnote-4)

The minimum wage scheme suffers from serious limitations as considered in Sections 2, 3. The primary one is that it secures barely more than a subsistence wage. The problem is exacerbated in the case of part-time, casual, and intermittently-paid employment when earnings fall below subsistence level so that even more State support is needed to make such work ‘pay’. In the absence of effective redistributive mechanisms on the Labour side capable of taking pay rates to a higher level, the ‘minimum wage’ has become a ‘going rate’ or ‘ceiling’ for many workers - particularly in the low pay sectors. On the Social Security side the government’s flagship Universal Credit (UC) scheme, by extending in-work support to low hours jobs, has been seen by the Institute of Fiscal Studies, the Resolution Foundation, and the Commons Select Committee on Work and Pensions as a factor that is contributing to the proliferation of low hours, low-paid, and highly subsidised ‘mini jobs’. At the same time low pay has been aggravated by freezes in the value of in-work support (Sections 4, 5).

The Labour Law and Social Security Law regimes share features that are relevant to hours, earnings, and progression. They both deploy discipline to manage participants’ behaviour throughout the work cycle.[[5]](#footnote-5) Labour Law confers on employers a ‘right to manage’ and to secure compliance with requirements to work overtime and additional hours, and the right to expect co-operation with workplace change.[[6]](#footnote-6) Contractual power to do this can now readily be reserved to the employer.[[7]](#footnote-7) Other approaches to signing up workforces to new variants on workplace flexibility are currently very much in vogue in low pay sectors like Retail. A significant example, which links to ‘progression’ themes explored later in Section 5, os the commitment by ASDA to pay its staff higher rates and provide better opportunities to gain experience in different, more varied work (and generally improve their earnings and career progression) in return for agreeing to flexible work and team rostering arrangements.[[8]](#footnote-8) Such changes also enable organisations to *reduce* hours: something facilitated by the income replacement role of the in-work social security system.[[9]](#footnote-9)

On the Social Security Law side, discipline has played a central role in regulating labour market participation, primarily by withholding support to secure take-up of employment. This feature has a long provenance, and has played a central role in shaping the ‘duty to work’ since the Poor Law.[[10]](#footnote-10) A number of factors have influenced the form which that duty takes, particularly since the end of post-World War 2 ‘full employment’ and demise of insurance-based benefits, the return of ‘active’ labour market approaches, and a consequential intensification of benefits conditionality and sanctioning. The period since the 1980s has also seen the expansion of part-time, temporary, and casual work paid at below-subsistence level wages, necessitating a return to wage subsidisation through means-tested benefits and tax credits in order to make such work viable.[[11]](#footnote-11)

Expectations that unemployed claimants should take up available work opportunities or training have featured strongly since the 1990s and New Labour’s *New Deal* programmes and *New Welfare Contract*[[12]](#footnote-12) and remain an integral part of current schemes like the Work and Health Programme.[[13]](#footnote-13) Reciprocity for support and the government’s commitment to ‘make work pay’ remains a central feature of the current regime.[[14]](#footnote-14) As important is an evolving duty on recipients of the State’s support to *maintain* work after it has been acquired – aspects of the duty to work which are reflected in benefits sanctioning under measures like ‘industrial misconduct’[[15]](#footnote-15) and ‘voluntarily leaving’ rules.[[16]](#footnote-16) Since then it has been but a short step to target workers receiving State support who cease paid work or *lose pay* ‘for no good reason’[[17]](#footnote-17), characterising them as a burden on the community.[[18]](#footnote-18)

By far the most controversial and wide-ranging extension to the duty to work has been introduced by the government’s in-work progression (IWP) scheme, and which is directed at workers in full or part-time low-paid employment. These groups are expected to take on *additional* work to raise their level of earnings to a ‘Conditionality Earnings Threshold’ (CET)[[19]](#footnote-19) which normally equates to a 35-hour working week at National Living Wage (NLW).[[20]](#footnote-20)

At the system’s heart is what in 2016 the (then) Employment Minister, Priti Patel MP, described as a ‘three-way relationship’ between employers, DWP work coaches, and workers.[[21]](#footnote-21) Whilst information is exchanged between employers and social security agencies in other areas of the system[[22]](#footnote-22), what is different about the IWP arrangements is the extent of the close working expected between employers, their workforce on UC, and DWP officials.

As considered in Section 5, the IWP scheme is an entirely novel variant on the duty to work. A duty to work longer and harder.

In the rest of this paper the focus of the paper will be as follows:

*Section 2*: Wage-welfare interactions

*Section 3*: The minimum wage ‘floor’

*Section 4*: Universal Credit

*Section 5*: In-work progression

*Section 6*: Towards a reformed regime?

Section 7 concludes.

**2. WAGE-WELFARE INTERACTIONS**

In a social security system dominated by means-tested benefits the complex inter-action of wages and benefits is not unlike an earnings and income see-saw. As wages go *up*, State support goes *down*, and vice versa. For groups with variable hours, or no set hours (as with zero hours, on call contracts, and other variants), and therefore variable earnings, the experience can be a difficult one. This is in spite of the re-design of UC to support flexible work conditions and improve the system’s ‘responsiveness’ to employment changes. This is particularly evident when support decisions are re-adjudicated or otherwise delayed. IT systems designed to support re-assessment more quickly, and even in real time, can in theory play an important role in helping to close the earnings and other gaps between ‘standard’ work conditions and those of ‘non-standard’ workers. In practice, however, variable working hours remain highly problematic.[[23]](#footnote-23) For low paid employees on means-tested benefits like tax credits and UC the employment cycle may be punctuated by one-off events like an annual rise in the NLW or a successful sex equality claim: but these do little to improve the employee’s overall position. This can be seen with successful equal pay claims assisted by the sex equality clauses in the Equality Act 2010. The wage rise will simply trigger a recalculation of the claimant’s benefits, with a higher net wage informing their re-assessment. It will largely be a Pyric victory as a wage rise will generally be off-set by a reduction in their social security income.[[24]](#footnote-24) If the claim is settled, and a capital sum is paid, the settlement will be treated as arrears of income triggering a recovery of benefits ‘overpayments’.[[25]](#footnote-25) In terms of winners and losers, the employer is generally the primary ‘loser’, and the government is the main ‘winner’. For that reason, unsurprisingly, class actions like the ASDA and Tesco litigation involving many thousands of staff in low hours, part-time work – are hard-fought. Realistically, the main ‘contestants’ are the employer and the government.[[26]](#footnote-26) With other equalities initiatives such as the requirement to report on employers’ progress in closing gender pay gaps[[27]](#footnote-27) the government is confident that such measures can, in time, have a positive impact in raising the income floor and reducing the fiscal burden on in-work social security. The operation and impact of the wages/benefits see-saw is a significant issue for low-paid groups and unions when negotiating pay rises. The point is relevant, for example, to NHS workers at the bottom end of the wages spectrum who benefited from the first significant pay award for many years after the removal of the public sector pay cap.[[28]](#footnote-28)

In the bigger picture, there has been a massive expansion since the 1980s in the use social security schemes as a means of making work pay – whether in the form of tax-based systems like the Earned Income Tax Credit in the USA[[29]](#footnote-29), or in the use of income transfers from State agencies to employers or workers.[[30]](#footnote-30) The latter kind of transfer has been the UK’s preference, and the chosen instrument has been the tax credit. Despite their name, ‘tax credits’ are essentially just income transfers paid directly into workers’ and self-employed claimants’ bank accounts.[[31]](#footnote-31) Broadly, the system assesses a claimant’s needs using a means-test that compares net earnings and other income resources with the living allowances or ‘credits’ for which the claimant is eligible. The amount of the award will then fluctuate as resources and needs change. At that point, or at a later re-assessment, the amount of support can be raised or reduced. In this respect tax credits do not differ greatly from other means-tested State benefits, despite initiatives to characterise them and UC as a kind of ‘quasi-wage’.[[32]](#footnote-32)

In the timing of payments to workers, the UC system has maintained the curious approach of trying to mimic wages. This can be seen in the alignment of intervals of payments of in-work UC monthly-paid wages, starting with a delay in paying the first instalment of UC for at least a month (mirroring a ‘wage in hand’ approach) and by making later payments monthly. Advice organisations have warned that this approach has been causing significant debt problems for workers and new job starters - one of the concerns that prompted MPs in a Commons debate in October 2017 to call for the suspension of UC’s roll-out.[[33]](#footnote-33) Despite such concerns the government has steadfastly clung to this feature of the system.[[34]](#footnote-34)

Systems like UC come within the range of schemes which the International Labour Organisation (ILO) sees as necessary due to a ‘lack of work-related income (or insufficient income)’ whether caused by factors like under-employment or sickness, ‘general poverty’ and ‘social exclusion’.[[35]](#footnote-35) More recent ILO reports have highlighted some of the financial pressures schemes face, particularly when supporting casual, short-term, and precarious work which generates ‘inadequate’ wages’.[[36]](#footnote-36) UK governments recognise this, and have started to look at ways to move towards what a previous Chancellor of the Exchequer, George Osborne MP described as a ‘higher wage, lower tax, lower welfare country’[[37]](#footnote-37). Prospects for a higher wage, lower welfare economy are not good, however, particularly given the impact inflation has on pay rises, and in the face of poor forecasts for real earnings growth.[[38]](#footnote-38) Reliance on the social security system to subsidise low pay is therefore likely to continue for the foreseeable future, with features not unlike earlier schemes like ‘outdoor relief’ provided by the old Poor Law, when the parish supplied labour and made up the difference between what the employer paid and a minimum subsistence income.[[39]](#footnote-39)

In what was perhaps the heyday of modern social security - the post-World War II period – conditions of near-full employment and effective insurance-based schemes obviated the need for such wage subsidisation. Besides giving effect to the recommendation in the Beveridge Report that services should be largely financed on a contributions basis, and not out of taxation[[40]](#footnote-40), the system avoided the need for publicly-funded, means-tested schemes of the kind now operating. No doubt this helped to commend Beveridge’s vision to the government in 1942.[[41]](#footnote-41) The system also did much to sustain the wages and conditions framework provided through labour market redistributive mechanisms like collective bargaining, National Joint Industrial Council terms and conditions, and wages councils’ orders setting minimum wages and conditions in low pay sectors. Out-of-work claimants could be expected to be ‘available for work’ and take up ‘suitable’ job opportunities. However, a ‘suitability’ criterion generally meant claimants could decline job offers on terms and conditions which were below prevailing conditions in their area, as informed by relevant collective agreements or which adjudicating officers accepted were in line with terms offered by ‘good employers’.[[42]](#footnote-42) In this way the system was ‘made to serve the wider goals of labour market regulation and the preservation of labour market standards’.[[43]](#footnote-43) Furthermore, most unemployed claimants – at least those within the National Insurance scheme rather than National Assistance - could expect income replacement to be provided at levels which at least bore some resemblance to what they had been earning. It was, in every sense, ‘insurance’.

By the 1980s, however, the national insurance system faced big challenges. Besides funding and coverage issues, from a position where the ‘full employment’ envisaged by Beveridge[[44]](#footnote-44) was a reality in the post-World War II period - with more vacancies for work than there were workers looking for vacancies – unemployment grew, and other labour market transformations were in progress. These included an expansion of part-time, low-paid work fuelled by structural incentives in the tax, national insurance, and benefits systems encouraging employers to make fuller use of such work.[[45]](#footnote-45) Most of those incentives are still in place.[[46]](#footnote-46) The transition away from contribution-based benefits, and towards means-tested benefits, undoubtedly helped to undermine the social protection floor and labour market standards as surely as deregulation impacted on wages and conditions. The more immediate impact on wage levels, however, came from deregulatory measures like abolition of the wages councils in 1993.[[47]](#footnote-47) That measure affected the wages and conditions of an estimated 3 million workers in the low pay sectors, triggering an increase in the take-up of in-work benefits like Family Credit and Earnings Top-Up. Leading welfare advice organisations saw such measures as a major cause of low pay as wages tumbled to levels where workers in those sectors were worse off in work than if they were on benefits[[48]](#footnote-48); and it was not long before commentators were questioning the case for such deregulation.[[49]](#footnote-49) Comparisons may be made with the current position given that an estimated half of all current low pay (and nearly half the *cost*) is still located in those sectors, including include Accommodation and Food Services, Retail and Wholesale, Agriculture, and Health and Social Care.[[50]](#footnote-50) Other aspects of deregulation contributed to the erosion of the wages floor[[51]](#footnote-51) - but most of the long-term impact has come from the assault on collective bargaining and on unions as principal actors in the bargaining system.[[52]](#footnote-52)

Deregulation as it has affected wages has been accompanied by deregulatory measures affecting pensions, necessitating State support from measures like the State Pension Credit Act 2002 to top up low pension incomes. A similar see-saw effect operates. As pension provision and other sources of income (including the wages from part-time work undertaken by labour market returnees encouraged or required to return to work) go *down* - the subsidy from Pension Credit goes *up*.[[53]](#footnote-53)

The central concern now must be with the inability of the current regulatory and redistributive mechanisms to deliver adequate earnings to the low paid, and particularly those groups most likely to be affected: women in part-time work, the young, part-time and temporary employees, those in lower-skilled occupations, and employees in very small firms.[[54]](#footnote-54) To the figures for those groups must be added the rising numbers of ‘self-employed’, including those working through on-line platforms in the ‘gig economy’: a group often characterised by casualisation, ‘work on demand via app’, and demutualisation of risk[[55]](#footnote-55), as well as poorly rewarded, intermittent work.[[56]](#footnote-56) Like the ‘employed’, the self-employed are also eligible for UC. Interestingly, the Bank of England Chief Economist, Andrew Haldane, has attributed much of the stall in wage growth in the economy to the rise of this group, seeing it as part of a disintegration of post-Industrial Revolution forms of organised labour necessitating ‘protective measures’ to keep earnings up. He has described the effects of ‘the clock being turned back to a pre-Industrial Revolution time when most people were, indeed, self-employed, and when there were no unions: ‘hours were flexible, depending on what work was needed to collect the crops, milk the cows or put bread on the table. Work was artisanal, task-based, divisible’.[[57]](#footnote-57)

For its part, the government is well aware of such trends, the impact of low growth and poor productivity on earnings, and the consequent rise in take-up (and fiscal costs) of in-work social security.[[58]](#footnote-58) The policy response, however, has largely been focused on ‘fiscal containment’. Ie cuts, coupled with developing incentivesto workers to progress to longer hours or better-paid work in an effort to reduce demand for in-work support.[[59]](#footnote-59) More recently, incentives have metamorphosed into something rather different, using powers in the Welfare Reform Act 2012, Part 1. A *duty to* *progress*, with sanctioning to underpin this new strand of activation policy.

