ILPA response to consultation on *Path to Citizenship* Green Paper

INTRODUCTION

1. 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.

2. This response is provided to *The path to citizenship: next steps in reforming the immigration system* Green Paper published in February 2008. We have chosen not to use the pro-forma questionnaire because it and the tick boxes provided are generally unsuitable to provide satisfactory responses to the proposals in the Green Paper. However, this response is structured so as to address each of the consultation questions. Our response is divided into sections, which relate to specific chapters of the Green Paper and allow for some introductory comment on each chapter. Responses to the consultation questions in the pro-forma are set out under discrete subheadings within the relevant chapter's section, and in the order in which the questions appear in the pro-forma; and we have indicated a tick box response in relation to each.

3. Some initial and fundamental observations are highlighted in this introduction.

4. The Green Paper is concerned with only a limited aspect of citizenship – the process of naturalisation. There are several further fundamental areas of concern regarding UK nationality law, which are in need of attention.

We have addressed these wider concerns in our submissions to the recent review conducted by Lord Goldsmith QC[1].

5. The Green Paper falls far short of a clear account of the current position regarding migration to the UK. It is, therefore, necessary to draw distinctions that are fundamental to the proposals and the discussion in this response. Two distinctions need to be understood by anyone considering the proposals in the Green Paper.

- It is necessary to distinguish between migrants whose long-term future is in the UK and migrants who have no intention of or route to such a long-term future here. The proposals in the Green Paper and the discussion in this response concern the former only. However, much migration to the UK is by people whose intention is to stay for limited periods of time, or for whom our immigration laws provide no route to a long-term future here.
- It is necessary to distinguish migration by EEA nationals (and their families) and migration by non-EEA nationals. Much migration to the UK is by EEA nationals. The proposals in the Green Paper do not affect this group.

6. The Green Paper is deficient in relation to these distinctions. It makes assertions about the impact of migration without any attempt to analyse the extent to which any such impact is contributed by those migrants for whom it makes proposals or by those migrants for whom it does not. It also purports to draw conclusions from nine public listening sessions, but gives no indication that any analysis of these distinctions was given at these sessions. It provides 14 quotations from participants, without any analysis of how what was said relates to such distinctions.

7. ILPA understands from the Green Paper, and indeed from other Government announcements and publications, that key objectives

[1] The Lord Goldsmith QC citizenship review is referred to elsewhere in this response – e.g. see fn. 4. Our December 2007 submissions to this review are available in the Submissions section at www.ilpa.org.uk

underlying the proposals are to achieve laws and legal processes that are simpler to understand and manage and to encourage greater integration into UK society by migrants whose long-term future is to be in this country. Measured against these objectives, the proposals on citizenship are not fit for purpose. Further explanation of why that is so is provided below in response to the particular questions that have been posed; but in brief we note here:

- The proposals add complexity by introducing a new and unfamiliar stage into the route to citizenship.
- This is aggravated by that new stage being of uncertain duration; and its introduction of unfamiliar and unworkable requirements for progression to citizenship.
- Such complexity would significantly increase barriers to integration.
- For those who are unable or unwilling to become British citizens, the proposals increase barriers to integration considerably further.
- By compelling migrants to take citizenship and making permanent residence more difficult to obtain than citizenship, the proposals fundamentally devalue citizenship.
- The extended, and in some cases greatly prolonged, periods during which migrants would be excluded from various public services would increase barriers to integration.

8. Chapter 7 of the Green Paper is not concerned with citizenship; but rather the general simplification project, which the then Border and Immigration Agency launched with the publication of *Simplifying Immigration Law: an initial consultation* in June 2007. ILPA responded to that consultation[2]; and on 3 August 2007 met with two Border and Immigration Agency officials then working on the simplification project. We were given to understand that a further and fuller consultation, providing details of proposals for legislative reform, would be available by the end of that year. However, no such details have been forthcoming until the publication of this Green Paper. Although we have addressed the two consultation

[2] This response of August 2007 is available in the Submissions section on our website: www.ilpa.org.uk

questions regarding Chapter 7 below, we briefly highlight here the fundamental inadequacy of this chapter and our concerns as to its implications for the simplification project more generally:

- A number of these proposals have no proper place in the Green Paper. They are not proposals, but matters of policy on which implementation has begun or concluded.
- There is insufficient detail to make consultation on those few proposals, which are new or formally remain mere proposals, meaningful.
- Given that what is presented in the Green Paper as the second stage of the consultation on simplification is so very limited, and that the timetable for the simplification project has so fundamentally slipped, ILPA's August 2007 comments are not only still relevant but more pressing:

> "*41. At present this project and its aims are too opaque to enable further or more specific comments or suggestions. At the 3 August meeting, it was indicated that a fuller consultation will be offered towards the end of this year. Given the potential vast scope of this project, and how little detail has been given to date, it will be essential that later consultation gives the fullest opportunity for meaningful engagement on the part of stakeholders, such as ILPA, and reflection on the part of the BIA. Clarity as to what is proposed and adequate time for consultation will be essential.*
>
> "*42. In the meantime, ILPA strongly urges that the ambit - certainly of its first stages - of this project should be reconsidered and narrowed so that consolidation is achieved and the project does not topple under its own weight. Any further simplification can then build on, and benefit from, the process of that consolidation.*"

CHAPTER 3 – The Architecture of the System:

9. It is stated in the Green Paper that there are three problems with the current route to citizenship, which the proposed system is designed to address. Having considered this analysis, we find there are two fundamental errors in it:

- The problems that are identified are either false or of far less significance than is claimed.
- The proposed system does not address these perceived problems. However, the proposed system may cause these problems.

10. The first problem asserted in the Green Paper is that the current route to citizenship is complex and difficult for the public to understand. There is no evidence presented for this assertion. Chapter 2 refers to listening sessions, but even what is said about these presents no evidence that there is complexity or the public finds the current route difficult to understand. Nor is there evidence that the public would find the proposed route easier to understand; and for reasons we set out in this response (e.g. see responses to Chapter 3, Questions 1 & 2 below) the proposals are more complex.

11. We can assess the relative complexity of the current and proposed routes to citizenship by breaking down these routes into their basic constituents:
    - The current route involves (i) a period of temporary residence, (ii) followed by permanent residence and (iii) if the migrant wishes to do so, an opportunity to apply for citizenship after one year of permanent residence.
    - The proposed route involves (i) a period of temporary residence, (ii) followed by another period of temporary residence and (iii) the option of either applying for citizenship after a varying period of no less than one year or applying for permanent residence after a varying period of no less than three years.

12. The proposed route would not achieve any greater clarity than the current route. It replaces a three-stage process with an alternative three-stage process, but where the difference between the first two stages is less clear (they are both periods of temporary residence), the duration of the second stage is far less easy to predict and the outcome that is the third stage varies. Also, the second stage is inherently a more complex stage than any

of the current stages (see discussion in responses to Chapter 3, Questions 1 & 2 below).

13. If complexity is truly considered to be a problem, it is possible to make the route more straightforward:

- If migrants were entitled to apply for either citizenship or permanent residence immediately after the first stage (temporary residence in a specific category in the Immigration Rules) this would produce a two-stage process for many and thereby encourage integration. (If this approach were adopted, those that opted for permanent residence should remain entitled to apply for citizenship later.)
- Greater clarity for refugees and those in need of humanitarian protection would be achieved by a two-stage process whereby at the first stage permanent residence was granted (that is when the migrant's protection need was first recognised)[3].

14. The second problem stated in the Green Paper is that the stages themselves are unclear. The Green Paper does not give any indication that whatever perceived lack of clarity there may be is addressed by what is proposed.

15. We have outlined the basic constituents of the current and proposed routes above (see paragraph 11). We do not understand what is unclear about any of the current stages. In any event, what is proposed provides no further clarity about any stage. Indeed – for reasons outlined in response to Chapter 3, Question 2 – the proposed new second stage (probationary citizenship) is the one stage in either route that lacks clarity.

16. The third problem is said to be that there is insufficient incentive for migrants to complete the journey to citizenship. Once again, the Green paper does not present any evidence of this.

[3] With the exception of Gateway refugees, there is an additional preliminary stage that refugees and others granted humanitarian protection pass through – temporary admission while awaiting status determination. The Green Paper ignores this stage. However, it is highly relevant to the period of time these migrants may be in the UK before citizenship or permanent residence and the difficulties they experience in seeking to integrate. This is returned to in response to Chapter 4, Question 4.

