COMMISSION FOR RACIAL EQUALITY

SUBMISSION TO THE HOME OFFICE CONSULTATION ON THE IMPLEMENTATION OF NEW POWERS TO PREVENT ILLEGAL MIGRANT WORKING IN THE UK

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Introduction

1. The Commission for Racial Equality (CRE) welcomes the opportunity to respond to the consultation on the implementation of new powers to prevent illegal migrant working in the UK.

   The CRE has the following duties under the Race Relations Act 1976 (RRA):
   - to work towards the elimination of discrimination and harassment;
   - to promote equality of opportunity and good race relations between people of different racial groups; and
   - to keep under review the workings of the RRA.[1]

   The CRE's primary goal is to create an integrated society. We have defined an integrated society as being based on three inter-related principles:
   - **Equality** - for all sections of the community - where everyone is created equally and has a right to fair outcomes
   - **Participation** - by all sections of the community - where all groups in society should expect to share in decision-making and carry the responsibility of making society work
   - **Interaction** - between all sections of the community - where no-one should be trapped within their own community in the people they work with or the friendships they make.

2. The consultation document presents a number of specific questions. Our response focuses on concerns in respect of race equality and race relations, most of which relate to question 5 (on the Code to Prevent Racial Discrimination) and questions 11 and 12 (on criminal sanctions and forced labour). We have also included concerns with the Equality Impact Assessment and the implications of its preliminary findings.

Key concerns

3. The CRE has a number of concerns relating to the implementation of new powers to prevent illegal migrant working in the UK. Firstly, we are concerned at the potential discriminatory employment practices that may develop as a result of the new powers.

4. The CRE has, since the introduction of the Asylum and Immigration Act in 1996, been raising its concerns about legislation providing sanctions against employers of illegally staying workers in Great Britain. Most recently, we have provided briefings on the Immigration, Asylum and Nationality Act 2006 as it passed through the parliamentary process[2].

[1] Section 43, Race Relations Act 1976.

[2] For further information on our concerns relating to the illegal working provisions in the Immigration, Asylum and Nationality Act 2006, see CRE briefing for House of Commons committee stage October 2005, briefing for House of Commons report stage November 2005 and House of Lords third reading 14 March 2006.

5. The CRE has concerns that the implementation of the new powers to prevent illegal migrant working, specifically the checks that are required to verify a person's right to work in the UK, could be carried out in a discriminatory manner or place such burdens on employers that they are less likely to employ persons believed to be not from the UK.

6. Secondly, our comments focus on the way in which these concerns are addressed by the Code of Practice for employers. The CRE welcomes the decision by the Border and Immigration Agency to issue a code of practice to help employers avoid unlawful discrimination while seeking to prevent illegal working and we have taken previous opportunities to comment on the contents of the Code. However, we feel that this guidance is still not sufficient to prevent discrimination, as we shall explain below. In addition, on reflection we believe the Code can be strengthened in several respects to reduce the possibility of racial discrimination, and we have made a number of suggested amendments.

7. Thirdly, the CRE has concerns regarding the Equality Impact Assessment (EIA) that was produced alongside the consultation document. A full EIA has been prepared to cover the change in policy which identifies, on a number of occasions, the possible racially discriminatory effect of the new policy. However it does not identify what steps will be taken to minimise the risk of racial discrimination. There is also no formal mechanism by which the BIA has indicated it will monitor and report on the possible racially discriminatory impact of the policy. We expect to see an updated version, once the consultation is over, that takes into account the responses gathered, and includes appropriate measures to eliminate or reduce any adverse impact on race equality and race relations.

8. Fourthly, the CRE supports the government in taking action against employers of illegally staying workers as:

    i. Persons working illegally are often working under exploitative conditions such as below the minimum wage, without any entitlements such as holiday and sick pay, and in working environments in breach of health and safety laws; and

    ii. Some of the persons working illegally have been trafficked to work in the UK which is a breach of their fundamental human rights.

    The CRE welcomes the criminal sanctions where an employer knowingly employs illegal workers, which may act as a deterrent to such activity. However, we believe the criminal provisions should specifically refer to forced or trafficked labour and exploitative working conditions as a factor permitting criminal penalties.

Discriminatory behaviour of employers in implementation

9. The draft code of practice for employers provides guidance on how to avoid the civil penalty for employing an illegal migrant worker, in a way that does not result in unlawful racial discrimination. However, in our view there is a real danger that the implementation of new powers to prevent illegal migrant working could result in discriminatory behaviour by employers, particularly concerning the verification of documents.

