PREVENTION OF ILLEGAL WORKING

ILPA RESPONSE TO THE CONSULTATION ON THE IMPLEMENTATION OF NEW POWERS TO PREVENT ILLEGAL MIGRANT WORKING IN THE UK

07 AUGUST 2007

General comments

The consultation

ILPA welcomes the opportunity to respond to this consultation and the wide circulation of the consultation documents. A note of caution: some employer clients have told ILPA that although they are interested in responding, they have felt overwhelmed with the material to be reviewed. A number of employers invited to respond will not have had sufficient time to go through all the relevant documents and respond to the consultation. Knowledge in the sector of these proposals therefore risks remaining fairly limited.

ILPA is also concerned at the lack of detail in aspects of the consultation documents. For example, the vital difference between: negligent practice and employing a person 'knowing' that they do not have permission to work is not clearly set out. Employers will require an understanding of both the civil penalty and the criminal offence, and the differences between the two.

ILPA has also considered the European Commission's proposal for a directive[1] on illegal working and the UK Explanatory Memorandum[2] on the proposal in preparing this response. Whether or not measures are taken at a European level, the survey of the means of tackling effective sanctions in that proposal can be used to inform thinking and practice at domestic level.

Protecting workers' rights; protecting employers who respect their obligations

ILPA does not oppose sanctions on employers in principle, but considers that, without addressing the rights of migrant workers, the new scheme will protect neither such workers nor law-abiding employers These proposals impose upon employers an onerous burden of more stringent checks on the immigration documents of employees and potential employees, and attempt to pass the burden, and the cost, of policing immigration control onto employers. The provisions increase the risk of discrimination against all migrants, whether here lawfully or not, and against people whom employers identify, rightly or wrongly, as migrants.

ILPA considers that the solution to the vexed question of how to stop the exploitative employer without increasing both the burden on other employers and discrimination against those under immigration control is not to be found in these provisions. Rather, it lies in giving more rights and greater protection to migrants and to migrant workers, so that their interest in colluding with the exploitative employer is reduced or negated, and the interests of the employers treating workers fairly and respecting the law are promoted.

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[1] *Proposal for a Directive of the European Parliament and of the Council providing sanctions against employers of illegally staying third country nationals* Council document 9871/07, Com (2007) 249 final, SEC (2007) 604.

[2] Submitted by the Home Office on 20 June 2007.

For instance, particular categories of employee are at risk of exploitation because they know, and the employers know, that they must stay with that employer and in that employment; otherwise they may have to leave the UK. A situation where there is unauthorised work is undesirable for a State, which thereby finds its immigration, tax and labour laws undermined. It is undesirable for lawful workers and their employers, as they are forced to compete with others who breach those laws. It is also undesirable for unauthorised workers themselves, given their greater vulnerability to abuse by employers and intermediaries.

ILPA considers that the more vulnerable migrant workers should have the right to resign and change employers. Migrant worker on temporary schemes are often at particular risk of exploitation, including, in particular, employers failing to pay the going rate for the job, refusing to honour contractual commitments and denying labour rights. There are precedents for giving rights to change employer, for example in the EU-Turkey Association Agreement where permission to change employer can be sought after a given period, in the registration scheme for A8 accession nationals where change must be notified, and for overseas domestic workers, albeit that this protection may be under threat as part of the Points-Based System (PBS) changes.

ILPA therefore concurs with the House of Lords Committee on the European Union, which has urged the government to reconsider the case for acceding to the Council of Europe Convention on Migrant Workers[3] and to examine the question of accession to the United Nations Convention on the Protection of Migrant Workers[4] and has recommended that all third country national migrant workers should enjoy as a minimum:

- the right to change employers after 12 months continuous lawful employment;
- the right to a reasonable period (not less than six months) to seek employment in the event of termination of previous employment
- equality as regards social rights (at least core benefits)[5].

The European Commission's proposal for a directive on employer sanctions[6] sets out what the UK government describes in its Explanatory Memorandum[7] as 'accompanying measures…designed to stimulate the transformation of undeclared work into declared employment'. The UK needs to give consideration to such measures in implementing the proposed legislation.

Government should be reducing opportunities for employers to exploit an immigrant labour force because it is cheaper or because there are fewer associated employment obligations. The proposed European directive would allow foreign nationals to register complaints and have protection against exploitative working conditions[8]. See further our response to question 11.

The Home Office will be expending resources on this new enforcement regime. **ILPA recommends that resources also be devoted to informing migrant workers of their employment and immigration rights and of these provisions when they**

[3] *Op. cit.,* Paragraphs 99 and 126.
[4] *Op. cit.*, Paragraphs 97 and 125.
[5] *Op cit.,* Paragraphs 106 and 129.
[6] *Proposal for a Directive of the European Parliament and of the Council providing sanctions against employers of illegally staying third country nationals* Council document 9871/07, Com (2007) 249 final, SEC (2007) 604.
[7] *Op cit.* 22 June 2007
[8] Article 14.

come into force. For example, there could be an independent helpline that migrants can use, or one or one that they can use with anonymity.