17. There is a fundamental contradiction in the position advanced by the Green Paper and in the conclusions drawn by Lord Goldsmith QC in his report *Citizenship: Our Common Bond*[4]. Both advance views that citizenship is something to be prized and that becoming a citizen can contribute to a migrant's sense of integration. However, the Green Paper explicitly sets out proposals which seek to compel migrants to become citizens by making it far more difficult to attain the alternative means to achieving a settled status in the UK (permanent residence).

18. We fail to understand how compelling a migrant towards citizenship is thought capable of increasing his or her sense of integration or the value he or she places on citizenship. The current route to citizenship allows certain migrants to choose whether to seek citizenship. The significance of that choice is identified in the Nationality Instructions which refer to whether:

> "*…applicants… have genuinely thrown in their lot with this country.*"[5]

19. If citizenship is perceived as holding value, we would expect that would supply an incentive to apply. However, removing or substantially reducing the element of choice here cannot infuse citizenship with value. Indeed, it achieves the reverse; and devaluing citizenship is likely to undermine any contribution the fact of being a citizen may make towards any sense of integration; or by extension its realisation.

20. The architecture of the proposed system, therefore, fails to address the perceived problems which it is designed to meet. Moreover, the architecture described is deficient in that certain migrants whose long-term future is in the UK are not included within it. Migrants with long residence in the UK and others whose stay in the UK is founded upon

[4] This report was published shortly after the publication of the Green Paper and is available at: http://www.justice.gov.uk/reviews/citizenship.htm

[5] see paragraphs 18.1.7 and 34.1.6 of Chapters 18 and 34 respectively available at http://www.ind.homeoffice.gov.uk/policyandlaw/guidance/nationalityinstructions/nivol1/

Article 8 rights will not necessarily fit into one of the three routes[6]. It is not clear whether this is by design or neglect. If by design, we note that excluding a category of migrants whose long-term future is in the UK would not advance their integration. Nor would it advance general clarity as to the status of migrants in the UK. If by neglect, this would suggest that either the proposals in this Green Paper have not been properly thought through or that the aim of presenting something as simple has been placed above the need to accurately present these proposals.

Chapter 3, Question 1:

Are all the parts of the system set out in Chapter 3 clear and easy to understand?

Tick Box answer – No.

21. The introduction of a new and unfamiliar "*probationary citizenship*" stage would constitute an addition of complexity to the current route to citizenship; and lacks practical or philosophical clarity. The deferment of the possibility of permanent residence (currently referred to as settlement or indefinite leave to remain) until after an extended period of "*probationary citizenship*" compounds this complexity considerably because it is less clear to what outcome a migrant may be heading and less clear how long the route may take.

22. The current route to citizenship provides clarity in that the status of any migrant will be either that he or she has temporary residence[7] in the UK, has permanent residence in the UK or is a British citizen. Under these proposals, a migrant might have temporary residence, probationary citizenship, permanent residence or British citizenship. To make matters more confusing, probationary citizenship (a distinct stage under the proposals) is simply another form of temporary residence. Figure 1 in the

[6] Migrants granted discretionary leave currently have a route to citizenship; as do long residents under paragraph 276B of the Immigration Rules. Neither are addressed by the proposals in the Green Paper.

[7] The term "temporary residence" is used here as that is the term used in Chapter 3. By contrast, Chapter 7 proposes a "permission" status; and hence temporary permission might have been more apt. In any event, we note that the reason for the "permission" proposal is to achieve simplification by wrapping up different current statuses (entry clearance, leave to enter and leave to remain) under one status (permission). The proposals in Chapter 3 tend in precisely the opposite direction.

Green Paper accurately describes it as "*further temporary leave*". Probationary citizenship by its very nomenclature is apt to be misunderstood as another form of citizenship, which it is not. Moreover, for those not seeking citizenship, probationary citizenship is a stage towards permanent residence – hence the stage misstates the true position and future of certain migrants.

Chapter 3, Question 2:

Do you think the concept of 'probationary citizenship' is a good idea?

Tick Box answer – No.

23. Currently, a migrant's route to citizenship can be described as 'probationary' throughout its duration in the sense that his or her conduct during this time can be and is reviewed along the way. When a migrant enters the UK or switches his or her status while in the UK onto a route that may result in his or her acquiring British citizenship, there is no guarantee of citizenship by mere completion of the time period of the route's ordinary or envisaged duration. Nor is there any guarantee of passage from one stage to the next (e.g. from temporary residence to permanent residence). At all stages, the conduct of the migrant is something that may influence whether or not he or she progresses; and in certain circumstances a migrant's progression may be curtailed altogether even before he or she reaches the point of applying to move from one stage to the next.

24. The proposed "*probationary citizenship*" stage, therefore, introduces of itself nothing new – except a new nomenclature, the formality of a new stage and the prospect of further and varying delay to migrants' completion of the journey. It adds complexity to the overall structure because of the very fact of formally introducing a new stage. It introduces practical and philosophical confusion because it is a new stage that introduces nothing of substance. It gives the appearance – as this consultation question implies – that something of substance has been

added; and therefore is apt to mislead those who may think or expect that it must entail something of real substance.

25. As regards the nomenclature, it is distinctly unhelpful. Firstly, it is misleading in respect of those migrants who are unwilling or unable to become British citizens but who will become permanent residents. The term "*probationary citizenship*" implies that these migrants are *en route* towards citizenship. However, they are not.

26. Secondly, the use of the word "*probationary*" is unhelpful. Probation suggests that the person currently holds the position or status (in this case, citizenship) to which the probation relates, albeit for a trial period[8]. That is not, however, what is being proposed. At paragraph 78 of the Green Paper it is stated:

> "*A number of people mentioned the idea of 'provisional citizenship' – a period during which citizenship could be removed if a serious crime was committed.*"

27. This statement is made under the subheading "*put new citizens on probation*" which is stated to be a "*theme identified by the public*". The members of the public cited have a different, and more accurate, understanding of the term 'probation' than those who have authored this proposal.

Chapter 3, Question 3:

Migrants of certain nationalities may choose not to become British citizens because of restrictions on holding more than one nationality in the law of the country of origin. Do you think that a permanent residence category should be provided for persons in this situation?

Tick Box answer – The question does not admit of a tick box answer. Should a permanent residence category be retained? – Yes. Is our answer simply by reason of the needs of those who cannot hold dual nationality? – No.

[8] An alternative and even less helpful connotation of probation is linked to crime and the criminal justice system.

28. All migrants whose long-term future is in the UK ought to be able to apply for permanent residence. A permanent status is by its nature more settled and secure than temporary residence; and hence it allows a migrant the opportunity to invest in the UK. What is here meant by investment is not merely concerned with financial investment, though that may well be included. Rather it is the process of integration including general concepts such as putting down roots and specific actions such as enrolling children in schools.

29. The approach to permanent residence advanced in the Green Paper is an attempt to reduce this status to a residual category. This appears to be in the belief that compelling migrants to seek citizenship rather than permanent residence will contribute in some way to their sense or experience of integration. However, this belief lacks any coherence. By compelling migrants to seek citizenship because the alternative means to securing a settled status is made so much more difficult to attain, the proposal merely devalues citizenship (see paragraphs 17-19 above).

30. As for those migrants whose current nationality precludes dual citizenship, no justification is advanced in the Green Paper for why they should be required to make the choice between either:

- abandoning a citizenship which they may value (for one that under these proposals is robbed of value beyond its status as a form of permanent residence); or
- delaying for a further two years their opportunity to attain the settlement available to others.

Indeed for some there may be no real choice at all because abandoning their current nationality may have prohibitive consequences – e.g. restrictions on or loss of inheritance or property rights in their country of origin[9].

[9] These concerns were in part recognised by Lord Goldsmith QC in his report, paragraph 33 (*op cit*). However, as explained in this section (and paragraphs 17-19) of our response, we do not agree with his conclusions concerning permanent residence or the reasons presented as favouring these conclusions.

31. The proposal on its face discriminates on the grounds of nationality by requiring two additional years of temporary residence from these migrants before they can achieve the settlement offered to other migrants under these proposals.

