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The regulation of internships: A comparative study

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and Labour
Market Policies
Branch



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Preface

The primary goal of the ILO is to work with member States towards achieving full and productive employment and decent work for all. This goal is elaborated in the ILO Declaration 2008 on *Social Justice for a Fair Globalization*, which has been widely adopted by the international community. Comprehensive and integrated perspectives to achieve this goal are embedded in the Employment Policy Convention of 1964 (No. 122), the *Global Employment Agenda* (2003) and – in response to the 2008 global economic crisis – the *Global Jobs Pact* (2009) and the conclusions of the *Recurrent Discussion Reports on Employment* (2010 and 2014).

The Employment Policy Department (EMPLOYMENT) is engaged in global advocacy and in supporting member States in placing more and better jobs at the centre of economic and social policies and growth and development strategies. Policy research and knowledge generation and dissemination are essential components of the Employment Policy Department's activities. The resulting publications include books, country policy reviews, policy and research briefs, and working papers.

The *Employment Policy Working Paper* series is designed to disseminate the main findings of research on a broad range of topics undertaken by the branches of the Department. The working papers are intended to encourage the exchange of ideas and to stimulate debate. The views expressed within them are the responsibility of the authors and do not necessarily represent those of the ILO.

Sangheon Lee
Director
Employment Policy Department

Foreword

Across the globe, young women and men are making an important contribution as productive workers, entrepreneurs, consumers, citizens, members of society and agents of change. All too often, the full potential of young people is not realized because they do not have access to productive and decent jobs. Although they are an asset, many young people face high levels of economic and social uncertainty. A difficult transition into the world of work has long-lasting consequences not only for youth but also for their families and communities.

The International Labour Office has long been active in youth employment, through its normative action and technical assistance to member States. One of the means of action of its Youth Employment Programme revolves around building and disseminating knowledge on emerging issues and innovative approaches.

In 2012, the International Labour Conference issued a resolution with a call for action to tackle the unprecedented youth employment crisis through a set of policy measures. The resolution provides guiding principles and a package of inter-related policies for countries wanting to take immediate and targeted action to address the crisis of youth labour markets. This paper is part of follow-up action on knowledge building co-ordinated by Niall O'Higgins of the ILO's Youth Employment Programme (YEP). It is one of three analyses of internship and work-based learning developed in collaboration with the SKILLS and LABOURLAW branches of the ILO.

Together with apprenticeships and temporary jobs, *internships* (or *traineeships* as they are often called in Europe) have become an important part of the transition from education to employment, especially in higher-income countries. Concerns have been expressed in recent years about the role of internships in serving as an effective bridge between education and (paid) work. The 2012 call for action noted that:

internships, apprenticeships, and other work experience schemes have increased as ways to obtain decent work. However, such mechanisms can run the risk, in some cases, of being used as a way of obtaining cheap labour or replacing existing workers.

Against that background, and in particular the ILO's commitment to promote decent work for young people, the objectives of this report are:

- to explain the different forms that internships may take and what is known about their prevalence;
- to discuss the extent to which different institutional arrangements and design features of internships are conducive to the integration of young people into longer term stable employment;
- to provide a comparative overview of the regulation of internships in selected countries, including a consideration of the extent to which interns are recognized and protected under both labour and social security laws; and
- to the extent possible, to discuss the appropriateness and effectiveness of particular regulatory strategies.

The current paper was undertaken conjointly with the LABOURLAW Unit of the GOVERNANCE department under the guidance of Colin Fenwick. The paper was authored by Andrew Stewart, Rosemary Owens, Anne Hewitt and Irene Nikoloudakis of the University of Adelaide. The authors are grateful to Joanna Vincent and Christian Werthmüller for their research assistance, to João Fernandes of the Rio de Janeiro Regional Labor Court for information on Brazil, to Paula McDonald, Damian Oliver and Joanna Howe for their involvement in related projects, and to Niall O'Higgins, Yoshie Noguchi and colleagues at the ILO for their helpful input as well as to the comments provided by participants at the 2017 Regulating for Decent Work Conference held in the ILO, Geneva in July 2017. The authors acknowledge that this report also draws upon research undertaken as part of an Australian Research Council funded project, 'Work Experience: Labour Law at the Intersection of Work and Education' (DP #150104516). The report is based on information and literature collected upto October 2017.

Kamran Fannizadeh
Director, a.i.
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Abbreviations

ALMP	active labour market programme (or policy)
CEACR	Committee of Experts on the Application of Conventions and Recommendations
DoL	Department of Labor (USA)
EU	European Union
FLSA	Fair Labor Standards Act 1938 (USA)
FWO	Fair Work Ombudsman (Australia)
ILO	International Labour Organization
OECD	Organization for Economic Cooperation and Development
QFT	Quality Framework for Traineeships (EU)
WBL	work-based learning
WIL	work-integrated learning

Executive Summary

Together with apprenticeships and temporary jobs, internships (or traineeships as they are often called in Europe) have become an important part of the transition from education to employment, especially in higher-income countries. Although there is no universally accepted definition, the term ‘internship’ is typically used to cover a wide range of schemes that seek to provide skills, knowledge and experience in a workplace.

Part 1 of this report notes the emergence of concerns about both the quality and effectiveness of many internships and their possible use as a way of obtaining cheap labour. Those concerns have been expressed by, among others, the Council of the European Union (EU), the International Labour Organization (ILO) and the G20. Against that background, and in particular the ILO’s commitment to ensure decent work for young people, the objectives of the report are:

- to explain the different forms that internships may take and what is known about their prevalence;
- to discuss the extent to which different institutional arrangements and design features of internships are conducive to the integration of young people into longer term stable employment;
- to provide a comparative overview of the regulation of internships in selected countries, including a consideration of the extent to which interns are recognised and protected under both labour and social security laws; and
- to the extent possible, to discuss the appropriateness and effectiveness of particular regulatory strategies.

Part 2 outlines some important context for any discussion of the regulation of internships. It considers various aspects of the labour market confronting people today as they seek to make a transition from education to employment, including high levels of youth unemployment, skills mismatches, market segmentation and an increasing reluctance by employers to invest in training. Reference is made to what has been termed the ‘fragmentation’ of employment relations, as well as the growing support for the concept of work-based learning (WBL) both for educational reasons and to enhance the employability of students and graduates.

Part 3 examines the nature and prevalence of internships, understood for the purpose of this report to mean any arrangement for the performance of work within a business or organization, a primary purpose of which is to gain experience, skills and/or contacts that will assist the worker to gain employment or other work opportunities in the future. Internships can be distinguished from apprenticeships, at least in the ‘ideal’ form that combines systematic and long-term workplace training with classroom instruction and attracts an entitlement to wages and other basic working conditions. But what is said about internships in this report can be regarded as applicable to the informal and unregulated apprenticeships prevalent in many lower-income countries. The report also focuses on non-altruistic arrangements for gaining work experience, so as to distinguish internships from volunteering. In its ‘true’ form, that is taken to mean unpaid work performed with the primary purpose of benefiting someone else or furthering a particular belief, rather than gaining experience, skills or contacts that may enhance employability. However, the line between the two can be blurred, especially where the host organization is a not-for-profit body.

There are various ways in which internships can be classified. These include:

- by whether they are paid or unpaid – taking ‘paid’ for this purpose to mean the receipt of financial compensation, in the form of a wage or stipend, though not the reimbursement of a limited range of expenses;
- by whether they involve ‘real’ or productive work, or are limited mostly to observation or mock tasks;
- according to the reason for undertaking them – in particular, whether they are (1) associated with formal education or training, (2) part of active labour market programmes (or policies) (ALMPs) established to assist job-seekers, or (3) open market internships organised by participants themselves or established by the organizations hosting them, without any formal connection to education or training or a government programme; and
- by whether they are confined to one jurisdiction or have an international or transnational element.

The third of these distinctions is given particular attention in the report. This is because the three categories of internship may be treated differently for regulatory purposes. It is commonly assumed that the institutions involved in administering those in the first two categories can be trusted to provide appropriate governance and quality assurance, leaving open market internships as the principal area of concern. The report questions the extent to which that assumption should be accepted.

As far as prevalence goes, the clearest evidence comes from Europe and Australia. A 2013 survey of people aged 18–35 in 27 EU countries found that 46 per cent overall had undertaken at least one paid or unpaid traineeship, though the figure was well over 70 per cent in some countries. A 2016 Australian survey revealed that nearly 60 per cent of those aged 18–29 had undertaken at least one type of unpaid work experience in the past five years. Elsewhere, evidence is more anecdotal, but it seems clear that internships have become common in developed countries. There has also been debate about these arrangements, and in some instances a regulatory response, in some emerging and developing countries.

As **Part 4** notes, there is a great deal of positive literature about internships, especially from an educational perspective. Interns themselves are generally quite satisfied with their experiences, as both the European and Australian surveys attest. But there is also a substantial body of research that identifies potential problems with internships – especially (although not exclusively) those in the open market. The concerns can be grouped into four main categories:

1. Some internships may not deliver on the promise of useful training and skill development. Tales are rife of internships that do not provide any real education or training, or that require productive work without adequate supervision or preparation. The European Commission has estimated that at least 30 per cent of traineeships are deficient in terms of either learning content or working conditions.
2. Internships may not in fact provide a bridge from education to paid work. There is a strongly entrenched perception that work experience enhances employability. But there is a dearth of reliable research on this point. What evidence there is suggests that paid internships are associated with better labour market outcomes than unpaid ones.
3. The practice of expecting or requiring unpaid or low-paid internships may impede social mobility. The cost of undertaking such internships is likely to be harder to bear for those from less advantaged backgrounds, especially if it is necessary to travel to an expensive location to find them. There is also evidence that those with a higher socio-economic status are more likely to be able to access paid internships.

-
4. The use of unpaid or low-paid internships may displace paid employment and undermine labour standards. As the ILO has noted, the availability of interns as a source of cheap labour creates an incentive for the displacement of paid entry-level jobs and the evasion of minimum wage laws.

As a prelude to the comparative analysis of internship regulation that follows, **Part 5** explains that 13 countries have been selected for study:

- *Developed countries:* Argentina, Australia, Canada, France, Germany, Japan, United Kingdom, United States
- *Emerging countries:* Brazil, China, Romania, South Africa
- *Developing countries:* Zimbabwe

These offer a range of different approaches to the regulation of internships, as well as being representative of different regions and levels of economic development. However, no empirical evidence was found on the impact or effectiveness of particular forms of regulation, either in these or other countries.

Part 6 outlines the various ways in which internships may be subject to instrumental state regulation of internships. Five different approaches are identified:

- specific regulation of the use or content of internships;
- regulation by inclusion – that is, expressly bringing internships within the operation of labour or social laws, either by defining them as employment or extending employment rights to certain training arrangements;
- regulation by exclusion – that is, expressly exempting internships from the operation of labour or social laws;
- strategic enforcement of labour or social laws by the state, even in the absence of any specific extension or exclusion;
- systematic use by the state of soft law, such as codes of practice, to influence the use and content of internships in both government and non-government organizations.

Each of these approaches can be seen in at least one of the 13 countries selected for study, and it is not uncommon for a country to adopt more than one approach, as the table shows.

Table 1: Approaches to state regulation of internships in 13 countries

	Specific regulation	Inclusion	Exclusion	Strategic enforcement	Soft law
Argentina	✓	✓	✓		
Australia		✓	✓	✓	
Brazil	✓	✓	✓		
Canada		✓	✓		
China	✓				
France	✓	✓			
Germany		✓	✓		✓
Japan	✓	✓			
Romania	✓	✓			
South Africa	✓	✓			
United Kingdom		✓	✓		✓
United States		✓	✓		
Zimbabwe		✓			

The most comprehensive laws are those in Argentina, Brazil, France and Romania. But in most of the other countries it remains an open question as to whether internships are covered by general labour laws that make no explicit reference to such arrangements. The answer generally depends on a court, tribunal or government agency determining whether an intern falls into the (often undefined) category of ‘employee’ or subordinate worker. In some jurisdictions, the number of cases testing this point has risen in proportion both to the use of internships and to the critical attention devoted to them by government agencies, academics, the media and intern groups. Australia appears to be the only country in which a government agency (the Fair Work Ombudsman) has systematically and publicly pursued sanctions against businesses or other organizations involved in the use of potentially unlawful internships.

Part 7 considers the treatment of the internships that attract the most criticism and policy attention, those found in the open market. Argentina, Brazil and France have each effectively outlawed such internships, by requiring a tripartite agreement involving the intern, the host organization and an educational institution. In China it also appears to be assumed that they are not permitted, though the legal basis for this is unclear. What is not known is whether open market internships nevertheless exist in practice in these countries.

Elsewhere, two broad approaches can be detected. In some countries, such as Germany and Romania, labour laws have been expressly extended to cover such interns, even if they would not otherwise be classed as employees in the general sense of the term. The same applies in some Canadian provinces. Otherwise, interns may benefit from labour laws only if they can be considered employees. In South Africa, the general definitions of employment appear broad enough to catch both paid and unpaid interns, at least when they are performing productive work. In Japan and Zimbabwe, by contrast, the relevant definitions refer to the need for wages or remuneration, which might seem to exclude unpaid interns. In Australia and the United Kingdom, there have been cases in which even unpaid interns have been treated as having an employment contract, and hence as being entitled to a minimum wage – although there have also been decisions to the contrary. In the United States it appears to be harder for an intern to show an employment relationship, given the insistence by the courts there on drawing a binary distinction between work and training.

Another finding is that in the countries selected for study, open market internships are generally covered by health and safety laws, but the relevant systems for compensating work-related injuries have a more mixed or uncertain coverage. In some countries, such as Germany, laws prohibiting workplace discrimination and harassment are broad enough to cover these interns, even if they are not otherwise regarded as employees. But in others, including Japan, the position remains unclear.

Part 8 covers the regulation of educational internships. Three general approaches are apparent. The first is to formally regulate such internships as a distinct category, with a view to ensuring their educational content. Examples can be found in Argentina, France and Romania, and to a lesser extent Brazil. Their laws typically provide for the levels of supervision interns can expect to receive from both the host organization and their educational institution and require learning objectives to be stipulated in advance. Jurisdictions in this category may also articulate the labour standards that apply, or make provision for specific workplace rights. For example, in France there are limits on the daily and weekly working hours of student interns, they are specifically extended protections against harassment, and they are entitled to compensation if the internship exceeds two months in duration.

A second approach is for students to be either included in or excluded from specific workplace protections and rights as a group, and for the educational quality of their internships to be left to voluntary charters. In the United Kingdom, for example, the minimum wage legislation specifically excludes student interns, but they are covered by regulations governing working time and the health and safety regime. The quality assurance of placements is managed through a voluntary code of practice. Germany and Canada also fall into this category. So too does Australia, except in so far as there is a limited national regime for the educational regulation of student placements.

The final approach is typified by jurisdictions such as the United States and Zimbabwe. With limited exceptions, student interns are not regarded as employees, and are therefore excluded from the laws that provide rights and protections to workers. Nor is much regulatory attention paid to the educational quality of placements.

In contrast to educational and open market internships, the ALMP internships considered in **Part 9** are generally aimed at unemployed youth with little professional skills or recent graduates, in order to assist their transition into the labour market. Typically, they involve a tripartite relationship between the intern, host organization and an employment services provider, most often a public employment service. The provider is presumed (whether rightly or not) to have a supervisory and quality assurance role. Whether ALMP interns fall within the ambit of labour laws is often far from clear. Some countries, like Argentina, require an employment contract to be entered into, while other jurisdictions, such as Australia and Germany, exclude ALMP interns from their labour laws. What is perhaps more consistent, though Australia may be an exception, is that occupational health and safety, anti-discrimination and workers compensation laws apply to ALMP interns. Many ALMP internships in the selected countries appear geared toward providing generic work experience that benefits the community, rather than enhancing professional skill levels.

Part 10 considers the extent to which interns are covered by existing ILO and other international labour standards. Some instruments, such as the eight core Conventions underpinning the 1998 Declaration on Fundamental Principles and Rights at Work, are considered to apply broadly to all ‘workers’, regardless of their employment status. However, other ILO Conventions, including the Minimum Age Convention 1973, are framed so as to exclude vocational and technical education and training from their scope, while others may apply to interns only if they are classed as employees. The ILO has not adopted a legal instrument to explicitly guide the regulation of internships, and nor have its supervisory bodies commented on the status of some types of internship discussed in this

report. One regional initiative that *has* sought to guide the regulation of internships is the EU's 2014 Quality Framework for Traineeships (QFT). The QFT seeks to increase the transparency of internship conditions, such as through the requirement of an internship agreement. But it is primarily focused on only open market internships and leaves unresolved the question of whether, and if so to what extent, interns are or should be protected by general labour and social laws.

Part 11 concludes the report by suggesting a number of principles that might guide the design of laws regulating internships:

1. There are some internships or work experience arrangements that, however they are labelled by the parties, should attract the same entitlements and protections as an 'ordinary' employment relationship. It is hard to see why, in many countries, apprentices are accorded the same rights and protections as employees, but interns and other trainees are not.
2. Even if a particular training arrangement should not attract the operation of certain employment standards, that should not dictate its exclusion from all forms of labour or social regulation. For example, there appears to be no reason why laws dealing with matters such as work safety, accident compensation, discrimination and harassment should not apply to interns while they are at work, even when undertaking a placement as part of an educational course or an ALMP.
3. Even in the case of educational or ALMP internships that are excluded from the operation of particular employment standards, it may be appropriate to establish modified entitlements or protections, especially for programmes that extend beyond a particular duration. But in the case of minimum wages, this should only happen to the extent that the intern receives actual training during working hours.
4. States should set minimum standards regarding the documentation of educational or ALMP placements, their duration, hours of work, requirements for specific learning outcomes to be achieved and the need to monitor what is happening at the relevant workplace. It should not simply be assumed that the mere involvement of an educational institution or public employment service will be sufficient to assure these objectives.
5. States should seek to improve access to good quality internships and other forms of WBL for those from disadvantaged backgrounds.

1. Introduction

As a recent International Labour Organization (ILO) book on the ‘youth employment challenge’ notes, there are many different working arrangements that may seek to help job-seekers, and young job-seekers in particular, to make the transition from education to work (Jeannet-Milanovic et al 2017). These include temporary or ‘casual’ jobs, as well as apprenticeships, which in their ‘ideal’ form combine systematic and long-term workplace training with classroom instruction.¹ But they also include internships or (as they are often called in Europe) traineeships.²

There is no universally accepted definition of an internship. The term originated in the context of medical education, where it is still used to denote a period early in the postgraduate training of doctors during which they work under supervision in hospitals for relatively low pay. From the 1930s in the United States, it was adopted to describe programmes that gave young people the opportunity to work in government and (later) political organizations. But the recent ‘explosion’ of such arrangements, especially in higher-income countries, means that interns can now be found in a wide range of industries and occupations, working for businesses, not-for-profit organizations and government agencies alike (Perlin 2012).

In today’s highly competitive labour market, internships may be undertaken to satisfy the requirements of education or training courses, or be offered to unemployed job-seekers by employment service providers as part of active labour market programmes (or policies) (ALMPs). They may be established by businesses to offer a taste of what work is like in a particular profession, or to test out applicants. Or they may simply be arrangements initiated by job-seekers themselves, in order to gain contacts or to fill out a resumé. These last two categories are often called ‘open market’ internships. In whichever of these forms, internships are ‘work-based schemes whose purpose is to provide skills and knowledge in the workplace’ (Jeannet-Milanovic et al 2017, 143), but which typically lack the longer duration and more structured combination of practical work and theoretical instruction associated with the ideal form of modern apprenticeships.

The scale of the internship phenomenon was nicely captured by *The Economist* (2014):

The internship – a spell of CV-burnishing work experience – is now ubiquitous across America and beyond. This year young Americans will complete perhaps 1m such placements; Google alone recruited 3,000 interns this summer, promising them the chance to ‘do cool things that matter’. Brussels and Luxembourg are the summer homes of 1,400 stagiaires, or embryonic Eurocrats, doing five-month spells at the European Commission. The ‘Big Four’ audit companies – Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers (PwC)—will employ more than 30,000 interns this year. Bank of China runs an eight-week programme (‘full of contentment, yet indescribable’, according to an intern quoted on its website); Alibaba, a Chinese online-retailing behemoth, has a global scheme. Infosys, an Indian tech giant, brings 150 interns from around the world to Bangalore each year.

As discussed further in Part 4, many concerns have been expressed in recent years about the role of internships in serving as an effective bridge between education and (paid) work.

¹ However, note that in some countries, apprenticeships are considered to include training schemes that do not conform to this model: see Jeannet-Milanovic et al 2017, 127–43, reviewing the regulation of both types of apprenticeship and the evidence as to their effectiveness.

² We will generally prefer the term ‘internship’ in this report, except when referring specifically to instruments or sources that speak of ‘traineeships’. More is said about definitions and terminology in Part 3.

These concerns were summarised by the European Union (EU) Council (2014, Preamble, [3]–[5]) in these terms:

Socio-economic costs arise if traineeships, particularly repeated ones, replace regular employment, notably entry-level positions usually offered to trainees. Moreover, low-quality traineeships, especially those with little learning content, do not lead to significant productivity gains nor do they entail positive signalling effects. Social costs can also arise in connection with unpaid traineeships that may limit the career opportunities of those from disadvantaged backgrounds.

The Council's response was to adopt a Quality Framework for Traineeships (QFT), with the intention of helping EU member states to '[i]mprove the quality of traineeships, in particular as regards learning and training content and working conditions, with the aim of easing the transition from education, unemployment or inactivity to work' (ibid, Recommendation, [1]). The Framework is discussed further in Part 10.

In June 2012, as part of a resolution concerning the 'youth employment crisis', the International Labour Conference (2012, [24]) noted that:

internships, apprenticeships, and other work experience schemes have increased as ways to obtain decent work. However, such mechanisms can run the risk, in some cases, of being used as a way of obtaining cheap labour or replacing existing workers.

The resolution invited the 'social partners' (trade unions and employers) not just to encourage enterprises to provide more internships or apprenticeships, but to engage in collective bargaining as to the working conditions of interns and apprentices, and indeed 'raise awareness' about the labour rights of young workers (ibid: [27]).

An article on the ILO's website subsequently warned of the dangers if internships become simply a 'disguised form of employment' without any of the benefits they promise, such as real on-the-job training. The same point has been raised by the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR). In its 2014 survey of the implementation of minimum wage fixing standards, the CEACR (2014, para 187) noted that 'problems have been raised in several countries relating to unpaid internship programmes and other similar arrangements, when they are used to evade the payment of applicable minimum wages and to curtail employment opportunities'. The importance of all forms of work experience, be they internships or apprenticeships, providing a quality learning experience and thereby a gateway to good quality and decent jobs, rather than being used to replace paid employees, has been reiterated in other global fora, including the G20 (OECD & ILO 2014: 11; ILO 2015b).

Against that background, and in particular the ILO's commitment to ensure decent work for young people,³ the objectives of this report are:

- to explain the different forms that internships may take and what is known about their prevalence;
- to discuss the extent to which different institutional arrangements and design features of internships are conducive to the integration of young people into longer term stable employment;
- to provide a comparative overview of the regulation of internships in selected countries, including a consideration of the extent to which interns are recognised and protected under both labour and social security laws; and

³ That commitment is reflected in the United Nations' Sustainable Development Goals, which also prioritise the development of strategies to promote youth employment: see Part 2.1 below.

-
- to the extent possible, to discuss the appropriateness and effectiveness of particular regulatory strategies.

To address these questions, Part 2 of this report begins by outlining some important context for any discussion of the regulation of internships. We consider various aspects of the labour market confronting people today as they seek to make a transition from education to employment, including high levels of youth unemployment, skills mismatches, market segmentation and an increasing reluctance by employers to invest in training. We also touch on what has been termed the fragmentation of employment relations, as well as the growing support for work-based learning. Part 3 outlines the different forms that internships may take and reviews what we know about their prevalence and effectiveness, drawing in particular on two major surveys in Europe and Australia. Part 4 then details various concerns that have been expressed about the growth, value and impact of these arrangements.

The next section of the report presents the results of our research into the regulation of internships in 13 countries: Argentina, Australia, Brazil, Canada, China, France, Germany, Japan, Romania, South Africa, United Kingdom, United States and Zimbabwe. Part 5 outlines how these countries were selected and the methods used to research them, while Part 6 presents a typology of different kinds of instrumental state regulation of internships, with examples from the various jurisdictions. We then go on to look in more detail at the treatment of three kinds of internship: those established or undertaken in the open market (Part 7), in connection with some form of recognised education or training programme (Part 8), or as part of some form of ALMP (Part 9). We examine here not just the application of minimum standards on wages or other employment conditions, but the applicability of laws concerning discrimination and equal treatment, work safety and access to compensation for work-related injuries.

Part 10 considers the extent to which interns may be covered by existing ILO or other international labour standards. We also outline what has been to date the most significant supra-national attempt to influence the use, content and governance of internships, the EU's QFT. Part 11 concludes by offering some observations about what appear to be interesting or worthwhile examples of regulatory approaches from the countries studied, as well as possible gaps or shortcomings. We also propose some guiding principles or minimum expectations for the regulation of this important and increasingly common type of work arrangement.

2. Context

2.1 Youth in education and employment

The world of work has undergone massive changes in recent decades, and there is little indication that the pace of change is abating. The impacts of globalisation, including through the opening up of national economies and their penetration by international trading agreements, the growth of labour migration (especially on a temporary basis) and the revolutions in digital and other technologies including in communications are as wide as they are profound. Little wonder that there is renewed focus on the recognition that quality jobs are essential for inclusive and sustainable growth, especially through the global commitment to ‘promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all’, to quote Goal 8 of the United Nations’ Sustainable Development Goals.⁴

The impact of changes in the world of work on young people has been particularly acute, as was made especially apparent by the global financial crisis in 2008–09. It was hardly surprising then that the G20 countries identified youth employment as one of the main issues to be tackled in their strategic objectives (G20 2014). However, so important is this issue, not only for young people but for all, that it has been explicitly addressed in the Sustainable Development Goals as part of Goal 8:

- By 2020 substantially reduce the proportion of youth not in employment, education or training ...
- By 2020 develop and operationalise a global strategy for youth employment and implement the Global Jobs Compact of the International Labour Organization.

An assessment of global employment trends in 2015 indicated that recovery from the global crisis was slow, with growth well below pre-2008 trends and a continuing deterioration predicted for the coming five years. Young people, especially women, were disproportionately affected, with the youth unemployment rate nearly three times higher than the adult rate. The ‘situation is common to all regions and is occurring despite the trend improvement in education, thereby fuelling social discontent’ (ILO 2015a, 11). Although there has been some easing of the youth employment crisis globally, in some developed economies the youth population continues to experience ‘massive discomfort’ from the economic crisis and youth employment remains a key policy concern (ILO 2015b, 4, 41, 64). Europe in particular continues to struggle, with youth unemployment at 21.9 per cent across the EU (European Commission 2015). A more recent assessment confirms the weakness of the global economy. While acknowledging regional differences and that unemployment statistics do not necessarily capture fully the extent of labour market and social challenges, it again highlights the fact that even in the strongest performing economies youth unemployment remains a significant labour market challenge (ILO 2016a, 3, 29).

The policies of many developed economies now require that young people be either in education or in work, as the extract above from the Sustainable Development Goals reflects. The EU Council’s 2013 ‘Youth Guarantee’, for example, ‘seeks to ensure that all EU Member States make a good-quality offer to all young people up to age 25 of a job, continued education, an apprenticeship or a traineeship within four months of leaving formal education or becoming unemployed’ (European Commission 2015, 1).

⁴ See www.un.org/sustainabledevelopment/ (accessed 27 October 2017).

The unstated assumption (or hope) in many such policies is that education provides an assured pathway to employment. But the transition is by no means automatic. Quite apart from problems with the availability and location of employment opportunities, there is much debate about whether formal education equips students with the necessary knowledge and skills for the world of work. While the proportion of young people completing higher education has grown, so too have problems of both over-education and under-education, often leading to a mismatch of qualifications and available employment (ILO 2013, ch 3; Felstead & Green 2013). This mismatch occurs at national, sectoral and occupational levels (see also Chlon-Dominczak & Zurawaski 2017). Opportunities can arise and disappear quickly as global developments outpace educational courses and institutions. Labour market needs identified when students begin a course may be changed completely by the time they exit.

These issues are of course not confined to developed economies. In many developing economies, the issues are compounded by a historical background context of very low levels of formal training. In sub-Saharan Africa and the Middle East there are particular challenges in the development of skills for the future (see eg World Economic Forum 2017a, 2017b). It has been noted that within the next 15 years, there will be 375 million young people who will become of working age in Africa.⁵ In countries such as South Africa, the concerns have been expressed as a triple imperative: for firms to become more innovative and to update and upgrade technology so that they become more competitive; to create more sustainable jobs and promote inclusive growth in the context of high unemployment; and for post-school training to be more responsive and flexible (Kruss & Petersen 2016).

2.2 Segmentation of the labour market

One of the striking features of the world of work in the global era is the segmentation of the labour market: that is, its division into separate markets or sub-markets, each with distinct characteristics.

