ILPA RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION:

BREAKING THE CYCLE: Effective Punishment, Rehabilitation and Sentencing of Offenders

INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-governmental organisations 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, and other, advisory groups.

ILPA's expertise concerns immigration, asylum and nationality law and practice; and in relation to the criminal justice system this particularly concerns foreign national prisoners. Accordingly, this response does not address several of the questions and issues raised in the consultation where these do not directly relate to foreign national prisoners or the use of criminal justice powers for the purposes of immigration control. Where possible, we have responded directly to specific consultation questions. However, many of the specific questions are beyond our expertise, so we have provided some short observations on some of specific sections of the consultation. Before addressing those questions and sections, we offer some more general remarks concerning the criminal justice system and its relation to immigration control. The response ends with some general observations concerning deportation policy.

General Observations concerning the criminal justice system and immigration control:

The Ministerial Foreword to the consultation sets out a number of key aims and principles. Many of these are beyond our expertise to offer a view as to their merits, but nonetheless these are relevant to the general observations we make here. The Foreword identifies costs to the criminal justice system, which need to be addressed. Thus, the Foreword describes as "*disastrous*" the point at which prison capacity ran out leading to early release of prisoners. It highlights a concern at the financial cost, including of imprisonment, which it urges must be addressed; and it indicates a pressing need for more effective use of resources to address rehabilitation of offenders and treatment of the mentally ill and drug-dependant. It states that: "*We will simplify and reduce a great mass of legislation.*" It also recognises that any strategy for the criminal justice system cannot be viewed in isolation from other policy areas. As regards foreign national prisoners, the Foreword states:

> *Foreign national offenders, unless they have a legal right to remain here, should be deported at the end of their sentence. We are exploring how punishments for these offenders could include immediate removal, rather than their imprisonment here at the taxpayers' expense.*

We have seen, over a period of several years, how the criminal justice system has become increasingly used as an arm of immigration control. This has led to injustice, expense and

arbitrariness, as the force of the criminal justice system has been used as a tool to disguise or distract from failures of efficiency and effectiveness on the part of those responsible for immigration control. The most stark example of such misuse of the criminal justice system for immigration control purposes followed the April 2006 revelation that the Immigration and Nationality Directorate of the Home Office, what is now the UK Border Agency, had not given any consideration to whether deportation should be pursued in the case of a little over 1,000 foreign nationals prior to their release from prison. The Home Affairs Committee described the situation as follows:

> *516. Late in our enquiry it emerged that over a thousand foreign national prisoners had been released from prison over the last seven years without the IND considering whether or not to deport them. We held three additional evidence sessions to examine how this problem arose and, most importantly, what it could tell us more generally about the IND. We have not attempted here to provide an exhaustive account of the problems surrounding foreign national prisoners or their deportation, though much of this is covered in the evidence that we received. We were presented with a consistent picture of how a problem was allowed to grow over time; how warnings about it were ignored; and how serious implications went unrecognised until too late in the day. The evidence highlighted clear failings in the management of IND, including the failure to alert ministers until the last few weeks before the crisis broke. We believe that the failure to consider so many foreign prisoners for deportation in a timely and effective manner has a great deal to tell us about the management and culture of IND as a whole...*[1]

At the time, HM Inspector of Prisons produced a thematic report on foreign national prisoners. Her report made clear that what happened was not a result of lack of powers or legislation:

> *This* [the absence of an effective and coherent approach to foreign national prisoners] *became startlingly apparent just after the fieldwork for this report was completed, when it emerged that many foreign nationals leaving prison had neither been identified nor considered for deportation. This was not because of a gap in legislation or powers. It was an acute symptom of the chronic failure of two services to develop and implement effective policies and strategies for people who were not seen as a 'problem': though in fact, as this report shows, they were people who had many problems, which were not sufficiently addressed.*[2]

HM Inspector of Prisons produced a further thematic report on foreign national prisoners within a few months. Her report there describes the immediate response to the public revelation that over 1,000 foreign national prisoners had been released without considering deportation. Her Introduction states:

