Strengthening and simplifying the civil penalty scheme to prevent illegal working

Results of the public consultation

10 October 2013

Foreword

Immigration can bring benefits to the United Kingdom, but without proper controls, community confidence can be damaged, resources are stretched and the benefits that immigration can bring are lost or forgotten.

The government has already made changes to our immigration policies with the aim of reducing net migration, which is now down by a third since its peak in 2010. However, we plan to go further in the Immigration Bill. The Bill will make it more difficult for illegal immigrants to live and work in the UK and it will also ensure that legal immigrants make a proper contribution to our key public services. It is vital that our immigration policy is built into our benefits system, our health system, our housing system, the provision of services across government and access to employment.

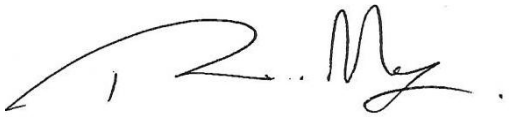
The consultation on '*Strengthening and simplifying the civil penalty scheme to prevent illegal working*' sought views on our proposals to strengthen and simplify the existing civil penalty scheme for the prevention of illegal working by migrants. This consultation report sets out the responses received to the consultation, the government's views, and steps we now intend to take to implement the proposals.

The Home Office is the first line of enforcement against illegal immigration and works with other agencies across government to take effective action against labour market abuse. Employers have a role to play in ensuring that their employees have the right to work in the UK. Since 2008, this has been underpinned by a civil penalty scheme.

We want to reform the civil penalty scheme to get tougher on rogue employers who continue to flout the law, exploit illegal labour and undercut legitimate business. We want to do this by increasing the level of penalties that may be applied and by making it easier to enforce them. We also want to simplify right to work checks to make it easier for compliant employers to fulfil their responsibilities.

To deliver a strong deterrent to illegal working we need to enforce the rules effectively. Alongside these proposals, the Home Office's Immigration Enforcement operation has stepped up its enforcement against illegal working. This has resulted in more than double the number of civil penalty notices for illegal working being served on employers between April and August this year, compared to the same period last year. Our enforcement operation is also working closely with other government departments to increase our enforcement reach and the range of sanctions we can bring to bear against abusive and exploitative behaviour by some employers.

Illegal working often results in the mistreatment of illegal immigrant workers, and it can also have an adverse impact on the employment of people who are legitimately in the UK. The best way to avoid both is to apply the full force of the law against rogue employers who exploit illegal labour.



The Rt Hon Theresa May MP
Home Secretary

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1. About the consultation

1.1 The Home Office conducted a public consultation on '*Strengthening and simplifying the civil penalty scheme to prevent illegal working*'. The consultation was open for 6 weeks from 9 July to 20 August 2013, and sought views on proposed changes to the current civil penalty scheme. This is part of a wider package of proposals for the Immigration Bill to strengthen the immigration system.

1.2 The consultation was available online at: http://ukba.homeoffice.gov.uk/policyandlaw/consultations/. Responses were received to an online questionnaire, by post and to the email address: homeofficeillegalworkingconsultation@homeffice.gsi.gov.uk.

1.3 Notification of the consultation was emailed to more than 20,000 external organisations registered with the Home Office as having a particular interest in immigration. They covered a cross-section of private and public sector employers and representative bodies, non governmental organisations, trade unions and legal representatives. In addition, two meetings and two webinar discussions took place with employers and employer organisations and representatives of the education sector.

1.4 The two webinar events covered 72 companies in the UK and overseas, mainly from the following industry sectors: consulting/professional services, consumer business, energy and resources, financial services, government/public sector/education, manufacturing and automotive, pharmaceuticals/healthcare/ research and development and technology/media/telecoms.

1.5 A meeting took place with seven representatives from labour intensive sectors, including employer organisations covering retail, cleaning, guarding and recruitment. There was also a meeting with Universities UK and the UK Council for International Student Affairs.

1.6 The consultation contained nine questions on the proposals for reforming the scheme. To all but one question, the range of replies was *yes, no, don't know*. In addition, there was a free text box for comments and any suggestions for improvements that could be made to the operation of the scheme. There was a further question about the equality impacts of the policy, with possible answers of *yes, no, don't know* for each protected characteristic, with another free text box for further comment and suggestions as to how to address any impacts identified.

1.7 Consultation responses are a self-selected sample and therefore may not be representative of the views of the public or organisations as a whole. Reported

differences between different groups are statistically significant at the five per cent level. These comparisons are made at two levels:

- between those responding on behalf of employers and employers' associations, compared with those responding as members of the public; and
- between those responding as British citizens, compared to non-European Economic Area nationals (that is, sub-sets of the members of the public group).

1.8 However, no statistically significant differences were found between the responses of the latter two groups. Therefore, the only reported differences were between the employers' group and the members of the public. These differences should be treated with caution, as there is no means of knowing the extent to which respondents are representative of the wider public or employers.

1.9 The main data tables (covering the findings for all respondents, the employers' groups and members of the public) are available at Annex A.

1.10 In addition, further tables will be published on our website to accompany this consultation which provide a breakdown of responses by nationality and the type of organisation (employer, employers' organisation, other). These data tables also include background information on individual and organisational responses, including demographic characteristics for the former group and organisation size and section for the latter. The tables also contain information on how respondents said they found out about the consultation.

1.11 All written responses to the consultation (whether submitted in the online survey, sent directly to the consultation mailbox, or sent in hardcopy) were analysed, with key themes being identified and summarised. These qualitative findings are reflected, alongside quantitative data in the report. Discussions with stakeholders were not included in the analysis of quantitative data, but were considered and taken into account in the government's response.

2. About the respondents

2.1 In total, 484 quantifiable responses were received. The vast majority of these (466) were responses to the online consultation. The remaining 18 responses were those which had been sent to the consultation in-box and were sufficiently quantifiable to include in the analysis. A further 15 largely narrative responses were received, mainly from organisations.

2.2 Four further responses by email were received after the consultation had closed. These comments were not included in the quantifiable responses, but were considered and informed the government's response.

2.3 A list of organisations which provided responses by email, in hardcopy and/or participated in meetings about the consultation are listed at Annex B. This list excludes organisations which responded to the online survey as this was anonymous and those organisations which participated in meetings and expressed a preference not to be identified.

2.4 Of the quantifiable responses, 387 respondents gave details of who they were responding on behalf of (see Table 1).

Table 1: Type of respondent

Type of respondent	**Respondents**	**%**
Private individual	185	48
Employer	140	36
Representative of an employers' association	29	7
Other type of company or organisation	33	9
TOTAL responding to question	**387**	100
Type of respondent not specified	97	

2.5 Private individuals were asked about their nationality. Seventy-four per cent said they were UK citizens. Four per cent were citizens of the European Economic Area (EEA). Twenty-two per cent were non-EEA citizens. Of the non-EEA citizens, 51 per cent stated that they had a time limit on their stay in the UK and 49 per cent did not.

