



ILPA comments on the Equality Assessment for Tier 4 (Students)

Introduction...1
Background...2
Does this Policy put in place any barriers to full participation from members of the community or communities you represent? ...2
A) Direct Discrimination...2
On the Grounds of Nationality ...2
On the Grounds of Age...3
On the Grounds of Gender ...4
On the Grounds of Disability...4
B) Indirect Discrimination ...4
On the grounds of Onerous Burdens placed on Educational Establishments ...4
What opportunities, and what challenges, does this Policy offer? ...5
Will these policies have a disproportionate impact, positive or negative, on any particular groups or communities? ...6
If you have identified any disproportionate impacts, what changes could we make to these policies to mitigate them? ...8

Introduction

This document outlines the issues raised by the Government's Equality Impact Assessment in advance of the introduction of Tier 4 of the Points Based System.

ILPA is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

The submissions made below are from real first-hand experience of members. The points made here are further expanded below. Some points may be repeated for clarity.

The Equality Impact Assessment is published in advance of any guidance or even a 'Statement of Intent' being published on Tier 4. While ILPA appreciates all efforts to collect the information necessary for an impact assessment at the earliest possible stage, it must be the case that all our comments are provisional until the details of the scheme are known.

## Background

The Home Office's press release on 24 July 2007 concerning the introduction of the Points Based System ("PBS") expresses the reasons for changing the present system. These reasons can be summarised as follows:

- welcoming the many international students who come to study in the UK each year;
- to crack down on bogus colleges, schools and those students who abuse the system by wanting to come to the UK for work;
- to bring in a system that is simpler, clearer and easier to enforce;
- to bring in the best way of letting in only those people who have something to offer Britain;

The Home Office propose to do this by introducing points-based criteria<sup>1</sup> and imposing further duties on institutions in order to be authorised to take on international students.

By way of context, there are approximately 1.5 million students in full time higher education in the United Kingdom. Of these, approximately 240,000 are from non-EU countries<sup>2</sup>. Of these 240,000, some 80% of students come from countries whose principal language is not English.

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

Yes, many members of the communities that we represent will encounter significant barriers. In particular, the introduction of Tier 4 raises the issues of:

### A) *Direct Discrimination*

#### On the Grounds of Nationality

- i) Of the top 10 countries highlighted by HESA in their 2006/7 research, it must be noted that 8 are countries where the principal language is not English. The Home Office's requirement that students should be able to demonstrate that they are proficient in English amounts to direct discrimination against students from non-English speaking countries by placing significant barriers of entry in their path compared to their English speaking counterparts, who are likely to score more points under the Policy.

There are 193 member nations of the United Nations. The British Council currently provides English teaching facilities to only 47 of them<sup>3</sup>. There are many students from countries where there is little or no facility for them to learn English before they come to the United Kingdom. This is why the British Council actively promotes English language courses offered by UK educational establishments.

The English requirement would effectively marginalise students from non-English speaking countries. This does not accord with Sedley LJ's statement in *GO & Ors* [2008] EWCA Civ 747:

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<sup>1</sup> Home Office - PBS: Making Migration Work for Britain 2006

<sup>2</sup> HESA Press release 120 HESA Students in Higher Education Institutions 2006/07 reveals increase in number of Eastern European students studying in the UK

<sup>3</sup> British Council website at: [www.britishcouncil.org](http://www.britishcouncil.org)

“...Before we turn in detail to our reasons, it is relevant to recall that the admission of foreign nationals to study here is not an act of grace...Not only does it help to maintain English as the world's principal language of commerce, law and science; it furnishes a source of revenue... We therefore find it unsurprising that the legislation and rules, correctly construed, do not place arbitrary or unnecessary restrictions on what foreign students can study here.<sup>4</sup>

- ii) The imposition of a maintenance requirement serves only to directly discriminate against students who are from poorer countries by demanding that they can demonstrate a disproportionately large percentage of their incomes in order to come to the UK to study.

