ILPA response to the Home Office consultation *Tackling illegal immigration in privately rented accommodation*

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional membership association the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups.

The questions in the consultation paper are tightly drawn and narrowly focused. We ask that our responses to the individual questions be considered in the light of and alongside the comments on the scheme made here and in response to question 1 as these are relevant to all the questions.

Checks by landlords and landladies would be a new stage in the privatisation of immigration control, a step change from the current system of checks by employers and educational institutions. For the reasons set out below, we consider that had the proposals been thought through adequately they would have been recognised as not workable. Checking immigration status is not a simple task. Individuals and families would be prejudiced as a result of problems with record keeping and delays in the Home Office, the First-tier Tribunal and the Upper Tribunal. For example, the proposals take no account of those who do not have leave but have an outstanding application which clearly meets the provisions of the Immigration Rules.

We consider that the proposals give rise to a real risk of increased homelessness, including of families, and of exploitation. We consider that the cost to local authorities of manufacturing homelessness persons in this way has not been considered adequately. It is on local authority social services departments that the cost of housing unlawfully present migrants often falls. No adequate account has given as to how the extra cost will be met by local authorities.

Identity checks for all

ILPA considers that the combination of these proposed checks, the proposals for health service checks and existing checks, such as those carried out by employers and educational institutions, amount to a system of identity checks for foreign nationals. What this means in practice is a system of identity checks for all, since it is necessary for British citizens or persons with permanent residence to prove that they are lawfully present in the UK if and when checked. We recall the Home Secretary's introduction of the Identity Documents Bill at second reading:

> The national identity card scheme represents the worst of government. It is intrusive and bullying, ineffective and expensive. It is an assault on individual liberty which does not promise a greater good. [1]
>
> …
>
> We are a freedom-loving people, and we recognise that intrusive government does not enhance our well-being or safety. In 2004 the Mayor of London promised to eat his ID card in front of
>
> > "whatever emanation of the state has demanded that I produce it."
>
> I will not endorse civil disobedience, but Boris Johnson was expressing in his own inimitable way a discomfort even stronger than the discomfort to be had from eating an ID card. It is a discomfort born of a very healthy and British revulsion towards bossy, interfering, prying, wasteful and bullying Government.[2]

It is not the mere fact of a card that produces that discomfort. Nor does it signify that landlords and landladies are a remote emanation of the State. British citizens, EEA nationals and third country nationals alike would be required to produce identity documents at many turns in a scheme that would be intrusive, bullying, ineffective and expensive and likely racist and unlawful to boot as described in responses to the questions below.

Consultation question 1: The focus of this policy is to check the immigration status of people who are paying money to live in accommodation as their main or only home. Given this focus, do you think the following forms of accommodation should be included in the landlord checking scheme?

> **(i) Properties rented out for one or more person(s) to live in as their main or only home (Yes / no / don't know)**
> **(ii) Homes which are not buildings – including caravans and houseboats – if they are rented as the tenants main or only home (Yes / no / don't know)**
> **(iii) Homes which were not built for residential purposes – for example someone renting a disused office as their home, including "property guardians" (Yes / no / don't know)**
> **(iv) Further forms of accommodation not described in the consultation (please specify further forms of accommodation) (Yes / no / don't know)**

ILPA does not consider that any of the forms of accommodation described in the question (or hinted at in subsection iv) should be included in the checking scheme.

ILPA does not consider that there should be a checking scheme. We make points applicable to the types of accommodation in all of categories (i) to (iv) then points on specific proposals.

[1] HC report 9 Jun 2010: Column 345.
[2] *Op. cit.* Col 350.

The scale of the change and the capacity of the Home Office to manage it

Those running a company are used to having to battle with red tape on a daily basis. Employers currently have to check the people they employ. Recruitment and treatment of employees is governed by employment law with detailed provisions to try to outlaw discrimination. With the vast majority of employers operating PAYE a lot of "all employers be aware" notices are sent to all those registered with Her Majesty's Revenue and Customs as registered for PAYE. In addition some employers are also licensed sponsors of migrant workers. No similar systems cover all landlords and landladies.

What is proposed is very different to the system for employers. The civil penalty scheme for employers is, in its current incarnation, backed by the sponsor licensing system (whether the person subject to immigration control is also sponsored)and in practice the two are interlinked. It is not proposed to licence all private landlords and landladies (the government rejected proposals made by the previous government to have such a register[3]) and the costs and bureaucracy involved in so doing would be prohibitive. But this creates enormous challenges even in communicating with them. Landlords and landladies are no longer permitted to hold deposits other than via bond companies, see the Deposit Protection Scheme and the Housing Act 2004 as amended, but not all of them take deposits. As to those that do, case law on tenancy deposit schemes, where the landlord must place the deposit in an authorised scheme and provide information to a tenant, is instructive as an illustration of the practical difficulties in many cases of making landlords and landladies aware of new regulatory obligations and of ensuring compliance with them[4].

Employees and would-be employees have routes of redress if they are treated badly, including if they are victims of discrimination. It is much more difficult to challenge discrimination, victimisation and harassment by a private landlord or landlady under Part 4 of the Equality Act 2010. Private landlords and landladies come in all shapes and sizes and many manage the letting of their property with a minimum of formality. They may be relaxed about matters such as subletting or persons succeeding to the tenancy. According to the Department of Communities and Local Government, in 2010 individual private landlords and landladies had responsibility for 71% of all private rental properties in England[5]. That survey showed that 78% of all landlords and landladies in England had only one rental property.

In 2013 Shelter estimated that some nine million people in England rent[6]. Tenancies are often granted for a short period, typically six to 12 months, and then renewed.

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[3] HC Report, 3 June 2013, col. 1232.

[4] See for example *Boyle v. Musso*, 25 October 2010, Bristol County Court; *Soens-Hughes v. Lewis* 22 December 2010, West London County Court; *Green v Sinclair Investments Limited* Clerkenwell and Shoreditch County Court, 11 June 2010; *Shepley v. Yassen,* Tameside County Court, 13 January 2011; *Woods v Harrington*, Haverfordwest County Court 19 May 2009; *Delicata v Sandberg*, Central London County Court. 2 June 2009. We have concentrated here on a selection of cases in the lower courts the facts of which illustrate what happens in practice, rather than cases in the higher courts on the correct legal interpretation of the very complex applicable provisions.

[5] *Private Landlords Survey 2010,* Department of Communities and Local Government, October 2011.

[6] See http://england.shelter.org.uk/campaigns/fixing_private_renting (accessed 12 August 2013).

Many persons will rent more than one property in the course of a year. Persons with sub-tenancies change perhaps more rapidly.

It was but a few short months ago, on 28 March 2013, that the Home Secretary abolished the UK Border Agency. She said[7]

> *However, the performance of what remains of UKBA is still not good enough. The agency struggles with the volume of its casework, which has led to historical backlogs running into the hundreds of thousands; the number of illegal immigrants removed does not keep up with the number of people who are here illegally; and while the visa operation is internationally competitive, it could and should get better still. The Select Committee on Home Affairs has published many critical reports about UKBA's performance. As I have said to the House before, the agency has been a troubled organisation since it was formed in 2008, and its performance is not good enough.*
>
> *…. I believe that the agency's problems boil down to four main issues: the first is the sheer size of the agency, which means that it has conflicting cultures and all too often focuses on the crisis in hand at the expense of other important work; the second is its lack of transparency and accountability; the third is its inadequate IT systems; and the fourth is the policy and legal framework within which it has to operate. I want to update the House on the ways in which I propose to address each of those difficulties.*
>
> *…the third of the agency's problems is its IT. UKBA's IT systems are often incompatible and are not reliable enough. They require manual data entry instead of automated data collection, and they often involve paper files instead of modem electronic case management.* …
>
> *The final problem I raised is the policy and legal framework within which UKBA has operated. The agency is often caught up in a vicious cycle of complex law and poor enforcement of its own policies, which makes it harder to remove people who are here illegally.* …
>
> *UKBA has been a troubled organisation for so many years. It has poor IT systems, and it operates within a complicated legal framework that often works against it. All those things mean that it will take many years to clear the backlogs and fix the system, ..."*

ILPA considers all the remarks quoted above to be fair and accurate and concurs that it will take many years to clear the backlogs and fix the system. At the moment we experience a demoralised management and workforce floundering.