2.6 Of the responses from employers and other organisations, 63 per cent were from private sector organisations, 27 per cent from the public sector and 9 per cent from the voluntary and community sector. Of these organisations, just over half (52%) employed 250 people or more. Thirty-three per cent employed 10 to 249 individuals and 14 per cent employed 9 people or fewer. Employers' associations were not asked these questions.

3. Detailed analysis of responses

Findings on the main consultation questions

3.1 The responses to each of the main questions in the consultation are set out below.

3.2 Differences between those responding on behalf of employers and employers' associations (labelled the 'employers' group') and responses from private individuals are only reported where they are statistically significant at the five per cent level. The full data are presented in the tables.

3.3 As noted above, there were no statistically significant differences between the views of those responding as British citizens, compared to non-EEA nationals. Non-EEA nationals' views were broadly in line with those of the British public.

Question 1:

If an employer breaches the right to work checks on more than one occasion, should a maximum civil penalty of £20,000 per illegal worker be levied?

3.4 Sixty-two per cent of respondents agreed that a maximum civil penalty of £20,000 per illegal worker should be levied when an employer breaches the prohibition on employing illegal workers on more than one occasion. Twenty-nine per cent disagreed.

3.5 Statistically, there were no significant differences between the employers' group and individual respondents. As can be seen in the discussion of the other consultation proposals below, this was the only question where this was the case.

3.6 In commenting on the proposed higher maximum penalty, employers in particular suggested that the actual penalty levied should be considered in the light of circumstances, or a failure to address underlying causes of previous breaches. Alternatives to civil penalties, such as repossession of assets and custodial sentences were also suggested by a small number of employer and private individual respondents.

3.7 Concerns were raised by a small number of survey respondents, including legal representatives, and an industry association, about the possible disproportionate impact of higher penalties on small businesses. A small number of respondents commented that the consultation document did not contain evidence to support the level of the increased penalty, but only a few respondents provided any evidence as to why £20,000 was too high.

3.8 One employers' association stated that is was concerned about the increase "*as we believe much more work is needed to simplify the current system and to support employers wanting to comply with the law"*. Another commented "*we question the deterrent value of doubling the civil penalties scheme with the existing conversion rates for enforcing and recovering fine."*

The government's response

3.9 We welcome the clear support for this proposal. As we set out in the consultation, we consider that it is important to increase the maximum penalty to better reflect the benefits accruing to, and the harm caused by employers of illegal workers. The level of the penalty should properly reflect the unfair competitive advantage rogue employers derive from being able to operate at a lower cost than legitimate competitors through non payment of taxes and national insurance contributions, statutory payments and national minimum wages, as well as breaching other workplace regulations. There are also direct costs to the taxpayer in taking enforcement action against rogue employers and removing illegal workers who have no basis to be in the UK, as well as less quantifiable societal costs associated with the displacement of legitimate workers and exploitative working conditions.

3.10 It is important to note that the maximum penalty would only be considered for those employers who had previously been served with a penalty notice, and thus been alerted to deficiencies in their right to work processes. It would not be considered for employers with a first-time breach.

3.11 We are aiming to improve the deterrent impact of the civil penalty scheme by increasing the maximum penalty, but also by making it easier to enforce unpaid civil penalties in the civil court. These reforms are being supported by increased operational enforcement by the Home Office against illegal working and by strengthening partnerships with other public bodies responsible for enforcing workplace-related laws to ensure that appropriate action is taken against those who flout multiple regulations.

3.12 The Home Office will also increasingly look to use its existing power under section 21 of the Immigration, Asylum and Nationality Act 2006 to prosecute those employers who knowingly employ illegal workers.

3.13 Increases in the penalty will be taken forward as an amendment to regulations in April 2014, and will be subject to an affirmative resolution procedure. An evidence-based impact assessment, focusing on the impacts on business, will be produced prior to the introduction of the amendment.

Question 2:

Should the calculation of civil penalties be simplified as proposed in the consultation?

3.14 Seventy-four per cent of respondents agreed that the calculation of civil penalties should be simplified as set out in the consultation document. Seventeen per cent disagreed.

3.15. Seventy per cent of private individuals agreed with the proposed simplification, compared to 83 per cent of the employers' group. This support was reflected in responses from organisations that represent the views of business.

3.16 A number of respondents (including employers, employers' associations, private individuals, and legal organisations) suggested that partial checks should still be a mitigating factor to allow for administrative errors and an insufficient understanding of the regulations. Again, one employers' organisation was particularly concerned about the potential impact on small businesses of removing this provision. Further suggestions on calculating penalties included taking into account how often an employer had breached checks, as well as non-compliance with other regulations such as paying the national minimum wage.

3.17 A small number of respondents, particularly some legal representatives, disagreed with the proposal, arguing it would remove the possibility of making representations that could affect the level of penalty imposed. They also raised concerns about an employer's legal and contractual responsibilities to employees and the implications of sharing information with the Home Office.

The government's response

3.18 We welcome the support for this proposal from consultation respondents. We will retain a sliding scale and simplify the calculation of civil penalties, ensuring that they are straightforward for employers to understand, transparent and consistently applied. We have however, considered the representations made in relation to the removal of mitigating factors which may indicate a willingness by employers to conduct right to work checks, but an error in their conduct (see question 3 below).

3.19 The calculation of penalties will reflect previous compliance or non-compliance – in terms of there being a higher starting point in the case of a second or further breach, and rewarding employers who proactively report suspected illegal working and co-operate with investigations into illegal working.

3.20 We will remove the partial check as a mitigating factor in view of the Home Office's parallel commitment to making the right to work checks easier to conduct. This includes simplifying the guidance, increasing support to employers and reducing the range of documents for checking purposes as we increasingly rely on biometric residence permits for non-EEA nationals to show their entitlement to work. This amendment will be taken forward by amending the regulations in early 2014.

Question 3:

Should a warning letter no longer be issued for a first time breach of the right to work checks?

3.21 Views on this proposal were mixed. Forty-one per cent of all respondents felt that a warning letter should no longer be issued in these circumstances. Fifty-four per cent felt a warning letter should continue to be issued.

3.22 Of all the questions with a *yes / no* response, this was the only one which did not have majority support from all respondents, private individuals or the employers' group. Forty-nine per cent of private individuals felt that a warning letter should no longer be issued, compared to 36 per cent of the employers' group. This suggests that this proposal was of particular concern to employers and employers' associations.

3.23 Reflecting the concerns noted above, a number of respondents from a variety of stakeholder groups felt that a warning letter should still be issued to prevent "*excessively penalising companies for genuine mistakes or lack of understanding".*

3.24 Concerns were also raised that - particularly in the case of new and/or smaller businesses with fewer resources - the five year duration of the existing penalties scheme and associated obligations did not necessarily guarantee full understanding of the regulations. This risk was felt to be exacerbated by the complexity of the process, inaccessibility of the guidelines, and insufficient support offered to employers in navigating the regulations.

3.25 An employers' association expressed concern about the potential impact of fines for first time breaches on small businesses, commenting that:

> "*A first time offence, that could be the result of ignorance or misinformation, could result in a fine. Whilst the UK's large businesses may, grudgingly, be able to absorb this cost small retailers would be crippled. Furthermore, even when a small retailer has worked with enforcement officers to report illegal workers and actively co-operated they could still receive a £5,000 fine."*

3.26 Some respondents said that warning letters had a role to play in supporting employers in complying with regulations. One legal representative suggested that warning letters are particularly important for Highly Trusted Sponsors, who may otherwise face losing their licence.

