REQUEST TO BOTH HOUSES OF PARLIAMENT TO PRAY AGAINST STATEMENT OF CHANGES IN IMMIGRATION RULES, HC 1113 – POINTS-BASED SYSTEM

ILPA urges both Houses of Parliament to pray against the Statement of Changes in Immigration Rules, laid before Parliament on 4 November 2008 and due to come into force on 25 to 27 November 2008[1].

ILPA is a professional association with some 1000 members (individuals and organisations), who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-government organisations working in this field are also members. ILPA aims to promote and improve the giving of advice on immigration and asylum, through teaching, provision of resources and information. ILPA is represented on numerous government, court and tribunal stakeholder and advisory groups. ILPA representatives and members have met regularly with the UK Border Agency throughout the development of the Points-Based System and have provided representations and evidence about the scheme, including to the Home Affairs Committee[2].

Why pray against the Statement of Changes in Immigration Rules?

- A prayer will provide Parliament with an opportunity to scrutinise the changes. To date, the whole question of the licensing of sponsors under the Points-Based System has been a matter developed through UK Border Agency policy and guidance. It has all been below the waterline of formal recognition in law. This is the first time that Parliament has the opportunity to challenge the scheme.

- A prayer can make a difference. Earlier this year, both Houses of Parliament prayed against the Statement of Changes in immigration rules, HC 321, which introduced re-entry bans. In the debate in the House of Lords, the Minister announced a concession[3]. In the debate in the House of Commons[4] further very substantial changes were announced, and subsequently incorporated into the immigration rules. Parliament contended that the rules as drafted were unworkable and unfair, and the government came to accept this view.

- The most controversial aspect of the Points-Based System, the licensing of

[1] See www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges/2008/hc1113.pdf?view=Binary
[2] See the Submissions and Briefings sections of www.ilpa.org.uk for examples
[3] *Hansard* HL Report, 17 March 2008 : Col 88ff, seewww.publications.parliament.uk/pa/ld200708/ldhansrd/text/80317-0013.htm#0803183000002
[4] *Hansard,* HC Report 13 May 2008 : Col 1336, seewww.publications.parliament.uk/pa/cm200708/cmhansrd/cm080513/debtext/80513-0025.htm#08051470000001

sponsors, has not commanded public confidence. As of 16 October 2008, only 745 sponsors were registered on the scheme[5], which is open for registration for Tier 2 (employers) Tier 4 (students) and Tier 5 (Temporary Workers and Youth mobility), compared to the many thousands who use the work permit scheme that it is to replace. Employers and others are being asked (unpaid) to do the work of immigration officers in checking the details of their potential employees or students. They do not want the job. This seems sensible: there are risks of error; in the hands of the unscrupulous there are risks of fraud and exploitation. Instead of the current system whereby a UK government official decides, in advance, who can come to the UK and who cannot, sponsors will take this decision and only find out whether they got it right when/if they are audited, months down the line. If they did not, they face fines[6] and removal from the register, with the consequence that anyone else they sponsored - employees, students and others such as entertainers and sportspeople, not limited to the person in whose case the error was made - may have to stop working, studying or performing and leave the UK.

- The scheme has been developed in considerable haste (as evidenced by the corrigendum to the Statement of Changes, issued the very day it was published[7]), with insufficient guidance. Many elements remain unclear. Employers, including those who have registered as sponsors, lack clarity about the full extent of their obligations under the scheme and about the mechanics of operating it in practice. They are asked to grapple with an immensely bureaucratic scheme (a 35-page, 58-question application form, accompanied by 130 pages of guidance on completing the form[8], plus reams of additional, essential, guidance[9]) for the convenience of the UK Border Agency. Experience of the Points-Based System to date (i.e. of Highly Skilled Migrants under Tier 1) reveals very prescriptive methods of evidencing that one meets the requirements, so that people can be tripped up because, for example, they have online bank accounts and only print-outs of bank statements. It raises revenue for the UK Border Agency but it does not provide a good service for applicants or their sponsors.

- The visitor rules in the Statement of Changes have divided the visitor category into General Visitors, Business Visitors, Sports Visitors, Entertainer visitors, Special visitors (which, confusingly, includes the existing and known categories of child visitors and student visitors). This is the very opposite of the 'simplification' that is the government's stated intention and claimed achievement[10]. The rules do not yet include the further complications of sponsorship for 'family visitors' which the government plans to introduce in early 2009.The risks of applying in

[5] See www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pointsbased system/pbsregisterofsponsors

[6] Under the employer sanctions scheme introduced by the Immigration and Asylum Act 2006, in force from 29 February 2008.

[7] See www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/statementsofchanges /2008/correctionshc1113.pdf?view=Binary

[8] See www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pbsguidance/sponsorapplicationsguidance.pdf?view=Binary

[9] See http://www.ukba.homeoffice.gov.uk/employers/ gives some indication of the difficulties.

[10] *Hansard* HC Report 4 November 2008: Col 21WS (Phil Woolas MP, Minister of State); *Hansard* HL Report 4 Nov 2008: Col WS16 (The Lord West)

the wrong category, with resultant delays, or even punishments such as re-entry bans for an innocent mistake, loom large. For example a General Visitor cannot have private medical treatment in the UK. It is possible to apply as a Special Visitor to come to the UK for private medical treatment, but what happens if a person who has come as a tourist or to visit family members falls ill and wants to pay for private treatment?