> *In November 2006, we published a thematic report on foreign nationals, pointing to some longterm systemic failures, in both the prison and immigration services. One consequence of those failures had been the realisation, six months previously, that some foreign nationals had been released from prison without consideration of whether they should be deported.*
> *As a consequence, all foreign nationals were assumed to be deportable. Foreign nationals who had been in open conditions, or were on licence in the community, were returned to closed prisons, even if their behaviour had been exemplary. The trawl was so indiscriminating that it included some British citizens (who are not deportable in any circumstances), Irish and EEA nationals (who are deportable only in limited circumstances),*

[1] Fifth Report for Session 2005-06, *Immigration Control* HC 775-I, 23 July 2006
[2] HM Inspectorate of Prisons, *Foreign National Prisoners: a thematic review*, July 2006 (published November 2006), Introduction

and those who had committed only minor offences, but had lengthy residence and family ties only in the UK.[3]

The report continues to detail some of the appalling consequences of the arbitrary recall, including increased incidence of self-harm, with considerable disruption more generally to prisons, prisoners and the prison service. More information is now available from the updates that have been provided to the Home Affairs Committee by the UK Border Agency over recent years. Most recent is the letter from the UK Border Agency of November 2010 to that Committee. The letter reveals that, of the 1,013 foreign nationals (or records) at the heart of the events in April 2006, and of whom a substantial proportion were recalled to prison in the months which followed, there were at that time 800 concluded cases, of which 417 had not resulted in deportation. Those 417 broke down as follows: 8 were found to be duplications, 81 to be British citizens, 10 to be Irish nationals, 22 to be exempt from deportation, 117 to not meet deportation criteria and 87 to be cases where for other reasons deportation did not follow.[4] The clear implication of the evidence is that several people were recalled to prison, in circumstances where their deportation would have been unlawful, unnecessary or impracticable, and suffered weeks or months of considerable uncertainty and distress, the burden of which fell to be met by prisons, prisoners and the prison service. In terms of the ambitions of the current consultation concerning effective use of resources, rehabilitation or treatment, such a situation can only have been disastrous (a term used in the Foreword, though in a specific but related context).

Our purpose in recounting the foregoing is to draw attention to the potential costs (whether measured in human, financial or policy-ambition terms) of improper use of the criminal justice system for immigration control purposes. The April 2006 events, and the recall to prisons which followed, are far from the full extent of the impact of immigration control on the criminal justice system, and we consider that there are several matters that the Ministry of Justice could usefully look at for the purpose of directing its resources more efficiently and effectively to the ambitions stated in the Ministerial Foreword to this consultation. We briefly describe these in the following bullet points, and would be pleased to provide further information as necessary if requested:

- There is a general need to ensure that all areas (including custody sergeants, the Parole Board, criminal practitioners, prison governors and the judiciary) of the criminal justice system have a better understanding of immigration status, including immigration applications available, and the meaning and entitlements of such status.

- There is a need to address the current tendency to treat uncertainty of immigration status or absence of a decision by the UK Border Agency as the guiding factor in determining questions, or as a reason for delaying answering questions, relating to foreign nationals at the bail, sentencing, sentence and release stages. In some cases, this leads to refusal of applications on the incorrect basis that the person is liable to removal. In other cases, this may lead to a refusal to consider such options as transfer to an open prison or use of home detention curfews. A recent decision of the Outer House of the Court of Session identifies a good example of such problems (the example is in type not unique to Scotland), where judicial review proceedings were successfully brought against a prison governor for abrogating his responsibility to decide upon a prisoner's application for transfer to an open estate pending a decision from the UK Border Agency about the prisoner's immigration status[5].

[3] HM Inspectorate of Prisons, *Foreign National Prisoners: a follow-up report* January 2007 (published February 2007)
[4] Home Affairs Committee, Fourth Report for Session 2010-11, *The Work of the UK Border Agency* HC 587-I, 11 January 2011, Ev 15-19
[5] *Absalom Re Judicial Review* [2010] CSOH 109

- An egregious, but not unique example of the inadequacy in the working arrangements of immigration and prison authorities, is provided by the case of Muuse[6], in which a Dutch national was unlawfully held in prison for more than four months, immediately following his being sentenced and ordered to be release, his having already served the period of his sentence, for the purpose of deporting or removing him to Somalia (a simultaneously unlawful and impracticable purpose) on the mistaken belief that he was simply a Somali national, despite the UK Border Agency having his Dutch passport.