The Home Office is running a number of consultations at the moment and we anticipate that a wide range of areas will be covered in the autumn's immigration bill: immigration and asylum have not seen dedicated primary legislation for some time and officials had got into the habit of being able to rely on frequent primary legislation so we anticipate that there is a large wish list.

We do not consider that the Home Office is in a position to take on a challenge of this scale. We urge caution. This project sets the Home Office up to fail. Again.

[7] Hansard HC Deb 6 Mar 2013 : Column 1500.

Experience from the Capita contact and the vans "pilot": risks of breach of equality and race discrimination laws

We have seen in the past year the Home Office subcontract to Capita Plc. to text and telephone migrants allegedly with no leave telling them to leave the UK. British citizens, nurses, investors with a million pounds invested in the UK, all have been recipients of these texts. This is no surprise. Capita has been working from the Home Office database which both reflects the complexity of current immigration law and is not up to date[8].

More recently we have seen the Home Office launch a campaign with advertisements on vans in particular London boroughs saying that there are 106[9] "illegal immigrants" in the area and advising those persons to send a text to get in touch with the authorities to arrange to "go home" or face arrest. Following a legal challenge based on the Government's failure to comply with the public sector equality duty under the Equality Act 2010, the Government confirmed that if any further campaigns of a similar nature are planned, they will carry out a consultation with local authorities and community groups[10].

Both the Capita exercise and the campaign involving the vans have been of questionable legality and the subject of widespread condemnation[11]. Both are object lessons in how difficult it is to produce a workable and efficient system against the backdrop of an enormously complex immigration system and longstanding problems and delays in Home Office immigration casework and record keeping. Both are object lessons in the extent to which there is at best a cavalier attitude to promoting equality or ensuring that the actions of the Home Office do not leave people, be they persons under immigration control or British citizens, vulnerable to abuse and victimisation.

The consultation paper states:

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[8] See further *Capita's work for the UK Border Agency*, Oral and written evidence *29 January 2013, Paul Pindar, Chief Executive, Andy Parker, Joint Chief Operating Officer, and Alistair MacTaggart, Managing Director, Secure Border solutions, Capita Plc* , report of the Home Affairs Select Committee HC 914-I, published on 11 April 2013.and ILPA's August 2013 response to the Home Office consultation *Strengthening and simplifying the civil penalty scheme to prevent illegal working.*

[9] In all the areas the same figure "106 arrests" has been used, a matter that is now one of the subjects of an investigation by the Advertising Standards Authority.

[10] *Home Office Agree Never To Run Van Adverts Telling Migrants To Go Home Again Without Consulting,* Press release by Deighton Pierce Glynn solicitors of 12 August 2013.

[11] Examples include: *Capita's work for the UK Border Agency, op.cit, supra. 'You are required to leave the UK': Border Agency contractor hired to find illegal immigrants sent them TEXTS* Daily Mail 11 January 2013, available at http://www.dailymail.co.uk/news/article-2260667/UK-Border-Agency-contractor-hired-illegal-immigrants-send-TEXTS-warning.html#ixzz2bm4JCfg2 (accessed 12 August 2013); ICO to investigate SMS messages sent to immigrants by Capita, Computer World 15 January 2013; *Nigel Farage attacks Home Office immigrant spot checks as 'un-British'*, The Telegraph, 2 August 2013; *Vince Cable MP*, BBC 28 July 2013, available at http://www.bbc.co.uk/news/uk-politics-23481481 (accessed 12 August 2013), *Bishops condemn Home Office 'go home' campaign*, Ekklesia, 12 August 2013, available at http://www.ekklesia.co.uk/node/18785 (accessed 12 August 2012), non-governmental organisations such as Show Racism the Red Card (see http://www.srtrc.org/news/news-and-events?news=4511 accessed 12 August 2013) and Liberty *"Go Home" vans, nasty racist and likely unlawful* 1 August 2013, see https://www.liberty-human-rights.org.uk/news/2013/go-home-vans-nasty-racist-and-likely-unlawful.php (accessed 12 August 2013).

> *34. Many landlords will meet a number of prospective tenants. There is no requirement to check the immigration status of all of them – only the people with whom the landlord actually proceeds. Checks should be performed on a non-discriminatory basis (i.e. without regard to race, religion or other protected characteristics as specified in the Equality Act 201020) on all adults who will be living at the property.*

This paragraph perfectly encapsulates the risk that racial profiling will take place before a tenancy is offered.

Three thousand pounds is a considerable sum and will cover the cost of many properties standing empty for months. It will cover a considerable amount of repair. In other words, a landlord or landlady would have an incentive not to accept a person who otherwise appears to be a model tenant if there is any risk of having to pay the fine. Any stereotype or prejudice might weigh with a person with multiple offers on the property, not because they feared having a particular individual as a tenant, but because they feared a fine, making the assumption that that person was more likely to be a person under immigration control whose documents would be complicated to check. When will a landlord perceive a risk of a fine? When will a landlady start worrying that a person's passport is false or otherwise unsatisfactory? All too often this is likely to depend on what people look like, what they sound like, what their names are and how those names are spelt, and what place of birth is identified in their passports. We recall the problems when in 2006 when attempts were made to identify foreign national prisoners. Prison records showed place of birth. British citizens born overseas, for example those who were children of members of the armed forces, were frequently wrongly identified. People from black and ethnic minorities would be likely to find it more difficult to rent property than the white population. Those with indefinite leave to remain, or permanent residence under European Union law, including those born in the UK, would be likely to find it more difficult to rent property than British citizens.

Were the proposals implemented, a landlord or landlady would be aware of the immigration status of their tenants and would know, and hold on file, all information that is contained in their passports or other acceptable documents. Will they keep that information confidential? Or store the documents safely? Or destroy them safely? There are risks to having private citizens hold such data on each other. Insofar as the Home Office is already sharing that information with members of the Credit Industry Fraud Avoidance Scheme (CIFAS) we consider it is likely that it is in breach of European Union law. See below.

Need for letting agents to register with the Office of the Immigration Services Commissioner

If landlords and landladies are companies, or if they do not check the status themselves but contract with a third party company to do this on their behalf then that company will need to ensure that the checks are being done by a solicitor, barrister, legal executive or person registered with the Office of the Immigration Services Commissioner because advice on a person's status will fall within the definition of immigration advice under Part V of the Immigration and Asylum Act

1999. For all save regulated or exempt persons to give such advice is a criminal offence[12].

That the advice is given to the landlord or landlady rather than the person under immigration control matters not for the purposes of the Act; it is given in respect of a particular individual[13]. Even if an exemption is given, we recall the matters aired in the discussions on whether social workers should be given an exemption to advise separated children (which ended in consensus that they should not – the Home Office, the Ministry of Justice, the Local Government Association, ILPA and the Office of the immigration Services Commissioner were among those involved in the discussions). Even if an exemption is given in the form of a Ministerial Order under s.84 (4)(d) of the Immigration and Asylum Act 1999, under Schedule. 5 paragraph 3 (3) of the Act, they still have to comply with the Commissioner's Code of Standards. The requirements of the Code include:

- Professional Indemnity Insurance
- Continuous Professional Development
- Acting in the best interests of the client
- Not acting where there is a potential conflict of interests[14].

Effect on the private rented sector

We draw attention to comments that have been made by experts about the effect on the private rented sector. In 2012 the Joseph Rowntree Foundation estimated that some 75% of recent migrants in the UK are housed in the private rented sector[15]. Many are in poor quality and overcrowded accommodation.