This is particularly highlighted by the fact that the maximum maintenance funds available by the government to locally domiciled students is £6,475.00, which equates to £539.00 a month<sup>5</sup>. By contrast, under these Home Office proposals international students are required to show £800 per month, and for Tier 1 (as a comparison), in-country applicants are also expected to maintain £800 (£2,400 for out-of-country applicants) for the privilege of studying here.<sup>6</sup> This requirement seems to have no basis in fact as recent studies show that expenditures between UK students and International Students are not significantly different as can be seen below:

	Home Students (£):	International Students (£):
<b>Essential Items:</b>		
Housing:	79* / 66**	70.42
Food:	26* / 29**	27.98
Travel & Transport:	14	14
Toiletries:	6	6
Other Weekly Expenses:	10	10
Course Related Expenses:	12	12
<b>SUB TOTAL:</b>	<b>147* / 137**</b>	<b>140.40</b>
<b>Non-Essential Items:</b>		
Mobile Phone:	7	7
Clothes:	8	8
Music:	2	2
Film/Movies:	2	2
Going Out:	30	20.17
Internet Access:	2	2
<b>SUB TOTAL:</b>	<b>51</b>	<b>51</b>
<b>TOTAL:</b>	<b>198* / 188**</b>	<b>181.57</b>
* students in university halls		
** students in private rented accommodation		

Tab 1: Table of International and UK Student weekly expenditures<sup>7</sup>

It can be seen from the above that far from requiring more money than domestic students, International students actually spend less. Particularly given the high fees international students have to pay, it has to be questioned why a high maintenance requirement is required. Indeed the requirement seems to be just another barrier to overcome. Without a rational explanation, the maintenance requirement appears to be arbitrary and directly discriminatory.

### On the Grounds of Age

Age should not be a factor for students to come to study in the UK, since persons of any age should be allowed to pursue an education if they so wish. Favourable treatment on age (on the assumption that more points are awarded the younger a

<sup>4</sup> para 4, GO & Ors [2008] EWCA Civ 747

<sup>5</sup> taken from the maximum student loan (maintenance and accommodation) at [http://direct.gov.uk/en/EducationAndLearning/UniversityAndHigherEducation/StudentFinance/FinanceForNewStudents/DG\\_069896](http://direct.gov.uk/en/EducationAndLearning/UniversityAndHigherEducation/StudentFinance/FinanceForNewStudents/DG_069896)

<sup>6</sup> Page 10, Home Office Tier 1(General) Policy Guidance

<sup>7</sup> Phil Vickers and Bahram Bekhradnia, The Economic Costs and Benefits of International Students, HEPI (2007)

student is<sup>8</sup>) clearly prejudices those students from poorer countries who will have to save more for longer in order to come to the United Kingdom to study. It should not be the case then that these students are then further penalised because they are older. 'ILPA urges the UKBA to confirm that there will be no age weighting for students'.

Additionally, the Policy as drafted appears to favour the traditional route of progressing from primary, directly to secondary, then directly onto higher education then professional job. The Policy therefore does not fully consider the needs of the mature student and furthermore may act as a significant barrier.

#### **On the Grounds of Gender**

In addition to discriminating by nationality, women are statistically also less likely to have the resources to meet the proposed maintenance requirement, which leads to gender discrimination. Indeed recent research suggests that there is a global disparity of 16% between the earnings of men and women.<sup>9</sup>

#### **On the Grounds of Disability**

The Policy imposes on the institution the obligation to ensure that a student makes satisfactory progress in order to satisfy immigration requirements. This obligation imposes an unconscionable restraint on the institution's responsibility and discretion with respect to students with disabilities and/or special needs. In doing so, the Policy creates a conflict between the institution's obligation to treat such students in a non-discriminatory manner and the obligation to apply the immigration rules strictly.

### ***B) Indirect Discrimination***

#### **On the grounds of Onerous Burdens placed on Educational Establishments**

##### ***i) Burden on Admissions***

The Policy of requiring the Institution to ensure that overseas students that it takes on are able to undertake the course of study is onerous and will have a negative impact on students from a more academically challenged background.

Whereas presently, an institution may look at the overall performance of the potential student in determining whether to accept a student on a course, taking into account character, attitude, aptitude and host of other indicators, the Policy now in fact requires the Institution to 'guarantee' the student will successfully complete the course.

This will inevitably result in institutions picking students less on their potential to succeed, but more on whether the student is likely to comply with the Policy. This is a task for which educational institutions are neither equipped for nor should be required to carry out.

It is fair to say that it is trite knowledge that where a person is out of his/her area of expertise, he/she will err on the side of caution. In the case of admissions tutors, the Policy is likely to prejudice and exclude those students that will and should benefit from a UK education.

##### ***ii) Burden on Accreditation***

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<sup>8</sup> This already appears to be the case in the Home Office guidance for the Tier 1 of the Points Based System

<sup>9</sup> ITUC (International Trades Union Confederation) Report The Global Gender Pay Gap (2008)

The new Tier 4 accreditation system particularly targets private colleges which in general are English language schools. Individual accreditation is costly and time consuming. This is likely to deter smaller/niche educational providers from continuing in business. Furthermore, the deterrent effect serves to diminish the choice available to students.