The scheme in practice

Complexity and the need for good communication

The proposals fail to recognise the complexity of immigration law and the difficulty of ascertaining whether an individual is allowed to work, and in what employment. It is difficult to understand which people appealing against a Home Office decision are entitled to work during the appeal period, precisely how many days a working holidaymaker or a student can be employed, and the status of an application for indefinite leave which has been pending for three years. There are real risks of people being refused employment wrongly, or being discriminated against, just because of the complexity of their situation. The Home Office's stated intention[9] to operate the current law more effectively, has already led to problems for employees, including those of long-standing, whose immigration status is difficult for their employers to decipher, for example those who have applications pending.

While a helpline may go some way to mitigating these difficulties, this will only happen if it is easy to get through on the helpline, if the helpline is staffed by people with a very good understanding of the law, and if they are supported by a system that can rapidly retrieve the individual file and if necessary identify the person dealing with the case. Members have cited examples of new account managers without detailed knowledge of work permits, and of commercial requirements in general, and **ILPA recommends that training and systems of quality control are sufficiently resourced and given a priority throughout the new system.**

ILPA understands from members that some of their clients have seen an increase in visits and inspections of their employee records by immigration officers and police. As higher priority is being given to the enforcement of sanctions against employers, **ILPA recommends that this must be accompanied by quicker decisions on complex immigration applications** if hardship and injustice to workers is to be avoided. The current estimate of five-years to resolve legacy cases is not helpful in this respect, quite apart from the other distress and practical difficulties that those with 'legacy' cases face.

ILPA does not oppose in principle a system of continuing checks. **Any system of continuing checks must be adequately, and clearly, communicated to employers.** Employers are more likely to support these changes if they understand what they must do and also clearly understand the penalties for non-compliance. For instance, an employer is more likely to support a system with a maximum penalty of £10,000 where that system is unambiguous and well communicated. If the system is unclear and confusing, employers will face higher penalties for inadequate preparation and compliance simply because of a lack of knowledge and understanding, due to inadequate communication.

Scale of Penalties

Will there also be any sort of link between the size of the employer and the level of the penalty? Smaller employers could be disproportionately affected by the penalties. In addition, larger employers are more likely to have processes in place to ensure compliance than smaller companies who may be hampered by limited resources.

[9] *Hansard*, HL, 15 May 2007, Col WS8.

Implementation

ILPA recommends that a reasonable period of time be given between any announcements of the new sanctions against illegal working and the deadline by which all employers would be expected to have systems in place to ensure compliance. ILPA would also suggest that after the new rules take effect, there should be a grace period to allow for employers and the Home Office to become accustomed the new rules. As stated above, not all interested employers have yet had time to engage with the detail of the proposal. ILPA suggests that for the first six months, where an employer is found to be in breach of the new rules, but is not suggested to have committed the s 21 of the Immigration, Asylum and Nationality Act 2006 offence of knowingly to have breached them, then instead of being immediately penalised, a written notice could be served on that employer so that they are aware that they must have more robust systems and processes in place to comply with the new requirements. This would also serve as a final practical training opportunity for the immigration and enforcement officers who will be inspecting employers.

Questions for Participants

1. Will the measures outlined in this consultation document lead to significant additional economic costs to recruitment practices?

YES

ILPA considers the measures outlined in this consultation will lead to significant additional economic costs to recruitment practices. In particular, the costs to employers of familiarisation with the new guidance and the costs of ensuring ongoing compliance are likely to be substantial. ILPA is especially concerned about the financial burden to smaller employers.

Employers may need to invest in IT systems/database management tools to initiate "alerts", when repeat checks are necessary. When s.8 was introduced the Home Office specifically advised that it was not necessary for employers to undertake repeat checks. It is our experience that in practice significant numbers of employers have relied on this advice and have not implemented systems for facilitating repeat checks. Now, particularly where there are large numbers of employees, a management tool of some kind will now be essential.

Many large employers have already started work on such a tool but it is unclear as to how much of that work will be duplicated, and therefore irrelevant, once the Sponsor Management System ("SMS") is operative. In particular, ILPA is concerned that employers may incur considerable costs in commissioning systems that may not be compatible with the SMS. **The Home Office should provide guidance on this point as soon as possible, even if such guidance at this time is simply to advise employers not to pursue creation of their own tool until further information is available.**

It is not possible exhaustively to define all the possible costs employees will face in this regard. However, some of the likely costs will include:

- Training HR personnel and managers;

- Redesigning induction systems and updating technical applications (software/databases etc to cope with changes) to initiate "alerts" when repeat checks are necessary;
- Maintaining repeat checks and system reminders;
- Dealing with Home Office visits/ penalties imposed (rightly or wrongly);
- Securing legal advice at the outset as to general liability and liability in specific cases,
- Employment advice relating to the reporting requirements which will need to be included in the employee's contract
- Ensuring personnel files kept up to date on ongoing basis and auditing etc;

Aside from direct financial costs, would these measures give rise to additional indirect costs?

ILPA considers there would be significant indirect costs associated with the proposed charges. Again, these costs are difficult to list exhaustively. However, these costs may include:

- Increased likelihood of discrimination claims/ discrimination practices because employers may be unwilling to employ workers they fear require immigration permission/further checks as such workers may be viewed as "too difficult";
- Employers altering their contractual arrangements to place obligations on individual employees to maintain their "permission to work" status.