32. However, the disadvantage to these migrants under these proposals is even greater because under the current route they would (like others who go on to apply for citizenship) attain permanent residence at least one year before a citizenship application can be made. Thus, the proposals delay settlement for all by at least one year, but delay settlement for this group by at least three years. Nothing in this promotes greater integration for anyone.

Chapter 3, Question 4:

Do you think the 'UK Ancestry' route should be abolished?

Tick Box answer – No.

33. This route is open to Commonwealth citizens aged 17 or over who are able to provide proof that one of their grandparents (by birth or adoption) was born in the United Kingdom and Islands and that they are able to work and intend to seek employment in the United Kingdom and can maintain and support themsevles without recourse to public funds[10]. The origins of the route are indefensible: it provided a route for 'white' Commonwealth citizens to come to the UK when, under the Immigration Act 1971, Commonweatlh citizenship no longer gave an unqualified right to enter the UK.

34. The question of the UK Ancestry route does not arise in isolation. It is necessary to look first at the importance of the Commonwealth to the UK, then at the status of Commonwealth citizen under UK nationality law and then make decisions on particular migration routes open to

[10] HC 395 as amended, Immigration Rules, paragraphs 186ff.

Commonwealth citizens. Instead, what seems to be happening, is that the Commonwealth is disappearing from our legal framework almost by accident; because no one is paying it attention and policies are being formulated without regard to the UK's place in the Commonwealth. The most recent example is the substitution of a 'working holidaymaker' scheme for which, under current rules all young citizens of the Commonwealth are eligible with a youth mobility scheme without Commonwealth links[11] as set out in the Tier 5 Statement of Intent published 6 May 2006; we understand from the Employer Task Force meeting that at the moment Japan, Canada, the USA, Australia and New Zealand are those currently expected to be eligible for the scheme. Lord Goldsmith QC in his review *Citizenship our Common Bond* proposed that the right to vote in UK elections be withdrawn from Commonwealth citizens[12] and gave no indication as to what he thought should become of the status in the future. The EEA has become a significant community of interest in immigration terms; it is not a necessary concomitant of this that all interest be withdrawn from the Commonwealth.

35. There is the prospect that a broader range of Commonwealth citizens[13] will now, and in the future, have grandparents born in the UK, even if the numbers applying under this category decrease as a result of changes to nationality law[14] and new routes for migration. This is a key reason why, despite its history, we advocate retention of the route. It does constitute some small recognition of the historical ties between the UK and the Commonwealth, ties which have been largely erased from UK immigration laws and are being erased further.

36. Those whose grandparents were born in Britain pre-1983 all have or had parents who are British by descent: British citizens who cannot pass on their citizenship to their children. Many are astonished to be told by

[11] Tier 5 Statement of Intent, UK Border Agency 6 May 2008
[12] *Op. cit.* paragraph 17.
[13] See British Nationality Act 1981, as amended, section 37. and see Lord Goldsmith's Review *Citizenship our Common Bond* e.g. Chapter 3; chapter 4 paragraph 14 for a discussion of the rights and entitlements of Commonwealth citizens under UK law.
[14] Eg the changes made in Part 1 of the Nationality, Immigration and Asylum Act 2002

immigration lawyers that they have no entitlement to British citizenship. Many feel a strong link to the UK, often one fostered by their parents and by the historical and present-day links between Commonwealth nations and the UK. They are, by the definition of the category, likely to have extended family in the UK. The Home Secretary speaks in her preface of changes 'to reinforce our shared values'. The language of 'community cohesion' is being used across different parts of government. They are congruent with ensuring that the immigration of those who feel strong ties to the UK even before arrival should be promoted and reducing the status of Commonwealth citizen to a cipher.

37. We propose that the route is not abandoned; and rather further consideration is given to expanding this route in a way that reaffirms the UK's Commonwealth links, avoids and makes some recompense for this route's historical bias. It would in particular be helpful to revisit the changes effected by HC 1112 on 25 October 2004[15] which prohibited in-country switching into this category[16].

Chapter 3, Question 5:

Do you think the 'Retired Persons of Independent Means' route should be abolished?

Tick Box answer – No.

38. We see no justification for the abolition of this route, which by its requirements relates to individuals with a close connection to the UK and with the means of integrating and intention to integrate.

[15] Statement of Changes in immigration rules HC 1112, amending paragraph 189 of HC 395.

[16] See *JCWI Immigration, Nationality and Refugee Law Hand*book 2006 edition at p462 "*It is extremely unclear why the government should have wanted to tighten its switching rules to the extent of catching straightforward applications in this category, where a person's entitlements are based on their nationality and heritage*".

CHAPTER 4 – Earning the Right to Stay

39. This chapter commences by repeating at paragraph 134 the unsubstantiated and false assertion that:

> "*At present the way migrants progress through the system is too complicated. This makes it hard to explain who is here and why, fuelling misconceptions that the UK is a soft touch, even though the reality is different.*"

As explained earlier in our response, what is proposed in the Green Paper is more complex than the current route. The Green Paper fails, however, to tackle the identified misconception directly.

40. The summary of requirements under the proposed route to citizenship, which are set out at paragraph 134, give the false impression that it is necessary to reform the current route in order to include these requirements. With the exception of the active citizenship proposal, each of the listed points is already addressed in the current route to citizenship:

- Since at least 1949, applicants for British citizenship have had to show 'sufficient' knowledge of the English language. This has recently been extended as follows: a migrant applying for British citizenship has been required to demonstrate improving command of the English language and pass a life in the UK test since November 2005[17]; and since April 2007 this requirement has been applied earlier in the route to citizenship at the time a person applies for permanent residence[18].
- The Immigration Rules have for very many years contained requirements relating to working and prohibiting recourse to public funds in respect of economic migrants and dependants who are on a route to citizenship. Similarly, where migration is based upon a relationship, the need for that relationship to be genuine has long been recognised in UK immigration law.
- A migrant applying for British citizenship has long been required to meet a 'good character' test. That requirement was included within the

[17] The requirement was introduced into Schedule 1 of the British Nationality Act 1981 by section 1(1) of the Nationality, Immigration and Asylum Act 2002 commencing 1 November 2005 by Nationality, Immigration and Asylum Act 2002 (Commencement No. 10) Order SI 2005/2782.
[18] See http://www.ukba.homeoffice.gov.uk/sitecontent/documents/residency/knowledgeoflifeuk.pdf

British Nationality Act 1981, but was not a new invention. During the passage of the Bill, the Minister explicitly stated:

> "*A person with a serious criminal record cannot be regarded as of good character. Equally, it is normal to refuse applicants with few or no convictions who are strongly suspected of being engaged in crime or are known associates of serious criminals.*"[19]

41. There is nothing here to make the case for any change to the current route to citizenship. As explained in responses to Chapter 4, Questions 5A, 5B & 6 below, we oppose the active citizenship proposal. However, we note here that although it is a new proposal it is not something that requires any change to the basic route to citizenship currently operating (temporary residence – permanent residence – citizenship, see paragraph 11 of this response).

42. So far as the proposal on active citizenship is concerned, it is not coherent. This is revealed most clearly by the attempt, at paragraph 176, to articulate what is envisaged as active citizenship. At its heart, what is being proposed is volunteering. The active citizenship proposal, then, is to make volunteering a requirement of a successful citizenship application – or at least an application that is not delayed by two years. Essentially the proposal is to compel migrants to undertake voluntary work because a migrant's route to any settled status would be dependent upon completion of the probationary citizenship stage under which active citizenship is necessary so as to avoid this significant delay. Compulsion and volunteering are inherently contradictory.

43. This is not merely philosophically incoherent; it is also practically irrational. By robbing 'volunteering' of its key constituent (i.e. that it is voluntary), the proposal robs it of its value. It no longer demonstrates any true commitment on the part of the 'volunteer'. Many agencies will question whether such a 'volunteer' is of interest to them at all. Moreover, certain of the suggestions put forward in paragraph 176 are plainly dubious

[19] Official Reports cc 691-9, 19 March 1981 per Timothy Raison; this reference is taken from *Fransman's British Nationality Law* (second edition) 1998, p325 fn 20

since, depending on the migrant's country of origin and time spent in the UK, it will simply not be possible to make adequate checks on the migrant's suitability to work with children or other vulnerable groups. Criminal Records Bureau checks and safeguarding requirements, such as those under the Safeguarding Vulnerable Groups Act 2006, would not provide adequate protection where the relevant checks would not cover substantial and indeed recent periods in respect of such migrants.

