

## **MERITS COMMITTEE'S CALL FOR EVIDENCE – HC 59 STATEMENT OF CHANGES IN THE IMMIGRATION RULES RESPONSE OF THE IMMIGRATION LAW PRACTITIONERS' ASSOCIATION**

### **Introduction**

1. 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**

2. 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
3. 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)
4. 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)
5. 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)*

6. 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?**

7. 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).
8. 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.
9. 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.
10. 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.
11. 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.
12. Restricting Tier I (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 I (General) applicants accurate?**

13. The Government has not issued any statistics in relation to the basis of its estimate of the volume of Tier I (General) applicants who may be deterred.
14. 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?**

15. ILPA has submitted substantial information to the UK Border Agency and others setting out why, in ILPA's opinion, Tier I 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](http://www.ilpa.org.uk/submissions/menu.html) and set out at Annexe I. 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?**

16. Small firms are often more reliant on Tier I (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 I (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 I (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 I (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 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.

17. As set out in Cm 6741, Tier I (General) is designed to attract individuals who will contribute to growth and productivity and who will assist in upskilling resident workers. Restricting Tier I (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?**

18. Yes. As noted above, the education sector is one that makes particular use of Tier I (General) but fewer applicants in this sector will qualify under the new criteria.
19. There is also the question of dependent children of Tier I (General) migrants who would otherwise have attended private schools and universities in the UK contributing much needed fee income to those institutions.
20. In addition, the Tier I (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?**

21. 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?**

22. 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**

23. 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 I (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.

Sophie Barrett-Brown  
Chair, ILPA  
6 July 2010

## ANNEXE I

### ILPA'S RESPONSE TO THE EQUALITY IMPACT ASSESSMENT: POINTS BASED SYSTEM HIGHLY SKILLED TIER

[Introduction omitted]

#### **I. 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 I. In particular, the Statement of Intent for Tier I 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 I. 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 revealed<sup>1</sup>. 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’<sup>2</sup>, 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 I 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

<sup>1</sup> 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/>

<sup>2</sup> *A Points-based system: making migration work for Britain* CM 6741, paragraph 43

women with a million pounds, are women disadvantaged by comparison with men (or vice 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.

## **2. What opportunities, and what challenges, does this policy offer?**

As a Points Based system, Tier 1 aims to reduce subjectivity. ILPA has previously contended<sup>3</sup> that this goal may prove illusive: 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 where nationals

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<sup>3</sup> See for example our briefings in the Immigration Asylum and Nationality Bill, on the briefings section of [www.ilpa.org.uk](http://www.ilpa.org.uk) and our submissions on the submissions part of that website.

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

**3. 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:

- I. 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 market<sup>4</sup>. 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 I, 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 I of majority English speaking countries<sup>5</sup> 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 I 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

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<sup>4</sup> 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*.

<sup>5</sup> *Highly Skilled Migrants Under the Points Based System Statement of Intent* Annexe B note 6



application may be submitted. This therefore raises issues of indirect race discrimination.

2. The age criterion.(Tier I – 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 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 role<sup>6</sup>). 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 I 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 I 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.’<sup>7</sup>*

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 children<sup>8</sup> 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.

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<sup>6</sup> 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>

<sup>7</sup> See [http://www.unicef.org/progressforchildren/2007n6/index\\_41845.htm](http://www.unicef.org/progressforchildren/2007n6/index_41845.htm)

<sup>8</sup> *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](http://www.ilpa.org.uk)

3. Requirement for a degree (Tier I – general) – It is impossible to score the numbers of points required for Tier I without holding a degree. The notion that a degree level qualification is required for Tier I 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, 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 necessarily 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 I.

4. Women (Tier I - 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 men<sup>9</sup>. 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 men<sup>10</sup>. 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 I. 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 2006<sup>11</sup>. The impression is that the 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

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<sup>9</sup> See the International Labour Organisation's Annual *Global Employment Trends for Women* at [www.ilo.org](http://www.ilo.org)

<sup>10</sup> Women and Work Commission's *Shaping a Fairer Future* [http://www.womenandequalityunit.gov.uk/publications/wwc\\_shaping\\_fairer\\_future06.pdf](http://www.womenandequalityunit.gov.uk/publications/wwc_shaping_fairer_future06.pdf)

<sup>11</sup> 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).

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.

5. Part-time workers (Tier I - 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.
6. Areas of expertise (Tier I – general) – In the UK it has been reported that women are more likely to enter poorly paid professions than men<sup>12</sup>. 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 I 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 I, such compensation is not possible.
7. 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 I 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.
8. 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 I is that of the question of the falsity or genuine nature of documents. The scope for

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<sup>12</sup>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](http://ec.europa.eu/employment_social/news/2007/jul/genderpaygap_en.pdf)

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 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 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.

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

1. 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.
2. Those over 31 years old (Tier I – 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.
3. Requirement for a degree (Tier I – 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 necessarily expect the lower earnings arising from being newly qualified to have been eradicated by the age of 31.
4. Women (Tier I - 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.

5. Part-time workers (Tier I - 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).
6. 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.
7. 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 accrue points that would contribute toward offsetting the ways in which the system appears to be biased against them.
8. Areas of expertise (Tier I – general)  
See point 4 (above).
9. 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
9. 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).

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Chair  
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