Before further consideration is given to this attention is now given to the first of two key mechanisms for tackling low pay in the UK, minimum wage interventions.

**3. THE MINIMUM WAGE FLOOR**

Despite having both a minimum wage floor and a sizeable investment in schemes like tax credits and UC, the current scale of low pay suggests that the current regulatory framework and support regime is failing, and badly.[[60]](#footnote-60) Furthermore, it looks set to continue doing so unless the system’s shortcomings can be addressed. Successive reports of both the Institute of Fiscal Studies and the Resolution Foundation have indicated that the traditional low pay constituency has been widening to encompass newer groups like the ‘just about managing’ (JAMS) cohort – a section of the labour market that has been feeling the impact of cuts to in-work support.[[61]](#footnote-61)

To understand the system’s workings, it is necessary to look more closely at the inter-action of the regulated wage floor and State support. Statutory minimum wage-setting under the National Minimum Wage Act 1998 is an essential component in the current regime for tackling low pay, especially since the decline of more effective redistributive mechanisms like collective bargaining capable of maintaining the wage floor more efficiently. Indeed, the introduction of the NMW went some way towards allaying the concerns of those who argued against abolition of the sectoral minimum wages floor provided by the wages council system, and the negative consequences of this.[[62]](#footnote-62)The scheme is limited, however, to providing a general safety-net, but without being able to respond to the variable conditions and specific needs of different sectors of the labour market. This has led the General Secretary of the TUC, a former member of the Low Pay Commission, to call for legally enforceable minimum wages to be set for different sectors.[[63]](#footnote-63)The NMW has been successful in reducing, if not completely abolishing, extreme low pay. Without it a sizeable section of the bottom decile of the wage distribution would be in ‘absolute poverty’. Beyond that, however, the scheme has only played a limited role. As the government pointed out in evidence in 2002 to the Low Pay Commission (LPC), the system was never meant to be the primary means of reducing poverty. It was just to provide a minimum wage floor on which tax credits system could build.[[64]](#footnote-64) In fixing that floor the scheme is constrained in how far it can go, and it must be sensitive to concerns about the impact of rises on job prospects, as seen in the consultations preceding the NLW rise in April 2018.[[65]](#footnote-65)

Despite the achievements of the 1998 Act, the system still leaves one in five workers earning below two-thirds of median pay, a level which as the Resolution Foundation has pointed out is ‘too little to afford a basic standard of living’. It also concluded that, despite the ‘welcome strides’ made by the NLW, in-work poverty and low pay ‘remain key challenges’ and the UC system will have to meet those challenges.[[66]](#footnote-66) That problem is exacerbated by the way some employers view the minimum wage. The intention in 1998 was to set a *minimum* rate, and then leave it to employers to build on that rate. By 2013, however, it was clear that the NMW had become both a ‘going rate’ and ‘ceiling’ for many employers – especially in the low pay sectors.[[67]](#footnote-67) Currently the scheme does no more than provide a single hourly rate floor[[68]](#footnote-68) across sectors with widely differing circumstances. Furthermore, it has provided ‘very little upward pressure on employers who could afford to pay more’, suggests much more could be done.[[69]](#footnote-69)

These fundamental weaknesses in the scheme were revisited in a review led by the founding Chair of the Low Pay Commission, Sir George Bain (the Bain Report).[[70]](#footnote-70) This concluded that the LPC and government should inform public debate about the scope for moving away from the current ‘single legal wage floor’ (which Bain had started to see as a ‘blunt tool’) and towards sector-focused options. Changes could be informed, initially, by analyses from the Low Pay Commission identifying sectors which could afford to pay above-NMW rates (recognising, too, that London may be a special case meriting a ‘London-weighting’).[[71]](#footnote-71) The fact that most employers did not see the implementation of the National Living Wage as posing any significant problems in terms of costs or on-costs[[72]](#footnote-72) added force to Bain’s findings.

From a fiscal perspective the attraction of a regulated wage floor – whether national, sectoral, enterprise-level (or all three) - is that as earnings from wages *rise* the bill for what has become, in effect, a State secondary wage[[73]](#footnote-73) *reduces*. If, as the report suggested, there is scope for looking to employers to pay more in sectors where this is affordable, then it would seem to be prudent to explore this.

Bain could have gone much further and addressed other problems which have beset the NMW and NLW, including on-going issues of compliance and enforcement.[[74]](#footnote-74) The period after April 2016 highlighted significant problems, including the readiness of some employers to recoup NLW costs by simply cutting benefits in the remuneration package like overtime, week-end working, and Bank Holiday premia, rather than introducing the kinds of productivity measures the government expected. Also, besides incentivising employers to hire younger workers in preference to older staff (and increasing the ‘age’ pay gap) by providing differentiated, age-related rates, with significantly lower rates for 18-20 year olds and 21-24 year olds - employers gained an incentive to ‘flatten’ their pay and reward structures and cut back on better-paid rates and supervisory roles, thereby limiting progression opportunities.[[75]](#footnote-75) The legislative amendments introducing the NLW clearly did not anticipate or cater for such ‘side-stepping’ actions.[[76]](#footnote-76) Worse was to follow. Implementation costs, coupled with the reductions in the value of support from UC and tax credits introduced by the Summer Budget 2015, prompted concerns that the changes would reduce opportunities for additional work. The Office for Budget Responsibility also warned that as some employers struggled jobs could be at risk.[[77]](#footnote-77)

Another difficulty associated with the NLW is that of wage compression. The proportion of the national workforce on the wage floor in 2015 was 6 per cent. This is now expected to more than double to 15 per cent by 2020, with variations geographically and between sectors. In Accommodation and Food Services, for example, as many as 45 per cent of the workforce are already earning at or near the NLW.[[78]](#footnote-78) By 2020 history could repeat itself. As well as being pitched at levels which are low[[79]](#footnote-79), the NLW could again become the new ‘going rate’. The floor could, once again, become the ceiling.

Besides on-going concerns about compliance and enforcement - making the statutory floor somewhat rickety - there are serious doubts about employers’ readiness to do more to promote progression opportunities to enable workers to progress to higher levels of pay in the way the scheme envisages. The available evidence suggests that the scope for creating opportunities for longer hours and better pay of the kind (and in the quantity) needed varies considerably by sector and geographically. They are certainly not assisted by a ‘hollowing out’ effect whereby progression prospects are better at the top and bottom ends of the labour market but are less evident for middle range and ‘mid-skilled’ work – the area where progression opportunities are really needed.[[80]](#footnote-80) Evidence of part-time workers’ experience of seeking to increase their hours suggests that employers in low pay sectors are often unable or unwilling to accede to requests to increase hours. There are likely to be a number of factors involved, one of which is that employers may simply prefer to recruit additional part-timers - particularly part-timers on flexible working arrangements.[[81]](#footnote-81) Allied to this is the point that there are some potent structural disincentives to raising hours built in to the tax and benefits regimes.[[82]](#footnote-82) A further consideration, advanced by the Chartered Institute of Personnel Development, is that the scope for assisting lower paid part-time staff to increase their hours and pay to meet the CET threshold is constrained by the low levels of investment in the kinds of training needed.[[83]](#footnote-83) The story is a familiar one, and evident in other areas, too, like apprenticeships: a report on the first year of the government’s apprenticeship levy scheme concluded that employers were rebadging low-quality, low-skill, low-wage roles as apprenticeships, and using the levy to rebadge existing training courses as ‘apprenticeships’ to shift the cost of training on to the government. [[84]](#footnote-84)

It is against this difficult back-drop that the legal changes that have been affecting in-work support are now considered. By and large the tax credits system has proved its worth, not least in supplementing earnings in the low to middle income group during the ‘lost decade of growth’ between 2004-25 and 2014-15: a period during which it has been said that incomes were being ‘propped up’ by the social security system.[[85]](#footnote-85)

But how effective is the current system since the advent of Universal Credit, and especially since cuts to the support it can deliver? This is now considered.

**4. UNIVERSAL CREDIT**

Despite an inauspicious start to the introduction of Universal Credit, the government remains committed to it as the centre-piece of the evolving in-work support regime. The Social Security Advisory Committee considers that it will be the ‘dominant landmark on the benefit skyline for many years to come’. However, it recognises the many challenges, including the problem that the scheme’s roll-out has been ‘coinciding with a ‘dramatic growth in part-time and more flexible patterns of working’.[[86]](#footnote-86) Detailed provisions on UC, including those directing support at low hours, low-paid work, are in the Welfare Reform Act 2012, Part 1 and the Universal Credit Regulations 2013, 2013/376.[[87]](#footnote-87) In summary, the level of financial support for a worker is assessed by aggregating the allowances for which recipients’ circumstances make them eligible (the ‘maximum amount’). These include a standard allowance and then amounts to meet specific needs or costs of children and young persons, housing costs, and for ‘other particular needs or circumstances’ which the scheme specifies. The total is then subject to deductions of earned and unearned income, including work allowances which enable eligible workers reduce the amount of earned income which would otherwise be taken into account.[[88]](#footnote-88) For employed recipients without a work allowance – which since cuts to the scheme were made by the Summer Budget 2015 (discussed below) means all workers other than those with responsibility for a child or qualifying young person, or who have limited capability for work - support is tapered away at a rate of 63 per cent of their earned income. For those who are still eligible for a work allowance it is 63 per cent of their earnings – but only in respect of earnings above the prescribed earnings threshold.[[89]](#footnote-89) Unearned income is reduced in full. The taper was first set at 40%, but it is now significantly higher (63% since April 2017).

Employed UC claimants are generally expected to seek and take on more hours if they are working below their ‘conditionality earnings threshold’ (usually 35 hours). The self-employed have not been left unscathed, but progression expectations operate differently, ie through ‘minimum income floor’ (MIF) provisions.[[90]](#footnote-90) These presume that self-employed UC claimants are earning at the level of their ‘individual threshold’ – essentially an earnings target that is comparable to the conditionality earnings threshold set for the employed - even if, in fact, they are earning less. The practical effect is to constrain support by reference to that fictitious level of earnings. The policy rationale is that these ‘align’ progression duties to those for the employed and enable the self-employed to ‘realise their financial potential’.[[91]](#footnote-91) The MIF scheme is controversial because it is leaving a lot of self-employed UC claimants significantly worse off than employed claimants, and considerably worse than under the tax credits system it replaces. Research by the Social Market Foundation estimates that around a fifth of families with a person in self-employment being supported by tax credits and housing benefit have been migrating to UC, and of that cohort 39% now earn below the MIF ‘floor’.[[92]](#footnote-92)

In 2015 the value of the UC scheme was hit very hard by an austerity agenda unveiled in the government’s Budget 2015 measures. Besides a four-year freeze on up-ratings to UC rates, the most dramatic of the cuts saw the complete removal of any worker without children from eligibility for work allowances, and significant reductions in the value of the allowances for those groups who remained eligible, including those with an incapacity and ‘limited capability for work’. The changes were made by secondary legislation.[[93]](#footnote-93) Remarkably, given the scale of the impact on a sizeable number of workers and employers, no impact assessment was produced. In formal terms, the reason given in the Explanatory Memorandum was that the legislation would ‘have no impact on business or civil society organisations’. The absurdity of this can best be gauged from the impacts seen since 2015 - not least from the effect of reduced support for wages on employers, the need for increased support from food banks for low wage workers and their families[[94]](#footnote-94), rising household indebtedness as it impacts on the low-paid[[95]](#footnote-95), and a range of other social costs and on-costs.