In early analyses, this was often presented as a dualistic division between a ‘primary’ labour market, characterised by firms that offered stable and life-long employment to its employees whose skills it developed as one of its assets, and a ‘secondary’ market where work was characterised more as short term and unskilled and not firm-specific (Doeringer & Piore 1971). It is perhaps more common today to speak of a distinction between the core and periphery of the labour market (De Stefano 2014; Ales et al 2016), or between insiders and outsiders (Lindbeck & Snower 1984). In this context we may also note the importance of the distinction between the formal and informal sectors of labour markets (Williams & Lansky 2013; O’Higgins et al 2017).

However described, a major outcome of the process of segmentation has been the emergence of labour markets characterised by inequality and precarious work: that is, where there is little security; where there is not enough work; where the work that is on offer is generally classified as ‘low skilled’; or where there are only poor conditions, such as low wages or a failure to abide by work standards (Kountouris 2012). This is a theme we explore further below. For now, it is enough to say that, along with women and migrants, young people have been particularly vulnerable to these types of precarity.⁶

⁵ See ‘Creating Decent Jobs for a Rapidly Expanding Young African Labour Force’, www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_570043/lang--en/index.htm (accessed 27 October 2017).

⁶ For a more general discussion of the concept of ‘vulnerability’, see Rodgers 2016.

As already noted, in developed economies the global financial crisis had a particularly savage impact on young people. Nonetheless, it is also important not to overstate the impact of such events, because that may tend to downplay other structural issues that are important to address. Segmentation and labour market inequalities may be the result of a complex interplay of forces which need to be examined within both a historical and a comparative context.

For example, as recent research by Marques and Salavisa (2017) has highlighted, there have been very different outcomes for young people in different countries in recent years. Broadly speaking, Continental Europe and Nordic countries have done rather better than Southern Europe and Anglo-Saxon countries. They identify two key drivers of ‘age-based dualization’ of the labour market: social conflict (between capital and labour) and deindustrialisation. They contrast the more harmonious and cooperative relations between the social partners (employers and trade unions) in countries such as Germany and Sweden with the more conflictual approach in nations such as Spain, France and the United States. Intersecting with this is the varying degrees of ‘de-industrialisation’ that have occurred, and so the level of reduction in the number of stable jobs, resulting in the uneven distribution of risks across different social groups.

Research such as this serves as a useful reminder of the importance of what political economists refer to as ‘path dependency’. In making decisions about how to deal with certain contemporary issues, history and previous developments may place constraints on what can be done and on what strategies will work. This is a particular challenge that needs to be borne in mind when we are thinking globally about how to regulate for decent work (including for young people). It is also a point that Deakin (2013) has highlighted in his important overview of the scholarship on labour market segmentation, in discussing the complex interaction between legal institutions, market norms and social forces in different countries. As he comments in discussing the role of law, both in relation to the causes of labour market segmentation and in crafting responses to it, ‘path dependencies and institutional rigidities within the law may amplify and perpetuate the effects of segmentation’ (ibid, 13).

2.3 Fragmentation of employment relations

Another useful concept to describe and analyse the world of work in the global era is that of fragmentation – suggestive as it is as the outcome of a violent process in which existing structures and norms disintegrate to a point where they are at most barely recognisable and incapable of reassembly.⁷ As Albin and Prassl (2016) have noted, fragmentation connotes a sense of the implicit dissolution of the institutional framework of employment relations, of the contract of employment and forms of work relations, of the firm and its tendencies in work relations to move away from integration towards disintegration, and of the boundary between formal or public (work in the regulated marketplace) and informal or private (work outside the regulated marketplace). In this world, the market pressures of productivity and flexibility have driven changes away from the forms of work that were normative in the industrial era. The growth of non-standard patterns of work, including temporary work, part-time and on-call work, and often structured through multi-party chains or in a way that seeks to disguise the very nature of the relationship, is now a feature of labour markets around the world (ILO 2016b). The capacity of employing entities to organise and transform themselves, often on a global scale, by using complex corporate forms and different contractual and proprietary forms, has made the identification of responsibility in work relations even more difficult (Collins 1990; Deakin 2001; Prassl 2015). The ‘fissuring’ of businesses into networks of smaller firms linked by complex

⁷ For an early use of this metaphor, see Watson et al 2003, esp 2–3.

contractual arrangements has, for example, intensified the regulatory challenges in delivering decent work (Weil 2014; ILO 2016c). This fragmentation of work relations has exposed problems for the traditional framework of labour regulation, one which challenges its assumptions of work relations as a bilateral contract between two unitary and bounded entities (Fudge 2006).

The concept of fragmentation is a particularly useful one to bear in mind in considering the issues relating to internships and traineeships. There is the reality, to take up the point just mentioned, that many internships or training arrangements involve three parties (worker; educational institution or training provider or commercial broker; and ‘host’ organization), not just two. But the idea also alerts us to the issue of the division of regulatory responsibility between different and overlapping spheres in relation to work.

The intersection or overlap of some areas, such as work and social security,⁸ or work and migration,⁹ has recently garnered some attention. In relation to the intersection of work and migration, for example, the relevance of these intersections between work and migration to young people and unpaid work in Australia has already been noted (Stewart & Owens 2013, ch 7). It has been further observed that in the recent past in Australia, the intersection of the regulatory schemes governing migration and work may have created perverse incentives for temporary labour migrants to perform unpaid work. Such incentives can have a powerful effect on young international students (Howe et al 2018). Likewise, in the EU it has been noted that students and trainees from third country nations outside the EU, who breach the work conditions attached to their migrant status, can be at risk of being dealt with more severely than other third country national migrant workers when it comes, for example, to claiming outstanding remuneration. These students and trainees may be ‘caught between learning and work’ (de Lange 2015).

Generally, however, there has been surprisingly little attention to the intersection of education and work. In particular, the nature of the role and responsibility of educational institutions in relation to work undertaken by students has scarcely been considered by labour lawyers. There may be an assumption that those undertaking work experience as part of a formal educational qualification, as opposed to (say) a more traditional apprenticeship, are not in the sphere of work at all, but in education (Hewitt et al 2017, 103–5). As we discuss in Part 3.4, this can be seen in the way that work arrangements may be categorised for statistical purposes.

There have also been important changes in the way that many people participate in education and work. No longer is there necessarily a linear progression over a life course, from participation in full-time formal education for young people, through participation in the world of work in full-time and ‘life-long’ secure employment during adulthood, to retirement in old age. Many now experience multiple transitions in and out of, as well as between, labour markets and are encouraged not just to engage in ‘lifelong learning’, but to acquire generic skills that will enhance their employability (Owens et al 2017, 648–54). These changing normative patterns regarding education and work provide an additional reason to question the traditional separation of the regulation of those spheres.

2.4 The embrace of work-based learning

There is nothing new about the idea of combining work and learning. The traditional model of apprenticeship was (and still is) premised on the idea of learning a particular trade or craft, while performing work to practise what has been learnt and to hone the skills

⁸ As for instance in relation to ‘workfare’ programmes: see eg Paz-Fuchs & Eleveld 2016.

⁹ See eg Costello & Freedland 2014; Howe & Owens 2016.

involved. However, the idea of learning through work is enjoying a resurgence, well beyond the boundaries of traditional apprenticeship schemes (Hewitt et al 2017). A broad array of modern educational and training programmes require students to engage in work experience. These range from secondary school students undertaking a short work experience placement, to vocational students (including but not limited to apprentices) engaging in extensive periods of work alongside more theoretical training, to university students completing industry projects or undertaking practical placements or internships within businesses. Each of these learning experiences is united by the fact that the students' learning is situated within the act of working. As a group, these pedagogies are often now referred to as either 'work-based learning' (WBL) or 'work-integrated learning' (WIL).

WBL is an umbrella term which refers to learning that occurs in real work environments through participation in authentic work activities and interactions (Atkinson 2016). WIL is sometimes defined more broadly, and can also include a range of strategies that promote students' learning by engaging them in aspects of real or simulated work, whether or not that is situated in an authentic workplace. For example, WIL can include students undertaking 'real' work on campus in collaboration with industry partners, as well as learning in simulated workplace learning environments. As this report is predominantly concerned with students placed in authentic workplaces, we will primarily use the terminology of WBL. However, for the purposes of this report, WBL refers not only to students' placements in authentic work environments, but also to experiences in which learning is intentionally integrated with the practice of work through specifically designed curriculum, pedagogic practices and student engagement.

While figures are hard to come by, it appears that both the variety of WBL experiences and the number of students engaging in them around the world is expanding. There are a number of possible explanations for this trend.

One explanation for the growth in WBL opportunities embedded in education is that they satisfy a growing demand for graduates to have workplace experience. As the ILO (2013, 64) has noted:

Work experience is highly valued by firms and so the lack of such experience constitutes a major obstacle for first-time jobseekers. Many young people are trapped in a vicious circle: they are unable to acquire work experience because they cannot find a first job, but they cannot obtain a job because they do not have work experience.

It appears that the requirement for practical work experience is becoming a permanent feature of the graduate labour market. In the United Kingdom, the Social Mobility Commission (2016, 143) has reported that work experience and internships are the new 'must have'. It observed that '[n]early half of the recruiters who took part in the Highfliers 2016 graduate labour market research survey stated that graduates who have had no previous work experience would have little or no chance of receiving a job offer from their organization'. Such arrangements are regarded by many employers 'as a much more effective mechanism for screening potential applicants than traditional routes such as interviews' (Purcell et al 2017, 10).

Because WBL allows participants to gain work experience without first being required to obtain a job, it is enthusiastically embraced by students. In a sluggish economic environment students are eager to gain a foothold in the job or sector of their choice. The opportunity to enter a workplace as part of an institutionally sanctioned WBL programme may be seen as a means to this end. Indeed, there is considerable evidence that students perceive that they obtain benefits from learning in a workplace. For example, a high proportion of Canadian students who participated in WBL agreed or strongly agreed that the experience had a positive impact on their critical and analytical thinking, improved their knowledge and skills in areas related to their study and helped them appreciate how concepts learned in the classroom applied to the real world (Kramer & Usher 2011). And in a 2016

Australian survey of unpaid work experience, 80.4 per cent of respondents who had undertaken unpaid work as part of their university study, 77.9 per cent of VET students and 64.3 per cent of secondary student respondents agreed or strongly agreed that their unpaid WBL experience helped them develop new skills (Oliver et al 2016, 50).

WBL also receives significant support from industry and the education sector, for its perceived ability to develop employability skills and improve graduate outcomes and productivity. For example, in 2015 the Australian Collaborative Education Network (ACEN), Universities Australia, Australian Chamber of Commerce and Industry, Australian Industry Group and the Business Council of Australia released a National Strategy on Work-Integrated Learning in University Education, which stated (ACEN et al 2015, 1):

WIL is aimed at improving the employability of graduates by giving them valuable practical experience which is directly related to courses being studied at university. WIL also improves the transition from university to work and productivity outcomes for the employer and the economy.

The assumption underlying this statement is that engaging in learning in a place of work assists students to develop skills and knowledge relevant to the workplace, which they are unlikely to develop in formal classrooms. There is certainly evidence that WBL can benefit students' academic learning (Gamble et al 2010), and assist to develop a range of employability skills, including teamwork, problem-solving, communication, information literacy and professionalism (Coll et al 2009; Jackson 2015). There is also evidence that engaging with WBL may improve students' capacity to transition into the paid workforce – although it remains unclear, as we discuss below in Part 4, whether undertaking some form of WBL actually makes a difference to gaining paid employment.

In any event, in response to demands from governments, industry and the broader community that graduates be better prepared for the world of work, many educational institutions have incorporated a commitment to WBL and WIL in their strategic policies and significantly expanded their WBL programmes. One reason for higher education institutions adding WBL pedagogies to their curricula may be to strengthen the employment outcomes of traditional academic courses, and make them more attractive to potential students seeking the highest future return for their investment in education (Abeysekera 2006). Additionally, whilst many educational institutions ensure a substantive academic experience integrated with a monitored or structured period of work, financial pressures may lead some institutions to implement WBL as a cost cutting exercise. This is where tuition for WBL based courses is received without having to provide classrooms, equipment or substantial instruction from educators (Burke & Carton 2013).

2.5 The changing approach to skills development

The current era is also one in which changes in approach to skills development are increasingly evident. As noted earlier, the normative relationship between education and work is one that has changed over time. During the industrial era, reforms in compulsory education in many (now) developed economies established a clear demarcation between the world of childhood and education and that of adulthood and work. There is now global acknowledgment of the importance of childhood as a time of learning, seen as a necessary precursor to successful and sustainable participation in the adult world of work. Today the

rights of children to be educated and, as a corollary, not to work, have been placed at the very heart of internationally accepted labour norms.¹⁰

However, both societal views about education (whether formal or informal) and the relationship between education and work have changed in subtle ways across time – and these changes can impact on the approaches to skills development. One set of changes may be identified in the subtle shift to viewing education (and therefore skills development) as an individual good – and one for which individuals are themselves responsible.

Institutional arrangements and the ascription of responsibility for the provision of education have changed over time. In many countries, the industrial era witnessed the introduction of a legislated requirement of compulsory attendance at formal educational institutions, first at the primary and then later the secondary school level. An integral aspect of this was a system of schools established by the state and to which there was free access. For example, in the latter part of the 19th century in Australia free, compulsory education represented, as elsewhere, an important development in the evolution of the line demarking work as the world of adults and education as the world for children (Stewart & van der Waarden 2011, 186–7). In the 19th century, post-secondary education was divided between universities, which were often seen as providing a general or liberal education, unconnected in any direct way with the world of work, and other learning through work opportunities such as apprenticeships. However, as the industrial era progressed, transformations in education, especially in post-secondary education, also saw much of the learning that had once occurred in workplaces being removed from them and formalised in educational institutions – including universities.¹¹ But at the same time responsibility for the provision of and payment for any higher education was assumed to lie with either the state or the individual. In recent years the balance has shifted in many countries (such as Britain and Australia) away from the state and toward the individual. The effect of such developments has been to reinforce the idea of the responsibility of the individual for their own education, as these individuals are encouraged to think of their education as an investment in their own ‘human capital’ and for which they will later be able to reap the rewards in the form of well-paying jobs. From such thinking it is really only a short step for young people to think that they should be responsible for undertaking unpaid/low paid internships or traineeships to educate themselves in the skills needed to gain a better job (see eg Smith 2010).

Other important shifts have occurred in relation to the role of employing businesses in skills development. It has always been acknowledged that learning at work may extend over a working life, with many legal systems recognising that ‘know-how’ accumulated on the job belongs to the worker and not to their current or any former employer (van Caenegem 2013).

It may seem obvious that the need to learn at work is likely to be greater for young workers at the commencement of their working life. This learning may occur in a formal way, through apprenticeships, for example, or more informally. In many legal systems both these formal and informal learning at work arrangements are classified as work and thus as deserving remuneration – although assumptions about a lower level of productivity on the part of these workers (and sometimes their familial responsibilities) may underpin what in

¹⁰ See the ILO Convention concerning Minimum Age for Admission to Employment 1973 (No 138) and ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst forms of Child Labour 1999 (No 182). See also the UN Convention on the Rights of the Child (1990).

¹¹ Over time the influential idea that a university should provide a purely liberal education (see eg Newman 1852) gave way to the view that they also offer professional practical training (Grubb & Lanzerson 2004).

some instances has become an elaborate system of lower minimum wages for apprentices and young workers.¹²

For an employing business the lower wages could be seen as a form of compensation for any lower productivity. However, in the industrial era there was also an additional incentive to invest in the training of a worker who would remain working at their enterprise for an extended period of time, often a ‘life time’. In the global economy many new developments – in work arrangements, in digital technologies, the competitive demands of markets – are in the process of transforming, or have already disrupted, these (admittedly deeply cultural) normative arrangements. Technological innovation continues to drive changes, including by enabling the creation of digital marketplaces in which ‘crowdworkers’ and ‘on-demand platform workers’ bid to win jobs (De Stefano 2016). Productivity and flexibility in competitive markets and in the workforce have become the new watchwords. Under these pressures the security of ‘lifelong’ employment patterns has been all but eradicated. The impermanence that marks work relations no doubt has an impact on the provision of training. In such a world, human capital theory suggests that responsibility for bearing the costs of and undertaking training may be less attractive to employing businesses. Thus, it has been argued, in some countries the ‘investment model’ of training at work has been displaced by a ‘production model’ in which those who need to learn at work are seen at best as a cheap form of labour.¹³

In triangular work relations, such as those involving labour hire arrangements, Sperrmann (2016) notes that short job placements present a major obstacle to increased investment by both workers and business enterprises in training. While the employment status of those who work through an agency may differ across various jurisdictions, limited job tenure should (as noted above) tend to reduce incentives for training. As against that, Sperrmann points out that from the perspective of the supplying agency, the employability of those on their list must be attractive, especially as they know the needs of the businesses to whom they provide workers. Nevertheless, high transaction costs and the possibility of losing workers often seems to become overriding factors and agencies typically do not provide enough training.

The issue of the costs of training is an important one. From the worker’s perspective, while there can perhaps be some obvious reasons to bear the costs (including at least in terms of time) of their own training, there are numerous consequences both for the individual (issues of equity) and the community (coherent strategies for sustainable employment growth). Consideration of the latter point may suggest that the state should have an obvious interest in, at the very least, contributing to the costs of skills development. It is for this reason that training funds are common in many countries, especially in Europe. No doubt too there is a need for the modernisation of the delivery of training, so that it is responsive to the changed world of work in which businesses operate.

In some countries, such as Australia, it has been noted that the formal system of registered training organizations (RTOs), which have traditionally delivered training in a reasonably systematic way, are taking on a different role as some businesses adopt a more proactive role in responding to external changes. The role of RTOs has thus changed from one of delivering training to assisting employers to identify training needs and providing expert guidance as to where those needs can be met (Smith et al 2017). In one recent study it was noted that, while employers considered training to be of critical importance for the survival of their firms, employer attitudes to training and their training decisions were affected by a number of factors. These included: the need to comply with regulations,

¹² As, for example, in Australia: see Stewart et al 2016: 420–1.

¹³ See eg Pfeifer 2016, contrasting the Australian approach with the investment approach still dominant in Germany. See further Supiot et al 2001, 28–31.

especially those concerning health and safety; the quality and source of entry level labour, which is affected by turnover in the industry; the availability of public subsidies for training; the quality and flexibility of training providers; and reliable information about the training market (Shah 2017).

3. The Nature and Prevalence of Internships

3.1 Defining and distinguishing an internship

The point has already been made that there is no clear or universal understanding of the type of work arrangement that is the subject of this report. As Perlin (2012: 25–6) notes, ‘what defines an internship depends largely on who’s doing the defining’. He says of the word ‘intern’ that it is ‘a kind of smokescreen, more brand than job description, lumping together an explosion of intermittent and precarious roles we might otherwise call volunteer, temp, summer job, and so on’ (2012: xi). The same can be said of broadly equivalent terms in other languages, such as *stagiaire*, *pasante* or *praktikant*.

For the purpose of this report, we take an internship to be any arrangement for the performance of work within a business or organization, a primary purpose of which is to gain experience, skills and/or contacts that will assist the worker to gain employment or other work opportunities in the future. But while we acknowledge the potential for overlap, we exclude from our consideration two types of arrangement.

The first is apprenticeships – at least when they are regulated in such a way as to provide some entitlement to wages and other basic working conditions, whether through characterisation as employment or otherwise. In many countries, especially in sub-Saharan Africa, informal and unregulated apprenticeships are widespread (Jeannet-Milanovic et al 2017, 138–9). What is said about internships in this report can be regarded as equally applicable to such arrangements, regardless of the apprenticeship label.

We also distinguish internships from volunteering, which in its ‘true’ form we take to mean unpaid work that is performed with the primary purpose of benefiting someone else or furthering a particular belief, rather than gaining experience, skills or contacts that may enhance employability (Stewart & Owens 2013, 5).¹⁴ Interns of course frequently ‘volunteer’ their services without remuneration, in the hope of gaining increased employability or a future job. And the line with ‘true’ volunteering can become particularly blurred where the host organization is a not-for-profit body that seeks to assist others (such as a charity) or is associated with a particular cause or belief (such as a political party or a religious institution). In such cases, unpaid work may be undertaken both to increase employability and as an act of altruism or ethical commitment (see eg Leonard et al 2016). Nevertheless, our focus is on non-altruistic arrangements for gaining work experience.¹⁵

3.2 Types of internship

In terms of classifying internships, one obvious distinction is between those that are *paid* and *unpaid*. For the purposes of this report, we assume that an internship is paid if the intern receives financial compensation, in the form of a wage or stipend, though *not* if they simply have a very limited range of expenses (such as travel costs) reimbursed.

¹⁴ Compare the United Nations definition of ‘activities ... undertaken of free will, for the general public good and where monetary reward is not the principal motivating factor’ (United Nations Volunteers 2015, xxiii).

¹⁵ Compare the more nuanced distinction drawn by Murray (2006, 697–8) between ‘genuine’ and ‘precarious’ volunteer work.

In a practical sense, there may be little reason for concern with internships that involve remuneration that at least matches the minimum wage that would otherwise apply to employees performing the same work. It is quite likely in this situation that the interns concern *will* be treated as employees.¹⁶

Generally speaking, the internships that raise the kind of concerns outlined in Part 4 will tend to be those that are either unpaid or that attract compensation below the legal minimum for employees. All the same, there may still be important regulatory issues with paid interns who are not treated as employees, in relation to matters such as hours of work, safety, freedom from discrimination and so on.

A further distinction may be drawn between internships that involve ‘real’ or productive work – work that benefits the host business or organization – and those that are limited mostly to observation or mock tasks. Again, the latter type may be of somewhat less concern, in so far as the host would have no incentive to use them in place of paid employees, or (given the costs of supervision) to have the arrangement extend for a lengthy period. Indeed interns in that category are far less likely to qualify as employees, even in countries with a broad definition of that class. Nevertheless, it may still be important to consider the regulation of such arrangements in relation to matters other than remuneration.

Yet another way of categorising internships or traineeships is to divide them into three categories that are based on their purpose or function.¹⁷ These are (a) placements associated with formal education or training programmes run by authorised institutions or providers; (b) periods of work experience associated with ALMPs designed by governments or employment service providers to assist the unemployed; and (c) other, open market internships (see eg Hadjivassiliou et al 2012, 4–5). This is a trichotomy that we do adopt in this report, because in many of the countries we have chosen to study different rules or processes apply to each of these categories, at least for certain regulatory purposes.

The reason for this is often said or assumed to lie in the different governance arrangements for the three types of internship (Lain et al 2014). For example, the EU’s QFT is expressly stated not to cover ‘work experience placements that are part of curricula of formal education or vocational education and training’, nor traineeships whose content is regulated under national law and which must be completed to enter a particular profession (EU Council 2014, Preamble, [28]). This omission has been justified on the basis that ‘traineeships which belong to these categories are in general of better quality, due to the quality assurance by the educational institutions or professional organizations involved’ (European Commission 2016, 4). Indeed as we note in Part 8, it is common for regulatory regimes to have an exemption for educational internships.

Similarly, while the QFT does cover ALMP traineeships, it often seems to be assumed that these should attract less concern than those in the open market (ibid):

In the case of open market traineeships there is no third party involved further to the trainee and the host organization, which also means that the quality assurance of the traineeship becomes more difficult. ALMP-type traineeships, on the other hand, are offered to (young) unemployed or those at risk of becoming unemployed, and there is usually a public institution (most often a PES [public employment service]) acting as an intermediary between the host organization and

¹⁶ Indeed that is the case in the way labour market statistics are gathered under internationally agreed standards, as discussed in Part 3.4.

¹⁷ Compare Grant-Smith & McDonald 2017, who conceptualise unpaid work according to two dimensions: that of ‘participatory discretion’ (whether it is mandatory or elective) and purpose (educational or productive).

the trainee. This intermediary institution also has a supervising function in terms of traineeship quality.

This is not to say, however, that such explanations should be uncritically accepted. Indeed we go on to argue later in the report that even if educational or ALMP internships should attract different rules or requirements, this should only be the case where certain pre-conditions are satisfied. We also suggest that there are some labour standards that should apply regardless of the type of internship involved.

A further distinction is between internships that are confined to one jurisdiction and those with an international or transnational element. It has become common in recent years for students or graduates to seek to do internships in another country. Such opportunities are often considered highly prestigious, as for example opportunities to work as an intern for agencies of the United Nations or other international organizations, such as the Red Cross and Red Crescent. In part, this reflects a belief that the internationalisation of WIL can help create ‘global citizens’ who can more readily find jobs and fill skill shortages around the world (see eg Gamble et al 2010) – even though the evidence suggests that only a minority of employers actually consider international experience when making recruitment decisions (Van Mol 2017).

Reflecting this trend, there are now agencies that broker such internships – a service for which they demand a fee (see eg Perlin 2012, ch 6). Often implicit in what these agencies offer is a promise that internships will open up not only entry to the labour market, but access to the citizenship of the destination country. Educational institutions, which often encourage and facilitate ‘exchange’ arrangements for students, may promote the opportunity to undertake internships in other countries as part of such arrangements. Transnational corporations and businesses may also place interns or trainees into another country, sometimes as part of the transnational delivery of contracts for specific services or sometimes to promote or emphasize generally what are perceived to be attractive work opportunities offered by their global reach.¹⁸ International internships are in this sense a new form of temporary labour migration, sometimes facilitated by a new type of migration agent (an educational institution, a commercial broker or a transnational firm).

International internships may also be promoted by government programmes. These may seek to provide incentives to the citizens of a country to undertake work experience abroad, whether out of a belief in the intrinsic value of such arrangements, or to improve engagement with a particular region.¹⁹ Or, conversely, they may provide opportunities for foreign students or workers to come and study in the government’s own country, to boost economic development either in that country or in the foreign interns’ home nations.²⁰

3.3 Evidence as to the prevalence of internships

The clearest data as to the prevalence of internships comes from Europe and Australia. In 2013, a survey conducted for the European Commission in the 27 countries that were then members of the EU found that 46 per cent of people aged from 18 to 35 had undertaken at least one (and often more than one) traineeship, understood for this purpose to mean ‘a

¹⁸ Significantly, regulatory regimes for global trade may treat interns or trainees in ways that are distinct from other workers (Engblom et al 2016).

¹⁹ As, for instance, with Australia’s New Colombo Plan, which provides Australian students with assistance to undertake internships in the Asia-Pacific region: see <http://dfat.gov.au/people-to-people/new-colombo-plan/pages/new-colombo-plan.aspx> (accessed 27 October 2017).

²⁰ The Japanese Technical Internship Programme has been a significant if controversial example of this, as discussed in Part 6.3.

limited period of work experience and training spent in a business, public body or non-profit institution by students or young graduates'. The proportion ranged from as high as 79 per cent in the Netherlands and 74 per cent in Germany, to only eight per cent in Lithuania and Slovakia. 59 per cent of respondents who had undertaken a traineeship reported that their most recent arrangement was unpaid, while of those receiving some form of compensation, less than half considered that the amount was sufficient to live on (DGESAI 2013).

In Australia, a national survey of arrangements involving unpaid work experience was undertaken in 2016. It found that 34 per cent of working-age adults had undertaken at least one such episode in the last five years, with the proportion rising to 58 per cent for those aged under 30 (Oliver et al 2016).²¹ One in five participants had undertaken five or more episodes in the past five years. Of the most recent experiences, half were associated with some form of formal education or training, whether at university (20 per cent), as part of vocational education or training (19 per cent), or at secondary school (10 per cent). Nearly one in ten (eight per cent) had participated as a requirement of maintaining access to unemployment benefits from the government, or as part of an unpaid trial while applying for a job (nine per cent). A further four per cent said they had been offered a paid job and the work experience was part of their training or orientation. Almost one in three (30 per cent) nominated some other reason for undertaking unpaid work experience, which would clearly cover open market internships.

In other developed countries, firm statistics are harder to find, though it seems clear that internships have become extremely common. In the United States, for example, Carnevale and Hanson (2015) estimate that interns now represent 1.3 per cent of the labour force, with around half of all college students reporting having completed internships during their studies, around 50 per cent of which were unpaid. By contrast, we would expect to find fewer interns in low and middle-income countries, given the prevalence there of informal employment arrangements that are likely to fill a similar niche in the labour market (O'Higgins et al 2017). Nevertheless, it is notable from the discussion later in the report that emerging countries such as Brazil, China and Romania have each passed laws regulating some or all types of internships, while there has also been debate about the treatment of interns in South Africa and Zimbabwe. Furthermore, and as we pointed out in Part 3.1, what are called 'apprenticeships' in some countries may have all the hallmarks of what would be regarded elsewhere as internships.

3.4 Official labour statistics on internships

Because the gathering of statistics provides the factual evidence which underpins, and so has consequences for, policy and regulation, the ways in which statisticians categorise internships and traineeships is important. In this respect an important development has been the passage of the 'Resolution concerning statistics of work, employment and labour underutilization' at the 19th International Conference of Labour Statisticians in Geneva, 2–11 October 2013.²²

As the Resolution demonstrates, statistics are not free from values and choices. For the most part, the Resolution is commendably broad. Work is defined as comprising 'any activity performed by persons of any sex and age to produce goods or to provide services for use by others or for own use', and specifically covers both formal and informal arrangements, and work performed in any kind of economic unit (para [6]). As such it clearly encompasses, for example, unpaid work in the home. However, the definition of work also

²¹ Note that this survey, unlike the European one, did not ask about paid internships.