- The foregoing concerns raise issues of inadequacy of training, supervision and guidance, including the use of blanket policies relating to foreign national prisoners (e.g. in relation to prison categorisation). Additionally, the UK Border Agency's approach to risk assessment in relation to immigration bail, and the provision of bail accommodation, has long been inadequate in failing to make proper assessment of an individual's circumstances rather than general factors[7].

- We have referred to certain inadequacies in the working arrangements of those agencies concerned with victims of trafficking in response to Q14 of the consultation (below), and made reference to further information relating to this.

- The application and the limited extent of the domestic 'refugee defence'[8] contained in section 31 of the Immigration and Asylum Act 1999 raises several concerns. The defence is wrongly restricted to certain immigration offences[9]. The defence introduces a restriction, requiring the defendant to show that he or she "*could not reasonably have expected to be given protection under the Refugee Convention* [in another country]", which is not to be found in the Refugee Convention[10]. Moreover, there would be good reason to extend the defence to non-refugees, who nonetheless cannot be removed from the UK having fled from a risk of serious harm (contrary to Article 3 of the 1950 European Convention on Human Rights) and who would (if the risk they faced was by reason of race, religion, nationality, membership of a particular social group or political opinion) qualify as refugees and to the refugee defence. Those forced to breach immigration laws and use false documentation by reason of the risk of serious harm ought not to be prosecuted, still less imprisoned, in the UK. We draw attention to particular concerns regarding the inadequacy of legal advice and the application of the refugee defence in response to Section 4: Sentencing reform (below).

- We draw attention to the proliferation of immigration offences on the statute book, to which we refer in response to Section 4: Sentencing reform (below).

Finally, we observe that a failing of the consultation document is the general absence of consideration to the circumstances of foreign nationals, to whom reference in the main body of the document is restricted to:

- Section 4: Sentencing reform, p57 – which includes reducing the number of foreign national offenders among the ambitions of sentencing reform

[6] *Muuse v SSHD* [2010] EWCA Civ 453
[7] While this concern stretches far beyond the use, by the UK Border Agency, of its 'harm matrix', this provides one example of such a general rather than individual approach. We understand the agency to be looking at the harm matrix at this time.
[8] This constitutes the UK's limited and inadequate incorporation of Article 31 of the 1951 UN Convention relating to Status of Refugees into domestic law.
[9] cf. *R v Asfaw* [2008] UKHL 31
[10] cf. Article 31 *op cit*

- Section 4: Sentencing reform, pp65-66 – which provides six short paragraphs under the heading 'Reduce the number of foreign national offenders'
- Section 6: Working with communities to reduce crime, p85 – which merely states that the Ministry of Justice will work with the UK Border Agency and Foreign and Commonwealth Office to remove foreign national offenders

We make two comments on this observation. Firstly, it is of considerable concern, particularly given the other general observations we have made here, that the consultation's approach to foreign nationals is almost exclusively directed to the removal of foreign national prisoners from the UK (the exception to this is the limited reference to work to implement measures to reduce the number of foreign nationals at risk of offending entering the UK). This is to ignore the fact and the consequences of inappropriate use of the criminal justice system as an immigration control tool, as detailed above. It is also to ignore the reality, also highlighted above, that many foreign national prisoners will not, and in several cases cannot lawfully, be deported or otherwise removed from the UK. Secondly, as a consequence of the foregoing, there is a failure running through the consultation to consider how the various proposals for rehabilitation and treatment will work in the cases of foreign nationals. Currently, there are profound problems in circumstances where relevant authorities are discouraged or prevented from exercising their obligations towards prisoners because of uncertainty as to the UK Border Agency's interest or intentions. Thus foreign national prisoners, who might benefit from such opportunities as re-categorisation, transfer to open prison, home detention curfew or probation arrangements are denied these opportunities – including in cases where the ultimate result is the prisoner's return to the community, but in circumstances where his or her rehabilitation has been impeded by this denial of opportunities. Our concern is that the results of this consultation should not result in a category of prisoners, who are marginalised or excluded, within the criminal justice system by reason of uncertainty as to the UK Border Agency's interests or intentions; or indeed by reason of deportation or removal proceedings by that agency which ultimately prove unsuccessful.

We make reference to these final comments in response to specific questions or sections of the consultation below.

SPECIFIC CONSULTATION QUESTIONS

Section 1: Punishment and payback

We have little to say in relation to this section, which raises issues almost exclusively outside our expertise.