The changes have emasculated much of the value of UC’s support for workers. The verdict of the Institute of Fiscal Studies (IFS) has been that the changes have been ‘significantly cutting the amount of support that UC gives to low-income working families’, and have impacted on ‘progression’ prospects.[[96]](#footnote-96) Both organisations have also provided helpful commentaries on the value of UC in terms of incentives to enter paid employment using the Participation Tax Rate (PTR); and to then take on more work and increase their earnings, using the Effective Marginal Tax Rate (EMTR), as measures.

In principle, and given its design aims, the UC scheme should be able to assist workers to enter employment, work only a small number of hours, and then provide a means of supporting promotions and progression to better work and increases to hours and earnings. Unfortunately, the impact of restricting eligibility for work allowances coupled with a high taper means that for most workers every additional pound earned is now immediately reduced by 63 pence. According to the Resolution Foundation, ‘failing to significantly lower the taper rate means there is little improvement (and in fact for many a *worsening*) of the incentive to progress’. Even for those who are still eligible for a work allowance the position has not just worsened markedly since the Summer Budget 2015, it is set to *continue* deteriorating. Indeed, the Foundation has estimated that by 2020 a worker who is eligible for a work allowance will exceed that allowance and be affected by the taper when employed for just five hours a week on a National Living Wage level of pay. For someone receiving help with their rental costs this rises to ten hours.[[97]](#footnote-97)

The UC changes, coupled with a four-year freeze on up-ratings to in-work benefits like tax credits and UC until at least 2020, are impacting on the very groups UC was intended to assist, such as the second person in couples wishing to enter the labour market or return to employment[[98]](#footnote-98), and single parent earners. The average loss affecting the latter group has been put at over £500 per year’.[[99]](#footnote-99) Single parents are hit in other ways. For example, child support is now treated as ‘unearned income’ without a specific disregard: a particularly surprising casualty given the support previously provided to single parent workers. [[100]](#footnote-100) Clearly these are different, and very much worse, outcomes than those intended when the UC scheme was introduced. They may also, in time, undermine the political support UC gets. A flavour of this was seen with the debacle in October 2017 when the Opposition called for a pause in the national roll-out of UC in a non-binding Commons vote.[[101]](#footnote-101) Given the scale of public investment in UC, it would not take much for public support to dwindle if it is seen to be failing to deliver on its objectives. This has been seen in other jurisdictions like France where support for a comparable benefit to UC has also been under pressure.[[102]](#footnote-102)

The UC scheme itself clearly has significant problems. But what of the *progression* aspects? The issue is important given that, unlike the main in-work scheme it replaces, Working Tax Credit, UC can be claimed by those in jobs below a minimum 16-hours threshold, thereby helping in the proliferation of low-paid mini jobs.[[103]](#footnote-103) Without measures to assist and incentivise new starters and existing job-holders to progress to better-paid work the UC project is set to be significantly more costly than the tax credits regime it is replacing. The government is keen to continue creating such new jobs, but it also recognises the need to contain the hefty costs of subsidising such employment. In this regard it places great store by the In-Work Progression scheme, and mandatory ‘progression’.

This begs the question, how will IWP work and what are the challenges it faces?

**5. IN-WORK PROGRESSION**

The government’s ambition is to enable employed Universal Credit recipients - currently representing nearly 40 per cent of the overall UC claimant group - to reduce their receipt of it or ‘earn enough to leave it completely’.[[104]](#footnote-104) There are, already, precedents for the regulation of take-up of in-work State support by EU workers by reference to ‘worker’ status and earnings thresholds.[[105]](#footnote-105) The IWP scheme goes very much further. Besides the scheme’s mandatory earnings thresholds, and associated conditionality and scope for sanctioning, there are other distinctive aspects, including what in 2016 the (then) Employment Minister, Priti Patel MP, described as a ‘three-way relationship’ between employers, DWP work coaches, and workers. She observed how a work coach could pick up the phone and say to the employer ‘This claimant has only been working X hours right now. He or she now feels they are ready to work more hours or develop or be supported into a new role’.[[106]](#footnote-106)

Aspects of such closer working have raised concerns, particularly given the DWP’s readiness to intervene as an active third force in employers’ recruitment processes: an area hitherto firmly within the employer’s domain. Trials are evaluating work coaches’ ability to develop knowledge of local labour market conditions, engage with employers, and form effective relationships with worker ‘clients’.[[107]](#footnote-107) Their primary remit, however, is to advance the DWP’s progression agenda and reduce the fiscal burden of supporting large numbers of low hours, low paid jobs. For its part, the Social Security Advisory Committee sees the success of the IWP project as dependent ‘to a very large extent’ on the effectiveness of work coaches.[[108]](#footnote-108)

It is not difficult to see the concept of ‘supporting a worker into a new role’ becoming a lot more, namely a discussion with the employer about a worker’s willingness (or otherwise) to take on more work. Indeed, it could be a significant source of pressure on workers who may have perfectly reasonable grounds for declining additional work. To assuage the critics, the government has said that it does not believe that under ‘normal circumstances’ employers should be involved in setting the requirements of a Claimant Commitment or adjudication of matters like sanctioning. However, it is adamant that the ‘circumstances’ of a person’s employment is something a work coach needs to know about and should be able to discuss with an employer: this has been described as gauging the worker’s ‘ability to progress’ and their ‘route of progression’.[[109]](#footnote-109) It is not entirely clear what this actually means in practical terms.

Plainly there is scope for the ‘three-way relationship’ to cut across demarcations based on two distinct relationships: first, the two-way employment relationship between employer and worker operating within what is still Labour Law’s private law domain; and, second, a quite distinct two-way relationship between the worker and social security agency officers operating within public law parameters. The idea of a *three*-way inter-action – particularly when it is subject to minimal regulation or oversight is bound to be problematic, crossing established lines of communication and potentially undermining confidentiality and trust affecting both the relationships workers need to maintain.

Conflicts between employers and their staff when the employer expects co-operation over requests to work more hours are familiar territory for legal practitioners. So, too, are the disciplinary scenarios that can follow: something which will increase as expectations to co-operate with flexible working and rosters of the kinds of regime pioneered by ASDA gather pace.[[110]](#footnote-110) Labour Law already underpins employers’ ‘right to manage’ in this respect. As a result of the IWP scheme, the pressures which workers can expect are likely to intensify and come from *two* quarters – first, the employer and, second, the DWP. The second, and newer source, comes from a ‘duty to progress’ rooted in the UC ‘Claimant Commitment’. Typically, this might be where an employer is able to require staff to increase their hours – for example to undertake overtime or week-end working, or to provide cover for staff on long-term sick leave. If at that point she is also working below her Conditionality Earnings Threshold (CET), and the DWP becomes aware of this opportunity following an enquiry and conversation with the employer, it is likely that the worker will be subject to directions from both sources: an employer instruction and a DWP direction to take up the additional work.

A variant of that scenario is where the employer may *not*, in legal terms, have the ability under the contract to formally require the person to work additional hours or take on different work. The ‘voluntariness’ of the employer’s request may be clear enough in employment law terms, as is the worker’s ability to say ‘no’: but it will not avail her if she is then directed by the DWP to say ‘yes’ to the employer and accept that work. Needless to say, the scope for disputes with Work Coaches is considerable. Typically, the worker may object to take-up of further work (or different work) on the ground that it would impact adversely on family, childcare, or other commitments, or mean increased travel time or other costs. The Commons Select Committee on Work and Pensions when looking into the operation of the IWP scheme recognised this. It recommended that the government should publish ‘more comprehensive guidance’ for Work Coaches on applying in-work conditionality, addressing such matters as individuals’ skills, confidence, health, caring responsibilities, access to both care and transport, etc. It also urged clarification of ‘the circumstances when it would be appropriate and constructive to take into account input from an employer in establishing the reasonable conditions of a Claimant Commitment’.[[111]](#footnote-111) Interestingly, in relation to family-related barriers it has been stressed in a successful appeal against UC sanctioning decisions that DWP decision makers must take care in situations where family commitments make work searches or availability difficult, and particularly as sanctions constitute a ‘financial penalty’.[[112]](#footnote-112)

As far as advice organisation and stakeholders are concerned conditionality and sanctioning aspects of IWP have always been a key concern; and the need for respect for family life and work-life balance, is high on the agenda. The Child Poverty Action Group has argued that workers should not have to give up ‘predictable shifts that fit in with family life’ or be expected to upset existing childcare arrangements; and protection of the needs of workers’ families and children should be put on a ‘statutory footing’, rather than just being left to Work Coaches and DWP decision-makers’ discretion and administrative guidance.[[113]](#footnote-113) Gingerbread, the organisation representing single parent families, reached similar conclusions. It maintains that workers with parental responsibilities should be able to hold out for jobs which do not just match their skills and experience, but which are sustainable, and can lead to steady and improving earnings - rather than simply meeting the government’s ‘work first’ approach and priority of increasing hours and pay.[[114]](#footnote-114)

After the committee’s report the government confirmed that it would continue with the IWP scheme, ‘pro-actively’ supporting claimants in low-paid work ad encouraging them to be independent of the Welfare State[[115]](#footnote-115), and using conditionality to support the scheme’s objectives.[[116]](#footnote-116) Sanctioning, it concluded, was as a necessary ‘tool’. Since then, conditionality has, indeed, been intensifying for newer groups including parent carers and foster parents.[[117]](#footnote-117)

Action in response to the committee’s call for more comprehensive guidance for work coaches is still awaited, leaving considerable uncertainty as to the precise scope and *limits* to the in-work duty to work, and requirements to ‘progress’ – particularly if directions risk interference with ‘family life’ or impact on health in the case of incapacitated or disabled workers. Arguably, such matters should not simply be left to the uncertainty and inconsistencies of individual officers’ discretion. Given that a right to work in various contexts has enjoyed some traction[[118]](#footnote-118), arguably a right *not* to work merits recognition, and more formalised protection – whether in the form of improved statutory guidance to structure work coaches’ and DWP decisions, and inform advisers and employers, or through the developing Convention rights jurisprudence.

In the face of potent expectations of reciprocity and ‘contribution’ as a condition of take-up of publicly-funded State support (unlike insurance-based benefits with a ‘property’ dimension to them[[119]](#footnote-119)) the ability to say ‘no’ to employers and social security agencies when expected to take up additional work opportunities - in effect a ‘right not to work’ - is still somewhat embryonic. Recent case developments have suggested that Convention rights are clearly engaged when groups like single parents with young children are required by the DWP to work at prescribed minimum weekly ‘hours’ thresholds to avoid financial penalties in the form of benefits ‘caps’. The High Court has held such measures to be discriminatory and unlawful, particularly given their negative impact on the welfare of lone parents and their children, assisted by ECHR art. 8 and the United Nations Convention on the Rights of the Child 1989 art.3(1) which requires that ‘in all actions concerning children ... the best interests of the child shall be a primary consideration’: however, uncertainty about the courts’ position continues following a successful appeal, and an anticipated further appeal to the Supreme Court.[[120]](#footnote-120)

**6. TOWARDS A BETTER REGIME?**

On the Social Security side of the Labour-Social Security interface the effectiveness of in-work support has been massively impaired by austerity measures and cuts, including successive freezes to annual up-ratings, restrictions on eligibility for UC work allowances, and a continuing high ‘taper’ rate. The latter problem also impacts on the progression prospects for millions of low-paid workers, and particularly women who tend to be disproportionately affected by the *cumulative* effects of low pay and progression prospects.[[121]](#footnote-121) As the Resolution Foundation has pointed out, ‘failing to significantly lower the taper rate means there is little improvement (and in fact for many a worsening) of the incentive to progress’. Even for those who are still eligible for a work allowance since the cuts made in the Summer Budget 2015 the position has not just worsened markedly it is set to *continue* deteriorating. Indeed, the Foundation has estimated that by 2020 a worker who is eligible for a work allowance will exceed that allowance and be affected by the taper when employed for just five hours a week on a National Living Wage level of pay.[[122]](#footnote-122)