Costs (both direct and indirect) will be greater for smaller employers who do not already have streamlined human resources (HR) systems in place. Those employers who have existing HR systems and processes are more likely to be able to adapt these to the new requirements, albeit at significant cost.

2. Will the proposed codes significantly impact upon recruitment practices?

YES

If yes, please explain how and why recruitment practices will be influenced.

The proposed codes may have the result that employers (particularly employers with less HR resources) will be less likely to recruit migrant workers who require ongoing HR input in terms of ensuring they are legally able to work in the UK. The commitment to preventing discrimination should be taken as seriously as the commitment to preventing illegal working. **The new codes on illegal working must be very clear indeed on how to comply with the new requirements in a way that does not discriminate**. **Good quality information on the obligation not to discriminate and what this entails must be provided to workers as well as to employers.**

The requirement for repeat checks will involve ongoing attention to this area of managing employees' personnel records. The increased penalties will mean that HR personnel and managers will carry greater responsibility than was previously the case. This increased burden is likely to have the impact of slowing down recruitment as HR personnel first have to become more familiar with the new systems and

implement them to reduce the possibility of having a penalty or other sanction imposed.

HR Personnel will also need to be trained in matters such as handling repeat checks in different factual scenarios (e.g. whether or not the employee is still married, if on a spouse visa) and how to go about assessing such situations without breaching the employee's right to privacy.

Recruitment practices will also need to be altered to ensure HR personnel are able to deal with site visits from the Home Office, knowing their rights in these circumstances and also dealing with any Home Office action (i.e. penalties/warnings etc.).

3. How well understood are the requirements for employers under the current (1996) legislation?

Misunderstood.

How much have the Government communication methods described above contributed to a good understanding of the current (1996) legislation?

A little.

If you do not think the current (1996) legislation is well understood, please outline why you think this is so.

There are employers who understand their obligations under the current legislation and who are committed to complying with the requirements. They have procedures in place to check that an employee is legally able to work. There are employers who are aware of their obligations and know that they are supposed to check the new employee but are not committed to doing the checks or just do partial checks. These employers may hold this view because they know there is no enforcement if they do not comply with the rules.

Since it came into force on 27 May 1997, s 8 of the Asylum and Immigration Act 1996 (AIA 1996).has been supplemented by s 8A[10] and revised[11] . Now it is to be replaced. These provisions have only rarely been enforced. The employer who did not comply knew that there was unlikely to be any sanction. More rigorous enforcement in the past would have resulted in more employers taking their obligations more seriously.

In contrast to the poor record on enforcement, the government's methods of communicating to the employers their obligations under s. 8 were quite effective. For instance, the current Employer Helpline pilot does allow employers to check a person's application which has been filed at the Home Office and will verify (after the employee and employer have completed the appropriate application) their status. The "verification service" offered to employers is a good way of employers verifying that the employee has permission to work and is a record for the employer. This

[10] Inserted by the Immigration and Asylum Act 1999, s. 22 with effect from 2 May 2001 for all purposes (SI 2001/1394, see also SI 2001/239).
[11] With effect from 1 May 2004. See the amendments made to s. 8 by s. of the Nationality, Immigration and Asylum Act 2002, s 147(2) and the Immigration (Restrictions on Employment) Order 2004, SI 2004/775.

service is approximately a year old and covers applications such as European Economic Area (EEA), indefinite leave to remain and extensions.

Furthermore, the "employing migrant workers" and "business link" websites were helpful tools and easy for employers to access. However many employers are not aware of these services and **the Border & Immigration Agency should ensure that there is a clear campaign directed toward employers about the types of services available for them**.

Government should be aware that a more vigorous enforcement regime may have an effect on the extent to which employers rely on helplines. Employers might feel reluctant to use helpline services, whether during recruitment or subsequently, if they feel they could incriminate themselves. Under s. 8, the requirement is that the employer makes the check before the employment commences. The employer is 'protected' by making the requisite checks at this stage and therefore would not incriminate themselves by making this enquiry. Whereas under the s. 15 of the Immigration, Asylum and Nationality Act 2006, there can be an ongoing requirement by the employer to make regular checks of the employee. An employer might be reluctant to contact 'verification services' if they have already employed the person and now fear that the person may not have permission to work.. They may feel that they will incriminate themselves and that the employer might feel that disclosing this information would place him/her at risk of a penalty.

The requirement that employers become 'immigration officers' and verify documents is an onerous one and places an equally onerous obligation upon the Home Office to ensure that guidance is very clear, widely known, and easily accessible.

The process of documentation verification is likely to be more respected, and to be better understood, if the documents to be checked are those that actually establish whether or not the person has permission to work. Even if employers are not made liable if they have performed proper checks, the system is likely to confuse them if, in cases where they made such checks, it is established that the person did not have permission lawfully to undertake the work. The confusion could result in increased discrimination against foreign nationals. There are real challenges here and what is advocated may not always be possible; for example it is difficult to think of any means by which an employer could verify that a working holiday-maker had not worked for more than 12 months of their two year stay, or that a student was working more than 20 hours per week. But, in general**, ILPA recommends that careful consideration be given to ensuring that individual documents, and combined documents to be checked those that in fact establish that a person has permission to work.**

Account Managers who are allocated to individual companies must be accessible to employers as a source of information on the verification process. It is envisaged that around 70,000 employers will register and **there must be provision for employers rapidly to access an Account Manager.**