10. Contrary to statements made in the consultation paper, document checks may well prove burdensome for many employers. They will add significant economic cost to the recruitment process in the form of complex initial checking procedures and training for HR staff. Repeat checking of those employees whose documents included one in List 2 will make further demands on time and resources, particularly when it involves employees working irregular or mobile jobs. Although the BIA contends that it does not expect employers to act as "Immigration Officers"[3], in effect employers are being required to carry out immigration control.

11. These extra demands will be particularly punitive, and the cost of compliance even greater, for small and medium enterprises with informal recruitment processes. Not only do small businesses tend to be the main employers of migrant workers, but many are owned by ethnic minorities[4].

12. The Equality Impact Assessment acknowledges that "*There may be employers who will not want to learn the new rules and will only employ those who satisfy their view of being British*". The EIA also acknowledges that the threat of sanctions, combined with the burden of document checks, acts as an incentive to employers to be more cautious about employing a worker who might appear to be foreign. The checks are not compulsory and many employers may chose to avoid the burden by recruiting only white British applicants. This could have an significant detrimental impact not only for new migrants coming to Britain, but also existing ethnic minority British citizens who may be perceived to be new migrants and not interviewed or employed.

13. The CRE has already received anecdotal evidence of discrimination against applicants with limited leave to remain, whose status and work entitlements would need to be verified on a yearly basis[5]. We believe there is a genuine risk that applicants offering documents from List 2 will not be considered for positions due to the extra burden of repeat checks, possibly constituting unlawful direct or indirect racial discrimination. The EIA dismisses this risk as "*no different from the current situation*" but does not provide evidence to support this statement. In our view the current situation *is* clearly different from the new regime, as the new regime requires regular checks of certain persons. This new requirement may

[3] Paragraph 4.9 of the BIA Consultation on the Implementation of the new Powers, May 2007.
[4] In England alone, in 2004 ethnic minority businesses made up 5.8% of SMEs, according to the Annual Survey of Small Businesses 2004 interim analysis.
[5] Email from the HSMP Forum dated 7 July 2007

impact on employer's treatment of applicants that they believe may (or, indeed do) have limited leave to remain.

14. The CRE is concerned that employers, seeking to reduce the burden, will only check applicants who appear to be non-EEA nationals. The EIA makes the assumption that the Code will not have an adverse impact on particular racial groups *'if the advice is followed correctly by employers'*. But the clear problem with the Code is that it is only guidance, there is no legal requirement on employers to follow the Code and apply their practices in a non-discriminatory manner. The experience of the CRE, which has issued a number of statutory codes over the last 30 years, is that although guidance is helpful, only primary or secondary legislation which requires compliance (for example, requiring all employers to carry out the checks on all prospective employees) will ensure there is no discrimination.

15. Additionally, the Code does not deal with the issue of continued discrimination beyond the recruitment and selection process. The CRE is concerned that employees whose documents must be re-checked to retain the statutory excuse, may be treated less favourably than other employees. They may, for example, be subject to greater scrutiny and it may affect their entitlement to extended employment contracts, promotion, training, or equal rates of pay.

Revision of the Code

16. In light of our further review of the draft Code and some of the submissions above, the CRE believes that a number of amendments to the draft are necessary. These are detailed below.

17. There a number of references in the Code to avoiding discrimination in employment but most of these refer only to the first stage of employment i.e recruitment. In our view, given the new laws require repeat checks of persons with limited leave to remain, the Code should make specific reference to the requirement not to discriminate in ALL stages of employment and ALL aspects of employment, such as promotion, training and rates of pay. We therefore propose the following amendments:

    Title:
    We believe the title of the Code should be amended replace "recruitment" with "employment" to read:

    "Guidance for Employers on the Avoidance of unlawful discrimination in ***employment*** *practice while seeking to prevent illegal working"*

    Paragraph 2.3
    Add at the end of the paragraph replace "recruitment" with "employment"

Insert a new paragraph after paragraph 3.5
The following (or similar) should be inserted to make it clearer to employers that they cannot discriminate at any stage of employment, both at recruitment and once in employment (see paragraph 3.2 and 3.3 of the CRE Code):

"Employers must not discriminate on racial grounds or subject a person to harassment in:

a. *the arrangements they make to decide who should be offered employment; or*
b. *the terms on which they offer to employ a person; or*
c. *by refusing or deliberately failing to offer employment.*