It is suggested that applications for accreditation cannot begin until 28 July 2008, which will undoubtedly create chaos as the high number of colleges simultaneously apply for accreditation.<sup>10</sup> Without accreditation and achieving sponsor status, Certificates of Acceptance cannot be issued in time, which in turn will lead to non-issuance of visas. This is discriminating against students that hope to study at these private colleges and particularly against those students that come from countries where visas take longer to process such as Pakistan, Kenya, India, since without a COA number they cannot apply for a visa.

### **On dependants of Students**

The Policy does not allow adult dependants of students to study. This is perverse. For example the fiancé of a student would not be allowed to study.

### **What opportunities, and what challenges, does this Policy offer?**

The implementation of the Policy at least gives the opportunity for the educational establishment to have the final say on the suitability of a prospective student, and their progress. This is a positive consequence of the Policy as presently, this decision is taken by poorly trained officers who are patently unqualified to pass judgement on what is and what is not satisfactory progress and who is or is not a suitable student. This has led to many unlawful decisions that have been subsequently overturned on appeal.

**Case Study:** An applicant was refused an extension of student leave based on the grounds that he had failed to show satisfactory progress because he failed to take his examinations. In the making of this decision, the Home Office caseworker failed to consider that the applicant had been in the United Kingdom for a considerable period of time diligently applying himself to his studies and gaining high marks in the process. However, he had fallen ill and had to undergo pioneer open heart surgery which necessitated a long convalescence which was with the university's full support.

Under the new Policy, it appears that the institution would be in the position to make the decision of what is satisfactory progress.

However, there are many challenges that the Policy must overcome. It is not clear how the Policy expects institutions to marry their responsibilities to their students with their new responsibilities imposed upon them by the Policy, acting as both mentor and immigration officer at the same time.

The Policy reveals the government's general distrust of overseas students which has the general effect of discouraging students. This in turn, calls into question the ability of the UK to maintain its pre-eminent position in the International community. As Sedley LJ said in *Goo & Ors*, foreign students studying in the UK help to maintain the status of English as the *lingua*

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<sup>10</sup> according to para36, Home Office RIA on Accreditation of Private Educational Institutions involved in recruiting students under the points based system: tier 4, there are 14,918 institutions that require entry to the register of sponsors

*franca* of the worlds of international commerce, law and science<sup>11</sup>. With such a restrictive Policy in place (preferring students who already know English over those who do not), it is likely that in time, English will be replaced with another language because fewer students will be able to study English. In time, fewer students will be inclined to do so. Quite how the Policy will ensure that English retains the prestige and reputation it currently enjoys is not explained by the Home Office.

Related to the above point is how the Policy expects to maintain the attractiveness of UK educational establishment in the international educational market. Deprived of free choice and having to meet additional requirements, it is likely that students will simply choose other countries to study in.

Moreover, the imposition of additional and onerous burdens on the institutions serves only to distract the institution from its primary purpose which is to educate those who attend it. This distraction will only serve to negatively impact on the standard of teaching in institutions.

The Policy also raises the question of how it reconciles itself with its stated objectives of retaining only those who benefit Britain. The Policy does not appear to recognise that there are students who are poor yet gifted who could be of benefit to Britain, luminaries such as Subrahmanyan Chandrasekar (Nobel Prize Winner), who was from a relatively modest background and was able to study in the UK in the 1930s, would be denied the opportunity to study in the UK under the Policy today.

The Government's emphasis is on targeting bogus institutions and overseas students who abuse the system to come to the UK to work. However, it is apparent from the Policy that the underlying assumption is that all student applications are false and there is always a hidden agenda of coming to the UK for work rather than study.

However, it has to be noted and recognised that students working in the UK is not a bad thing. For foreign students, it provides a deeper understanding of the fabric of UK society, work ethics and of course the income students make goes towards their own support and also provides taxation revenue. The current Rules in allowing students to work part-time and full-time during vacations recognise that there are cultural, educational and fiscal benefits. This is further reinforced by the existence of other Rules, such as for Working Holidaymakers which also recognise the same cultural and fiscal benefits to the UK and to the applicants.

The Policy pays mere lip service to the vital benefits that overseas students bring to the UK and fails spectacularly to consider ways to assist and encourage overseas students to choose the UK over other countries that are also well known for their education systems.