On 3 July 2013 the Residential Landlords Association issued a news release with the results of a survey showing that 82% of landlords and landladies opposed the plans: *Landlords oppose Government's immigration plans*[16] The Chair of the Association, Alan Ward said:

> *The private rented sector is already creaking under the weight of red tape so it is little wonder that landlords are so clearly opposed to this flagship Government measure.*
>
> *"Whilst the RLA fully supports measures to ensure everyone in the UK is legally allowed to be here, this proposal smacks of political posturing rather than a seriously thought through policy.*

[12] Immigration and Asylum Act 1999 s 84 read with s 91.
[13] Immigration and Asylum Act 1999 s 82(1).
[14] This was discussed at length in the context of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in the specific context of whether social workers could be given an exemption under the Act. See the letter of 5 October 2012 from Clyde James, Office of the Immigration Services Commissioner to Rebecca Handler of the Legal Strategy Team in the Immigration and Border Policy Directorate of the Home Office.
[15] *UK migrants and the private rented sector A policy and practice report from the Housing and Migration Network* John Perry February for the Joseph Rowntree, February 2012.
[16] Available at http://news.rla.org.uk/landlords-oppose-governments-immigration-plans/ (accessed 12 August 2013). The report defines "recent" as having arrived within the last five years.

> *"For a Government committed to reducing the burden of regulation it is ironic that they are now seeking to impose a significant extra burden on landlords making them scapegoats for the UK Border Agency's failings.*

The article describes the Home Office as giving assurances that it will take a "light touch" approach to regulation. This terminology is familiar to us from the employers' civil penalty and sponsor licensing schemes. In our experience it means different treatment for different employers with no objective basis for this. And as per the *Strengthening and simplifying the civil penalty scheme to prevent illegal working* consultation[17], once the legal powers are in place it is easy to change from light touch regulation to greater enforcement. The Home Office's light touch approach toward employers has been criticised by the Chief Inspector of Borders and Immigration[18] and by the Home Affairs Select Committee[19]. If the Home Office intends a scheme to be light touch, the legal powers it takes should reflect this.

The above suggests that the scheme may make small landlords and landladies more reluctant to rent property. This could decrease the availability of rental property which could in turn drive prices up and make it easier for bad landlords and landladies to find tenants for unsafe and insanitary accommodation. Any scheme for demanding that landlords and landladies make checks would need to go hand in hand with much greater enforcement that currently occurs of legislation designed to protect people from poor housing, including where accommodation is tied to particular employment. It could concentrate available property in the hands of a smaller number of letting agents, who may have regional or local monopolies. This too could drive prices up.

Particular categories

Main and only home

The terms of the question illustrate the complexity of what is proposed. How is "main" home to be defined? If the definition is to be drawn from housing law then there is a considerable amount of case law on this and similar phrases from cases under the Rent Act 1977, Housing Act 1985 and Housing Act 1988[20]. It is relevant whether a property is a person's "sole or main residence" in calculating council tax and there is considerable case law on what this means[21]. Under this case law whether a property is a person's main or only home depends on the facts of the individual case. It is extremely difficult for a landlord or landlady to ascertain

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[17] *Op cit.*

[18] UK Border Agency's operations in the North West of England An Inspection of the Civil Penalties Compliance Team – Illegal Working March - April 2010, Chief Inspector 18 November 2010. See also *Inspection of Freight Searching Operations at Juxtaposed Controls in Calais and Coquelles, the report of a pilot inspection contained in the Chief Inspector's 2008-2009 Annual Report.*

[19] Most recently in its Fourth Report of session 2013-2014, - *The Work of the UK Border Agency (October-December 2012),* HC 486 | *Published 13 July 2013.*

[20] See for example *Cox. v London Southwest Valuation Tribunal & Poole Council* 1994; *Codner v Wiltshire Valuation and Community Charge Tribunal HC* [RVR 1994]. *Courtney plc v Murphy (VO) LT* [RA 1998]; *Clayton v Watford Borough Council & Hertfordshire Valuation Tribunal HC* [RA 1997].

[21] *City of Bradford Metropolitan Borough Council v Neil Anderton HC* [RA 1991]; *R (on the application of Williams) v Horsham District Council HC* [RVR 2003]. CA [RA 2004]; *Bennett v Copeland Borough Council*, [2003] RVR 296[2003] EWHC 990 (Admin).

whether a property is a person's main or only home, particularly when the person asserts that their main home is outside the UK.

Or is the Home Office to operate its own free-standing definition? This will result in considerable confusion for those landlords and landladies with some familiarity with the other definitions.

Caravans and Houseboats

We refer the Home Office to the Caravan and Boat Act 1996, passed as a consequence of the decision of the Lands Tribunal in *Atkinson (V)) v Foster and others* (RA 1996). This serves as a warning that case law that develops under any penalty regime introduced may have knock-on effects in housing law with consequences for other government departments.

If a person rents a caravan and caravans are outside the scheme, and the person spends more time the caravan than in a flat which is within the scheme, will the landlord or landlady of the flat be required to check that person or not? What if the person's "main" home is outside the UK? Will the landlord or landlady be clear about whether they are required to check the person or not? Will the landlord or landlady be required to carry out spot checks?

At what point does a stationary caravan turn into a house, or a property originally built as, for example, a public house, chapel or office turn into a house?

Property guardians

The question of property guardians is one of considerable complexity in housing law[22].

Further forms of accommodation

These appear to include anywhere a person lives that they do not own under an arrangement that involves money changing hands. These are many and various. Is the term confined to buildings? Does the accommodation have to be classed as a property in housing law?

Establishing these classificatory systems should not, we suggest, be a top priority for immigration officials.

Consultation question 2: Do you think the following forms of accommodation should be excluded from the landlord checking scheme?

(i) Social housing rented to tenants nominated by local authorities or to households provided accommodation under the homelessness legislation (Yes /no / don't know)

[22] See '*Who guards the guardians'*, Giles Peaker, Journal of Housing Law, January 2013.

(ii) Privately rented accommodation offered by the local authority to a person to whom a homelessness duty is owed (Yes / no / don't know)
(iii) Sales of homes, including those purchased on a leasehold or shared ownership basis (Yes / no / don't know)
(iv) Accommodation provided by universities and other full-time educational Accommodation provided by employers for their employees (Yes / no / don't know)
(vi) Tourist accommodation such as hotels and guest houses providing short-term accommodation to tourists and business travellers (Yes / no / don't know)
(vii) Short term business and holiday lets (Yes / no / don't know)
(viii) Hostels providing crisis accommodation to homeless and other vulnerable people (Yes / no / don't know)
(ix) Hospital and hospice accommodation for patients (Yes / no / don't know)
(x) Care homes for the elderly (Yes / no / don't know)
(xi) Children's homes and boarding schools (Yes / no / don't know)
(xii) Other forms of accommodation not described above (please specify other forms of accommodation) (Yes / no / don't know)

ILPA does not agree that there should be a checking scheme.

ILPA considers that none of the types of property listed above should be part of a checking scheme.

The list illustrates the complexity of the scheme. Insofar as any scheme would make it more difficult for British citizens, persons lawfully present and others to find accommodation in the private rented sector, these are the types of alternative accommodation likely to be put under pressure.

As to "privately rented accommodation offered by the local authority to a person to whom a homelessness duty is owed", what would happen if it turned out that as a matter of law no duty was owed to the person under the homelessness legislation? Would the landlord be liable for having failed to carry out the check? What happens where the duty is discharged and the person continues to be a tenant of that same privately rented accommodation. Has any consideration *at all* been given to the subtle and various ways in which s 193(5)-(12) of the Housing Act 1996 regulates the cessation of duties owed to homeless persons? If not, why not? In the absence of such consideration this proposal looks administratively unworkable and chaotic.

As to "sales of homes, including those purchased on a leasehold or shared ownership basis", is it intended that sellers would have to check the status of those to whom they sold their property? This would be a whole new scheme on top of a scheme to check the status of tenants.

As to "Accommodation provided by employers for their employees" save in the case of tied accommodation etc. most such accommodation is provided through a separate private landlord or landlady

As to "tourist accommodation such as hotels and guest houses providing short-term accommodation to tourists and business travellers and "short term business and holiday lets", we are familiar with bed and breakfasts in seaside towns being used to house persons seeking asylum because they are cheap. It is not straightforward to designate accommodation as being or not being "tourist accommodation and guest houses".

As to "short term business and holiday lets" see the response to question 3 below. It is unclear why both the type and duration of the tenancy are both considered relevant and this appears to introduce further complication.