<u>The government's response</u>

3.27 We proposed to remove this option for the reasons set out in the consultation: that the scheme had been operating long enough for employers to be aware of their responsibility, the availability of the warning as opposed to a penalty may not encourage upfront compliance and our intention to simplify checks would make compliance easier.

3.28 We recognise the concerns expressed, particularly in relation to the impact on small businesses, but equally want to continue to ensure that the scheme remains robust and that employers properly conduct right to work checks to minimise illegal working.

3.29 We are therefore proposing to retain the option of a 'warning-type' letter, but to narrow the circumstances in which it will be applied, as follows: in the event of a first breach (as now) where an employer is able to demonstrate that they have effective recruitment processes in place which are generally compliant with the regulatory duty, a history of compliance and meet the other published mitigating factors (reporting suspected illegal working and active co-operation with the Home Office's investigation).

3.30 In addition, we are committed to simplifying the right to work checks and issuing more 'user-friendly' guidance and providing greater support to employers – and we will consult employers about these changes. When the amendments to the scheme are introduced, we will work with employer organisations to ensure that they are effectively communicated to employers so that they are clear about their duties and how to conduct right to work checks.

Question 4:

If an employer has already received one or more civil penalty notices, should these be considered an aggravating factor when determining the current penalty level?

3.31 Eighty-one per cent of all respondents agreed that, if an employer has already received one or more civil penalty notices, these should be considered an aggravating factor when determining the current penalty level. Fifteen per cent disagreed.

3.32 In contrast to the preceding question, the employers' group was significantly more supportive of this proposal than individuals (with 89% compared to 78% respectively agreeing with the consultation proposal).

3.33 Generally, comments supported the notion of more severe penalties for repeat 'offenders'. However, one employers' association felt that there should be a distinction made between those employers who make mistakes, and those who fail to carry out the checks. Similarly, legal representative organisations suggested consideration should be given to circumstances where employers breach the terms at multiple times, but for different reasons. They suggested that such factors should be taken into account in the calculation of the penalty.

3.34 Concerns were raised by two employers' associations about the potential impact on large companies, and those with a high staff turnover. In such cases, the company may incur multiple penalties simultaneously, or in close succession. These respondents again emphasised that such breaches may be due to human error in spite of employers having the right processes in place. It was suggested that the existence of such processes should be taken into account when calculating penalties, as should the proportion of the workforce involved.

The government's response

3.35 We welcome the broad support for this proposal from consultation respondents. We consider it to be important to levy a civil penalty that is proportionate to the employer's breach of the right to work checks and serves as a deterrent to illegal working. At the same time we need to put in place a straightforward, transparent and consistently applied process, and one which provides clarity to an employer about the likely level of sanction in the event of non-compliance.

3.36 An initial breach will have alerted the employer to one or more deficiencies in their recruitment procedures which should be rectified, and it is reasonable to expect such an employer to put in place the required arrangements. We also consider it reasonable to expect larger employers to have in place a rigorous human resources system necessitated by higher volumes of staff, which in turn meets their regulatory duty. We will therefore take forward a sliding scale of penalties which reflects that second or subsequent breaches will incur a higher penalty, as now.

3.37 We do not think that the penalty should reflect the size of the company. However, the employer may reduce the size of their financial sanction through the application of published mitigating factors. In addition, we have decided to incorporate the possibility of a 'warning type' option for a first breach which may be applied where an employer has made an error but they show through the existence of processes for right to work checks and co-operation with the Home Office that they intended to comply with their regulatory duty. The maximum penalty will be determined using the available evidence and amendment to the penalty level will be subject to an affirmative resolution procedure in Parliament.

Question 5:

What should be the starting point for the calculation of a first civil penalty to act as an effective deterrent to employing illegal workers?

3.38 This question offered three response options for the calculation of a first civil penalty to act as an effective deterrent to employing illegal workers. Most respondents opted for the lower (£10,000, 54%) or higher (£15,000, 40%) options, with only six per cent choosing the middle option of £12,000.

3.39 A higher proportion of the employers' group (62%) were in favour of the £10,000 starting point, compared to individual respondents (46%). Fifty per cent of individuals felt the starting point should be £15,000, compared to 29 per cent of the employers' group.

3.40 A number of respondents, including employer and legal associations, did not agree with any of the proposed options. As with responses to the maximum civil penalty proposal, some respondents suggested that greater evidence was needed to justify changes to the level of penalties set.

The government's response

3.41 We intend to set the penalty for a first breach at £15,000. This represents a doubling of the current starting point for the calculation of a first time penalty. This both takes into account our proposal to retain a 'warning-type' option (see the response to question 3) and our desire to ensure that the penalties act as an appropriate deterrent and reflect the benefits that rogue employers can accrue from employing illegal workers.

3.42 Employers will also be able to reduce the penalty by proactively reporting their suspicions of illegal working, actively co-operating with the Home Office's investigations and by paying the penalty early (a 30 per cent reduction for payment within 21 days of the penalty being levied).

3.43 We will set the maximum penalty by of way an amendment to regulations in April 2014, and this will be subject to an affirmative resolution procedure. An impact assessment will be produced to inform this.

Question 6:

Would reducing the number of acceptable documents simplify the right to work checks?

3.44 Sixty-four per cent of all respondents agreed that reducing the number of acceptable documents would simplify the right to work checks. Twenty-nine per cent disagreed.

3.45 The employers' group was significantly more supportive of this proposal than individual respondents with 73 per cent supporting it, compared to 61 per cent of individuals.

3.46 Comments from a range of stakeholders were broadly supportive of reducing the number of acceptable documents as an approach to simplifying the scheme. As one employers' association commented, currently the "*range of documents makes checks time consuming and difficult and increases the chance of error".* A small number of respondents who commented on this proposal were concerned that it might lead to a situation in which some individuals would not have the correct documents.

The government's response

3.47 We will reduce the list of documents over time, and the pace at which we do so will also be linked to the rollout of biometric residence permits for non-EEA nationals (see question 7). Changes to document requirements will be communicated with advance notice.

Question 7:

Do you support working towards the biometric residence permit being the main acceptable document for right to work checks for most non-EEA nationals?

3.48 Seventy-six per cent of all respondents supported working towards the biometric residence permit (BRP) as being the main acceptable document for right to work checks for most non-EEA nationals. Twenty per cent of respondents disagreed.

3.49 This proposal attracted particularly strong support from the employers' group, with 85 per cent agreeing with the proposal, compared to 68 per cent of individual respondents.

3.50 Although largely supportive of the proposal, a concern was raised by a small number of respondents, and a range of stakeholders, about how widely used the BRP documents would be. A representative of the trade union sector also highlighted that the BRP would need to be kept up to date, as this would affect employability. A number of respondents suggested that other documents should still

be acceptable, and document reduction should depend on the rollout and degree of penetration of the BRP.