On the Labour side, the challenges are equally great. Improvements are needed to raise the wages floor and reduce the current high level of wage subsidisation. Arguably, the quest for what George Osborne MP, former Chancellor of the Exchequer, called a ‘higher wage, lower tax, lower welfare country’[[123]](#footnote-123) is also a project for the Left, recognising the scope for reforms to the minimum wage machinery and regulated and voluntary collective bargaining, and adding to the current limited mix of redistributive mechanisms. Whilst the NLW has been helpful the reality is that the wage floor would need to be raised *very* significantly from the current £7.83 level (2018-19 rates) before reliance on State social security schemes could end. The Joseph Rowntree Foundation has estimated that both members of a couple with two children would need to be employed full time and paid at a rate of £13 an hour (just above median wage) - before they could reach even the most basic minimum income standard.[[124]](#footnote-124) Given that the NWL is nowhere near such a level, State support is going to be needed for the foreseeable future by millions of workers in low paid jobs. Furthermore, without the value of UC work allowances being maintained year-on-year low income families will at risk of becoming ‘systematically worse off’.[[125]](#footnote-125)

As previously considered, the Bain Report identified some initial steps for moving away from the ‘single legal wage floor’ towards a higher, secondary wage floor. This would be an evidence-led transition, dependent on research by the Low Pay Commission and the identification of sectors which could afford to pay above the NMW.[[126]](#footnote-126) Beyond Bain, there may be scope, too, for the reintroduction of new variants on the wages council system and, in time, regulated collective bargaining. A model for this is currently provided by the Agricultural Wages Boards in Scotland, Wales, and Northern Ireland. The Republic of Ireland, too, has moved to a revised version of its Joint Labour Committee (JLC) system, and the establishment of minimum sectoral wage floors - despite earlier set-backs in the courts.[[127]](#footnote-127)

Even without an immediate restoration of a wages council-type system, there is certainly scope for moving to two minimum wage floors: a primary floor that would continue to provide a general safety-net minimum wage rate; and a new secondary, higher floor organised around sectoral minimum rates. Such a reform could readily be implemented by amending the National Minimum Wage Act 1998 to cater for an extension to s.2 and regulations, and to provide the framework for such a secondary floor. The remit of the Low Pay Commission (LPC) - currently provided for in s.8 and Schedule 1 - would also need to be modified. This would enable the LPC to carry out the modified research and reporting functions envisaged by Bain, assisted by research and inputs from employers and unions and other interest groups. Changes could be piloted before a full roll-out - as could any later changes to secure a more developed system of regulated ‘bargaining’. This would necessitate extensive consultations and separate primary and secondary legislation. Essentially, sectoral wage-setting, and any subsequent moves to introduce bargaining elements, would be the product of statute and a regulatory framework in the same way as the former wages councils operated, and out of which it was anticipated voluntary bargaining could grow.[[128]](#footnote-128)

A more developed and structured approach has been put forward by the Institute of Employment Rights in a *Manifesto for Labour Law*.[[129]](#footnote-129) This proposes Sectoral Employment Commissions (SECs) – either bilateral or tripartite in composition. These would promote collective bargaining and ‘regulate minimum terms and conditions within specific sectors’. Among other things, the Commissions would negotiate Sectoral Collective Agreements (SCAs) that would establish minimum terms and conditions of employment. The terms of such agreements would ‘apply as mandatory terms to govern the employment relationship of any worker employed by any employer in the sector to which the agreement relates unless it provided to the contrary’. Such agreements could set the kind of minimal sectoral floor on which enterprise-level agreements could then improve, assisted by what editors of the *Manifesto* have described as a ‘regulatory collective bargaining system’.[[130]](#footnote-130) The SCAs and the enterprise-level agreements building on them could also provide the framework for the kinds of pay grade structures which would support earnings and career progression opportunities in the way Joint Industrial Council agreements and wages councils orders have done in the past.[[131]](#footnote-131)

The establishment of what would, in effect, be a new and more closely regulated secondary minimum wage floor would be attractive, even if there are going to be some significant challenges ahead. Where sectoral wage-setting has continued - notably in Agriculture in Scotland, Wales, and Northern Ireland - rates in statutory orders remain stubbornly close to the NLW.[[132]](#footnote-132) There are a range of factors in this, including the problem that there are ‘sectors within sectors’ in sectors like Agriculture, with smaller, lower paying employers likely to oppose above-NLW rises. Businesses in Scotland, Northern Ireland, and Wales also make the point that it is hard to set rates much above the NLW while English producers pay only NLW or near-NLW rates.[[133]](#footnote-133) Going forward, mechanisms such as the proposed SECs and SCAs have considerable potential to transform the current wages and conditions landscape and restore a renewed balance of responsibility between employers as purveyors of the contractual wage and the community as the funder for State subsidies. Such a move is long overdue – particularly in sectors like Retail and Accommodation where employers include some of the most profitable corporations in the world, but where significant numbers of workers are on, or close, to the NLW. There are also sizeable challenges when it comes to progression.[[134]](#footnote-134)

Needless to say, obtaining political backing for a return to ‘regulation’ - particularly from political parties wedded to the idea that the ‘best outcome’ is one in which ‘employers are able to sit down and discuss issues direct with their staff’- would not be easy.[[135]](#footnote-135) On the other hand, it is not necessarily the case that all employers and employers’ organisations would be hostile to the idea of a second tier of minimum wage-setting, or to the introduction of a collective bargaining element to it. Shifts in political and business attitudes towards regulation can be fickle. Two years into Margaret Thatcher’s administration Employment ministers were still proclaiming the merits of the wages council system and resisting calls for their abolition, arguing that abolition would remove ‘the only machinery there is for fixing minimum wage levels’, and without which ‘a reasonable standard of pay would not be maintained’.[[136]](#footnote-136) Nor was it the case that employers and employers’ organisations were universally supportive of abolition. In fact, leading HR organisations like the Institute of Personnel Management (now the CIPD) were supporting retention of the system as late as 1989.[[137]](#footnote-137) On the union side, attitudes to wages council-type arrangements have been ambivalent as far as the Donovan Report.[[138]](#footnote-138) More recently, however, there has been a clear shift towards restoration, with the General Secretary of the TUC, Frances O’Grady, calling for wages councils to be re-established, coupled with legally-enforced sectoral minimum wage rates.[[139]](#footnote-139)

**7. CONCLUSIONS**

The proposals in the Bain Report for a move away from the current ‘single legal wage floor’ and towards sector-focused wage floors[[140]](#footnote-140), and put forward by the Institute of Employment Rights, both look promising. The IER proposals go considerably further than Bain, particularly in establishing bilateral or tripartite Sectoral Employment Commissions with a collective bargaining component. Besides catering for negotiated Sectoral Collective Agreements to establish sector-wide, mandatory minimum terms and conditions, the scheme envisages support for enterprise-level initiatives. Both analyses, and proposals for reform, have considerable potential to improve the current low pay regime.

Such institution-building and the introduction of new redistributive mechanisms on the Labour side of the Labour Law-Social Security law interface involve a significant degree of regulation, but will be a necessary step to take if a necessary re-balancing of responsibilities between the key stakeholders – employers, workers, and the State – is to be achieved, and if the labour market’s dependency on State support for the low-paid is to reduced or even, in time, eliminated. As this paper has considered, wage subsidisation since the 1980s has brought with it all the accompanying baggage of means-testing, conditionality and sanctioning, the wages/benefits see-saw, and a plethora of new benefits traps for workers dependent on State support – the most recent being the introduction of new, and arguably excessively low earnings thresholds for determining workers’ eligibility for free small meals and childcare vouchers.[[141]](#footnote-141) Unfortunately, on current trends in-work social security ‘dependency’ is set to continue for the foreseeable future given that the statutory minimum wage floor is nowhere near the level required for attaining even the most basic minimum income standard.[[142]](#footnote-142)

Despite the achievements of the NLW, public sector pay rises after the lifting of the public sector pay cap, and expectations for successful equal pay claims in low pay sectors like Retail, the reality for many workers still on State benefits is that much of value of such ‘gains’ is off-set by the see-saw effect of means-testing described in Section 2. Any such gains are also immediately affected by the impact of cuts to the level of State support.[[143]](#footnote-143) For the self-employed, already disadvantaged by exclusion from the minimum wage scheme, the imposition of the minimum income floor system as a means of restricting their level of support from UC not only means that their position is anything but ‘aligned’ to that of employed claimants: it is also ensures that a large number of this sizeable and growing group are ‘low paid’ as a result of the creation of a deliberate benefits, tax, and regulation ‘gaps’.[[144]](#footnote-144)

As Parliamentary debates on the NLW, or the reduction in access to free school meals and childcare vouchers, have shown, the priorities for the low pay regime - on both sides of the Labour Law -Social Security law interface - is ultimately a matter for law-makers and the democratic process. As Ronald Dworkin has observed, the distribution of wealth is ultimately based on the community’s choices and is the ‘product of a legal order’: this ‘massively depends’ on the laws the community wants to enact, whether it is ‘laws governing ownership’ or ‘welfare law, tax law, labor law…’. It is not only predictable that some citizens’ lives will be worsened by its choices, but also to a considerable degree *which* citizens these will be.[[145]](#footnote-145)

Clearly, the system currently faces a crisis of daunting proportions. A crisis of *coverage* given the demands placed on in-work social security; a worsening *fiscal* crisis due to the escalating cost of wage subsidisation[[146]](#footnote-146); and a *political* crisis in the face of growing hostility to UC from both Left and Right.