4. Would the provision of any other services assist employers in complying with their duties under the legislation?

The current provisions in place and mentioned above such as the Employer helpline are very helpful. It is proposed under the Points-Based System that employers become sponsors for employees. This could provide another opportunity for the employer to verify that an employee is legally able to work. The proposal that, under

the Points-Based System, employers be allocated Account Managers from the Border & Immigration Agency may be another way to ensure that employers comply with the legislation. **Employers should be able to call upon their Account Managers to assit in verfying an employee's status.**

ILPA has expressed its reservations about the proposals for biometric ID to be compulsory for migrants before they are for other people[12]; those reservations remain. The potential for biometrics and unique identification numbers to assist in identifying whether a person has permission to work is in our view outweighed by the risks that this system will compound the risks of increased discrimination already inherent in a system of employer sanctions. In its Explanatory Memorandum on the European Commission's proposal for a directive on employer sanctions[13], the UK government argues that 'there are arguably existing measures' that already impose requirements to notify relevant government departments of an individual's working status, citing P45s, the national monitoring of working status through the National Insurance Number System and monitoring employment through payment of tax and National Insurance, suggesting that there is already considerable provision for keeping checks on individuals without Biometric Identity Documents for foreign nationals only.

At present, IT systems in the Home Office are not linked together and one department does not have access to another. This has the potential to cause delays which could make it impossible to comply with recruitment timescales, or to get a worker in place within the timescale dictated by the demands of the business. This will not be solved by the IT being built to support the Points-Based System, as workers may have permission to work because of their status, rather than because they hold an immigration employment document.

The government has obligations under data protection legislation which affect when it can provide information to third parties, including employers, without a person's knowledge or consent. The consultation paper does not address how this will affect implementation.

Whatever services are put in place, given the complexity of immigration and employment legislation, it is likely that many employers will decide to take independent legal advice. **Employers who wish their legal representatives to handle their sponsor managment function must be able to do so**. ILPA understands the Authorising Officer within the company must be a senior company representative. However many companies will want their legal representative to issue the Certificate of Sponsorship and file the employee's on-line entry clearance application to ensure that details such as the correct company name and job title are the same on both applications and to provide continuity. **Provision should be made for this.**

Would employers be prepared to pay a fee for use of these services?

The current "verification service" does not charge employers. ILPA will be interested to see how employers respond to fees. .**ILPA considers that there should be no further charges, given that over the last few years Home Office fees, which were already high, have risen rapidly.**

[12] See our briefings on the UK Borders Bill.
[13] *Op cit.*

5. The Code recommends that employers conduct document checks on all prospective employees to avoid allegations of unlawful discrimination. Do you think this recommendation will be followed?

UNSURE

The recommendation to make document checks on all potential employees at the same stage of the recruitment process is an important one. Whether or not this recommendation is followed will depend on the employer and the internal practices they put in place. Larger employers tend to be better placed to institute an additional step within their recruitment procedures. They also have more HR capacity to take on additional paperwork. Smaller employers may not have adequate resources to ensure this practice is followed prior to taking on a new employee and may be less likely to comply.

Do you think the recommendation is enough to provide a safeguard against unlawful discrimination?

NO

In a number of cases it will act as a safeguard. However, it is generally the case that where there is a recommendation which does not attract a penalty if it is not followed, that recommendation may be ignored. Employers (particularly those with limited resources) will give priority to ensuring processes and procedures are in place to comply with those regulations where penalties could be imposed for lack of compliance. On its own, the recommendation will not be a sufficient guard against discrimination.

Of course, discrimination is already covered under other legislation and the recommendation will underline existing legislation. However, as stated in our introductory comments, migrants need be protected in other ways as well. By establishing and protecting these rights for migrant workers, there is a far better chance of reducing discrimination than merely by equalizing document checking processes.

Are there any alternatives that would provide further safeguards against unlawful discrimination?

The important point is that procedures should be applied equally to all candidates at the same stage of the recruitment process. But the timing of this will vary from employer to employer. For instance, a number of employers would find it onerous to undertake such a check at the onset of a recruitment exercise where there could potentially be a significant number of candidates. However, as an example all candidates could be requested to provide evidence of their UK immigration status if they are called for a final interview.

The European Commission, in its proposal for a directive on employer sanctions[14] proposes that member States would be required to undertake a certain number of controls on the basis of a risk assessment. Breaches of health and safety law, breaches of tax or customs regulations, benefit fraud and general criminality are the examples given in the Home Office's Explanatory Memorandum on the proposal, which observes that the UK has no central department responsible for workplace assessments[15]. While the Commission's proposals may be primary directed at preventing exploitation, ILPA would also suggest that employers who do not comply with these obligations are unlikely to comply with obligations under laws relating to discrimination and **that risk assessments on compliance with other laws could have a role to play in identifying cases of unlawful discrimination**.

6. Should the timings of follow up checks be standardised?

YES

If yes, when and how should follow up checks be undertaken?