- Among the immigration routes lost as Tier 5 is introduced, is that of the Working Holidaymaker, along with the Japan Youth Exchange Scheme and British Universities North America Club (BUNAC). These schemes allowed young people to come to the UK to work and to experience living here. The Working Holidaymaker scheme provided these opportunities for young people from Commonwealth countries and thus strengthened ties between the countries that make up the Commonwealth It is replaced by a youth mobility scheme that covers only four countries: Australia, Canada, Japan and New Zealand.

- Where concerns have been raised, many have received no response. For example, employers have repeatedly expressed concerns about the abolition of the Training and Work Experience (TWES) scheme and the Student Internships scheme because this will affect their training and recruitment practices. These issues have not been addressed. The new scheme does not appear to meet concerns voiced by businesses as to how it will handle the bringing of a contractor's staff to do very specific work (e.g. on IT systems or high-technology equipment) in the UK, for which provision is currently made.

- In the rush to get the system up and running, UK Border Agency staff have stopped carrying out audits on employers before registering them as sponsors. Given that sponsors will be able to issue Certificates of Sponsorship that will stand in the place of the current work permits, the potential for fraud is large. In 2001, for six months, the Home Office piloted a scheme whereby selected employers could issue their own work permits. It was closed down very soon because of concerns about fraud.

- There is no indication that the current immense bureaucracy will target those employers who do not play by the rules. The most extreme examples of such employers are those involved in human trafficking and the exploitation of migrant workers, including the use of bonded labour[11], thus undercutting employers who respect their obligations under health and safety law, company law and employment law, whether they employ migrant workers or those from the resident labour market. The UK Points-Based System is often described as 'Australian-Style'. Australia's Employer Nomination Scheme, which concerns the sponsorship of those coming to reside permanently in Australia, provides that, to gain approval to sponsor a skilled worker from overseas, the employer must demonstrate (among other things) that it is an "employer of good standing", which includes a record of compliance with both immigration and workplace

[11] See *Hard Work Hidden Lives* The Report of the TUC Commission on Vulnerable Workers, TUC 2008. On human trafficking see the Joint Committee on Human Rights Twenty-Sixth report of session 2005-1006, *Human Trafficking,* HL 245/HC 1127, 9 October 2006 and the Committee's *Human Trafficking; Update* HL 179/HC 1056, 21st report of session 2006-2007, 18 October 2007. See the Submissions page of www.ilpa.org.uk for examples of ILPA's extensive work on human trafficking.

relations. Under the Australian Regional Sponsored Migration Scheme (which allows employers in regional areas to sponsor skilled workers where no labour is available locally), the employer must demonstrate (among other things) a record of compliance with workplace relations laws. By contrast, the UK Border Agency scheme does not ensure that workers' rights are respected but rather raises revenue from employers who take all these obligations seriously but might sometimes make an innocent mistake in understanding their obligations or in collating or retaining the evidence of compliance.

- The scheme disadvantages migrants from non-OECD countries, whose currencies perform poorly against sterling and those from less-developed countries where the costs of living and salaries are lower. A 'maintenance' requirement is imposed; a requirement for the potential worker to show funds in his or her bank account for three months before coming to the UK, never dropping a penny below that sum. In the case of Tier 2, replacing most of the present work permit system, this is despite the person's coming to take up specific, paid employment with a known salary and being given leave subject to a 'no recourse to public funds' condition. The maintenance requirement adds nothing to these safeguards, but skews the group from whom UK employers can recruit toward particular nationalities, based on the economy of the home country. While the rules indicate that the employer can provide an undertaking in respect of the £800 which a principal applicant under Tier 2 must show, the applicant him or herself must find the £533 for each dependant. Applying the Home Office's own measure of relative income values worldwide, a person with a partner and two children from Malawi, Nepal, Nigeria, Ghana or Uganda (for example), even if their employer gave an undertaking for their own maintenance, would still need to have the equivalent of over £18,000 in their bank account for three months. If the employer does not give an undertaking, they need the equivalent of over £27,000 for the same period. It seems likely that this will either exclude people, or force them to turn to loan sharks, or others who will exploit them.

What could be the results of a prayer?

- The government could agree, or be forced, to take back the scheme and do further work on its development, rather than proceeding in haste.
- The government could agree, or be forced, to address outstanding concerns and modify or scrap the scheme. This action might include:
    - Reviewing the proposed scheme and focusing its regulatory efforts on those employers who breach health and safety and labour law and exploit their workforce, including their migrant workforce
    - Reviewing the maintenance requirement to ensure that it does not prevent people from non-OECD countries coming to the UK to work or study and thus discriminate against them
    - Making provision for student interns and trainees, as well as specialist contractors, in the scheme
    - Providing clarity to sponsors on their obligations before the scheme starts to operate
    - Reducing the bureaucracy and plethora of confusing guidance with which sponsors have to grapple

ILPA, 5 November 2008