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1. Advocates of closer integration include Hugo Sinzheimer; see H. Sinzheimer ‘Das Wesen des Arbeitsrechts’ in Sinzheimer, H (ed) *Arbeitsrecht und Rechtssociologie*, Vol 1 (Bund Verlag, 1976) 108 et seq, discussed in M. Weiss ‘Re-Inventing Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2013) 44. [↑](#footnote-ref-1)
2. On other elements in a wider welfare mosaic, including intra-family assistance and below-market price voluntary support, see N. Barr, *The Economics of the Welfare State* (Oxford: Oxford University Press, 5th edn.) 7. Dependence on a partner’s wage, food banks, and travel concessions are among the elements that make low-paid work sustainable. However, it is to governments and the ‘Social State’ that people have to look for support; Sir Nicholas Pissarides ‘Social Europe in a Climate of Austerity’, Speech at the Eurofound Conference, Athens, 23rd June 2014, in *Social Europe*, London: On-Line <https://www.socialeurope.eu/social-europe-austerity> [↑](#footnote-ref-2)
3. Based on a ‘core’ definition of gross hourly earnings (excluding overtime) below two-thirds of median pay, the ‘low paid’ are 20 per cent of the workforce (approximately 5 million people). A ‘needs-based living wage’ definition takes the figure closer to 25 per cent (6.2 million people, up from 6 million in 2016); *Low Pay Britain 2017* (London: Resolution Foundation, October 2017) 5. [↑](#footnote-ref-3)
4. S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005) 15, 16. The authors provide a fulsome account in chapter 1 of the juridical nature and structure of the employment relationship and its evolution, analysing the close links between labour law and social security law systems. [↑](#footnote-ref-4)
5. ‘Industrial discipline’ is perhaps a better term which encompasses a wider range of activities in the work cycle; P. Edwards and C. Whiston ‘Industrial Discipline, the Control of Attendance, and the Subordination of Labour: Towards an Integrated Analysis’, *Work, Employment & Society*, Vol 3(1), 1989, 1-28. [↑](#footnote-ref-5)
6. *Cresswell v Commissioners of Inland Revenue* [1984] ICR 508 is an example in the context of use of new IT. [↑](#footnote-ref-6)
7. *Bateman v ASDA Stores PLC* [2010] IRLR 370. For an incisive critique, see F. Reynold QC and J. Hendy QC, ‘**Reserving the Right to Change Terms and Conditions: How Far can the Employer Go?’ (2012) ILJ 41(1), 79-92.** [↑](#footnote-ref-7)
8. The attractions included a rise from £7.44 to £8.50 an hour on base rates: but, as important, were what ASDA’s Vice-President for People, Hayley Tatum, described in 2017 as ‘opportunities to gain better opportunities to progress and develop their career in retail’. The changes entailed the loss of paid breaks, however, and requirements to work on Bank Holidays and at other unsocial times; Z. Rodionova, ‘Asda Offers 135,000 staff pay rise in exchange for ‘flexible contracts’, *The Independent*, 13th March 2017. The Living Wage Foundation pointed out that some of ASDA competitors’ staff already received the Real Living Wage (£8.44 an hour) or above; R. Clarke ‘Asda offers employees a pay rise for ‘flexible’ working’, *HR Review*, 16th March 2017. [↑](#footnote-ref-8)
9. Groups like single parents with children can gain more from tax credit income and benefits like child care costs than they do from their contractual wages after flexible working transitions; see the example of the teaching assistant who reduces her hours from 40 to 20 a week in K. Puttick, ‘21st Century Welfare and the Wage-Work-Welfare Bargain’ (2012) 41(1) ILJ 122 at 128. In doing this, the system clearly supports an important ‘empowerment’ agenda, facilitating labour market participation (and retention) by groups like lone parents, longer-term incapacitated workers, and older returnees. [↑](#footnote-ref-9)
10. Deakin and Wilkinson, n.4 above, ch. 3. On conditionality aspects of contemporary welfare-to-work programmes, see A. Paz-Fuchs *Welfare-to-Work: Conditional Rights in Social Policy* (Oxford: Oxford University Press), ch.3. [↑](#footnote-ref-10)
11. Deakin and Wilkinson, n.4 at 194. The authors, in their analysis, refer to ‘shifting patterns of labour force participation’, including the reduced reliance of households on a ‘sole male breadwinner’ model, mirroring the declining importance of derivative benefits in social security law, and a rise in female labour market participation. A key attraction of tax credits as a wage subsidy has been that the support they give to low-paid workers reduces employment costs and enables minimum wage rates to be set at a lower level than would otherwise be necessary; ‘Tackling Poverty and Making Work Pay – Tax Credits for the 21st Century’ (No. 6 in the series *The Modernisation of Britain’s Tax and Benefit System*) HM Treasury, 2000, 16; and P. Gregg, ‘The Use of Wage Floors as Policy Tools’, OECD *Economic Studies*, 2000 No.31, September 1999, 133-146. [↑](#footnote-ref-11)
12. *New Ambitions for Our Country: A New Contract for Welfare* (DSS: London, 1998 Cm 3805) 80. [↑](#footnote-ref-12)
13. Replacing the Work Programme. DWP contracted providers deliver a variety of schemes requiring participants to engage in work-seeking and other activities; DWP *Provider Guidance* (updated November 2017). Some schemes that support self-employment through the New Employment Allowance involve mentoring requirements rather than the more conventional usual kind of ‘conditionality’ - but with ‘claimant participation restrictions’ (NEA *Provider Guidance*, DWP 2016). [↑](#footnote-ref-13)
14. The Foreword to *21st Century Welfare* (DWP: London, 2010 Cm 7913) read: ‘We will help [people] to find work and make sure work pays when they do. They in return will be expected to seek work and take work when it is available’. [↑](#footnote-ref-14)
15. With the introduction of ‘conduct’ as an admissible ground for dismissal by the Industrial Relations Act 1971 s.24(2) - now the Employment Rights Act 1996 s.98(2)(b) - there was a degree of systems convergence. [↑](#footnote-ref-15)
16. A rule seen at different times as inhibiting labour mobility; see, for example, Social Security Advisory Committee Occasional Paper, 2007 No. 1: Sanctions in the Benefit System: Evidence Review of JSA, IS and IB Sanctions, 69. [↑](#footnote-ref-16)
17. Welfare Reform Act 2012 s.26(2)-(4). [↑](#footnote-ref-17)
18. ‘Universal Credit – Leaving Paid Work or Losing Pay Voluntarily (LV) or through Misconduct’, Memorandum ADM 17/17, providing guidance on the operation of the Welfare Reform Act 2012 s.26(2)(d). The scale of sanctioning in such cases is pitched at the ‘higher level’ sanctioning. The government’s policy rationale, as set out in the Memorandum is that ‘The claimant has become a burden (or increased the burden) on the welfare state due to leaving paid work or *losing pay*…’. [↑](#footnote-ref-18)
19. The 2015 Spending Review indicated that this area of conditionality will apply to another 1.3 million people by 2020 (*Spending Review and Autumn Statement 2015*, HM Treasury, Cm 9162 – approximately doubling the number of recipients subject to conditionality; D. Finch, *Universal Challenge: Making a Success of Universal Credit* (London: Resolution Foundation, May 2016). [↑](#footnote-ref-19)
20. Welfare Reform Act 2012 Part 1, ss.13-29; and Universal Credit Regulations 2013/376 regs 89-99. Couples without children must achieve earnings equal to *two* wages at NLW. Until then they are normally subject to ‘claimant responsibilities’ in accordance with the Welfare Reform Act 2012 s.19 and Universal Credit Regulations 2013/376, reg 90(1). ‘Conditionality Earnings Threshold’ is a term used in the Explanatory Memorandum to the Universal Credit Regulations 2013 No.376, para 7.27. [↑](#footnote-ref-20)
21. In her evidence to the House of Commons Select Committee on Work and Pensions Inquiry: Report of the In-Work Progression in Universal Credit Inquiry, HC 549, 11th March 2016, para 41. [↑](#footnote-ref-21)
22. For example, in relation to claims for industrial injuries benefits, when employers’ give their view of the circumstances of accidents to inform decisions on claims. Liaison between DWP officers and employers increased markedly with Jobseeker’s Allowance and procedures like ‘mandatory reconsideration’ - adding to the kinds of pressures on the system’s dependants accurately portrayed in the BAFTA and Palme d’Or-winning film *I Daniel Blake* (BBC Films/BFI, Director: Ken Loach, 2016). [↑](#footnote-ref-22)
23. Variable hours are arguably as important a determinant of workers’ overall pay and conditions as other factors; and this certainly poses challenges for social security systems’ role in helping to close the deficit between ‘standard’ work and atypical work; ‘Atypical Work’ (Brussels: Eurofound/European Observatory of Working Life, Nov 2017). [↑](#footnote-ref-23)
24. The precise impact will depend on the person’s eligibility for continued UC support, and the operation of work allowances (and the taper) when the UC award is recalculated. The deteriorating value of UC since 2015, and particularly the cuts to the value of UC Work Allowances, has undoubtedly impacted on the real value of such litigation ‘wins’. [↑](#footnote-ref-24)
25. Unless the recipient is on very low earnings, and gets maximum Housing Benefit, the rise in earnings will also result in reduced support for rental costs given the way ‘earnings’, including arrears of wages, are under the Housing Benefit Regulations 2006, SI 2006/213, and under UC. Settlements of equal pay claims are also problematic as they generally treated as arrears of income triggering a ‘recoverable overpayment’ of previously-paid costs; *Minter v Kingston-upon-Hull City Council* [2012] HLR 3, CA. [↑](#footnote-ref-25)
26. When the Court of Appeal in *ASDA Stores Ltd v Brierley and Others* [2016] ICR 945 allowed the case to proceed in the employment tribunal, rather than allowing it to be moved to the High Court where costs would have made the claims considerably more expensive, it opened the door to many more low-cost, but potentially high value, equal pay claims. Test cases against other major employers in Retail such as Tesco are also in progress. [↑](#footnote-ref-26)
27. Equality Act 2010 (Gender Pay Gap Information) Regulations 2017, SI 2017/172 from April 2018. The duty to publish annual information, which is in reg. 2, applies to organisations with more than 250 employees. Up-to-date data on trends is provided in the Office for National Statistics Annual Survey of Hours and Earnings. For the most recent data, see ‘Gender Pay Differences’ in Provisional and 2017 Revised Results, Office for National Statistics, October 2017. There is still a long way to go in closing the gender pay gap, and even further went it comes to addressing earnings *progression* prospects; Costa Dias et al, *The Gender Wage Gap* (London: Institute for Fiscal Studies, 2016). [↑](#footnote-ref-27)
28. Details of rates are in the *NHS Agenda for Change Pay Scales 2018-19*. Some groups will have been lifted out of benefits ‘dependency’, or at least had that dependency reduced. Others remain dependent on benefits and subject to a number of separate ‘traps’. For example, from 1st April 2018 the children of employed UC recipients will lose access to free school meals if their net earnings rise to £7400. The Children’s Society estimate that it will require their earnings to rise by £1124 a year more (equivalent to 2.4 hours at NLW) to make up for the loss of support that changes to the legislative regime will mean (see n.93 below). [↑](#footnote-ref-28)
29. One of a number of ‘make work pay’ schemes developed since the 1980s; K. Adireksombat and Y. Jinjarak, ‘The Adoption of In-Work Benefit Programs: An Exploration of International Experiences’, Singapore: Nanyang Technical University, 2008. On the EITC system, see ‘Earned Income Tax Credit’, US Inland Revenue Service; and on the limitations of tax-based schemes, see A. Alstott ‘The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, (1995) 108 *Harvard Law Review* 533, and ‘Why the Earned Income Tax Credit Doesn’t Make Work Pay’, (2010) 73 *Law and Contemporary Problems* 285. [↑](#footnote-ref-29)
30. Such schemes are an important part of modern social protection floors, but their fiscal and political sustainability is in doubt, prompting questions about the need to construct other redistributive mechanisms, including improved minimum wage and equalities interventions and regulated collective bargaining; K. Puttick ‘Social Security and State Support for the Wage-Work Bargain: Reconstructing Europe’s Floor of Social Protection’, ISLSSL XI European Congress of Labour Law and Social Security, Dublin, Theme III Keynote Paper, pp.5-9. [↑](#footnote-ref-30)
31. Initially, the Working Families Tax Credit under the Tax Credits Act 1999 was paid through the pay-roll at the same time as wages, with payments itemised on pay slips. The aim was to reduce the stigma associated with in-work benefits and highlight the advantages of a wage over ‘welfare’; *Tackling Poverty and Making Work Pay*, n.11 above at para 2.8. Later, payments were made by HMRC directly to recipients under the Tax Credits Act 2002. WTC and CTC are now ‘legacy’ benefits being progressively replaced by Universal Credit which is paid directly by the DWP under the Welfare Reform Act 2012, Part 1. [↑](#footnote-ref-31)
32. K. Puttick, ‘Welfare as ‘Wages’: Benefits, Low Pay and the Flexible Labour Market’ (1998) 27(2) ILJ 162. The way in-work support from UC works is considered more fully in Section 4. [↑](#footnote-ref-32)
33. HC Deb, Vol 629, 15 Oct 2017, cols 860 et seq. The Trussell Trust reported a rise in take-up of food bank help by UC recipients; *Early Warnings: Universal Credit and Foodbanks*, Trussell TrustApril 2017. [↑](#footnote-ref-33)
34. *Autumn Budget 2017* (London: HM Treasury), para. 7.3; and Statement of the Secretary of State for Work and Pensions, Autumn Budget 2017; and ‘More Detail on £1.5 Billion Package for Universal Credit’, DWP, 23rd November 2017. [↑](#footnote-ref-34)
