HOUSE OF LORDS

Merits of Statutory Instruments Committee

4th Report of Session 2010-11

Statement of Changes in Immigration Rules

Report and oral evidence

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

(1) The Committee shall, subject to the exceptions in paragraph (2), consider—

(a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;

(b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,

with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).

(2) The exceptions are—

(a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;

(b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;

(c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.

(3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—

(a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;

(b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;

(c) that it may inappropriately implement European Union legislation;

(d) that it may imperfectly achieve its policy objectives.

(4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

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The Lord Eames OM
Rt Hon. the Lord Goodlad (*Chairman*)
The Baroness Hamwee
The Lord Hart of Chilton
The Lord Lucas
The Lord Methuen
Rt Hon. the Baroness Morris of Yardley
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Publications

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Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

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Fourth Report

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the ground specified.

Statement of Changes in Immigration Rules (HC 59)

Summary: This Statement of Changes in Immigration Rules ("the Statement") makes two changes to the Points-Based System ("the PBS") as applied to highly skilled migrants. These are: to provide for the application of a limit on applications approved under Tier 1 (General) of the PBS; and to increase the number of points required to qualify under Tier 1 (General). The changes are of an interim nature and the Government is consulting on how limits should be determined and applied in the longer term. The changes received a significant amount of media coverage. The Committee therefore issued a Call for Written Evidence and received responses from eight organisations (see Appendix 2). The Committee also took oral and written evidence from the Home Office Minister Baroness Neville-Jones (see Appendix 3). This is a significant body of evidence which should enable the House to be well sighted on the issues surrounding the imposition of a limit for Tier 1 (General). From the Committee's consideration of the Statement there are a number of areas that the House may wish to explore. These include: whether the Government's analysis of the impact of the changes on the number of applicants is accurate; whether the case for interim limits has been fully made; whether the changes will have any specific equality impacts; and the Government's reasoning for not putting the actual limit in the Statement itself (which would make it subject to Parliamentary scrutiny). As the Government intends looking later at Tiers 3, 4, and 5 of the PBS, the House may wish to satisfy itself that any changes to those Tiers will take full account of the learning coming out of this exercise.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. This Statement of Changes in Immigration Rules (HC 59) ("the Statement") was laid before Parliament by the Home Office on 28 June, together with an Explanatory Memorandum ("EM") and an Impact Assessment ("IA"). Its purpose is to make changes to the Points-Based System ("the PBS") as applied to non-EEA economic migrants. Specifically the changes provide for the application of a limit on applications approved under Tier 1 (General) of the PBS and to increase the number of points required to qualify under Tier 1 (General). The changes are of an interim nature. The Government is consulting on how limits should be determined and applied in the longer term; but they believe an interim limit is necessary to prevent a surge in applications in the meantime (EM paragraph 7.4).

2. The changes received a significant amount of media coverage[1], with a number of organisations expressing concern about the possible impact. For this reason, the Committee decided to take evidence on the Statement to ensure the House is fully sighted on all the issues. The Committee issued a Call for Written Evidence and received responses from eight organisations. These provide a broad mix of perspectives on the changes (see Appendix 2 for all written evidence cited in this report). The Committee also took oral and written evidence from Baroness Neville-Jones, Home Office Minister for Security and Counter-terrorism, and Mr Neil Hughes, Director of Temporary Migration at the UK Border Agency ("UKBA") (see Appendix 3).

Policy objectives

3. The IA for the changes to Tier 1 (and linked changes to Tier 2), gives the policy objectives as being: to reduce net migration; to reduce any adverse social impacts of immigration; and to continue to attract the brightest and best people to the UK (IA page 1). These objectives are of a high level nature and the Committee was keen to explore the reasoning behind them. In her evidence to the Committee, the Minister said that these objectives apply to the policy across the board, and not just to the interim measures. She added that the objective of the exercise generally is not to introduce a sharp reduction; the Government wants to bring immigration down but believe it should be done in a gradual manner (Q 2).

4. In response to the Call for Written Evidence, a number of organisations give a view as to whether the Statement is likely to achieve its policy objectives. The Chartered Institute of Personnel and Development (CIPD) say that they do consider that the Statement will achieve its policy objectives (Appendix 2, page 14) and the CBI supports the changes in the Statement (pp 14-15). However, a number of the other responses suggested that the changes will not achieve some of the policy objectives. These include: Hammonds LLP (pp 15-16); HSMP Forum (pp 17-19); British Medical Association (the "BMA") (pp 12-13); and the Immigration Law Practitioners' Association (ILPA) (pp 19-30). These organisations questioned in particular whether the changes will allow for the continued attraction to the UK of "the brightest and the best". In her evidence, the Minister said that the Government does not consider that the changes will have an adverse effect in this regard because the people applying in this category are extremely well qualified and will get over the points bar even if it is raised (Q 2).

Impact on the number of applications

5. The Government provided only limited evidence in the IA and EM of the likely impact of the changes. The Committee recognises that the changes are intended only to be of an interim nature and that the Government will consult fully on longer term plans. However, we would normally expect to see more evidence provided to support the policy intentions of an instrument. A key focus of the oral evidence session was therefore to draw out a better understanding of the likely impact of the changes in the Statement.

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[1] For example: 'UK to cut number of skilled workers from outside EU': BBC News 28 June 2010; 'UK migration cap is 'unworkable', say Indian professionals: India Today 28 June 2010; and 'Foreign workers may need private health care to work in UK': Telegraph.co.uk 28 June 2010.

6. The IA says that visa approvals will be limited to the same volumes as the equivalent period in 2009; the interim limit of visa approvals will therefore be set at 5,400 for Tier 1 (General) for the period July 2010 to March 2011 (IA page 9). However, the IA says that the Government is uncertain to what extent raising the Tier 1 qualifying threshold will have an impact. The IA states that if "the points change bites fully", 5,000 applicants could be deterred. However, the IA then settles on the assumption that the actual fall in volume will be between 0 and 1,000 (IA page 9). There is no explanation in the IA and EM as to why the Government has arrived at this position. This is picked up by the ILPA in their evidence, and the HSMP Forum say that they believe it could be a much larger figure. On the other hand, the CIPD say that their estimate of the volume of deterred applicants is in line with the Government's. The Committee therefore sought further information from the Minister about the basis for the Government's analysis. She explained that the initial estimate was that 5,000 applicants would be deterred. However, the Government then applied a corrective to that figure as many of the people applying for Tier 1 (General) are well qualified and they consider they will still qualify even if the points threshold is raised. They therefore believe the actual reduction will be much smaller (Q 12).

Rationale for interim limits

7. Both the IA and the EM explain that the Government is introducing an interim limit to avoid the possibility of a surge in applications if there was an expectation that full limits could be introduced in due course (EM paragraph 7.4 and IA page 7). The Call for Written Evidence produced mixed views on this issue with the CIPD and CBI accepting the argument that there could be a surge, but with the HSMP Forum and ILPA suggesting that this might not be the case. The ILPA make the interesting point that the persons who enter through Tier 1 (General) are persons who have a choice of destinations in different countries around the world. The Committee therefore asked about the evidence base for believing that there could be such a surge. In response, Mr Hughes said that there have been application surges in other areas. As an example he gave details of a surge in the precursor highly skilled migrant scheme where there was an increase in applicants of 80% when people were trying to submit their applications before Tier 1 came in (Q 9).

8. The Committee notes that there has been no surge in applications since the Statement was laid. During the evidence session Mr Hughes explained that the lead-time needed before an application could be made might explain the absence of any surge so far (Q 10). The risk of a surge in applications is central to the Government's case for interim limits. The Committee considers that the evidence of the possibility of a surge is balanced and that, as the imposition of the interim limit might appear to prejudge the outcome of the Government's own consultation, the House may wish to examine this point further.

Impact on the economy

9. The IA says that the Government expects the changes to have a limited impact on the UK economy, fiscal position, and labour market, as the reduction in migration is relatively limited (IA page 11). A number of the responses to the Call for Written Evidence place the changes in the context of the current economic situation, and their evidence suggests the situation may be more complex. ILPA sat that it is highly likely that the changes will have a negative effect on business, especially small firms, and Hammonds

LLP say that the cap and increase in points would mean that their clients will not have access to the people they need to meet client demand. CIPD do not agree with the principal of capping non-EU labour which they believe will stop businesses recruiting the talent they need in recovery; they also say that their *Labour Market Outlook* shows that 15% of employers plan to recruit migrant workers in the coming quarter. The CBI stress the need for the PBS to strike the right balance; allowing firms to remain competitive, while not undermining the fight against domestic unemployment. This is an area of significant interest for the Committee, and we sought further information from the Minister about how the changes sit with Government's wider economic policy. She said that the Government does not believe the interim measures will have an adverse economic impact, but that the Government is mindful of the need to consult and will do this very carefully (Supplementary written evidence).

10. Responses to the Call for Written Evidence brought out another interesting issue. A number of the responses suggest that too much emphasis is placed on previous earnings in the Tier 1 (General) category. The BMA say that doctors, whilst highly skilled, will not necessarily fall within the highest banding and may not achieve the increased points requirement. Hammonds LLP say that the changes will disadvantage architects, engineers and designers, the salaries of whom are generally lower than other professions within comparably lengthy training periods. The ILPA also refer to this point. The Minister said in oral evidence that they are mindful of the need to consult and they will not ignore the fact that people are concerned, and groups of employers are concerned, about the potential impact (Q 17). However, the Minister added in the Supplementary written evidence that they have not carried out any detailed analysis on how the increased pass mark could affect particular professions. It is still not clear to the Committee the extent to which the changes to the Tier 1 (General) category are tailored to the high skills needs of the UK economy.

Equality impact

11. The Equality Impact Assessment identifies no adverse consequences as a result of these changes (IA page 15). However, the Committee notes the view of the Joint Council of Welfare of Immigrants (JCWI) that the Equality Impact Assessment is flawed and does not comply with basic statutory obligations in relation to discrimination/promotion of equality (pp 30-32). This view is explained in detail in their written evidence. The ILPA also believe that the discriminatory effects they have previously identified in Tier 1 will be increased by the further restrictions in this category. The JCWI say that the most extensive users of Tier 1 are of Indian and Pakistani origin, and the HSMP Forum believe that ethnic minorities will suffer more due to the increase in the salary threshold. As the IA is light on evidence in support of the Government's view on the equality impact, the Committee was keen to give the Government an opportunity to expand on their analysis. In subsequent written evidence to the Committee, the Minister repeated that the Government sees no adverse equality consequences from the interim limit (Supplementary written evidence). The House may wish to satisfy itself that this is a fair assessment.

Parliamentary Procedure

12. The parliamentary scrutiny process for this type of instrument is unusual. The Statement is laid before the House under Section 3(2) of the

Immigration Act 1971 ("the 1971 Act"). As set out in the Statement, the changes to the Immigration Rules will come into force on 19 July 2010. Within a period of forty days beginning with the date of laying (and exclusive of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days), either House may pass a resolution disapproving the Statement. (In this case the 40 day period is expected to expire on 13 September[2].) The 1971 Act provides that in the event of such a disapproval, the Secretary of State shall, as soon as may be practical, make such changes or further changes in the rules as appear to her to be required in the circumstances, so that the statement of those changes be laid before Parliament, at latest, by the end of the period of forty days beginning with the date of the resolution (but with the exclusions as above).

13. As the Statement is subject to a form of the negative procedure, it will not come before the House for debate automatically: it will only be debated if a Member tables a motion on the Statement.

14. An important feature of these changes is that the actual limit imposed on applications for Tier 1 (General) applications is not in the Statement. The EM says that the limit to be applied to the Tier 1 (General) category will be published separately by the UKBA on their website (EM paragraph 7.5). This matters because the Statement is subject to formal Parliamentary scrutiny, but guidance issued by UKBA is not. UKBA has explained that the limit itself is to be set out in guidance to provide UKBA with flexibility in administering the limit from month to month (see Appendix 1). Shortly before the meeting with the Minister JCWI submitted details of a recent judgment dealing with substantive changes to immigration policy, which were not subject to formal Parliamentary scrutiny. The Minister said that she was aware of recent judgments on the issue, and that the Government has as a result decided to alter the way in which the Tier 2 changes are to be implemented, but not to make any further alterations in respect of the Tier 1 changes (Q 7). However, the actual limit imposed for Tier 1 (General) would seem to be an important matter, and the House may wish to consider further the Government's reasoning for not putting the proposed Tier 1 (General) limit in the Rules themselves. For instance, the House may wish to examine whether under the proposed system Ministers would be able, if they wished, to set the Tier 1 (General) limit at zero, through an administrative act subject to no Parliamentary control. The House might also wish to consider whether the Government's desire for flexibility could be met by setting an overall limit in the Rules themselves, with the UKBA then given the ability to vary the month-by-month quotas in order to provide the desired flexibility.