²² See www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/normativeinstrument/wcms_230304.pdf (accessed 27 October 2017).

excludes certain activities: those not involving the production of goods and services; self-care (such as grooming and hygiene); and ‘activities that cannot be performed by another person on one’s own behalf’ (para [6(b)]). In relation to the latter category, the Resolution specifies by way of example ‘learning’, as well as ‘sleeping’ and ‘activities for own recreation’.

The way in which the Resolution understands the intersection of learning and work is, therefore, critical. It sets out five mutually exclusive ‘forms of work’, distinguished by the intended destination of the goods and the nature of the transaction (para [7]). These are: own-use production work; employment work; unpaid trainee work, comprising work performed for others without pay to acquire workplace experience or skills; volunteer work; and other work activities (not defined). More specifically, apprentices, interns and trainees who work for pay in cash or in kind are included in the category of employment (para [30]). Conversely, those who work as ‘unpaid trainees’ without remuneration in cash or in kind (although limited forms of support may be provided) are excluded from the category of ‘employment work’ (para [33]).²³ The definition of an ‘unpaid trainee’ includes those who are in traineeships, apprenticeships and internships when unpaid in the sense just explained (para [34]). But it excludes anyone undertaking a period of probation, general on-the-job learning, those in volunteer work, and those learning while engaged in own-use production (para [35]). The Resolution also indicates that the acquisition of workplace experience or skills ‘may occur through traditional formal or informal arrangements, whether or not a specific qualification or certification is issued’ (para [33(e)]).

As the Resolution implicitly acknowledges, work and learning are not mutually incompatible. In relation to ‘unpaid trainee work’ the Resolution concludes that (para [36]):

Essential items that need to be collected to support analysis of the characteristics and conditions of work of persons in unpaid trainee work include industry, occupation, working time, programme time and length, contract characteristics and coverage, existence of participation fees and nature of certification.

To date, the gathering of such information is yet to be undertaken on a systematic basis. However, it can also be borne in mind that while such information is important in understanding the phenomenon of ‘unpaid trainee work’ and its relationship to the labour market, in using the fact of payment (whether in cash or in kind) to differentiate ‘learning’ from ‘work’ and learning-at-work, the Resolution is of no assistance in identifying the problem of sham arrangements or answering the normative question of whether or not such learning-at-work should be paid.

²³ Note that paragraph [33](c) of the Resolution suggests that ‘transfers of education stipends or grants’ may be disregarded as not constituting remuneration, as well as ‘occasional in cash or in kind support (eg a meal, drinks)’. It is not entirely clear whether something called a stipend, but doing more than reimbursing a very limited range of expenses, would be treated as remuneration for this purpose.

4. Policy Concerns

There is a great deal of positive literature, especially from an educational perspective, about the constructive role that internships can play. For example, a 2015 review of 57 studies on the impact of internships completed by university students concluded that they offer a ‘win-win situation’ for students, employers and higher education institutions (Sanahuja Velez & Ribes Giner 2015). The benefits identified for students included the enhancement of employment opportunities, the improvement of skills and competencies, and a better understanding of career paths.

Interns themselves also tend to have a positive view. In the European survey referred to in Part 3.3, over 70 per cent of respondents considered that their most recent traineeship had been or would be helpful in getting them a regular job, although only a quarter reported being offered employment following completion (DGESAI 2013). The more recent Australian survey returned a similar result, as noted in Part 2.4. Around 70 per cent overall of those who had undertaken unpaid work experience in the past five years agreed or strongly agreed that they had developed relevant skills and new knowledge. More than half agreed or strongly agreed that their most recent episode would help them to find employment, improve their networks, determine if that field of work was right for them, and develop their understanding of career opportunities in that field. Again, however, only 27 per cent were offered paid employment by the organization that had hosted their most recent work experience (Oliver et al 2016).

As against the glowing view that is offered by many educators, there is also a substantial body of research that identifies potential problems with internships – especially (though certainly not exclusively) those in the open market. The concerns can be grouped into four main categories: that some internships may not deliver on the promise of useful training and skill development; that they may not in fact provide a bridge from education to paid work; that the practice of expecting or requiring unpaid or low-paid internships may impede social mobility; and (not least) that the use of such internships may undermine labour standards. We briefly consider each of these in turn.

4.1 Poor quality internships

Despite the positive view that many interns seem to have of their period undertaking work experience, others have a different story to tell (see eg Holford 2017). Tales are rife of internships that do not provide any real education or training, with interns given menial tasks (photocopying, making coffee, collecting laundry, and so on) that bear no relation to the jobs they are ultimately seeking to do. Given the competition for ‘prestige’ or highly valued internships, it is not surprising that many job-seekers will be prepared not just to accept such conditions, but to be (or at least seem) enthusiastic about their experience (Swan 2015). Conversely, some interns are expected to do real, productive work without adequate supervision or preparation (Perlin 2012, 102).

According to the European Commission (2013), analysis of the results from the European survey revealed that ‘30% of traineeships were deficient in terms of either learning content or working conditions’ and, crucially, that ‘those who had done a substandard traineeship were significantly less likely to find a job afterwards’.

On one view, as noted in Part 3.2, these quality concerns are far more likely to be associated with open market internships. As Lain et al (2014) argue:

‘governed’ internships, linked to educational programmes or genuine active labour market policies, are much more likely to have beneficial outcomes ... This is because they provide the positive governance conditions relating to contract, duration and partnership arrangements

under which employers, interns and third parties understand how they can benefit from the internship and what their responsibilities are.

In some countries, as we note in Parts 8 and 9, those ‘positive governance conditions’ are effectively now mandated by law. But in others, it merely seems to be assumed that the involvement of an educational internship or employment services provider will be sufficient to assure appropriate governance.

4.2 A bridge to (paid) employment or a trap?

As Grant-Smith and McDonald (2018, 566) note in their literature review:

From a mainstream employability perspective, unpaid work is advantageous in a fluctuating, uncertain economy as it improves skills, knowledge and experience, assists an individual to match their human capital profile to labour market demands and enhances their long-term marketability ...

The perception that this is the case is certainly well entrenched, as we have previously noted. This is reflected, for example, in a recent study of pathways into employment in the Midlands region of the United Kingdom, based on interviews with young people and employers (Purcell et al 2017, 34):

We found that work experience, especially voluntary work, prior to entry to paid work is pretty much a prerequisite for all but the lowest-skilled, lowest paid jobs – and even there, those who had work experience were more likely to have been recruited. Those who had had paid work experience and internships were generally enthusiastic about its value to them personally and professionally, and the majority of those who had done unpaid work experience, with the exception of some who had experienced mandatory work experience as a condition of receiving unemployment benefits, also regarded it as having been beneficial to them, enabling them to gain skills and experience that led to career opportunities.

At the same time, however, it is far less clear that internships actually make the difference between finding and not finding paid employment. Grant-Smith and McDonald (2018, 566) comment that:

Econometric analysis of the outcomes of unpaid work experience and the extent to which participation facilitates subsequent paid employment is scarce. This may be partly the result of the recency of the phenomenon and the challenges associated with collecting large-scale and accurate data on what is an under-reported activity.

O’Higgins and Pinedo (2018) make a similar point, observing that:

Whilst there is quite an extensive literature of sorts either eulogising or condemning internship programmes, there is relatively little reliable evidence on the impact of internships on subsequent labour market experiences of young people.

From the relatively few studies that might be considered to track labour market outcomes, rather than just rely on perceptions, they offer the following summary:

- a. Internship programmes are sometimes – more often than not – associated with an improvement of post-programme employment prospects as broadly understood;
- b. Paid internship programmes are clearly associated with better post-programme outcomes than unpaid ones;
- c. The identification of causal impacts, or more generally, causal mechanisms underlying remains less clear since the evidence involving a convincing attribution of causality is rare.
- d. Evidence on open market internships is largely lacking.

O'Higgins and Pinedo's own analysis of data from the 2013 European survey, together with an online survey undertaken in 2015 by the Fair Internship Initiative,²⁴ led them to conclude that 'paid internships are associated with better labour market outcomes than unpaid ones' – though there was little to suggest that the amount of the payment made a significant difference. They hypothesised that this was because:

- a. paid internships attract 'higher quality' interns – in part this may arise from the easing of the financial constraint enlarging the pool of potential interns and hence improving the quality of the successful ones;
- b. being paid motivates interns to put more effort into their internships – and hence to also get more out of it in terms of competency development;
- c. being paid allows interns to focus on their internships by easing the income constraint, i.e. not having to find a second-job, or another source of income.
- d. firms which pay interns are more committed to making internships effective training programmes possibly in part because they are effectively being used as trial recruitment periods.

It is also notable that there was nothing in the recent Australian survey to indicate that undertaking unpaid work experience had made a difference to a person's chances of being or not being in employment at the time of the survey (Oliver et al 2016, 54–6). A recent British study has indeed suggested that graduates undertaking an unpaid internship after the completion of their studies (and hence in the open market) earn less 3.5 years after graduation than those going straight into paid work or further study (Holford 2017).

4.3 Access and social mobility

Working as an intern often comes at a financial cost. As already noted, many internships are unpaid, or paid at a rate below a subsistence wage. Indeed, interns often have to pay for the privilege of undertaking work experience, whether by way of course fees to an educational institution, or a brokerage charge to an intermediary, or even as the price of winning an auction for the right to work unpaid at a prestigious enterprise (see eg Perlin 2012, 155–6). In addition, they may also incur additional indirect costs as a result of undertaking an internship – for example, when students who are required to complete an internship as part of an educational programme must forgo their paid employment in order to do so.²⁵

As the United Kingdom's Low Pay Commission (2012) has noted, these costs can have a 'potentially damaging impact ... on social mobility by inhibiting labour market access for particular groups who cannot afford to undertake them'.²⁶ The Sutton Trust (2014) has highlighted the fact that in the United Kingdom, as in many other countries, 'elite and influential professions such as politics, journalism, law and finance have been consistently dominated by those from the most privileged backgrounds'. Given living costs in London,

²⁴ See <https://fairinternshipinitiative.wordpress.com/resources/fiis-world-internship-survey/> (accessed 27 October 2017).

²⁵ In the Australian survey, for example, over a quarter of respondents who had undertaken unpaid work experience reported that they had cut back their hours of paid work to do so, while around the same number indicated they had received financial assistance from family or friends to cover living expenses. But the proportion of those having to forgo paid work was much higher for respondents undertaking work experience as part of a higher education course (52 per cent) or vocational training (43 per cent): Oliver et al 2016, 45–6.

²⁶ Low Pay Commission, National Minimum Wage: Low Pay Commission Report 2012, Cm 8302, The Stationery Office, London, 2012, p 98; and see also Hadjivassiliou et al, above n 2, pp 68–9.

where those professions are most likely to offer the opportunity to gain work experience, it is clear that ‘unpaid internships will be largely restricted to those from the wealthiest families’, and that such arrangements can ‘only serve to reduce chances for social mobility for those from more modest backgrounds’.²⁷ The recent Australian survey revealed that the likelihood of undertaking unpaid work experience increased according to the socio-economic status of respondents aged 18–29, as measured by their parents’ highest level of education. Similarly, participation was higher for those living in capital cities, compared to smaller towns or rural areas (Oliver et al 2016, 24–5). In many professions, more affluent students or graduates are already likely to have an advantage in gaining jobs, through the quality of education they have received and the networks or contacts their families can offer. To require what may be a lengthy period of unpaid work, especially in an expensive city, simply pushes the bar even higher for anyone from a lower socio-economic group.

As Hunt and Scott (2017) note, however, the problems here do not just lie in geography and affordability. Their survey of creative and communications graduates in Britain revealed that ‘while those from less advantaged backgrounds were no less likely to do unpaid internships ... advantaged graduates were more able to access the better, paid opportunities’ (ibid, 191). This class effect is supported by the research undertaken in the same country by Holford (2017, 29). He reports that the salary penalty for unpaid internships noted above:

is significantly mitigated for graduates with parents in professional occupations or who attended private school. This suggests that their social and financial capital gives an advantage in accessing ‘good’ internships, a segregated market over exploitative positions, and in capitalizing on this experience.

Similarly, O’Higgins and Pinedo (2018) note that a global survey conducted by the Fair Internship Initiative reveals a ‘clear positive correlation between parental educational attainment and likelihood of participating [in] a paid internship’.

4.4 Replacing paid employment and undermining labour standards

It seems clear that unpaid or lower-paid internships can be used as a source of what Standing (2011, 76) calls ‘cheap dead-end labour, exerting downward pressure on the wages and opportunities of others who might otherwise be employed’. As Perlin (2012, 62) observes, the willingness of desperate job-seekers to work unpaid creates a ‘race to the bottom’:

Every time young people scramble for an unpaid position, they reinforce the flawed perception that certain kinds of work have lost all value. Whether or not any given individual is happy to make this trade-off, the decision has consequences for everyone else.²⁸

Especially in the creative industries (see eg Siebert & Wilson 2013; Allen et al 2013; Hunt & Scott 2017), what might once have been paid entry-level jobs appear to have been displaced by a constantly replenished pool of unpaid interns, competing for the opportunity to be hired. In this situation, interns (or their families, or sometimes governments) are in fact subsidising the organization for which they are working. Hence internships of this type, especially (but not solely) those in the open market, potentially have the effect of evading or undermining labour standards on wages and other employment conditions. It is this prospect, in particular, that in 2012 seems to have motivated the International Labour Conference to issue the warning noted in Part 1 of this report.

²⁷ See also Allen et al 2013; Roberts 2017.

²⁸ Above n 1, p 62.

5. The Selected Countries

The countries chosen for this study have been selected to capture a range of different approaches to the regulation of internships, as well as being representative of different regions and levels of economic development. A determining factor in certain cases was the availability of reliable (or at least apparently reliable) information on a given country's treatment of internships. Thirteen nations were ultimately selected for detailed study:

- *Developed countries:* Argentina, Australia, Canada, France, Germany, Japan, United Kingdom, United States
- *Emerging countries:* Brazil, China, Romania, South Africa
- *Developing countries:* Zimbabwe

The concentration on developed countries is explained by the greater prominence of internships there. Nevertheless, as we pointed out in Parts 3.1 and 3.3, it is not unusual to find such arrangements in other nations, albeit they may sometimes be called apprenticeships.

For each of our selected countries, information was gathered via desk research. Particular reliance was placed on three very helpful sources: a 2012 overview of the regulation of traineeships in what were then the 27 EU member states (Hadjivassiliou et al 2012); a follow-up study by the European Commission (2016) on the implementation of the QFT in those states, together with the recently-admitted Croatia; and the ILO book mentioned in the introduction, which includes a chapter on internships and other 'contractual arrangements for young workers' (Jeannot-Milanovic et al 2017). We have also drawn on earlier research of our own, in particular a report for Australia's Fair Work Ombudsman (FWO), which included a chapter on international perspectives (Stewart & Owens 2013, ch 8), and a subsequent article which began to develop the framework that underpins the comparative analysis in this report (Owens & Stewart 2016).

In addition, we have conducted online searches for relevant literature and, where possible, accessed primary sources (legislation and case law) for each selected country. One significant limitation, however, is that we have generally been limited to searches in the English language. We did receive assistance with the location and translation of certain material in other languages for Brazil, Germany and Japan. But beyond that, we have been limited to material available in English, including the sources listed above.

Although the sections that follow concentrate on the regulation of internships in our 13 selected countries, we do in a few instances note examples from other jurisdictions.

One general point to make, however, is that we have located no studies or other empirical evidence on the impact or effectiveness of particular forms of regulation. While, for example, the European Commission (2016) has assessed the laws of EU member states for compliance with the EU's QFT, this exercise involved a review of the laws themselves, not how they were operating in practice. This point assumes particular importance, as we go on to note in Part 7.1, in relation to laws that purport to prohibit open market internships. But it would also be useful to determine whether laws that seek to assure the quality of educational or ALMP internships, of the types discussed in Parts 8.4 and 9.3, are having anything like their intended effect.

6. Forms of State Regulation

6.1 Introduction

There are various ways in which internships can be – and are in practice – regulated. Organizations that ‘host’ interns will often develop their own rules and processes (whether formal or informal) for selecting those who will participate, for designing and supervising whatever tasks interns are invited or required to perform, and for ensuring their adherence to the organization’s policies and procedures. Educational institutions and employment service providers are also likely to have internally-generated rules that govern the administration and assessment of educational placements and ALMP internships.

At a broader level, other bodies or groups may seek to influence the use, content or treatment of internships. In many countries, private codes or guidelines have been put forward by peak bodies or industry groups. In the United Kingdom, for instance, the National Council of Voluntary Organizations (2015) has developed a guide for internships in the voluntary sector, emphasising the difference between employment and ‘true’ volunteering, canvassing the arguments about the appropriateness of taking on volunteer interns, and suggesting ‘principles of good practice’. Similarly, a professional body for HR practitioners in South Africa has issued a guide for employers, ‘[i]n the interests of setting South African standards for internships programmes’ (South African Board for People Practices 2014, 2). An intern is defined for this purpose as ‘[a] person who is employed at an entry level position in an organization in a structured programme to gain practical experience in [a] particular occupation or profession’ (ibid, 3). The guide recommends, among other things, that interns should be paid, and should receive appropriate employment contracts, as they ought to be considered employees.

Pressure groups representing interns have also been very active in this space. For example, the European Youth Forum has developed an Employers’ Guide to Quality Internships which has been endorsed by a number of major companies.²⁹ The National Fair Internship Pledge put forward by Interns Australia seeks to play a similar role.³⁰

In principle too, collective bargaining might be used to set minimum wages and other conditions for interns. It has indeed been reported that collective agreements play a significant role in regulating traineeships in many European countries (Hadjivassiliou et al 2012, 62, 95–8; European Commission 2016, 6). But it appears that this is primarily directed to apprenticeships or analogous arrangements in the vocational education sector, as opposed to the types of open market internship that have created most concern in recent years. A possible exception here might be the collective agreements used in Germany, at least in some sectors, to regulate the ‘volontariat’, a type of traineeship for university graduates in media, publishing and advertising that allow them to gain the skills needed for professional practice (Wolfgarten & Linten 2012, 231). In some countries, however, there may be questions about whether the laws and processes governing collective bargaining can apply to interns who are not regarded as employees (see eg Rosin 2016, 147–51).

²⁹ See www.youthforum.org/quality-internships/ (accessed 27 October 2017).

³⁰ See www.internsaustralia.org/nationalfairinternshippledge (accessed 27 October 2017).

In any event, for the purpose of this report we are principally interested in *instrumental* state regulation of internships. In accordance with the approach developed by Owens and Stewart (2016), we distinguish in the sections that follow between five approaches.³¹

- **specific regulation** of the use or content of internships;
- **regulation by inclusion** – that is, expressly bringing internships within the operation of labour or social laws, either by defining them as employment or extending employment rights to certain training arrangements;
- **regulation by exclusion** – that is, expressly exempting internships from the operation of labour or social laws;
- **strategic enforcement** of labour or social laws by the state, even in the absence of any specific extension or exclusion;
- systematic use by the state of **soft law**, such as codes of practice, to influence the use and content of internships in both government and non-government organizations.

Each of these approaches can be seen in at least one of the 13 countries we have selected to study in this report. Indeed it is not uncommon for a country to adopt more than one, for different purposes. The following table summarises the spread of different approaches.

Table 1: Approaches to state regulation of internships in 13 countries

	Specific regulation	Inclusion	Exclusion	Strategic enforcement	Soft law
Argentina	✓	✓	✓		
Australia		✓	✓	✓	
Brazil	✓	✓	✓		
Canada		✓	✓		
China	✓				
France	✓	✓			
Germany		✓	✓		✓
Japan	✓	✓			
Romania	✓	✓			
South Africa	✓	✓			
United Kingdom		✓	✓		✓
United States		✓	✓		
Zimbabwe		✓			

In the sections that follow, we provide more detailed explanations of these various approaches to regulation, illustrating them by reference to each of the countries in our study. But first it is useful to examine what might be termed the ‘default’ position in each country. In the absence of any specific mention, are interns considered to fall within the scope of labour or social standards that are established for the benefit of ‘employed’ workers?

³¹ Compare the different typology adopted by the European Commission (2016, 6) in summarising the approach taken in the 28 EU nations to the regulation of traineeships.

6.2 The default position: Are interns treated as employees?

In many countries it remains an open question as to whether internships or traineeships are covered by general labour laws that make no explicit reference to such arrangements. The answer generally depends on a court, tribunal or government agency determining whether an intern falls into the (often undefined) category of ‘employee’ or subordinate worker.³² In recent times, at least in some jurisdictions, the number of cases testing this point has risen in proportion both to the use of internships and to the critical attention devoted to them by government agencies, academics, the media and intern groups.

In the **United States**, the position may vary depending on the legal regime being applied. Since the 1947 Supreme Court ruling in *Walling v Portland Terminal Co* (1947) 330 US 148, in which a group of railway brakemen undergoing a preliminary course of training were found not to be employees, courts have applied a range of different tests in determining whether trainees of various kinds are entitled to the protection of labour statutes. The most common have been a ‘primary beneficiary test’, which asks whether it is the trainee or their alleged employer who benefits most from the training; and a test focusing more generally on the ‘totality of circumstances’ (Bergman 2014; Brookhouser 2015). According to comment (g) on Article 1.02 of the American Law Institute’s Third Restatement of Employment Law, ‘[i]nterns who provide services without compensation or a clear promise of future employment generally are not employees’ and nor are ‘students who render uncompensated services to satisfy education or training requirements for graduation or for admission into a particular profession or craft generally’. The Reporters’ Notes for this comment suggest that:

Many students do not meet the initial conditions for being employees because their work serves only their own interest in learning and skill development rather than the interest of the institution providing the instruction or training. This can be true even for a for-profit enterprise providing practical training as a means of developing a labor pool for future recruitment.

As these notes make clear, however, there is far from unanimity on this point. There have certainly been a number of major cases in which interns have been unable to establish employment status.³³ But there appears to be scope for reaching a different result under the federal Fair Labor Standards Act 1938 (FLSA). The FLSA applies to a range of employers, including many in the private sector. Among other things, it requires the payment of a minimum wage to any ‘employee’, defined in section 203(e)(1) as ‘any individual employed by an employer’. The legislation specifically excludes certain workers who would otherwise fall within the definition of ‘employee’, including certain volunteers. But by virtue of section 203(g), the word ‘employ’ also includes ‘to suffer or permit to work’. This particular wording has been taken to justify adopting a broader meaning of the term ‘employee’ than in other statutory regimes, as the Reporters’ Notes to comment (g) on Article 1.02 of the Restatement of Employment Law make clear.

There is no specific definition in the FLSA that refers to interns. Nonetheless, the Wage and Hour Division of the Department of Labor (DoL), which administers the FLSA, has developed a six-point test to determine whether a trainee is an ‘employee’ and so entitled to workplace benefits under the legislation. The test, which is based on criteria distilled from

³² On the approach generally taken in different jurisdictions to the characterization of employees, especially in distinguishing them from independent contractors, see eg Casale 2011; Engels 2014; Davidov et al 2015. On relevant international principles for distinguishing such work relationships, see also the ILO’s Employment Relationship Recommendation, 2006 (No 198); and see further Creighton & McCrystal 2016.

³³ See eg *O’Connor v Davis* (1997) 126 F 3d 112 (discussed below in Part 8.3); *Masri v State of Wisconsin Labor and Industry Review Commission* (2014) 850 NW 2d 298.

the decision in *Walling*, is set out in a factsheet issued in 2010 as guidance for interns and those employing them in the for-profit sector (see DoL 2010). It involves asking whether:

- the internship is similar to the training given in an educational environment;
- the experience is for the intern's benefit;
- the intern does not displace regular staff;
- the employer derives no immediate advantage from the training;
- the intern does not automatically get a job at the end; and
- both parties understand there is no entitlement to wages.

If all six of these questions are answered in the affirmative, the intern is regarded as a trainee, not an employee.

In the wake of this initiative, a number of test cases have been brought by or on behalf of unpaid interns to establish their entitlement to minimum wages under the FLSA. The most notable of these involved two unpaid interns who had worked in the production office for the Oscar-winning film *Black Swan*. Both had worked for many months without pay as accounting or production interns. Their tasks included a wide range of office chores, from making coffee, taking lunch orders and cleaning the office, to reviewing personnel files, delivering pay cheques and preparing invoices, as well as other secretarial tasks.

In *Glatt v Fox Searchlight Pictures, Inc* (2016) 811 F 3d 528 the United States Court of Appeals for the Second Circuit overturned a lower court ruling in favour of the plaintiffs in this case and remitted it for further consideration. The primary beneficiary test was held to be determinative, for three main reasons: its focus on what the intern receives, the flexibility it provides for the court to examine the economic reality of the relationship between the intern and the employer, and because it acknowledges that in the intern-employer relationship the intern expects to receive educational and vocational benefits not necessarily found in the employment relationship. In an approach modelled on the general approach of the common law to the determination of employment status, the court emphasised that all the circumstances of the individual case must be taken into account and that no one factor is determinative. For that reason, it refused to allow other claims by other Fox interns to be joined by way of a class action. It made a similar ruling in relation to separate litigation brought by an intern who had worked at the fashion magazine *Harper's Bazaar*.³⁴

At the same time, the court identified a set of seven non-exhaustive considerations that could assist a court in classifying unpaid internships. Most of these overlapped with, but restated, the criteria used in the DoL's factsheet, expressing them in a way that focused on the relationship between the internship and the intern's formal education and training. They included '[t]he extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit' (ibid, 536–7). As the court concluded, this approach was more focused on the central feature of modern internships, because 'the purpose of a bona-fide internship is to integrate classroom learning and practical skill development in a real world setting ... and better reflects the role of internships in today's economy' (ibid, 537).³⁵

In the wake of this ruling, the *Black Swan* case was settled by the payment of agreed compensation to the plaintiffs for their work (Miller 2016). Similar settlements had earlier been reported in a number of other cases involving broadcasters, publishers, model agencies

³⁴ For earlier proceedings in the *Harper's Bazaar* case, see *Wang v Hearst Corp* (2013) 293 FRD 489 (SDNY).

³⁵ For criticism of this approach, see eg Hacker 2016; Pardoe 2016.

and football teams (The Economist 2014; Stempel 2014). These payouts reflect the likelihood that US interns who are performing productive work that would otherwise have been done by paid employees, and without reference to a meaningful education programme, could succeed in establishing an entitlement to the minimum wage under the FLSA. But the point remains uncertain and calls are likely to continue for the position to be clarified, if not by the Supreme Court, then by State legislatures (see eg Bergman 2014; Budd 2015; Brookhouser 2015; Reid 2015).

From a comparative perspective, what stands out from the approach taken in cases such as Walling and Glatt is the insistence on seeing employment and training as mutually exclusive categories. This can be contrasted with the approach taken in some other common law jurisdictions. In **Australia**, for example, it is clear that apprentices and other paid trainees can be regarded as employees, notwithstanding the dual purpose of the arrangement.³⁶ But whether an unpaid internship qualifies as employment is less clear. Australia's main labour statute, the Fair Work Act 2009, has no general definition of the term 'employee'. As explained in Part 8.1 of this report, there is a specific exclusion for an unpaid 'vocational placement' associated with an authorised education or training course. But for other arrangements, the existence of an employment relationship is determined by applying certain common law principles (Stewart et al 2016, chs 8–9). Among other things, these require the existence of a contract – that is, an enforceable agreement – to perform work.

On a narrow view, the willingness of a person to work without pay may be treated as an indication that they are volunteering their services, with no intention to enter into a contract.³⁷ But it is also possible that a contract may be inferred whenever an intern makes a commitment to undertake productive work that benefits the business or organization hosting them (as opposed to just observation or mock tasks), in return for the opportunity to gain experience and enhance their employability.³⁸ This has been the view taken by the FWO, the agency responsible for enforcing the Fair Work Act. More is said about the agency's role in Part 6.6. For now, it suffices to note that it has initiated a number of recent court cases that have resulted in businesses being fined for underpaying interns. While liability was not contested in these cases, the judges concerned were clearly satisfied that it was appropriate to treat the interns in question as employees.

For example, in *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 a broadcaster was fined for underpaying two university students who worked for many months as radio producers. The breaches were acknowledged not to be deliberate and were quickly rectified after the FWO intervened. But Judge Reithmuller described the arrangements as 'exploitative' and emphasised that 'profiting from "volunteers" is not acceptable conduct' (ibid, [45]). In *Fair Work Ombudsman v Aldred* [2016] FCCA 220 the same judge expressed similar views in a case involving two interns who worked for three months at a marketing firm without pay and, subsequently, for less than the required minimum rate of pay. In *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024 a job seeker answered an advertisement for an event planner internship and had to do 180 hours of unpaid work before being given paid employment. The company and its director, who had previously been warned by the FWO for purporting to engage employees as volunteers, were fined over

³⁶ See eg *Rowe v Capital Territory Health Commission* (1982) 39 ALR 39; *Phung v Advanced Arbor Services Pty Ltd* [2010] NSWCA 215; Owens & Stewart 2013, 13–15.