As to "hostels providing crisis accommodation to homeless and other vulnerable people" we anticipate that such accommodation would come under considerable pressure from those unable to rent elsewhere. Shortages in such accommodation would hit hardest the very people for whom it is designed.

As to "hospice accommodation for parents" and "care homes for the elderly", what would be intended to happen in a non-commercial arrangement where a person takes a dying friend or family member into their own home to care for them? Would they be expected to check that person's documents?

As to (xii), notable omissions in the list include:

- Accommodation provided under the Children's Act 1989;
- Accommodation in which persons are housed under mental health legislation.

Consultation question 3: The Government wishes to exclude tourist accommodation and short-term business and holiday lets from immigration checks because these do not usually represent the person's main or only home. However, the Government considers checks should be made if the person stays there for an extended period of time. After what duration of stay should an immigration check be required?

(i) At the end of one month;
(ii) At the end of two months;
(iii) At the end of three months;
(iv) At the end of four months;
(v) Longer than four months;
(vi) Don't know?

None of the above; there should not be checks.

The proposal is unworkable.

See our comments on "main home" above. Some business lets are a main home; some are not. Some are short term; some are not. A partner or friend of may come to live in the property. A person may take over a business let as their own tenancy. A person may occupy a business let for a very short period, but where the property is nonetheless their main or only home, for example those who move to a new city to work and are looking for a permanent home.

The distinction between a holiday let and a let for a place that is a person's main home is not clear cut: some people end up staying in "holiday lets" for very considerable periods, letting out their "main home" or allowing family or friends to live there.

Many students would not regard the property they rent as their main home – they may be studying away from their main home, which, for younger (and not so young) students, may be the parental home.

What happens when a number of tenants live in the property, arriving and leaving at different times?

Either an exception would be made for short term lets, or it would not. If it is, it is likely that the result will be a series of short-term lets as a means of avoiding having to check.

Consultation question 4: The Government is interested to know whether it is appropriate to include lodgers and sub-tenants in the policy. Should the policy apply to:

> **(i) Owner-occupiers taking in paying lodgers where the lodger is living there as their main or only home (Yes / no / don't know)?**
> **(ii) Tenants of privately rented accommodation taking in lodgers or sub-tenants as their main or only home (Yes / no / don't know)?**
> **(iii) Social housing tenants taking in paying lodgers or sub-tenants where the lodger is living there as their main or only home (Yes / no / don't know)**

None of the above.

See our comments on "main home" above.

See our comments on the capacity of the Home Office above. To extend the scheme to these arrangements would be to extend it enormously.

We anticipate that if this sort of agreement were made subject to the duty to check lodgers or subtenants' records this would lead to a large number of these arrangements going undeclared, being hidden and, if discovered, presented as friendly, non-commercial transactions, with the consequent evasion both of tax and of obligations under legislation designed to protect standards of accommodation.

The prohibition on discrimination under Part IV of the Equality Act 2010 is very much less robust in the case of "small premises" into which category these arrangements appear to us to fall.

Small premises are defined as premises where the person or their relatives reside and intend to continue to reside in another part of the premises and the premises include parts shared with residents who are not members of the first person's household. The premises must include accommodation for at least one other

household and be let or available for letting on separate tenancy agreement(s), and not normally sufficient to accommodate more than two other households. The premises are also small if they are not normally sufficient to provide residential accommodation for more than six persons in addition to the first person and their relatives.

The prohibition of discrimination, harassment and victimisation under the Equality Act 2010 applies to the characteristic of race in the let of small premises but otherwise it will be lawful to discriminate in the disposal (etc.) of tenancies in small premises. A visa may reveal other things about a person, for example that they are in a civil partnership and thus their sexual orientation. A landlord or landlady in "small premises" could treat people differently on this ground.

As to discrimination on the grounds of race, this may be very difficult to prove unless advertisements bar particular nationalities as there are a multitude of reasons that an individual can advance for not sharing their home with another person and the burden of proving that it was not one of the these but the lodger's nationality that led to the refusal of a particular lodger or licensee (or tenant) is a heavy one. A claim against a landlord or landlady for discrimination is brought in the county court but no statistics are available to show how often such cases succeed. We suggest the Home Office obtain and publish information on whether there have been any and/or any successful claims against landlords and landladies of small premises under the Equality Act 2010.

Arrangements where an owner occupier takes in a paid lodger are often very informal. The sums of money changing hands can be very low. The arrangements are often at the lower end of the rental market. Lodgers or licensees have less protection from eviction under the Protection from Eviction Act 1977 than those who are sole occupants of property under a formal tenancy. The chances of a landlord or landlady's taking fright and putting lodgers who are ill-placed to find alternative accommodation onto the street, retaining deposits including money deposited against payment of any possible fine under these measures, are high.

An approach that includes sub-tenants would be unworkable. How would responsibility be assigned, and how would it be aligned with having knowledge of, and responsibility for, a person's being in the property? However, an approach that excluded sub-tenants might result in subtenancy becoming the preferred arrangement, with the role of head tenant becoming a specific paid job. Landlords and ladies often impose restrictions on subtenancies; this would encourage them to do the reverse.

Consultation question 5: If the Government does decide to include lodgers and subtenants, then who should be held liable for making the migration checks on the lodger or sub-tenant?

(i) Always the landlord's/owner occupier's responsibility;
(ii) Always the tenant's responsibility;
(iii) Unless they specifically agree otherwise, the landlord;
(iv) Unless they specifically agree otherwise, the tenant;
(v) Don't know?

The question reveals why the policy would be unworkable.

ILPA considers that it should be open to the parties to a contract to agree the terms of that contract and therefore options iii) or iv) are to be preferred to options i) and ii). Were i) and ii) chosen we should anticipate considerable confusion over the strict liability nature of the offence with a likely prevalence of a belief that it is possible to transfer liability by contract.

As to options iii) and iv): the landlord or landlady will not always know about a sub-tenancy and may be far away. A sub-tenancy may be of short duration and be informal. How does one distinguish a short-term subtenant from a visitor or someone minding the property when a tenant is on holiday etc.? Relationships between subtenants and tenants vary considerably, some may be very informal and a means of helping out a friend, even though money may change hands to cover bills and out of pocket expenses. Relationships between a subtenant and other tenants may be complex. Where there is more than one tenant in the property, who is responsible for the subtenant? What does 'joint and several liability' mean in this context?

We can envisage an elaborate system of written agreements purporting to shift liability growing up, without any real assumption of liability anywhere in the system.

Consultation question 6: If you are a current or prospective tenant or lodger, and you are in the UK legally, would you readily be able to provide one of the forms of documentation that are in the list? (Yes / no / don't know / NA)

N/A.

But

ILPA is familiar with dealing with persons under immigration control and makes the following comments. These are in part based on our experience of the civil penalty system for employers, see further our August 2013 response to *Strengthening and simplifying the civil penalty scheme to prevent illegal working*[23]

A "UK passport" does not mean that a person is a British citizen. There are many types of UK passport and some people who hold a UK passport are not exempt from immigration control.

A naturalisation certificate does not prove that a person has British citizenship. The person may have renounced that citizenship subsequently or have had it taken away.

A person with a right of abode certificate is not necessarily a British citizen.

Many EEA nationals and non-EEA nationals who are lawfully present are still reliant on leave to remain that is endorsed in passports, e.g. those who applied for indefinite

[23] *Op.cit.*

leave to remain before the end of February 2012 when Biometric Residence Permits were introduced for all.

The Home Office does not issue letters saying that a person has an outstanding appeal. Communications come from the Tribunals

There are currently very severe delays at the Tribunals. It can take over two months or even longer to receive a Notice of Hearing.

Family members of EEA nationals are not required to obtain EEA family member residence cards, etc. The introduction of these checks would force such family members to obtain documents if they wish to rent accommodation and raises questions under European Union law.

The proposals do not make any provision for those who have made in-time but invalid applications and then resubmitted them within 28 days as permitted by the Immigration Rules or those who overstay without making an in-time application but fit within the Immigration Rules and the 28-day concessions for overstayers.