Review

15. The Committee asked the Minister for more information on the parameters of the review of the interim limits. In subsequent written evidence to the Committee the Minister said that they will keep the interim limits under constant review to assess whether they are meeting the objectives outlined and to monitor any unintended consequences. The consultation has been sent to all UKBA's key partners and sponsoring employers (Supplementary

[2] This date conforms with current published sitting and recess dates, including that the Commons will sit from 6 September to 16 September. This date may be subject to change if currently announced sitting dates change (in either House).

written evidence). Although the Committee welcomes the intention to consult thoroughly, we note that the Statement contains no "sunset clause". The changes would therefore appear to have permanent effect unless and until the Government decides to bring forward any further changes. The House will be interested to note the Minister's statement that the Government intends looking later at Tiers 3, 4, and 5 of the PBS. The House may therefore wish to seek assurances from the Government that any changes to the provisions of those Tiers take full account of the learning coming out of this exercise.

OTHER INSTRUMENTS OF INTEREST

Draft Child Trust Funds (Amendment No.3) Regulations 2010

16. These draft Regulations have been laid following the Government's announcement on 24 May 2010 that it intends to reduce and then stop all Government contributions to Child Trust Funds. Stopping certain aspects of the scheme will require primary legislation, which has not yet been introduced. These current Regulations make a number of amendments to the Child Trust Funds Regulations 2004, including: ending all Government contributions at age seven into Child Trust Funds; ending Government contributions made to Child Trust Funds of disabled children with effect from 5 April 2011; reducing the amount of Government contributions made into Child Trust Funds when first opened; reducing the amount of the additional Government contributions made to children in low income families; and reducing the amount of the special contribution the Government makes to looked after children. The rule changes implemented by the draft Regulations will be incorporated into HM Revenue and Customs' Child Trust Fund guidance for providers and local authorities.

Draft Financial Services and Markets Act 2000 (Contributions to Costs of Special Resolution Regime) Regulations 2010

17. The purpose of this instrument is to allow the Treasury to call upon the Financial Services Compensation Scheme (FSCS) to contribute to costs associated with the exercise of a stabilisation power of the special resolution regime (SRR) under Part 1 of the Banking Act 2009 to resolve a failing bank or building society. The draft Regulations also provide for safeguards for the use of the powers. The draft Regulations repeal the Financial Services and Markets Act 2000 (Contribution to Costs of Special Resolution Regime) Regulations 2009 ("the 2009 Regulations") which were made on an urgent basis in March 2009 to enable the resolution of the Dunfermline Building Society[3]. The draft Regulations follow an *ex post* consultation on the 2009 Regulations. The Treasury have provided a detailed note setting out the differences between the draft Regulations and the 2009 Regulations which may assist the House when debating this draft SI (see Appendix 4).

[3] See MSIC 14th Report of Session 2008-09: 30 April 2009

Draft Scottish Parliament (Constituencies and Regions) Order 2010

18. This draft Order in Council gives effect, without modifications, to the recommendations contained in the Report on the First Periodic Review of Scottish Parliament Boundaries by the Boundary Commission for Scotland. It defines the Scottish Parliament constituencies (other than those of the Orkney Islands and the Shetland Islands) including their names, boundaries and status. It also defines and names the Scottish Parliament regions. The Explanatory Memorandum (EM) says that the intention is for the new boundaries to apply to the Scottish Parliament elections in May 2011 (see Paragraph 8.2). The Boundary Commission's report was accompanied by two DVD-ROMs containing geographical information system data defining the constituency boundaries. The EM says (paragraph 7.3) that this approach was necessary because a number of the recommended Scottish Parliament constituencies have boundaries which do not follow existing local government ward boundaries, and the level of detail required to define the constituency boundaries means that the boundaries could not practically be shown on traditional maps at an appropriate scale. Reference copies of the two DVD-ROMs are available in the House Library.

Fishing Boats (Electronic Transmission of Fishing Activities Data) (England) Scheme 2010 (SI 2010/1600)

19. This SI provides for the payment of grants as a contribution to the purchase or supply of approved software for the electronic recording and transmission of fishing activities data by English fishing boats over 15 metres length overall. It contains provisions relating to eligibility for grant aid, applications for grant, payment of grant, revocation of approval and recovery of grant. In response to questions from the Committee, Defra have provided further information which may be of interest to the House when debating this SI (see Appendix 5). In particular, the House may wish to note that, although Defra Ministers have made a commitment to fund the reasonable costs of the software, Article 6(b) provides that grants may be any amount that the Secretary of State may determine, with no reference made to meeting reasonable costs. The Committee also notes that under Article 10 a grant may be withheld if it "appears" that certain conditions have been breached or an offence has been committed. Though the supplementary information indicates there will be scope for representations against such a decision, this is not mentioned in Article 10 itself.

Non-Domestic Rating (Small Business Rate Relief) (England) (Amendment) Order 2010 (SI 2010/1655)

Non-Domestic Rating (Collection and Enforcement) (Local Lists) (England) (Amendment) (No.2) Regulations 2010(SI 2010/1656)

20. Small Business Rate Relief was introduced in 2005 to address the disproportionate burden on small firms and offered a 50% reduction for those with business premises with a rateable value below £6,000 per year with a tapering decrease in the relief of 1% for every £120 increase in value up to a rateable value of £12,000. These Regulations temporarily double the rate of relief. This was originally announced in the March 2010 Budget but the incoming Government has decided to honour the commitment. This will give 100% relief, ie no charge, to small businesses whose premises have a

rateable value of less than £6,000 and double the relief by amending the taper to 1% for every £60 increase in rateable value between £6,000 - £12,000. The relief is temporary and will run from 1 October 2010 to 30 Sept 2011 when it will revert to current levels. The additional relief will be between £0 and £1221 for eligible businesses at an aggregate cost to the Exchequer of £340m plus the revised billing costs for local authorities, which the Government has undertaken to meet under the 'new burden' agreement.

Safeguarding Vulnerable Groups Act 2006 (Appropriate Officer and Schedule 7 Prescribed Persons) (Revocation) Regulations 2010 (SI 2010/1707)

Safeguarding Vulnerable Groups Act 2006 (Supervisory Authority and Devolution Alignment) (Amendment) Order 2010 (SI 2010/1710)

21. The Safeguarding Vulnerable Groups Act 2006 ("the 2006 Act") created a new vetting and barring scheme ("the VBS") which has been implemented in stages. The Explanatory Memorandum (EM) says (EM paragraph 7.2) that since the General Election there has been a change in policy in relation to the next stages of the implementation of the Act. On 15 June the Home Secretary announced that the implementation of the next stage of the VBS, planned for the 26 July 2010, would not go ahead. This related to the monitoring provisions of the 2006 Act. These SIs therefore revoke provisions which were due to come into force on 26 July 2010. A review of the VBS will now be carried out.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Draft Child Trust Funds (Amendment No. 3) Regulations 2010

Draft Control of Donations and Regulation of Loans etc. (Extension of the Prescribed Period) (Northern Ireland) Order 2010

Draft Financial Services and Markets Act 2000 (Contribution to Costs of Special Resolution Regime) Regulations 2010

Draft Scottish Parliament (Constituencies and Regions) Order 2010

Instruments subject to annulment

SI 2010/1600 Fishing Boats (Electronic Transmission of Fishing Activities Data) (England) Scheme 2010

SI 2010/1651 Social Security (Disability Living Allowance) (Amendment) Regulations 2010

SI 2010/1655 Non-Domestic Rating (Small Business Rate Relief) (England) (Amendment) Regulations 2010

SI 2010/1656 Non-Domestic Rating (Collection and Enforcement) (Local Lists) (England) (Amendment) (No. 2) Regulations 2010

SI 2010/1668 Zoonoses and Animal By-Products (Fees) (England) Regulations 2010

SI 2010/1673 Medicines for Human Use (Prescribing by EEA Practitioners) (Amendment) Regulations 2010

SI 2010/1676 Social Security (Claims and Payments) Amendment (No. 3) Regulations 2010

SI 2010/1707 Safeguarding Vulnerable Groups Act 2006 (Appropriate Officer and Schedule 7 Prescribed Persons) (Revocation) Regulations 2010

SI 2010/1710 Safeguarding Vulnerable Groups Act 2006 (Supervisory Authorities and Devolution Alignment) (Amendment) Order 2010

APPENDIX 1: STATEMENT OF CHANGES IN IMMIGRATION RULES: GOVERNMENT RESPONSE

Information from the UK Border Agency

Q. *Is the Government planning any more caps on migration? Possibly on the other Tiers in the PBS?*

A. The measures announced on 28 June implement interim limits on migrants admitted to the UK under Tiers 1 and 2 of the Points Based System while we consult and take decisions on the level and operation of annual limits in respect of those routes in the future.

The Home Secretary stated in her Statement to the House that restoring confidence in the immigration system will require us to look beyond Tiers 1 and 2 of the PBS. We will be reviewing other immigration routes in due course and will bring forward further proposals for consideration by Parliament.

As far as the other Tiers are concerned, we will be introducing measures to minimise abuse of the immigration system - for example, student routes - and we will apply transitional controls as a matter of course in the future for all new EU Member States.

Q. *Why did the Government choose to set the limit on the UKBA website and not in a way that could be subject to more direct Parliamentary scrutiny?*

A. While the actual number was not set out in the Immigration Rules, the rules will contain all the details of how the limit will operate and to whom it will apply. Furthermore the Home Secretary made clear in her Statement to the House that is our intention to hold Tier 1 numbers flat from the equivalent period for 2009-10.

That means that there will be 5,400 visa approvals in the Tier 1 (General) category between the entry into force of the new Rules on 19 July and the end of March 2011. Our purpose in introducing interim limits is to prevent a surge in applications and to ensure that UKBA is able to administer the limit in a way that does not disrupt its other services. So the rules change has been designed to provide UKBA with flexibility in administering the limit. In particular, it provides for UKBA to be able to administer the limit in regular allocation periods. In practice, we expect to release the overall limit through a series of monthly releases of grants.

However, the size of each of those monthly releases could vary depending on the intake of applications, or numbers of approvals of applications, in preceding months - if there is a shortfall in one month, we can carry the balance of the limit over to the next month. We do not think it would be practicable or useful to make successive Statements of Changes to the Immigration Rules to announce each monthly limit. Maintaining flexibility enables us to operate the limit as fairly as possible because it allows us to make quick adjustments to the number of grants to be released in any one month and thereby ensuring that applicants can benefit without delay where the monthly intake or number of grants has been lower than expected.

Q. *Why did the Government choose to make the changes to Tier 2 in the way it has and not in a way that would be subject to more direct Parliamentary scrutiny?*

A. We could, as we have done for Tier 1, have applied the limit to the number of grants of entry clearance or leave to remain approved under Tier 2. There are good reasons why we chose not to do so in this interim period.

Tier 2 migrants are sponsored by employers who are licensed with the UK Border Agency for that purpose. The rules governing the licensing of Tier 2 sponsors sit outside the Immigration Rules. Each licensed sponsor is given an annual allocation of Certificates of

Sponsorship which it can use to sponsor individual Tier 2 migrants. If we had simply allowed employers to continue to use their existing allocation of Certificates of Sponsorship and implemented the limit at the point at which those migrants submit an application for entry clearance or leave to remain, employers would be left with considerable uncertainty as to whether individual migrants would succeed in securing admission and would have encouraged a early surge in applications, which is what we are seeking to avoid. We have therefore chosen, for this interim period, to implement the limit the numbers through the allocation of Certificates of Sponsorship. This allocation process is not covered by the Immigration Rules. This is a pragmatic but proportionate approach to applying an interim limit.

The Government is consulting on the mechanisms for implementing the first full annual limits from next April.

UKBA

July 2010

APPENDIX 2: STATEMENT OF CHANGES IN IMMIGRATION RULES: RESPONSES TO THE CALL FOR EVIDENCE

Submission from the British Medical Association

Executive Summary

The British Medical Association (BMA) is an independent trade union and voluntary professional association which represents doctors from all branches of medicine throughout the UK. It has a total membership of over 141,000 doctors.

This response summarises the BMA's views on the recent Statement of Changes in Immigration Rules HC59 which provided for the application of a limit on skilled migration, namely applications to Tier 1 (General) of the Points-Based System (PBS) and to increase the number of points required to qualify under Tier 1 (General). The BMA's comments in this submission are limited to the medical workforce.

Will the statement achieve its policy objectives?