3.51 Two employers indicated concerns that this proposal would not address the problems faced by employers when establishing the right to work of EEA nationals, and the spouses of EEA nationals.

The government's response

3.52 We started a phased rollout of BRPs in 2008. To date we have issued over 1.2 million cards to non-EEA nationals staying in the UK for more than six months. Since February 2012, any non-EEA national who makes an application within the UK for leave exceeding six months or to replace older forms of immigration documentation is required to apply for a BRP. In 2014, we are proposing to provide BRPs to all non-EEA nationals overseas coming to the UK for more than six months and who are currently granted a visa. We are currently considering our approach to rolling out BRPs to the settled migrant population who currently possess other forms of immigration documentation, to enable a reduction to the range of acceptable documents.

3.53 Reducing the plethora of acceptable immigration documents will make it easier for employers to make right to work checks and reduce their costs. By focusing checks for non-EEA nationals primarily on the BRP, the security of the checking process will be improved as the BRP is more difficult to forge and may be authenticated more easily than older forms of immigration documentation, making it more difficult for illegal migrants to bypass employer checks by using falsified documentation.

3.54 A BRP contains the holder's immigration status, their entitlements and restrictions while they are in the UK. The information on the document will be updated to reflect any changes of status and conditions held by the migrant. In addition, the Home Office is working on the development of automated BRP checks, as part of wider support for employers in conducting right to work checks and is currently piloting a process with some large employers.

3.55 We will also consider what further support we can provide to employers in the understanding of EEA documentation and the risk of forgeries, as requested by some employers. The Immigration Bill will also include measures to enable us to issue biometric cards, similar to BRPs, to non-EEA family members of EEA nationals.

Question 8:

Would a follow-up check linked to the expiry of permission to stay in the UK reduce the burden on employers?

3.56 Seventy-two per cent of all respondents felt that a follow-up check linked to the expiry of permission to stay in the UK would reduce the burden on employers while twenty per cent of respondents disagreed.

3.57 As with the preceding question, this proposal attracted particularly strong support from the employers' group. A significantly higher proportion (81 %) of the employers' group supported the proposal, compared to private individuals (65 %).

3.58 A small number of the online survey respondents commented on this proposal. They were generally supportive of removing annual checks as it would reduce the burden on employers, especially those with large numbers of employees. Many of the narrative responses from organisations (for example from the local government, education and legal sectors) supported the proposal on the same basis.

3.59 However, some respondents, from both the legal and employment sectors, took a different view about the burden on employers, and believed that this proposal could have a negative impact for large businesses as it would create a greater burden to determine the expiry date of an employee's visa. It was therefore suggested that employers should be given a choice as to whether to conduct an annual check or a check at the expected date of expiry. A number also commented on the uncertainty of handling a situation when employees apply to renew their visas, for example,

> "*if we check at the end of an expiry and the person has submitted a new application then we would have to keep checking until they have the new one, as there are no timescales to know how long this takes, it is difficult to keep on top of. Also if someone is turned down we would not be aware*."

The government's response

3.60 We want to reduce the burden on employers of conducting right to work checks. One of the ways in which this could be achieved is through dispensing with unnecessary annual checks on an employee with time-limited status who has several years of permission remaining, and replacing these with a check at the point of expiry of the visa.

3.61 It is important that employers are aware of the expiry of an employee's permission to work, following which they should no longer be employing an individual unless they have a valid application for further leave outstanding, or this has been granted. We will ensure that we provide a full and clear explanation of an employer's responsibilities at the point of expiry of an employee's permission to work in a revised Code of Practice and simplified guidance. We will make it clear how to handle situations in which an employee has made a further valid application, and this will be supported by employer checking services.

Question 9:

Should directors and partners of limited liability businesses be held jointly and severally liable for civil penalties to allow recovery action to be taken against them if the business does not make payment?

3.62 Sixty-two per cent of all respondents felt that directors and partners of limited liability businesses should be held jointly and severally liable for civil penalties to

allow recovery action to be taken against them if the business does not make payment. Twenty six per cent of respondents disagreed.

3.63 There was majority support (57%) for this proposal from the employers' group, but this was significantly lower than the level of support (68%) from members of the public.

3.64 A small number of respondents to the online survey made additional comments which supported the proposal on liability. Within this, some employers referred to the importance of looking at both mitigating and aggravating factors, for example:

> "*I would only be in favour of extending personal liability to directors etc. if they have some aggravating factors (eg where as mentioned above, they have deliberately employed illegal workers, failed to pay the National Minimum Wage, failed to pay tax, NIC etc, are repeat offenders and/or have used a phoenix company to avoid liability). However, I do not believe that it would be right to adopt a joint and several liability offence as a general proposition, especially where ability to pay is not a mitigating factor*."

3.65 Other respondents said that partners or directors should only be liable if they were directly involved with hiring illegal workers. Other comments, in particular from legal organisations, included concern about the complexity of this proposal and its relationship with company and partnership law.

The government's response

3.66 The consultation identified support for this proposal in principle. However, we acknowledge the complexity of this issue and the link with company and partnership law. The Home Office will therefore continue to work with the Department for Business, Innovation and Skills with a view to developing an appropriate measure which addresses the key concerns highlighted.

Additional comments made during the consultation:

3.67 In addition to the specific proposals raised, the consultation invited further suggestions for improvements to the operation of the scheme. The key suggestions made are highlighted below.

(i) Employer checking services

3.68 Respondents from a variety of stakeholder groups commented on the need for improved guidance and support for employers from the Home Office. This was encapsulated by one employers' organisation:

> "W*e would like to see additional support for employers to help them navigate through the necessary processes. This would include: the provision of simpler and shorter guidance to clearly outline the requirements, information more readily available online, access to quick, consistent and responsive customer contact arrangements..."*

The government's response

3.69 As set out in the consultation, we are committed to simplifying our processes and guidance for employers, as well as providing greater support for them in the conduct of right to work checks. We are currently exploring how to deliver changes which will meet the needs of employers, and will consult employers on revised guidance before it is introduced.

(ii) Deterrence requires increased operational enforcement

3.70 A small number of respondents from a variety of stakeholder groups advocated increasing the focus on enforcement and strengthening border controls. One employers' organisation said:

> "... *proactive enforcement activity at a local and national level based on intelligence is more likely to be a deterrent to those employers attempting to get a competitive advantage through employing illegal workers."*

The government's response

3.71 Dealing with illegal working is our priority and we are clear that deterrence is underpinned by an effective operational response. This year, with the creation of a new Immigration Enforcement Directorate within the Home Office, there is already an increased focus on this issue, with the delivery of the results we expect. More than double the number of civil penalty notices for illegal working have been served on employers between April and August 2013 (1,436), compared to the same period last year (669).

3.72 National co-ordinated campaigns to tackle illegal working have been undertaken this year. In addition, we are working increasingly closely with other relevant government departments and agencies to ensure that we are able to bring to bear the widest range of sanctions from across government for various breaches of workplace compliance by an employer. As well as an effective operational response, we need to ensure that employers who are served with civil penalties are less able to evade them, so we are also taking powers to improve our debt recovery.