³⁷ See eg *Pacesetter Homes Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449.

³⁸ See eg *Nominal Insurer v Cleanthous* [1987] NTSC 51; *Cossich v G Rossetto & Co Pty Ltd* [2001] SAIRC 37; and see further Stewart and Owens 2013, ch 6.

AU\$280,000. Importantly, the arrangements in each of these cases were open market internships and hence did not fall within the vocational placement exception.

In the **United Kingdom**, the situation is broadly similar to that in Australia, although there has traditionally been more of a distinction between employment and training arrangements.³⁹ The general status of interns has been described as a ‘contentious’ issue (Higgins & Newton 2012, 815–6). Many rights and protections are extended by legislation either to those who can be considered employees in the common law sense, or who fall within a broader definition of ‘worker’, which includes any contract to personally perform work or services.⁴⁰ On either basis, as in Australia, the challenge is to establish that an intern is working under some form of contract. There have been at least two cases in which interns have successfully brought claims under the National Minimum Wage Act 1998 for unpaid wages and holiday pay, one involving an art director’s assistant at a film company and the other a website coordinator.⁴¹

By contrast, in *Drozd v Money Matters* [2014] NIIT 287_14IT a work experience arrangement was found by a tribunal to be ‘voluntary’ in nature, thus precluding any application of the minimum wage. The unsuccessful applicant in this case had undertaken sales work for a finance advisor, initially as a placement for her business and administration course, but then for a further period of nearly six months after graduating.

There has been ongoing pressure for stronger regulation in the United Kingdom, reflected in the introduction into Parliament of the National Minimum Wage (Workplace Internships) Bill 2016–17. This would have amended the National Minimum Wage Act to clarify its coverage of interns. Although the Conservative Government did not support this proposal, it did indicate that it was considering some form of limitation on unpaid internships, because of concerns about their negative impact on social mobility (Mason 2016; Coughlan 2017). Since the government was narrowly returned to office in June 2017, however, there has been no sign of any move to introduce such a reform.

The uncertainty over the status of interns is not confined to common law systems. For example, in **Japan** Article 9 of the Labour Standards Act (No 49 of 1947) defines a worker as being ‘employed at an enterprise or office ... and receives wages therefrom’. This would appear to exclude unpaid interns. However, Instruction No 636 from the Labour Standards Department Director (of the then Ministry of Labour) to the prefectures’ directors of labour standards, which was issued in 1997, suggests that whether an intern will be considered a worker also depends on the nature of the work they are undertaking. If the intern primarily observes, rather than performing work, they are unlikely to be considered a worker. However, where the intern undertakes productive activities, where the benefit of their work is primarily for the host organization, or where a relationship of use and subordination can be recognised, it is said to be more likely the student falls within the concept of worker.⁴²

If an intern does satisfy the tests to be considered a worker, they are entitled to a minimum wage under the Minimum Wage Act (No 137 of 1959). Interns who are considered workers are also entitled to the various protections in the Labour Standards Act, including the provisions in Chapter 4 regarding working periods, rests and annual leave. In addition, Article 69 of that Act provides that an employer ‘shall not exploit an apprentice, student,

³⁹ See eg *Wiltshire Police Authority v Wynn* [1981] 1 QB 95 at 109; Owens & Stewart 2013, 15–18.

⁴⁰ See eg National Minimum Wage Act 1998 s 54(3).

⁴¹ See the unreported cases of *Vetta v London Dreams Motion Pictures* ET/2703377/08 (2008) and *Hudson v TPG Web Publishing Ltd* ET/2200565/11 (2011), discussed in Stewart & Owens 2013, 228–30.

⁴² Instruction from the Labour Standards Department Director – Ministry of Labour, 18 September 1997, No 636.

trainee, or other worker, by whatever name such person may be called, by reason of the fact that such person is seeking to acquire a skill’.

In **China**, the official position has long been that internships are considered to be part of education rather than employment (China National Textile and Apparel Council & ILO Country Office for China and Mongolia, 2014, 21; Su 2011, 351). Only students who have not yet completed their studies are regarded as being able to undertake an internship (Jeannet-Milanovic et al 2017, 153). According to Yao and Elsinga (2014), once an intern graduates, ‘the relationship will be considered an employment relationship and covered by the Labor Contract Law’. Among other things, the employer will be required to formalise the relationship and comply with minimum wage and social insurance requirements.⁴³

As a consequence of the fact that student interns are generally assumed to fall outside the scope of China’s labour laws, such as the 1995 Labour Law, they are not entitled to the minimum wage (Chan & Zhai 2013, 20-1) or overtime payments (Brown 2009, 129). They also cannot join a trade union and, when a legal violation occurs, or if the intern suffers an occupational injury, the local Labour Inspection Bureau does not investigate (Chan & Zhai 2013, 22). In one court decision it was also held that a student intern who was killed in traffic on the way to work was not protected under China’s work-related injury insurance regulations. This was because of the intern’s student status and also because of the existence of a written agreement in which the employer agreed to be liable only for work-related injuries for which it was responsible (Brown 2009, 118).

More recently, however, some academics have begun to question this general position. For example, Ron Brown argues that where an intern works alongside regular employees and the intern’s work is unrelated to an educational programme, the intern is, in reality, an employee (Brown 2016, 51–2). Similarly, Earl Brown and Kyle deCant argue that ‘when [internships] ... are devoid of any relevant educational component and maintained solely for the benefit of the employer’s bottom line, these interns should be afforded the full protection of China’s labor laws’ (Brown & deCant 2014, 195).

Zengyi Xie (2015, 13) also agrees that interns can fall within China’s labour laws, arguing that:

[i]n judicial practice, the majority of cases show that arbitration agencies or the courts do not accord interns the status of an ‘employee’. Yet in some recent cases, according to the actual situation, arbitration agencies or the court may recognize interns as employees and their relationship with the employer as a labor relationship. In theory, if a student is not a mere intern but in fact replaces a regular employee of the employer, the student complies with the employer’s rules and regulations and works for a relatively long period of time, and the employer pays a considerable wage, the student should be recognized as an ‘employee’ and be protected by the labor law.

One reason why there have been recent calls for student interns to be included within the scope of China’s labour laws is because of revelations about the exploitation of vocational interns. Those concerns are considered further in Part 8.1, together with a discussion of regulations introduced to (partially) deal with the issue.

In **South Africa**, it is perhaps more likely that interns would be found to be employees, given the broad definitions of employment in section 213 of the Labour Relations Act (No 66 of 1995) and section 1 of the Basic Conditions of Employment Act (No 75 of 1997). In each instance an ‘employee’ is defined to mean:

⁴³ As to the possible basis for this view, see the discussion in Part 7.1.

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- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
 - (b) any other person who in any manner assists in carrying on or conducting the business of an employer.

The second part of that definition could certainly extend to an unpaid intern performing productive work. The chances of this being the case are strengthened by the presumptions of employment in section 200A of the Labour Relations Act and section 83A of the Basic Conditions of Employment Act. These state that, unless the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of their contract, to be an employee if any one or more of various factors are present. Those factors include being subject to control or direction in relation to the manner or hours of work, being ‘part’ of an organization, or being provided with tools of trade or work equipment. Furthermore, one of the exceptions to a prohibition on fixed term contracts of longer than three months for lower-earning employees concerns ‘a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession’ (Labour Relations Act s 198B(4)(c)). This plainly contemplates that at least some educational or open market internships may qualify as employment.

There have indeed been cases to date in which a medical intern and a candidate attorney at a law firm were found to be employees for the purposes of the Labour Relations Act, although in both instances these workers were being paid for their services.⁴⁴ By contrast, in *Dankie v Highveld Steel & Vanadium* (2005) 26 ILJ 1553 it was held that a sponsorship arrangement that allowed the applicant to pursue his studies in mechanical engineering at a higher education institution did not create an employment relationship within the meaning of the Basic Conditions of Employment Act. In return for the sponsorship, the applicant was required to perform certain tasks at the respondent’s premises, for which he received a monthly allowance. According to the arbitrator (*ibid*, [9]):

[t]he sponsorship agreement is a special arrangement between the respondent and appointed sponsored students, who it is envisaged would complete their studies and thereafter be offered employment at the respondent. Even though the students are obliged to report at the respondent’s premises to perform certain tasks, and are paid an allowance, that in itself does not imply that they are employees as envisaged in the provision of the BCEA as their association with the respondent is of a special kind

The decision, however, has been criticised by Dekker (2006), on the basis that there were many features of the arrangement that suggested an employment relationship, not least the applicant’s obligation to perform work as directed by the respondent.

In contrast to South Africa, **Zimbabwe** has a narrower definition of employment. Section 2 of the Labour Act 28:01 defines an ‘employee’ as (emphasis added):

any person who performs work or services for another person *for remuneration or reward* on such terms and conditions that the first-mentioned person is in a position of economic dependence upon or under an obligation to perform duties for the second-mentioned person, and includes a person performing work or services for another person—

- (a) in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or

⁴⁴ *Andreanis v Department of Health* (2006) 5 BALR 461; *Mashaba v Cuzen & Woods* (1998) 19 ICJ 1486.

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- (b) in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services ...

According to Madhuku (2015, 45), apprentices or trainees will in ‘many cases’ fall within this definition, ‘as they render services in return for remuneration in a subordinate position. The additional aspect of undergoing training does not take away the characteristics of an employment contract.’ Clearly, however, this assumes that the trainee is being financially compensated for their work. An unpaid internship or placement would presumably not satisfy the requirement for ‘remuneration or reward’ – unless the latter term were interpreted broadly to include the benefit of gaining skills or experience.

6.3 Specific regulation of internships

In four of the countries we have chosen to study, general laws have been introduced to regulate internships. In three instances the relevant laws focus on educational internships and accordingly are considered in more detail in Part 8 of this report. It suffices here to briefly summarise the approach taken in these countries.

In **Argentina**, the Creacion del Sistema de Pasantias Educativas en el Marco del Sistema Educativo Nacional Ley No 26,427 was passed in 2008. It requires there to be both an agreement between the host organization and the educational institution, and a separate internship agreement between the student and the host. Student interns must be paid an allowance that is calculated as a proportion either of the basic wage established by an applicable collective agreement for employees, or of the minimum wage. An intern must not be engaged to replace an existing staff member, or fill a vacancy. Furthermore, any failure by an employer to comply with the terms of an internship agreement will result in the intern being deemed to have a continuing employment contract. There are also limits on the duration of internships, the hours interns can be required to work and the number of interns a host organization can have.

Brazil has adopted broadly similar legislation, in the form of the Lei do Estágio (Law No 11,788 of 2008). Rather than requiring two agreements, however, a tripartite commitment must be entered into by the intern, the educational institution and the host organization. Nor, unlike the position in Argentina, is there any applicable minimum wage.

In **France** the ‘Cherpion Law’ (Act No 2011-893) introduced a range of measures to regulate internships and protect interns from being exploited. These were supplemented in 2014 by Law No 2014-788, in response to perceptions that employers were continuing to abuse internships, in part because of a lack of proper enforcement (MacGuill 2013). As in Brazil, a tripartite agreement is required, although the duration of internships is capped at just six months, compared to two years in Brazil. For any arrangement exceeding two months, financial compensation is required. The Law also prohibits internships being used to replace employees, even on a temporary basis. In addition, there are detailed rules as to the educational component of internships. As with the regimes in Argentina and Brazil, an intern will only be regarded as an employee if there is non-compliance with the terms of the internship agreement.

Romania has adopted a broader and somewhat different approach. As in the other three countries, internships that form part of educational programmes must be governed by a framework agreement between the student, educational institution and external partner, while there are also detailed rules about supervision and assessment.⁴⁵ But as explained in

⁴⁵ Law No 258/2007; Order of the Minister of Education, Research, Youth and Sport no 3955/9.05.2008.

Part 8.1, organizations are not just permitted to employ students undertaking such internships, there are also financial incentives to do so.

What Romania has also done is introduce legislation that regulates other types of internship as well (Corbescu & Csaki 2014). Under Article 31(5) of Romania's Labour Code (Law No 53/2003), all higher education graduates are deemed to be interns or probationers during the first six months from the commencement of their first regular assignment (employment) in the profession they have chosen. This six-month internship is regulated by Law No 335/2013, which came into force in March 2014. The 'methodological norms' for applying this law are found in Government Decision 473/2014. The law covers both open market and ALMP-type internships (European Commission 2016, 64). But it does not extend to internships undertaken as part of a student's academic curriculum or to qualify for particular professions (such as law, medicine or the public service),⁴⁶ for which a placement of a certain duration is stipulated in other regulations (Labour Code art 31(5); Law No 335/2013 arts 1(2), 16(2)).

The employer and intern must enter into both an employment contract and an internship contract (Law No 335/2013 art 2(b)). During the internship period, the intern enjoys all rights and duties provided for under labour legislation, the collective labour agreement applicable to the employer, and the individual employment contract (Labour Code art 31(4); Law No 335/2013 art 17). This includes a monthly salary, as negotiated by the parties (Law 335/2013 arts 4, 18). However, salary negotiation is not possible for internships that are carried out in an authority or public institution where the salaries are established by law (Puiu & Ciochină-Barbu 2015, 9). Working hours are eight hours a day or 40 hours per week (Law No 335/2013 art 18), subject to the provisions of any applicable collective agreement. Other working conditions are the same as for employees (European Commission 2016, 64).

Law No 335/2013 requires the intern to be given a work plan approved by the employer that sets out the objectives of the internship and the activities to be undertaken (art 3). The employer must appoint a mentor who is allowed to coordinate and supervise no more than three interns at a time (arts 5, 7), and who must have professional experience of at least two years in the field in which the internship will take place (GD 473/2014 art 12(1)(b)).

Article 23 of Law No 335/2013 confers a number of important rights on the intern, including:

- to receive support from their mentor;
- to be given a programme of activities that corresponds to their position and grows in difficulty and complexity over the period of the internship;
- to be given the time and information needed to improve their skills; and
- to be assessed objectively.

The Law also sets out in considerable detail the required process for appraising an intern (arts 8, 11). If the appraisal is satisfactory, the intern is entitled to continue in employment at the end of the six months. If not, their services may be terminated and they are entitled merely to a certificate which shows they completed the internship. But a decision to terminate may be challenged in court (arts 14, 20). Conversely, the employer may contractually impose a retention period during which the intern cannot terminate the

⁴⁶ See, eg, Law No 51/1995 arts 18–19 ('trainee lawyer' must complete an internship of professional training for two years); Government Ordinance No 18/2009 (the training period is one year for physicians, dentists and pharmacists); Law No 188/1999 (internships undertaken by public servants range from 6 to 12 months depending on the ranking class of the public servant). See generally Puiu & Ciochină-Barbu 2015.

employment contract for a given period if, during their internship, they have benefitted from professional training financed by the employer (art 21).

A final point to note about the Romanian law is that it includes an incentive to hire graduates as interns. Employers, other than public institutions or authorities, who enter into internship contracts can receive a monthly subsidy (art 28). Under a recently passed amendment to Law No 335/2013,⁴⁷ this subsidy has increased, in a bid to encourage employers to provide more internship placements to university graduates.⁴⁸

In our other selected countries, internships are regulated on a much more limited basis. For example, in **China**, rules have been introduced for internships undertaken by certain students receiving full-time education in either a secondary vocational school or an advanced vocational school. The nature of these rules and the background to their introduction is explained in Part 8.1.

South Africa also has limited forms of regulation that operate in the government sector. For example, the Determination on Internship in the Public Service, made by the Minister of Public Service and Administration pursuant to section 3(5)(a) of the Public Service Act 1994, stipulates (among other things) that:

- the intern must enter into a contract with the host department for a fixed period of up to 12 months;
- interns do not receive a salary, but a monthly allowance, which is determined by the Schedule for Interns' Allowances in the Public Service;
- the intern must enter into a mentorship agreement with a mentor or coach assigned to them, with the agreement to include a work plan that is used as a tool for measuring their development; and
- interns must be evaluated using the approved 'Internship Reporting Tool'.

In **Japan**, the government has created a three-year Technical Internship Programme under the Immigration Control and Refugee Recognition Act No 319 of 1951. The programme is designed to assist people from developing countries to receive technical training in industrial fields that will then enable them to contribute to their own country's economic development after returning home (Watanabe 2010, 45). It has been widely criticised, as in its original form, many trainees were excluded from the protections of Japanese labour laws, but were expected to work, often in dangerous situations. Takenoshita (2016, 103) states that trainees were being used for 'unskilled, low-paying labor ... where they had no opportunity to take training courses'. There were also human rights violations, such as violence and sexual harassment (Watanabe 2010, 48). Many technical trainees worked in harsh conditions (Takenoshita 2016, 103) and well in excess of statutory work hours, with reports that between 2005 and 2010 at least 127 trainees died on the job, most likely due to the strain of the excessive labour (Bhattacharjee 2014, 1154).

In response to these issues the programme was revised in 2009. As a consequence of the amendments, technical interns are now required to complete a two-month language and training course at the beginning of the programme that focuses, inter alia, on informing them about Japan's labour standards laws (Bhattacharjee 2014, 1157). Upon completion of this course, the technical interns engage in on the job training and become entitled to protections under the relevant labour acts and regulations, such as the Labour Standards Act and the Minimum Wage Act. If the Immigration Bureau identifies that an organization in relation to

⁴⁷ See <http://sgg.gov.ro/new/wp-content/uploads/2017/03/LEGE.pdf> (accessed 27 October 2017).

⁴⁸ See Ministerul Muncii și Justiției Sociale, 'Guvernul Decontează Salariul Minim pe Economie Pentru Ucenici și Stagiari', media release, 30 March 2017.

the Technical Intern Training Programme has engaged in ‘misconduct’, then that body will be suspended from the training programme for either one, three or five years depending on the nature of the breach (Watanabe 2010, 61).

Despite the 2009 amendments, Jeannet-Milanovic et al (2017, 148) note that conditions for foreign trainees have not improved.⁴⁹ They are still forced to work under the menace of deportation, they are not allowed to change their employer, and they remain vulnerable to abuse by employers. The internship programme’s ‘weak regulatory structure and a general lack of government accountability’ has been criticised (Scott 2010). The government entrusts most of the operations of the technical internship to the Japan International Training Cooperation Organization (JITCO) (Bhattacharjee 2014, 1156). Whilst JITCO provides a key role in providing support and advice to technical interns and the sending and supervising organizations, it was not originally given the power to sanction participating organizations or companies exploiting interns (Scott 2010). Further, until recently, employers who violated the dictates of the programme were not actually punished, beyond temporarily losing the privilege of employing trainees (Bhattacharjee 2014, 1168). However, recent amendments have introduced provisions to penalise employers who violate the rights of technical interns. Under a Bill on Proper Implementation of Intern Training for Foreigners and Protection of Trainees, passed in November 2016, employers are prohibited from forcing interns to work through measures that involve confinement, intimidation or violence (Osaki 2016; The Mainichi 2016).

6.4 Regulation by inclusion

Each of the regimes considered in the previous section create special rules for interns. Most of them extend some but not all of the benefits and protections generally conferred on employees to interns, while reinforcing that interns are not to be regarded as having that status. (The Romanian Law No 335/2013 is an exception in this regard, in that it requires graduate interns to be employed, while creating additional entitlements.) But a simpler alternative is either to deem certain types of interns to be employees, or to include them in some other way within the scope of a general labour law.

One country that has – at least in some parts – adopted this approach is **Canada**. The legal position for interns in Canada is complicated, as for other workers in that country, by the fact that labour standards are mostly left to the provinces, rather than the national legislature. But the three most populous provinces (Ontario, Québec and British Columbia) each have laws setting minimum employment standards that are capable of applying to open market internships, even if there might be doubts as to the practical capacity of interns to enforce these laws (Langille 2015, 27). Section 1 of British Columbia’s Employment Standards Act, for example, defines an employee to include ‘a person an employer allows, directly or indirectly, to perform work normally performed by an employee’, as well as ‘a person being trained by an employer for the employer’s business’. This latter phrase also appears in section 1(1)(c) of Ontario’s Employment Standards Act 2000,⁵⁰ although it is currently subject to a limited exception for unpaid training in section 1(2) that will be considered below in Part 6.5.

Germany offers another example of inclusive provisions. Section 26 of its Vocational Training Act (Berufsbildungsgesetz) covers anyone who is ‘engaged to acquire vocational

⁴⁹ The programme has also been the subject of comment by the ILO’s CEACR (2016, 195–6).

⁵⁰ Note that Bill 148 for a Fair Workplaces, Better Jobs Act, which is currently before the Ontario legislature (see Part 6.5 below), proposes to amend s 1(1)(c) to read ‘a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer’s employee’.

skills, knowledge and qualifications or occupational experience’, even if they are not subject to the kind of structured training (including apprenticeships) with which the Act is otherwise concerned. The view taken by the Federal Ministry of Labour and Social Affairs is that an arrangement will only be covered by this provision if there is an ‘element of qualification’ that involves a practical increase in the trainee’s skills. If that element is missing, a work placement will not be treated as a traineeship, even if it is labelled as such. ‘As soon as the relationship has the character of regular employment, it is subject to common labour law and rules of remuneration’ (Wolfgarten & Linten 2012, 233).

Where section 26 does apply, section 10(2) has the effect that such persons are given the same rights and protections as employees, subject to certain qualifications. Interns covered by section 26 are also entitled to the federal minimum wage, by virtue of section 22 of the Minimum Wage Act (Mindestlohngesetz). The passage of that legislation in 2014 was indeed said by the federal Labour Minister to have put an end to the practice of unpaid internships (EurActiv 2014). But, as with the Canadian provisions, section 22 also has some important exceptions that are outlined in Part 8.1.

It is especially common to find inclusive definitions in laws concerning health and safety. Indeed as will become apparent from the sections that follow, these can be found in most of the countries in our study. **Australia** offers a good example. The obligation to provide safe working conditions is generally imposed in relation to any kind of ‘worker’, a term specifically defined to include trainees, students undertaking work experience and volunteers.⁵¹ That definition is also picked up by section 789FC of the Fair Work Act 2009, meaning that an intern can seek protection under the Act’s anti-bullying provisions, even if they are not an employee and hence have no other entitlements under the legislation.

A final example of an inclusive approach comes from the State of New York in the **United States**, which in 2014 amended its employment discrimination statute to expressly cover unpaid interns. Section 296-c of Article 15 of the New York State Executive Law (the ‘Human Rights Law’) now specifically prohibits various discriminatory practices relating to interns. For the purpose of the statute, an intern is defined as a person performing work for the purpose of training, where (a) the employer is not committed to hiring the person at the end of the training, (b) it has been agreed that the person is not entitled to wages, and (c) the work performed:

- provides or supplements training that may enhance the employability of the intern;
- provides experience for the benefit of the person performing the work;
- does not displace regular employees; and
- is performed under the close supervision of existing staff.

6.5 Regulation by exclusion

While inclusive provisions are common for some purposes, it is not at all unusual for the opposite approach to be taken in relation to employment standards – that is, for interns to be expressly excluded from the application of general labour laws that might otherwise have covered them. For example, section 22 of the Minimum Wage Act in **Germany** contains important exceptions for traineeships mandated by educational institutions or vocational training requirements, as well as those undertaken in preparation for or concomitantly with vocational studies or university education and lasting no more than three months.

⁵¹ See eg Work Health and Safety Act 2011 (Cth) s 7; Work Health and Safety Act 2011 (NSW) s 7.

Likewise in **Canada**, it is common for employment standards not to apply to placements that form part of a recognised education course or a programme of professional training. In Ontario, for example, there are exemptions for work performed under a programme authorised by secondary school board, a college of applied arts and technology or a university, or by a student in training to be a registered practitioner of (among other things) law, engineering, medicine and teaching.⁵²

More is said about exclusions of this sort in Part 8, though we note that it is not so common to find similar gaps in the application of laws dealing with health and safety, work-related injury, or discrimination and harassment.

For now though, one other current exemption in Canada is worth considering. Section 1(2) of Ontario's Employment Standards Act 2000 precludes a person from being considered an employee if the person or organization who would otherwise be their employer can establish that they were engaged under a training arrangement that meets six conditions:

1. The training is similar to that which is given in a vocational school.
2. The training is for the benefit of the individual.
3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained.
4. The individual does not displace employees of the person providing the training.
5. The individual is not accorded a right to become an employee of the person providing the training.
6. The individual is advised that he or she will receive no remuneration for the time that he or she spends in training.

The test in section 1(2) is similar to that adopted by the DoL in the United States, as discussed in Part 6.2. The need to satisfy all six criteria should in theory make it very difficult for businesses or organizations to treat an intern performing productive work as anything other than an employee – and that has generally been borne out by the case law on the section.⁵³ Nevertheless, the provision has attracted criticism as being potentially confusing for both interns and host organizations. As a recent review of Ontario's system of labour standards put it (Mitchell & Murray 2017, 274–5, references omitted):

The current provision is unclear and difficult to understand. For example, what is 'training ... similar to that which is given in a vocational school'? What are the circumstances in which the person providing the training 'derives little, if any, benefit from the activity of the individual while he or she is being trained'? Will the average trainee or employer understand exactly what these conditions mean?

In our view, the current provision is not only difficult to understand but also almost impossible to monitor and enforce.

Individuals categorized as 'persons receiving training' are unlikely to understand their rights or to complain when the exclusion is misused. They may be anxious to obtain references and work experience that could lead to paid employment. They therefore become vulnerable to being misclassified by employers seeking to benefit from free labour.

The current provision thus 'opens the door to evasion of the law.'

⁵² Employment Standards Act 2000 s 3(5); Ontario Regulation 285/01 s 2(1)(e).

⁵³ See eg *Girex Bancorp Inc v Hsieh* [2004] CanLII 24679; *Canada Inc v Ignjatovic* [2016] CanLII 25846.

The review recommended that section 1(2) be repealed. A proposal to that effect has been included in Bill 148 for a Fair Workplaces, Better Jobs Act, which at the time of writing is before the Ontario legislature.⁵⁴

By contrast, federal legislation was passed in 2015 to create an exception of the type set out in section 1(2) of the Ontario Employment Standards Act. This would have applied the exemption to the industries covered by Part III of the Canada Labour Code, though the amendments in question have not been brought into force.⁵⁵

6.6 Strategic enforcement of general laws

So far as we are aware, **Australia** is the only country in which a government agency has systematically and publicly pursued sanctions against businesses or other organizations involved in the use of potentially unlawful internships. The FWO is responsible for promoting both understanding of, and compliance with, the Fair Work Act 2009. As with other aspects of its work (see eg Hardy et al 2013), the agency has played an active and visible role in seeking not just to clarify the law, but to change attitudes and practice. In 2011, it identified unpaid work experience as an emerging issue that warranted its attention. Besides developing educative materials on the subject, it commissioned two of the authors of this report to undertake a major study.

The report from that study, released in 2013, acknowledged the differing approaches that could be taken to the law in Australia. But it also suggested that it would be consistent with the objectives of the Fair Work Act to ‘start from the assumption that if a person is performing productive work for an organization, under an arrangement whereby they will either gain experience or be considered for an ongoing job, they are doing so under an employment contract – unless there is clear evidence to the contrary’ (Stewart & Owens 2013, 249). The report also stressed that it was important to take an objective view of work experience arrangements, by having regard to the practical reality of what was involved, rather than how they might be described or labelled by the parties involved (ibid, 120–2, 149–50, 253).⁵⁶

The report went on to recommend that the FWO take a number of steps to help clarify the legal status of unpaid internships, including by refining its educational materials. The agency was encouraged to continue and extend its attempts to work with stakeholders (including young people and migrant workers, educational institutions and industry groups), not just to improve understanding of the legal position, but to help develop ‘best practice’ approaches that would improve the quality of work experience programmes and reduce the misuse or exploitation of young job-seekers (ibid, ch 9, esp 258–61).⁵⁷ It was also proposed that the FWO look for opportunities to bring test cases before the courts, and that it be

⁵⁴ See www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=4963 (accessed 27 October 2017).

⁵⁵ Economic Act Plan 2015 Act No 1 s 89. The amendments also proposed an exception, similar to those noted above, for work undertaken to fulfil the requirements of a programme offered by a secondary or post-secondary educational institution or a vocational school.

⁵⁶ For support for this approach, in the context of disregarding contractual arrangements designed to portray or disguise employees as independent contractors, see eg *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346.

⁵⁷ Similar recommendations have been made by a parliamentary committee in the State of New South Wales, once again drawing on the views of Stewart and Owens: see Committee on Children and Young People 2014, ch 5.

especially willing to pursue businesses that were not just agreeing to help job-seekers, but actively setting out to profit from their willingness to work for free.