The BMA believes that the statement will achieve the policy objective of reducing net migration and preventing a spike in the number of foreign nationals entering the labour market prior to a permanent cap on skilled migration being introduced in 2011. We believe that the policy objective of reducing pressure on public services may be compromised by employers being unable to recruit highly skilled public sector employees, such as doctors, as a result of the cap on skilled migration. Whilst the pressure on public services of an increasing population might be reduced, staffing pressures within those services themselves might well be increased as employers find themselves increasingly restricted from recruiting from outside the EEA when workforce needs cannot be met by the resident workforce. The potential for a detrimental impact on the provision of public services may be unlikely as a result of the initial temporary reduction but undoubtedly needs to be borne in mind when considering longer term reductions in levels of skilled migration to the UK.

The policy objective of continuing to attract the "brightest and best" to the UK may well be compromised by raising the points threshold to Tier 1 General from 95 to 100 points. The greatest number of points available fall within the 'previous earnings' section disproportionately benefiting those who earn the most money. Doctors, whilst highly skilled, will not necessarily fall within the highest banding of this category and may not achieve the increased points requirement.

Is the Government's estimate of the volume of deterred Tier 1 (General) applicants accurate?

The BMA has no comment to make on the accuracy of the Government's estimate of the volume of deterred Tier (1) General applicants.

Do your experiences support the Government's assessment of equality impact?

The BMA has no comment to make on the Government's assessment of equality impact.

Do your experiences support the Government's assessment on small firms impact?

The BMA has no comment to make on the assessment on small firms impact.

Will these changes have an indirect impact on education provision?

The BMA does not believe that the interim cap will have an indirect impact on the provision of undergraduate medical education in the short-term. In the longer-term the BMA has concerns that more permanent limits on highly skilled migration could impact the provision of medical education by deterring individuals from coming to study at UK medical schools. Long-term reductions in skilled migration may ultimately foster an increased perception that the UK is no longer a receptive destination for foreign nationals

and this could have an impact on the UK medical schools' ability to attract international students.

Do you envisage any wider economic impact as a result of these changes?

The BMA has no further comment to make on the wider economic impact of the interim cap.

Do you anticipate any unforeseen consequences as a result of these changes?

The BMA is pleased to note that the interim cap necessitates only a small reduction of 6% from 2009 levels for Tier 2 visas and the limiting of Tier 1 visa approvals to the same level as the equivalent period in 2009. On the basis that the initial reduction to skilled migration is minor the BMA does not anticipate that the temporary changes will have any initial significant unforeseen consequences.

The BMA has some concerns that raising the points required to secure a Tier 1 (General) visa in order to ensure that only the "brightest and best" are recruited to come to the UK overlooks the vital, non-monetary contribution that overseas doctors bring to the UK. The timeframe between announcing the change to the points allocation and the change taking effect is also extremely short. Whilst we understand that allowing a lengthier transition period might enable a spike in applications to Tier 1 (General) we are aware that some doctors who are already in the UK and seeking to switch into Tier 1 (General) may not now be able to do so. This is unlikely to be a significant unforeseen consequence but is worth highlighting.

In the long-term the BMA is concerned that a more permanent and drastic reduction in skilled migration could impact upon the provision of healthcare in the UK by restricting NHS employers from recruiting skilled migrants from outside the EEA when the resident workforce is not sufficient to fill available vacancies.

The BMA welcomes the full consultation to consider the impact, feasibility and potential consequences of more long-term reductions in the levels of skilled migration to the UK - we will highlight our concerns more comprehensively during this consultation process.

How would you like to see this policy reviewed?

Any medium and long-term attempts to cap highly-skilled migration must take into account the need for the NHS to be able to recruit much needed doctors from abroad when there are no resident workers available to fill vacant posts. The immigration system should retain an adequate level of flexibility to enable NHS employers to source staff from other countries even if annual immigration targets for highly-skilled migrants have been reached. A failure to do so is likely to have a detrimental impact on staffing levels and may ultimately impact upon standards of patient care.

Long-term development of a policy to cap levels of skilled migration must involve sustained, wide-ranging and meaningful consultation with the medical sector and other key stakeholders within the NHS to ensure that staffing requirements can be met without service delivery being compromised. In addition such a policy must incorporate the means to make allowances for recruitment of highly skilled migrants to fill essential posts even if the annual grant allocation has been reached.

Reductions in net migration cannot be introduced at the expense of the provision of vital public services such as healthcare.

July 2010

Submission from the Chartered Institute of Personnel and Development

The CIPD does not agree with the principle of capping non-EU migrant labour which we believe will stop businesses recruiting the talent they need in recovery. Our Labour Market Outlook shows that 15% of employers plan to recruit migrant workers in the coming quarter. However for the purposes of the Committee inquiry, we do believe that the statement will achieve the policy objectives, and do not foresee any major unintended consequences.

Will the Statement achieve its policy objectives?

The CIPD concludes that the Statement is sensible when considered in the light of the Government's long-term policy objective of substantially reducing net annual migration to the UK. To meet the latter objective the Government will introduce an annual limit on the number of non-EU migrants admitted to the UK to live and work. There is an obvious risk that the introduction of such a limit would be preceded by a spike in immigration as aspirant migrants apply to enter the UK ahead of the limit. A spike would create management difficulties, give rise to a temporary increase in administrative costs and run counter to the spirit of the Government's long-term policy objective. Although the CIPD has reservations about the merit of the long-term objective, the application of a temporary limit en route to full implementation is appropriate.

Is the Government's estimate of the volume of deterred Tier 1 (General) applicants accurate?

The CIPD estimates that the volume of deterred Tier 1 (General) applicants will be small, around 10% of the proposed interim limit, which is in line with the Government's estimate.

Do you envisage any wider economic impact as a result of these changes? Do you anticipate any unforeseen consequences as a result of these changes?

The CIPD expects no wider detrimental economic impact resulting from the interim limit. This is partly because the overall impact on migration into Tier 1 (General) will be small but primarily because the measure will not affect applicants classified as Investors or Entrepreneurs. Some employers may incur an administrative cost in ensuring they are legally compliant with the interim limit but this will be negligible when considered from the perspective of the economy as a whole.

Similarly the CIPD does not envisage any unforeseen consequences, although it is possible that there may be a spike in applications from Investors and Entrepreneurs if individuals in these latter categories perceive they might be covered by the Government's controlled migration policy once this is implemented in full.

July 2010

Submission from the Confederation of British Industry

I am pleased to respond to this call for evidence on behalf of the CBI. The CBI is the UK's leading business organisation, speaking for some 240,000 businesses of all sizes that together employ around a third of the private sector workforce.

The CBI has supported the Points-Based System (PBS) for managing migration of non-EEA migrants, which our members think strikes a successful balance between businesses' need or access to skilled workers and the wider societal impacts of migration, which must be managed. As we proceed through a fragile economic recovery, changes to the PBS must be sensitive to the need to retain this balance, allowing firms to remain competitive, while not undermining the fight against domestic unemployment.

The CBI welcomes the government's decision to consult widely on proposals to amend the PBS. We also welcome the decision to involve the independent Migration Advisory Committee (MAC) in providing evidence on the appropriate levels for limits to be set, both next year when the limits become operational and over the course of the parliament. Though CBI members have an interest in the functioning of both economic routes (Tiers 1 and 2), their main interest lies in the operational aspects of Tier 2. We note that the interim changes to Tier 2 do not require amendment to existing immigration rules and therefore do not fall within the remit of the call for evidence. We will be setting out our views on the government's proposals for Tier 2 in full in our official consultation response.

On Tier 1, we accept the need to apply interim limits while the outcome of the consultation is being considered. We accept the government's argument that interim arrangements will be important to help avoid a 'closing down sale' or surge of applications that could result from the expectation of full limits being introduced in due course. We also support the increase of the pass mark from 95 to 100, as this will ensure that most of the effect of the interim limit falls on those closer to the margin of the original test. We believe this will continue to ensure that only the brightest and best are attracted to the UK. We also welcome the exclusion of sub-routes for entrepreneurs, investors and post-study work. Though we have not had the opportunity to do statistical analysis on the impact of the change in the points requirement as of yet, we note that any impact assessment estimate would need to be qualified by recognition of the likely fragility of economic conditions throughout the remainder of 2010 and to March 2011, which may serve to depress applications for entry to the UK via Tier 1. Limiting the number of visa approvals to 5,400 - the same number as in the equivalent period in 2009 - therefore seems sensible.

July 2010

Submission from Hammonds LLP

Hammonds LLP is a leading international commercial law firm employing over 1,000 people with more than 170 partners working out of 10 offices across 6 countries. Hammonds has a specialist business immigration department which advises a wide range of blue chip and international clients. It has an expert knowledge and understanding of the UK immigration system and extensive experience of legal requirements in non-UK jurisdictions within Europe and beyond. In submitting this evidence Hammonds is representing the views and interests of its clients, in particular, those in the architectural, creative and media and utilities sectors.

The Merits Committee has asked for evidence on a number of very specific points. We have chosen to respond to those most relevant to our clients, as set out below:

Will the changes achieve the policy objective of continuing to attract the brightest and the best people to the UK?

No. We act for clients in a wide range of sectors including architecture, creative and media and utilities and the overwhelming feedback from these clients is that the changes to Tier 1 (General) will deter the brightest and the best people from coming to the UK because fewer of the most highly skilled migrants will now qualify.

The changes to the Tier 1 (General) pass mark means that all applicants both in-country and out-of-country will be required to score 80 rather than 75 points for qualifications, previous earnings, UK experience and age. This rise in pass mark comes only shortly after a rise in the salary bandings for Tier 1 (General) effective from 6 April 2010. The most likely consequence of the raise in pass mark is that applicants will be required to earn the equivalent of £5,000 more in terms of previous earnings to be able to qualify. In turn, this will mean that fewer architects, engineers and designers will now qualify under Tier 1 (General) which will put such individuals at a disadvantage compared to their peers as

salaries for such individuals are generally lower than other professions with comparably lengthy training periods.

The UK Border Agency's assumption that higher earnings mean higher skills is therefore mistaken, particularly in the case of architects where it is not uncommon for an architect with 5 years' post qualification experience to earn less than £40,000 in the UK (let alone outside the EEA). In practice, this means that a fully qualified 30 year old non-EEA architect educated to Master's level outside the UK and with 5 years' post qualification experience would not qualify under Tier 1 (General).

Further, the cap of 5,400 applied to Tier 1 (General), even if applied in 12 monthly tranches, will mean that success is dependent on the timing of an application (which has nothing to do with being highly skilled), not just meeting the points criteria. With this degree of uncertainty hanging over the success of an application, Tier 1 candidates are likely to consider taking their skills to countries other than the UK.

Do you envisage any wider economic impact as a result of these changes?

A number of our clients are heavily dependent on being able to recruit highly skilled migrant workers to fulfil their business needs.

Being able to pitch for, commit to and win new projects from both inside and, in some cases, outside the UK and fulfilling those projects to the required standard depends entirely on the quality of skilled staff employed in the UK, staff who cannot always be sourced from the EEA resident workforce even if timescales could allow for that workforce to be "up-skilled".

Both the cap of 5,400 and the increase in points for Tier 1 would mean that our clients will simply not have access to the best and the brightest people that they need in order to meet client demand successfully and their businesses will suffer as a result. With respect, we believe that it defies logic that these measures are being introduced now when the sectors mentioned above are just emerging slowly but surely from recession and will still need all the help they can get.

Do you anticipate any unforeseen consequences as a result of these changes?

One client of ours, in particular, is currently undertaking unprecedented levels of capital investment to extend, reinforce and replace its infrastructure in order to ensure that it meets its current obligations and also meets the need to accommodate emerging technologies and ongoing and future customer requirements. Since 2004, this client has regularly managed increasingly large recruitment campaigns for key skill roles across the organisation. All campaigns are initially aimed at the resident labour market. However repeated campaigns for such key skill requirements have had limited success as there is an insufficient pool of suitably qualified candidates within the EEA and therefore a number of vacancies have remained unfilled. This has been supported by the Migration Advisory Committee and the subsequent inclusion of a number of these key roles on the Shortage Occupation List. Combined with the intended changes to Tier 2, both the cap on Tier 1 (General) and the rise in pass mark will have serious implications for this client in terms of its ability to meet its short-term resourcing requirements in the business critical roles. Longer term these proposed changes will have potentially serious adverse implications for the efficiency of investments made and the ability of this client to deliver on its capital plan.

How would you like to see this policy reviewed?

In light of the above, no cap should be imposed and the required aggregate points for qualifications, previous earnings, UK experience and age should remain at 75.