ILPA favours an adaptation to the consultation's suggestion at 6.1 that the employer should make a note of the expiry date at the time of employment and that follow up checks should be conducted within 28 days of the documents expiry. **ILPA would recommend that advice to employers suggests a check 56 (rather than 28) days after the document's** expiry to enable proper procedures to be followed in good time, given that further leave to remain applications must be submitted to the BIA before existing leave expires if they are to be valid. Home Office service standard guidelines currently indicate that processing times for work permits are up to 15 working days[16]. Work permit applications do not constitute applications for further leave to remain. A further in-time application, for leave to remain, is required. Our proposal is designed to protect employees, and the employers who wish them to continue working without interruption. However this process will require knowledge of immigration procedures which employers do not currently possess, which is one of the weaknesses of the proposal to require follow-up checks

Cost Implications

ILPA's view is that follow-up checks will impose significant additional costs on employers working to maintain an effective enforcement system. Further, they are likely to be a disproportionate burden for smaller businesses, or those with a low turnover, which are less likely to be well enough resourced to maintain running checks of a number of employees.

The Illegal Working Taskforce Regulatory Impact Report[17] finds:

[14] *Op cit.,* Article 15.
[15] *Op Cit.* para 37.
[16] http://www.ind.homeoffice.gov.uk/6353/11406/49552/wpserviceandstandardsguidmay.pdf, accessible via www.workingintheuk.gov.uk
[17] 22 June 2005

"Assuming employers are required to conduct checks on temporary migrant workers every 12 months the projected cost to business of a continuing obligation in the fifth year after its introduction would be approximately£1.3 million, This is based on the assumption that it will take an employer approximately 0.25 hours to check a document and an average wage of £11.73 an hour. However, this additional cost will not be distributed across all UK business but will be borne by businesses that use migrant labour."

There is a real risk that the regime could adversely affect businesses that rely on a migrant workforce.

There is also likely to be a social cost, if there is a reluctance to employ temporary migrant workers because of the greater administrative burden of carrying out further checks in relation to this group. Employers may pass up the opportunity to recruit or retain foreign nationals.

There will also be a greater impact on those businesses that employ migrant workers over longer periods than on a business with a higher staff turnover that employs people for shorter periods. This could adversely affect businesses/organisations on the shortage profession list. Employers may also decide to give only short-term contracts to migrant workers on permit free employment, to avoid the need to make ongoing checks.

Implications for the means of calculating penalties

The partial excuse framework only permits a reduction in penalty if employers have carried out initial checks on recruitment, but have then failed to do the required ongoing checks.

ILPA considers that the further checks requirement is likely to affect the levels of employment of overseas nationals in the UK, given the direct and indirect additional costs ongoing checks are likely to require. Identifying dates when an individual employee's leave expires and monitoring the progress of outstanding applications and their eventual outcome will place a practical and financial burden on employers. There will be failures and there will be penalties. Those employers who have failed for want of resources will be hit particularly hard.

Further Checks Regime

The Draft Civil Penalties Code of Practice[18] indicates at 2.5 that employers must

'Make subsequent checks on your migrant staff to retain the statutory excuse"

The Draft Civil Penalties Code of Practice confirms that at 1.2;

'Section 15 of the 2006 Act allows the Secretary of State to serve an employer with a notice requiring the payment of a penalty of a specified amount where they have employed a person aged 16 or over, who is subject to immigration control unless:

[18] February 2006

that person has been given valid and subsisting leave to be in the UK by the Government and that leave does not restrict them from taking the job in question; or

the person comes into a category where employment is also allowed.'

Annex B sets out the penalties that will be incurred by employers. If there is a failure to conduct further checks it will almost always result in a penalty. The only occasion on which a penalty would not be issued is in the case of a warning. ILPA considers that there should be greater flexibility in calculating this aspect of the penalty.

Reporting Suspected Illegal Workers

The penalty due for each worker can be reduced (under para 2.10 of the Draft Civil Penalties Code of Practice) where an employer co-operates with the Border and Immigration Agency (BIA) in an investigation. The level of reduction depends on whether full checks have been conducted. In addition, in flagrant cases where the employer 'knowingly' employed an illegal worker, there may be a prosecution brought under s. 21 of the Immigration, Asylum and Nationality Act 2006.

In Case F, (in the case scenarios in Appendix 2 to the Draft Civil Penalties Code of Practice follow up checks of 12 months are referred to, leading to a penalty of £2,500 for an employer. The scenario suggests that employers will always be liable to the penalty if there is only a partial statutory excuse – i.e. where further checks are not carried out.

It will be necessary part of the further checks regime for employers to have access, with appropriate consents, to information on the BIA databases which record applications received, and the progress of those applications. They will need to be able to obtain confirmation from caseworkers of an individual employee's ongoing entitlement to work in the UK whilst any further leave application is pending. Without this service an employer would continue to risk falling foul of the penalty regime.

ILPA considers that financial incentives for employers to report suspect workers will have a detrimental effect on relations within the workplace and may lead to allegations of constructive dismissal or breach of confidentiality. The risks of a reduction in trust between employer and employee, and even between groups of employees, are high.

Employers Helpline- Further Checks

An employer's helpline could facilitate the further checks regime by enabling employers, with the appropriate consents, to have an access to the BIA to ensure that they have the most up to date information about an employee's status and further leave applications. However, the use of an employer's helpline for individual cases raises questions of security and confidentiality. There will need to be well-developed protocols for confidentiality and employee consent in these procedures. Difficulties will be particularly acute where the application for further leave is not a work-related application, for example if it based on marriage, civil partnership or discretionary consideration on the basis of a medical condition. Migrant, or indeed any, employees may not wish their employers to have this information. Employers will not, of course, have this information about employees for whom they are not required to undertake partial checks.