Since receiving the report and accepting its recommendations, the FWO has consulted extensively with stakeholders and developed a new and expanded range of internet resources for employers.⁵⁸ This has included working with educational institutions to help develop model policies and procedures for both vocational placements and the facilitation of extracurricular programmes. In terms of compliance, the FWO has devoted considerable resources to investigating and pursuing employers for what it regards as unlawful exploitation of trainees or interns (FWO 2014). Some matters have been resolved by employers undertaking to rectify any underpayments and alter their practices (see eg FWO 2015). But as noted in Part 6.2, several proceedings have also resulted in favourable court decisions. Nor has the compliance activity in this area come to an end, with further proceedings in train (see eg FWO 2017).

The FWO's activities in relation to unpaid internships in Australia offer what we would regard as a sensible and nuanced approach to this issue. While the most visible outcomes might be court decisions such as those described in Part 6.2, it is the agency's 'behind the scenes' work in encouraging businesses and institutions to review and improve their practices that arguably stands as its greater contribution. We are in the early stages of conducting further research to assess how the educational sector in particular may have modified its practices in light of increasing scrutiny from the FWO and others. But our preliminary impression, albeit for now based on anecdotal evidence alone, is that the FWO's educational and compliance activities have made some difference in halting or slowing the proliferation of unlawful or exploitative internships. Despite this, it has been estimated that at least 10 per cent of the unpaid work experience arrangements recorded in the 2016 Australian survey had features that suggested they were unlawful (Oliver et al 2017).

It is possible that enforcement agencies in other countries are playing a similar role to the FWO, at least in relation to private or confidential guidance. But we have not come across any evidence of the issue being given as high a priority as it is in Australia. In the **United Kingdom**, for instance, there have been periodic reports of Her Majesty's Revenue & Customs, the agency responsible for enforcing the minimum wage, conducting targeted investigations of potentially unlawful internships in certain industries (see eg Malik 2011, 2013). But such efforts do not appear to have resulted in any cases being brought to court.

The same appears to be true in **Canada**, despite the occasional enforcement 'blitzes' by Ontario's Ministry of Labour. The most recent of these, in 2015, involved 77 employers with interns being inspected, of whom 18 were found to be in contravention of the province's Employment Standards Act. A total of CA\$140,630 was assessed as being owed to the interns concerned.⁵⁹ In their review of Ontario's employment standards, Mitchell and Murray (2017, 76) recommended the introduction of a new workplace enforcement agency which could 'broadly publicize a clampdown on illegal practices' such as unpaid internships, which were described as both 'widespread' and 'a fundamental repudiation of the essential protection of the law, namely, a refusal to recognise that someone is an employee entitled to basic rights'. It does not appear that this recommendation has been taken up, although the Ministry of Labour (2017) has announced plans to hire up to 175 new employment standards officers and put more resources into both enforcement and education of employers.

In the **United States**, the role played by the DoL's Wage and Hour Division has also been a limited one. With only limited resources, it has not been in a position to press the

⁵⁸ See www.fairwork.gov.au/pay/unpaid-work (accessed 27 October 2017).

⁵⁹ See 'Blitz Results: Internships', 29 April 2016, https://www.labour.gov.on.ca/english/es/inspections/blitzresults_intern2016.php (accessed 27 October 2017).

issue of the possible underpayment and exploitation of interns. Instead, it has been left to individual litigants and their lawyers to initiate legal proceedings. The DoL's 2010 factsheet, to which reference was made in Part 6.2, may have operated to provide guidance to businesses and interns. But at least one appeal court has refused to defer to the DoL's interpretation of the FLSA. In *Glatt v Fox Searchlight Pictures, Inc* (2016) 811 F 3d 528 the Second Circuit Court of Appeals observed that the DoL had no special competence or role in interpreting previous judicial decisions. Making a point that highlights the difficulties for any enforcement agency which operates in a common law system and tries to provide clear guidance, the court indicated that the test presented in the factsheet was 'too rigid for our precedent to withstand' (ibid, 536).

6.7 Soft law

There are many ways in which governments can seek to influence the use and content of internships, without directly regulating them. To take just one example, conditions may be attached to the provision of subsidies, a common practice in Europe even in relation to programmes not formally linked to educational institutions (see eg Hadjivassiliou et al 2012, 63–5). Government agencies can also adopt a 'lead by example' approach, for example by banning unpaid or informal internships (see eg United Kingdom Government 2011, 7–8, 56–8). But we are interested here more particularly in the use of guidelines to reshape the way internships are used not just in the public sector, but outside government.

In the **United Kingdom**, for example, the Common Best Practice Code for High Quality Internships is a joint initiative of the Department for Business, Innovation and Skills and the Gateways to the Professions Collaborative Forum (GPCF), an advisory body representing professional bodies and related organizations. First issued in 2011 and most recently revised in late 2013 (GPCF 2013), the Code outlines the nature of an internship, its purpose and value to both interns and their employers, its length (ranging from six weeks to 12 months, but typically three months), and its openness to undergraduate, graduate or postgraduate placements, students in further education or adult education institutes, or adults wishing to make a career change. The Code also identifies what an internship is not: for example, a compulsory component of a course of study or work experience/work shadowing, vacation work unrelated to professional career, or ordinary employment undertaken by a student. It makes clear the need for employers to comply with the requirements of the National Minimum Wage legislation, where applicable. In addition, it provides detailed guidance through six best practice principles on how to ensure a high quality internship, covering every aspect of the process: preparation, recruitment, induction, treatment, supervision and monitoring, and certification reference and feedback. The Code is complemented by a two-page guide for interns themselves, prepared with the assistance of the group Interns Aware.

As the European Commission (2016, 74) has noted, however, the Code contains limited guidance on learning content and there is a lack of transparency regarding hiring practices. Furthermore, the creators of the Code have acknowledged that (GPCF 2013, 3–4):

it is not as widely used as we would like. Many businesses are not aware of its principles and most do not regularly use it when recruiting and managing interns. There are still interns who are not receiving the National Minimum Wage despite being entitled to it, and others who are simply offered a poor quality experience. There are also many employers, especially small and medium sized enterprises, who have never offered internships, but might be encouraged to do so with the help of the Code.

In an earlier report for the Commission, Higgins and Newton (2012, 847–8) noted the lack of hard evidence as to the actual impact of guidelines of this sort. They observed that 'quality frameworks are more effective at helping organizations who "want" to provide quality traineeships (but are, perhaps, unsure about what factors they need to consider) than

they are in stimulating good practice in organizations where bad practices are more entrenched’.

A further example of the use of soft law can be found in Germany. Prior to the minimum wage legislation being introduced there in 2014, there had been various proposals by trade unions and opposition parties to regulate internships. These were resisted by the governing Christian Democrats and Liberals, on the basis that they might lead to a loss of training opportunities. But the federal government did agree in 2011 to issue guidelines on traineeships (Wolfgarten & Linten 2012, 241–2). Developed in conjunction with business groups, these set out the legal rules relating to such arrangements and made recommendations as to their use, including the use of written contracts and the definition of learning objectives (Ministry of Labour and Social Affairs and Ministry of Education and Research 2011). More recently, in January 2015, the federal government issued new guidelines for public sector traineeships, limiting voluntary traineeships to three months in federal institutions (European Commission 2016, 40).

7. The Status and Regulation of Open Market Internships

As we noted in Part 1, and again in Part 3.2, the types of internship that have attracted most criticism and policy attention in recent years have been those found in the ‘open market’: that is, with no formal connection to either a recognised education or training course or an ALMP. As a 2012 overview of the regulation of traineeships in the EU explained (Hadjivassiliou et al 2012, 36):

In recent years there has been an expansion of traineeships which young people have to undertake after graduation and/or completion of mandatory professional training. These traineeships which provide graduates with on-the-job experience before they find, whenever possible, a more stable form of employment, seem to be the least regulated. Not surprisingly, these traineeships have attracted most criticism since they tend to be quite unregulated and, in some cases, associated with reports of trainee exploitation; the replacement of regular staff by trainees who are used as cheap or even free labour; poor terms and conditions, including long working hours, heavy workload, lack of compensation and/or social security coverage; low or non-existent learning content; etc.

This is not to say that open market internships are an issue in every country. For example, the European Commission (2016, 5) has suggested that despite being ‘legally possible’, they are very rare or nearly non-existent in Croatia, Cyprus and Malta. And as we have previously observed, we would not expect to find (or at least readily distinguish) this type of arrangement in lower-income nations that feature high levels of informal employment.

Nevertheless, in the countries where open market internships are more likely to be prevalent, some very clear differences emerge in the way they are regulated. In the sections that follow, we consider the treatment of such internships in the 13 countries we have selected to study. We look first at those that have prohibited this type of arrangement. The remainder are then considered under three further headings, looking at the treatment of open market internships for the purpose of general employment standards, the regulation of safety at work and the associated question of compensation for work-related injuries, and prohibitions on discrimination or harassment at work.

7.1 Prohibitions on open market internships

In at least three of the countries that we have chosen to study, open market internships are effectively prohibited. This is clearest in **France** where, as the European Commission (2016, 5) puts it, arrangements that involve ‘a direct agreement between employer and trainee ... are not allowed by law’.⁶⁰

This is a consequence of the regime outlined in Part 6.3 and explained in more detail in Part 8, which requires a tripartite agreement involving an educational institution. There are similar requirements in **Argentina** and **Brazil**, except that, as noted earlier, two separate contracts are required in Argentina (one between the host organization and an educational institution, and the other between the student and the host).

There also appears to be a belief that graduate or other open market internships are not allowed in **China**, as mentioned in Part 6.2, although the basis for this is not entirely clear.

⁶⁰ Italy and Latvia are the two other EU countries that are said to fall into this category. For a summary of the legal position in those countries, see European Commission 2016, 48–51; and on Italy, see further Pesce 2012.

It seems to be assumed in the sources we have reviewed that any arrangement for the performance of work by someone who has completed their studies will necessarily be a ‘labour contract’, within the meaning of the Labour Contract Law of the People’s Republic of China. But there is no definition of such a contract under that law. Article 7 simply states that ‘[a] labour relationship is established by an employing unit with a worker as of the date the former *employs* the latter’ (emphasis added).

Significantly, we have not been able to locate any studies that confirm whether open market internships are or are not in practice a feature of the labour markets in each of these countries. It is possible that whatever the actual (or perceived) legal position, such arrangements do in fact exist.

7.2 Employment standards

In the countries whose laws do not expressly or implicitly prohibit open-market internships, two broad approaches can be detected. The first involves extending the reach of employment standards on matters such as wages or working hours to certain interns, even if they would not otherwise qualify as employees or subordinate workers.

Germany is an example of this, by reason of sections 10 and 26 of the Vocational Training Act. As explained in Part 6.4, these extend a range of employment rights to anyone who is ‘engaged to acquire vocational skills, knowledge and qualifications or occupational experience’. Open market internships can clearly be caught by this, unless they lack the necessary element of ‘qualification’. A work arrangement that is called an internship (or traineeship), but that does not involve skill acquisition, would be treated in any event as ‘regular employment’ (Wolfgarten & Linten 2012, 233). Open market interns covered by section 26 of the Vocational Training Act must also be paid the minimum wage, by virtue of section 22 of the Minimum Wage Act. This means that unpaid internships are clearly now unlawful, at least when not associated with educational programmes.

In **Canada** too, certain types of open market intern are brought within the reach of employment standards, at least in some provinces. As explained in Part 6.4, this is a function of having definitions of the term ‘employee’ that extend to persons being trained, not just those who would be regarded as employees as a matter of common law.

Romania has gone further. Under the provisions set out in Part 6.3, graduates are generally deemed to be probationary employees during their first six months of work after completing their studies, with (broadly speaking) the same entitlements as other employees. The only question that arises here is whether, as the European Commission (2016, 64) has claimed, this can truly be regarded as ‘comprehensive’ legislation on open-market traineeships. It is unclear to us, for example, whether an internship can lawfully be offered on any basis other than employment to someone who does not have formal qualifications (and hence is not a graduate), or to someone who has previously been an intern elsewhere and is no longer in their first six months of ‘assignment’.

In a second group of six other countries, there is a different approach. Interns here only have the benefit of minimum wages and other employment standards if they can be classified as employees, as that term is generally defined or understood. Without duplicating the discussion of the relevant legislation (and in some instances case law) in Part 6.2, it suffices to note that there is far from a uniform approach within this group.

In **South Africa**, for example, the definitions of employment in the two main labour statutes appear broad enough to catch both paid and unpaid interns, at least when they are performing productive work. In **Japan** and **Zimbabwe**, by contrast, the relevant definitions refer to the need for wages or remuneration, which on a literal approach might seem to exclude unpaid interns.

As for the common law countries, there too there are differences. In **Australia** and the **United Kingdom** it would seem relatively easy to establish that paid interns are employees, assuming that there is some obligation to attend for work. Furthermore, there have been cases in which even unpaid interns have been treated as having an employment contract, and hence as having an entitlement to a minimum wage – although there have also been decisions to the contrary. By contrast, in the **United States** it appears to be somewhat harder for an intern to show an employment relationship, given what appears to be a rather unnecessary insistence by the courts there on distinguishing between work and training. But even then, it appears that many open market internships in the United States would be found to violate the FLSA if tested in court.

7.3 Health, safety and work-related injuries

In some of the countries in our study that permit (or at least do not prohibit) open market internships, it would seem that they are covered by both health and safety laws and the relevant system for compensating work-related injuries. In the case of **Romania**, this follows from the laws that, as previously discussed, deem graduate interns to be employed. But in other countries, it is a function of broad coverage provisions that operate beyond the category of employment.

In **Germany**, for example, health and security standards are regulated by the Working Conditions Act (*Arbeitsschutzgesetz*), and extend to all interns, even those not entitled to the minimum wage. There also seems to be a general consensus that interns will be regarded as employees for workers compensation purposes and accordingly will generally be covered by employer liability insurance (Orlowski 2009, 29).

In **Canada**, trainees who would not otherwise be regarded as employees are expressly covered by provincial occupational health safety legislation,⁶¹ and also workers compensation laws.⁶² The federal Canada Labour Code was also recently amended to ensure that interns are entitled to occupational health and safety protections. Section 123(3) now provides that Part II of the Code, which relates to occupational health and safety, applies to ‘any person who is not an employee but who performs for an employer to which this Part applies activities whose primary purpose is to enable the person to acquire knowledge or experience’.

In **Australia**, however, the position differs between the two regimes. All Australian jurisdictions except Victoria and Western Australia have harmonised their workplace health and safety laws. The model legislation applies to ‘workers’, a term which, as mentioned in Part 6.4, is broadly defined and includes a ‘trainee’ and a ‘student gaining work experience’, as well as a ‘volunteer’ (see eg Work Health and Safety Act 2011 (NSW) s 7). Even in the Australian States that have not yet adopted the model legislation, host organizations are obliged to take reasonable steps to maintain the safety of such workers.⁶³ By contrast, Australian workers compensation statutes are generally drafted so as to apply only to employees in the common law sense. While some other workers are deemed to be employees

⁶¹ See eg Occupational Health and Safety Act 1990 (Ontario) s 1 (definition of ‘worker’); Act Respecting Occupational Health and Safety, CQLR, c S-2.1 (Québec) s 1 (definition of ‘worker’); Workers Compensation Act, RSBC 1996, c 492 s 1 (definition of ‘worker’); Canada Labour Code s 123(3).

⁶² See eg Workplace Safety and Insurance Act 1997 (Ontario) s 2 (definitions of ‘worker’ and ‘learner’); Act Respecting Industrial Accidents and Occupational Diseases, CQLR, c A-3.001 (Québec) s 10; Workers Compensation Act, RSBC 1996, c 492 s 1 (definition of ‘worker’).

⁶³ See Occupational Health and Safety Act 2004 (Vic) s 23(1); Occupational Safety and Health Act 1984 (WA) s 22(1).

for this purpose, few workers compensation regimes are expressly extended to interns (Stewart & Owens 2013, 105–7).

It is similar in the **United Kingdom**. The Health and Safety at Work etc Act 1974 clearly extends to individuals beyond employees, including interns, as explained in Part 8.2. By contrast, interns will only be covered by the Employers' Liability (Compulsory Insurance) Act 1969 if they are employees. The same is true in **South Africa**, with the Occupational Health and Safety Act (No 85 of 1993) having a much broader coverage than Compensation for Occupational Injuries and Diseases Act (No 130 of 1993), as explained further in Part 8.2.

In other instances, both health and safety and workers compensation laws are generally confined to employees. In **Japan**, for example, it appears that interns who do not satisfy the definition of 'worker' in Article 9 of the Labour Standards Act (No 49 of 1947) are not covered by the workers compensation regime included in Chapter 8 of that Act, nor the Industrial Safety and Health Law (No 57 of 1972).

In the **United States**, the Occupational Safety and Health Act (1970) is the primary legislation at federal level regulating occupational health and safety in both the private sector and federal government. It imposes duties in relation to employees, a term that the Occupational Safety and Health Administration considers does not extend to an 'unpaid intern'.⁶⁴ The same is generally true for workers compensation laws, though as discussed in Part 8.2 some State laws do have a broader operation.

7.4 Protections against discrimination and harassment

As with health and safety, the laws prohibiting workplace discrimination or harassment in some countries are broad enough to cover interns, even if they are not necessarily employed. For example, **Canadian** equality laws have generally been interpreted to cover unpaid work, even in the absence of specific extensions to that effect.⁶⁵ Similarly, in **Germany**, the main equality laws are framed so as to cover those engaged to perform work for the purpose of vocational training.⁶⁶ In the **United Kingdom** the prohibitions against discrimination, harassment and victimisation at work under Part 5 of the Equality Act 2010 apply not just to employers, but to the activities of an 'employment service-provider', a term defined in section 56 to include a provider of vocational training or work experience.⁶⁷

By contrast, it is not clear whether the Employment Equity Act (No 55 of 1998) in **South Africa**, which applies to employees as defined in section 1, extends to all interns. The same is true in **Japan**. The prohibitions in the Labour Standards Act (No 49 of 1947) against discrimination based on nationality, creed and social status (art 3) or sex (art 4) would appear to cover interns only if they satisfy the definition of 'worker' in Article 9 of that Act.

In **Australia**, there is no consistent position (Stewart & Owens 2013, 107–9). The four main federal statutes, the Sex Discrimination Act 1984, Racial Discrimination Act 1975, Disability Discrimination Act 1992 and the Age Discrimination Act 2004 cover a range of workplace relationships. But they do not appear to extend to unpaid work – unless it is possible to identify an employment contract, in accordance with the principles discussed in

⁶⁴ See <http://webapps.dol.gov/elaws/osha/recordkeeping/05.aspx> (accessed 27 October 2017).

⁶⁵ See eg Vancouver Rape Relief Society v Nixon [2005] BCCA 601; Rocha v Pardons and Waivers of Canada [2012] HRTO 2234.

⁶⁶ General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz) s 6(1).

⁶⁷ See eg Blackwood v Birmingham & Solihull Mental Health NHS Foundation Trust [2016] EWCA Civ 607.

Part 6.2. The same is true of the prohibition against discriminatory treatment in section 351 of the federal Fair Work Act 2009, as well as of some State laws, such as the Equal Opportunity Act 1984 in Western Australia.

But other State or Territory laws in Australia do extend protections against harassment or discrimination on various grounds to those engaged in work experience. For example, section 87(1)(a) of the South Australian Equal Opportunity Act 1984 prohibits a person subjecting to sexual harassment any ‘person with whom he or she works’. The Act goes on to provide in section 87(9)(c) that ‘a person works with another if both carry out duties or perform functions, in whatever capacity and whether for payment or not, in or in relation to the same business or organization’. These provisions clearly encompass interns working within an organization. The same Act prohibits discrimination on a range of bases against ‘employees’, a term defined in section 5(1) to include unpaid workers, and which could also include interns.⁶⁸ In Victoria, Part 6 of the Equal Opportunity Act 2010 extends protection from sexual harassment to ‘an unpaid worker or volunteer’. In contrast, however, the broader prohibitions against discrimination in that legislation do not extend to unpaid workers, just employees in the common law sense. The same is true under the Anti-Discrimination Act 1977 in New South Wales.

In the **United States**, the position is similar. Many equality laws apply only to employees.⁶⁹ But in some jurisdictions, interns are specifically protected against discrimination. An example that has already been set out, in Part 6.4, can be found in section 296-c of Article 15 of New York State’s Human Rights Law. In 2014 Illinois also amended its Human Rights Act to include ‘unpaid intern’ in its definition of an ‘employee’ (Schonfeld 2016). Other States too, including California, Oregon, Maryland, Connecticut and the District of Columbia, have extended protections against discrimination or harassment (and, in some jurisdictions, both) to unpaid interns (Lachman 2016). And in 2016 protections under the Civil Rights Act were extended to unpaid interns working for the federal government, although not to those working in the private sector (Marcos 2016).

⁶⁸ A similar approach is adopted under Queensland’s Anti-Discrimination Act 1991, the Anti-Discrimination Act 1998 in Tasmania, and the Australian Capital Territory’s Discrimination Act 1991.

⁶⁹ See eg *O’Connor v Davis* (1997) 126 F 3d 112, discussed below in Part 8.3; and see also *Lowery v Klemm* (2006) 845 NE 2d 1124, discussed in LaRocca 2006.

8. The Status and Regulation of Educational Internships

Different jurisdictions take radically different approaches to regulating educational internships. In some countries, students or trainees undertaking internships for educational purposes are brought within the scope of at least some forms of labour regulation. For example, for health and safety purposes, interns are often given the same rights and protections as employees, even if they are not categorised as such. Equality or anti-discrimination laws are also often drafted or interpreted to apply to interns; though this is not universally the case. The same is generally true in relation to insurance against work-related injuries.

What is also common, however, is for educational internships to be specifically exempted from the operation of certain types of labour regulation. This is especially true in relation to minimum wage entitlements, but also other standards as well, concerning hours of work, leave, employment protection and so on. In Argentina, France and Romania, and to a lesser extent Brazil, this is offset by detailed regulation of the relationship between the intern, the institution at which they are studying and the host organization. But in the other countries, there is far less prescription.

Different jurisdictions also manage the educational content of internships in disparate ways. Some countries regulate to ensure educational internships offer true learning experiences. For example, France requires the learning objectives of each internship to be stipulated in advance, and regulates with regard to minimum levels of supervision of interns by both educational institutions and host organizations. But some other jurisdictions have limited or no regulation of the learning content or context of educational internships.

The discussion below considers the manner in which student interns are included or excluded from labour or social laws, and the regulation of the educational content of internships. It illustrates the variety of different approaches that are taken internationally. But given the scope and complexity of the subject, and in particular the scope for local or institution-level regulation, it does not provide a comprehensive analysis of the treatment of educational internships.

8.1 Employment standards

A number of countries exclude or partially exclude students undertaking internships as part of their studies from entitlements to employment benefits. One clear example is **Australia**. As noted in Part 6.2, the main federal labour statute, the Fair Work Act 2009, recognises the concept of a ‘vocational placement’. This is defined in section 12 to mean an unpaid placement undertaken as a requirement of an education or training course and authorised under a federal, State or Territory law or administrative arrangement. The Act provides that a person undertaking such a placement is not regarded as an employee, and as a consequence is not entitled to minimum wages, leave entitlements or other employment-related benefits or protections (ss 13, 15, 30C and 30M). The drafting and scope of this exception are not as clear as they might be (Stewart & Owens 2013, 75–82). But it ensures at the very least that periods of unpaid work experience undertaken as a required part of a higher or vocational education course are not (at least for most purposes) covered by the Fair Work Act, even if they might otherwise be capable of characterisation as employment.⁷⁰

⁷⁰ See eg *Upton v Geraldton Resource Centre* [2013] FWC 7827. As to the position under State laws in Australia, which generally apply only to public sector or local government employment and do not

By contrast, a ‘training’ programme not associated with an accredited institution or provider will not attract the operation of the vocational placement exception; and nor will an ‘internship’ undertaken by a student or graduate hoping to gain experience that will gain them (paid) employment.

A similarly mixed legislative approach can be found in **Canada**. A range of Canadian provincial laws contain significant exclusions for placements that form part of a recognised education course or a programme of professional training. In Ontario, for example, there are exemptions for work performed under a programme authorised by a secondary school board, a college of applied arts and technology or a university, or by a student in training to be a registered practitioner of (among other things) law, engineering, medicine and teaching.⁷¹ Québec also exempts students working during the school year in an establishment selected by an educational institution pursuant to a government-approved job induction programme, while its minimum wage provisions are also precluded from covering any legally recognised vocational training programme.⁷²

As discussed in Part 6.2, in the **United States** the position of student interns varies according to the legal regime being applied. Nevertheless, most rights and protections at work are accorded primarily to employees, and to other workers only by some form of special extension. This is problematic for student interns, who are generally not regarded as employees, even under the broad definition of employment in the FLSA. The difficulties for students in obtaining protection are highlighted by the decision of the Court of Appeals for the Eleventh Circuit in *Schumann v Collier Anesthesia PA* (2015) 803 F 3d 1199. That case concerned the status of a group of student registered nurse anaesthetists, who claimed to be entitled to payment for work undertaken in the course of an accredited clinical programme run by a for-profit college. In remitting for reconsideration the trial judge’s ruling that the plaintiffs were trainees, the appeal court commented on the difficulty of distinguishing between interns and employees in such a case (*ibid*, 1211):

Our dilemma arises in determining how to discern the primary beneficiary in a relationship where both the intern and the employer may obtain significant benefits. We think that the best way to do this is to focus on the benefits to the student while still considering whether the manner in which the employer implements the internship programme takes unfair advantage of or is otherwise abusive towards the student. This orientation allows for student internships to accomplish their important goals but still accounts for congressional concerns in enacting the FLSA.

At the time of writing, the final decision in *Schumann* has not been made, and as yet we do not know whether the students in that case will, in fact, be treated as covered by the FLSA. Therefore, it cannot be assumed that the employment status of student interns in the United States has been entirely resolved. Nevertheless, it seems likely that internship programmes that are a formal part of an educational course will not attract any entitlement to minimum wages and other protections, even under the FLSA.

In the **United Kingdom** there are clear statutory exceptions to the national minimum wage for educational internships. Regulation 53 of the National Minimum Wage Regulations 2015 covers students required to do an internship for less than one year as part of a higher education course or further education course, while regulation 54 exempts government-funded traineeships of up to six months with a skills programme that includes a work experience placement and work preparation training. By contrast, the Working Time Regulations 1998 have a somewhat broader operation. According to regulation 42, they

contain an equivalent to the federal exemption for vocational placements, see Stewart & Owens 2013, 91–5.

⁷¹ Employment Standards Act 2000 s 3(5); Ontario Regulation 285/01 s 2(1)(e).

⁷² Act Respecting Labour Standards, CQLR c N-1.1 s 3(5); Regulation Respecting Labour Standards, CQLR, c N-1.1 s 2(2).

cover not just employees, but any person receiving ‘relevant training’. That term is defined in regulation 2 to mean ‘work experience provided pursuant to a training course or programme, training for employment, or both’, except where this is offered by ‘an educational institution or a person whose main business is the provision of training’.

Student interns are also excluded from the scope of the employment relationship in **Brazil**. Under Article 3 of the Lei do Estágio (Law No 11,788 of 2008), a tripartite agreement must be signed by the intern, the educational institution and the host organization. Provided this agreement is observed, the intern will not be protected by the general labour statute, the Consolidação das Leis do Trabalho (CLT). However, any non-compliance with the agreement will automatically create an employment relationship that is covered by the CLT (Law No 11,788, art 3). There are also restrictions on the number of interns that any organization can have, while 10 per cent of its internships must be reserved for people with disabilities (art 17).

Interns in Brazil do not have the right to receive a mandatory minimum wage (art 12), although some employers pay an ‘intern scholarship’ (Bolsa estágio) that may be higher than the national minimum wage. Student interns’ working hours are regulated and are generally limited to 20 hours per week for students at non-tertiary level and 30 hours for those at tertiary level, although 40 hours are allowed in cases where courses alternate classroom-based teaching and work experience (Law No 11,788, art 10). There is also a limit of two years on the duration of any internship (art 11).

As noted in Part 8.2, employers do not have to comply with social security system obligations regarding interns’ employment contracts (art 12). As a consequence of this exclusion, together with the absence of any minimum wage, the cost of hiring interns for companies is lower than for employees. This has been said to create an incentive for companies to treat internships as a way of obtaining cheap and relatively highly qualified labour (OECD 2014, 114).

In **Germany**, as mentioned in Part 6.4, sections 10(2) and 26 of the Vocational Training Act effectively ensure that informal or ‘voluntary’ internships are generally subject to employment standards, even if they do not involve an employment relationship. But ‘compulsory’ internships undertaken as part of an educational course of study are treated differently. For example, section 22 of the Minimum Wage Act establishes exceptions for traineeships mandated by educational institutions or vocational training requirements, as well as those undertaken in preparation for or concomitantly with vocational studies or university education and lasting no more than three months.

As Wolfgarten and Linten (2012, 232) note:

Mandatory internships, irrespective of whether they are vocational or academic, are controlled by Schulordnungen (school regulations) and Studien- und Prüfungsordnungen (study and examination regulations of colleges and universities). They define the duration of traineeships and oblige employers to issue detailed certificates on the activities of the trainee and the experience he or she acquired. Besides that, there is no further specific ruling. Contracts can be concluded either orally or in writing, remuneration is voluntary and there is no entitlement to holidays.