35. *World Social Security Report 2010/11: Providing Coverage in Times of Crisis and Beyond* (Geneva: ILO) 13. Social exclusion has been an important driver for citizenship and solidarity-based programmes comparable to UC like France’s Revenu de Solidarité Active; T. Vlandas, ‘The Politics of In-Work Benefits: The Case of the Active Income Solidarity’ in France’, (2012) *French Politics*, Vol 11, 117-142; and M. Cousins, ‘In-Work Benefits: Effective Social Protection or ‘Emperor’s New Clothes’? (2014) *European Journal of Social Security* Vol. 16 Issue 2, 100-121 (comparing France’s, USA’s, UK’s, and New Zealand’s schemes). [↑](#footnote-ref-35)
36. *World Social Protection Report 2014/15* (Geneva: ILO, 2014) 26; K. Puttick, ‘The Challenges for Labour Law and Social Security Systems at the Labour-Social Security Interface’ in R. Blanpain, F. Hendrickx, D. Du Toit (eds), *Labour Law and Social Progress: Holding the Line or Shifting the Boundaries?* (2016) BCLR Vol 92 (Netherlands: Kluwer Law International BV) 159 at 168. The Social Security Advisory Committee has noted how the Universal Credit programme’s roll-out is coinciding with a ‘dramatic growth in the part-time and more flexible patterns of working’; *In-Work Progression and Universal Credit – A Study by the Social Security Advisory Committee* (Occasional Paper No.19), November 2017. [↑](#footnote-ref-36)
37. ‘This will be a Budget for working people. A Budget that sets out a plan for Britain for the next 5 years to keep moving us from a low wage, high tax, high welfare economy; to the higher wage, lower tax, lower welfare country we intend to create’; Speech of the Chancellor of the Exchequer, Summer Budget 2015, HM Treasury, July 2015. [↑](#footnote-ref-37)
38. *Economic and Fiscal Outlook* (London: Office for Budget Responsibility) March 2017, Cm 9419; and *Forecast Evaluation Report* (London: OBR), October 2017. Some projections point to wage stagnation and real household disposable income falling for 19 consecutive quarters; *Freshly Squeezed: Autumn Budget Response* (London: Resolution Foundation, 23 November 2017). Forecasts for real earnings growth for the 5 years to 2023 is forecast to remain ‘subdued’, averaging no better than 0.7% a year; *Economic and Fiscal Outlook*; Office for Budget Responsibility, March 2018, Cm 9572. [↑](#footnote-ref-38)
39. Deakin and Wilkinson, n.4 above at 126-130. One variant on that support was for the parish to supply labour and made up the difference between what the employer paid and a subsistence income. Such support was restricted after 1834 by the Poor Law Amendment Act 1834, and even more effectively barred out in Scotland by the Poor Law Amendment (Scotland) Act of 1845. This left destitute workers during the Scottish potato famine between 1846 and 1848 reliant on the Destitution Board system set up by private subscription for subsistence-level support. The system could oblige them to take on additional work for ‘destitution projects’ like public road-building paid at ‘rock bottom wages’; M. Lynch, *Scotland: A New History* (London: Pimlico). [↑](#footnote-ref-39)
40. *Social Insurance and Allied Services* Report by Sir William Beveridge (London: HMSO, 1942, Cm 6404). [↑](#footnote-ref-40)
41. The War Cabinet summary of the report observed that Social Security was ’pre-eminently not a plan for giving to everybody something for nothing and without trouble’: rather it was a plan to secure to each citizen an income adequate to satisfy a natural 'minimum standard’ on ‘condition of service and contribution…’, adding that ‘benefit in return for contributions rather than free allowances from the State is what the people of Britain desire’. (para D21). It observed that ‘whatever money is required for provision of insurance benefits should come from a Fund to which the recipients have contributed’ (p.3); War Cabinet Summary of Report Social Insurances and Allied Services by Sir William Beveridge: Confidential WP (42) 547, 25th November 1942 (National Archives, accessed 12th November 2017). National Assistance support was to remain outside the scheme (p.9). [↑](#footnote-ref-41)
42. National Insurance Act 1946 s.13(5). [↑](#footnote-ref-42)
43. Deakin and Wilkinson, n.4 above at 167. [↑](#footnote-ref-43)
44. Lord Beveridge, *Full Employment in a Free Society: A Report* (Works of William Beveridge) (London: Routledge, 2014) Prologue, ‘Full Employment’, 5. [↑](#footnote-ref-44)
45. The proportion of part-time work was estimated to have risen from 18 to 33 per cent in the period 1975-1982 as a result of incentives like removing employees working below the Lower Earnings Limit for NI contributions out of the requirement to pay Class 1 contributions; O. Robinson and J. Wallace ‘Growth and Utilisation of Part-Time Labour in Great Britain’ (1984) 92 *Employment Gazette* 391-397; Deakin and Wilkinson, n.4, 187. [↑](#footnote-ref-45)
46. *The Gig is Up: Trade Unions Tackling Insecure Work* (London: TUC, June 2017) 44-49. [↑](#footnote-ref-46)
47. Trade Union and Employment Rights Act 1993, with a saving for Agricultural Wages Boards. England’s AWB was abolished in 2012, but they continue in Scotland, Northern Ireland, and Wales: in Wales after a Supreme Court case in which it successfully resisted abolition); *Agricultural Sector (Wales) Bill: Reference by the Attorney-General for England and Wales* [2014] UKSC 14. [↑](#footnote-ref-47)
48. J. Allbeson, *Benefits and Work: A CAB Perspective on the Welfare to Work Debate* (London: National Association of Citizens Advice Bureaux, July 1997) 12-14, discussed in K. Puttick ‘Welfare as ‘Wages’, n.32 above at 164. There was evidence by 1995 that jobs in at least five sectors where minimum rates had previously been set by wages council orders were being paid below the rates paid before abolition; J. Lourie, ‘A Minimum Wage’, House of Commons Research Paper 95/7, 17th January 1995, p.5, referring to a Low Pay Network study ‘After the Safety-Net’, 1995. [↑](#footnote-ref-48)
49. R. Dickens, P. Gregg, S. Machin, A. Manning ‘Wages Councils: Was there a Case for Abolition?’ (1993) *British Journal of Industrial Relations* 31(4) 515-50. They also concluded that abolition was unlikely to help create jobs, and that more minimum wage interventions and regulation were needed, not less. [↑](#footnote-ref-49)
50. S. Thompson et al, *Boosting Britain’s Low-Wage Sectors: A Strategy for Productivity, Innovation and Growth* (London: Institute of Public Policy Research, 2016) 6. An estimated 274,000 of the 1.5 million workers covered by the NLW are employed outside the low pay sectors; NMW: however, the overall number of workers covered by the NLW is expected to double, rising to 3 million, by 2020; *Low Pay Commission Analysis*, Low Pay Commission, December 2017, p.4. [↑](#footnote-ref-50)
51. For example, compulsory competitive tendering, ‘best value’ requirements in public sector procurement, and rescission of the Fair Wages Resolution (B. Bercusson ‘Proposal to Rescind the Fair Wages Resolution: The Future of Fair Wages Policy’ (1982) 11(1) ILJ 271). Social objectives, including ‘living wage’ clauses, have been a feature of the public procurement framework; A. Koukiadaki ‘The Far-Reaching Implications of the Laval Quartet: The Case of the UK Living Wage’ (2014) 43(2) ILJ91. [↑](#footnote-ref-51)
52. P. Davies and M. Freedland, *Labour Legislation and Public Policy* (Oxford: Clarendon Press, 1993), ch. 8. [↑](#footnote-ref-52)
53. This was one of the policy objectives of the legislation. As set out in *A New Contract for Welfare: Partnership in Pensions* (1998, Cm 4179), the aim was for the Guarantee Credit to subsume the ‘minimum income guarantee’ in Income Support to target means-tested support on pensioners with little or no pension income. If the person has no income the full minimum guarantee amount is paid: otherwise the amount payable is the difference between the minimum guarantee amount and her or his income; State Pension Credit Act 2002 s.2(2)(a), (b). [↑](#footnote-ref-53)
54. *Low Pay Britain 2017*, n.3 above, at 6. More recent studies have also highlighted the rise in part-time, low paid work among men, with a quarter of the lowest paid men now working below 30 hours a week; R. Joyce *Poverty and Low Pay in the UK: The State of Play and the Challenges Ahead*, Institute of Fiscal Studies, 6th March 2018. [↑](#footnote-ref-54)
55. Demutualisation connotes a transfer of employment-related risks away from the employer and the community to the ‘self-employed’ person. However, there is also now a degree of *mutualisation* in respect of the in-work welfare system’s income transfers to support self-employed peoples’ earnings. Both kinds of ‘transfer’ are described in the Introduction to N. Countouris and M. Freedland (eds), *Resocialising Europe in a Time of Crisis,* (Cambridge: Cambridge University Press, 2013) 7. [↑](#footnote-ref-55)
56. Platforms and apps in the gig economy support potentially huge networks that connect workers, labour providers, and clients across the world’s labour markets. However, they also pose a raft of status, tax, social security, and other challenges; V. De Stefano, ‘The Rise of the ‘Just-in-Time Workforce’: On-Demand Work, Crowd-work, and Labor Protection in the ‘Gig Economy’, *Comparative Labor Law and Policy Journal* Vol 37(3) (Spring 2016) 471. [↑](#footnote-ref-56)
57. L. Elliot, ‘Low Wages are a Return to Pre-Industrial Britain Says Bank of England Chief Economist’, *The Guardian* 22nd June 2017. Haldane sees such changes as a factor in explaining why wage growth is so poor despite unemployment being low. [↑](#footnote-ref-57)
58. *Fixing the Foundations – Creating a More Prosperous Nation* (London: Department for Business, Innovation and Skills and HM Treasury, 2015) Cm 9098, 5. In 2017 productivity was described as ‘subdued’: it was also observed that the need to raise productivity was a ‘central long-term challenge facing the UK’; *Spring Budget 2017*, HM Treasury, March 2017, para 2.3. [↑](#footnote-ref-58)
59. ‘The welfare system should ensure that people are incentivised and helped to find work which is fairly paid, and that the taxpayer does not subsidise low pay or foot the bill for an unfair system where too many people remain on benefits’; *Fixing the Foundations*, n.58 above at 49. [↑](#footnote-ref-59)
60. *UK Poverty 2017* (York: J. Rowntree Foundation, December 2017) citing factors like falling State support, in real terms, and rising rents, and reduced support for low-income renters. [↑](#footnote-ref-60)
61. D. Finch and M. Whittaker, ‘Under New Management: options for supporting “just managing” families’ at the Autumn Statement’, Resolution Foundation, 7th November 2016. For workers in the JAMS cohort the value of the NLW rise in 2018-19, and the end of the public sector pay cap, have been outweighed by the cuts to support from cuts to benefits; D. Finch, ‘Just about managing families set for biggest year of benefits cuts’, Resolution Foundation, 11th March 2018. Among the forecasted risks for rising expenditure on UC is the growth in low hours jobs and low-income self-employment; *Welfare Trends Report 2018*, Office of Budget Responsibility, January 2018, Cm 9562, p.13. [↑](#footnote-ref-61)
62. The trade union movement was divided over the value of wages councils, and therefore over the wisdom of finally abolishing them all, except the Agricultural Wages Boards, in 1993; S. Keevash ‘The Wages Councils: An Examination of Trade Union and Conservative Government Misconceptions about the Effect of Statutory Wage Fixing’ (1985) 14(1) ILJ 217. [↑](#footnote-ref-62)
63. Frances O’Grady ‘Bring Back Wages Councils to Tackle Living Standards Crisis’, TUC 8th March 2013. Such a ‘return’ could also extend to wage structures and grade differentiation – an important element in earnings progression – helped by models provided by the Agricultural Wages Boards in Scotland, Wales, and Northern Ireland and Ireland’s Joint Industrial Committees; K. Puttick ‘Social Security and State Support for the Wage-Work Bargain: Reconstructing Europe’s Floor of Social Protection’, ISLSSL XI European Congress of Labour Law and Social Security, Dublin, Theme III Keynote Paper, p.13 [↑](#footnote-ref-63)
64. Evidence to the Low Pay Commission, Annex A Submission, HM Treasury, 2002, discussed by B. Simpson, ‘The National Minimum Wage Five Years On: Reflections on Some General Issues’ (2004) 33(1) ILJ 22, 24. The floor ensures that at least part of the burden of low pay is allocated to employers; P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford: Oxford University Press) 189. [↑](#footnote-ref-64)
65. The Low Pay Commission Consultation Letter April-July 2017 generated evidence on matters such as the likely impact of a rise on wages, working hours, staffing levels, the adjustments employers have made to terms and conditions, and the economic outlook resulting from Brexit to inform its recommendations for the April 2018 increase. The process follows a model like that used by most EU Member States in preference to indexation-based schemes*; Labour Market and Wage Developments in Europe: Annual Review*, EU Commission 2016, Analytical Chapter, 4, 71-100. In the event, the rise was modest, with the single hourly rate increasing by just 33 pence (to £7.83) for workers over 25. [↑](#footnote-ref-65)
66. D. Finch, *Universal Challenge: Making a Success of Universal Credit* (London: Resolution Foundation, May 2016), p.5. [↑](#footnote-ref-66)
67. J. Plunkett and A. Hurrell, *Fifteen Years Later: A Discussion Paper on the Future of the UK National Minimum Wage and Low Pay Commission* (London: Resolution Foundation) 2013, p.6. [↑](#footnote-ref-67)
68. National Minimum Wage Act 1998 s.1(3) and the National Minimum Wage Regulations 2015/621 regs 4-6. [↑](#footnote-ref-68)
69. *Fifteen Years Later,* n.67 above at 6. [↑](#footnote-ref-69)
70. *More than a Minimum: The Resolution Foundation Review of the Future of the National Minimum Wage Final Report* (Bain Report) (London: Resolution Foundation) 2014. [↑](#footnote-ref-70)