July 2010

Submission from the Highly Skilled Migrant Programme Forum

This is a submission to the merits committee on the issues concerned in implementation of the Statement of Changes in Immigration Rules HC 59 by limiting the numbers entering on Tier 1 (general) and applying stringent / difficult criteria by increasing the points threshold for existing migrants to qualify under Tier 1 (general).

"HSMP Forum" is a not-for-profit organisation. It was formed after the 2006 decision by Government to apply new qualifying criteria for Highly Skilled Migrant Programme (HSMP) for permanent residency (ILR) and for visa extensions of existing Highly Skilled Migrant residents. "HSMP Forum" has been lobbying the legislature, executive and judiciary by challenging unfair policies, to allow existing legal Skilled Migrants to settle in UK. The organisation's aim is to support and assist migrants under the world-renowned British principles of fair play, equality and justice and believes in challenging any unfair policies which undermines migrants' interests.

The Government's 'Programme for Government' announced on 20th May 2010 quoted on an annual limit on the number of non-EU economic migrants "admitted into the UK" to live and work but the statement of changes has increased the points threshold for migrants already admitted and are resident in the UK. Therefore, the statement of changes has gone beyond the announcement made by the Government in May 2010.

The policy objective of attracting the brightest and the best people to the UK cannot be met if the government applies arbitrary rules which are likely to sabotage existing skilled and highly skilled migrants in the UK. UK is unlikely to attract the brightest and the best when in fact it tends to reduce the numbers of the same who are already here. Frequent changes and looming uncertainty regarding extension will hurt UK's reputation as an immigration friendly country and the brightest and the best migrants might choose more certain and safe countries which welcome highly skilled immigrants.

The government is seeking the migration advisory committee to conduct a consultation but has already implemented an interim cap, this makes the whole process of a fair and open consultation difficult to be achieved. We are not convinced with the Home Secretary's argument of rush of applications as a genuine reason for such an interim cap. It has been an age old trick by past governments to give an excuse for such a measure[1] which was criticised both by parliamentary bodies[2] and the courts.

We do not believe the government's estimate of 0 to 1000 deterred applicants is accurate. As estimated by past practices the deterred applicants can be in high proportion. Although we believe it can be much larger figure than what is estimated by the impact assessment. The current qualifying threshold is relatively high and the amount of previous earnings seems to be given too high importance especially since UK is recovering from an economic crisis. The government needs to act with care and always consider the worst possible scenario to avoid a possible legal scrutiny of its measures on a later date.

The equality impact assessment acknowledges stakeholders concerns for not addressing issues concerned with inequalities in migrants applying from their home countries but considered this outside its scope[3]. The government also failed to take into consideration the equality impact within the UK. The Equality and Human Rights Commission and its predecessor, Commission for Racial Equality findings show that ethnic minorities find it

[1] R (HSMP Forum Ltd) v Secretary of State for Home Department (2008), application of sudden changes on 7th November 2006 without consultation.

[2] Joint Committee on Human Rights report on HSMP Changes

[3] http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/limits-on-non-eu-migration/ia-migration-interim-limit.pdf?view=Binary

harder to get into employment with higher salaries in the UK, this is an important requisite since the interim cap seeks a higher earning threshold for those under tier 1 thus causing further difficulty. The courts have recognized the issue concerned with employment of ethnic minorities and the findings of the commission.[4] We believe ethnic minorities will suffer more due to the increase in the salary threshold.

The economic recovery might increase the demand for skilled and highly skilled workers. Setting limit based on recession year might be risky for businesses, especially for small ones.

The increase in the points threshold will also have an impact for those switching from post study work. Those coming on student visas to study in the accredited UK universities or colleges would not be keen to come to the UK if they are not given opportunity to work in the UK or a provision which can make it possible for them to continue their work and stay in the UK. This can cause serious downfall in the £ 12.5 billion[5] per year estimated economic contribution of international students to the UK economy and will impact the universities which are heavily relying on overseas students' fees.

We believe the changes would be considered harsh and rigid by employers who are unable to fill in positions locally. The very need for employers to hire non European migrants is because they were unable to find a local or European migrant who can fulfil their requirements. The calibre of migrants coming from European Union does not necessarily fulfil a skilled and highly skilled requirement thus the need for migrants from non European countries (or commonwealth countries). For example, NHS can be stuck with vacant posts for doctors, nurses, technicians and consultants[6]; this will cause a significant impact on public health services.

We do not agree that the impact will just be concerned with increased costs for the firms although the costs of additional training itself could have a major impact on smaller firms. As explained earlier (e.g. doctors in both public and private sectors) many of these positions we believe cannot be filled by additional training or by familiarisation. The firms will be forced to deliver a lower service quality due to non availability of required manpower thus affecting its competitiveness overall leading to further impact on the business concerned and also in terms of UK's global competitiveness in delivery of products and services. This can pose serious problems for businesses which heavily rely on skilled manpower for service delivery and could lead to closure of divisions, departments and companies. Some firms which heavily rely on such skill sets although could have been deterred earlier from outsourcing jobs abroad may find the need to do so now. They may find it more economical to outsource jobs in a larger spectrum and thus be encouraged.

The government's approach in imposing a cap we believe is more inclined towards managing unskilled workers than skilled migrants. The government does not seem to acknowledge the very need on why the firms required non European migrants to fill in the positions in the first place and therefore is trying to reinvent the wheel.

We propose the following changes to this policy;

1) Any changes introduced should not affect resident migrants in the UK. We believe it will be unfair to apply any strict measures for further visa extensions to migrants who came under a different set of rules. The conservatives and liberal democrats when in opposition principally opposed such retrospective legislation of the then labour government in 2006.

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[4] Paragraph 62, http://www.bailii.org/ew/cases/EWHC/Admin/2008/664.html

[5] http://www.britishcouncil.org/home-press-180907-global-value-study.pdf

[6] http://www.personneltoday.com/articles/2010/06/03/55808/immigration-cap-could-lead-to-skills-shortages-in-key.html

2) We believe any measures if at all should only be taken after proper and independent consultation with stakeholders who will be affected by such a decision.

3) Finally, the country is still struggling with the economic crisis and in this scenario such a cap will only make things more difficult for the businesses. These measures should be postponed until and unless UK fully recovers from the economic crisis.

July 2010

Submission from the Immigration Law Practitioners' Association

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency and other 'stakeholder' and advisory groups.

Policy objectives outlined in the Explanatory Memorandum and relevant background

The Explanatory Memorandum to HC 59 sets out two main policy objectives relevant to this call for evidence:

> Objective 1: Prevention of a surge and a spike, thereby defeating the objective of reducing net migration
>
> Objective 2: To continue to attract the brightest and most able highly skilled migrants

The second objective should be examined in light of the command paper, A Points -Based System: Making Migration Work for Britain (Cm 6741, Home Office March 2006). The Home Office set out in that document that Tiers 1 and 2;

> *"…are essentially about attracting individuals who will contribute to UK growth and output, developing the UK skilled workforce and filling shortages in the labour market" (paragraph 37)*

and that:

> *"Tier 1 is designed to bring into the UK those migrants with the very highest skills….It will select migrants with top-level skills who will be able to find employment or self-employment and increase the productivity and growth of the UK economy." (paragraph 73)*

The Command Paper also set out that

> *"…migrant workers…contribute disproportionately to the economy (figures for 2001 show that migrants in the UK generate 10% of GDP while forming 8% of those in employment)" (paragraph 2)*

Further gloss is provided by the Impact Assessment of 28 June 2010 (HO 0007 Migration Interim Limits (PBS Tier 1 and Tier 2) which states, inter alia, in relation to Tier 1 (General):

> *"Option 2: Apply limit to Tier 1 (General) which will limit approvals to the same level as the equivalent period in 2009." (page 1)*
>
> *"As fewer migrant workers will be available, there may be negative impacts in the short-term on businesses and the labour market…Over the longer-term we expect businesses to adapt to the changes by adjusting production." (page 2)*
>
> *"The policy is also designed to continue to attract the brightest and the best highly skilled migrants and to encourage the upskilling of UK resident workers." (page 2)*
>
> *"A further risk is that some applicants, who will view Tier 1 and 2 as 'too difficult' to get into, will then displace into other routes. Neither of these risks are quantifiable." (page 2)*

In the Consultation by the Migration Advisory Committee on the Level of an Annual Limit on Economic Migration to the UK on limits to economic migration (30 June 2010) the Migration Advisory Committee has stated:

> *"According to the LFS [Labour Force Survey], the foreign born working-age population in the UK remained constant between the first quarters of 2009 and 2010…The apparent lack of growth of migrant stock over this period may reflect the consequences of the economic recession." (paragraph 2.24)*

Will the Statement achieve its policy objectives?

As to the first objective, prevention of a surge and spike before the 'cap' comes into force, it is likely that there will be some extra applications before the interim cap under HC 59 comes into force from persons who had been planning to submit applications shortly. However, as set out in our comments on the second objective, it is likely that other people will be deterred from coming to the UK at all. Persons who enter through Tier 1 General are persons who have a choice of destination in different countries around the world. No evidence has been provided which demonstrates that there will be surge of applications from these persons, who have many other options. Were there such a surge, at a time when a need to stimulate economic growth has been identified, this would appear to fulfil the policy objectives underlying Tier 1 (General).

As to the second objective, attracting the most able, as the quotations from Cm 6741 illustrate, the group desired are not desired simply for their own sake, but for the contribution they bring to the UK skilled workforce and the economy. It is highly likely that the measures contained in HC 59 will, from 19 July 2010, fail to contribute to the underlying policy objectives for Tier 1 (General) and, as set out in the extracts from the Impact Assessment cited above, have a negative impact on businesses, especially small firms and prospective small firms which may have been established by affected migrants, and on the wider labour market and economy.

A blanket policy of denying or delaying entry to the UK to many of the most 'highly skilled' individuals and, by the uncertainty that it creates, making the UK a less attractive destination for those eligible to enter under Tier 1 General, will interfere with those individuals' ability to contribute to growth and productivity and assist in upskilling resident workers in the UK, the underlying reasons for the existence of the category.

Based on the experiences of ILPA members in advising clients, it is likely that the limitation combined with the points increase will:

- lead to 'highly skilled' individuals who would have entered through this route but for the changes and continue to wish to come to the UK, entering the UK through other routes, thereby having no impact on net migration. This possibility is specifically referenced in the Impact Assessment (as referred to above); or, if that does not happen,

- lead to 'highly skilled' individuals who would have entered through this route had it been attractive to them, taking their economic skills and abilities elsewhere where there are more attractive policies in place.

It is unlikely that persons eligible to enter through this route will be willing to make their applications, pay a fee and then wait for an indefinite period of time to see if they may or may not be able to conduct their economic activities and their lives in the UK. The route already provides little certainty for those individuals who have entered the UK and who contribute (disproportionately) to growth and productivity because it is subject to constant change (recently declared unlawful (SSHD v Pankina [2010] EWCA 719 Civ)). ILPA considers that urgent measures should be put in place to give effect to the judgment in Pankina, stabilise this route and make it more attractive at a time when the need to stimulate growth in the UK economy is paramount.

Restricting Tier 1 (General) in the manner set out in HC 59, imposing a limit and increasing the points, can only result in the UK restricting its ability to attract the "brightest and most able highly skilled migrants."

Is the Government's estimate of the volume of deterred Tier 1 (General) applicants accurate?

The Government has not issued any statistics in relation to the basis of its estimate of the volume of Tier 1 (General) applicants who may be deterred.

It is proposed that visa levels be limited to those for the same period in 2009. During this period the UK Border Agency was not awarding points for skilled migrants with Bachelors degrees whereas points for Bachelors degree were awarded in the periods before and after. The period thus provides an unusually low comparator. The period in question was also a period of recession and for this reason provides an atypically low comparator as described in the passage from the Migration Advisory Committee report cited in the introduction. We suggest that it is not rational to impose a policy which restricts the category which exists solely to attract "the brightest and most highly skilled migrants" to the UK to contribute to growth and productivity to the unusually low numbers of migrants who came to the UK during the global recession.

Do your experiences support the Government's assessment of equality impact?

ILPA has submitted substantial information to the UK Border Agency and others setting out why, in ILPA's opinion, Tier 1 raises issues of indirect sex discrimination, indirect (and arguably direct) race discrimination and indirect age discrimination. Full information on this can be found in ILPA's response to the Equality Impact Assessment: Points Based System Highly Skilled Tier, January 2008, available on the www.ilpa.org.uk/submissions/menu.html and set out at Annexe 1. ILPA considers that the discriminatory effects identified will be increased by the further restrictions on this category that are proposed in particular in the cases of gender and age discrimination. See also below regarding sector-specific effects.