Getting in touch with the Home Office enquiry services can be time-consuming. They may give different answers at different times. This can be as a result of their understanding of a person's status or because the Home Office database has not been updated, the latter is a problem that can last for considerable periods.

A very much larger operation than the employers' checking service would be required. Large numbers of additional staff (or subcontractors) would be needed. They would have to be trained and quality control would be required. The online guidance mentioned at paragraph 54 would have to be drafted. If wrong information were given, there would need to be schemes for redress and compensation. How is all this to be paid for at a time when cuts are being made to government expenditure?

It is stated in paragraph 99 of the consultation paper that while landlords and landladies need not check children they may have "to satisfy themselves that the people concerned are children." It is a complicated matter, with potentially grave consequences, to have professional social workers call into question a child's age, as is set out in ILPA's *When is a child not a child Asylum, age disputes and the process of age assessment*[24]. To set up a scheme where private landlords and landladies are doing so can only run counter to the Home Office's duties under section 55 of the Borders Citizenship and Immigration Act 2009 to safeguard and promote the best interests of a child.

Many workers and students secure accommodation before they arrive in the UK. Checks prior to agreeing the tenancy are not possible in these cases. Where a person is confident that a visa will be awarded, or is prepared to take the risk, they may secure accommodation before they have leave. The proposals would make this impossible. While it is suggested in the consultation paper that an agreement could be made conditional upon a satisfactory check on arrival, neither the person letting the property nor the person renting is likely to be enthusiastic about an agreement

[24] Heaven Crawley for ILPA, May 2007.

that could be voided at such a late date. Proposals such as this one do not inspire confidence that the realities of the rental market have been fully understood.

We do not understand the meaning of a "Home Office letter of authorisation" for those who do not have leave.

Provision needs to be made for those without leave. If an employee becomes an overstayer s/he can stop work. The equivalent in this regime is to become homeless. *Inter alia*, we do not consider that making the children of those here without leave homeless is compatible with the duties of the Home Office under section 55 of the Borders, Citizenship and Immigration Act 2009. Nor has any adequate consideration been given to the result burden on local authority social services departments who often bear the burden and cost of accommodating otherwise homeless unlawfully present migrants.

Consultation question 7: **Are you in receipt of welfare benefits? If so, do you have in your possession a letter that is less than three months old and which evidences your entitlement to benefits that you could show to a landlord? Which benefits does this relate to?**

N/A.

But

ILPA members are lawyers accustomed to checking clients' entitlements. It is not infrequent for persons with lawful leave and British citizens leading chaotic lives, including those who have mental health problems, to find it extremely difficult to lay their hands on documents evidencing entitlements. These are people who already find it difficult to secure private rented accommodation.

We also question the value of including this question in the consultation as those persons on welfare benefits answering the consultation are, as evidenced by their responding to the consultation, more aware of these matters and more concerned by them than the population as a whole. It is therefore to be anticipated that they are more likely to be able to evidence their status. Any statistical reporting of the answers to this question will need to be adjusted for bias in the sample.

Consultation question 8: **What other evidence have you used to demonstrate your identity for official purposes?**

Transport photocard. Workplace pass. Credit or debit card with or without photo embedded. Bank statement. Letter from the bank. Letter from Her Majesty's Revenue and Customs. European Health Insurance Card. Store card. Utility bill. Proof of age document. Envelope with home address on. We are well aware that these do not prove identity; it is simply that they have been accepted in different official contexts.

Consultation question 9: When the requirement for employers to check employees' migration status was introduced, the Home Office estimated

that employers would take on average two hours to familiarise themselves with the new requirements. Do you think the time required for landlords to familiarise themselves with the new requirements would be:

(i) shorter than two hours;
(ii) about two hours;
(iii) longer than two hours;
(iv) don't know?

iii) Longer than two hours.

As it is for employers, the estimate for employers was and remains an enormous underestimate. The main employers' guidance runs to some 89 dense and difficult pages; simply to read it takes very much more than two hours. Currently, the page of the Home Office website dealing with Preventing Illegal Working[25] provides links to some eight separate current documents, totalling some 194 pages. List A of acceptable documents[26] goes on for 12 pages and list B for 11[27]. These lists include combinations of documents that do not prove definitively that a person has the right to work in the UK and fail to cover many situations when a person does have the right to work in the UK.

No member has identified an employer client who managed to familiarise themselves with the requirements in under two hours, even where there was someone to explain it to them. Counting UK passports, visa stamps and EEA passports and identity cards each as one document (of course, they are many documents and change over time) then table A in the consultation paper includes some twenty-four different documents.

It is is not just a question of "familiarisation" – a system of record keeping needs to be set up, anyone helping needs to be educated and questions arise when documentation is not straightforward, as is frequently the case.

And immigration law keeps changing; keeping up to speed and understanding the implications of changes are a huge challenge. For landlords and landladies, as for smaller employers and those with a low turnover of staff, it is not a case of familiarising themselves once and then being experts; it is more likely to be something they have to re-learn each time they do it. In the last 12 months there have been statements of changes in immigration rules in July 2012 (twice), September, November, December (twice), January, February, March (twice), April and July 2013. These run in total (inclusive of explanatory notes, but exclusive of explanatory memoranda and amended guidance) to some 740 pages. A number were brought in with little or no notice. For example the January changes were

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25 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/ (accessed 12 August 2013).

26 *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 14. Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/currentguidanceandcodes/comprehensiveguidancefeb08.pdf?view=Binary (accessed 12 August 2013).

27 *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 26

published on 30 January and came into force on the 31st. The second December changes were printed on 20 December (the Thursday before the Christmas, with Christmas day falling on the Tuesday) and came into force on New Year's Eve. The first December changes were printed on 12 December and came into force on 13 December amending the rules previously laid which had been due to come into force on that date. The September 2012 changes were printed on 5 September and came into force on 6 September. The second July changes were brought into force "with immediate effect" on 20 July 2013, *inter alia* amending rules laid on 9 July 2013. Even where a longer lead in time was given, rules did not always appear at once on the Home Office website and only those scouring the parliamentary lists of publications were aware that they exited at all.

It also takes time for landlords and landladies to familiarise themselves with data protection obligations.

Consultation question 10: When the requirement for employers to check employees' migration status was introduced, the Home Office estimated that employers would on average take 15 minutes to check the migration status of an employee. Do you think the time required for checking the migration status of a tenant would be:

(i) shorter than 15 minutes;
(ii) about 15 minutes;
(iii) longer than 15 minutes;
(iv) don't know?.

iii) Longer than 15 minutes

The estimate for employers was an enormous underestimate. One complex case can take many hours. See the response to question 9 above.

It can take more than 15 minutes or more to get through to a Home Office enquiry line, a requirement where a person holds one of a number of types of document. Landlords and landladies with one or two properties may not be used to the same levels of administration and red tape as employers. If they only have a new tenant once every year or two, they are going to need to familiarise themselves with the process all over again every time. This we see in the case of small employers.

We highlight the situation of landlords and landladies with a visual impairment. They may be the sole person in charge of letting a property. How will they perform the checks unassisted without incurring additional costs?

Consultation question 11: If the landlord or agent undertaking the migration status check has a specific enquiry that needs to be answered by email, what would be the maximum acceptable response period:

(i) one to two working days;
(ii) three to five working days;
(iii) More than five working days but less than two working weeks;

(iv) Two to three working weeks;
(v) Don't know?

None of the above.

The private rental market is extremely competitive; without an immediate response many landlords and landladies will let to the tenant whose British passport they can see at once. This may be even more the case for letting agents keen to let the property to the first suitable tenant.

Some people will only hold a type of document that has to be verified with the Home Office checking service. The employer's service takes some five days (the service standard is five days[28], we understand that the actual time is longer, 5.3 days). That may already cause delays in a recruitment process and lead to difficulties in managing other applicants for the job, but this is as nothing compared to the problems it is likely to cause in the private rented sector. These people will simply be unable to compete with other prospective tenants for accommodation. It will always be quicker and easier to let to the other tenants.

Consultation question 12: If you are a letting agent, would you be willing to provide a checking service on the prospective tenant's migration status? (Yes / no / Don't know)

N/A.