71. *More than a Minimum*, n.70 above at 13. Bain also commented at the time that ‘With a single rate, it will always be hard to raise the rate because you're worried about employment in vulnerable areas. But minimum wages are ill-fitting garments, pinching hard in some places and leaving room in others. We need to ask whether there's more we could do to push up pay in sectors that could afford it’; G. Bain ‘Minimum wage risks becoming going rate for millions, low pay pioneer warns’, *The Guardian* 5 July 2013. [↑](#footnote-ref-71)
72. C. D’Arcy and M. Whittaker, *The First 100 Days: Early Evidence of the Impact of the National Living Wage* (London: Resolution Foundation, 2016), 10. [↑](#footnote-ref-72)
73. Other countries describe wage supplementation or schemes for paying social benefits on top of wages, in similar terms. South Africa, for example, refers to the ‘social wage packet’; Social Security Agency’s *Annual Report 2013/14* (Pretoria: SASSA, 2014); K. Puttick, ‘The Challenges for Labour Law and Social Security Systems at the Labour-Social Security Interface’, n.36 at 180. [↑](#footnote-ref-73)
74. On enforcement aspects, following the TUC’s Commission on Vulnerable Employment and *Hard Work, Hidden Lives* report (London: Trade Union Congress, 2007) the Employment Act 2008 strengthened enforcement measures – particularly in dealing with underpayments: but non-compliance problems continue. [↑](#footnote-ref-74)
75. Low pay sector unions like USDAW, representing shop workers, believe that paying a lower rate for workers under 25 who are doing the same job is unjustified; ‘National Minimum Wage’ [www.USDAW.org.uk/Campaigns/National-Minimum-Wage](http://www.USDAW.org.uk/Campaigns/National-Minimum-Wage): last accessed 3rd April 2018. On trends towards flattening pay structures, see the *Manpower Employment Outlook Survey* (March 2016). In the aftermath of the NLW’s introduction in 2016 there were, indeed, some high-profile examples of cuts to remuneration packages to fund NLW costs - mainly in the retail sector; ‘Retailers will have to find £3 billion more a year for ‘national living wage’, S. Butler, *The Guardian* 31st March 2016. [↑](#footnote-ref-75)
76. The National Minimum Wage Regulations 2015, SI 2015/621, reg.4 merely stipulated what the national living wage rate should be for the purposes of the National Minimum Wage 1998 s.1(3). No further compliance measures were put in place to coincide with the NLW. The view of the Chancellor of the Exchequer at the time, reportedly, was that whilst such actions had not been barred out by the NLW provisions in the 1998 Act they were not in the *spirit* of the law; J. Faragher, ‘Covering the cost of the national living wage – is it fair or legal to cut back perks?’ *Personnel Today*, 9 June 2016. [↑](#footnote-ref-76)
77. K. Forster ‘National Living Wage comes in amid fears of widespread job losses’, *The Independent*, 1st April 2016. Forecasting was difficult, however. Office for Budget Responsibility forecasts before the NLW, taking account of the ‘spill-over’ effects on wages further up the wage distribution, focused on reduced hiring that would not have occurred without the NLW (but with off-sets of costs passed on to customers); *The Effects of the National Living Wage*, OBR Nov. 2015. [↑](#footnote-ref-77)
78. *Low Pay Britain 2016* (London: Resolution Foundation, 2016) 10. [↑](#footnote-ref-78)
79. *Low Pay Britain 2016*, 6, 7. The RF survey suggested that if rises continue at a low level, rather than reaching a 60 per cent of median earnings by 2020 - as hoped when it was introduced - workers on the NLW could be as much as £1000 worse off. More recent projections forecast an even lower figure, with full-time NLW earners being £1400 worse off by 2020’; C. D’Arcy ‘The Autumn Budget brings worse than hoped for news for the low paid’, Resolution Foundation, 23 November 2017. [↑](#footnote-ref-79)
80. L. Gardiner and A. Corlett, *Looking through the Hour Glass – Hollowing Out of the UK Jobs Market Pre- and Post-Crisis* (London: Resolution Foundation, 2015) 2-11. HR organisations like the CIPD also see difficulties in promoting better progression of UC-supported workers to better rewarded work; *Making Work Pay – Implementing Universal Credit* (London: CIPD, 2014). [↑](#footnote-ref-80)
81. L. Judge, *Round the Clock – In-Work Poverty and the ‘Hours’ Question* (London: Child Poverty Action Group, 2015). Given that such employers are also beneficiaries of in-work social security as a form of wage subsidy it is perhaps surprising the government does not countenance some conditionality measures directed at employers. [↑](#footnote-ref-81)
82. Given that the lower earnings limit (LEL) for the payment of employer NI is currently £162 a week, employing staff at below 20 hours a week levels at NLW rates produces a ‘nil’ NI liability. Keeping wages below the LEL also avoids liability to pay SSP, maternity, paternity, and adoption benefits. Such disincentives to raising hours and pay run completely counter to IWP aims. [↑](#footnote-ref-82)
83. This is the primary group targeted by the UC In-Work Progression scheme; *Making Work Pay – Implementing Universal Credit***,** n.80 above. The CIPD research (at p.5) indicated that most training was just focused on helping staff do their *current* job rather than providing the kind of training and support that would help them progress to a higher-paid job. [↑](#footnote-ref-83)
84. T. Richmond *The Great Training Robbery: Assessing the First Year of the Apprenticeship Training Levy* (Reform Research Trust, April 2018) 4. Under the NMW apprentices can be paid as low as £3.70 an hour at 2018-19 rates. [↑](#footnote-ref-84)
85. Finch and Whittaker, n.61 above at 23. [↑](#footnote-ref-85)
86. *In-Work Progression and Universal Credit*, n.36 above. [↑](#footnote-ref-86)
87. For a commentary, see K. Puttick, ‘21st Century Welfare and the Wage-Work-Welfare Bargain’, n.9 above; and ‘21st Century Welfare: Reconstructing the Wage-Work-Welfare Bargain’ ILJ Vol 41(2) July 2012, 236. [↑](#footnote-ref-87)
88. Welfare Reform Act 2012 s.8(1)-(4). ‘Other particular needs or circumstances’ is a general power to extend support by regulations and includes limited capability for work and regular and substantial caring for a severely disabled person; s.9(1), (2). [↑](#footnote-ref-88)
89. UC Regulations 2013, SI 2013/376 reg.22(1), (2). A higher allowance is paid if the award does not include housing costs. [↑](#footnote-ref-89)
90. See the UC Regulations 2013 Part 6, particularly regs. 62-64. [↑](#footnote-ref-90)
91. Explanatory Memorandum to the Universal Credit Regulations 2013, para. 7.33. [↑](#footnote-ref-91)
92. N. Broughton and B. Richards *Tough Gig: Tackling Low Paid Self-Employment in London and the UK*, ’Social Market Foundation, October 2016 (using estimates based on SMF’s analysis of Households Below Average Income data). The scale of low earnings in this area is better understood by the estimates made by the Foundation of the numbers of self-employed earning less than the NLW. These suggest that just under half the group were paid below the NLW in 2016 - just over 1.7 million workers, albeit with some substantial variations between sectors. The policy is attractive to the government as it is achieving sizeable savings on UC expenditure; *Welfare Trends Report 2018*, OBR, January 2018, Cm 9562, p.10. [↑](#footnote-ref-92)
93. Universal Credit (Work Allowance) Amendment Regulations 2015, SI 2015/1649, amending the Universal Credit Regulations SI 2012/376 reg 22(1)-(4). Those without a housing support element in their UC award went from an earnings threshold before the taper operated of £734 a month (for a single claimant with a child) to a new standard maximum of £397 a month. For those with housing costs it went from £263 a month to a new standard £192. Withdrawal of automatic passporting of all workers to NHS benefits except those on very low earnings, coupled with withdrawal of free school meals (FSM) from households with a worker earning more than £7400 a year and limitations on access to childcare support, represented further in-roads to earlier commitments to provide access to free school meals, childcare costs, and other benefits available to all UC recipients including those in work. The Children’s Society estimated that a worker in a one-child family would need to earn £1,124 a year more, and in a three-child family £3582 more, to make up for the loss of the FSM benefit. Childcare costs support has also worsened for some low-earnings households after ‘restructuring’ of that support; *The Parent Trap: Childcare Cuts under Universal Credit*, Children’s Society, 2017. The government’s position has been that access to FSM by all UC recipients was only meant to be a ‘temporary measure’; Baroness Buscombe, Parliamentary Under Secretary of State, DWP, HL Hansard Vol 789, 14th March 2018, and Opposition attempts to reverse the changes made by the Free School Lunches and Milk, and Early Years Finance (Amendments Relating to Universal Credit) Regulations 2018, SI 2018/148, including a new ‘earned income’ limit from 1st April 2018, were defeated after intense Commons debates on the amending regulations (HC 637, 13th March 2018). [↑](#footnote-ref-93)
94. *Early Warnings,* Trussell Trust, n.33 above. A key finding was that foodbanks were seeing nearly a 17% increase in referrals for emergency food assistance in areas where UC has been rolled out in full, and that ‘People in insecure or seasonal work are particularly affected, suggesting that the work incentives in Universal Credit are not yet helping everyone’. A significant problem appears to be lengthy UC waiting periods – up to 6 weeks before UC payments are received unless DWP loans are obtained. [↑](#footnote-ref-94)
95. *Britain in the Red*, London: Trade Union Congress Economic Report Series 2016; E. Cadman ‘Stagnant wage growth causing debt crisis for low-paid, TUC Warns’, Financial Times 23 August 2016. [↑](#footnote-ref-95)
96. *IFS Green Budget 2016*: Chapter 10 ‘The Changing Effects of Universal Credit’. The view of the Resolution Foundation was that the majority of working families with in-work support would be detrimentally affected; D. Finch, *Universal Challenge: Making a Success of Universal Credit*, n.66 above at 7. [↑](#footnote-ref-96)
97. *Making a Success of Universal Credit*, n.66 above at 21. The Foundation’s main contention in this regard is a significant reduction in the taper rate is needed, ideally reduced to 55% over the medium term, and should be a clear policy objective. Given that current numbers of workers being paid at NLW rates is expected to double to 3 million by 2020 (Low Pay Commission, n.53 above) a significant portion of the labour market will be affected by these limitations. [↑](#footnote-ref-97)
98. There is a regional dimension to the impact on this group, with the impact being more acute in regions like Northern Ireland and other areas of the UK with lower than average earnings. A greater proportion of single-earner couples in such regions is likely to be on low earnings and therefore receiving means-tested State support. Accordingly, those with a partner already in such paid work are likely to face higher levels of UC withdrawal when they start employment; J. Browne and B. Roantree, ‘Universal Credit in Northern Ireland: What Will its Impact Be and What are the Challenges?’ Institute of Fiscal Studies Report R77, 2013. [↑](#footnote-ref-98)
99. J. Portes and H. Reed, *The Cumulative Impact of Tax and Welfare Reforms*, Equality and Human Rights Commission, 2018. [↑](#footnote-ref-99)
100. Targeted support and child support disregards have previously been part of the bedrock of successive governments’ ‘empowerment’ agendas since at least 2000. For example, see the initiatives in *A New Deal for Welfare: Empowering People to Work* Department of Work and Pensions (London: DWP, 2006 Cm 6730) 51-61. Child maintenance paid to a working parent with care was disregarded when assessing tax credits, with the aim of providing a further incentive to enter paid employment, remain in it, and secure a third income stream to supplement wages and State support; K. Puttick *Child Support Law: Parents, the CSA and the Courts* (Welwyn Garden City: EMIS, 2003) 18. [↑](#footnote-ref-100)
101. On 15th October 2017; n. 33 above. After the DUP withdrew support from the government (unsurprisingly given Northern Ireland’s negative experiences of UC) rather than face defeat in a vote in which they participated, the government’s Whips instructed their MPs not to vote, and the motion, which was not binding, was lost by the government by 299-0. [↑](#footnote-ref-101)
102. France’s Revenu de Solidarité Active, including what is now the Activity Premium supplementing low paid workers’ wages, has been problematic in this regard since its inception. The RSA was only introduced after a fragile consensus between the Left and Right, and employers’ organisations and unions; T. Vlandas, ‘The Politics of In-Work Benefits: The Case of the ‘Active Income of Solidarity’ in France’, *French Politics* 11, 117–142. The scheme recognised what commentators had been pointing out for some while, that labour market changes, and reduced opportunities for work, dictated new measures to tackle newer forms of social exclusion. Failing social insurance programmes, and newer groups of *les exclus*, had produced newer crises of coverage, legitimacy, and participation; D. Beland and R. Hansen, ‘Reforming the French Welfare State: Solidarity, Social Exclusion and the Three Crises of Citizenship’, *West European Politics* Vol 23 No. 1 (January 2000) 47-64. Besides the scheme’s complexity (see C. Bourgeois and C. Tavan (2009) ‘The Revenu de Solidarité Active or Earned Income Supplement: Its Design and Expected Outcomes’, Paris: Trésor-Economics No. 61, July 2009: Treasury and Economic Policy Directorate, République Française) its cost has grown exponentially, prompting sections of the media to brand it a ‘failure’ (M. Landre, M ‘Five Years On, the RSA Is a Failure’, *Le Figaro Economie*, 1 June 2014). More recently, some departments simply lack the resources to keep pace with demand (G. Guichard, ‘Departments Trapped by the Soaring RSA’, *Le Figaro Economie* 24 March 2016). [↑](#footnote-ref-102)