However, we note the emphasis on providing work and training opportunities in prisons. We understand this to have a twofold aim – firstly as part of an effort to engage prisoners' in a purposeful regime; secondly as part of an effort towards rehabilitation and reintegration on completion of sentence. This is an area where failure to engage foreign national prisoners in the same way as British national prisoners could prove divisive, destabilising and to have longer term adverse consequence on release; and we, therefore, highlight our concerns – in particular, our final comments – set out among the above general observations.

Section 2: Rehabilitating offenders to reduce crime

Much of this section raises issues beyond our expertise.

However, we note the proposals for a new approach to managing offenders, including in relation to rehabilitation and treatment. Our response to Section 1: Punishment and payback is similarly applicable to aspects of this section.

Q14. In what ways do female offenders differ from male offenders and how can we ensure that our services reflect these gender differences?

A sentence of imprisonment may involve the separation of a parent from his or her child. In particular, in women's cases this may involve the placing of a child with foster carers, with social services or in a formal or informal private fostering arrangement. In such cases, there is a particular need to address the question of reuniting the mother with her children on completion of her sentence. Having regard to the rights of the child, in particular, and more particularly Article 9.1 of the 1989 UN Convention on the Rights of the Child (requiring that separation be restricted to circumstances where it is in the best interests of the child), there is an urgent need to ensure effective communication between the prison service, the UK Border Agency and social services and, in any event, to ensure that mothers are not detained post-sentence in circumstances where they ought to be reunited with their children.

As with many British citizen prisoners/offenders, there are significant numbers of female foreign national prisoners/offenders, who have committed offences arising from abuse, coercion and/or by way of survival strategies. This includes, but is not limited to, victims of trafficking – whether to and/or within the UK. We draw particular attention to our joint response with the Anti-Trafficking Legal Project (ATLeP), in October 2010, to the Crown Prosecution Service consultation on the CPS Public Policy Statement on Prosecuting cases of Human Trafficking[11]. The following extracts are taken from that response:

> *The* [CPS] *Statement asserts that "we also work closely with other agencies such as the UK Border Agency, the UK Human Trafficking Centre and the Vulnerable Persons team". It is the experience of ILPA members and ATLeP that unfortunately this is often not the case. It is important that the Statement acknowledges the practical difficulties of working with other agencies, and identifies procedures that will result in better co-ordination between agencies...*
>
> *The experience of ILPA members is that many victims of trafficking continue to be criminalised, whether for the use of false documents or for their role* [as] *"gardeners" in cannabis factories. Until that changes the protections contained in the* [CPS] *Statement cannot be put into effect.*

We also draw attention to our response, in June 2010, to the UK Border Agency questionnaire on first twelve months of operation of the National Referral Mechanism[12]. The following extracts are taken from that response:

> *The focus on immigration control is an effective barrier to effective collaborative working forcing agencies to focus on immigration control rather than take a holistic view of the needs of the trafficked person...*
> ...
> *Prosecution of people who have been trafficked for alleged crimes committed while under the control of traffickers is a barrier to collaborative working* [among various agencies], *as are people being held in prison or in immigration detention centres...*

We have highlighted discrete extracts, rather than repeating the whole or extended extracts from these two responses. However, we consider them both to contain much more of relevance to the current consultation.

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[11] Our response (Crown Prosecution Service Consultation on prosecution and trafficking) is available in the 'Submissions' section of our website at www.ilpa.org.uk

[12] Our response (UKBA Trafficking Review) is available in the 'Submissions' section of our website at www.ilpa.org.uk

Section 3: Payment by results

We have little to say in relation to this section, which raises issues almost exclusively outside our expertise.

However, we note the ambition to develop approaches designed to effect rehabilitation and reintegration. This is another area where failure to engage foreign national prisoners in the same way as British national prisoners could prove divisive, destabilising and to have longer term adverse consequence on release; and we, therefore, highlight our concerns – in particular, our final comments – set out among the above general observations.