Do your experiences support the Government's assessment of small firms impact?

Small firms are often more reliant on Tier 1 (General) than larger firms. They may not have the infrastructure to be confident in applying to be a sponsor of Tier 2 migrants, may not have the capacity or desire to take on these responsibilities or may not have the resources to warrant the direct and indirect costs of obtaining and maintaining a sponsor license for the comparatively low volume of migrant workers they require and will thus look to Tier 1 (General). Members' experience suggests that there will be particular impact in certain sectors including: architecture, pharmacy, education, engineering, accountancy, the arts and charities, where there is particular reliance on Tier 1 (General). Whilst the skill level required in these sectors is often exceptionally high (particularly to enable UK businesses to compete internationally), these sectors are traditionally not

highly paid (compared for example to investment banking, law or management consulting); raising the points threshold for Tier 1 (General) has the effect of requiring applicants to show an even higher level of past earnings (with the earnings points thresholds having already been significantly raised the in April 2010). For example as a result of the changes a highly skilled qualified architect (having a minimum seven years academic and professional education) aged 35 may need to show earnings of £75,000 – far in excess of the usual salaries for such professionals. The changes further favour the highly paid, not the highly skilled, and therefore do not serve to attract the brightest and the best and will adversely affect small businesses in particular.

As set out in Cm 6741, Tier 1 (General) is designed to attract individuals who will contribute to growth and productivity and who will assist in upskilling resident workers. Restricting Tier 1 (General) in the manner proposed is likely to mean that fewer such individuals come to the UK and consequently fewer small businesses will be created by them, with the loss of the possibility of the jobs and other contributions to growth that such business would have provided.

Will these changes have an indirect impact on education provision?

Yes. As noted above, the education sector is one that makes particular use of Tier 1 (General) but fewer applicants in this sector will qualify under the new criteria.

There is also the question of dependent children of Tier 1 (General) migrants who would otherwise have attended private schools and universities in the UK contributing much needed fee income to those institutions.

In addition, the Tier 1 (General) category includes a significant number of high earners and the revenue from the taxes that they pay will be lost, which will affect the revenue from taxation available for, inter alia, education.

Do you envisage any wider economic impacts as a result of these changes or anticipate any unforeseen consequences?

The restrictions on the very route which is, as set out in Cm 6741, designed to attract migrants who make a particular contribution to UK growth and productivity will have far reaching economic implications. It will also have a significant impact on the UK's ability to compete in attracting such individuals.

How would you like this policy reviewed?

The Equalities and Human Rights Commission should be asked to consider the equality impacts of the policy. The Migration Advisory Committee should be involved in any review but it will also be necessary to draw in wider assessment from across Government of the wider social and economic effects of the policy. It would be appropriate that detailed reports on the effect of HC 59 be laid before and considered by parliament, for example by the Home Affairs Committee and on the floor of both houses, before consideration be given to moving to a more general cap. It would be helpful to monitor how the balance of migration is shifted between Tiers 1 and 2 by this policy and to collect evidence from individuals and organisations affected. See also 'legality of the changes' below.

Legality of the changes

In the recent case of SSHD v Pankina [2010] EWCA 719 Civ the Court of Appeal held that the only binding and effective part of the Points-Based System rules and guidance are those set out in the Immigration Rules themselves. This is because these are the only provisions that have been properly laid before Parliament in accordance with section 3(2) of the Immigration Act 1971.

For the reasons set out by the Court of Appeal in Pankina, limiting Tier 1 (General) applications on a monthly basis in the manner proposed is not something which can lawfully be implemented through guidance notes which may be changed at any time and without parliamentary scrutiny and the implementation of the policy in the manner suggested would therefore appear to be unlawful.

Annex 1 – ILPA's response to the Equality Impact Assessment: Points Based System Highly Skilled Tier

1. Does this policy put in place any barriers to full participation from members of the community or communities you represent?

Yes, many groups will face difficulties in qualifying under Tier 1. In particular, the Statement of Intent for Tier 1 raises issues of:

a. Indirect sex discrimination

b. Indirect (and arguably direct) race discrimination

c. Direct and indirect age discrimination

It is useful to note that throughout, the terms "direct" and "indirect" discrimination are used. These should be given the following meaning:

Direct discrimination occurs when someone is treated less favourably than another on grounds of his or her perceived or actual (age), disability, gender, nationality, religion, gender orientation or sexual orientation.

Indirect discrimination occurs where the effect of certain requirements, conditions or practices imposed has a disproportionately adverse impact on one group or other. Indirect discrimination generally occurs when a rule or condition, which is applied equally to everyone, can be met by a considerably smaller proportion of people from a particular group.

It is also useful to remember that race discrimination includes discrimination on the grounds of nationality.

There are two ways of looking at questions of discrimination in the context of Tier 1. The first is to contend that the criteria by which a person is judged to be 'highly skilled' – earnings, university qualifications etc., raise questions of cultural and gender bias of sufficient seriousness to amount to discrimination. One could contend, for example, that the investor class is inherently discriminatory because of patterns of distribution of wealth between men and women. The language of 'highly skilled' is arguably unfortunate – as press furores have revealed4. Moreover, the derivation of the attributes against which points are scored, stated to be 'points will be awarded for attributes which measure the applicant's potential value to the UK labour market'5, is obscure. 'Highly skilled' is not a clear, albeit complex, descriptor, on a par with, for example 'student'. It is a matter of some complexity to divide questions of semantics from those of value and bias in this context. Without wishing to underplay the strength of these arguments, ILPA has limited comments to make here as some of the matters raised go beyond our specialist expertise.

The second way of looking at the question is to say 'Do the criteria by which the highly skilled and those in Tier 1 have been defined prejudice certain groups who might be expected to hold those attributes as compared to others?' Thus, to return to the example of the investor category and gender, the question would become 'Among the men and women with a million pounds, are women disadvantaged by comparison with men (or vice

[4] See for example *Fury of Taxi Drivers as Minister calls them 'low-skilled'* 9 August 2007 , http://london-taxi.taxiblog.co.uk/165/fury-of-taxi-drivers-as-minister-calls-them-low-skilled/

[5] A Points-based system: making migration work for Britain CM 6741, paragraph 43

versa) by the other criteria for the category? Here the criteria must be viewed as they interact, not only in isolation, and questions of evidence will be as important as questions of the criteria themselves. It is on these questions that we focus in this response; please see answers set out below for further details of the impact.

What opportunities, and what challenges, does this policy offer?

As a Points Based system, Tier 1 aims to reduce subjectivity. ILPA has previously contended6 that this goal may prove elusive: questions of e.g. the probative value of documents will always involve exercise of judgment. As subjectivity is reduced, there should be less room for prejudiced decision making on the grounds of race, religion, disability, gender, gender orientation, sexual orientation and age. At present, accusations of prejudice are dealt with through an appeals system. What happens where there is no appeals system is discussed in the reports of the Independent Monitor for entry clearance applications without right of appeal.

Whilst it is laudable to seek to remove direct discrimination/ prejudice in decision making, in reality, by removing the ability to exercise discretion, instances of indirect discrimination may become more prevalent. To give just one example: in Tier 1 attempts have been made to set out the documents that will be held to evidence that particular criteria are met. Where the type or format of these documents is based upon UK models, then people ordinarily resident in countries whose documentation (be it payslips, contracts of employment, or bank statements) are most similar to those produced in the UK will have advantages over others. It is the case that the majority of people resident in the vast majority of countries will be nationals of those countries, thus the specifying of particular documentation gives rise to a risk of indirect discrimination on the grounds of nationality and thus race. It is of course no answer to indirect discrimination to say all those applying from country X are treated in the same way, whatever their nationality. If it can be shown that the majority of those applying in country X are nationals of that country, then, in the absence of justification of the differential treatment on objective grounds, there is indirect discrimination.

It is incumbent upon the Border and Immigration Agency to allow adjustments to the points based system to minimise the adverse impact that it will have upon certain groups, including women, disabled people, certain nationalities and certain age groups.

The challenges and the opportunities are to design a system which removes direct discrimination from the decision making process, whilst having enough discretion to prevent decisions being so universally applied as to be indirectly discriminatory.

The following must be considered when implementing policy:

1. ensuring that documentary requirements can be met by all groups, and where they cannot, allowing flexibility;
2. ensuring that the points available are designed, and include adjustment mechanisms, to avoid indirect discrimination on grounds of age, disability, gender, nationality, religion, gender orientation, sexual orientation and other categories relating to age.
3. ensuring that processes and timings at each of the diplomatic posts and outsourced partners do not create direct or indirect discrimination, either by applying a universal rule stringently and without regard for the indirectly discriminatory impact this may have on certain groups or by having such different practices, procedures and timings that certain groups are adversely affected, for example

[6] See for example our briefings in the Immigration Asylum and Nationality Bill, on the briefings section of www.ilpa.org.uk and our submissions on the submissions part of that website.

where nationals of country X have a noticeably worse service than nationals of country Y (creating the grounds for an accusation of direct discrimination).

Will this policy have a disproportionate impact, positive or negative, on any particular groups or communities?

The following policies will have disproportionate effects and give risk to discrimination or to a risk of discrimination:

English language – The requirement to have to take a test to demonstrate English language ability discriminates against those nationals who are not from the listed majority English speaking countries and who do not have a bachelor's degree from an English speaking university.

There are two difficulties here. The first is that historical accidents of birth (race and nationality) are privileged over the contribution an individual may be able to make. A university degree is no proof that a person has contributed successfully to an economy – our understanding is that the Border and Immigration Agency has selected this criterion (as it has selected previous earnings) on the basis that it is an indicator of likely future success in the labour market7. Linguistic competence may be relevant to whether a person will learn English, but the proposed system has no way of allowing for the linguistic competence of a person who does not have English as a first language but will acquire it with ease. Such a person may have highly specialised skills that do not require high level of competence in English to start work in the UK and perform well in the labour market. Were ability to speak English tested at the point of applying to extend limited leave in tier 1, it would be easier to understand. When it is made an entry requirement, it has every appearance of being discriminatory.

The second question, and one that gives rise to a clear possibility of direct discrimination, is the question of which countries are on the list of being 'majority English speaking countries'. The BIA's list in the Statement of Intent on Tier 1 of majority English speaking countries8 is as follows: Antigua and Barbuda, Australia, the Bahamas, Barbados, Belize, Canada, Dominica, Grenada, Guyana, Jamaica, New Zealand, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago, the USA. Canada, for example, is a dual language country and in the Francophone province of Quebec an individual need speak no English to earn a degree and a high level of earnings. States of the United States of America such as California recognise both English and Spanish as official languages. Why is Canada on the list, while Nigeria is not? If one takes the class of Canadians holding university degrees and the class of Nigerians holding those degrees, which has the greater proportion of English speakers in it? Do more or fewer Canadians than Nigerians holding Bachelor's degrees meet the requisite level of English language? In certain West African countries, for example, the majority of the educated elite (those who achieve university degrees and thus make up the subset from which those who can qualify under Tier 1 is comprised) will speak English. The list of countries offers the greatest scope that we can see within the scheme for direct discrimination.

The language requirement will especially impact those who are on the cusp of an age category and who will therefore not receive (enough) points for age because of the delay in the timing of their application caused by the need to sit a test before the application may be submitted. This therefore raises issues of indirect race discrimination.

The age criterion.(Tier 1 – general) – By having points available for those under 31 and tailored for different ages up to 31, the system is treating people differently on the basis of

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[7] See *A Points-based system: making migration work for Britain* CM 6741, paragraph 43 'points will be awarded for attributes which measure the applicant's potential value to the UK labour market' and *passim*.

[8] Highly Skilled Migrants Under the Points Based System Statement of Intent Annexe B note 6

age. The Border and Immigration Agency contends that this is to avoid younger people being disadvantaged because of their lower earnings. However, it is necessary to demonstrate that this is indeed the case, and that the effect is accurately reflected in the way the points are calibrated and then stop at age 31. ILPA has a particular concern that this criterion may unfairly disadvantage women, who may be more likely to take a career break to have children in their twenties (a combination of gender and other factors may be relevant here as ages at which people have their first children do differ from country to country and faith and cultural considerations can play a role9). The BIA should therefore undertake and publish research (including drawing on existing research) to show that this different treatment may be objectively justified and if not, adjust these criteria accordingly.