(iii) A rights based approach to illegal migrants

3.73 Trade unions responded to suggest that "*the key to tackling exploitation of undocumented workers is to allow them recourse to the law to claim their rights at work which they are currently denied and better enforcement of workplace rights through government agencies*."

The government's response

3.74 Illegal migrants who work in the UK do not have a lawful contract of employment and are therefore not able to claim any employment rights, or enforce these through the employment tribunal system. It is wrong to reward illegal immigrants for breaking the UK's immigration laws by working illegally. A different approach is required. The government believes that the best way to avoid mistreatment is to ensure that employers receive appropriate sanctions when they are found to be employing illegal workers, and to deter them from doing so in future.

This is the rationale for the proposals contained in the consultation, which are supported by increased enforcement activity by the Home Office, often working in partnership with other agencies.

3.75 However, the government does recognise that some migrants are brought to the UK and forced to work against their will. They are victims of human trafficking. Whilst our response to this crime is outside the scope of this consultation, the government has a National Referral Mechanism in place to help identify and support human trafficking victims and from October the National Crime Agency (NCA) will lead the fight against organised criminals who seek to traffic in human beings. The UK Human Trafficking Centre will form part of the NCA and support the single intelligence hub with the Border Policing and Organised Crime Commands to deliver an intelligence-led operational response to trafficking. The government is also exploring legislative options to strengthen the law enforcement response and hold those who exploit labour to account.

3.76 More generally, our focus on working more closely across government agencies is helping to ensure that labour market enforcement is joined up, intelligence on labour market abuse is more effectively shared and stronger and wider sanctions are delivered in response to abusive behaviour by employers so that the full force of the law can be applied. Agency partners include HM Revenue and Customs, the Employment Agency Standards Inspectorate, the Health and Safety Executive, the UK Human Trafficking Centre, the police, local authorities and the Gangmaster Licensing Authority.

(iv) EEA national family members

3.77 A small number of legal representatives considered that the requirements for family members of EEA nationals to produce certain documents may be in breach of EU law.

The government's response

3.78 The aim of the civil penalty regime is to prevent illegal working in the UK and the associated document list provides a simple means for family members of EEA nationals to demonstrate their right to work by producing documents that they are most likely to possess. It is open to any non-EEA national who has an enforceable European Union law right to work in the UK to demonstrate the existence of that right through means other than those documents in Lists A and B of the Immigration (Restrictions on Employment) Order 2007 (S.I 2007/3290). An employer may choose to accept such alternative evidence or to seek further advice from the Home Office. However, in the event that a non-EEA national is found not to qualify to work in the UK, the employer would be liable to payment of a civil penalty unless they checked the documents prescribed in the 2007 Order above.

(v) Providing evidence of a student's right to work

3.79 A small number of employers made particular reference to the requirements for establishing a student's right to work. Although welcoming the proposal, some felt further clarity was needed on what would be deemed "acceptable" evidence. It was further noted that evidence of term schedules would only be appropriate in the case of taught courses, and would not be applicable to PhD students for example.

The government's response

3.80 Many international students are able to work part-time during their study term-times and full-time during their holidays. We will require students to present evidence of their term dates as part of the right to work checks. As the consultation noted, this is to prevent students working in breach of their visa conditions, provide some clarity to employers on students' ability to work and support students in demonstrating their right to work.

3.81 We aim to have a light touch and proportionate approach to this requirement, which is likely to rest on a student providing published evidence of term times provided by the education provider. Where this does not exist, or does not apply to the student's particular course of study, the student would need to provide a letter from their educational institution. We will consult various education providers and their representatives on this provision before its introduction.

(vi) Checks for staff acquired as a result of a TUPE transfer

3.82 A small number of respondents and participating stakeholders commented on the checks required to be made by a company that acquires staff as a result of a Transfer of Undertakings (Protection of Employment) Regulations transfer. They considered that the 28 day grace period following the transfer to carry out the document checks was inadequate.

The government's response

3.83 We acknowledge that a TUPE transfer which may involve a large number of staff would put pressure on the new employer to make adequate checks. We maintain that these checks are important in order for the new employer to acquire a defence against the levy of a civil penalty for illegal working. However, acknowledging the impact on businesses, we are proposing to extend the grace period to 60 days.

Impacts on people with protected characteristics

Question 10

3.84 Respondents were asked about **the consultation proposals' impact on individuals based on different protected characteristics.**

3.85 Table 2 lists the responses relating to negative impacts on protected characteristics. Most respondents felt that there would not be an impact on those with protected characteristics. The responses on negative impacts indicated that a higher proportion of respondents felt that there might be negative impacts relating to race, including ethnic origin (22%) than for other protected characteristics (all between 11% and 15%). However, even with respect to race, more than half of respondents did not regard these proposals as having a negative impact.

Table 2: Negative impacts on individuals based on different protected characteristics

	Yes (%)	No (%)	Don't know (%)
Age	13	64	24
Disability	13	62	25
Marriage / civil partnership	14	61	26
Pregnancy	13	62	25
Race	22	56	23
Religion or belief	15	61	24
Gender	12	64	24
Gender reassignment	11	63	26
Sexual orientation	11	63	26

3.86 Individual respondents were significantly more likely to feel there would be negative impacts on individuals based on all protected characteristics, compared to responses from the employers' group (see the data tables at Annex A for responses from these two groups).

3.87 A greater proportion of the write-in and narrative responses, from all types of respondent, reflected on the negative, rather than positive impacts, on individuals with protected characteristics. In line with the quantitative findings, the greatest concern was about potential discrimination on the basis of race, as expressed in one response from a union representative:

> *"Home Office proposals would negatively impact on people on the grounds of race defined in terms of ethnicity and colour. The requirement for document checks for employees to prove they have a right to work is likely only to be exercised by employers who perceive their employees to be non-EU citizens."*

3.88 Some respondents making this point also referred to discrimination on the basis of faith (specifically against Muslims). There were also a small number of references to the risk of discrimination on the basis of marriage or partnership, as employers might have difficulty understanding the rights to work associated with dependants' visas or EEA family permits.

3.89 There were also a small number of responses made from an employer standpoint, with respondents arguing that the checks might be harder to implement for some disabled or older employers.

3.90 Comments about positive impacts tended to reflect on the wider fairness and benefits of preventing illegal working. Positive impacts for young people were specifically mentioned by some respondents, for example an individual respondent commented:

"If less people are employed illegally it will therefore ensure people out of work, particularly young people (18-24) will have a better chance of finding employment which is very unfairly affected with the current high levels of illegal working."

3.91 A small number of respondents mentioned that the removal of annual document checks could be seen as a positive step for non-EEA workers.

3.92 There were also some more neutral responses, (from both individual and organisational respondents) which argued that the changes need not be discriminatory. These responses tended to argue that the checks would not be discriminatory if employers worked within the existing equalities law and, as expressed by this respondent (from an 'other' type of organisation):

"...provided there is clear guidance in place and migrants are not excluded from applying for or being granted the right to work in the UK because of a particular protected characteristic."