An employers helpline addressing individual cases will require effective IT and communication systems. Those currently in place in the BIA are not adequate. The IT element of this should be a part of the specification for the ongoing work to design of IT to support the Points-Based System, and of the specification for the ongoing larger projects to provide a new IT system for the BIA and Ukvisas.

Despite the useful information on the Home Office website, and the employers' helpline, it is very difficult for employers to understand who is entitled to work and who is not. Even where their understanding, based on publicly available information, is correct, they are unlikely to feel confident that it is correct. Employers who take their obligations seriously rely heavily on specialist legal advice (for which they pay). The difficulties are acute for those who are but infrequently faced with employing people from abroad, and for those whose workforce is small and who recruit infrequently.

A further concern is the ambit of the offence under s. 21 of the Immigration and Nationality Act 2006 and the risk faced by employers of being found guilty of this offence, regardless of any proper introductory checks conducted, if their standardised updates fail and/or an employee loses the right to work in the country during the course of employment. Thus, what happens when an employer has done all checks, but is considered to have fallen foul of the 'knowingly' test because s/he should have realised that an employee's visa/permission to work would expire before the first further check was performed? If an employer takes on someone is a working holidaymaker who has already worked for seven months and makes annual checks, is that employer liable to be charged with the s.21 offence once the employee has worked for 4 further months and one day?

7. What is the right maximum civil penalty for those employers who conduct no document checks at recruitment and have been found to repeatedly employ illegal migrant workers?

A: £10,000 per employee

Our answer to this question assumes that the prevention of illegal working regime is designed to be easily understood by employers and operated in a transparent, fair and workable way. This is necessary to ensuring that employers "buy in" to the system and its necessary enforcement features, of which penalties and their level are key components.

Our answer also has regard to:

- £10,000 per employee being a maximum penalty; and
- this being a maximum penalty that may be imposed, but which will not necessarily be imposed, on employers who conduct no document checks at recruitment and have been found repeatedly to employ immigrant migrant workers.

ILPA believes that the maximum civil penalty should be set at a level that has sufficient deterrent effect. The low maximum penalty on summary conviction under the current regime has contributed to its lack of success as a deterrent. Given the lack of enforcement under the current regime, some employers fear accusations of discrimination in the checking process more than the consequences of not carrying

document checks altogether, even given the provision for unlimited penalty on indictment under s.8 of the Asylum and Immigration Act 1996.

This leads us to the conclusion that the maximum penalty has to be sufficient to impact on the business of an employer, which may have very significant resources and could easily absorb an inadequate financial penalty. If the employer does not have significant resources, for example, because it is very small, ILPA understands that there will be no obligation on the officer to impose the maximum penalty if that would be disproportionate in the circumstances.

8. Should employers only receive a written warning for a first offence in the generality of cases unless the number of illegal workers involved exceeds four or there is evidence of deliberate wrong doing on the employer's part?

No.

ILPA distinguishes between the introduction of the scheme, and the approach to be taken to 'first offenders' once it is up and running. ILPA advocates a six-month grace period at the outset of the scheme, but not as a matter of policy after that

ILPA notes the Government's recognition in the preamble to this question that smaller businesses are more likely to make genuine mistakes in their recruitment practices (implicitly with greater excuse) than larger and better-resourced ones. ILPA welcomes the recognition that the penalty should be proportionate to the breach. However, ILPA is concerned that, when the full penalty regime is in place, it should act as an effective deterrent. ILPA is concerned that, if only a written warning is issued following first visits, many employers will avoid implementing documenting checking practices from the outset and will rely too much on the advisory input of officers following a first visit before doing so. This may increase the cost, ultimately borne by business and the taxpayer, of the civil penalty regime, while undermining its effectiveness.

Thus **ILPA is against a general policy of "written warnings only for first offences" once the scheme is in place**. However, where the imposition of a financial penalty is not justified by the circumstances of an employer (for example because it is smaller or less well resourced), the officer would retain appropriate discretion to give a written warning only.

9. How important should the following factors be in calculating the amount of the penalty?

a) Whether full or partial document checks have been completed by the employer.

VERY IMPORTANT

b) Whether any previous penalties or warnings have been issued.

IMPORTANT

(but please see caveat in "Other factors" below)

ILPA considers that this should be an important factor in calculating the amount of the penalty, but would contend that this decision should be made on a case-by-case basis, in accordance with clear guidance as to what would constitute improvement in procedures. ILPA is aware of the government's desire to move away from subjective decision making in the area of immigration law, and towards imposing rigid "tick box" criteria which allow for more objective decisions. ILPA opposes to the use of any such "one size fits all" model procedure here. Assessments as to whether there have been sufficient improvements in an employer's procedures need to be made in a flexible and fair way, and to take into account the relative size and resources of the particular employer.

We should welcome more detail as to the specific proposals envisaged for investigations looking for improvement, and the effect on the level of penalties.

e) Whether the employer has reported his or her suspicions to the Border & Immigration Agency.