44. It is particularly dispiriting to note that less than three weeks prior to the publication of the Green Paper, the UK Border Agency also published a consultation and draft code of practice on the subject of "*keeping children safe from harm*"[20]. We have responded to that consultation also, and have been very critical of the draft code[21]. One of our concerns was that a change of culture in respect of children's needs and safety required a change by both operational staff and those responsible for policy; and the proposals on active citizenship exemplify the reasons for that concern. They also highlight why we said in our response that the UK Border Agency was not the appropriate agency to take a lead on child protection matters; and that it needed to be brought into the existing child protection framework by the adoption of the general safeguarding and welfare duty established under section 11 of the Children Act 2004.

45. These proposals also highlight a lack of joint working in Government since in the very same month that the Green Paper was published the Department of Children Schools and Families published the *Staying Safe Action Plan*[22], in his Foreword to which the Secretary of State for Children, Schools and Families stated:

> "*The actions here from across Government signal a shared commitment to improve children's safety, and a new approach to co-ordinate policy.*"

[20] This consultation has closed. However, the consultation and draft code is available at http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/keepingchildrensafe/
[21] Our April 2008 response to the *Keeping Children Safe From Harm* consultation is available in the Submissions section at www.ilpa.org.uk
[22] The Action Plan is available at http://www.everychildmatters.gov.uk/resources-and-practice/IG00312/

46. Both this Green Paper and the consultation on keeping children safe from harm indicate that this new approach has not extended to the policy agenda of the UK Border Agency.

Chapter 4, Question 1:

Are the proposed minimum time periods for a migrant to complete the journey to British citizenship suitable?

Tick Box answer – This question does not admit of a tick box answer as the proposed route to citizenship is fundamentally flawed.

47. If the proposal to substitute a further period of temporary residence (probationary citizenship) for permanent residence at the second stage of the route to citizenship were abandoned, the minimum time periods along the route would remain in form and substance as now. However, the proposed substitution means that, while the minimum time period to reach British citizenship is, unchanged, the minimum time period to reach a stage of settlement is delayed by at least one year.

48. As we have indicated in paragraph 13 of this response, if it is held to be desirable to remove a stage of permanent residence as a necessary stage *en route* to citizenship, the simpler option would be to allow migrants to apply for citizenship or permanent residence immediately after the period of temporary residence. This would promote integration. For those that were unwilling or unable (because of a prohibition on their holding dual nationality) to apply for citizenship immediately, it should remain an option for them to choose to apply for citizenship later.

Chapter 4, Question 2:

Are the proposed minimum time periods for a migrant to complete the journey to permanent residence suitable?

Tick Box answer – No. The time periods should be decreased.

49. The Green Paper provides no justification for adding a further year to the period of time it currently takes before a migrant can attain a settled status;

and an additional two years beyond this for a migrant who is either unable or unwilling to seek British citizenship. As indicated elsewhere, the proposals on permanent residence do not aid clarity but create new complexities; and introduce new and discriminatory barriers to integration for some (see e.g. responses to Chapter 3, Questions 2 & 3 above).

50. The position in the Green Paper is also inconsistent with the reasons the Home Office gave in March 2006 for increasing the period of time from four to five years for migrants (other than those joining a settled or British partner) to attain a settled state[23]. The Home Office then said that the increase in the time was necessary so as "*to bring the UK's practice for the qualifying period required in line with the rest of the European Union.*" If it is considered necessary that UK practice on the qualifying period for settlement be in line with the rest of the European Union, the proposals in the Green Paper must be abandoned as these will cause UK practice to cease to be in line. If, on the other hand, it is not necessary that UK practice should be in line, the proposals in the Green Paper are inappropriate in seeking to delay still further the time before which a migrant can reach a settled stage having only two years previously extended the qualifying period for what is now shown to be no good reason.

Chapter 4, Question 3:

Should the partners of British citizens or permanent residents be required to demonstrate that they are in an ongoing relationship with the citizen/permanent resident before progressing?

Tick Box answer – No.

51. First and foremost, the probationary citizenship stage should be abandoned (see our response to Chapter 3, Question 2). We also note here that the references to working and paying taxes in Chapter 4 should certainly not be an indication that such requirements would have to be met by the

[23] see http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/changestoimmigrationrules

partners to whom this question relates in order for them to avoid any delay on their journey to citizenship. Such an approach would be likely to be indirectly discriminatory against women in view of the disproportionate number of women as compared to men undertaking the responsibilities for childcare in families and the impact of pregnancy on women.

52. The specific question put here contains a significant discrepancy. Chapter 4, at paragraph 145, states:

> "*Partners of British citizens and permanent residents will need to demonstrate the genuine nature of their relationship to progress through the system.*"

53. The premise of the question, however, is concerned with relationships that are "*ongoing*". Genuine relationships come to an end for a variety of reasons. Migrants, no less than British citizens, suffer bereavement, relationship breakdowns and domestic violence. Some relationships end despite the wishes of the parties to the relationship. In any event, that one or both partners choose to end a relationship does not itself indicate that the relationship was not genuine.

54. If a relationship, upon which a migrant's route to citizenship is based, is not genuine, the current rules allow the migrant's progress towards citizenship to be stopped and his or her permission to be in the UK to be curtailed[24]. The proposal, not made express, which appears to underlie the question is that a migrant's progress should be stopped and his or her status curtailed if the relationship ends – regardless of whether the relationship was genuine or not. The current rules allow for this if the relationship breaks down during the current stage of temporary leave[25]. We see no justification for a proposal to extend the period for which the relationship must remain ongoing.

[24] Paragraph 323(i) of the Immigration Rules (read with paragraph 322(2)) allows for curtailment of a migrant's leave to enter or remain if it was obtained by the making of a false representation – which would include representing that a relationship was genuine when it was not.
[25] See e.g. paragraph 287(a)(ii) of the Immigration Rules.

55. We oppose such a proposal. For a migrant trapped in an abusive relationship, the proposal would risk serious harm because the victim may feel compelled to remain in a relationship for fear of the immigration consequences of seeking to escape violence or an otherwise abusive relationship. Where a relationship comes to an end for other reasons, a migrant may nonetheless have committed his or her future to the UK in ways which ought to remain recognised by his or her continuing to have the capacity to progress to a settled status, including citizenship.

56. Of course, this may be the case whether or not there are children of the relationship. However, where a relationship comes to an end, and this affects children who are either born in the UK or have developed close ties to the UK, this would provide one very clear example where a requirement that a relationship was ongoing would be inappropriate. In such cases, a requirement that the migrant show his or her relationship to be ongoing could lead to children being permanently removed from one parent where an ongoing relationship with both parents would otherwise have been possible for the child. It would present families and children with invidious choices – such as choosing between parents, or choosing between a parent and remaining at school, with friends and in a familiar country. The harm that children may be exposed to when relationships break down where there is no immigration status in question is well recognised. Immigration rules ought not to exacerbate that harm.

57. In the circumstances, we would question whether such a proposal is human rights compliant. Its effects would be arbitrary, produce unlawful interference with Article 8 (private and family life) rights and contribute to Article 3 (torture, inhuman and degrading treatment) harms.

Chapter 4, Question 4:

Should Gateway refugees continue to be granted permanent residence on arrival in the UK?

Tick Box answer – Yes.

58. In his report *Citizenship: Our Common Bond*[26], Lord Goldsmith QC observed that there were pressing matters of psychological insecurity, which increased the barriers to integration for refugees and those granted humanitarian protection. Accordingly, he recommended that the Government consider a return to the position immediately before 30 August 2005 whereby refugees were granted permanent residence from the moment of recognition[27]. The rationale for this recommendation would extend the same approach to those currently granted humanitarian protection.

59. Gateway refugees do receive permanent residence immediately. We consider this does significantly address the concerns regarding barriers to integration expressed by Lord Goldsmith QC in relation to this small group.