It is also unlawful for employers to discriminate on racial grounds against a worker, or to subject him or her to harassment:

a. *in the terms of employment provided; or*
b. *in the way they make opportunities for training, promotion or transfer, or other benefits, facilities or services, available; or*
c. *by refusing access to such opportunities or benefits, facilities or services; or*
d. *by dismissing the worker or subjecting him or her to some other detriment."*

Add a new paragraph after 7.5
An additional paragraph should be added to make it clear that persons with limited leave to remain should not be treated less favourably, not only in recruitment but also during employment:

"Once a person who has limited leave to remain has been employed, they should not be treated less favourably during their employment, including the terms of employment provided, opportunities for training, promotion or transfer, benefits facilities or services, or by dismissing the worker or subjecting them to some other detriment"

18. Some of the definitions of concepts need expanding:

Expand paragraph 3.4
The paragraph should be expanded (preferably with separate paragraphs) and include victimisation, harassment, pressure or instructions to discriminate and discriminatory advertisements.

Currently there is no inclusion at all of harassment, and the descriptions of the different types of unlawful conduct are too brief. This should be rectified.

We refer you to paragraphs 2.14 to 2.27 of the CRE Statutory Code of Practice on Race Equality in Employment (2006) for the type of information that should be included. Whilst we do not believe the same degree of detail is required as in the CRE Code, we consider it necessary to include more than is currently contained in paragraph 3.4.

19. Our particular suggestions are:

Amend paragraph 3.6
Insert at the end of the first sentence "…the acts of discrimination."

Move paragraph 3.5
For ease of reference we believe it makes more sense to put the current paragraph 3.5 at the end of section 3.

New paragraph after 4.2
In our view the Code should make reference to the fact that where an employer has been found to have committed an act of unlawful racial discrimination, the Public Procurement Regulations 2006 provide that public authorities may disqualify the organisation from entering into public procurement contracts.

This is an important recent development and in our view should assist in deterring organisations from racially discriminating and make them aware of the possible ramifications of such discrimination.

20. Our general suggestions are:

Greater use of practical examples to assist employers
Whilst the draft Code contains some useful examples, such as paragraph 3.2, in our view there are not enough and as a result the code as currently drafted does not sufficiently assist employers in a practical manner on how to avoid racial discrimination. By illustration there should be practical examples of what would constitute victimisation, harassment or discriminatory advertisements in the context of the exercise of the new regime. For example, if an employee with limited leave to remain was only given a more degrading form of work to do in comparison with workers from other countries with unlimited leave to remain, that may constitute racial harassment.

Another example of practical information that could have been provided is paragraph 3.2 which offers an example of how employers should not discriminate with respect to overseas qualifications. It could go further and state that employers, if unsure of the UK equivalent of an overseas qualification, should consult the NARIC website, which provides useful comparators.

Information on differences between asylum seekers, refugees, migrant workers and other relevant groups
It would also be useful for the Code to include a summary of the differences between relevant persons such as asylum seekers, refugees, migrant workers (including persons from the EU and third country nationals) with particular reference to the difference in their entitlements to work. This would be helpful as many employers find this area confusing

and do not understand such differences. A brief outline could be included in the form of another appendix to the Code.

21. Finally, there is no information on how the Code is going to be disseminated to all employers and how the government will encourage all employers to follow it. In our view, this is not a situation where merely publishing the Code on the Home Office website will be sufficient as it is likely the Code will simply be ignored. There would need to be an active campaign, done in conjunction with informing employers of the new measures, to make employers aware of their obligations not to racially discriminate in their employment practices, and encouraging them to use their verification procedures for all potential employees.

The Equality Impact Assessment and future monitoring of the policy

Statistics and Research

22. The EIA cites a piece of internal research carried out for the Home Office by the Institute for Employment Studies in 2005, and a piece of commissioned research to be carried out by the Immigration Research and Statistics Service. The CRE would expect to see the publication of these research reports alongside the production of a final EIA. We are concerned that both pieces of research focus on the perspective of the *employer*, and fail to address the research and data gap in relation to the experiences of *migrant workers* and *ethnic minority communities* as well as the six other equalities strands.