103. The Commons Select Committee on Work and Pensions identified a further negative feature, namely the link between such small scale employment and poor pay progression, limited career prospects, and job security (and frequent periods of unemployment between jobs); House of Commons Select Committee on Work and Pensions Report of the In-Work Progression in Universal Credit Inquiry, HC 549, 11th March 2016, 5. The SSAC has pointed (n.91 above) out that UC’s introduction has coincided with a ‘dramatic expansion’ in the growth of part-time and flexible forms of working, but without making the connection between the way the scheme is more supportive of such work and its incentives for employers. [↑](#footnote-ref-103)
104. *In-Work Progression and Universal Credit*, n.36 at p.9. [↑](#footnote-ref-104)
105. DWP guidance provides criteria for determining whether an EU national has worker status, including an expectation of earnings which are at least in line with the primary earnings threshold (PET) for Class 1 National Insurance Contributions (broadly equivalent to 24 hours a week at the NMW). If earnings fall below the PET enquiries are made as to whether the employment is ‘genuine and effective’, and otherwise in line with worker status in EU Law. This requires employment to be ‘real and genuine’ rather on a small scale that is just ‘marginal and ancillary’; *Genc v Land Berlin* [2010] ICR 1108, ECJ. [↑](#footnote-ref-105)
106. In evidence to the Commons Select Committee on Work and Pensions Inquiry; n.21 above, at para 41. [↑](#footnote-ref-106)
107. Key aspects of IWP are being evaluated in the *UC In-Work Randomised Control Trial*, DWP December 2017, including the impact of an ‘active labour market regime’ on earnings and hours on those in low-paid work. Among other things it is evaluating the results of 3 groups with differing frequencies of meetings with work coaches, including two groups who are subject to mandatory actions in their Claimant Commitment. An important comparison of earnings will be made with a third group who are expected to agree voluntary actions, with a progress reviews at 8-weekly intervals. The DWP has also held external trials looking at alternative approaches to progression, including some employer-led projects. [↑](#footnote-ref-107)
108. *In-Work Progression and Universal Credit*, n.36 at 28. [↑](#footnote-ref-108)
109. See *In-Work Progression in Universal Credit: Government Response to the Committee’s Tenth Report of Session 2015-16* (HC Fourth Special Report of Session 2016-17) 19th July 2016, Appendix para. 35. [↑](#footnote-ref-109)
110. Z. Rodionova, ‘Asda Offers 135,000 staff pay rise in exchange for flexible contracts’, n.8 above. [↑](#footnote-ref-110)
111. Commons Select Committee on Work and Pensions Inquiry, n.103 above at para.59. [↑](#footnote-ref-111)
112. *RR v Secretary of State for Work and Pensions (UC)* [2017] UKUT 459 AAC (24 November 2017). [↑](#footnote-ref-112)
113. CPAG Submission (Submission IWO0023) to the Commons Select Committee on Work and Pensions Inquiry, n.21 above, at paras. 36, 37. [↑](#footnote-ref-113)
114. Gingerbread Submission to the Inquiry (IWO0026). [↑](#footnote-ref-114)
115. In-Work Progression in Universal Credit: Government Response to the Select Committee on Work and Pensions Tenth Report of Session, n.109 above. [↑](#footnote-ref-115)
116. Ibid, para.27. The effectiveness of such policies and conditionality will, however, continue to be tested in on-going pilots. [↑](#footnote-ref-116)
117. Welfare Reform and Work Act 2016. [↑](#footnote-ref-117)
118. On the right to work, see Hepple, ‘A Right to Work?’ (1981) 10 ILJ 65; and V. Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford: Hart Publishing, 2017). A right *not* to work could, perhaps, be seen as an adjunct to the right not to be exploited by an employer. If that is problematic when asserted against an employer at a private law level (otherwise than in more obvious cases like modern slavery for which there are criminal law sanctions) then asserting a right not to work against the State is, arguably, even more so – particularly in the face of potent arguments that expectations of ‘reciprocity’ and ‘contribution’ as conditions of take-up of State support – albeit in-work support – are legitimate goals to pursue, and within the margins of appreciation States generally enjoy. [↑](#footnote-ref-118)
119. J. Bowers and J. Lewis *Employment Law and Human Rights* (London: Sweet and Maxwell, 2001). [↑](#footnote-ref-119)
120. A key consideration for Collins J in the High Court in *R (DA) v Secretary of State for Work and Pensions* [2017] HLR 35 was the difficulty, even impossibility, of a lone parent with young children being able to work 16 hours a week, or increasing her work to that threshold, to ‘escape’ the cap. By a majority the Court of Appeal allowed an appeal ([2018] EWCA Civ 504). It accepted Convention rights were engaged, but the majority concluded the restrictions were ‘justified’. McCombe LJ dissented, concluding that lone parents with very young children to whom the cap had been extended, faced special difficulties and childcare; and in ‘justification’ terms art. 3 of the UN Convention invalidated the cap. A Supreme Court appeal is expected later in 2018. [↑](#footnote-ref-120)
121. Costa Dias et al, n.27 above. Even when those in this group are assisted by equality legislation, resulting pay rises or settlements (which are generally treated as ‘income’) may then produce a reduction in their means-tested tax credits or UC awards (nn.24, 25 above). Men are also now starting to be a sizeable group within the part-time low paid cohort; R. Joyce ‘Poverty and Low Pay in the UK: The State of Play and the Challenges Ahead’, Institute for Fiscal Studies, 6th March 2018. [↑](#footnote-ref-121)
122. For someone receiving help with rental costs the position improves, but only marginally (the figure rises from five to ten hours). [↑](#footnote-ref-122)
123. Chancellor’s Speech, Summer Budget 2015, HM Treasury, July 2015, n.37 above. [↑](#footnote-ref-123)
124. D. Hirsch, ‘Not by Pay Alone’, CPAG *Poverty*, 2017 156, p.12. [↑](#footnote-ref-124)
125. M. Padley and D. Hirsch, *A Minimum Income Standard for the UK in 2017* (York: J Rowntree Foundation, 2017) 15. [↑](#footnote-ref-125)
126. *More than a Minimum*, n.70 above. [↑](#footnote-ref-126)
127. JLCs established under the Industrial Relations (Amendment) Act 2012 cover a number of low pay sectors including several which mirror UK low pay sectors like agriculture, retail, hotels, and catering. The scheme caters for sectoral wage-setting mechanisms including Employment Regulation Orders. The legislation was passed following earlier court decisions upholding challenges to aspects of the system (see, particularly, *John Grace Fried Chicken v The Labour Court* [2011] 3 IR 211). On the difficulties the collective bargaining system faces, and ‘regulatory’ options, see M. Doherty, ‘When You Ain’t Got Nothin’, You Got Nothin’ to Lose: Union Recognition Laws, Voluntarism, and the Anglo Model’ [2013] ILJ 42(4) 369-397. [↑](#footnote-ref-127)
128. F. J. Bayliss*, British Wages Councils* (Oxford: Basil Blackwell, 1962) 138. [↑](#footnote-ref-128)
129. K. Ewing, J. Hendy, C. Jones (eds), *A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers’ Rights* (Liverpool: Institute of Employment Rights), pp.20-23. [↑](#footnote-ref-129)
130. K. Ewing and J. Hendy ‘New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining’ ILJ (2017) 46(1), 23. [↑](#footnote-ref-130)
131. In the agricultural sector the pay scales provided in orders were seen by both employers and unions as a positive feature of orders, particularly in providing ‘stability’ in the sector; see A. Hatchett et al *The Implications for the National Minimum Wage of the Abolition of the Agricultural Wages Board in England and Wales: A Report for the Low Pay Commission* (London: Income Data Services), December 2011, p.4. Stability, progression, and other positive features of sectoral minimum wage scales also featured in arguments for retention by Welsh farmers, unions, and the Welsh government, together with the concerns that abolition would mean greater take-up of tax credits to compensate for the lower wages which the government anticipated in its own impact assessment; *Abolition of the Agricultural Wages Board*, Impact Assessment (IA) Defra1462 (Final) 19 December 2012). In the event Wales retained the system, and the Agricultural Wages (Wales) Order 2017, SI 2017/1058 (W.271) offers a useful model for six grade rates and an apprenticeship rate for workers in the sector, as well as Continued Professional Development. [↑](#footnote-ref-131)
132. Scottish Agricultural Wages (Scotland) Order (No 64). Arts 5-7 provide for a standard minimum rate for all employees which ‘applies equally to all full and part-time workers, students, workers on piece-work, etc, and irrespective of what work is done. A worker with a relevant agricultural qualification or who has a certificate of ‘acquired experience’ must also be paid a supplement. Unlike other low pay sectors, overtime pay is guaranteed at 1.5 x the minimum rate (arts 8, 9). [↑](#footnote-ref-132)
133. This has been highlighted when the Scottish AWB fixes new minimum rates. In 2013, NFU Scotland was concerned about the likely impact of lower wages being paid by English competitors after abolition of the English AWB. It commented that ‘those parts of our industry that are reliant on seasonal workers could face serious competition issues for staff in the years ahead…For our soft fruit and vegetable growers, having a statutory requirement to pay higher wages while growers south of the border need only pay the national minimum [wage] will put our farms at a competitive disadvantage’ (Agricultural Wage Proposals *Reflect Difficult Year*, NFUS 23 May 2013: 73/13). [↑](#footnote-ref-133)
134. Like other unions in low pay sectors, the Retail sector’s main union, USDAW, campaigns to prevail on employers to pay at or above the Living Wage Foundation rate (currently £10.20 in London and £8.75 in the rest of the UK); see ‘The National Living Wage’, USDAW, 2018: [www.usdaw.org.uk/Campaigns/National-Minimum-Wage](http://www.usdaw.org.uk/Campaigns/National-Minimum-Wage): accessed 2nd April 2018. [↑](#footnote-ref-134)
135. In 2011 the Conservative-led Coalition espoused a position wherebyemployers and workers should negotiate their relationship ‘directly’ and ‘with minimal intervention by the Government’; *Flexible, Effective and Fair: Promoting Economic Growth through a Strong and Efficient Labour Market*, Department of Business, Innovation and Skills, London: Department for Business Innovation and Skills, October 2011, p.3. This is not exactly compatible with a programme that would require a degree of sectoral wages and conditions setting and, going forward, reforms to collective bargaining and recognition (including arrangements for smaller enterprises) which would be needed to enable employees and employers to have the necessary ‘voice’ in new arrangements. [↑](#footnote-ref-135)
136. David Waddington, Under-Secretary for Employment, HC Deb 11 March 1981 Vol 1000, col 982. It was only five years or so later that deregulation began with the removal of workers under 21 from wages council protection. The rest is history. [↑](#footnote-ref-136)
137. ‘Wages Councils’, (1989) *Equal Opportunities International* Vol 8(2) 27-31. [↑](#footnote-ref-137)
138. *Report of the Royal Commission on Trade Unions and Employers Associations 1965-1968* (Chairman Rt. Hon Lord Donovan), London: HMSO, 1968 Cm 3623. [↑](#footnote-ref-138)
139. ‘Bring Back Wages Councils to Tackle Living Standards Crisis’, n.63 above. Her concern is that there are many sectors that could ‘easily absorb a higher minimum wage’ but which are currently only subject to the same minimum floor as ‘genuinely hard-pressed companies’. [↑](#footnote-ref-139)
140. Bain’s most telling observation was that ‘With a single rate, it will always be hard to raise the rate because you're worried about employment in vulnerable areas. But minimum wages are ill-fitting garments, pinching hard in some places and leaving room in others. We need to ask whether there's more we could do to push up pay in sectors that could afford it’; G. Bain ‘Minimum wage risks becoming going rate for millions, low pay pioneer warns’, *The Guardian* 5 July 2013. [↑](#footnote-ref-140)
141. For the revised legal framework, see n.93 above. [↑](#footnote-ref-141)
142. D. Hirsch, ‘Not by Pay Alone’, n.124 above. Indeed, demand for State support is expected to increase given the factors like the ‘dramatic growth in part-time and more flexible patterns of working’, and the expected doubling of workers at or near the NLW by 2020; *In-Work Progression and Universal Credit – A Study by the Social Security Advisory Committee*, n.36 above. [↑](#footnote-ref-142)
143. D. Finch ‘Just about managing families set for biggest year of benefits cuts since 2012’, Resolution Foundation, March 2018. [↑](#footnote-ref-143)
144. An estimated one in seven labour market participants in the UK are ‘self-employed’ and a ‘large proportion’ of the group (45% of those who are aged 25 or over) have earnings below the NLW: this compares with the 20%-25% of the ‘employed’ who are low-paid; N. Broughton and B. Richards *Tough Gig*, n.92 above. [↑](#footnote-ref-144)
145. R. Dworkin, *Sovereign Virtue* (Cambridge, Massachusetts: Harvard University Press, 2000) 1. Dworkin’s points are, of course, entirely relevant to the argument for regulation as a necessary basis for ‘regulated collective bargaining’ (Ewing and Hendy, n.130 above) and schemes like the IER’s proposed SECs and SCAs. Similar sentiments to Dworkin’s were expressed by Thomas Paine, an early advocate of use of the tax system as a system of redistributive justice and source of funding for welfare-led fiscal transfers, writing in 1790; T. Paine, *The Rights of Man* (Ware: Wordsworth Editions) Chapter V, pp.190-198. Paine’s views provided an early legislative architecture for the modern tax credit. [↑](#footnote-ref-145)
146. The Office of Budget Responsibility included among the ‘forecasted risks’ for rising expenditure on UC a growth in low hours jobs and low-income self-employment; *Welfare Trends Report 2018*, OBR, January 2018, Cm 9562, p.13. [↑](#footnote-ref-146)