60. In the circumstances, we agree that Gateway refugees should continue to receive permanent residence immediately.

61. We consider there are good reasons to treat other refugees and those currently granted humanitarian protection in a similar way. The barriers to successful integration for those whose protection needs are decided while they are in-country may be considerably increased by the period of time they spend waiting for a final determination of their case. Even under new processes this may take many months[28]; and in some instances a period of years. This period will for many, who cannot work and generally suffer considerable uncertainty as to their future, constitute a period of regression so far as integration is concerned. Accordingly, it is all the more important

[26] *Op cit*
[27] See paragraphs 44-45, and 52 *et seq* of his report, *op cit*
[28] The New Asylum Model was introduced for all new asylum claims in March 2007. Under this model, the UK Border Agency has targets whereby a certain proportion of asylum cases are to be resolved within 6 months of the claim being made. However, even by end 2011 this target will only apply to 90%. Even assuming the Agency meets and surpasses this target, the model envisages that some claims may not be resolved within that timescale. Although this model specifically aims to avoid the excesses of the past where some claims have remained unresolved for very many years, the experience of the Immigration and Nationality Directorate (the Agency's predecessor) demonstrates that lengthy delays in some cases, especially where there is complex and lengthy litigation, may be difficult to avoid.

that progress towards integration is assisted by early recognition of the group's need for settlement.

Chapter 4, Questions 5A & 5B:

Should 'active citizenship' be a means by which probationary citizens can speed up their journey* [to] *British citizenship or permanent residence?

Should 'active citizenship' be a mandatory requirement for all probationary citizens to qualify for British citizenship or permanent residence?

Tick Box answers – No.

62. The proposals on active citizenship expose the fundamental weakness of the proposal for probationary citizenship.

63. The proposals on active citizenship radically change the nature of the previous questions on minimum time periods (Chapter 4, Questions 1 & 2). If there are significant barriers to a particular migrant participating in activities that would constitute 'active citizenship', the Green Paper envisages that the minimum time periods for him or her to acquire citizenship will be 8, 5 and 8 years (see Chapter 4, Question 1); and to acquire permanent residence 10, 7 and 10 years (see Chapter 4, Question 2)[29]. What is clear is that those most marginalised, and hence least able to participate, would be penalised in ways that increased or perpetuated their marginalisation.

64. Refugees and others are currently excluded from economic activity, and have no control over their place and security of residence, for the period that they are in the UK prior to recognition of their protection needs. This initial period can last several months, and in some instances years, and can contribute towards the individual becoming highly marginalised before any recognition of their right to be in the UK. A requirement of active

[29] Paragraphs 169-170 set out the time periods envisaged. For a refugee family whose status is quickly recognised by the UK Border Agency and who face profound cultural, economic and social obstacles to integration, the active citizenship proposal would mean it would be more than 8 years before the family could acquire a settled and secure status in the UK; or more than 10 years if the family does not want to or cannot apply for British citizenship. By contrast, such a family faces a period of more than 5 years at present. It is plain that such a family's integration is not promoted by this proposal.

citizenship for such individuals is unrealistic. Some may be suffering severe and chronic mental or physical trauma or disability. Others may simply have become so marginalised by the time their status is recognised that the barriers to such active citizenship may be too great.

65. As regards economic migrants, there may be those whose business or work activities demand exceptional time commitment and who may simply not be free to participate in the way envisaged here. Presumably the intention is not simply to discourage very high earners from seeking to migrate to the UK?

66. Moreover, these proposals would have serious implications for children, women and families (including particularly single parent families). We can see no recognition in these proposals of the situation of separated (unaccompanied) child refugees. Are children expected to face more extensive delays to settlement because their age may preclude them from activity available to others? Cultural, social and religious traditions may mean that some women have less freedom to participate as envisaged in these proposals or have far greater inhibitions to overcome in order to participate. Implementing these proposals would risk leading to indirect discrimination against women. The proposals similarly fail to have regard to families, and perhaps most particularly single parent families. Is a parent expected to be active in the community at the expense of his or her own children (or indeed other vulnerable dependents) to avoid the penalty of delay to his or her progress to settlement?

67. Very similar concerns would apply in respect of the elderly, those with disabilities and carers.

68. While we would be more than content to see the Government encouraging and supporting local communities, individuals and organisations to be welcoming and encouraging of community participation by migrants; we do not consider it reasonable or feasible to be demanding such participation on pain of penalty as envisaged by this proposal. The

opportunity for such participation would necessarily be so variable depending upon the particular circumstances of the migrant and the particular circumstances of the community in which he or she was, that we can envisage no fair and consistent way of applying such a proposal in practice. The proposal would increase or perpetuate the marginalisation of some migrants for no better reason than the absence of any suitable activity in which they were able to participate. At worst, the proposal is a licence for the further exploitation of the most vulnerable migrants who may be compelled or seduced into participation in unsuitable or abusive activity in an attempt to avoid delaying their progress to settlement. However, the proposal is viewed it is inconsistent with the stated aims of avoiding complexity and establishing an objective and transparent immigration system. A test of a person's participation in community activities would be subjective.

Chapter 4, Question 6:

Should the following activities be viewed as demonstrations of 'active citizenship'?

Tick Box answers – These questions do not admit of tick box answers. The proposal for active citizenship on which these questions are founded is fundamentally flawed.

69. As indicated in response to the previous questions, we fundamentally disagree with the proposals for 'active citizenship'.

70. That opposition is confirmed by the specific suggestions made. We question how any assessment of a migrant's activity will be made. Would it be enough that he or she could point to enrolment or formal involvement with activities or groups falling within or similar to the examples given? Is it envisaged that there be more rigorous assessment of actual participation and commitment? If so, how, by whom and against what criteria; and what resources will be made available to conduct this?

71. We doubt whether it is possible to devise an objective and fair means of making such assessment so as to ensure consistency across the range of

applications for British citizenship. If no rigorous assessment is to be conducted, however, how will the UK Border Agency ensure that the claimed activity constitutes meaningful community participation? If the plan is to regulate or formally designate specific groups who may offer volunteering activity for these purposes (i.e. in the same way that under the points based system educational institutions or employers may be granted permission to sponsor), how will this be done and regulated; and what happens if there is no accessible organisation with capacity for the migrant's participation?

72. It may be that regulation is not proposed. No doubt voluntary and other community organisations would be glad of that. However, how will the UK Border Agency be able to distinguish the case where false assertions are made of active participation by an unscrupulous organisation or individual; and how will it prevent the case where a migrant is exploited to provide unpaid labour by another unscrupulous organisation or individual?

73. Moreover, how will the UK Border Agency distinguish between the case of a migrant who has the capacity to participate in 'active citizenship' from a migrant, whose economic status or family or personal circumstances, preclude or seriously inhibit this?

74. We also question the lack of thought that has been given to how adequate background checks could be made in respect of some migrants, whose history before entering the UK may through no fault of their own simply not be capable of any or any reliable investigation. Working with children or other vulnerable groups, as is suggested by some of the specific suggestions, may simply not be possible for some migrants.

Chapter 4, Questions 7 & 8:

Do you think that committing a crime which attracts a custodial sentence should slow down or stop a migrant's progression to permanent residence?

Do you think that committing a crime which does not attract a custodial sentence should slow down or stop a migrant's progression to permanent residence?

Tick Box answers – These questions do not admit of tick box answers. Whether or not a custodial sentence should slow or stop a migrant's progression will depend on all the circumstances of the case including the seriousness of the offence; and insofar as it is implied that offending should always constitute a block on citizenship we disagree with the implication.

75. The UK's immigration laws currently allow for regard to be had to criminality in considering an application for citizenship (and see fn. 19); and allow for a migrant's permission to be in the UK to be removed altogether in some cases[30].

76. However, we oppose blanket measures that fail to have regard to the specific circumstances of the individual's case. Whereas the fact that a custodial sentence has been imposed is an indicator of the relative seriousness of an offence, it is simplistic to assume that a migrant's future can or should be determined merely by reference to whether he or she has received a custodial sentence or indeed a sentence of any particular length.

77. Some migrants, despite relatively serious criminality, may have a long-term future in the UK. Length of residence in the UK, family relationships in the UK and circumstances in the migrant's country of origin may all be factors which indicate that the individual's long-term future is here. If integration is considered an important benefit in relation to migrants, it makes sense that those whose long-term future is here have a means of securing a settled status for themselves and their families.