The effect is that voluntary trainees ‘are in a stronger position than those in a compulsory traineeship’ (ibid), because they have the benefit of the Vocational Training Act, as well as (now) the minimum wage.⁷³

France has also introduced laws to regulate internships, in the form of the 2011 Cherpion Law, as supplemented in 2014. Every internship is required to be undertaken under a tripartite agreement between intern, host and educational institution (Code de l’éducation art L 124-5). The length of internships has been capped at six months, and for any arrangement exceeding two months the intern is entitled to compensation (although this is expressly stated not to be a salary) (art L 124-6). Interns are also granted a range of other workplace protections, including limits on daily and weekly working hours (art L 124-14). An internship cannot be used as a means of dealing with a temporary increase in business activity, to replace an absent employee, to fill a seasonal job, to replace an employee who is absent, or to replace an employee whose employment contract has been suspended (art L 124-7). Furthermore, once an internship ends, the host organization is allowed to introduce a new intern in the same role only after a break equivalent to a third of the length of the previous internship (art L 124-11).

Importantly, the relationship between the host organization and intern is not regarded as one of employment, even if the intern receives payment and notwithstanding the subordinate nature of the relationship. But it is different if the terms of the internship agreement are not being followed.⁷⁴

A slightly different approach has been taken in **Romania**, which introduced specific regulations to manage the internship experiences undertaken by tertiary, secondary and vocational students in 2007 and 2008.⁷⁵ Those laws require that internships are undertaken pursuant to a ‘framework contract’ or ‘cooperation agreement’ between the internship organization (the educational institution where the student studies) and the internship partner (the host organization with which the internship will be completed). The standard format for such a contract/agreement is provided in Order No 3955/2008, and must contain information about where the internship is to take place, the period of the internship, and the obligations of the internship organiser and the internship partner.

There is no requirement that a student intern be paid, but internship partners do have the option of hiring a student for the period of their internship on a fixed-term employment contract, in exchange for a negotiated rate of pay (art 21 of Law No 258/2007). Incentives are provided to encourage such employment contracts. In particular, Article 4(1) in Appendix 2 of Order No 3955/2008 states that if the internship is under an employment contract, then the internship partner can benefit from Law No 72/2007 (the Students Employment Act). Article 1 of that Act provides that employers who hire students during holidays and undertake to pay them not less than the minimum wage can receive, for each student, a monthly subsidy (Ciutacu 2012, 744).

Argentina has also introduced laws to regulate internships for higher education students. The Creacion del Sistema de Pasantias Educativas en el Marco del Sistema

⁷³ As to whether internships undertaken as an optional element of (say) a university course should be regarded as voluntary arrangements to which s 26 of the Vocational Training Act should apply, see Orłowski 2014, 320.

⁷⁴ Court of Cassation Decision, 17 October 2000, Bulletin 2000 V No 336, 259, discussed in Rosin & Muda 2013: 300–1.

⁷⁵ Law No 258/2007 and Order of the Minister of Education, Research, Youth and Sport no 3955/9.05.2008 (Order No 3955/2008).

Educativo Nacional Ley No 26,427⁷⁶ was enacted in 2008 to unify the legal provisions governing internships, better monitor the practice of internships and prevent their fraudulent use.

As in Romania and France, there is a requirement for formal agreements to be entered into for each internship. Both an agreement between the host organization and the educational institution (the master agreement) (Law No 26,427, art 5) and an internship agreement with the student (art 1) are required. Amongst other things, the internship agreement must include information about the rights and obligations of the intern and company, the duration, schedule and placement of the internship, the amount the student intern will be paid and the tasks they will undertake (arts 8–9). Importantly, interns cannot be recruited to fill a vacant or new job, or replace an existing staff member of the host organization (art 12).

The existence of these agreements does not create an employer-employee relationship between the student intern and host organization (art 12), and there is no option for the intern and host to enter into such an arrangement as there is in Romania. However, if the host fails to comply with the terms of the internship agreement, then the agreement is deemed to become a permanent contract of employment (art 19).

In any event, even if not treated as employees Argentinian student interns receive most of the benefits to which employees are entitled, provided that this is compatible with the non-employment nature of the internship.⁷⁷ In addition, they must receive an allowance, although it is non-remunerative in nature. If there is an applicable collective agreement, then the amount received will be calculated on a pro rata basis (that is, in proportion to the number of hours worked) using the basic salary stipulated in that agreement. If there is more than one applicable collective agreement, the most favourable to the intern will be considered. If there is no applicable collective agreement, then the amount received will be calculated on a pro rata basis using the minimum wage (art 15).

There are clear restrictions on the duration of internships and the hours student interns can work. Article 13 of Law No 26,427 provides that internships must last for a minimum period of two months and a maximum period of 12 months. However, the internship period can be renewed for an additional six months by signing a new internship agreement. The maximum weekly working hours is 20 hours (art 13), and the maximum work day is 6.5 hours.⁷⁸ The general position is that interns should only work during the day between Monday to Friday. If, however, due to the nature of the activities undertaken in the internship, work on weekends or at night is required, the Secretary of Labour of the Ministry of Labour, Employment and Social Security must authorise this work. Article 14 of Joint Resolution No 825/2009 also limits the number of interns each host is allowed to take.

In contrast to the countries discussed above, labour laws in Zimbabwe and South Africa only cover students completing internships if they satisfy the definition of ‘employee’ in those laws.

As discussed in Part 6.2, in **Zimbabwe** that definition is provided in section 2 of the Labour Act 28:01 and includes ‘any person who performs work or services for another person for remuneration or reward on such terms and conditions that the first-mentioned person is in a position of economic dependence upon or under an obligation to perform duties for the second-mentioned person’. As companies are not obliged by law to pay students ‘on

⁷⁶ Law No 26,427 replaced the previous laws on internships: Law No 26,165 and Article 2 of Law No 25,013.

⁷⁷ Law No 26,427 Art 15; Joint Resolution No 825/2009 and No 338/2009 Art 11.

⁷⁸ Joint Resolution No 825/2009 and No 338/2009 art 7.

attachment’ to an external organization, it is likely most students would not satisfy this definition.

This situation has been the subject of significant criticism, on the basis that it facilitates exploitation of students and undermines the integrity of the educational system. For example, Wilson (2016, 37) has argued that the attachment system provides employers with an opportunity ‘to enjoy cheap labour at the expense of the training [students] need’. There have been media reports of students on attachment being paid as little as \$50 per month,⁷⁹ and that ‘[s]ome are forced to work in risky environments like deep mine shafts for the whole year for free’ (Muzulu 2017). There is also evidence of female students experiencing sexual harassment while on attachment (Wilson 2016, 41).

In **South Africa**, as noted in Part 6.2, the definitions of employment in the Labour Relations Act and Basic Conditions of Employment Act appear broad enough to cover student interns who are undertaking productive work under the direction and control of the business or organization hosting them, notwithstanding the decision to the contrary in *Dankie v Highveld Steel & Vanadium* (2005) 26 ILJ 1553.

South Africans engaged in a formal ‘learnership’ – a vocational training programme leading to a nationally recognised qualification, which combines practical work with academic study – are specifically required to enter into a contract of employment with the employer for the period of the learnership (Skills Development Act (No 97 of 1998) s 18). There is a specified minimum learner allowance that must be paid to unemployed learners undertaking a learnership. This is not a salary but covers expenses like travel and meals. However, only students who were unemployed before commencing a learnership are entitled to the stipend; those who already have a contract of employment with the employer continue to be paid at the usual rate (s 18(1)). The educational regulation of learnerships will be discussed below in Part 8.4.

The position with regard to the extension of employment standards to student interns in **Japan** is broadly similar to in South Africa and Zimbabwe, in that student interns are extended specific rights if they satisfy the criteria for being a ‘worker’, within the meaning of Article 9 of the Labour Standards Act (No 49 of 1947). As noted in Part 6.2, although that definition would appear to exclude unpaid interns, it has also been suggested that the performance of productive work or the existence of a ‘relationship of use and subordination’ may be enough to bring an intern within the coverage of the employment standards set by the Act. A student intern who can be classified as a worker may also fall within the Minimum Wage Act (No 137 of 1959).

However, there is provision for reducing employment standards for trainees engaged in vocational training. Article 7(iii) of the Minimum Wage Act provides that for workers ‘who receive vocational training in basic vocational skills and gain related knowledge’, the employer may pay the minimum wage at a reduced rate with the permission of the Director of the Prefectural Labour Bureau. Vocational training arrangements are managed under the Vocational Ability Development and Promotion Law (No 64 of 1969) and must be approved by the Prefectural Labour Office.⁸⁰ Where a vocational training arrangement has been approved, Article 70 of the Labour Standards Act also provides that some conditions of

⁷⁹ ‘Are Zimbabwe Companies Exploiting College Students?’ Voice of America (online), 30 June 2015 <https://www.voazimbabwe.com/a/students-attachment-tertiary-institutions/2843216.html> (accessed 27 October 2017).

⁸⁰ Ordinance for Enforcement of the Labor Standards Act (Ordinance No 23 of the Ministry of Health and Welfare, August 30, 1947) Article 3.4.4.

employment stipulated in that Act can be amended by an Ordinance of the Ministry of Health, Labour and Welfare.

It appears that internships in Japan (as opposed to vocational training arrangements) are largely of short duration, are primarily used as a recruitment tool rather than a specific vehicle for skills development, and are predominantly for tertiary students who are more advanced in their studies. However, a survey conducted by the Ministry of Education, Culture, Sports, Science and Technology of internship practices in the 2005 academic year reported that 90 per cent of universities and other educational institutions (including specialised higher education institutions and graduate schools) either gave credit for or were involved/informed of students' internships. That survey also demonstrated the extent of involvement in internships, with more than 20 per cent of students participating.⁸¹

China has taken yet another approach to the regulation of educational internships. As noted in Part 6.2, internships are generally considered to be part of education rather than employment. But there have been recent calls for student interns to be included within the scope of China's labour laws, not least because of revelations of exploitation of vocational interns. Smith and Chan (2015, 308) explain that a 'three-year vocational education programme in China is made up by the first two years in structured and career-orientated classroom learning, followed by the final year in practice with a period of internship closely linked to the programme of study'. However, it appears many students undertake internships with little or no relationship to their studies, and are exploited as cheap labour.

This exploitation has been most evident in the case of Foxconn, which is the world's largest electronics manufacturer and which may have the largest internship programme in the world (Chan et al 2015, 78). There are reports that in some Foxconn factories, student interns represent more than 50 per cent of the workforce (Chan & Zhai 2013, 22), work 10 to 12 hours a day, six to seven days a week (Chan & Zhai 2013, 76) and receive lower wages than formal employees despite performing the same work (Smith & Chan 2015, 312-3). There have also been reports of interns not being able to leave the internship without facing negative repercussions, such as the termination of their contractual relationship with the vocational school at which they are studying (Smith & Chan 2015, 319), a practice that may constitute forced labour under international labour standards (Brown & deCant 2014, 183). Further, Foxconn does not enrol its interns in the government-administered social security system, which means that these interns are not covered by medical insurance and work injury insurance (Chan 2017, 90-1). The internships at Foxconn also confer little educational benefit to the intern because of the lack of connection between students' majors and their internship experience. Brown and deCant (2014, 157) report that 'Foxconn interns assembling electronics feature diverse majors like nursing, languages, and art'.

However, Foxconn is not the only company said to be exploiting student interns in the manufacturing industry. In 2010, there was a 17-day strike at Honda Auto Parts Manufacturing Co Ltd in the province of Guangdong. At the time of the strike, it was reported that approximately 70–80 per cent of the workers there were interns recruited from technical schools. While the strikers listed 108 demands to management, the most essential was to receive a pay rise. The monthly salary of interns was 900 yuan (the minimum wage at the time was 920 yuan), while the salary for employees was 1544 yuan. The interns also did not receive any social benefits, such as accident insurance, and felt pressured not to quit due to the risk of losing their school qualification (Chan & Zhai 2013, 22–3; Brown & deCant 2014, 161). While immediately following the strike interns' wages increased to 1500 yuan per month, this was still far less than the increase received by the full-time employees, who saw their wages go up to 2044 yuan per month (Chan & Zhai 2013, 22–3).

⁸¹ www.mext.go.jp/b_menu/internship/1387145.htm (accessed 27 October 2017).

Exploitation of student interns also exists in other industries, as evidenced in a study conducted by the China National Textile and Apparel Council and the ILO Country Office for China and Mongolia (2014) of interns in textile and apparel sector enterprises. While that study acknowledged that Chinese student interns are not protected under general labour law in China, one of the aims of the study was ‘to benchmark actual practices in the textile and apparel industry against national minimum standards set in the labour law’ (ibid, 21).

The study revealed that 52 per cent of interns worked in conditions that in one way or another did not meet the national minimum standards for labour protection. The breaches were highest in the areas of rest periods, overtime work and restrictions in freedom of movement. The data also indicated that one in seven interns (14.8 per cent) were undertaking involuntary and coercive work during the internships, such as working overtime under duress and with a threat of punishment if they left their substandard work. Punitive measures identified in the study included expelling students or withholding their diplomas if they refused an internship or wanted to leave. Some enterprises saw interns as a short-term solution for relieving labour shortages. They did not make full use of their interns’ professional knowledge and ability, with many assigned to positions with low skill requirements. Over 30 per cent of interns also reported that their school was not involved in the management or supervision of their internship.

In response to the exploitation suffered by interns enrolled in vocational schools, the Ministry of Human Resources and Social Security and three other ministries jointly issued the Regulations on the Management of Vocational School Student Internships, which came into effect on 11 April 2016. The 2016 regulations apply to students who receive full-time education in either a secondary vocational school or an advanced vocational school (art 2). Manufacturing enterprises that hire students from one of these schools are required to comply with the Regulations. Each internship must be subject to a tripartite agreement between vocational school, host organization and intern. That agreement must specify: the rights and responsibilities of each party; the duration of the internship; the hours/shifts; remuneration; vacation/rest days; applicable provisions on labour protection, work health and safety conditions; liability for breach of agreement; and insurance for the intern and provisions relating to addressing accidents and injuries. The employer and the vocational schools must purchase liability insurance to cover potential accident/injuries of vocational interns, and neither the host nor vocational school can transfer this expense to the intern.

The Regulations distinguish between three types of vocational internships: ‘observing internships’ (where the intern learns through observing the work); ‘guided internships’ (where the intern performs work under close supervision); and ‘independent internships’ (where the intern performs the work independently under minimal or no supervision). Most of the restrictions in the Regulations apply to ‘independent internships’, given that they are the ones most vulnerable to abuse by employers. Requirements applicable to ‘independent internships’ include that:

- the number of interns must not exceed 10 per cent of the employer’s total workforce and 20 per cent of similarly positioned workers (art 9);
- the duration of the internship is generally limited to six months (art 10);
- interns may not work overtime, on statutory holidays or be placed on nightshifts (art 16);
- interns’ wages must not be less than 80 per cent of the probationary period salary for regular employees in the same position (art 17); and
- written guardian consent is required to hire an intern below 18 years of age (Art 14).

While the 2016 Regulations constitute a positive step forward, they do not apply to full time tertiary students. In addition, Brown (2016, 30) has criticised the Regulations because employers not engaged in manufacturing may hire students of secondary vocational schools or advanced vocational schools as interns and may handle internships as before, with both parties agreeing on their rights and obligations. The Regulations are unclear on enforcement and silent on penalties.

There are also a few regulations that apply to student interns in other industries. For example, the 2010 Education Circular specifies that ‘interns shall not work beyond the eight-hour workday’, while the Law on the Protection of Minors requires that the training of interns under the age of 18 takes place during the daytime to ensure their safety and physical and mental health (Chan 2017, 88).

8.2 Health, safety and work-related injuries

In **Australia**, students undertaking internships are covered by health and safety laws, under the provisions outlined in Part 7.3. But student interns will not generally be covered by statutory workers compensation regimes (Stewart & Owens 2013, 105–7), although it is common in practice for educational institutions to arrange and pay for insurance against injuries suffered by students while on placement.

The reverse position applies in many States in the **United States**, where student interns are unlikely to be covered by occupational health and safety laws, for the reasons set out in Part 7.3, but may be entitled to workers compensation for work-related injuries. The coverage of such regimes is determined on a State by State basis. For example, the position of the Workers’ Compensation Board in New York is that:

[a]n unpaid student intern providing services to a for-profit business, a nonprofit or a government entity is generally considered to be an employee of that organization and should be covered under that organization’s workers’ compensation insurance policy. Workers’ Compensation Law Judges have ruled that the training received by student interns constitutes compensation (even though the student interns may not be receiving actual ‘cash payments’ for their efforts) ... Naturally, a paid student intern providing services to a for-profit business, a nonprofit ... or a government entity should be covered under that organization’s workers’ compensation insurance policy.⁸²

The Court of Appeals in Colorado has also held that an unpaid student intern was covered under workers’ compensation provided by their university. The Court stated that ‘unpaid student interns with a sponsoring employer for training should have an average weekly wage imputed to them so that medical impairment benefits may be calculated and awarded’.⁸³ However, in 2007 a court in Florida ruled that a student intern was not covered for workers’ compensation benefits when the internship was required for graduation.⁸⁴ In that case the issue was whether a university student who was injured while interning at an elementary school was protected by Florida’s workers compensation laws. She was required to satisfy the definition of ‘employee’ under section 440.02(15)(a) of the Florida Statutes

⁸² Workers’ Compensation Board, New York State, ‘Workers’ Compensation Coverage’ <http://www.wcb.ny.gov/content/main/onthejob/CoverageSituations/studentInterns.jsp> (accessed 27 October 2017).

⁸³ *Kinder v Industrial Claim Appeals Office of the State of Colorado* (1998) 976 P2d 295, 296. Medical impairment benefits for whole person impairment are based upon a claimant’s average weekly wage.

⁸⁴ *Orange County School Board v Powers*, No 1D06-0069, District Court of Appeal First District, 2007.

(2003), which covered ‘any person who receives remuneration from an employer for the performance of any work or service’. The court held that:

[a]lthough the claimant obviously received a benefit from the internship because it was required to obtain her degree, the claimant was merely a full-time student of UCF [University of Central Florida] who was participating in a course entitled ‘Internship II.’ Education received in exchange for payment of tuition is not remuneration for purposes of section 440.02(15)(a), Florida Statutes.

The determining factor as to whether a student intern is covered under a particular workers’ compensation regime appears to be whether the training and experience that they receive during the internship is considered to be equivalent to wages (Swift & Kent 1999, 24). Where a court is prepared to accept that, it is likely that student interns will be extended protection under a workers compensation regime.

In **Canada** and **Germany**, for the reasons discussed in Part 7.3, student interns are covered by both health and safety, and workers’ compensation regimes. The same is true in **France**, where interns are extended occupational work and safety protections under the Code de l’éducation (art L 124-14), as well as compensation for work-related injury (art L 412-8).

Similarly, the **United Kingdom’s** Health and Safety at Work etc Act 1974 extends to individuals beyond employees, including student interns. The Health and Safety (Training for Employment) Regulations 1990 provides that a person provided with ‘relevant training’ is treated, for the purposes of Part 1 of the Act, as the employee of the organization who is providing the training (reg 4). The regulation 2 definition of ‘relevant training’ includes work experience, unless the immediate provider of the work experience is an educational establishment and ‘it is provided on a course run by the establishment’. These regulations may alter the entity responsible for health and safety of student interns in some situations, but do not exempt them from protection. It is also generally accepted, despite the lack of any similar extensions, that work experience students (as opposed to other types of intern) will be treated by insurers as employees for the purposes of the Employers’ Liability (Compulsory Insurance) Act 1969, so that they have access to workers compensation.⁸⁵

In **Romania** student interns are expressly extended protection by Law No 319/2006 (Safety and Health at Work), because Article 5(a) states that for the purposes of this law ‘worker’ includes students for the period of the internship. Article 6(3) in Appendix 2 of Order No 3955/2008 additionally provides that the internship partner must take any necessary steps to ensure the intern’s safety and welfare at the workplace, and inform the intern of the rules regarding the prevention of occupational risks. Romanian student interns are also covered by Article 5(1)(d) of Law No 346/2002 (Insurance for Work Accidents and Occupational Diseases), which states that apprentices, pupils and students undertaking an internship are insured.⁸⁶ This means that students are covered for social security indemnification purposes in the event of work accidents and professional hazards, for the entire length of the internship (Ciutacu 2012, 744).

In **Argentina** host companies are obliged by Article 15 of Law No 26,427 to provide student interns with healthcare insurance (as regulated by Law No 23,660 on Health Insurance Plans). Article 14 also stipulates that they must meet the conditions of hygiene and safety as provided in Law No 19,587 (the Labour Hygiene and Safety Act) and its regulations. The same provision obliges hosts to take out insurance against accidents or sickness for all student interns (as regulated by Law No 24,557 on Employment Injuries), which covers students for injuries obtained by the intern when undertaking their tasks and/or

⁸⁵ See eg Health and Safety Executive 2012, 5; Department for Work and Pensions et al 2013.

⁸⁶ Article 11(3) in Appendix 2 of Order No 3955/2008 also expressly states that the student can benefit from Law No 346/2002.

injuries obtained on the company's premises where they are interning. In addition Article 7 of Joint Resolution No 825/2009 and No 338/2009 provides that interns cannot engage in tasks considered dangerous or risky.

By contrast, whether interns in **South Africa** are covered by the Compensation for Occupational Injuries and Diseases Act (No 130 of 1993) will depend on whether they are remunerated (thus satisfying the definition of 'worker') or are undertaking the internship as a 'learnership'. (As previously noted, the latter is a formal programme that involves developing a specific trade or skills through a combination of practical work undertaken pursuant to a contract of employment with some specific conditions, and a period of academic study.) Section 1 of the Compensation for Occupational Injuries and Diseases Act defines 'employee' to include a person working 'under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind'.

In contrast to the unclear position of student interns under the Compensation for Occupational Injuries and Diseases Act, the Occupational Health and Safety Act (No 85 of 1993) clearly extends to unpaid student interns. Section 1 of that act defines 'employee' to mean 'any person who is employed by *or works for any employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person*' (emphasis added). In addition, section 9(1) states that

[e]very employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

In **China** the 2016 Regulations on the Management of Vocational School Student Internships, which were discussed in Part 8.1, have some impact on work health and safety and insurance for workplace injury. The regulations apply to manufacturing businesses engaging students who receive full-time education in either a secondary vocational school or an advanced vocational school (art 2), and require internships to be subject to a tripartite agreement between vocational school, host organization and intern. That agreement must specify a range of things, including applicable provisions on labour protection, work health and safety conditions and insurance for the intern and provisions relating to addressing accidents and injuries. The regulations also stipulate that the employer and the vocational schools must purchase liability insurance to cover potential accidents or injuries on the part of vocational interns (art 35), and neither the host nor vocational school can transfer this expense to the intern. However, these regulations do not apply to tertiary students or in industries other than manufacturing, which means many student interns will not receive these protections.

In **Japan**, student interns who do not satisfy the definition of 'worker' in Article 9 of the Labour Standards Act (No 49 of 1947) would appear not to be covered by the workers compensation regime included in Chapter 8 of that Act, nor the Industrial Safety and Health Law (No 57 of 1972). However, since the 2009 reforms discussed in Part 6.3, technical interns (individuals from developing countries coming to Japan to receive technical training in an industrial field under a Technical Internship Programme created under the Immigration Control And Refugee Recognition Act (No 319 of 1967)) are protected by the Industrial Safety and Health Law (JITCO 2010, 1). In addition, the host company must organise workers accident compensation insurance and employment insurance (which is paid if the intern loses their job) for each technical intern (ibid, 9–10).

The position in **Brazil** is a mixed one. Article 14 of the Lei do Estágio (Law No 11,788 of 2008) makes it clear that legislation regarding health and safety at work applies to internships, and that its implementation is the responsibility of the host. But under Article 12, it is not mandatory for the host to make national insurance contributions. An intern will

only be insured against work-related injury if they choose to make contributions of their own, something which is entirely optional.

8.3 Protections against discrimination and harassment

For the reasons explained in Part 7.4, in relation to open market internships, the equality or anti-discrimination laws in **Canada, Germany** and the **United Kingdom** are framed broadly enough to protect student interns even if they are not employees. **France** specifically prohibits the harassment of students engaged in formal educational internships. According to Article 124-12 of the Code de l'éducation, interns are entitled to the rights and protections of Articles L1152-1 (protection against moral harassment) and L1153-1 (protection against sexual harassment) of the Code du Travail, under the same conditions as employees.

By contrast, it would seem that the Employment Equity Act (No 55 of 1998) in **South Africa** would apply to student interns only if they were employees, and that the same is true in **Japan** of the prohibitions on discrimination in Articles 3 and 4 of the Labour Standards Act (No 49 of 1947). It is also unclear whether student interns in **Argentina** are entitled to protections against discrimination, although in 2013 the ILO did call for the Argentine government to ensure protection against discrimination for interns.⁸⁷

China has no separate law or legal regime that forbids employment discrimination. While the Employment Promotion Law of the People's Republic of China and the Labour Law of the People's Republic of China include provisions that ensure basic principles of employment equality (China Daily 2014), these do not appear at present to extend to student interns. As discussed in Part 8.1, such interns are regarded as learners, not workers.

In the **United States**, some equality laws have been extended to cover unpaid interns, as noted in Part 7.4. But otherwise, courts have refused to extend the protection of such laws to students, on the ground that they are not employees. For example, in *O'Connor v Davis* (1997) 126 F 3d 112 a young woman undertaking an internship at a hospital for people with mental disabilities as part of her degree in social work was subjected to a range of inappropriate sexual remarks from one of the psychiatrists. She claimed that she had been sexually harassed, in violation of Title VII of the federal Civil Rights Act. In rejecting her complaint, the Court of Appeals for the Second Circuit held the absence of any remuneration was fatal to her claim. She also failed in her claim under Title IX for discrimination under an 'education program or activity', because the host institution, the hospital, did not have education as its primary purpose.

In **Australia** too, as Part 7.4 has revealed, there is no consistency in whether or not student interns are covered by laws prohibiting harassment and discrimination in the workplace. The federal anti-discrimination laws cover students only if they can show an employment relationship, while that possibility is specifically denied in relation to the prohibitions in section 351 of the Fair Work Act 2009, because of the vocational placement exception discussed earlier. By contrast, many State laws are broad enough to cover student placements.

8.4 Educational regulation

The extent to which different jurisdictions have made provision to ensure the educational quality of student internships and WBL opportunities varies markedly. Some

⁸⁷ International Labour Organization, Direct Request (CEACR) — Adopted 2012, Published 102nd ILC session (2013), www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3081821 (accessed 27 October 2017).

jurisdictions have endeavoured to regulate to ensure minimum standards, such as the stipulation of learning objectives and supervision requirements. Others have taken a ‘soft law’ approach, using codes of conduct and best practice guidelines, while still other jurisdictions have not addressed the quality of internship learning at all.

Australia has a specific regulatory regime that governs nationally recognised qualifications which form part of the Australian Qualifications Framework (AQF). That regime authorises specific bodies to accredit and/or issue AQF qualifications. In the higher education sector, this role is performed by the Tertiary Education Quality and Standards Agency (TEQSA), while in the vocational education sector, the Australian Skills Quality Authority (AQSA) is authorised in all Australian jurisdictions except Victoria and Western Australia. Both AQSA and TEQSA have a system for accrediting both providers and courses, and for conducting audits to ensure compliance. However, AQSA provides no specific guidance to training providers as to how student placements in workplaces should be structured, assessed or managed to ensure high quality learning outcomes and positive student experiences, while TEQSA provides only broad guidance. For example, TEQSA guidelines state that a provider will be expected to demonstrate a ‘well-founded approach to the use of WIL and the type of WIL involved in a course’ which is evident in the course design and assessment of learning outcomes (TEQSA 2017, 6). TEQSA also makes explicit that arrangements for WIL (including internships) must be managed by a formal agreement which sets out the expectations for the parties involved and the outcomes sought for students (ibid).

Both agencies have certain regulatory powers if a compliance audit reveals issues that affect students’ learning experience, including in relation to internship experiences integrated into qualifications. For example, TEQSA can impose sanctions by shortening or cancelling the period of accreditation for the course of study. However, because compliance audits occur irregularly, and guidance regarding the expectations for internship experiences and other practical learning is relatively scanty, students are largely dependent on the local policies and practices implemented by their education or training provider to ensure that their learning, including in any internship-like placements, is of a high quality.