<u>The government's response</u>

3.93 Our full consideration of the proposals' impact on individuals based on different protected characteristics is set out in the Policy Equality Statement at Annex C.

4. Conclusions from the consultation

4.1 We have considered the quantitative responses to the consultation and the qualitative responses provided online, by email and during discussion with stakeholders.

4.2 As a result, we have set out our views on each proposal, including how we intend to take forward each of one of them (see section 3). In addition, respondents provided further comments on the working of the civil penalty scheme, to which we have also responded.

4.3 The changes on which we consulted, with the exception of the proposal in question 9, will be taken forward in secondary legislation in early 2014, with the change to the maximum civil penalty level being subject to an affirmative resolution procedure.

4.4 The Home Office and Department of Business, Innovation and Skills will continue to explore appropriate measures in relation to directors and partners of limited liability businesses in the event that businesses evade payment of civil penalties for the employment of illegal migrant workers.

4.5 In the Immigration Bill we will also make the following changes, which were set out in the consultation document:

- an amendment to section 17 of the Immigration, Asylum and Nationality Act 2006 to require an employer to exercise their right to object before they make their appeal to the civil court; and
- an amendment to section 18 of the same Act to streamline the steps needed to enforce unpaid civil penalties in the civil courts.

4.6 We will work to simplify our processes and guidance for employers, as well as providing greater support for them in the conduct of right to work checks. We are exploring how to deliver these changes, and we will consult employers on the revised guidance before it is introduced.

4.7 When the reforms to the civil penalty scheme are ready to be implemented, we will ensure that we explain these changes to employers, and we will wish to work with employers' groups to ensure that employers understand their duties and how to conduct them effectively.

Annex A

Data tables setting out the quantitative responses to the consultation questions

		All respondents (total number = 484**)**		**Members of the public** (total number = 185)		**Employer or employers' association** (total number = 169)	
		Count	**Percentage**	**Count**	**Percentage**	**Count**	**Percentage**
1. If an employer breaches the right to work checks on more than one occasion, should a maximum civil penalty of £20,000 per illegal worker be levied?	**Yes**	294	62%	126	69%	103	62%
	No	136	29%	50	27%	48	29%
	Don't know	41	9%	7	4%	14	9%
2. Should the calculation of civil penalties be simplified as proposed in the consultation?	**Yes**	333	74%	129	70%	137	83%
	No	76	17%	38	21%	21	13%
	Don't know	41	9%	17	9%	8	5%
3. Should a warning letter no longer be issued for a first time breach of the right to work checks?	**No longer be issued**	182	41%	89	49%	60	36%
	Continue to be issued	239	54%	87	48%	102	61%
	Don't know	23	5%	7	4%	6	4%
4. If an employer has already received one or more civil penalty notices, should these be considered an aggravating factor when determining the current penalty level?	**Yes**	346	81%	142	78%	147	89%
	No	62	15%	33	18%	15	9%
	Don't know	17	4%	8	4%	3	2%
5. What should be the starting point for the calculation of a first civil penalty to act as an effective deterrent to employing illegal workers?	**£15,000**	160	40%	88	50%	45	29%
	£12,000	24	6%	7	4%	14	9%
	£10,000	212	54%	80	46%	97	62%
6. Would reducing the number of acceptable documents simplify the right to work checks?	**Yes**	273	64%	111	61%	122	73%
	No	124	29%	57	31%	37	22%
	Don't know	29	7%	14	8%	9	5%
7. Do you support working towards the biometric residence permit being the main acceptable document for right to work checks for most non-EEA nationals?	**Yes**	323	76%	124	68%	142	85%
	No	83	20%	48	26%	23	14%
	Don't know	19	5%	11	6%	2	1%
8. Would a follow-up check linked to the expiry of permission to stay in the UK reduce the burden on employers?	**Yes**	302	72%	119	65%	135	81%
	No	83	20%	46	25%	24	15%
	Don't know	35	8%	17	9%	7	4%
9. Should directors and partners of limited liability businesses be held jointly and severally liable for civil penalties to allow recovery action to be taken against them if the business does not make payment?	**Yes**	251	62%	123	68%	91	57%
	No	105	26%	42	23%	43	27%
	Don't know	46	11%	16	9%	26	16%

		All respondents (total number = 484**)**		**Members of the public** (total number = 185)		**Employer or employers' association** (total number = 169)	
		Count	**Percentage**	**Count**	**Percentage**	**Count**	**Percentage**
10: Do you think these proposals would have any **positive** impact on individuals based on the following protected characteristics:							
	Yes	35	9%	26	15%	5	3%
	No	250	66%	107	61%	112	72%
Age	**Don't know**	96	25%	43	24%	39	25%
	Yes	28	7%	21	12%	3	2%
	No	247	66%	106	62%	111	72%
Disability	**Don't know**	101	27%	45	26%	41	27%
	Yes	27	7%	18	10%	3	2%
	No	245	65%	109	63%	108	70%
Marriage / civil partnership	**Don't know**	106	28%	47	27%	44	28%
	Yes	25	7%	18	11%	4	3%
	No	249	66%	107	62%	111	72%
Pregnancy	**Don't know**	101	27%	47	27%	39	25%
	Yes	39	10%	19	11%	13	8%
	No	245	64%	110	63%	107	68%
Race	**Don't know**	98	26%	45	26%	38	24%
	Yes	26	7%	18	10%	3	2%
	No	251	67%	110	64%	111	72%
Religion	**Don't know**	100	27%	45	26%	41	27%
	Yes	24	6%	18	11%	3	2%
	No	252	67%	108	63%	113	73%
Gender	**Don't know**	98	26%	45	26%	39	25%
	Yes	23	6%	19	11%	2	1%
	No	248	66%	106	62%	112	73%
Gender reassignment	**Don't know**	103	28%	47	27%	40	26%
	Yes	22	6%	18	11%	2	1%
	No	248	66%	106	62%	112	72%
Sexual orientation	**Don't know**	105	28%	47	28%	41	27%

		All respondents (total number = 484**)**		**Members of the public** (total number = 185)		**Employer or employers' association** (total number = 169)	
		Count	**Percentage**	**Count**	**Percentage**	**Count**	**Percentage**
11: Do you think these proposals would have any **negative** impact on individuals based on the following protected characteristics:							
	Yes	46	13%	32	20%	9	6%
	No	224	64%	95	59%	106	68%
Age	**Don't know**	83	24%	35	22%	40	26%
	Yes	46	13%	33	20%	7	5%
	No	221	62%	92	56%	108	70%
Disability	**Don't know**	88	25%	39	24%	40	26%
	Yes	48	14%	37	23%	7	5%
	No	215	61%	86	53%	106	68%
Marriage / civil partnership	**Don't know**	91	26%	40	25%	42	27%
	Yes	47	13%	35	22%	7	5%
	No	219	62%	90	55%	107	70%
Pregnancy	**Don't know**	87	25%	38	23%	40	26%
	Yes	78	22%	47	28%	17	11%
	No	202	56%	84	51%	98	63%
Race	**Don't know**	83	23%	35	21%	41	26%
	Yes	52	15%	35	22%	9	6%
	No	217	61%	92	56%	103	67%
Religion	**Don't know**	86	24%	36	22%	43	28%
	Yes	41	12%	31	19%	6	4%
	No	225	64%	95	59%	106	70%
Gender	**Don't know**	84	24%	36	22%	40	26%
	Yes	39	11%	29	18%	6	4%
	No	222	63%	92	57%	106	68%
Gender reassignment	**Don't know**	91	26%	40	25%	43	28%
	Yes	39	11%	29	18%	6	4%
	No	224	63%	94	57%	106	68%
Sexual orientation	**Don't know**	92	26%	41	25%	43	28%