But

Extra costs to those letting property could arise from this proposal. These could be passed onto tenants. Monopolies by letting agents, members of CIFAS, etc. could develop, distorting the housing market and driving up rental costs, whether in particular areas or more broadly.

We anticipate that letting agents who express a willingness to provide a checking service have not understood what this would entail. Letting agents would be required to register with the Office of the Immigration Services Commissioner, as described in our response to question 1 above. See also our response to question 9 above.

Consultation question 13: If you are a letting agent who would be prepared to provide a checking service, would you be willing to have liability transferred to you for carrying out the check? (Yes / no / don't know)

N/A

But

[28]See http://www.ukba.homeoffice.gov.uk/business-sponsors/preventing-illegal-working/support/ecs/ecsstep3/

ILPA assumes that in a number of cases the answer will be "for a price." That price could result in some properties being taken off the market by landlords and landladies unwilling to pay that price or unable to charge rent that would make it worthwhile to do so and could drive up prices in the private rented sector for all. They may opt for short term or business lets instead if this exempts them from the scheme.

Landlords do retain liabilities when they instruct a letting agent. Under the Equality Act 2010, section 109 the principal is vicariously liable for the prohibited conduct of their agent. Thus the landlord is liable if the letting agent refuses to let to a particular prospective tenant because of race, sex, sexual orientation, etc. or treats a prospective tenant less favourably, regardless of whether the landlord instructed the letting agent to discriminate or knew that the agent was discriminating. Section 110 of the Act makes the agent liable if they do something which would be prohibited conduct if done by the principal.

Consultation question 14: **If you are a letting agent who would be prepared to provide a checking service and accept liability, would you charge extra to check the migration status of a prospective tenant? (Yes / No / Don't know)**

N/A

But

See response to question 14 above.

Consultation question 15: If you are a landlord who does not currently use a letting agent, would this policy prompt you to use a letting agent in the future if they agreed to accept the responsibility for checking the migration status of tenants? (Yes / no / don't know/N/A)

N/A

But

In what sense would the letting agent be "accepting responsibility"? They might carry out the initial check but what would be their relationship with the landlord or landlady in the case of sublets, or visitors or changes to a person's status? In such circumstances what come back if any would the Home Office have against the letting agency which would surely argue that it had acted reasonably, used best efforts, satisfied due diligence requirements etc? Home Office enforcement of employer sanctions has come under considerable scrutiny[29] and we have no doubt that it will be scrutinised to see whether this is enforcement in name only.

[29] UK Border Agency's operations in the North West of England An Inspection of the Civil Penalties Compliance Team – Illegal Working March - April 2010, Chief Inspector 18 November 2010. See also *Inspection of Freight Searching Operations at Juxtaposed Controls in Calais and Coquelles, the report of a*

Would landlords or landladies have to sue a letting agent in negligence to obtain redress if checks were not carried out properly, as would be the case if a lawyer failed to carry out a client's instructions appropriately? What duty of care does the letting agent owe to them? Small landlords and landladies may be put at risk of exorbitant charges.

Consultation question 16: For properties rented out to a corporate tenant (i.e. a company), who should be responsible for making checks on people living in the property?

(i) The landlord;
(ii) The company that rents the property;
(iii) It is up to the landlord and company to agree but, in the absence of explicit agreement, the landlord should be responsible;
(iv) It is up to the landlord and company to agree but, in the absence of explicit agreement, the company should be responsible;
(v) Don't know.

The question reveals why the policy would be unworkable.

A company does not necessarily have control over whether one of its employees invites someone to stay with them in their flat. Whatever the terms of disclaimers and contracts, it would not necessarily know if they did so. A company might be under an obligation to notify the person letting the property; and might try to pass the obligation onto an employee. But in how many cases would this amount to more than a series of written agreements? Pinpointing where fault lay, and making that person responsible for the penalty would be extremely difficult and could give rise to litigation.

ILPA considers that it should be open to the parties to a contract to agree the terms of that contract and therefore options iii) or iv) are to be preferred to options i) and ii).

Consultation question 17: If a tenant provides evidence showing they have limited leave to remain in the UK, when is the next time that the landlord or letting agent should be required to repeat the check of their immigration status?

(i) Immediately after their leave to remain expires (however soon after the initial check or far into the future that may be);
(ii) after a year (regardless of when their leave expires);
(iii) after a year or when their leave expires, whichever is later;
(iv) whenever the tenancy is renewed / renegotiated;
(v) don't know.

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pilot inspection contained in the Chief Inspector's 2008-2009 Annual Report. See also the Home Affairs Select Committee Fourth Report of session 2013-2014, *The Work of the UK Border Agency (October-December 2012),* HC 486 published 13 July 2013.

Establishing when a person's leave expires is not always easy. A landlord or landlady may find it difficult to establish at the outset when the prospective tenant's leave is due to expire. A judgement as to when leave is due to expire will constitute immigration advice if provided in the course of a business, whether or not for profit, by a third party. Thus, for example, a letting agent's identifying when leave is due to expire, see the response to question 1 above.

A person's documents may all be with the Home Office at the time when their leave expires and an application for an extension of leave be pending. Establishing that a person has lawful leave under section s 3C or 3D of the Immigration Act 1971 is not straightforward and, even where it is established, what is achieved? A landlord sees a person whose passport is with the Home Office. A Home Office checking service confirms that the person has section 3C leave. That may end at any time, when a decision is made on the application or when appeal rights are exhausted. The checking service cannot say whether, when it ends, the person will be granted further leave.

Employers are not infrequently given inaccurate information when they check with the employers' helpline. Even if the helpline accurately reports what is on the Home Office database, what is on that database may be inaccurate because an application has not been entered on the database. There can be very lengthy delays in updating the database, this is one of the causes of the problems with Capita's phoning and texting people allegedly in the UK without lawful leave but all too often in practice British citizens or persons with leave as described in our response to question 1 above.

In our experience, many employers are failing to carry out the annual checks even though they may be aware of the need to do so. The reasons for this are that it is administratively inconvenient for those who employ large numbers of migrant workers. Employers ask why they need to do these checks when the individual still has leave to remain for a number of years and nothing has changed.

Many lets are for a period of six months. It would be oppressive for those letting property and tenants and intrusive for tenants, to require landlords to check documents every six months. How could it be established that a landlord or landlady had not simply taken a pile of photocopies at the beginning of the tenancy and signed one every six months?

Consultation question 18: If you are a landlord or letting agent: assuming that the legislation, enquiry service and guidance are in place by March 2014, what is the earliest date by which you will be ready to undertake checks on new tenants?

(i) April 2014;
(ii) July 2014;
(iii) October 2014;
(iv) January 2015;
(v) later;
vi) don't know.

ILPA is not a landlord or letting agent

But

v) later

ILPA is not a landlord or letting agent. However, our experience of the employers' scheme, which we consider, although extremely complicated, to be very much less complicated that what is proposed, and the Home Secretary's comments on the UK Border Agency cited in this introduction, with which we concur, lead us to urge caution.

Consultation question 19: If the Secretary of State issues a notice of liability requiring the recipient to pay a penalty, it is proposed that the recipient should have the opportunity to deny liability and/or claim that one or more of a list of 'statutory excuses' exists, so that a penalty should not be payable. These objections must be considered by the Secretary of State, following which there is a further right of appeal to the courts. Do you think this approach provides sufficient safeguards for landlords and letting agents against a notice of liability issued unfairly? (Yes / no / don't know)

Don't know.

This level of generality does not enable an answer to be given to the question. The starting point for assessing the lawfulness of such schemes is International Transport Roth GmbH v Secretary of State for the Home Department *[2002] EWCA Civ 158.*

We draw attention to footnote 29 in the consultation paper which indicates that the Government proposes to amend the employer's scheme to remove need to seek an order in the County Court for a debt owed by way of an unpaid civil penalty to be enforced. ILPA is against this proposal for employers, and would be against its being followed for landlords and landladies.