At the moment, the age criterion is stated to compensate the young for their lower earnings, but it does so in a way that may well be shown to discriminate against older people. Since December 2006, when the criterion for the Highly Skilled Migrant Programme changed, it has been more difficult for the old to compensate for this and the problem is exacerbated by the way in which it interacts with the degree requirement (see below). No longer are work experience and skills taken into account. In addition, there are no additional points to be scored for earnings above a level equivalent to £40,000 (scoring 50 points), so that those who have very high earnings cannot earn extra points on this basis. If the age criterion exists because it assumes that young people earn less, this suggests an assumption that older people are more likely to earn more. As the scheme stands, and as it is proposed that Tier 1 will stand, there will be no opportunity for them to earn extra points for very high earnings. There is scope for investigation as to whether the current programme, and the proposed Tier 1 disadvantages older people in a way that cannot be reconciled with any measure of their likely contribution to the labour market

The question of proof of age may also be a complex one – UNICEF's Progress Report for 2007 states:

> *'Around 51 million children born in 2006 have not had their births registered. Forty-four per cent of these children live in South Asia. One in three developing countries has birth registration rates of less than 50 per cent. Two out of three African children under age five are not registered.'10*

Similar reports have been produced for many years. Thus, if a premium is to be placed on age, it is necessary to look very carefully at what is required to prove age. A requirement of a birth certificate is likely to introduce indirect discrimination on the grounds of nationality. ILPA's report on disputes of age of children11 is well-known, but we see the problem in a much wider variety of contexts, for example in cases where it is not accepted that elderly parents seeking to enter as dependants under rule 317 of the Immigration Rules are over 65.

Requirement for a degree (Tier 1 – general) – It is impossible to score the numbers of points required for Tier 1 without holding a degree. The notion that a degree level qualification is required for Tier 1 entry is problematic in the sense noted in our introduction – that a degree is proof of having skills likely to benefit the UK may be seen as the product of cultural and gender stereotypes, not to mention an attitude to the importance of higher education qualifications with which younger would-be applicants may have grown up, but which may not have prevailed when older would-be applicants were of an age to decide whether to continue their education or start work. It would be very interesting to examine,

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[9] See the United Nations Statistics Division Demographic and Social Statistics – Age of mother at birth of first child ever born. http://unstats.un.org/unsd/Demographic/sconcerns/natality/natmethods.htm

[10] See http://www.unicef.org/progressforchildren/2007n6/index_41845.htm

[11] When is a child not a child? Asylum, age disputes and the process of age assessment Crawley, H., for ILPA, 2007, available on www.ilpa.org.uk

across a range of countries, statistics on the percentage of the population holding a degree stratified by age.

As to the way in which this criterion interacts with the other criteria: women, and particularly women from certain cultures, may go to university later or take longer to complete a degree because of child-bearing responsibilities, and the age at which people embark on a degree may also differ from country to country (earnings is part of this mix – if the degree finishes later, one would not necessary expect the lower earnings arising from being newly qualified to have been eradicated by the age of 31).

Under the Highly Skilled Migrant programme existing prior to December 2006, there was scope to compensate for the lack of a degree by demonstrating work experience or skills. This provided a mechanism by which to ensure that women or older people were not unfairly disadvantaged. It is possible that the ability to score extra points for earnings above £40,000 also contributed, as discussed at point 2 above. No compensating mechanisms are in place in the current scheme and that proposed under Tier 1.

Women (Tier 1 - general) – ILPA is not an organisation concerned with the collation of sociological data nor its analysis. However, it appears that in every country where published analyses of male/ female pay are available, women earn significantly less than men12. For example, in February 2006, it was reported that women in the UK were paid 13% (using a median average) or 17% (using a mean average) less than men13. Having a previous earnings requirement that applies to men and women without taking the pay gap into account has a negative impact on women's ability to qualify under Tier 1. One might contrast older models (pre December 2006) of the Highly Skilled Migrant programme where previous experience was taken into account, making the quality of the work done, rather than only the remuneration for that work, of importance. Members' experience is that the demographic of those applying under Tier has dramatically changed since December 200614. The impression is that thee current combination of age, degree and earning requirements favour young men over other groups. ILPA raised in meetings with the BIA in August 2007 the question of how the gender profile of applicants under the Highly Skilled Migrant Programme had changed since the December 2006 changes. We were told that the baseline data to make the comparison were not available. We would strongly suggest that the BIA collate these data (applicants must specify their gender and age on application forms so the data is available), if necessary by the use of examination of random samples. We anticipate that the sampling would show that the combination of age and earning requirements, and the removal of points for work experience, has disadvantaged women.

The changed criteria in December 2006 appeared to be more the product of a desire to move to a more objective, points-based system, than a desire to attract a different profile of applicant under the Highly Skilled Migrant Programme. This raises the spectre that women may have been disadvantaged for reasons of administrative convenience.

Part-time workers (Tier 1 - general) – it is a matter of UK case law that the majority of part-time workers are female and that measures which discriminate against part-time workers therefore indirectly discriminate against women. Having an earnings requirement for the previous 12 months without having an adjustment for part-time workers indirectly discriminates against women.

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[12] See the International Labour Organisation's Annual *Global Employment Trends for Women* at www.ilo.org

[13] Women and Work Commission's *Shaping a Fairer Future* http://www.womenandequalityunit.gov.uk/publications/wwc_shaping_fairer_future06.pdf

[14] For a more detailed discussion of the changes see Is the New Highly Skilled Migrant Programme 'fit for purpose?' If not, the Government's Proposed Points Based Immigration System is Fundamentally Flawed' Devine, L., (2007) Vol 21 No 2 IANL 90 (IANL is ILPA's official journal, the peer review Journal of Immigration, Asylum and Nationality Law).

Areas of expertise (Tier 1 – general) – In the UK it has been reported that women are more likely to enter poorly paid professions than men15. It would be useful to examine equivalent data for other countries. For example, globally, are there proportionately more women in the caring professions than men and proportionately more men in the financial services industry than women? What are the pay scales within these professions? At present Tier 1 does not make any adjustment for the sector in which people work and so does not recognise that a very senior caring role pays less than a very junior role in a bank. This is likely indirectly to discriminate against women. Under the pre-December 2006 Highly Skilled Migrant Programme a person who could not demonstrate high earnings could nonetheless have demonstrated skills and experience and thus there would have been compensation for a group, such as women, working in lower paid sectors. Under the current scheme, and the proposed Tier 1, such compensation is not possible.

Funds requirement – To obtain entry clearance it will be necessary to demonstrate that £2,800 is available to the migrant to allow for set up/ maintenance costs within the UK. This is a proportionately higher cost to an Indian national than an Australian national, as is recognised by the adjustments made for earnings in Band A-E countries. This cost may be so high as to prevent certain nationalities applying under Tier 1 and is therefore indirectly discriminatory on grounds of race. While the BIA may plead the need to support oneself a reason to require this figure, there is no reason for this when the Highly Skilled Migrant has a particular job offer (there is nothing to stop a person offered a job determining that it is in their best interests to come as a highly skilled migrant rather than on a work permit), or can demonstrate that his/her skills are so in demand as to make the notion of languishing without a paid job for any length of time highly unlikely.

Evidential requirements - ILPA has long been critical of letters of refusal that, to paraphrase, say, for example 'Lots of documents from the Indian sub-continent are false; therefore we do not believe yours are genuine.' Risk-profiling is one thing, direct or indirect discrimination on the grounds of race, religion or nationality is quite another. The distinction between them is not merely the quality of the general evidence base but the way in which the individual case is judged against the evidence. The most obvious 'subjective' or 'judgement' element remaining in Tier 1 is that of the question of the falsity or genuine nature of documents. The scope for discrimination – unjustified differential treatment on the grounds of nationality through 'guilt by association', is enormous. That false degree certificates have been produced from a certain country or university maybe a reason to examine a person's documents with care, it is not a reason to reject them or to conclude that they are false without evidence in the individual case.

Experience of the existing Highly Skilled Migrant Programme has demonstrated the extent to which evidential requirements that appear to be neutral are, when closely examined, based on UK or Anglophone models. The means by which people are paid, for example, would appear to have been examined through filters based on the UK tax system. Thus the question of whether dividends paid by the company are to be regarded as part of earnings is examined in a way that is based on UK tax models and may fail to reflect the realities of payments elsewhere. Bank statements or payslips that do not resemble UK bank statements or payslips may not to be held to prove earnings, but the combination of documents required does not allow a different combination of documents that will satisfy the requirements to be produced by applicants from certain countries. Attempts to draw up very tight evidential requirements are likely to run repeatedly into cultural specificity amounting to indirect discrimination. As stated above, it is no answer to indirect discrimination to say all those applying from country X are treated in the same

[15]See, July 2007 Communication From The Commission To The Council, The European Parliament, The European Economic And Social Committee And The Committee Of The Regions *Tackling The Pay Gap Between Women And Men* http://ec.europa.eu/employment_social/news/2007/jul/genderpaygap_en.pdf

way, whatever their nationality. If it can be shown that the majority of those applying in country X are nationals of that country, then, in the absence of justification of the differential treatment on objective grounds, there is indirect discrimination.

Current evidential requirements appear to be based on form rather substance. Not merely do they require that a person satisfy a criterion, it is required that it be satisfied in a particular way. For example, a degree certificate is accepted, a transcript is not. This increases the risks of discrimination described above and again, appears to be based on administrative convenience rather than on what would show the required attribute, or on a robust risk assessment.

If you have identified any disproportionate impacts, what changes could we make to this policy to mitigate them?

English language – The current list of English speaking countries should be withdrawn and the contents of any list reconsidered. If language requirements are imposed, this should be at the point of renewal of leave and not entry.

Those over 31 years old (Tier 1 – general) – The Border and Immigration Agency should undertake and publish research to determine the extent to which age affects earnings and should either demonstrate that the giving of additional points to those under 31 can be objectively justified or adjust this criterion. Such adjustment may involve having different age-related points for men and women.

Requirement for a degree (Tier 1 – general) – The Border and Immigration Agency should revisit the question of a degree being an essential requirement. In addition it should amend guidance to allow for such instances as mentioned above, where, if a degree is completed later, one would not necessary expect the lower earnings arising from being newly qualified to have been eradicated by the age of 31.

Women (Tier 1 - general) – The Border and Immigration Agency should examine the available statistical information on the differential earnings between men and women and adjust the previous earnings criterion accordingly – either in isolation or in conjunction with the age criterion.

Part-time workers (Tier 1 - general) – The Border and Immigration Agency should examine the available statistical and other information on the gender composition of the part time work-force in different countries of the world. Points for earnings (and/or the time period during which such points can be accrued should be adapted accordingly).

Points for skills and work experience. As described above, the reintroduction of points for skills and work experience would provide a means to ensure that those disadvantaged on the grounds of their sex and age were able to compensate for this in other areas and would reduce the risk of discrimination against women and older people.

Points for earnings in excess of the equivalent of £40,000. As discussed above, making provision for extra points to be scored by those with very high earnings would provide opportunities for older people and for people without degrees (in which group women and older people may be disproportionately represented) to accure points that would contribute toward offsetting the ways in which the system appears to be biased against them.

Areas of expertise (Tier 1 – general)

See point 4 (above).

Funds requirement – The Border and Immigration Agency should reduce the funds requirements and dispense with this requirement altogether where a job offer is in place or where it can be demonstrated that the individual's skills are in such short demand that s/he is extremely unlikely to remain without a job offer for any significant period

Evidential requirements – The BIA should be clear about what it is that they wish an applicant to prove – give guidance as to what they wish to establish but do not be prescriptive as to evidence. In addition, work should be undertaken to ensure that risk assessments do not result in cases being rejected without adequate consideration of the individual case).

July 2010

Submission from the Joint Council for the Welfare of Immigrants

Joint Council for the Welfare of Immigrants ("JCWI") is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to promote the welfare of migrants within a human rights framework.

Introduction

We welcome the opportunity to submit evidence in relation to this enquiry. This brief submission is structured in the following way. As per the Committee's call for evidence, in part one we deal with the Government's assessment of the equality impacts of these measures. In summary, our view is that the Government's equality impact assessment is flawed and does not comply with basic statutory obligations in relation to discrimination/promotion of equality.

As the call for evidence invites submissions on other issues are considered significant, in part two we address the issue of human rights obligations under the European Convention on Human Rights. Specifically the Joint Committee on Human Rights had in the light of past experience recommended that immigration rule changes should be accompanied by a statement of compatibility with obligations under the Human Rights Act. In the case of rule changes of this kind, given that they potentially engage ECHR obligations, the Committee should raise this in any report it produces. In the final part of this submission we address the issue of a review as per the call for evidence. Specifically, we believe that a systematic proper evaluation of the impact of the changes, but also the operation of Points based system more generally from the perspective of equality based considerations should be built into the terms of any review.

Statutory duties to promote equality

Until such time as the Equality Act 2010 comes into force, existing equality based obligations are found in the Race Relations Act, Sex Discrimination Act and Disability Discrimination Act.