There has been some concern internationally that educational providers may have an incentive to offer internship courses which allow for tuition to be charged without the need to incur expenses for facilities or instruction costs (see eg Perlin 2012, ch 8). In Australia this risk is controlled by the Higher Education Support Act 2003, which provides that if courses containing work placements are to receive government funding at the same level as other university courses, they need to be directed and meet specific academic criteria to do with the quality and nature of the university input.⁸⁸

Canada’s educational system is managed on a provincial and territorial basis, rather than nationally. Ontario is the only province that seeks to regulate, albeit indirectly, the educational quality of workplace placements and the responsibilities for supervision and monitoring of students on placement (Turcotte et al 2016, 45, 47–8). It does this through the unusual mechanism of a Co-operative Education Tax Credit (CETC), a tax refund for Ontario businesses that provide work placements to postsecondary students enrolled in a ‘qualifying co-operative education program’ at certain educational institutions.⁸⁹

⁸⁸ See s 33-30(1) regarding non-payment for ‘work experience in industry’ and the definition of that term in Sch 1 cl 1(1). See also Higher Education Support Act Administration Guidelines 2012, 5.5.1, which provides that if the educational provider meets criteria that include monitoring students, providing direction of their work, and managing the educational content and objectives of placements and assessing student learning, then a placement is not regarded as ‘work experience in industry’.

⁸⁹ See Taxation Act, 2007, SO 2007, c 11, Sch A s 88.

Under the CETC an eligible employer can claim up to 30 per cent of ‘eligible expenses’ (such as wages paid to the student) for each qualifying work placement. For a placement to qualify it must meet a number of criteria. Of specific interest in this context are that the student must be paid, and be engaging in productive work (not just observing the work of others); the placement must be approved by the educational institution as ‘a suitable learning situation’; and both the corporation and institution have obligations with regard to the supervision and monitoring of the student while on placement.

While this is an interesting approach to the educational regulations of internship placements, Turcotte et al (2016, 46-7) note:

It is worth considering whether these requirements are best located in the tax system, where they apply only to some employers and likely complicate administration of the credit, or in some other legal regime such as employment standards law.

Ontario continued its leadership role in relation to internships when the Higher Education Quality Council of Ontario (2016) published Canada’s first guidelines for ensuring the educational quality of post-secondary WIL.⁹⁰ The Guidelines include six main recommendations for enhancing the educational quality of structured work experience. They are:

1. Deliberately structure the WIL programme
2. Empower the learner in the structured work experience
3. Provide students with relevant challenges in the workplace
4. Consider the learning environment
5. Work in partnership with students and the workplace organization
6. Ensure continual assessment of student learning and evaluation of the WIL programme.

In the **United Kingdom** the quality assurance of internships and work experience placements is predominantly pursued through voluntary quality charters and standards. Individual higher education institutions are responsible for ensuring the quality of their students’ work placements and have their own internal quality assurance guidelines and procedures. At a national level, the Quality Assurance Agency for Higher Education has produced a Code of Practice on WBL (QAA 2007). Whilst not formally binding, higher education institutions are expected to take the Code of Practice into account when developing their own guidelines. It contains eight general principles for implementing high quality WBL. These include:

- Learning outcomes are clearly identified and relevant to the overall programme of study;
- The learning opportunities provided are appropriate;
- Students are provided with appropriate information, support and guidance prior to, throughout and following their work-based and placement learning;
- Institutions have, use and regularly review policies and procedures for securing, monitoring, administering and reviewing work-based and placement learning.

⁹⁰ HEQCO, *A Practical Guide for Work-Integrated Learning: Effective Practices to Enhance the Educational Quality of Structured Work Experiences Offered through Colleges and Universities*, 2016.

http://www.heqco.ca/SiteCollectionDocuments/HEQCO_WIL_Guide_ENG_ACC.pdf (accessed 27 October 2017).

As in the United Kingdom, it is common in **South Africa** to find guidelines intended to direct or influence the content of internships. These are common for governmental internship programmes, some of which specifically provide for student interns. For example, the internship programme offered by the Department of Public Works in the Province of Limpopo is regulated by a Departmental Internship Policy (Department of Public Works, Limpopo Provincial Government 2014). The programme is targeted, among others, at students who are enrolled at an educational institution and required to undertake practical experience to gain their South African Qualifications Authority registered qualification. Student interns are required to waive their right to receive workers' compensation in the event of an injury or accident (ibid, 7.4.2), and while graduate interns may be entitled to remuneration, student interns are not (ibid, 7.5.2). The stipulation that student interns will not be paid is noteworthy, as student internships under this programme are required to be between three and 24 months in duration (ibid, 7.10.2). However, student interns undertaking the programme are allocated mentors/supervisors, who are responsible for developing the internship programme, compiling progress reports and completing a workbook based on the performance of the learner (ibid, 7.6.3).

A similar public internship programme is offered in the municipality of Mbashe. Like the Limpopo programme, it targets unemployed graduates as well as students undertaking a higher education qualification who must undertake work experience to fulfil the requirements of their qualification (Municipality of Mbashe 2015, 3–4). The duration of the Mbashe internships is 24 months (ibid, 8) and, as in Limpopo, only graduate interns are entitled to remuneration. However, once again, Mbashe's Internship Policy does require the appointment of a suitable mentor for each intern, with whom the intern enters into an agreement. The intern must be adequately supervised throughout the duration of the internship and must conduct on-the-job assessment based on identified performance indicators (ibid, 8–10).

In a vocational context South Africa has adopted a system of 'learnerships'. A learnership is a WBL programme that leads to a National Qualifications Framework registered qualification. Learnerships are directly related to an occupation or field of work, for example, electrical engineering, hairdressing or project management, and are managed by Sector Education and Training Authorities (SETAs). They are governed by the Skills Development Act (No 97 of 1998). This requires that students undertaking a learnership must enter into a tripartite agreement between the student, the organization employing them, and the education provider offering the theoretical training component (s 17). That agreement outlines the rights and responsibilities of all three parties. In addition, the student enters into a contract of employment with the employer for the period of the learnership (s 18).

In contrast to the largely voluntary charter approach to regulation of educational quality of internships in the United Kingdom and South Africa, both **France** and **Romania** have sought to actively regulate the quality of educational internships. Since the adoption of the 2011 Cherpion Law, and further changes in 2014,⁹¹ all internships in France must be completed under a tripartite agreement between intern, host organization and educational institution (Code de l'éducation art L 124-5). That internship contract must specify both the educational objectives of the internship and its conditions. For example, the internship agreement must state the activities the intern will undertake and the skills they will develop (art D124-4(4), art L124-2(2)). In addition, the intern must be supervised by both the educational institution with which they are enrolled and by the organization with which they are placed (art L124-2(3), art L124-9). In order to ensure effective supervision, there are

⁹¹ Act No 2011-893, 2011 ('Cherpion Law'), as supplemented by Law no 2014-788, 2014.

strict limitations imposed on the numbers of interns that supervisors can oversee (art R124-13, art D124-3).

In Romania, Appendix 2 of the Order of the Minister of Education, Research, Youth and Sport (Order No 3955/2008) makes a number of provisions concerning the management of tertiary internships. For example, Article 6(1) requires that every internship partner (the organization hosting a student intern) must nominate an employee tutor to supervise interns, while Article 6(4) obliges the partner to provide the intern with all the necessary means to acquire the targeted competencies as set out in the internship portfolio. In addition, Article 7 provides that the educational institution in which the student intern is enrolled must nominate a supervising teacher, who is responsible for planning, organising and monitoring the internship. During the internship, the tutor and supervising teacher must monitor progress of each student intern. The criteria that they need to assess include the student's level of technical knowledge, as well as their behaviour and capacity to integrate in the company's daily activity (with respect to discipline, punctuality, accountability to the tasks assigned, compliance with the rules and regulations of the internship partner, etc) (art 10(1)). At the conclusion of the internship, the tutor and supervising teacher must assess the competence acquired by the intern, based on their progress during the internship, an interview/oral examination and a practical test. The overall score obtained on this evaluation will be considered by the teacher in the student's final mark for the course (Ciutacu 2012, 742). Obligations are also imposed on the student intern, who is required to maintain an internship notebook indicating: the training method, skills practised, activities undertaken during the internship and personal remarks relating to the tasks performed.⁹²

There are clear similarities in the Romanian and French approaches to ensuring that internships offer a genuine learning experience for students. For example, both jurisdictions require a foundational agreement under which an internship is undertaken and which stipulates a variety of conditions regarding the internship. It is perhaps no coincidence that both jurisdictions have a high proportion of tertiary students engaged in internship experiences in the workplace. In France most Bachelors and Masters level degrees require some practical internship placements, while the Romanian Agency for Quality Assurance in Higher Education requires a minimum of two to three weeks per year of practical training, beginning in second year, in all higher education degrees (Ciutacu 2012, 746).⁹³

Zimbabwe also requires higher education students to undertake practical placements, referred to as 'attachments' and usually lasting an academic year, as part of their tertiary studies (Matamande et al 2013). However, there is no national regulation of the educational content of attachments, and there has been significant criticism that they are not offering quality learning experiences. For example, there are reports that many students are being required to undertake attachments in organizations which do not specialise in the area they are studying (Wilson 2016, 38), of students undertaking menial jobs while on attachment (Matamande et al 2013, 2), and that lack of student access to machines and equipment while on attachment compromises the quality of their learning (Wilson 2016, 41).

⁹² Order No 3955/2008 Appendix 2, art 10(3).

⁹³ In Estonia and Finland the educational content of vocational traineeships is also regulated. In these countries, traineeships must be completed under a traineeship agreement, which is primarily directed at guaranteeing the educational component of the traineeship. In Estonia, the traineeship agreement should include provisions regarding the organization of the traineeship, its aims, the rights and obligations of the parties, the tasks the trainee will complete, and the expected outcomes of the traineeship (Estonian Vocational Educational Institutions Act s 30(3)). Finnish laws envisage similar conditions within the traineeship agreement, but in addition require agreement upon the supervision and evaluation of the trainee (Jeannet-Milanovic et al 2017, 152–3).

The attachment system has also been criticised for its costs to students. Currently, students attending state-run institutions of higher education (universities and polytechnics) are paying full tertiary fees while on industrial attachment. This is despite the fact that students on attachment are off campus and do not use university or college materials, equipment and other facilities, or attend lectures. In May 2017 the Deputy Minister of Higher and Tertiary Education, Science and Technology Development stated that the government was in the process of lowering the amount to be paid by students on attachment, but the exact amount is still being determined.⁹⁴

Similar criticisms have been made of the internship system in **China**. The limitations of the 2016 Regulations on the Management of Vocational School Student Internships, which cover full-time students in either a secondary vocational school or an advanced vocational school undertaking internships in the manufacturing industry, were discussed in Part 8.1. The Regulations apply only to internships in manufacturing, exclude full-time tertiary students. While they provide important threshold standards for the conditions of interns, they do not attempt to ensure the educational quality of the internship experience.

The regulation in **Argentina** is more similar to that in France and Romania, in that it attempts to control the educational quality of internship experiences. As discussed in Part 8.1, before an internship can be undertaken a master agreement between the host organization and the educational institutions, and an internship agreement with the student, must be signed. The internship agreement must specify, amongst other things, the contents of the educational internship plan and tasks assigned to the intern (Law No 26,427, art 9), and the educational objectives of the internship must be specified in the master agreement, as well as the rights and obligations of the host organization and educational institution (art 6).

Law No 26,427 also addresses the issue of supervision of student interns. It requires that a teacher be appointed by the educational institution and a tutor appointed by the host company in order to assist and evaluate the intern (arts 17–18). Upon completion of the internship, the intern receives a certificate, which details the duration of the internship and the tasks which were undertaken (art 18).

Brazil's federal Law No 11,788 of 2008 likewise seeks to regulate the content or quality of internship experiences in various ways. Aside from the need for a formal agreement between the three parties involved, it is required that each intern have both an academic advisor and a supervisor from the host organization (art 3). The advisor must provide an orientation for the student and also monitor and evaluate their activities (art 7). In addition, the educational institution must require reports from the interns at least every six months. Those reports must be checked and signed by the intern, their adviser and the supervisor (art 3). Despite these rules, however, internships offered to tertiary and vocational students have been criticised because of the disconnect between the tasks students typically undertake and their studies, and because host companies may display no concern regarding the educational content of the internship experience (Campos 2013, 5).

As discussed earlier, internships for tertiary students in **Japan** appear to be primarily a recruitment tool rather than a vehicle for learning. These internships are largely governed by voluntary codes of conduct. For example, Keidanren (the Japan Business Federation which represents employers at the ILO) has issued guidance on the recruitment of new graduates. However, that guidance note is specifically focussed on graduate (not student) internships,

⁹⁴ Parliament of Zimbabwe, Parliamentary Debates, National Assembly, 10 May 2017 (Godfrey Gandawa) <http://www.parlzim.gov.zw/national-assembly-hansard/national-assembly-hansard-10-may-2017-vol-43-no-61> (accessed 27 October 2017).

and the guidance only applies to Keidanren members. The guidance strongly encourages companies to consider the education quality of internship experiences:

it is advisable to ensure the educational effectiveness of such programs, for example by accepting students into workplaces and providing them with feedback ... Only highly educationally effective one-day programs that accept students into workplaces, offer career education, and provide feedback can be conducted.⁹⁵

However, more details are provided regarding the educational content of technical internship arrangements for overseas workers, which were discussed in Part 6.2. A key aspect of the 2009 reforms related to the level of instruction, supervision and support provided to the interns, which has now been extended to all three years of the technical internship (Immigration Bureau 2010). An ordinance of the Ministry of Justice requires the supervising organization to receive lectures, provided by an ‘expert’, on the legal protection of technical interns.⁹⁶ The Ordinance also requires monthly inspections of the site where the internship is being conducted to confirm the situation of the technical internship and provide directions; that Board members of the supervising organization conduct an audit of technical internships at least once every three months; and that organizations offer counselling staff that can provide advice to the technical interns.

⁹⁵ Chairman Sakakibara's statements and comments at his press conference, 10 April 2017, www.keidanren.or.jp/en/speech/kaiken/2017/0410.html (accessed 27 October 2017).

⁹⁶ Ibid.

9. The Status and Regulation of ALMP Internships

In contrast to educational and open market internships, ALMP internships are targeted toward unemployed youth with little or no professional skills, and recent graduates, in order to facilitate their transition into the labour market (European Commission 2015, 5). Thus, these internships focus less on education and more on assisting young people to secure immediate employment (Directorate General for Internal Policies 2017, 20). Typically, they involve a tripartite relationship between the intern, a host organization and an employment services provider, most often public employment services or other organizations delivering ‘workfare’ programmes. The provider is typically responsible for recruiting jobseekers and graduates to the programme and acts as the intermediary between the intern and host organization. It is assumed to have a supervisory role in terms of overseeing the quality of the internship and the results of the programme (ibid, 20, 45). In contrast, the role of the host organization or the ‘employer’ has been considered to a lesser extent. If a contract exists between the intern and the host organization, then the latter’s responsibilities, such as providing minimum working conditions and ensuring skill development, may be included in that agreement. For some countries, as explored below, the obligations of the host organization are specified in soft law, such as policy directives issued by the government, although rarely are they mandated by law.

Similar to educational and open market internships, how ALMP internships are regulated varies remarkably between jurisdictions. In some countries, such as Germany and Australia, ALMP internships are expressly excluded from the scope of employment-related legislation, whereas in other jurisdictions, such as South Africa, ALMP interns appear to fall within the ambit of their labour laws. What is perhaps more consistent between countries (although Australia may be an exception), is that occupational health and safety, anti-discrimination and workers compensation laws will apply to ALMP interns. This position is often clarified through the use of soft law, such as government guidelines, ministerial determinations and policy directives. It also appears that many ALMP internships, and particularly those aimed at lower skilled individuals, provide only generic work experience that is geared more toward benefiting the community rather than enhancing skill levels.

The following discussion explores the manner in which ALMP interns are included or excluded from labour, anti-discrimination, occupational health and safety, and workers compensation laws, as well as the regulation of the quality of the internships. It reveals the plethora of approaches that are taken internationally. But given the scope and complexity of the subject, and in particular the scope for local or institution-level regulation, it does not provide a comprehensive analysis of the treatment of ALMP internships.

9.1 Employment standards

A mixed legislative approach to the regulation of ALMP internships can be found in **Canada**, and particularly in Ontario and Québec. Ontario’s social assistance programme, Ontario Works, is administered by the Ontario Ministry of Community and Social Services (OMCSS), and includes community participation and employment placements. Community participation, as the name suggests, requires individuals to take part in community service activities in public or not-for-profit organizations. All placements are unpaid, but the Ontario Works Directives, published by the OMCSS, state that community participation activities must comply with standards relating to: public and religious holidays, pregnancy and parental leave, and termination (participants must receive one week’s notice prior to their dismissal) (Ontario Ministry of Community and Social Services 2016, 1, 6–7).

Notably, section 3(5) of the Employment Standards Act 2000 expressly excludes participants of the programme from its scope, while section 73.1 of the Ontario Works Act 1997 excludes these individuals from the scope of the Labour Relations Act 1995. Section 73.1 sparked fierce debate in Parliament when it was first introduced in 1998, as part of Bill 22 for the Prevention of Unionization Act (Ontario Works) 1998. This is because it prevents individuals engaging in community participation activities from unionising, bargaining collectively and striking. It was claimed that the Bill ‘denie[d] its citizens charter rights’ and constituted a ‘violation of basic human rights’.⁹⁷ But the Bill was ultimately passed to avoid situations involving ‘persons who are being paid by the taxpayers because they find themselves temporarily indisposed going on strike to increase the amount of money they get from the taxpayers or to increase their vacation time’.⁹⁸

Quite a different position exists when it comes to the Ontario Works employment placements, which provide unemployed individuals with on-the-job training. The Ontario Works Directives prescribe that participants are afforded the protection of the Employment Standards Act and must be paid the prevailing wage rate for the position in which they are hired (Ontario Ministry of Community and Social Services 2016, 6–7).

Another approach to the regulation of internships can be found in Québec. Emploi Québec offers two types of financial assistance programmes: a Social Assistance Program aimed at individuals who are capable of being employed and a Social Solidarity Program for people whose capacity to work is severely limited. To achieve the objectives of the programmes, the Minister of Employment and Social Solidarity offers employment-assistance measures, which are described in Title I of the Individual and Family Assistance Act. These employment-assistance measures can include ALMP-type internships, such as placement services and vocational training aimed at increasing workplace-related skills.

On their face, the provisions of An Act Respecting Labour Standards and the Labour Code apply to an employment activity engaged in within the scope of an employment measure. But this is a general position that is subject to a number of exceptions. For instance, by virtue of regulation 6 of the Individual and Family Assistance Regulation, the provisions of these statutes do not apply to:

- work activities not governed by An Act Respecting Labour Standards;
- work activities carried out under employment-assistance measures focused on training or the acquisition of skills; and
- work activities carried out under employment-assistance measures that include workplace exploration intended to clarify vocational orientation or to support entry on the labour market or job preparation, for the first four weeks of each training period.

These exceptions, therefore, operate to exclude most ALMP-type internships from the scope of Québec’s labour laws.

Similar to Québec, **Germany** implements two social assistance schemes: one regulated under the Second Book of the Social Code (‘SGB II’) and the other regulated by the Twelfth Book of the Social Code (‘SGB XII’). SGB II applies to individuals who are unemployed, but capable of working at least three hours per day (Eleveld 2014). As a condition of receiving financial assistance, the beneficiaries may be obliged to participate in ‘temporary

⁹⁷ Ontario, *Parliamentary Debates*, Legislative Assembly, 17 August 1998.

⁹⁸ Ontario, *Parliamentary Debates*, Legislative Assembly, 27 May 1998.

extra jobs' (Arbeitsgelegenheiten in der Mehraufwandsvariante), which typically involve community service and work in public infrastructure (Walter 2012, 79).

According to section 16d(7) of the SGB II, temporary extra jobs do not constitute an employment relationship, but nor are the individuals taking part in these jobs considered unemployed (Walter 2012, 80). In addition to their welfare benefits, they receive an hourly payment of one to two Euros from the host organization, and it is for this reason that temporary extra jobs have been dubbed 'One Euro Jobs' in Germany. Although SGB II does not specify the number of hours the beneficiary must work, the jobs are typically part-time and a maximum of 30 hours per week (Eleveld, 2014).

What SGB II does state, however, is that the Job Centre must enter into a 'reintegration agreement' (Eingliederungsvereinbarung) with the beneficiary (s 15 of SGB II). According to the Federal Social Court, this agreement must specify, among other things, the work the individual will perform, where the job will take place, the amount of compensation to be paid and the number of weekly working hours.⁹⁹

Australia has also enacted legislation that excludes from the scope of the country's federal labour laws many ALMP-type internships, including the Green Army Programme introduced in July 2014. The Green Army Programme is aimed at a diverse group of young people, such as indigenous Australians, graduates and unemployed jobseekers, aged 17–24, who are interested in engaging in environmental and heritage conservation projects. While at its inception it was heralded as creating 'Australia's largest-ever environmental workforce', the programme will be discontinued in June 2018.¹⁰⁰ Section 38J of the Social Security Act 1991 states that participants of the programme are not employees for the purposes of the Fair Work Act 2009. Instead, participants receive a 'green army allowance', but cannot receive income support payments at the same time.¹⁰¹ Participants typically work 30 hours, five days per week for a project lasting between 20 and 26 weeks.¹⁰²

However, whether other ALMP internships that have been introduced by the Australian government fall within the ambit of the Fair Work Act 2009 remains less clear. An example of this is the PaTH (Prepare-Trial-Hire) Programme, which came into effect April 2017 and provides the opportunity for young jobseekers to take part in internships. The PaTH internships are unpaid by the business, although interns receive a fortnightly allowance in addition to their welfare benefits. Arguably, this fortnightly payment could constitute 'remuneration' for the purposes of the Fair Work Act 2009, so as to preclude the operation of the 'vocational placement' exception in that Act (see Part 7.2). It is also possible that provisions of the Social Security Act 1991, such as sections 544B(8) and 631C, may operate to exclude the possibility of an employment relationship arising, given that the PaTH internship may constitute an 'approved programme'. But whether these provisions protect the host business, and not just the federal government, remains to be seen.

Argentina, in contrast, has introduced laws to regulate one of its main ALMP internships, the Programa de inserción Laboral. This programme is regulated by Resolution MTEySS No 45/06 and implemented by the Ministry of Labour, Employment and Social Security (MTEySS). The programme runs between one month and (generally) six months, and is aimed at promoting the insertion of particular groups of unemployed workers in quality jobs, through the provision of economic incentives to employers seeking to increase

⁹⁹ BSG 16 December 2008 B 4 AS 60/07 R.

¹⁰⁰ www.environment.gov.au/land/green-army (accessed 27 October 2017).

¹⁰¹ <http://guides.dss.gov.au/guide-social-security-law/3/1/15> (accessed 27 October 2017).

¹⁰² <https://www.environment.gov.au/system/files/pages/d2ef53a4-1e46-4906-b7c4-a0bb0fa537ee/files/green-army-faqs-round-3.pdf> (accessed 27 October 2017).

staff levels. The intern is required to enter into a contract of employment with the host organization, although Article 12(1) of Resolution MTEySS No 45/06 provides that no labour contract exists between the intern and the MTEySS. Employers must comply with the applicable labour and social security laws, but as the intern is receiving monthly financial assistance from the MTEySS, host organizations are permitted to deduct this amount from the intern's salary and pay the difference necessary to reach the salary specified in the applicable collective labour agreement.

Like Argentina, the **United States** has introduced laws to regulate ALMP internships. In 1996, the United States Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which established the federally-funded welfare programme, the Temporary Assistance for Needy Families. One of the express purposes of the PRWORA was to 'end the dependence of needy parents on government benefits by promoting job preparation [and] work' (s 601(a)(2)).

To be eligible for federal grants to fund state welfare programmes, the PRWORA requires States to ensure that a certain percentage of welfare recipients participate in 'work activities', such as on-the-job training. New York enacted a welfare reform statute, the New York Social Services Law, which complied with the PRWORA requirements and, among other things, authorised the establishment of the Work Experience Program.¹⁰³ As a condition for receiving welfare benefits, the recipient may be required to participate in such a programme. Under section 336-c(2)(b) of the New York Social Services Law, the number of hours a participant of the Work Experience Program is required to engage in is calculated by dividing their monthly financial benefit (which includes the value of any food stamps they receive) by the higher of the federal or state minimum wage. In other words, participants are required to 'work off' their benefits.

In *Brukhman v Giuliani* (2000) 94 NY2d 387 the Court of Appeals of New York held that participants of the Work Experience Program are not entitled to divide their benefit by the prevailing wage rate (as opposed to the minimum wage) on the basis that they are not employees:

Program participants simply are not 'in the employ of' anyone — that is the very reason they are receiving welfare benefits and required to participate in the Program, until they can find or be placed in jobs with the customary array of traditional indicia of employment.¹⁰⁴

That said, a number of cases after *Brukhman v Giuliani* have held that participants of the Work Experience Program are employees within the meaning of Title VII of the Federal Labor Standards Act.¹⁰⁵ Indeed in *Carver v State of New York* (2015) 26 NY 3d 272, the New York Court of Appeals cautioned that the *Brukhman v Giuliani* decision should be confined to its facts.

In **France**, two types of ALMP internships delivered by the Pôle Emploi are the L'action de formation préalable au recrutement (AFPR) and the Préparation Opérationnelle à L'emploi (POE). The AFPR is designed to bridge the gap between the skills a jobseeker holds and the skills required for a job for which they have received an offer, but conditional

¹⁰³ For a summary of how the Work Experience Program commenced in New York, see *Elwell v Weiss* (2006) US Dist LEXIS 96934 (W D NY).

¹⁰⁴ *Brukhman v Giuliani* (2000) 94 NY 2d 387, 395–6.

¹⁰⁵ See eg *Stone v McGowan* (2004) 308 F Supp 2d 79; *Elwell v Weiss* (2006) US Dist LEXIS 96934; *Carver v State of New York* (2015) 26 NY 3d 272; *United States v City of New York* (2004) 359 F 3d 83, 86.

that the jobseeker receives training.¹⁰⁶ The Pôle Emploi pays an allowance to companies who train one or several unemployed individuals and hire them on temporary contracts from six to 12 months (Gineste 2015, 4). Thus, access to the programme is only possible if the jobseeker has signed a working contract before taking part in the programme (European Commission 2016, 38).

In contrast, the POE assists jobseekers to develop the necessary vocational skills and competencies in order to obtain employment. There are two types: the individual approach (POEI) and the collective approach (POEC), both of which are integrated in France's Code du travail (arts L 6326-1, L 6326-3). The POEI requires participants to have received a job offer conditional on the receipt of training (which is up to 400 hours) to adapt their skills to the job (European Commission 2016, 38). As with the AFPR, accessing the POEI is possible only if the jobseeker has signed a working contract before taking part in the programme (ibid). Thus, the POEI is the same measure as the AFPR, except that the POEI is dedicated to longer hiring contracts: permanent contracts, non-permanent contracts or 'professionalization contracts' longer than 12 months (Gineste 2015, 5; European Commission 2016, 38).

The POEC, on the other hand, provides unemployed individuals with the opportunity to be trained for a job that has been identified as lacking candidates in a specific territory (Gineste 2015, 4). The collective approach is also up to 400 hours of training, in which up to one third is work experience, but does not require a contractual commitment from the enterprises. The duration of the internship cannot be longer than one month (European Commission 2016, 38).

Another approach to the regulation of ALMP internships can be found in **South Africa** in relation to the Expanded Public Works Programme (EPWP), which is the country's largest ALMP (Meth 2011). The Department of Labour has provided a Code of Good Practice for Employment and Conditions of Work for Expanded Public Works Programmes (Department of Labour 2011)¹⁰⁷ and Ministerial Determination 4: Expanded Public Works Programmes (Department of Labour 2012) to ensure the effective implementation of the programme. The EPWP is administered by various government departments and is targeted at the unemployed and particularly those from marginalised groups, such as low-skilled individuals, people with disabilities and the urban and rural poor. The interns are employed on a temporary or ongoing basis either by the government, non-governmental organizations or contractors.¹⁰⁸ According to the Code of Good Practice for EPWPs, they are afforded the protection of the Basic Conditions of Employment Act (No 75 of 1997) and the Labour Relations Act (No 66 of 1995). Arguably, this is because the intern satisfies the broad definition of 'employee' in both Acts (see Part 6.2), given that they receive remuneration in return for their work, and assist the host organization in carrying on or conducting its business.

The remuneration that the intern receives must be paid at least monthly, must not be less than the EPWP wage rate, and can be paid either at a daily rate or based on the number of tasks completed (Department of Labour 2011, [9.1]–[9.2]; Department of Labour 2012, [13.1]–[13.2]). Normal hours of work apply, as is customary in the relevant sector, but are limited to 40 hours per week (Department of Labour 2011, [10.1]). The Code of Good Practice for EPWPs also provides that an intern can only be dismissed if: (a) there is a 'good reason' for the dismissal (which may relate to the intern's conduct, such as lateness); and (b) the host organization has followed a 'fair procedure', such as by investigating the incident,

¹⁰⁶ www.pole-emploi.fr/candidat/l-action-de-formation-prealable-au-recrutement-afpr--@/article.jspz?id=60635 (accessed 27 October 2017).

¹⁰⁷ Hereafter referred to as the 'Code of Good Practice for EPWPs'.

¹⁰⁸ www.epwp.gov.za/ (accessed 27 October 2017).

notifying the intern and allowing them to respond to any allegations made against them (ibid, [15]).