78. The proposed new route to citizenship compounds these potential problems by relegating permanent residence to a default status which for those who do not progress to citizenship takes longer to reach. One of the strengths of the current route to citizenship is that it allows for firm decisions to be made in respect of migrants' applications for citizenship, which place appropriate value on citizenship, without causing or

[30] Criminality may lead to a migrant facing deportation under section 3(5), Immigration Act 1971 and, expected to be in force later in the year, under section 32, UK Borders Act 2007.

perpetuating marginalisation of those whose long-term future remains in the UK because this group – unless a decision has been taken that they should be deported and/or their permanent residence should be revoked – continue to have access to a settled status.

79. The Government has already committed itself in several ways to arbitrary responses to criminality by migrants where even petty theft and minor criminal damage offences are treated in law as equally serious as murder, rape or chemical weapons offences[31]. Such approaches do not aid clarity, are generally not human rights compliant and promote litigation.

Chapter 4, Question 9:

Do you think progression should be stopped or delayed for those whose children commit criminal offences?

Tick Box answer – No.

80. We do not consider that it is appropriate to penalise parents in this way for the behaviour of their children.

81. We note – without commenting on the efficacy of these measures, on which we have no expertise – that the UK youth justice system includes provision for parenting orders as a means to address parents' responsibilities in relation to child offending. We see no grounds for penalising what may be particularly marginalised parents in our society in ways that would perpetuate or increase their marginalisation, rather than adopting the same responses that are used in the cases of other parents.

[31] Section 72, Nationality, Immigration and Asylum Act 2002 sets out a blanket approach to refugee status determination in response to offences listed on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 SI 2004/1910. This lists theft and criminal damage (which offences include shoplifting and graffiti) alongside murder, rape and chemical weapons offences as equally particularly serious crimes. This same list forms the basis of a blanket approach to the 'automatic' deportation provisions in sections 32-39, UK Borders Act 2007; and to denial of formal status and access to work or welfare for those whose removal is prohibited because of the risk to them of torture or execution provided by the 'special immigration status' provisions in sections 128-135, Criminal Justice and Immigration Act 2008. These provisions in the UK Borders Act 2007 and Criminal Justice and Immigration Act 2008 are yet to come into force.

What is proposed in the question would not serve integration; and in some cases may perpetuate marginalisation that contributes to further offending.

CHAPTER 5 – The Impact of Migration

82. There are essentially two proposals put forward in Chapter 5. The first proposal is to delay the point at which certain of those migrants, whose long-term future is in the UK, can access housing, welfare, health and education services or support in the same way as others whose status in the UK is settled or who are exercising certain EU Treaty rights. The second proposal is to impose further charges upon non-EEA migrants.

83. ILPA does not support either proposal. Moreover, despite the short Chapter 6 on EEA nationals, we note that the Green Paper and Chapter 5 fall fundamentally short of providing an evidence-based analysis of the impact of migration. It is not clear, therefore, that the proposals properly address whatever concerns it is considered there may be.

84. In the circumstances, it is inadequate to make general proposals for addressing the impact of migration where the proposals fall upon only a limited group of migrants. It cannot be assessed whether and to what extent any impact that may be of concern is caused by those migrants to whom the proposals apply or those migrants (in particular, EEA nationals and their dependants) to whom the proposals do not apply. However, the proposals would have the result of significantly extending periods of time during which migrants would be excluded from basic public and welfare services and support. Migrants and their families, no less than British citizens, are susceptible to the vicissitudes of life; and extending the periods during which such unforeseen circumstances cannot be mitigated by the general welfare support system available to others will adversely affect the integration of those migrants affected.

85. Moreover, non-EEA nationals already face a disproportionate burden. Application fees for this group have risen substantially in recent years; and significantly beyond the mere cost of administering their applications. The proposal for a fund as put forward in the Green Paper is no more than a proposal to impose a further tax upon one group of migrants, who are already taxed in relation to their migration. This group is also facing additional fees for biometric identity cards.

Chapter 5, Question 1:

Should probationary citizens who have entered the UK through the economic or family routes have access to benefits* in addition *to those based solely on contributions made through the national insurance scheme?

Tick Box answer – This question does not admit of a tick box answer. We disagree with the premise of the question.

86. As indicated previously, we oppose the proposal for a new stage of probationary citizenship.

87. What is proposed in the Green Paper amounts to an extension of the period of temporary residence through which a migrant is required to pass before he or she can apply for a settled status. The length of the extended period is variable and indefinite; but would be for no less than one year. Figure 2 of the Green Paper indicates that the period would last for a maximum of five years in respect of a migrant successfully applying for British citizenship. However, for a migrant who may follow the route to permanent residence, although a minimum is stated (three years) there is no maximum period stated.

88. Currently, many migrants are denied access to certain housing, welfare, health and education services and support during any period of temporary residence. For those migrants whose long-term future is in the UK, we see no justification for extending this period during which the migrant is excluded from these services/this support. The proposal does not make anything more or less clear than present. However, extending this period

is a move away from integration. Moreover, health and education services are provided to all on the basis that these have benefits to the community as well as the individual. It does not make sense therefore to exclude migrants.

Chapter 5, Questions 2A & 2B:

At what stage in the journey to citizenship do you think further education for the same fees as British nationals (rather than at the higher 'overseas rate') should be available?

At what stage in the journey to citizenship do you think higher education for the same fees as British nationals (rather than at the higher 'overseas rate') should be available?

Tick Box answers – These questions do not admit of a tick box answer.

89. As previously indicated, we oppose the proposed new route to citizenship. Our position in relation to these questions mirrors our position in respect of the previous question. We see no justification for extending the period during which migrants, whose long-term future is in the UK, are denied access on a similar basis to British citizens to further and higher education; and note that the proposal to do so is a move away from integration.

90. Indeed, we would suggest that further consideration is given to allowing migrants and their families, whose long-term future is in the UK, to have earlier access to further and higher education at the same rates as British citizens. This would, we think, be in keeping with the stated desire to promote integration; and would be a more positive and workable step than the proposal for active citizenship (considered above).

Chapter 5, Question 3:

Should non-EEA migrants entering through the economic and family routes pay an additional charge on top of existing application fees in order to create a fund which would be used to alleviate short-term pressures on local public services caused by migration?

Tick Box answer – No.

91. Non-EEA migrants have already experienced greatly increased application fees, which are now set at rates above the cost of administering applications[32]. We oppose this escalation in current fees. We have provided a detailed response to what was an inadequate and particular short consultation in relation to application fees under the points based system late last year[33].

92. Migrants (other than EEA nationals and their families) are already taxed for the purpose of raising funds for immigration control and policy measures. This proposal would effectively double tax this group of migrants for their migration. Indeed, given that migrants whose long-term future is in the UK also pay taxes like British citizens (the Green Paper indicates at paragraph 155 that migrants are "*net fiscal contributors*") it constitutes a triple tax.

93. Moreover, the proposal would accentuate concerns we have previously expressed of indirect discrimination because the ability to pay tax is necessarily affected by an individual's earning potential.

94. Accordingly, we oppose this proposal.

CHAPTER 7 – Simplifying the system and reforming the law

95. We are extremely concerned at the paucity of the proposals set out in Chapter 7. The timetable for the simplification project, as explained to us in August last year[34], was that detailed proposals for simplification would be published by the end of 2007, a draft Bill would be published for pre-

[32] The power to set fees for certain immigration applications above the cost for administering the application was initially provided by section 42, Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; and extended by section 51, Immigration, Asylum and Nationality Act 2006 and section 20, UK Borders Act 2007.
[33] This response of November 2007 is available in the Submissions section at www.ilpa.org.uk
[34] ILPA met with two Border and Immigration Agency officials during the initial consultation period on the simplification project, during which meeting the timetable was explained to us – see paragraph 8 of this response.

legislative scrutiny by the summer of 2008 and by the autumn of 2008 a Bill would be introduced in Parliament. This timetable was confirmed in Parliament during the passage last year of the UK Borders Bill, where the Lord Bassam of Brighton said in response to an amendment to address a long-standing discrimination in UK nationality laws:

> "*…We would like to legislate to give British citizenship to those affected and so have committed ourselves to addressing this problem, as noble Lords have already detected in a simplification Bill. Because of its wider scope, it will allow us to provide an avenue to citizenship for those concerned, rather than just a right of abode.*
> "*I have asked officials to give me an idea of how quickly we could right this wrong and ensure that this problem is sorted out. There will be consultation which will begin before November. We expect, therefore, a draft Bill to be published next summer. One would then normally expect a Bill to be introduced in November 2008…*"[35]

96. The content of Chapter 7 is, therefore, late. Even if what is now published provided the degree of detail that had been expected, and would have been necessary for any serious second stage consultation on this project, it would be unrealistic to expect that consideration of responses would be possible in time to influence a draft Bill by the summer. However, the content of Chapter 7 does not provide the degree of detail that had been promised or is necessary. A significant part of this chapter merely recounts policy measures that have already been introduced. What is new is provided in only very general terms. It does not reflect any "*detailed analytical work*" or offer any genuine opportunity to "*consult on more specific simplification proposals*" as had been envisaged at the start, and was expressly reiterated in the December 2007 report on the responses to the initial consultation[36].