Section 71 (1) of the Race Relations Act 1976 imposes an obligation on the UK Border Agency to have 'due regard' to the need to eliminate unlawful racial discrimination and to promote good race relations between different racial groups.

Section 76(A) of the Sex Discrimination Act requires that the UK Border Agency has due regard to the need amongst other things to: a. eliminate unlawful discrimination and b. promote equality of opportunity between men and women.

Section 49(A) of the Disability Discrimination Act 1995 requires the UK Border Agency to have due regard amongst other things to the need to a. eliminate unlawful discrimination under the Act and b. promote equality of opportunity between disabled persons and others and promote positive attitudes towards them and encourage their participation in public life.

All of the above extend to cases of indirect discrimination and are therefore broadly applicable in circumstances where neutral conditions apply but have a disparate impacts.

The UK Border Agency is required to publish its Equality Scheme detailing the way in which it complies with its obligations. There is presently a problem with the UKBA archives, and therefore in obtaining a copy of the most recent policy/its review. As we understand it however, the UKBA seeks to comply with the above obligations through the use of equality impact assessments for new policies, and subsequent reviews.

There are several observations that are relevant to the UKBA's equality impact assessment in the light of the above:

i. There is no consideration whatsoever of the extent to which the proposals – an increase in pointing for tier 1 (General), a numerical cap for tier 1 (General) applications from outside of the country, and further limitations on the certificate of sponsorship allocations meet the statutory requirement above in S71(1) RRA 1976 to promote good race relations. This means that the EIA is legally flawed, and so too arguably are the proposed rule changes. Compliance with the relevant obligation would require that s71 obligations are fully considered through the use of statistical evidence and input from migrants, and the 'host community'.

ii. There is no consideration of the extent to which the proposed measures would fulfil the aforementioned positive statutory gender and disability duties i.e. the promotion of equal opportunities for women and disabled people, and participation in public life and the promotion of positive attitudes for the disabled people. This means that that the EIA is flawed and the proposed rule changes are arguably unlawful.

iii. 'Access difficulties[16]' are arguably not outside of the scope of the EIA in so far as statutory requirements relating to discrimination goes. Neutral requirements applicable to all with disproportionate impacts for certain groups can legally fall foul of all of the above statutory obligations where they are not shown (as is the case here) on the evidence to be justifiable. It is not difficult to see that an increase in the pointing threshold, and a cap may have discriminatory effects for certain groups. The Equality and Human Rights Commission[17] for example found that tier 1 (when the lower pointing threshold was applicable that 75 points were required for educational qualifications, salaries and age) was generating a low approval rate for those coming from underdeveloped countries (nationality was used as a proxy for race). Its impact was considerably higher for in country applications due to prevailing racial discrimination in the labour market- Bangladeshi and Black African men earn 25% less than their white counterparts, and the treatment by UK employers of qualifications obtained in African and some Asian countries. Equally it is noteworthy that the most extensive users of tier 1 are of Indian and Pakistani origin.[18]

Human rights obligations

The proposals engage the right to private and family life under Article 8 ECHR given that the new pointing requirements are to apply to tier 1(General) in country applicants.

The Joint Committee on Human Rights previously noted the lack of parliamentary scrutiny the immigration rules receive and concluded in the light of previous experiences:

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[16] See Migration Interim Limits (PBS Tier 1 and Tier 2), impact assessment, p.15

[17] See Kofman, E, Lukes S, and D'Angelo, A and Montagna, N. (2009) The Equality Implications of Being a Migrant in Britain, Equality and Human Rights Commission, p.24-40

[18] Salt, J (2009) International Migration and the United Kingdom, Report of the United Kingdom SOPEMI Correspondent to the OECD, 2008

> We recommend that the Government accept that where a change to the Immigration Rules engages a Convention right …, it does not have an unfettered power to make changes to the Rules, and that where a change would lead to an interference with a right such as the right to respect for home and family life, the requirement that any such interference be in accordance with the law requires that such changes should be prospective only. We also recommend that changes to the Immigration Rules should always be accompanied by a statement as to the compatibility of the changes with the ECHR.[19]

In the light of the very significant and potentially problematic implications that these changes may have for families who are already in the UK through changing the Tier 1 (General) criteria - applicable on extensions, this is something that in our view should at a minimum be sought in this instance. More generally however we should say that we consider this to be problematic as it will lead to applicants who are on the verge of their leave expiring, being required to fulfil new 'retrospective' criteria. This will inevitably mean that some applicants who have reorganised their lives, and relocated to the UK in the expectation that they are likely to be able to remain, will fall foul of these changes.

The need for a review

Specifically, we believe that systematic proper evaluation of the impact of the changes, but also the operation of Points based system more generally from the perspective of equality based considerations should be built into the terms of any review. As the Equality and Human Rights Commission noted in its report:[20]

A proper evaluation of the equality implications of the PBS requires systematic analysis of the impact and outcomes of the scheme which has not been undertaken for the various tiers. The Canadian Gender-Based Analysis (GBA), applied by CIC to the Immigration and Refugee Protection Act, may offer one example. Status of Women Canada (2002) defined GBA as:

> … a process that assesses the differential impact of proposed and/or existing policies, programmes and legislation on women and men. It makes it possible for policy to be undertaken with an appreciation of gender differences, of the nature of relationships between women and men and of their different social realities, life expectations and economic circumstances. It is a tool for understanding social processes and for responding with informed and equitable options.
>
> It compares how and why women and men are affected by policy issues. Gender-based analysis challenges the assumption that everyone is affected by policies, programs and legislation in the same way regardless of gender, a notion often referred to as gender neutral policy…

A similar kind of analysis could usefully be applied to understanding the implications of other social relations and differences, and the interactions between them… as for example between gender, nationality and age….

July 2010

Submission from Newland Chase

As a general comment, the impact assessments carried out in relation to HC 59 take inadequate account of the changed position for Tier 4 and Tier 1 (Post Study Work)

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[19] JCHR, 20th Report Highly Skilled Migrants: Changes to the Immigration Rules (2006–07), HL Paper 173 HC 993 para. 52-56

[20] See Kofman, E, Lukes S, and D'Angelo, A and Montagna, N. (2009) The Equality Implications of Being a Migrant in Britain, Equality and Human Rights Commission, p. 40

migrants. HC 59 is likely not to meet its policy objectives, since the changes incorporated have a high risk of deterring the best and brightest from:

- studying in the UK;
- taking up Tier 1 (Post Study Work); and/or
- being able to use Tier 1 (Post Study Work) as the intended bridge to Tier 1 or Tier 2.

Some comments on the specific written evidence questions are below.

Will the Statement achieve its policy objectives?

The increased points threshold for Tier 1 (General) and the reduced number of Certificates of Sponsorship under Tier 2 (General) significantly reduce the opportunities for those who hold current leave to remain in the UK under Tier 1 (Post Study Work) to switch into Tier 1 or Tier 2, as was the intended purpose of the scheme.

Young graduates will need to generate an additional £5,000 to meet the new 80 point threshold for Tier 1 (General), which represents a substantial proportion of the income a graduate can expect to earn in the UK, particularly in the currently depressed labour market.

Also, once the availability of Certificates of Sponsorship under Tier 2 (General) is capped, employers may choose to reserve/prioritise usage of their allocation to more experienced potential recruits and/or be dissuaded from applying for Tier 2 sponsorship in order to facilitate an existing employee's transition from Tier 1 (Post Study Work) to Tier 2.

The new situation may also create an environment in which prospective Tier 4 migrants are dissuaded from studying in the UK, and students/Tier 4 migrants dissuaded from applying for Tier 1 (Post Study Work) if there is no viable path to longer term settlement.

Is the Government's estimate of the volume of deterred Tier 1 (General) applicants accurate?

According to Table 1.1 of the Control of Immigration: Quarterly Statistical Summary, United Kingdom (January-March 2010) the number of Tier 1 (Post Study Work) entry clearances issued in the 8 quarters to the end of March 2010 was 11,060. The number of approved applications for further leave to remain in the UK for the same period (set out in Table 4.1) cannot be determined as the figures provided are for all of Tier 1 and are not disaggregated to show figures for Tier 1 (Post Study Work) only.

However, the majority of Tier 1 (Post Study Work) applications are submitted in-country and the entry clearance figure by itself is substantially higher than the 5,000 total number of applicants expected to be deterred by the change, as cited in the Impact Assessment. It therefore appears that the Government's estimate represents a gross underestimate.

Do your experiences support the Government's assessment of small firms impact?

Many Tier 1 (Post Study Work) migrants are currently employed by small firms. The impact of these changes will not be negligible for small firms as they will be less able to retain these migrants following the expiry of their Tier 1 (Post Study Work) leave. Where a Tier 1 (Post Study Work) migrant is unable to move into Tier 1 or Tier 2, the firms will have to incur the costs associated with recruiting and training alternative workers.

Will these changes have an indirect impact on education provision?

It is foreseeable that if Tier 1 (Post Study Work) cannot operate effectively as the intended bridge to Tier 1 or Tier 2, prospective Tier 4 migrants may choose to study in a country other than the UK.

Do you anticipate any unforeseen consequences as a result of these changes?

It is possible that those individuals who cannot move successfully into Tier 1 or Tier 2 may overstay in the hope of meeting the 14 year long residence rule in the future, particularly those who have spent a considerable number of years in the UK already and have a well established private and/or family life.

How would you like to see this policy reviewed?

This policy should be reviewed by commissioning appropriate reports to be laid before Parliament with a view to ensuring that Tier 4 migrants and Tier 1 (Post Study Work) migrants are not unfairly and disproportionately disadvantaged as a result of the changes.

July 2010

APPENDIX 3: STATEMENT OF CHANGES IN IMMIGRATION RULES: ORAL AND WRITTEN EVIDENCE FROM THE HOME OFFICE

Oral evidence from Baroness Neville-Jones, Minister for Security and Counter-Terrorism; and Mr Neil Hughes, Director of Temporary Migration, United Kingdom Border Agency

Supplementary written evidence from the Home Office

A number of the Committee's questions sought clarification on the scope for the interim limits. I thought, for the sake of completeness, that it might be helpful for me to set this out here.

- For Tier 1, the interim limit will cover out of country applicants for Tier 1 (General) only. Applicants for the sub-routes for Investors and Entrepreneurs; in-country applicants; and dependants are excluded. The post-study work route within Tier 1 - through which foreign students can gain 2 years' access to the labour market - is out of scope of these limits.
- For Tier 2, the interim limit will cover applicants for Tier 2 (General). Applicants for the sub-routes for Intra-Company Transfers, Ministers of Religion and Elite Sportspeople; and dependants are excluded.

The Government does intend to bring forward, before the implementation date for interim limits, next Monday 19 July, an amendment to the Immigration Rules which makes clear that there will be an interim limit for Tier 2 limiting the number of Certificates of Sponsorship available to sponsor employers pending introduction of the first full annual limit. In this instance it will be necessary to breach the convention of laying statutory instruments 21 days before commencement. The Minister for Immigration will be writing to the committee separately on this matter.

Answers to questions not covered in oral evidence

Q. *Has the Government carried out any research to assess the impact of the Tier 1 changes on the broader economic situation?*

A. It is important to remember that these measures are, at their core, matters of social as much as economic policy. The Government is aiming to reduce net migration in order to reduce pressure on public services and increase public confidence in our migration system.

We do however want to ensure that as we reduce net migration, we optimise the economic benefits of those who come to the UK to work. Before we implement our first full annual limit, the Government will give full consideration to the economic and social impacts. That is why we have asked the independent and well respected Migration Advisory Committee to advise us on the level of the limit, taking into account both economic and social and public service impacts.

The risk though, as I explained at yesterday session, is that by launching this consultation we could see a surge in applications. This is why we are introducing our interim measures - to give us the space we need to fully consult and understand those impacts.

Q. *The Equality Impact Assessment identifies no adverse consequences as a result of these changes, but has the Government identified any possible adverse consequences at all, in terms of equality?*

A. The UK immigration system has a very wide pool of potential users who can come from anywhere in the world. The criteria for entry and leave to remain are designed to maximise the economic benefits of migration and are the same for all potential migrants from outside the EEA.

Our corporate partners have previously suggested that labour market discrimination in the UK against ethnic minorities, people with disabilities, women, trans-gender people, and gay and bisexual people makes it harder for applicants from these groups to achieve the points criteria required under PBS. Corporate partners have also told us that some groups may have difficulty in accessing these tiers, due to a wide range of social, educational and economic inequalities in different societies around the world. The UK immigration system

cannot be used to mitigate such wider-ranging barriers and inequalities in the home countries of those who may wish to use it.