Annex B

List of the organisations that responded to the consultation in-box and/or participated in stakeholder meetings

Association of Convenience Stores
BP
British Retail Consortium
BT
Business Services Association
Capital One
Computer Sciences Corporation
Centrica plc
Confederation of British Industry
Convention of Scottish Local Authorities
Discrimination Law Association
DWF Solicitors
EEF Manufacturers' Organisation
Employment Lawyers Association
Forum of Private Business
GlaxoSmithKline
GuildHE
Immigration Law Practitioners' Association
ISS World
KPMG
Knightsbridge Cleaning
The Law Society
Lewis Silkin LLP
Medical Research Council UK
Mitie
National Health Service Employers Organisation
Natural Environment Research Council
Newland Chase
North West Regional Strategic Migration Partnership
Northern Ireland Strategic Migration Partnership
NSL
The Pirbright Institute
Penningtons Solicitors LLP
Price Waterhouse Coopers
Recruitment and Employment Confederation
The Refugee Council
The Road Hauliers Association
Science and Technology Facilities Council
Shared Business Services Ltd

Speechly Bircham LLP
Talisman Sinopec Energy UK
Tesco
Trades Union Congress
Travers Smith LLP
UK Council for International Student Affairs
UNISON
Unite
Universities and Colleges Employers Association
Universities UK
The University of Edinburgh
The University of Cambridge
The University of Oxford
Yemenia

Annex C

Policy Equality Statement

Home Office

HOME OFFICE
POLICY EQUALITY STATEMENT (PES)

Strengthening and simplifying the civil penalty scheme to prevent illegal working

Aims of the policy:

The main aim of the current scheme, which was introduced in the Immigration, Asylum and Nationality Act 2006, is to prevent illegal working by migrants. Employers are required to check that a person is permitted to work in the UK by checking one or two of a number of 'acceptable documents' in order to establish a statutory excuse against a civil penalty.

The government is taking a tougher approach to illegal immigration. The availability of work encourages migrants to come to the UK illegally and legal migrants to overstay their permission to be in the UK. Illegal working is frequently associated with exploitative working conditions and tax evasion. Businesses that employ illegal workers undercut legitimate business through their unfair and illegal cost-cutting activity. Illegal working has adverse impacts on the employment of people who are legitimately in the UK. It also costs the taxpayer in terms of lost revenue as well as the costs of Home Office enforcement activity and the removal of migrants who have no basis to remain in the UK.

We are proposing to make a number of changes to the civil penalty scheme which will strengthen and improve its operation, and these were set out in our consultation on '*Strengthening and simplifying the civil penalty scheme to prevent illegal working*', which was available at: http://ukba.homeoffice.gov.uk/policyandlaw/consultations/.

Our twin aims are to introduce more robust measures against employers of illegal workers and make those sanctions more commensurate with the harm they cause, while at the same time, reducing the administrative burdens imposed on legitimate employers in conducting right to work checks.

The changes will be delivered through a new Immigration Bill, which will commence its passage through Parliament in the Autumn of 2013, and secondary legislation in early 2014.

Summary of the evidence considered in demonstrating due regard to the Public Sector Equality Duty.

Introduction:

As set out in the consultation document, the civil penalty scheme represents an existing policy. A full Equality Impact Assessment was completed when the policy was introduced in the Immigration, Asylum and Nationality Act 2006.

The Equality Impact Assessment noted that:

"...where correctly applied, this policy will not lead to unlawful direct or indirect discrimination. Individuals will be excluded from employment as a result of their legal entitlement to take the employment in question and not as a result of unlawful discrimination."

We have reviewed this document and considered its findings to remain relevant. It was noted that while the civil penalty scheme is being reformed, its reach, in terms of those on whom it will impact, will remain unchanged.

The consultation asked for views on the equality impacts of the policy and stated that, in the light of responses, we would review our policy proposals and complete a further equality statement.

When the scheme was introduced, a statutory Code of Practice was published containing 'Guidance for employers on the avoidance of unlawful discrimination in employment practice while seeking to prevent illegal working'[1].

Section 1:

This section summarises and discusses the issues and risks raised by the public consultation and the steps that will be taken to address them.

The consultation asked whether respondents considered the proposals would have any impact, positive or negative, on individuals based on the protected characteristics defined in the Equality Act 2010, and asked for suggestions about how such impacts might be managed, maximised or mitigated. The responses to this question were received through the on-line survey, by email to the consultation in-box and in meetings with stakeholders.

The following issues relating to the protected characteristics were raised as part of the consultation process. The issues described here are also found within

1 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/

the consultation report and are repeated here for ease of reference.

A clear majority of respondents to the consultation felt that there would not be an impact on those with any of the listed protected characteristics. However, the responses on negative impacts indicated that a slightly higher proportion of respondents felt that there might be negative impacts relating to race (22%), than for other protected characteristics (all between 11% and 15%).

The equality impact of the policy proposals was also discussed in meetings with some employers and their representative associations, and have also informed the government's response.

A greater proportion of the write-in and narrative responses, from all types of respondent, reflected on the negative, rather than positive impacts on individuals with protected characteristics. In line with the quantitative findings, the greatest concern was about potential discrimination on the basis of race, as expressed in one response from a trade union:

"*Home Office proposals would negatively impact on people on the grounds of race defined in terms of ethnicity and colour. The requirement for document checks for employees to prove they have a right to work is likely only to be exercised by employers who perceive their employees to be non-EU citizens."*

Some respondents making this point also referred to discrimination on the basis of faith (specifically against Muslims). There were also a small number of references to the risk of discrimination on the basis of marriage or partnership, as employers might have difficulty understanding the rights to work associated with dependants' visas or EEA family permits.

There were also a small number of responses made from an employer standpoint, with respondents arguing that the checks might be harder to implement for some disabled or older employers.

Comments about positive impacts tended to reflect on the wider fairness benefits of preventing illegal working. Positive impacts for young people were specifically mentioned by some respondents, for example an individual respondent commented:

"If less people are employed illegally it will therefore ensure people of out work, particularly young people (18-24) will have a better chance of finding employment which is very unfairly affected with the current high levels of illegal working."

A small number of respondents mentioned that the removal of annual document checks could be seen as a positive step for non-EEA workers.

There were also some more neutral responses, (from both individual and organisational respondents) which argued that the changes need not be discriminatory. These tended to argue that the checks would not be discriminatory if employers worked within the existing equalities law and, as expressed by this respondent (an organisation other):

"...provided there is clear guidance in place and migrants are not excluded

from applying for or being granted the right to work in the UK because of particular protected characteristics."