UNSURE

ILPA is very wary of measures that may encourage an employer to act as an Immigration Officer. To include reporting on suspicions within the penalty calculation mechanism may encourage overzealous reporting by employers, which could particularly prejudice employees with temporary leave to remain/those awaiting decisions on applications etc. Immigration law is complicated, and ILPA would be concerned if employers felt they had to report any employees whose immigration positions were in any way unusual, in order to provide a level of "insurance" against possible future penalties. Such a position would also be discriminatory and would undermine the relationship of trust and confidence between employer and employee, putting the employer at risk of allegations of constructive dismissal.

f) Whether the employer has co-operated with the Border & Immigration Agency.

VERY IMPORTANT

Are there other factors which should be given importance when calculating the fine?

As discussed in our response to question 5, the proposal for a directive on employer sanctions[19] issued by the European Commission, suggests at Article 14 that member States would be required to undertake a certain number of controls on the basis of a risk assessment. The examples given in the Home Office Explanatory Memorandum are breaches of health and safety law, breaches of tax or customs regulations, and

[19] *Proposal for a Directive of the European Parliament and of the Council providing sanctions against employers of illegally staying third country nationals* Council document 9871/07, Com (2007) 249 final, SEC (2007) 604.

other criminality. ILPA considers that failure in any of these spheres is a matter that could properly be taken into account as an aggravating factor in assessing the level of penalty.

There should be sufficient flexibility within the calculation mechanism to take into account the differing sizes and resources of employers, and any particular extenuating circumstances.

While ILPA agrees that the penalty should be a sufficient and appropriate amount to act as an effective deterrent, we would strongly oppose any "tick box" approach to calculating the penalty, which could unfairly penalise some employers.

It is unclear how and in what circumstances on-the-spot penalties will be levied. An inspection could be made at an employer's premises where records of the employees are held at a different location. A particular concern is those multinational companies where the HR practice is outside the UK. In such instances, the records of employees would be held overseas. **A company that does not have its records at the same premises as the inspection is carried out, should be given a reasonable time frame within which to produce evidence that its employees will have the right to work for it in the UK.** Where a company holds employee records outside the UK, the evidence may not be produced on the same day because of time differences.

ILPA is also unclear on the following practical matters:

- Could there be a procedure whereby an on-the-spot penalty could be waived if the correct documentation is produced within a reasonable time frame? Or whereby it could be imposed to take effect after the expiry of a deadline for production?
- Either way, if the evidence is produced and the penalty quashed, will this be without prejudicing the employer's rating for the purposes of the Points-Based System and their ability to sponsor workers in any way?
- If an on the spot penalty is subsequently overturned, how will this affect an employer's rating level for the purposes of sponsorship under the Points-Based System?
- Will the issue of a penalty be in the public domain?

ILPA would be particularly wary of a "parking fine" approach (i.e. where a reduced penalty could be paid if the right to appeal is waived). While such an approach may cut down on administrative burdens/costs, an unfair penalty would remain on an employer's record and may have other negative consequences (q.v. our questions re the effect on ability to sponsor workers).

The existence of an appeal structure does not obviate the need to ensure that the correct level of penalty is established at the outset wherever possible, rather than the system relying on the corrective effect of representations, and/or on appeals to the County Court.

10. Do you agree that, in certain circumstances, employers should be allowed to pay fines in instalments?

YES

ILPA agrees with this proposition. Given the intended deterrent effect of the penalty, ILPA believes that the onus should be placed on the employer to show that they are unable to pay in one instalment (e.g.: by demonstrating commercial or immediate cash flow problems etc.).

If yes, should a maximum period in which to pay the fine be set?

YES

If yes, what maximum period should employers have in which to pay the fine?

Six months should be the standard maximum period, with one year in exceptional circumstances

11. Do people feel that these measures will have any effect upon trafficking for forced labour?

UNSURE

The Illegal Working Taskforce Regulatory Impact Report published on June 22 2005 highlights that:

> *'A civil penalty regime will have a more limited impact on deliberately non-compliant employers who flout the law in pursuit of large profits and will therefore have a restricted effect on reducing the risks of illegal working in such instances.'*

The s. 21 offence of knowingly employing an illegal worker will address the nexus of serious criminality that can surround illegal working and its high social and economic risks but there is a requirement for robust enforcement and protection for the victims which is not addressed in the consultation. Codes of Practice alone are unlikely to have an impact on employers already operating in the informal economy and therefore are unlikely to tackle the social costs of illegal working.

The offence under s. 21 of the Immigration, Asylum and Nationality Act 2006 is another offence that is likely to apply to those who traffic human beings, and the prospects of success under this section may lead to prosecutions being brought in cases where prosecutors would be less confident of getting a conviction under the specific trafficking provisions of the Sexual Offences Act 2003 and under s.4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. However, the same could be said of the offence under s.8 of the Asylum and Immigration Act 1996, which was broader in scope.

It is doubtful whether the civil penalty regime will have an effect on trafficking. The profits to be gained from exploitation may greatly outweigh the levels of penalty. Trafficking is very often a hidden activity and those engaged in it often willingly and knowingly accept trafficked labour.