As set out in the Impact Assessment, we believe that there are no adverse consequences in terms of equality associated with these interim measures.

Q. *Has the Government carried out any analysis to identify whether the changes to Tier 1 will have a disproportionate impact on any particular professions?*

A. We have not conducted detailed analysis on how the increased pass mark could affect particular professions. The current Tier 1 points table has been in place for a little over three months, having been introduced by the previous Government on 6 April.

Furthermore, Tier 1 migrants do not necessarily enter the UK with a job offer and they are not required to report to Government as they take up employment. It is therefore very difficult to assess what proportion of Tier those who have entered through the current frame work are already in work and the types of jobs they are doing.

We are however very keen to understand better the occupational distribution of Tier 1 migrants and we will be looking at this during our consultation period.

Q. *What will be the parameters of the review of the interim limits and how will you ensure that the consultation gets a full range of views?*

A. We will keep the interim limits under constant review to assess whether they are meeting the objectives outlined and to monitor any unintended consequences.

We are entirely confident that our consultation on the limits to be put in place for the longer term will receive a full range of views. Our consultation has been sent to all of the UK Border Agency's key partners and sponsoring employers, over 22,000 organisations, and we have also notified those organisations of the Migration Advisory Committee's review. We have already received over 1000 responses to our consultation, which was launched on 28 June.

Q. *Statements of Changes to Immigration Rules are subject to formal Parliamentary scrutiny, but guidance issued by the UK Border Agency is not. What principles do the Government use to decide what matters should be in the Rules themselves, and what can safely be left to guidance?*

The Government has considered the impact of the recent Court of Appeal judgment in the Secretary of State for the Home Department v Pan kina. We have considered carefully whether this judgment has implications for the approach taken to the Statement of Changes which is the subject of your current deliberations. The Government does not intend to make any amendments to this Statement, which relates to Tier 1.

14 July 2010

APPENDIX 4: DRAFT FINANCIAL SERVICES AND MARKETS ACT 2000 (CONTRIBUTIONS TO COSTS OF SPECIAL RESOLUTION REGIME) REGULATIONS 2010: GOVERNMENT RESPONSE

Information from HM Treasury

You have asked us to highlight briefly the provisions that were in the Financial Services and Markets Act 2000 (Contribution to Costs of Special Resolution Regime) Regulations 2009 and those which are new in the draft Regulations.

Because of the substantial changes to the enabling provisions in the Financial Services and Markets Act 2000 (FSMA), the structure of the new draft Regulations is rather different to the 2009 Regulations.

Regulation 1 is self explanatory.

Regulation 2 makes the same provision for the definition of terms as were used in the 2009 Regulations, but with additional terms that relate to the more detailed provisions of these Regulations.

Regulation 3 – liability of the scheme

This regulation sets out the expenses ("eligible expenses") to which the FSCS may be required to contribute. It largely follows regulation 3 of the 2009 Regulations but also makes clear that expenses incurred in connection with the appointment of the valuer, the independent valuer in accordance with section 54, and the person responsible for verifying the accounts kept by and the expenses and recoveries made by the authorities, may be recovered. In the 2009 Regulations, these items were implicitly covered as expenses incurred in connection with the transfer of property, rights and liabilities of the banking institution. There is no explicit reference to the authorities' cost of funding as an expense; this is not needed as new section 214B(4) of FSMA makes clear that interest is an expense for these purposes. The reference in the 2009 Regulations in regulation 3(a) to payments in connection with the transfer of rights and liabilities of the banking institution in respect of protected deposits is also not needed as it is covered by the more general wording in the new regulation 3(a).

Regulation 4 – initial notification

This regulation sets out the information that must be included in the notification given by the Treasury to the FSCS at the start of a resolution if the FSCS is to be required to contribute to

SRR resolution costs. It largely follows Regulation 4 of the 2009 Regulations, but it also includes:

- requirements to notify the FSCS of the interest rate (which may be fixed or floating) to be used for calculating the authorities' cost of funding a resolution and the cost of funding the FSCS would have had to pay if it had paid compensation to depositors and borrowed to meet that cost, and the periods for which this rate would apply;
- principles which the FSCS will be required to apply, methods to be used and matter that should or should not be taken into account when the FSCS is making its determinations in accordance with regulation 6; and
- details as to when the FSCS will be required to make the payment.

Regulation 5 – further notification

This regulation provides for further notifications to the FSCS if circumstances have changed and the initial notification needs to be updated. This provision expands on

regulation 4(3) of the 2009 Regulations by prescribing when further notifications should be made i.e. where further expenses have been incurred, recoveries have been made by the authorities, there are changes to the interest rate and the periods for which it is to apply or where the Treasury expect a material change to the level of expenses expected to be incurred or recoveries expected to be made.

Regulation 6 – the scheme manager's expenditure

This regulation follows regulation 5(2) of the 2009 Regulations but requires the FSCS to keep a record of actual net expenses incurred by the FSCS in the resolution process to deal with cases where the FSCS pays compensation to eligible claimants whose deposits could not be transferred.

Regulation 7 – calculation of the net cost of resolution

This regulation introduces Schedule 1 and requires the Treasury to keep accounts of the actual cost of the resolution and of the actual recoveries which are made to calculate the net cost of the resolution. The detailed calculations required, including for the addition of interest, are set out in Part 1 of Schedule 1. This provision was not included in the 2009 Regulations, and is necessary because of the new requirement to include cost of funding in calculating the net cost of resolution.

Regulation 8 – calculation of the scheme manager's limit

This regulation requires the Treasury to calculate the FSCS cap using the determinations of the FSCS notified to the Treasury under regulation 6 and those of the valuer notified under regulation 13. The detailed calculations required, including for the addition of interest, are set out in Part 2 of Schedule 1. This provision was not included in the 2009 Regulations, and is necessary because of the new requirement to include cost of funding in calculating the net cost of resolution.

Regulation 9 – interim payment

This regulation sets out the steps that have to be followed before the FSCS can make an interim payment towards the cost of the resolution. It provides for interim payments to be made either on the stipulation of the Treasury or voluntarily by the FSCS with the Treasury's consent. Although interim payments were permitted under the 2009 Regulations, this provision provides further detail as to the amount of interim payment the FSCS can make as a result of the introduction of subsections (8) and (9) of the new section 214D of FSMA. The calculations required, including for the addition of interest, are set out in Part 3 of Schedule 1.

Regulation 10 – final notification (no interim payments)

This regulation provides for the Treasury to notify the FSCS of the contribution it has to make towards resolution costs at end of a resolution if there have been no interim payments. The amount of the contribution is simply the lower of the net cost of resolution and the scheme manager's limit. Separate provisions for the final notification were not thought necessary for the 2009 regulations due to the way they were drafted.

Regulation 11 – final notification where there have been interim payments

This regulation provides for the calculation and payment of the final balancing payment by or to the FSCS when interim contributions to the cost of a resolution have already been paid. The method for calculating the balancing payment is set out in Part 4 of Schedule 1 but the principle is that the FSCS has to pay a balancing payment if the final contribution calculated in regulation 10 exceeds the total cost of the interim contributions made. Separate provisions for the final notification were not thought necessary for the 2009 regulations due to the way they were drafted.

Regulation 12 – independent verification

This regulation provides for the independent verification of the accounts kept, actual expenses paid and actual recoveries made by the authorities during a resolution. This expands on the provision for independent verification made in regulation 5(7) of the 2009 Regulations.

Regulation 13 – appointment and determinations of the valuer

This regulation largely follows regulations 7 and 8 of the 2009 Regulations save that the Treasury may now specify principles to be applied, methods to be use or matters to be or not to be taken into account by the valuer when making its determinations under the new section 214D(3) of FSMA.It also introduces Schedule 2 (which largely follows the Schedule to the 2009 Regulations).

Regulation 14 – reconsideration of the valuer's determinations

This regulation confers jurisdiction on the Upper Tribunal to hear appeals of the valuer's reconsidered determinations. It largely follows regulation 9 of the 2009 Regulations but with the substitution of the Upper Tribunal for the High Court and Court of Session.

Regulation 15 – reference to the Tribunal

This regulation confers jurisdiction on the Upper Tribunal to resolve disputes arising under the regulations in respect of calculations or assumptions made, or issues relating to the making of payments. It largely follows regulation 10 of the 2009 Regulations but with the substitution of the Upper Tribunal for the High Court and Court of Session.

Regulation 16 – proceedings before the Tribunal

This regulation introduces Schedule 3 which makes provision for proceedings before the Upper Tribunal arising from references under regulation 14(5) or regulation 15.

Regulation 17 – payments made under these Regulations to constitute payment of compensation under the scheme

This regulation largely follows regulation 11 of the 2009 Regulations. It ensures that a depositor, having had their deposit transferred to a new banking institution under the exercise of a stabilisation power under Part 1 of the Banking Act 2009 , will be unable to claim compensation for that deposit from the FSCS.

Regulation 18 – transitional provision for previous notifications

This regulation makes transitional provision to ensure that any notifications made under the 2009 Regulations (e.g. those made in respect of the Dunfermline Building Society) can be treated as notifications under the draft 2010 Regulations with necessary modifications. In particular, provision is made for the addition of interest from 19 November 2009 - which was the date of the Economic Secretary's announcement that interest would be added to resolution costs and the FSCS cap and of the introduction of the Financial Services Bill in the House of Commons.

Schedules

Schedule 1 and 3 are new.

Schedule 1 is necessary because of the much greater level of detail required to be specified in the Regulations by the relevant provisions of FSMA. This schedule sets out the detailed methods for calculating the net cost of resolution of resolution (Part 1), the scheme manager's limit (Part 2), the total cost of interim payments (Part 3) and the balancing payments (Part 4).

Schedule 2 largely follows the schedule to the 2009 Regulations. It makes detailed provision for the remuneration and removal of the valuer (Part 1) and for applications to

the court by the valuer to require a person to provide information for the purpose of assessing recoveries and the timing of such recoveries (Part 2).

Schedule 3 makes detailed provision for proceedings before the Upper Tribunal.

6 July 2010

APPENDIX 5: FISHING BOATS (ELECTRONIC TRANSMISSION OF FISHING ACTIVITIES DATA) (ENGLAND) SCHEME 2010 (SI 2010/1600): GOVERNMENT RESPONSE

Information from the Department for Environment, Food and Rural Affairs

Q1. *How does the transmission work in practice? Do fishermen email the data from fishing boats at sea? If so, how do you manage the risks around this?*

A1. Logbook information is transmitted via satellite to the communication hub operated by the Marine Management Organisation (MMO), reporting is done at least once a day. The technology used is reliable and, in order to provide assurance that data has been received, a receipt or acknowledgement report will be automatically generated and sent to the vessel to retain as proof of receipt. There is also a non-receipt message where the data is corrupt or does not contain all relevant information which is automatically generated and sent back to the vessel to alert them to the error. In the event of failure there are back up procedures for the information to be transmitted manually, via fax, phone or email.

Q2. *Is the policy intention for the Government to pay the full cost of the software? If so, why is Article 6(b) drafted in such a way that it would allow the Government to pay significantly less than the full cost? Are there any safeguards to protect fishermen in this regard?*

A2. No. Defra Ministers made a commitment fund the reasonable costs of the software. These have been estimated at £1500-£2000 per vessel. This will cover the full software costs of the two software systems that have already successfully passed the UK Fisheries Authorities' approval process. However if the cost of the software that fishermen choose to purchase exceeds this amount, they would have to pay the difference.

Q3. *Under Article 10 (1), the Secretary of State can revoke/withhold a grant if it "appears" that conditions have been breached or an offence has been committed. Why is the threshold set this low? Are there any safeguards to protect fishermen against unjust revocations/withdrawals?*

A3. Grant aid can be revoked or withheld by the Secretary of State if after investigating the application there is sufficient evidence to prove that vessels have provided false information or if after providing the grant aid, vessels have not met any of the conditions for eligibility e.g. to be registered and administered in England by the MMO.

Once this decision is taken, the MMO who will be administering the scheme on behalf of Defra will write to the vessel's owner explaining why this decision has been taken. Vessel owners will then be given 28 days to make representations as to this decision.

July 2010

APPENDIX 6: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 13 July 2010 Members declared the following interests on instruments reported to the House:

Statement of Changes in Immigration Rules

Baroness Butler-Sloss: trustee of the Human Trafficking Foundation.

Attendance:

The meeting was attended by B. Butler-Sloss, L. Eames, L. Goodlad , B. Hamwee, L. Hart of Chilton, L. Methuen, L. Norton of Louth and L. Scott of Foscote.