Consultation

23. The CRE is greatly concerned by the lack of evidence of external or internal consultation prior to the production of the EIA. We would expect to see evidence that inclusive consultation has been undertaken alongside the development of the policy rather than as an add-on at the end of the process. In particular, consultation should take place with those groups most likely to be directly impacted – not only employers and the Illegal Working Group, but migrant workers and the diverse communities from which they originate.

24. The repeated use of the term '*we anticipate*' suggests that the Home Office is making assumptions about the potential impact on different communities. If these assumptions are based on community engagement findings then we would expect to see a copy of these findings alongside the EIA. If they are not, then the EIA is inadequate and the Home Office has not properly fulfilled its statutory requirement to produce an impact assessment.

The Three Strands

25. We would consider it appropriate that a more rigorous consideration is given of the implications of the policy for each strand of the race equality duty, taking into consideration a range of different ethnic minority communities, and backed up by analysis of internal and external data. There are references to all three strands on page 7 of the EIA but they are

not explored in any depth and, considering this preceded any consultation exercise, they are based on assumption rather than evidence.

26. At no point does the EIA genuinely address the good race relations strand, revealing a lack of understanding of the statutory responsibility in this regard. Rather than reiterating the intended consequences of the implementation of the new powers, we would expect to see consideration of the impact of the Code and the implementation process (i.e document checking) on communities and within the workplace. The stigma attached to repeat document checks as well as the development of a view among certain ethnic minority and migrant communities and businesses that they are being targeted by the Home Office, may indeed lead to tensions and hostility between and within communities. These measures may create divisions within the workplace that will affect cohesion, productivity and staff retention. A culture of suspicion and fear, generated by the encouragement to report suspected employees to the BIA in return for reduced penalties, may erode trust between fellow workers and with employers and may well lead to harassment, exploitation and undue scrutiny. Although some of these risks are mentioned in the EIA, no attempt is made to offer a solution or action to mitigate these risks.

27. The EIA also fails to address the duty to promote equality of opportunity. By creating a system of repeat checks employers may either decide not to employ persons with limited leave to remain, or employ them on worse terms and conditions than other workers. This clearly indicates how the policy may inhibit equality of opportunity for all types of workers and therefore the EIA should consider how the BIA will address any adverse impact.

28. Generally, where potential adverse impact is identified, such as discrimination by employers, no action is identified to remove this impact, and no named post holders are identified to implement specific actions.

Monitoring

29. The EIA states that '*there is no statutory obligation to monitor the policy*'. While technically this may be the case, we are concerned that the BIA has made this comment and believe it may demonstrate a lack of understanding of the race equality duty under section 71 of the Race Relations Act. Under section 71, the Home Office has duties in carrying out its functions to pay due regard to the need to eliminate unlawful discrimination, and promote equality of opportunity and good race relations. If the Home Office is to fulfil this duty, specific measures to monitor the impact of the policy should be put in place. This is particularly significant as the EIA identified potential discrimination by employers who fail to follow the Code correctly, both in the carrying out of document checks and in recruitment and selection. It is, therefore, essential that BIA regularly monitor the impact of the policy and publish this monitoring data.

30. The EIA states on page 9 that:

"A central administrative team will monitor the imposition of penalties and administer the objection process. The Border and Immigration Agency will collect management data relating to the issuance of penalties and will publish these externally.

The civil penalty scheme will be officially reviewed one year after its commencement."

However, in relation to possible racial discrimination issues the EIA states that the policy will be monitored through ongoing contacts with the Illegal Working Group and the Commission for Racial Equality.

31. In our view, the general monitoring process outlined above should include information and research on any evidence of the racially discriminatory impact of the provisions. This review should also take place annually, in the form of a public report. We consider this appropriate for the following reasons:

    a. the government agrees that a Statutory Code is appropriate, indicating that the possibility of racial discrimination is very real and could potentially take place on a wide scale;
    b. the EIA identifies possible racially discriminatory effects;
    c. the production of an annual report would assist the Home Office in fulfilling its race equality duty with respect to this policy.

32. There is a precedent for such reports in the context of the exception to racial discrimination under section 19D for immigration functions and authorisations. Section 19E places a duty on the independent race monitor to monitor the possible discriminatory impact of such authorisations and to report annually. We recognise that there is no such statutory requirement to produce a report concerning the possible racial impact of these laws. However, considering the government has recognised the potential for racial discrimination and has consequently issued a Code of Practice for employers, it is our view that contact with the Illegal Working Group and the CRE in itself would not be sufficient, and a report would be an appropriate additional method of monitoring.