It is the desire to increase enforcement and the means by which enforcement is carried out, that will determine whether the scheme delivers benefits for people who have been trafficked. The regime set out in the consultation paper does not on its

face in any way assist individual workers who face poor working conditions, exploitation and inadequate health and safety. People who have been trafficked and other exploited migrants are unlikely to approach the authorities or seek redress from an employment tribunal when they are mistreated or their rights violated, making the role of proactive inspection regimes potentially all the more important.

The inspection regime could become a tool to uncover more cases of trafficking. Equally, there are risks that traffickers will use the inspection regime as a further tool to threaten those trafficked.

Steps to ensure that the inspection regime's potential to expose trafficking is fully utilised and to mitigate the risks that inspection could poses to victims should be built into planning to take forward the Home Office and Scottish Executive *Action Plan on Tackling Human Trafficking*. This will require work on:

- Identification. ILPA notes that the UK Human Trafficking Centre is working on identification tools at the moment, for use e.g. by police and support the building of links between work on the civil penalty and this project. It is not enough to have the tools; training and support will also be required.
- Action where a risk is spotted, with priority given to protection for those who have been trafficked, first and foremost as victims of human rights violations, but also as potential witnesses. In particular, it will be necessary to tackle the problem of people who have been trafficked being prosecuted for documentation and other offences rather than protected.
- Whether inspections are targeted at 'quick wins' or at cases where there is a suspicion that some of the worst exploitation is happening. Unless the civil penalty regime is tied up with workers' rights in the broader sense, ILPA fears that the scheme will not make much difference to the level of exploitation.

Forced labour is often part of a pattern of illegality. Other forms of criminal behaviour on the part of the employer such as tax evasion, breaches of health and safety regulations, document forgery and facilitation of illegal entry often accompanies the employment of illegal workers. It is unlikely that the proposed regime will affect those responsible to any greater degree given the number of offences currently on the statute unless it is properly designed, widely enforced, and has sufficient resources devoted to it. As discussed in our responses to questions 5 and 9, the proposal for a directive on employer sanctions[20] issued by the European Commission, suggests at Article 15 that member States would be required to undertake a certain number of controls on the basis of a risk assessment. The lacuna in the UK recorded in the Home Office Explanatory Memorandum on the proposal is important: the UK has no system of workplace inspection. **It is necessary to consider how inspections for the purposes of verifying employer compliance with employment provisions of the Immigration, Asylum and Nationality Act 2006 will be linked to other inspections such as those designed to detect breaches of health and safety law, breaches of tax or customs regulations and other crimes.**

The proposed European directive would allow foreign nationals to register complaints and have protection against exploitative working conditions[21]. The UK in its Explanatory Memorandum responds to this with references to the Gangmasters Licensing Act 2004 and to 'existing UN and EU Conventions' on trafficking. What is present in the Council of Europe Convention, and absent from the civil penalty regime, are steps to assist people who have been trafficked. **ILPA urges the**

[20] *Proposal for a Directive of the European Parliament and of the Council providing sanctions against employers of illegally staying third country nationals* Council document 9871/07, Com (2007) 249 final, SEC (2007) 604.
[21] Article 14.

government to take steps rapidly to ratify the Council of Europe Convention on Action against Trafficking in Human Beings, which the UK signed on 23 March 2007. It avails little to make reference to that Convention as meeting proposed obligations under other proposals, until it has been implemented in the UK.

The European Commission's proposal in Article 14 for a system whereby foreign nationals could register complaints should be considered at a national level. Without these and without efforts to stop the prosecution of victims of trafficking for documentation offences a stronger enforcement regime will not stop trafficking in human beings.

The new employer sanctions are likely to be introduced in tandem with other parts of the Points-Based System. It is necessary to look at the measures as a whole to establish whether they will help to tackle human trafficking. For example, **ILPA advocates retention of existing protections for overseas domestic workers when the Points-Based System is introduced** as more likely to be determinative of whether exploitation of such workers is tackled than the employer sanctions regime. Whether inspections will reach into the homes where these workers are exploited is unknown at this stage.

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12. When preparing cases for prosecution under section 21 of the 2006 Act, knowingly employing an illegal worker, should we routinely invite the court to consider disbarring the director alongside any other punishment thought appropriate?

ILPA considers that it would be appropriate for the Court generally to be invited to consider disbarring directors who are found to have knowingly employed an illegal worker, although prosecutorial discretion should be retained. ILPA believes the judiciary can be trusted to determine on a case-by-case basis, taking the relevant circumstances into account, whether such a request should be upheld. The penalty is a severe one and ILPA anticipates that court decisions to disbar directors would be far from routine.

Are there any other measures that you would feel may prove to be an effective penalty for repeat and/or serious offenders?

The threat of being debarred, together with the other penalties which may be imposed, as outlined elsewhere in the consultation and given the other offences that may apply on the facts of the case, will act as strong deterrents against employing illegal workers, although, as discussed in our response to question 11, a deterrent effect in trafficking cases seems unlikely.

However, we note that a possible outcome of prosecution may also be bad publicity, which would also act as a deterrent to possible offenders. The Home Office should keep detailed statistics on s. 21 and should publicise convictions. Additionally, possible impact on a convicted employer's status on the Sponsorship Register for the Points-Based System (i.e. down-grading of their rating) is likely to have a deterrent effect.

ILPA 7 August 2007