Section 4: Sentencing reform

The general comments at the start of this section include that: "*Sentences have become increasingly severe in recent years.*" The main body of the section highlights excessive use of, and complexity introduced by, legislation over the past decade. The consultation includes at Q32 a question on simplifying the sentencing framework. It is understood that these matters are all considered to be related. We draw attention to the experience of foreign nationals over the same period. There has been a proliferation of immigration offences – new offences were introduced in the Nationality, Immigration and Asylum Act 2002, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the UK Borders Act 2007; and in the Immigration, Asylum and Nationality Act 2006 and Borders, Citizenship and Immigration Act 2009[13]. Over this period during which immigration offences have proliferated, so have the numbers of prosecutions and the severity of sentences tended to increase. We would urge that the Ministry of Justice and Home Office take steps to reverse this trend, just as the Ministry of Justice is now concerned to reverse the excesses in relation to non-immigration-related offences and offenders.

In this regard, we also draw attention to the Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation of 30 September 2010[14]; and we note Article 16 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of the Families (which applies to regular and irregular migrants) providing for the right to liberty and security of persons to migrant workers and their family members[15]; Resolution 63/184 of the 2009 UN General Assembly on the protection of migrants (in particular paragraphs 1, 3 and 9)[16]; and the call of the UN Secretary General for all States "*to end the criminalization of migrants...*" in his July 2010 report on promotion and protection of human rights, including ways and means to promote the human rights of migrants (paragraph 67(h))[17].

Our general comments in other sections concerning the need to ensure that measures for the rehabilitation and treatment of prisoners are equally available to foreign national prisoners apply to discrete aspects of this section.

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[13] The first three are here differentiated from the latter two because they introduced offences for which migrants might be prosecuted, whereas the offences introduced by the latter two introduced offences for which others might be prosecuted though in relation to immigration.

[14] http://www.globalmigrationgroup.org/pdf/GMG%20Joint%20Statement%20Adopted%2030%20Sept%202010.pdf

[15] http://www2.ohchr.org/english/law/pdf/cmw.pdf

[16] http://www.unhcr.org/refworld/docid/49d369550.html

[17] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/459/22/PDF/N1045922.pdf?OpenElement

Q44. How can we better incentivise people who are guilty to enter that plea at the earliest opportunity?

In our general observations (above, preceding responses to specific sections and questions of the consultation), we drew attention to the refugee defence. It is currently the case that many individuals prosecuted before their asylum claims are determined plead guilty despite the potential application of the refugee defence. In many cases this is due to the uncertainty of prosecution and the likelihood that the individual will be refused bail, and hence held on remand for longer than any sentence, both militate in favour of the plea. We are also aware that knowledge of the refugee defence is not universal among criminal practitioners[18]. These concerns have been compounded, and having regard to current proposals upon which we have responded to consultation may be further compounded, by inadequacies of access to Legal Aid advice and representation. However, the answer to the specific concerns we raise here regarding the application of the refugee defence would in large part be provided by not pursuing prosecutions until after the asylum determination process is concluded. The criminal justice system is not the appropriate place for determining complex issues of fact and law relating to asylum, and hence the applicability of the defence.

One way of preventing unnecessary expense to the criminal justice system of Crown Court proceedings is to make all offences under the Identity Cards Act 2006 either way offences. This Act was passed to give statutory effect to the Identity Cards scheme (now abolished) and much of the Act has now been repealed. The remaining offences are no more than a more specific example of 'obtaining services or pecuniary advantage by deception', which were either way offences under the Theft Act 1968 or Forgery and Counterfeiting Act 1981. Whilst the use of apparatus may be more serious there is no reason why appropriate mode of trial guidelines could not be devised to ensure the most serious or complex cases end up in the Crown Court, e.g. in relation to criminal networks selling false documents.

Q45. Should we give the police powers to authorise conditional cautions without referral to the Crown Prosecution Service, in line with their charging powers?
Q46. Should a simple caution for an indictable only offence be made subject to Crown Prosecution Service consent?
Q47. Should we continue to make punitive conditional cautions available or should we get rid of them?

We raise two specific issues in relation to foreign nationals: firstly, the danger of giving an incentive whilst there may be inadequate advice available for the individual to make an informed decision; and, secondly, the need for adequate and consistence guidance similar to the Crown Prosecution Service Codes regarding prosecuting so that local inconsistencies in practice do not lead to inappropriate determinations of immigration status/entitlement.

As regards the first issue, there is a clear distinction for criminal practitioners in terms of their ability to deal with immigration detainees. Whilst they are required to deal with immigration offences, they are not in a position to give specialist immigration advice. Therefore, in dealing with a client who is being offered a caution on the condition that he or she will agree to removal, an immigration adviser will be needed as any advice is beyond the remit of criminal practitioners.