97. As indicated in the introduction to this response, we had strongly urged that the simplification project should be fundamentally revised so that an initial aim of consolidating what is an unwieldy set of immigration laws

[35] Hansard HL Report, 11 October 2007 : Column 430
[36] See page 6, Border and Immigration Agency report *Simplifying Immigration Law: responses to the initial consultation* available at http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/simplification1stconsultation/consultationresponses.pdf?view=Binary

could be achieved. We note that there was significant support for that view in the responses to the initial consultation; and that staff of the then Border and Immigration Agency also supported it[37]. Our reasons for pressing this were that we considered: (i) consolidation was urgently required; (ii) consolidation was an achievable and generally uncontroversial task; (iii) a process of consolidation would facilitate further consideration of simplification; and (iv) the ambit of the simplification project was so large and at large that there was a significant risk that the project would topple under its own weight resulting in neither simplification nor consolidation.

98. That this project has made so little progress, and is so far behind schedule, confirms our fears. Accordingly, we repeat our call for the ambit of the project to be revised and for a focus on consolidation first.

Chapter 7, Questions 1A, 1B & 2:

Overall, are the simplification proposals set out in Chapter 7 of the Green Paper in keeping with the simplification principles outlined in paragraph 223?

Are there any simplification proposals that you feel are not in keeping with the simplification principles in paragraph 223?

Do you have any further thoughts or comments on the simplification proposals set out?

Tick Box answers – These questions do not admit of tick box answers.

99. Below we provide comments under subheadings which relate to specific headings or subheadings in Chapter 7 of the Green Paper.

Simplification principles

100. We reaffirm our position detailed in our responses to the initial consultation that:

> "*Immigration law, which encompasses the control of borders and the consequences of such controls, should meet the UK's international and*

[37] See page 9, Border and Immigration Agency report of responses *op cit*

human rights obligations, provide for equality and avoid discrimination, be proportionate and avoid arbitrariness, ease the lawful entry and stay of those entitled to be in the UK and provide access to justice and judicial remedy. These are key principles, against which any simplification should be assessed."[38]

101. In view of the lack of detail generally provided in Chapter 7, there is very little meaningful comment that we are able to offer at this time. However, we suggest that further consideration is given to the views we expressed in our August 2007 response to the initial consultation on simplification. Developments since that time have borne out warnings we then gave concerning transitional arrangements and the need to retain discretion.

102. The judgment of the Administrative Court on the changes to the Highly Skilled Migrant Programme demonstrates the pitfalls of major changes in law and policy without considering and making careful transitional provisions[39].

103. The introduction, without prior consultation, of mandatory grounds for refusal and re-entry bans by HC 321 Statement of Changes in Immigration Rules has introduced considerable uncertainty and arbitrariness into UK immigration law. It has led to the Government finding a need in March 2008 to introduce a concession outside the Rules[40] – a step not in keeping with the 'simplification principles' which aim to minimise "*reliance on concessions outside the normal rules*"; which prompted significant amendment of Entry Clearance guidance on at least two occasions since the announcement of the concession in March 2008. Despite these steps the new mandatory grounds for refusal continue to provide for arbitrary results[41]; and it has already been members' experience that new mandatory grounds have led to increased reliance on human rights grounds, which

[38] See paragraph 9 of our August 2007 response *op cit*
[39] In *HSMP Forum Ltd v SSHD* [2008] EWHC 664 (Admin), Sir George Newman ruled that the changes to the HSMP rules with retrospective effect were unlawful. The House of Lords has taken a similar approach in its ruling in *Bapio Action Ltd & Anor v SSHD & Anor* [2008] UKHL 27.
[40] Hansard HL 17 March 2008 : Columns 96-97 *per* the Lord Bassam of Brighton
[41] Further information is available from our May 2008 briefing for the House of Commons debate on HC 321 Statement of Changes in Immigration Rules available in the Briefings section of our website at www.ilpa.org.uk

have been met by inadequately or wholly unreasoned responses in entry clearance decisions which we believe are not human rights compliant and will be susceptible to judicial challenge.

104. As this response was being finalised, the Government has on 13 May 2008 found a need to introduce further concessions outside the Rules[42]. In concluding his speech, the Minister said:

> "*I hope that the hon. Member for Eastleigh will recognise the benefits of some of the changes announced this evening, and indeed the balance that we are trying to draw between the elimination of subjectivity in decision making on the one hand and the need for discretion on the other.*"

105. A key reason why ILPA was critical of what were presented as principles of simplification in the initial consultation (see our response to Question 1 of that initial consultation[43]) is that these were objectives rather than principles; and the absence of recognised principles meant there was no proper basis against which any steps in favour of one objective or another could be assessed. The Minister repeats this error in the extract cited from his speech. By failing to be clear on matters of principle, it is not possible to identify in any particular case or with regard to any particular measure where the correct balance lies between the two objectives cited. We have identified principles that ought to be recognised (see paragraph 97 above). Continued failure to recognise such principles merely risks repetition of the difficulties experienced in introducing HC 321.

Progress

106. We are not impressed by the observation in paragraph 226 that "*a range of detailed and specific ideas for change of the law and procedures*" has been generated; and that "*these have been logged*" to be addressed later. Detail had been promised by now and it is urgently needed. It was said in

[42] Hansard HC 13 May 2008 : Columns 1352-1353 *per* Liam Byrne MP, Minister for Borders and Immigration.
[43] *Op cit*

December 2007 that "*detailed analytical work is now underway*"[44]. At that time the consultation and simplification timetable had already slipped. However, it seems that since that time the project has regressed. Paragraph 256 of Chapter 7 suggests merely that it provides "*strong platform for further detailed work*".

Simplifying the legal architecture

107. We do not accept as accurate the description of the points based system as "*spelling out more clearly and transparently the routes to the UK and criteria for our decisions*". Steps on the way to this system have included retrospective and unlawful measures, and been introduced without consultation or notice[45]. As we noted in our response to the initial consultation on simplification, steps intended to produce clarity instead introduced arbitrariness[46]. Since then, we have identified how maintenance provisions introduced for tier 1 of the points based system indirectly discriminate on grounds of age and race[47]. There are similar problems with proposals on tiers 2 and 5[48].

108. As regards the proposals on 'entitlement' and 'permission', there is simply too little of substance or detail to make meaningful comment beyond:

- The absence of consideration of the special immigration status provided for in the Criminal Justice and Immigration Act 2008 fundamentally undermines the structure which appears to be envisaged here[49].

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[44] See page 6, Border and Immigration Agency report of responses *op cit*
[45] See fn 39
[46] See paragraph 21 of our August 2007 response *op cit*
[47] See our April 2008 briefing on the Points Based System available in the Briefings section at www.ilpa.org.uk
[48] Statements of Intent regarding tiers 2 and 5 have just been published. These indicate similar problems for these tiers. The Statements are availed at http://www.ind.homeoffice.gov.uk/sitecontent/newsarticles/tighternewrules
[49] ILPA opposes the introduction of this new status. Further details are available from our Memorandum of Evidence of November 2007 to the Public Bill Committee which scrutinised the Criminal Justice and Immigration Bill, though with little time for consideration of this status. That Memorandum is available in the Briefings section at www.ilpa.org.uk

- The admission in paragraph 231 that it is still to be worked out how temporary admission will fit this structure is a further weakness.