In order to be firm but fair, the Policy needs to effectively address the root cause of the abuse of the educational system. Instead of penalising the student, it should focus on ensuring that educational institutions meet the required standards. Only then can it effectively meet the challenges above raised by the Policy in its present form.

### **Will these policies have a disproportionate impact, positive or negative, on any particular groups or communities?**

Yes, there are negative impacts as the Government has failed on this front before when visa application fees were dramatically increased a few years back and that led to strong protest and a big drop in Student applications. It is submitted that the Policy will have the following disproportionate effects:

- a. Evidentially, majority of the overseas students are from non English speaking countries and most are from economically less well off countries. The Government fails to appreciate the financial sacrifices that many

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<sup>11</sup> Op cit.

overseas students have to make in order to study in the UK. It is often the case that it is the less well off and perhaps also less academic families that have the aspiration to better enable their children to get out of the poverty trap. To achieve this, these families save and scrimp to send their children for an education in the UK. The Policy does nothing to recognise those genuine overseas students that have real potential but may find it difficult to meet the maintenance requirement or from a poor educational background.

- b. The Policy requires the institution to ensure overseas students comply with Immigration Rules, including leaving the UK if the course chosen is not taken up or for whatever reason, turns out to be unsuitable or not as expected. The overseas student would have paid the fees and spent a great deal of money coming to the UK. In wanting to simply change institution, it is understandable that students do not see the need to have to return to their country of origin only to come back. This situation may happen for a range of genuine reasons and will create a real underlying tension between the institution and the student and this will detract from the Institution concentrating on providing the best education for the individual student.
- c. There is also a genuine concern from potential students that their choice of institutions will be severely restricted by the Policy indirectly. It is common for students to seek out a number of institutions before deciding which one to go to. It is feared that in order to get a certificate of acceptance to apply for a visa, the student is forced into committing to one that they believe to be the best at the time of the decision and because the obligations imposed by the Policy, the institution issuing the certificate quite understandably will require a firm commitment from the overseas student. It is common that a student will have a number of unconditional offers without making a final commitment at the time of applying. The different institutions also understand that the student may have a number of offers and ultimately the student has the final choice, which must be right. The Policy will directly affect this process of choice when one of the major concerns will be that the Institution may not want to issue certificates until the student is firmly committed especially considering that an institution will only have a finite number of certificates to issue in the first place. Any subsequent cancellation will result in the loss of the number of certificates which could be issued to students and therefore result in increased financial cost to the institution.
- d. The Government may argue that the current Immigration Rules already commits an overseas student to a chosen course. Thankfully, the Court of Appeal decision of *GO & Others*<sup>12</sup> made explicit the benefits of overseas students choosing to study in the UK and that these students are allowed to choose and change courses. Even more importantly the Court of Appeal recognises that there are genuine reasons why a student may not be able to complete the course or pass an exam on time, and that it does not result in non-compliance of the rules. The rules must be interpreted purposively. This exercise of judgement and perhaps discretion currently falls on the Secretary of State. The new Policy places this burden on the Institution which is not in the best interest of the student and creates a conflict between the Home Office and the Institutions and between the Institutions and the students.
- e. The Policy positively encourages elitism and indirectly contributes to the brain drain of overseas countries by picking only the best students from those countries and encouraging them to stay after their studies.
- f. In addition there are no arrangements for vocational training within the Policy. Not all students aim to go down the academic qualification route. Many may wish to pursue training that will lead to industry recognised

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<sup>12</sup> Op cit.

qualifications but not in the traditional sense, for example hairdressing at an internationally renowned salon school or fashion design. Such vocational training is usually aimed at older 'students', who may have a certain level of experience in their chosen career, however the PBS Policy will discriminate against them in terms of age and path of study.

**If you have identified any disproportionate impacts, what changes could we make to these policies to mitigate them?**

- The Policy should positively encourage students to come to the United Kingdom;
- Allow institutions to determine questions of the Policy requirements that are of an educational nature, such as 'satisfactory progress' and suitability of students;
- Remove the obligations of the institution to police and enforce the Policy;
- The Policy should not penalise students whilst addressing the root cause of the abuse of the education system. The current registration system could be reinforced with the additional £100m earmarked for enforcing colleges meet specified requirements. This should yield better results than introducing a points-based system which is arbitrary and unnecessary;
- Remove any discrimination on age;
- Remove any English requirement;
- Remove the amount of the maintenance requirement; and
- Allow all adult dependants the automatic right to study.

**REFERENCES**

**Cases**

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