Criminal penalties, exploitation and trafficking

33. The CRE supports the provisions for a new criminal offence for those employers found to be knowingly employing illegal migrant workers. However, we believe that the criminal offence should include specific reference to trafficking for forced labour and the employment of illegal workers in exploitative working conditions. The CRE has previously called upon the government to sign and ratify the European Convention Against Trafficking in the context of its submission to the Home Office's action plan

against trafficking[6]. We were pleased that earlier this year the government agreed to sign and ratify the Convention.

34. In order for the government to properly implement the provisions under the European Convention it will need to introduce a number of new legislative measures. This includes creating a criminal offence for trafficking associated with labour (see articles 4, 18 and 22 of the Convention). As a result the government could either introduce new legislation regarding trafficking generally[7] or amend section 21 of the Immigration and Asylum Act 2006 to include trafficking. It is also relevant to point out that article 10(1)(d) of the Proposed EU Directive for sanctions against employers of illegally staying third country nationals provides for such a similar criminal offence where there has been trafficking[8]. In our view the government should support the legislative adoption at EU level of that provision and implement it, which would also be in furtherance of the government's commitment in relation to the European Convention Against Trafficking.

35. We also support the adoption and implementation of article 10(1)(c) of the Proposed Directive which requires a criminal offence where workers have been subject to "significantly exploitative working conditions" vis-à-vis other legally employed workers. Such treatment is, in principle, discriminatory and may be in certain circumstances a breach of human rights. This would demonstrate the government's commitment to prevent and deter exploitative working conditions.

36. In order to comply with the European Convention against Trafficking, the government will also need to legislate for recovery and reflection periods for victims in cases of trafficking and temporary resident permits[9]. Such legislation would provide them not only with an opportunity to recover, but would also enable victims to assist authorities without the fear of prosecution and deportation. The CRE supports the introduction of these measures and similar measures under articles 14(2) and (3) of the Proposed Directive.

37. The CRE also supports the introduction of practical and confidential mechanisms by which employees may lodge a complaint against an employer of illegal workers, and any appropriate associated complaints such as:

    a. potential or actual employees are being racially discriminated against as a result of the new provisions;
    b. employees have or may have been trafficked; and
    c. employees have been subjected to exploitative working conditions.

[6] CRE Consultation Response, 5 April 2006: http://www.cre.gov.uk/Default.aspx.LocID-0hgnew0dc.RefLocID-0hg00900f006.Lang-EN.htm
[7] This would seem the most efficient approach as all relevant provisions would be in one piece of legislation.
[8] COM(2007) 249 final, 16 May 2007.
[9] Articles 13 and 14 of the Convention.

38. In our view this could take the form of a telephone line similar to that for employers. Current systems only focus on employers and there is a need for a mechanism to facilitate complaints by workers, including complaints regarding discriminatory or exploitative conduct. This would also be consistent with article 14(1) of the Proposed Directive concerning complaints by employees, which is also supported by the CRE.

Conclusion

39. Once the CRE dissolves, the CEHR will continue to engage with the Home Office on this issue given its potentially widespread discriminatory ramifications.

40. The CRE urges the Government to;

    a. revise the draft Code of Practice to ensure that it makes clear that all stages of employment are relevant for the purposes of the Code, includes more detail of discrimination concepts and provides more practical examples to make it useful to employers;

    b. develop a strategy outlining the dissemination of the Code to all employers and the manner in which they will be encouraged to apply its principles;

    c. publish a full EIA on the implementation of new powers to prevent illegal migrant working following the outcome of this consultation;

    d. ensure that the EIA indicates what action will be taken by the BIA to mitigate against possible discrimination by employers;

    e. fully monitor the implementation of the new powers and the impact of the Code of Practice for employers by ensuring that any annual report includes monitoring data, research or other information regarding the impact of the policy on racial discrimination, equality of opportunity and good race relations;

    f. introduce new criminal laws which create an offence where an employer knowingly employs illegal workers and either knows that they have been trafficked, or allows working conditions that are exploitative when compared to other legally employed workers;

    g. introduce laws allowing recovery and reflection periods and temporary resident permits for persons trafficked for labour, to assist them in recovering and to allow them an opportunity to provide assistance to authorities;

    h. introduce mechanisms within the legislation, by which employees can lodge confidential complaints of illegal working, and possible linked complaints of racial discrimination, trafficking and exploitation.