Receiving and registering applications

109. We agree that case ownership could provide a means to significant improvements in the way applications and appeals are managed by the UK Border Agency. However, this does not of itself require any legislative change. It requires attention to good administration and management Frequent and fundamental changes in law and policy, we consider, have compromised the capacity of staff and individual departments in the UK Border Agency's predecessors to develop the necessary familiarity with and confidence in their roles and responsibilities to promote efficient and effective decision-making.

110. Consolidation of immigration law would, therefore, assist the current development of case ownership throughout the UK Border Agency. Further changes in legislation and policy are likely to obstruct this.

111. Members report that case ownership is already experiencing serious pressures in the area in which it is most developed (new asylum cases) such that lack of planning or resources has led to case owners delegating functions, including the most substantive functions such as decision-making or representing at appeals, to colleagues – sometimes to colleagues who are not from the same asylum team; sometimes to colleagues who are not even from the same UK Border Agency region. These responses fundamentally undermine case ownership; and we would far rather greater attention is paid to remedying these administrative and management problems than developing new or revised laws and policies.

Protection

112. There is too little of substance or detail on protection to allow us to provide meaningful comment. However, we draw attention to the very

wide discrepancy between outcomes through the detained fast track process at Yarl's Wood and Harmondsworth and outcomes in the ordinary asylum process. The detained fast track process is an unsafe and arbitrary process; and any reform of the asylum system ought to commence by reconsidering this process and indeed ending it.[50]

The border

113. There is too little of substance or detail to allow us to provide meaningful comment.

Purpose of entry or stay

114. We note the reference to the reduction of "*80 existing routes*" to "*5 tiers*" in paragraph 246. However, there are categories and subcategories within these tiers. In any event, we note that the approach presented here is the opposite of what is proposed in relation to visitors[51].

115. Generally, there is a lack of detail here, but we note our observations above in relation to the Highly Skilled Migrant Programme, mandatory grounds for refusal and re-entry bans (see paragraphs 101-103 of this response).

Enforcement and compliance

116. Lack of detail means there is little here on which meaningful comment can be provided.

[50] Further detail of our concerns with the detained fast track process is set in our February 2008 response to the consultation on the draft DFT & DNSA – Intake Selection (AIU Instruction), especially under the heading 'General observations upon the detained fast track', available in the Submissions section at www.ilpa.org.uk

[51] The Border and Immigration Agency *Visitors: consultation paper* of December 2007 proposed to significantly extend the number of categories in relation to visitors. Regrettably, the Green Paper (paragraph 254) appears to indicate that these proposals are to be implemented. For ILPA's views on the proposals, see our March 2008 response in the Submissions section at www.ilpa.org.uk

117. We note the proposal that "*timescales would be introduced for barring return to the UK after removal*" and the earlier proposal that "*general grounds for refusal and cancellation will be set out more clearly*". This appears to be the sum of consultation offered on the changes to the general grounds for refusal and re-entry bans to which we have referred above. As such, this aspect of Chapter 7 is especially deficient since the details provided here are inadequate for any meaningful consultation, yet the proposals on which consultation is invited have already been introduced.

Biometric information

118. Again there is too little of substance or detail to allow us to provide meaningful comment[52].

Appeals

119. There are no specific proposals here. However, we are concerned at the absence of basic information, which we consider to be fundamental to the consideration of the matters set out in paragraph 255. In general, the following questions would be among those relevant to consideration of concerns regarding statutory review and judicial review applications, which would need to be separately considered. What proportion of these applications are brought by the UK Border Agency? What proportion are brought by litigants in person? What proportion are brought under legal aid? What proportion of applications are conceded by the UK Border Agency before hearing? What has been the effect of the changes to chapter 44 of the Operational Enforcement Manual in March 2007[53], and the amendment to the practice direction of the Administrative Court introduced at the same time[54]?

[52] ILPA has responded to the recent consultation on a code of practice in relation to compulsory identity cards for foreign nationals. That April 2008 response is available in the Submissions section at www.ilpa.org.uk

[53] This has now been replaced by Chapter 60 of the Enforcement Instructions and Guidance, but the change introduced in March 2007 is maintained in the new EIG.

[54] This amendment was the introduction of paragraph 18 to Practice Direction 54 of the Civil Procedure Rules.

120. A reduction of the burden on the Administrative Court would be achieved by general improvements to the quality, timeliness and consistency of decision-making by the UK Border Agency. However, the need to maintain judicial supervision of the appeals process by the higher courts has recently been emphatically demonstrated in the case of *AM (Cameroon) v AIT & SSHD* [2008] EWCA Civ 100 where the court concluded that:

> "*But on any view it seems to us that AM has simply not had any fair hearing of her appeal through no fault of her own, and the real cause of that having happened was the conduct of the immigration judge.*"[55]

121. That case concerned an asylum appeal. It is instructive to note that the reconsideration process introduced by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was tested to the full and found wanting. The Tribunal refused reconsideration of the case as did the Administrative Court. In view of the need to maintain judicial supervision of the appeals process by the higher courts, we would oppose any attempt to reduce the burden upon the Administrative Court by merely reducing the available avenues for such supervision; and we note that careful consideration needs to be given to avoiding switching a burden from the Administrative Court to the Court of Appeal, which the change to the appeals structure introduced by the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 achieved by blocking the route to reconsideration in respect of appeals heard by a panel of three immigration judges and appeals where one reconsideration had already taken place.

ANNEX C – Consultation on Impacts of the Green Paper proposals

Do you think that the scope of the identified costs and benefits in Annex C is correct?

[55] See the final sentence in the final comment section under paragraph 37 of the judgment. Full details of the immigration judge's conduct and the failings in the appeal process are set out in the judgment of Hooper LJ in the earlier permission decision: *AM (Cameroon) v AIT & SSHD* [2007] EWCA Civ 131.

Tick Box answer – No.

122. As we have indicated previously in this response, the analysis contained in the Green Paper is generally inadequate. There is an urgent need for those responsible for this project to have regard to the guidance provided by the Better Regulation Executive[56].

123. If it remains the intention to implement the citizenship proposals, we would suggest that further work is first required to assess the risks of discrimination, exclusion, human rights non-compliance and exploitation which we have identified in this response. Having assessed those risks, it would be necessary to monitor the impact of these proposals should they subsequently be implemented.

124. As regards simplification more generally, we note that there will be a need for detailed impact assessments of any specific proposals for changes in immigration law. The statements as to possible benefits, which are made under the heading 'Simplification' are wholly speculative relating as they do to a project which has the potential to include far-reaching changes to UK immigration law and practice but which has yet to produce any substantive proposals for change.

125. On 2 April 2008, we wrote to the Ministry of Justice and Department for Business Enterprise and Regulatory Reform in view of our concern at the failure by the Border and Immigration Agency to carry out legal aid and other impact assessments in relation to HC 321 Statement of Changes in Immigration Rules. As we stated there:

> "*…the Border and Immigration Agency (from 1 April 2008 the UK Borders Agency) plans significant changes to all aspects of immigration, asylum and nationality law, revisiting all immigration legislation enacted since the Immigration Act 1971 – a very large corpus of legislation. The Agency's record on impact assessments is patchy and in many areas, including that of legal aid impact*

[56] This guidance is available at http://www.berr.gov.uk/bre/policy/scrutinising-new-regulations/preparing-impact-assessments/page44077.html

assessments, to give just one example, very poor. There is a pressing need to address this shortcoming before the changes are rolled out."

126. The contents of Annex C to the Green Paper merely confirm our concerns.

CONCLUDING REMARKS

127. If greater simplicity is perceived to be an end in itself, there is an urgent need to revisit the proposals for changing the route to citizenship because what is proposed in the Green Paper adds complexity and achieves nothing for simplification.

128. However, we reiterate – as we made express in our response to the initial consultation on simplification – that simplicity ought not to be regarded as an end in itself. If that is taken on board, radical rethinking of that project and the justifications for it is needed.

129. The proposals on the route to citizenship are not well thought out or philosophically coherent and they do not meet the aims of simplification or integration which we understand to be behind them. This may well be explained by the lack of analysis – analysis of the current route, the general impact of migration or the proposals contained in the Green Paper.

130. The further proposals on simplification are lacking in detail – especially having regard to the proposed timetable for that project.

131. The simplification project should be circumscribed as a matter of urgency. Consolidation is urgently needed in immigration law. The sights of this project should be firmly set on achieving that before anything further is attempted.

Sophie Barrett Brown
Chair, ILPA

14 May 2008