[18] The recent judgment in *Mohamed & Ors v R* [2010] EWCA Crim 2400 provides example. The various appellants there had pleaded guilty to offences under section 25 of the Identity Cards Act 2006 regarding false instruments on which they had travelled to the UK. In the case of two of the four appellants, the Court of Appeal concluded that they had not been advised as to the availability of the refugee defence. In these two cases, and another of the four, having regard to the refugee defence, the Court of Appeal quashed the convictions as unsafe.

Given the limited number of advisers in certain areas there is a real danger those offered a caution will not be given advice. Whilst the immigration advice line is available that too has limited ability to give detailed advice on removal over the telephone, particularly if a person has a lengthy immigration history or the facts of their case are borderline or require scrutiny or collection of immigration papers and other evidence – e.g. Article 8 where the merits will often depend on the statements and circumstances of other family members, including children. Often the immigration telephone adviser will provide a caveat to advice that a person should seek legal representation local to where they are detained.

Experience suggests that only a small proportion of detainees take up their rights to advice at this time and so the prospect of pressure and misunderstanding is a risk in dealing with foreign nationals in this way. It would also need to be clear to custody staff at the police station that, under the Legal Service Commission regulations, two advisers would be required.

There would need to be an understanding by both the UK Border Agency and the police that time may be required before an individual could reasonably be expected to make a decision to accept the offer. This may require a person to be bailed back to get the advice or detained in immigration detention if the UK Border Agency will not authorise release for someone who is liable to detention. Currently, the fixed fee police station fee for criminal practitioners does not provide incentive for 'bail-backs' or spending time finding immigration advisers.

We understand that the pilot for 'diverting foreign national offenders from prosecution'[19] has only just been rolled out in the East Midlands[20]. However, we have limited information about this and are not aware of any specific examples of the pilot in operation. Indeed, as of 28 February 2011, so far as we were aware, the Nottinghamshire criminal law committee had received no information e.g. through the police or UK Border Agency other than that posted on the Law Society website[21] of Legal Services Commission website[22]. It is, therefore, unclear by what method or procedure the police and UK Border Agency are ensuring a person who wants advice gets sufficient opportunity to receive that advice and thence to make an informed decision.

As regards the second issue, we consider that something as fundamental as inviting a person to consent to his or her removal from the UK should not be left to the individual discretion of a custody sergeant. The Crown Prosecution Service should be involved and a specific code of practice devised alongside the cautioning process. This is the only way to ensure some consistency of approach. In relation to this, we note that the Crown Prosecution Service are about to publish trafficking guidance (please see the matters referred to in relation to Q14, above).

In conclusion, we have concerns about the specific options being trialled (or to be trialled) concerning the use of a simple caution on agreement to removal from the UK, while supporting moves towards decriminalisation of irregular migrants. The answer to this dichotomy may, in significant part, lie in the safeguards to which we have referred in our responses to this section of the consultation; though we note that there currently exists far greater scope for the exercise of discretion not to prosecute.

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[19] Ministry of Justice letter of 3 December 2010 to Christopher Kinch QC
[20] We have seen the following notice on the Legal Services Commission website: http://www.legalservices.gov.uk/civil/cls_news_12477.asp?page=1
[21] http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=434271
[22] *op cit*

Section 5: Youth justice

Much of this section raises issues beyond our expertise.

However, much as with previous sections, measures to address rehabilitation and reintegration for youth offenders need to be available to foreign national youth offenders; and we, therefore, highlight our concerns – in particular, our final comments – set out among the above general observations. Moreover, we draw particular attention to Article 40.1 of the 1989 UN Convention on the Rights of the Child, which requires particular attention to the rehabilitation of youth offenders; and which has, in the immigration/deportation context, been given particular weight in judgments of the European Court of Human Rights[23] and in domestic court judgments[24].

We also draw attention to our comments concerning victims of trafficking in response to Q14 (above).

Q52. How do you think we can best incentivise partners to prevent youth offending?