The **United Kingdom's** main welfare-to-work scheme is the Work Programme. Although referrals to the programme ceased on 1 April 2017, participants already on the programme can continue taking part for up to two years since the date they joined.¹⁰⁹ The Work Programme provides support to people receiving a jobseeker allowance that are in long-term unemployment or at risk of becoming unemployed. If the jobseekers are unable to secure employment, despite being on the programme, they are required to participate in the Help to Work scheme. One of the three measures provided by Help to Work is Community Work Placements, which are delivered by external providers. Claimants must take part in these placements 30 hours per week for a maximum of six months.

The Department for Work and Pensions has issued two main guidelines relating to Community Work Placements: the 'Provider Guidance' (Department for Work and Pensions 2016) and the 'Generic Guidance' (Department for Work and Pensions 2017). Both provide non-binding entitlements for jobseekers participating in the placements. According to clause 109 of the Generic Guidance, any activities that a participant may be required to undertake 'must not contravene the National Minimum Wage Act 1998'. However, jobseekers taking part in these placements are not legally entitled to the minimum wage for the simple reason that they do not satisfy the definition of 'worker' in section 54(3) of the Act (Paz-Fuchs & Eleveld 2016). Indeed, it is also the UK government's position that workers on a government employment programme, including the Work Programme, are not entitled to the national minimum wage.¹¹⁰ Furthermore, for the purposes of terminating a Community Work Placement, the jobseekers would not be regulated under the dismissal provisions provided by the Employment Rights Act 1996, as it requires an employment relationship under section 94. That said, both the Provider Guidance and Generic Guidance provide for some circumstances in which a jobseeker can be dismissed, such as engaging in 'inappropriate behaviour' (see cls 3.36–3.40 of the Provider Guidance).

9.2 Health and safety, work-related injuries and discrimination and harassment

Even if ALMP interns do not fall within the scope of a country's employment standards, for most jurisdictions it appears that occupational health and safety, anti-discrimination and workers compensation laws will apply to them. In **Germany**, for example, section 16d(7) VII of the SGB II (discussed above) states that individuals undertaking temporary extra jobs are protected by occupational health and safety laws. In **Argentina**, Article 13(1) of Resolution MTEySS No 45/06 expressly provides that host organizations of the Programa de inserción Laboral may be given financial assistance to ensure that interns of the programme have access to the necessary safety clothes and hygiene items. In relation to **France's** POEC, the Pôle emploi has clarified that interns are provided with social protection during the training period in relation to work-related accidents and illnesses (Pôle Emploi 2015).

Similarly, in **Canada**, ALMP interns are covered by provincial health and safety, anti-discrimination and workers' compensation regimes. In Québec, for example, section 11(4) of An Act Respecting Industrial Accidents and Occupational Diseases provides that for the purposes of that legislation, persons performing work as part of a programme under Title I of the Individual and Family Assistance Act are deemed workers of the government (unless the work is performed under the responsibility of the Minister of Employment and Social

¹⁰⁹ www.gov.uk/moving-from-benefits-to-work/job-search-programmes (accessed 27 October 2017).

¹¹⁰ www.gov.uk/national-minimum-wage/who-gets-the-minimum-wage (accessed 27 October 2017).

Solidarity). In Ontario, the Ontario Works Directives state that host organizations of Community Participation placements must comply with the Ontario Human Rights Code, Occupational Health and Safety Act, the Workplace Safety and Insurance Act, and that participants of Employment Placements are afforded the protection of the latter two Acts. Although the Directives are silent on whether Employment Placement participants are protected against workplace discrimination and harassment, the Ontario Human Rights Code is given a broad and generous interpretation, and so would protect individuals in any work-like context.¹¹¹

In **South Africa**, the Minister of Labour's Code of Good Practice for EPWPs clarifies that host organizations of the Expanded Public Works Programme must comply with the Employment Equity Act (chs 1–2), the Occupational Health and Safety Act, and the Compensation for Occupational Accidents and Diseases Act (Department of Labour 2011). This is because interns of the Expanded Public Works Programme are under the direction and supervision of the host organization and must receive payment for their work, thereby satisfying the definition of 'employee' in these Acts.¹¹²

The **United States**, at least when it comes to the regulation of programmes such as the New York Work Experience Program, has adopted a similar approach to the countries discussed above. Section 336-c(2)(a) of the New York Social Services Law states that a recipient of welfare assistance may be assigned to participate in a Work Experience Program only if 'appropriate federal and state standards of health, safety and other work conditions are maintained'. Section 336-c(2)(c) also requires that participants of this programme be provided with 'appropriate workers' compensation or equivalent protection for on-the-job injuries', but not necessarily at the same benefit level that regular employees receive.¹¹³ Furthermore, the Federal government has clarified that federal anti-discrimination laws apply to workfare participants (DoL 1997). Indeed, the New York Court of Appeals for the Second Circuit has held that participants of the Work Experience Program are 'employees' for the purposes of Title VII of the Civil Rights Code.¹¹⁴

In the **United Kingdom**, the Department of Welfare and Pensions' Community Work Placements Provider Guidance and Generic Guidance state that host organizations of Community Work Placements must comply with the country's social laws. In particular, clause 9.8 of the Provider Guidance and clause 21 of the Generic Guidance require host organizations to adhere to the minimum health and safety standards of the Health and Safety at Work Act etc 1974 and associated regulations. This is due to section 3(1) of the Act, which provides that employers owe a general duty to conduct their undertaking in a way that ensures, so far as is reasonably practicable, that non-employees who may be affected thereby are not exposed to risks to their health or safety. A similar general duty is imposed on 'persons concerned with premises' (s 4(2)), for they must also ensure, again so far as is reasonably practicable, that the premises are safe and without risks to the health of non-employees.

The Employers' Liability (Compulsory Insurance) Act 1969, however, appears to not apply to participants of Community Work Placements, given that 'employee' is defined in

¹¹¹ www.ohrc.on.ca/en/iii-principles-and-concepts/5-who-protected-work (accessed 27 October 2017).

¹¹² See definition of 'worker' in the Employment Equity Act (No 55 of 1998) s 1, Occupational Health and Safety Act (No 85 of 1993) s 1 and Compensation for Occupational Injuries and Diseases Act (No 130 of 1993) s 1.

¹¹³ See also *Kemp v City of Hornell* (1998) 672 NYS 2d 537

¹¹⁴ *United States v City of New York* (2004) 359 F 3d 83.

this Act to mean a person who has ‘entered into, or works under, a contract or service or apprenticeship with an employer’ (s 2). Nevertheless, clause 37 of the Generic Guidance recommends that host organizations adopt ‘similar or the same procedures’ that they use for existing employees in relation to reporting and managing workplace accidents. The Generic Guidance (cl 40) and Provider Guidance (cls 8.6–8.8) also require that host organizations comply with the Equality Act 2010. In particular, Part 5 of this Act prohibits discrimination, harassment and victimisation at work. It covers not only employers,¹¹⁵ but the activities of an ‘employment service-provider’, defined to include a provider of vocational training or work experience (ss 55–56), as explained in Part 7.4 of this report.

There are some jurisdictions, however, that have expressly excluded ALMP internships from the ambit of their social laws. Such a situation currently exists in **Australia**, as the Social Security Act 1991 exempts from the scope of the federal Work Health and Safety Act 2011 and Safety Rehabilitation and Compensation Act 1988 a number of ALMP internships, including the Green Army Programme discussed above.¹¹⁶ The exclusion of interns of the Green Army Programme, in part, sparked an inquiry into the programme by the Senate Standing Committee on Education and Employment. The stance of the Liberal/National Government, which introduced the programme, is that such exclusions are acceptable because alternative measures have been put in place. In particular, the government has implemented ‘a risk management system ... to provide for the health and safety of all those engaged in, and relevant to [the Green Army Programme]’, which includes, among other things, work health and safety audits, personal accident insurance by the Department of Education, and the provision of safety training (Department of the Environment 2014; Department of the Environment 2015). Further, the government has assured that Green Army Programme participants will be subject to federal, State and Territory laws with respect to anti-discrimination protections (Senate Standing Committee on Education and Employment 2014, 10) and State and Territory laws with regard to work health and safety, and workers compensation (Department of the Environment 2014). However, whether this assurance is correct is questionable, at least in relation to workers compensation laws and (in some jurisdictions) anti-discrimination laws.¹¹⁷ As such, it is unsurprising that some have lamented that ‘[t]he government [is making] ... it clear that health and safety is not a top priority’ for these ALMP interns.¹¹⁸

Concerns about health and safety seem warranted, given that evidence from other countries has emerged of ALMP interns being required to engage in unsafe practices. An example of this can be found in **China**. The city of Guangzhou implements a comprehensive workfare programme, which is aimed at unemployed beneficiaries of the Minimum Living Standard Scheme aged 18–50 (for women) and 18–60 (for men), and which requires participants to engage in a range of social and community services in order to receive financial assistance (Chan & Ngok 2016). There have been circumstances where beneficiaries have been required to engage in community work that puts their physical health into serious risk. For example, it has been reported that one claimant ‘was forced to do community work despite ill health’, while another claimant, who was an acute cancer patient,

¹¹⁵ See sections 39–40 of the Equality Act 2010, although noting that they refer to both employees and job applicants.

¹¹⁶ The Social Security Act 1991 excludes several ALMP-type internships from the scope of federal employment and social laws, such as: Green Army Programme (s 38J), an approved programme of work for income support payment, such as Work for the Dole (s 120) and the Parenting Payment Employment Pathway Plan (s 501D(4)).

¹¹⁷ See the discussion as to the scope of these laws in Parts 7.3 and 7.4.

¹¹⁸ www.sharonbird.com.au/bills_social_security_legislation_amendment_green_army_programme_bill_2014 (accessed 27 October 2017).

was required ‘to continue doing a patrol duty in the evenings because the authority could not find someone to swap him’ (ibid, 485).

It is cases such as these that illustrate the importance of ensuring that ALMP interns are afforded the protections of anti-discrimination, occupational health and safety, and workers compensation laws. But they also throw into doubt the assumption that ALMP internships are of high quality, at least when compared to open-market internships, due to the presence of the labour market intermediary. It is this very assumption to which we now turn.

9.3 Regulation of the quality aspect of ALMP internships

As noted in Parts 1 and 3.2, ALMP internships are often assumed to be of better quality than open market internships because of the intermediary’s supervisory function. Such assumptions are arguably more valid for ALMP internships that are specifically governed by regulations or soft laws that set out the content of the internship and the responsibilities of the host organization and intermediary. For example, in **Canada**, the Ontario Works Directives require the host organization of an Employment Placement with Incentives to enter into a written agreement establishing, inter alia, their responsibility to provide participants with adequate supervision and training (Ontario Ministry of Community and Social Services 2016, 6). Similarly, **France’s** POEI requires that the training the jobseeker receives be adapted to their profile, and that the host organization (in consultation with the employment centre) define the skills for the jobseeker to acquire during the training. In relation to **Australia’s** PaTH internship programme, the federal government has released guidelines that require the provider, host organization and intern to sign a PaTH internship agreement. The agreement, among other things, must record the supervisor’s details and the activities the intern will complete. The host organization must also guarantee that there is a reasonable prospect of employment for the intern following completion of the internship (Department of Employment 2017).

However, other ALMP internships, and particularly those aimed at lower skilled individuals, provide only generic work experience that is geared more toward benefiting the community rather than enhancing skill levels. For example, the essence of Guangzhou’s Workfare programme in **China**, as discussed above, is that beneficiaries must engage in a range of community work, which includes community sanitation, neighbourhood patrols, providing support to the elderly and those with disabilities, and distributing donated goods (Chan & Ngok 2016, 483). While the contents of the Workfare programme must be defined and recipients’ attendance is monitored, they are clearly ‘not tailor-made programmes for addressing welfare recipients’ employment barriers’ (ibid, 485). Similar concerns can also be raised in relation to Ontario’s Community Participation placements in **Canada**, which can require participants to engage in activities such as maintenance work, cleaning and kitchen help (Castonguay 2009, 232). As Castonguay puts it, ‘those work-activities in the Ontario Works program take place in a sector which is distant to the regular labour market’ (ibid). Furthermore, there are no requirements regarding the structure of the Community Participation placements. Instead, requirements on participating organizations focus on guaranteeing that: (i) the placements cannot displace any paid employment in the organization; (ii) the placements cannot interfere with a participant’s paid employment or an opportunity to gain paid employment (such as job searching); and (iii) certain standards in relation to labour and social laws are met (as discussed in Part 9.1).

Germany’s temporary extra jobs are also frequently used for community services, as well as work in public infrastructure (Walter 2012, 79). While the aim of these jobs is to reintegrate the unemployed into the labour market, an amendment in 2012 revoked the clause in SGB II which required that the jobs improve recipients’ professional knowledge and

skills.¹¹⁹ What the SGB II does currently require is that temporary extra jobs meet three main conditions (ibid). First, they must be of value to society at large, which is on par with the community services virtue of Ontario's Community Participation placements and Guangzhou's Workfare programme. Secondly, the temporary extra jobs must not be in direct competition with jobs that currently exist in the labour market. This condition is in place to safeguard the job security of regular, fully paid workers; that is, ensure that they do not have to compete with 'cheaper' interns. Thirdly, the temporary extra jobs must be additional in nature, in the sense that such jobs must not currently exist in the labour market and nor will they in the near future. Given this last requirement, how participants of the programme are expected to gain transferable skills is unclear, as employers are clearly in demand of other skills; that is, skills relevant to jobs that actually exist in the market (ibid, 80).

The **United Kingdom's** Community Work Placement and Work Experience Programme are other examples of ALMP internships centred on providing simple work experience, rather than the acquisition of higher level skills (Hadjivassiliou 2012, 83). The Work Experience Programme is a two-to-eight week internship programme organised by Jobcentre Plus and aimed at young unemployed adults aged 18–24, and people over 25 who do not have recent work experience. No requirements exist as to the structure of the Work Experience placements, which (in part) stems from fears that this would increase red tape for businesses and thereby decrease their participation in the programme (ibid). Indeed, Jobcentre Plus expressly provides that it 'won't be prescriptive about the structure of [the] placements or make ... [the participating organization] fill out unnecessary forms and paperwork'.¹²⁰ Similar to Ontario's Community Participation placements, the requirements of the participating organization centre on ensuring that the participant does not displace current staff in the organization, that they can continue job searching whilst on placement and that the participating organization must provide them with a reference at the end of their placement.¹²¹

The **United States** has also taken a similar approach to the abovementioned countries when it comes to the regulation of the Work Experience Program in New York. The New York Social Services Law provides that assignments undertaken as part of the Program must occur in the public or not-for-profit sector (s 336-c(1)(b)) and serve a 'useful public purpose' (s 336-c(2)(d)). Yet, some of the assignments participants have been required to do include highway maintenance duties,¹²² sorting paper clips and straightening nails.¹²³

It is unsurprising, then, that a study into the Work Experience Program in 1998 found that 33 per cent of those who left welfare had not worked since their time on the programme (New York City Human Resources Administration 1998). More recently, there have been laments about the one-size-fits-all approach to the programme (Al Jazeera America 2014).

Also noteworthy is that section 336-c(2)(e) of the New York Social Services Law requires that the assignments undertaken cannot constitute 'a substantial portion of the work ordinarily and actually performed by regular employees' and nor can they result in 'the displacement of any currently employed worker'. However, whether this provision is enforceable in practice remains open to question. In *Rosenthal v City of New York* (2001) 725 NYS 2d 20, the Appellate Division of the New York Supreme Court held that in order to prove a breach of section 336-c(2)(e), a plaintiff employee must be able to point to the

¹¹⁹ Amendment of art 3(2) SGB II, 1 April 2012, as discussed in Eleveld 2014.

¹²⁰ www.gov.uk/government/publications/employers-could-you-offer-work-experience/work-experience-employer-guide (accessed 27 October 2017).

¹²¹ Ibid.

¹²² *Stone v McGowan* (2004) 308 F Supp 2d 79.

¹²³ *Elwell v Weiss* (2006) US Dist LEXIS 96934 (W D NY).

specific Work Experience Program participant that displaced them. But ‘[w]ith vast systems of municipal employment and workfare in New York City, it is virtually impossible to establish such proof’ (Empire Justice Centre 2008, 61, citations omitted).

10. International Standards

By virtue of their subject matter, many of the international labour standards are particularly relevant to young people.¹²⁴ However, as Jeannet-Milanovic et al (2017, 145) note, '[t]here are no legal instruments adopted by the ILO to explicitly guide the regulation of internships/traineeships'. This is not to deny that interns are covered by international labour standards, including the core Conventions that underpin the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.¹²⁵ For example, many standards are expressed broadly to apply to all workers, and in all sectors.¹²⁶ As Creighton & McCrystal (2016, 706) note:

the eight core Conventions apply to all 'workers' in the broadest sense of the term: that is, they apply irrespective of the kind of contractual arrangement (if any) under which individuals are engaged and, with very limited exceptions, irrespective of the sector of the economy in which they work.

The ILO's supervisory bodies have taken the view, for example, that persons hired under training agreements should have the right to organise, regardless of whether they are employed (ILO 2006, [258]–[259]).¹²⁷ The status of some of the types of internship covered in this report has not been the subject of any comment by those bodies. But as an aside, it may be noted that in a recent case the European Court of Justice held that a person undergoing training under an ALMP should be regarded as a 'worker' for the purpose of EU law, notwithstanding the fact that they were being remunerated from public funds and not by the host organization.¹²⁸

However, some ILO Conventions are framed to apply only to employment relationships (Creighton & McCrystal 2016, 723–4). Furthermore, even in those instruments which are broad enough to cover interns and other trainees, regardless of their employment status, there is very little specific guidance as to how and to what extent their provisions should apply to such workers. An exception is Article 6 of the Minimum Age Convention 1973 (No 138), which provides as follows:

This Convention does not apply to work done by children and young persons in schools for general, vocational or technical education or in other training institutions, or to work done by persons at least 14 years of age in undertakings, where such work is carried out in accordance

¹²⁴ See, for example, the list of labour standards relevant to youth employment at www.ilo.org/global/topics/youth-employment/standards/lang--en/index.htm (accessed 27 October 2017).

¹²⁵ These core Conventions are the Forced Labour Convention 1930 (No 29), Freedom of Association and Protection of the Right to Organize Convention 1948 (No 87), Right to Organize and Collective Bargaining Convention 1949 (No 98), Equal Remuneration Convention 1951 (No 100), Abolition of Forced Labour Convention 1957 (No 105), Discrimination (Employment and Occupation) Convention 1958 (No 111), Minimum Age Convention 1973 (No 138), and Worst Forms of Child Labour Convention 1999 (No 182).

¹²⁶ However, note the problem (discussed earlier in this report) that may arise when trainees and interns are not paid and so considered to be 'learning' rather than 'working'.

¹²⁷ See further Rosin 2016, 147–51, discussing the right of trainees in certain European countries to organise and conclude collective agreements.

¹²⁸ *Balkaya v Kiesel Abbruch- und Recycling Technik GmbH* [2015] EUECJ C-229/14.

with conditions prescribed by the competent authority, after consultation with the organizations of employers and workers concerned, where such exist, and is an integral part of–

- a) a course of education or training for which a school or training institution is primarily responsible;
- b) a programme of training mainly or entirely in an undertaking, which programme has been approved by the competent authority; or
- c) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.

On the face of it these provisions appear to incorporate the common assumptions that the work undertaken in those circumstances is somehow to be ‘outside’ regulatory oversight.

It is interesting then to consider a regional initiative which does (albeit incompletely) attempt to deal specifically with the issue of work experience, namely: the EU’s QFT, adopted in 2014. This is focused primarily on open market traineeships. As previously noted, it is not intended to cover ‘work experience placements that are part of curricula of formal education or vocational education and training’, nor traineeships whose content is regulated under national law and which must be completed to enter a particular profession, such as medicine or architecture (EU Council 2014, Preamble, [28]). This reflects the fact that, as a review had shown (Hadjivassiliou et al 2012), the great bulk of previous EU laws and regulations related specifically to traineeships undertaken as part of formal education and training courses, or ALMPs. Few appeared to have much application to the kind of open market arrangements identified in the review as being in the greatest need of attention.

Member States were urged to take appropriate measures as soon as possible to apply the Framework, and to report their progress by the end of 2015 (ibid, Preamble, [19]–[20]). According to a summary prepared for the European Commission (2016, 6), eight member states have ‘undertaken legal changes to strengthen the alignment of national frameworks with the Council Recommendation since its adoption in 2014’, while six further states reported that further legislation on traineeship quality was planned.

Key elements of the QFT include:

- requiring a prior written agreement that sets out (among other things) the educational objectives and duration of the arrangement, working conditions, whether the trainee is to be remunerated or compensated, and the parties’ rights and obligations;
- encouraging a supervisor to be designated;
- ensuring that, where applicable, any limits set by national or EU laws on working time and rest periods are respected, together with holiday entitlements;
- encouraging traineeship providers to clarify whether they offer health and accident insurance, as well as sick leave;
- ensuring a reasonable duration for traineeships that, except where a longer duration can be justified, does not exceed six months;
- clarifying the circumstances in which a traineeship may be extended or renewed;
- encouraging agreements to clarify the circumstances in which a traineeship may be terminated;
- promoting the recognition, assessment and certification of the knowledge, skills and competences acquired during a traineeship; and

-
- promoting transparency, by encouraging advertisements and other information to specify both the terms and conditions of a traineeship, and the number of trainees typically recruited into ongoing employment (EU Council, 2014, paras. 2–15).

At first sight there is some value in these standards and it is easy to understand why they should be considered appropriate for at least some kinds of training. But aside from the need to determine at what point a work experience arrangement becomes sufficiently substantial to warrant this level of formality and prescription, the Framework leaves unresolved the question of whether, and to what extent, trainees should also enjoy the protection of general labour or social laws. It encourages any applicable rules to be observed, but does not say whether they are or indeed should be applicable at all. In our view, this is a major deficiency.

11. Conclusion: Towards a Normative Framework Regulating Internships

As a recent publication on WIL issued by the Higher Education Quality Council of Ontario has highlighted, the policy challenge in this area is to balance the positive contribution internships can potentially make from a human capital perspective with the reality that they may represent a form of precarious work (Turcotte et al 2016, 5).

The research presented in this report has demonstrated that internships have become an important part of the transition from education to employment, especially in higher-income countries. But there is also a substantial body of literature that identifies potential problems with their use – especially (though not exclusively) in the open market. Internships do not always deliver on the promise of useful training and skill development. Nor, contrary to perception, do they necessarily create a bridge from education to paid work, especially when no remuneration is provided. The cost of undertaking unpaid or low-paid internships is likely to be harder to bear for those from less advantaged backgrounds, especially if it is necessary to travel to an expensive location to find them. And the availability of interns as a source of cheap labour creates an incentive for the displacement of paid entry-level jobs and the evasion of minimum wage laws.

As we have seen, four of the countries in our study (Argentina, Brazil, France and Romania) have introduced specific legislation to regulate internships. In many of the other nations, interns have expressly been brought within the coverage of particular labour or social laws. But it is also just as common for ALMP or (especially) educational internships to be excluded from the operation of such laws. Nor is much typically done to ensure that these arrangements attract the kind of governance or quality assurance that is often assumed to follow from the involvement of educational institutions or public employment services. In many jurisdictions too, there remains uncertainty as to whether internships of various kinds should be classed as employment arrangements, so as to attract the operation of labour standards.

Against that background, the question arises of how internships should be regulated. Building on previous work (Owens & Stewart 2016, 704–5), we suggest a number of principles that might guide the design of new laws for this purpose, or indeed the framing of new international standards:

1. There are some internships or work experience arrangements that, however they are labelled by the parties, should attract the same entitlements and protections as an ‘ordinary’ employment relationship. Of the countries in our study, Germany, Romania and (to a lesser extent) Canada come closest to realising that objective – though only for ‘voluntary’ or open market internships. In France and Argentina (and again to a lesser extent Brazil), where open market internships are prohibited (at least in theory), the lack of employment status for educational interns is at least offset by detailed regulation of their working conditions.

In Australia and the United Kingdom it is certainly possible for open market internships to be classed as employment relationships for certain purposes, but this is heavily dependent on how judges choose to draw a notoriously imprecise line between contractual commitments and purely ‘voluntary’ arrangements. While in Australia at present there are positive signs about the use of the law to crack down on exploitative arrangements, there is no guarantee – in the absence of clearer legislative signposts – that the courts will continue to back the FWO’s view of the scope of the Fair Work Act 2009. Even in Australia, therefore, there remains a distinct risk of employment standards being (lawfully) evaded by the mere description of a worker as an intern ‘volunteering’ their services.

In South Africa, the definition of employment used in the main labour statutes is perhaps broad enough to encompass even unpaid internships, but the case law on this point is limited. In Japan and Zimbabwe, by contrast, the relevant definitions appear to require remuneration, which seems unduly limiting. In the United States, the insistence of courts on distinguishing work from training, rather than recognising the dual nature of many arrangements, means that many interns are left unprotected by employment standards. But it remains possible that the FLSA can be used to insist on payment for productive work performed as part of open market internships. As for China, the position is particularly unclear and could usefully be clarified by more specific regulation.

It is particularly hard to see why, in many countries, apprentices are accorded the same rights and protections as employees, but interns and other trainees are not (Jeannet-Milanovic et al 2017: 159).

2. Even if a particular training arrangement should not attract the operation of certain employment standards, that should not dictate its exclusion from all forms of labour or social regulation. For example, we see no reason why laws dealing with matters such as work safety, accident compensation, discrimination and harassment should not apply to interns while they are at work, even when undertaking a placement as part of an educational course or an ALMP. This is generally true in some countries (such as Canada, France, Germany and the United Kingdom), but not completely in others (such as Australia or the United States). In a number of countries, including Japan, the application of laws on these subjects is tied to employment status, an approach that we would suggest is unnecessarily narrow. Arguably, the values of safety and equality at work should be seen as objectives that apply to all forms of work, whether paid or unpaid, and whether or not undertaken as part of education or training. The same should be true of the other ‘core’ standards recognised as part of the ILO’s 1998 Declaration on Fundamental Principles and Rights at Work, including freedom of association and the right to engage in collective bargaining.

3. Even in the case of educational or ALMP internships that are excluded from the operation of particular employment standards, such as minimum wages, it may be appropriate to establish modified entitlements or protections, especially for programmes that extend beyond a particular duration. French and Argentinian law clearly does this, while Brazil provides some protections (though not an allowance or minimum wage). But in other countries that have labour standards exemptions (including Australia, Canada, Germany and the United Kingdom), there is very little to fill the gap. This appears to be a classic case of regulation fragmenting as we move across the boundary from ‘work’ to ‘education’.

However, where minimum wages or other employment benefits are modified, we suggest that it is important to bear in mind a significant point of principle articulated by the ILO’s CEACR (2014, para 188):

Recalling the overarching principle of equal pay for work of equal value, the Committee considers that persons covered by apprenticeship or traineeship contracts should only be paid at a differentiated rate where they receive actual training during working hours at the workplace. In general, the quantity and quality of the work performed should be the decisive factors in determining the wage paid.

4. States should set minimum standards regarding the documentation of educational or ALMP placements, their duration, hours of work, requirements for specific learning outcomes to be achieved and the need to monitor what is happening at the relevant workplace. It should not simply be assumed that the mere involvement of an educational institution or public employment service will be sufficient to assure these objectives. Once again, France can be regarded as a leader in this respect, along with Argentina, Brazil and Romania, at least in relation to educational internships. Countries such as Japan, South Africa and the United Kingdom rely more on codes or voluntary charters,

while there is limited guidance and oversight of educational placements by a government quality assurance agency in Australia. Arguably, the ‘light touch’ approach does not go far enough. We are in agreement here with the conclusion reached in the book mentioned at the beginning of the report (Jeannet-Milanovic et al 2017, 161):

Compared to both temporary work and apprenticeships, traineeships/internships seem to be the arrangements that are most at risk of pushing young people into persistent precariousness rather than supporting their entry into decent work. In order to avoid this outcome, it would be helpful if countries included trainees/interns within the scope of labour law in a fashion similar to apprentices, or regulated both aspects of traineeships/internships – the learning and the working component – separately and thoroughly.

5. States should seek to improve access to good quality internships and other forms of WBL for those from disadvantaged backgrounds. Given the potential benefits to employability that have been shown to exist from such arrangements, but the potential barriers they may also create (or raise) for disadvantaged students, graduates or job-seekers, it seems to us that this should be an important component of any effective regulatory regime. Banning unpaid internships in the open market would clearly be a step forward in this respect. But as Holford (2017, 30) argues, there is also much to be said for reducing the opportunity cost for those from lower socio-economic groups in undertaking work experience as part of educational programmes, not to mention ‘improving provision of information to students and early graduates about the likelihood of different outcomes from internships in key fields’. In this respect, the various proposals put forward by Roberts (2017) may be worth considering. If broadened from the specific context (that of British higher education) in which they are advanced, they could include:

- ensuring that educational institutions prioritise disadvantaged students in brokering work placements;
- governments overcoming any geographical barriers by funding ‘residential internship’ opportunities for young people from remote areas;
- using a training levy to help employers offer high-quality placements; and
- banning placements of longer than a certain duration, unless they involve paid employment.

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