In the case of employers, the proposal is to change the rules on enforcement of a penalty to allow enforcement as though the penalty were a debt due under a court order. In other cases where debts accrue under a statutory scheme, such as child support or council tax debts, there is a prior stage where a liability order is made. Here, efforts are being made to avoid such a stage (at which it is possible to contest the making of the order), or the equivalent stage of seeking a civil judgment that a debt is owing, and move directly to the equivalent of the post-making-of the-liability-order stage, where all that remains is for the debt to be enforced as if under court order.

In the case of employers it is proposed that an objection must be exercised before any appeal - if this is implemented ILPA has said that there should be an option to waive the objection and move straight to an appeal. There is no point in spending time and money on an appeal in circumstances where a person is aware that the Home Office disagrees with their analysis of law or fact and will not change its mind.

In the event of an appeal, where the Respondent concedes the Appellant is right (e.g. because a fine was wrongly imposed), an order has to be drawn up that addresses costs. The Civil Procedure Rules Practice Direction 52 and Costs Practice Direction are in point. The former provides that where a settlement has been reached disposing of the application or appeal, the parties may make a joint request to the court for the application or appeal to be dismissed by consent. If the request is granted the application or appeal will be dismissed. Where the Home Secretary has conceded the issue, she has no basis to resist a costs order. When the appeal is settled so that it is withdrawn as the underlying decision is accepted to be wrong, the default position, that costs follow the event, applies.

Consultation question 20: If a landlord or letting agent is found to have an illegal adult migrant as a tenant, they may be subject to a penalty. Do you consider that the following penalty levels (per adult illegal non-EEA migrant) are:

(i) too low;
(ii) about right;
(iii) too high;
(iv) don't know.?

£1,000 per migrant for landlords or letting agents who have not received an advisory letter or notice of liability within the past three years

£3,000 per migrant for landlords or letting agents who have received an advisory letter or notice of liability within the past three years

All too high.

We consider that the likelihood of a landlord or landlady's failing to make an adequate check is high. We consider that even where they use their best efforts to make an adequate check the likelihood of their getting it wrong are high. We consider that this is in very large measure due to the complexity of immigration law, the plethora of documents to be checked and the inadequacy of Home Office systems. Landlords and landladies should not be penalised for the shortcomings of the Home Office.

The person letting the property may have received an advisory letter through no fault of their own. It would be wrong to penalise them for having been unlucky.

As described in response to question 1, many landlords and landladies are private individuals, not letting agents. It will be costly to pay a third party to do the checks for them. Costs of checks are likely to be passed on to tenants making it harder to find accommodation in the private rented sector. Tenants may be required to deposit a sum equal to the maximum possible penalty with a landlord or landlady along with any other deposit required for the property. This would put those put rental properties beyond the reach of some tenants. For many of those who could pay, it would tie up a considerable part of their available capital, and deny them the use of that sum or any interest on it. Tenants and potential tenants should not be penalised for the shortcomings of the Home Office.

Consultation question 21: The Government is considering whether the policy should apply to lodgers and sub-tenants. If it is decided that it should apply to them, the Government is minded to apply lower penalties to those landlords who take into their home up to two lodgers or sub-tenants, if their lodger(s) and sub-tenant(s) are found to be illegal adult migrants. Do you consider the following penalty levels (per adult illegal non-EEA migrant) for such landlords are:

(i) too low;
(ii) about right;
(iii) too high;
(iv) don't know?

£80 per migrant for a landlord who has not received an advisory letter or notice of liability within the past three years

£500 per migrant for a landlord who has received an advisory letter or notice of liability within the past three years

Too high.

See answer to question 20 above. This applies *mutatis mutandis* to this question. See also the response to question 4 for just some of the reasons not to extend any scheme to these arrangements.

In the case of lodgers, licensees or subtenants, these agreements are often for considerably lesser sums then formal tenancies. In many cases there will be no formal paperwork and the landlord or landlady will not be accustomed to keeping records. In this group there are likely to be landlords and landladies who will find it most difficult to comply with any duties imposed.

As described in response to question 21, we anticipate that many landlords and landladies would simply demand the sums, perhaps always the higher sum, in addition to any other deposit required.

Consultation question 22: Should local authorities in England and Wales be able to take a person's previous record of complying with this policy into account when deciding whether that person is fit and proper (or competent) to hold a licence for (or manage) a House in Multiple Occupation? (Yes / no / don't know / NA)

No.

In general ILPA is supportive of the notion of linking enforcement regimes. For example, employers exploiting migrant workers may also pay scant regard to health and safety[30]. However, in this case, because of the fatal shortcomings of the proposed scheme, we consider that the chances of a landlord doing their very best

[30] *Hard Work; Hidden lives, the full report of the TUC Commission on vulnerable employment*, 7 May 2008.

falling foul of the scheme are very high and that this approach would penalise landlords and landladies who are fit and proper persons to run houses in multiple occupation. We should have greater confidence in local authorities making their own checks.

The higher the stakes on compliance the more landlords and landladies are likely to take a risk adverse approach and discriminate against migrant tenants, black and ethnic minority tenants and persons, including British citizens, who do not hold a UK passport.

Consultation question 23: Should local authorities in Scotland or the Housing Executive for Northern Ireland be able to take a person's previous record of complying with this policy into account when considering licence applications for a House in Multiple Occupation? (Yes / no / don't know)

No. Reasons are as for question 22 above. We should have greater confidence in local authorities and the Housing Executive making their own checks.

Consultation question 24: [To be answered by landlords and letting agents] **Given that you are already subject to the Data Protection Act, does the requirement to check tenants' migration status add substantially to the work you need to do in order to be compliant with the Data Protection Act? (Yes / No / don't know)**

ILPA is not a landlord or letting agent,

But

we make the following comments:

Landlords and landladies', including private individuals who are landlords and landladies, obligations under the Data Protection Act 1998 include:

- to register with the Information Commissioner's Office (ICO) as a data controller;
- to implement appropriate technical and organisational security measures against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and not to keep personal data for longer than is necessary for the purpose for which it was originally collected.

While the proposals will not add any new obligations that do not already exist, the proposals will increase the amount of personal data that landlords and landladies hold about their tenants meaning that it is more likely that a breach will occur.

Although there is not currently a mandatory notification obligation under the Data Protection Act 1998, the Information Commissioners' Office recommends that serious breaches should be notified to it. This might affect landlords and landladies who hold personal data of a large number of tenants or in some circumstances

smaller landlords and landladies. Under the proposals for a European Data Protection Framework[31], notification of breaches to the Information Commissioners' Office and in some cases to the data subject will be mandatory. This would affect private landlords and landladies as well as companies.

Excessive data collection, where a person has no real option but to hand over their personal data may also breach Article 8 of the European Convention on Human Rights. Landlords and landladies may well find that they violate Article 8 ECHR as regards these proposals even though they are not core public authorities for the purposes of the Human Rights Act 1998. It appears that little or no adequate consideration has been given to this risk. Data protection law is vastly more complicated than this consultation appears to grasp, as we have already made clear to the UK Border Agency and the Home Office.

ILPA first entered into correspondence with Jonathan Sedgwick, then Deputy Chief Executive of the UK Border Agency, about the UK Border Agency's membership of the Credit Industry Fraud Avoidance System (CIFAS) in June 2010. Damien Green MP, then Minister for Immigration, acknowledged our concerns in his letter of 5 July 2010: "I acknowledge the freedom of information and data protection act concerns your members have registered." Insofar as some landlords, landladies or managing agents may be intending to obtain data via Credit Industry Fraud Avoidance System we reiterate those concerns here.

The data held by members of the Credit Industry Fraud Avoidance System may be held outside the jurisdiction and may be accessed by persons who are outside the jurisdiction. Some of the companies may be incorporated in countries other than the UK.