We highlight this question simply to emphasise the need for all concerned, including the UK Border Agency, to have regard to the best interests of children in relation to such matters. A particular example of where such emphasis is needed relates to the deportation or removal of parents, which will or may lead to the separation of parent and child. Whether this relates to a youth offender or a child who has no offending history, there are criminal justice risks where a child in the UK is separated from his or her parent by reason of deportation or removal. Such risk is at least implicitly recognised in decisions of the higher courts including:

> *Children need to be brought up in a stable and loving home, preferably by parents who are committed to their interests. Disrupting such a home risks causing lasting damage to their development, damage which is different in kind from damage done to a parent by the removal of her child, terrible thought that can be.*[25]

> *From research and clinical experience we know that children do better if: (i) there is no ongoing conflict between parents; (ii) they maintain free and easy contact with both parents; (iii) they have a coherent explanation about the break-up of the family; (iv) they have stability in terms of contact arrangements with the out of house parent.*[26]

Section 6: Working with communities to reduce crime

We have little to say in relation to this section, which raises issues almost exclusively outside our expertise, but we note the comments we have made in preceding sections concerning the need to ensure that approaches designed to effect rehabilitation and reintegration are equally available to foreign national prisoners/offenders.

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[23] See, most particularly, the Grand Chamber decision in *Case of Maslov v Austria* (Application No. 1638/03), 23 June 2008

[24] *Case of Maslov op cit* is no frequently cited in relevant decisions of the First-tier Tribunal (Immigration and Asylum Chamber), the Upper Tribunal (Immigration and Asylum Chamber) and the higher courts

[25] *EM (Lebanon) v SSHD* [2008] UKHL 64, *per* Baroness Hale of Richmond, paragraph 46

[26] *Working with Children and Parents through Separation and Divorce*, Dowling & Gorrell-Barnes, 1999, Macmillan Press, cited with approval *In Re: L (A Child) & Ors* (2000/1098), Court of Appeal, *per* Thorpe LJ

FINAL OBSERVATIONS ON DEPORTATION POLICY

We do not make extensive observations in relation to deportation policy in this consultation response. However, insofar as the Ministry of Justice is concerned to reduce the numbers of prisoners and more effectively use its resources for the punishment, rehabilitation and treatment of offenders, we consider that the following aspects of deportation policy, in particular, should be reconsidered:

- The mandatory regime (with exceptions) introduced by the UK Borders Act 2007[27] does not address the administrative problems, which prompted its introduction. As HM Inspector of Prisons said at the time, those problems did not arise from any absence of legislative or other power[28]. However, the introduction of this regime constitutes a legislative impediment to the exercise of prompt and responsible decision-making on the part of the UK Border Agency both because of the legislative directive for deportation and the power provided to detain, under immigration powers, for such period as it may take for the relevance of the legislative directive to be established or considered. Thus persons may remain in prison despite the non-application of the mandatory regime to them simply because it is thought that the regime may apply or it has not been considered yet whether it does apply; and because they are subjected to deportation proceedings by reason of the directive of the legislation albeit that their deportation may prove to be unlawful (e.g. contrary to European Union or human rights law)[29]. Accordingly, the UK Border Agency is effectively impeded or discouraged from exercising its powers and decision-making authority in ways that would assist the aim of reducing prisoner numbers despite its refusal or failure to so act pursuing no ultimate purpose for immigration control.

- The introduction of a presumption in favour of deportation into the Immigration Rules[30], which preceded the introduction of the UK Borders Act 2007 regime, constituted a more modest example of the errors and problems discussed in the preceding bullet.

Sophie Barrett-Brown
ILPA, Chair

4 March 2011

[27] Sections 32 *et seq* of the UK Borders Act 2007 were commenced in part on 1 August 2008 by the UK Borders Act 2007 (Commencement No. 3 and Transitional Provisions) Order 2008, SI 2008/1818
[28] see fn. 2
[29] We note that, since the establishment of the Upper Tribunal (Immigration and Asylum Chamber) in February 2010, we are aware of it reporting three determinations in which it has considered the mandatory regime introduced by the UK Borders Act 2007, and in each case it has allowed or upheld the appeal against deportation: see *RG (Nepal)* [2010] UKUT 273 (IAC), *MK (Gambia)* [2010] UKUT 281 (IAC) and *BK (Ghana)* [2010] UKUT 328 (IAC).
[30] This was effected from 20 July 2006 by the amendment to paragraph 364 of the Immigration Rules made by Statement of Changes in Immigration Rules (HC 1337).