The Home Office's use, sharing, storage and retention of data on individuals is dealt with in standard paragraphs on application forms or read at the beginning of interviews and recorded as part of the interview record. The forms of standard consent have changed over time. Particularly in the case of those who have been here, with or without leave, for some time that they will have signed different versions of consent forms that are not the same as those currently in use. We consider that, at the very least, very many of the forms of consent that we have seen over the years do not form a basis for asserting that an individual has given any consent, let alone informed consent, to the sharing of their data with the Credit Industry Fraud Avoidance System, nor to the retention, use or storage of their data by the Credit Industry Fraud Avoidance System. Under data protection principles a person cannot consent to an open-ended use of data. The reasons given for keeping and using the data are, in many of the standard consents, too broad, in light of the legitimate bases for processing data as listed in the Directive 95/46/EC on the

[31] See the *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Safeguarding Privacy in a Connected World - A European Data Protection Framework for the 21st Century*, Brussels, 25.1.2012 ,COM(2012) 9 final enclosing in particular *Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data*, Brussels, 25.1.2012, COM(2012) 10 final, 2012/0010 (COD) {SEC(2012) 72 final} {SEC(2012) 73 final}, in which draft articles 28 and 29 are relevant.

protection of individuals with regard to the processing of personal data and on the free movement of such data.

The Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data[32], ratified by the UK in 1987, provides in Article 2 that 'Personal Data' is defined as any information relating to an identified or identifiable individual - known in all subsequent texts as 'data subject'.

Article 5 states that data is to be 'stored for specified and legitimate purposes' and not used in a way incompatible with these purposes (b); and is 'adequate, relevant and not excessive in relation to the purposes for which they are stored' (c).

The length of time for which data is kept is to be 'no longer than is required for the purpose for which those data are stored.'

Article 6 describes 'special categories of data' including 'racial origin… health' which 'may not be processed automatically unless domestic law provides appropriate safe guards'.

Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, requires member States to enact domestic legislation on the processing of personal data to ensure and protect the fundamental rights and freedoms of natural persons as recognised under Article 8 of the European Convention on Human Rights and in the general principles of EU Law.

'Personal data' is defined in Article 2 (a) of the Directive by reference to whether information relates to an identified or identifiable individual, (as above). In addition to the Convention, the Directive details how 'reference to an identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity' are factors for identification.

Consent is stated in Section II, Article 7 to be necessary to make processing of data legitimate. It provides:

(a) the data subject has unambiguously given his consent OR
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into the contract… OR
(c) …compliance with a legal obligation to which the controller is subject OR
(d) …to protect the vital interests of the data subject OR
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed.

[32] CETS No.: 108, 1981.

Article 10 describes information that is to be given to the data subject when collecting data from the data subject, including the purpose of the data collecting (10(b)), and the recipients or categories of recipients of the data (10 (c)). Article 11 details information that must be given to the data subject when not collected from him, including in 1(c) the recipients or categories of recipients.

The Data Protection Act 1998 repeats the substance of the Directive definition of 'personal data' in Part 1, 1(a) and (b). This is similar in wording to the Directive but with the added sentence that it 'includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual'.[33]

The Act first considers the nature of the processing in order to determine whether the information in question is 'data' (either processed by automatic means or manual processing for a filing system) and, secondly, considers whether such 'data' is 'personal data' in that it relates to an identifiable individual. 'Sensitive Personal Data' means personal data relating to 'racial or ethnic origin of the data subject', as with the Directive.[34]

Schedule 3 states the conditions relevant to processing of the data. Processing data in order to protect the 'vital interest of the data subject or another person' is detailed in 3.3. Exceptions to consent are given in 3(a)(i) and (ii) whereby consent cannot reasonably be expected to be obtained (ii).

Schedule 3 also contains conditions for processing of data for legal proceedings (6(a)) and for the 'purposes of establishing, exercising or defending legal rights' (6(c)).

The length of time data is kept is stated as being assessed on a case by case basis in Part II, 7 (10). Here it is stated the 'prescribed period' means 40 days or such other period as may be prescribed and that (11) 'different amounts or periods may be prescribed under this section in relation to different cases'. The fifth principle of the Data Protection Act states that personal data should not be kept longer than is necessary for that purpose or purposes.

The relevant case law of the European Court of Human Rights includes the judgment of the Grand Chamber in *S & Marper v UK* (2008) *(Application nos. 30562/04 and 30566/04)* in which the Grand Chamber held:

> *'…the core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and insist on limited periods of storage.'* (paragraph 107 of the judgment)

The Court stated that 'private life' covered physical and psychological integrity of a person (*Pretty v UK*, ECHR application 2346/022002) and that it can 'therefore embrace multiple aspects of the person's physical and social identity.'[35] The Court found that the 'mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8… and that the

[33] Part 1, 1, (1) (b). Data Protection Act, 1998.
[34] Part 1, 2, (a). *Ibid.*
[35] S66, *S.And Marper v The United Kingdom*, [2008] ECHR.

subsequent use of that stored information has no bearing on that finding (*Amann v Switzerland* ECHR application no. 27798/95 [2000]).[36]

The Court held that the individual's concern about the future use of stored data was legitimate and relevant to the determination of whether there had been interference under Article 8.

Different information is discussed as to what is considered sensitive or not.[37]

The Court criticised the UK Government's 'vague' definitions regarding its procedures. It is essential to have clear rules governing the scope and application for measures, and 'minimum safeguards concerning duration, storage, usage, access of third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction.'[38] An interference with Article 8 is considered necessary if there is a legitimate aim, answers a 'pressing social need', and is proportionate to the legitimate aim pursued. Also the reasons adduced by the national authorities to justify it must be 'relevant and sufficient.'[39]

The companies who are members of the Credit Industry Fraud Avoidance System have many staff and these are spread across the globe. The chances of information about, for example, a person who has sought asylum or humanitarian protection falling into the hands of their persecutors appears to us high. Even if the person's initial claim for international protection was rejected, the sharing of the information may increase the risk to them taking them above the threshold whereby they are found to be in need of international protection. We recall what the Court of Appeal held in *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA Civ 360 (15 April 2008) as to the lack of any requirement of affirmative evidence to establish certain aspects of the conduct of repressive regimes. In the case of those who remain in the UK but whose initial claims for asylum were rejected some time ago, circumstances in their country of origin may have deteriorated. The dangers of providing not only an individual's personal biographical information but also an address in such cases are very clear.

There will be other migrants, in whose cases there is no risk of persecution, who could find themselves disadvantaged by the sharing of information between the Home Office and the Credit Industry Fraud Avoidance System. Fraud information and alerts posted by the financial services sector may not be accurate, or may not be sufficiently detailed to identify whether an individual has done anything wrong. The risk of discrimination on the grounds of race or nationality is high. The information held by the Home Office is not in our experience sufficiently accurate or complete to ensure that the financial services agencies with which it shares information are not misled. And we have illustrated this above by reference to the contract with Capita Plc. We have seen no evidence that a person's record with the Home Office in the exercise of its immigration and nationality functions makes them a person of particular risk to a financial services agency.

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[36] S67, *Ibid.*
[37] S84. *Ibid*
[38] S99 *Ibid*
[39] S101.*Ibid.*

Those exercising EU Treaty rights include EEA nationals and their third country national family members. Members have seen too many cases where a third country national family member is peremptorily told that that they are not a person exercising Treaty rights and denied entitlements attendant on that status, only for it to transpire on further examination that the person does indeed continue to exercise Treaty rights.

Consultation question 25: [To be answered by landlords and letting agents] On average, how long do you keep records of your past tenants?

(i) Dispose of immediately after the tenant's departure;
(ii) Up to a year;
(iii) Longer than a year;
(iv) Don't know.

N/A. ILPA is not a landlord or letting agent.

But

In the experience of ILPA members also practising in housing law and their colleagues, "keep records" is a rather grandiose term for what often happens in practice. A tenancy agreement may be kept while the tenancy is current; it may not always be easy to locate. In the case of lodgers and tenants there may be nothing in writing at all. How long it is retained will very often depend simply on when an individual landlord or landlady is motivated to sort out papers and thinks "I do not need that any more". As a consequence tenants face a greater risk of identity theft and fraud and landlords and landladies of breaching their statutory obligations under the Data Protection Act 1998 and any contractual obligations under the tenancy agreement.

If landlords and landladies retain personal data any longer than the specified 12 months the tenant would be entitled to complain to the Information Commissioner's Office that their personal data had been held for longer than is reasonably necessary and legally allowed.

As to destruction, what guarantee is there that the landlord or landlady will dispose of documents safely in a way that does not put the tenant at risk of identity fraud?

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ILPA
20 August 2013