Section 2

The following section addresses potential impacts for each of the protected characteristics under the Equalities Act:

Race
Race includes colour, nationality and national or ethnic origins (section 9 of the Equality Act).

22% of respondents who expressed an opinion considered that the policy could result in race discrimination.

A small number of comments were received, and mainly from trade unions and legal representatives, of which the following is a representative view:

"*Businesses may be deterred from employing a migrant (or perceived migrant) due to their skin colour, country of origin or religious observances on the basis that they assume employing this person will lead to a potential civil liability and a yearly logistical obstacle in the form of migrant document checks."*

Some of these respondents commented that this situation may be worsened by reducing the list of documents which could mean that some people who have the right to work may be unable to produce documents to meet the requirements.

A further comment received from a trade union was:

"...*discrimination may also take place with certain ethnic and racial groups being asked to produce documentation by employers whilst this will not be required of those who are assumed to be EU citizens, which will impact on BME communities disproportionately."*

The reduction in the list of documents will be gradual and linked to the increased usage of biometric residence permits for non-EEA nationals. This document will make it easier for the holder to establish their immigration status and entitlement to work.

The proposal to remove annual right to work checks on non-EEA nationals with time-limited status may also assist to reduce the burden on employers and possibly avert any current discriminatory behaviour as a result.

The current statutory Code of Practice contains 'Guidance for employers on the avoidance of unlawful discrimination in employment practice while seeking to prevent illegal working' and makes clear that pre-employment checks should be made 'in a non-discriminatory manner by applying them to all applicants and at the same point of the recruitment process.' This will be reinforced in a revised Code of Practice and guidance for employers.

Gender
12% of respondents who expressed a view considered that the policy could

have an adverse impact on gender.

Two trade union responses noted they had also "*encountered many cases of migrant workers women who are subjected to sexual abuse and harassment due to their vulnerable status".*

This is a legitimate concern, but not relevant to the proposals under consideration.

Disability
13% of respondents who expressed an opinion considered that the policy could have a negative impact on the grounds of disability. A small number of responses were made from the standpoint of the employer, and included the suggestion that it would be more difficult for employers to conduct the right to work checks.

A legal representative organisation said that "*the Home Office should examine whether the likelihood of a British citizen having a passport is affected by any of the protected characteristics. For example, severely disabled persons may be unable or find it difficult and costly to travel and may therefore be less likely to hold a passport than other British citizen"*.

The potential risk here is mitigated by the acceptance of other forms of documentation. The range of documentation is set out in the Code of Practice and guidance for employers. In addition employers should not specify a particular document from within the list of acceptable documents.

The simplification of the right to work checks, together with simpler guidance and additional support for employers will make it easier for them to understand and carry out their duties.

Age
13% of respondents who expressed an opinion were concerned about the effects of the proposal on people of different ages. Comments concerned the impact on elderly employers of conducing right to work checks. A private individual commented:

"...older people who run businesses or employ e.g. casual domestic staff may find it extremely difficult to understand the process of checking employees' right to work and may be distressed by being threatened with huge fines if they get it wrong."

The simplification of the right to work checks, together with simpler guidance and additional support for employers will make it easier for them to understand and carry out their duties.

Religion or belief
15% of respondents were concerned the policy might lead to religious discrimination, with discrimination against Muslims being mentioned in some write-in responses. One employer stated:

"Immigration status is widely perceived to be correlated with race and also with

some religions. In isolation these changes to the penalty regime are likely to result in employers being more biased against recruiting people from ethnic minorities or perceived to be Muslim."

We consider that the mitigations set out for race will be equally relevant in reducing any impact on religion and belief.

Sexual orientation
11% of respondents were concerned about the impact of the policy on sexual orientation, though additional comments were not provided to further explain this concern.

It is not considered that there would be a negative impact on this protected characteristic.

Gender reassignment
11% of respondents were concerned about the impact of the policy on gender reassignment, though additional comments were not provided to explain this concern.

The revised Code of Practice and employer guidance will make it clear that the checks relate only and solely to entitlement to work in the UK. These checks give no grounds on which to enquire as to previous gender or gender reassignment. Most people undergoing gender reassignment will already have advice and assistance in securing replacement official documentation. This includes immigration documents, particularly where there is a change in name.

The introduction of biometric format documents may also reduce any adverse impact on the ground of gender reassignment, as entitlement will not require reference to older forms of immigration documentation which may refer to the previous gender of the person.

Pregnancy or maternity
13% of respondents were concerned about the impact of the policy on pregnancy or maternity, though additional comments were not provided to explain this concern.

On the other hand, one employer commented that:

"The proposal to remove the follow-up annual right to work should have a possible impact for those staff on maternity leave as they will not be expected to come into the organisation while on a period of leave in order to provide proof of their eligibility to work in the UK in line with the 12 month checks currently required."

As suggested in the response above, it is considered that the proposal to remove annual right to work checks on non EEA nationals with time-limited status may have a positive impact on employees on the grounds of maternity.

Marriage and civil partnership
14% of respondents were concerned about the impact of the policy on marriage or civil partnership. The concern seems to focus mainly around clarifying rights to work of family members, including non-EEA spouses of EEA nationals. For

example, a private individual said:

"Employers don't always understand that dependant visas are tied to the main applicant and can make unwitting mistakes by not asking the right question of a dependant. This only applies where the main person is a visa holder."

A legal representative commented that:

"If there is a preference for BRPs when undertaking document checks, employers may be more reluctant to employ family members of EEA nationals who do not have a BRP".

The Immigration Bill will provide the Home Office with powers to take biometrics from non-EEA nationals with enforceable EU Law rights and subsequently to issue a secure biometric format document. Issuing biometric format documents will make it easier for non-EEA nationals to evidence their EU Law rights, so facilitating the exercise of free movement rights, and make it easier for businesses, employers and public authorities to verify the existence of these rights.

Section 3

Actions identified / taken

Employers already have obligations under the Equality Act 2010 which prohibits discrimination on the grounds of these protected characteristics. The policy is intended to impact solely on the immigration status of an individual. Guidance explains that the equality laws apply. The statutory Code of Practice containing 'Guidance for employers on the avoidance of unlawful discrimination in employment practice while seeking to prevent illegal working' requires updating to reflect legislative changes and this will be undertaken.

One organisation representing a cross-section of stakeholders responded that *"..it is concerning that the further equality impact was has not been produced alongside the consultation. This suggests that consideration of the equality impact has become separated from consideration of the merits of the policy."*

Consideration was given to the proposals for reform alongside the Equality Impact Assessment and the existing Code of Practice. As a result, it was considered that their findings remained relevant, that the consultation should ask for views on the equality impacts of the policy which would be considered and a further equality statement would be completed.

We will update the statutory Code of Practice, including to reflect changes in legislation, and this will be published following consultation with the Equality and Human Right Commission, the Scottish Human Rights Commission, the Northern Ireland Human Rights Commission and the Equality Commission for Human Rights.

We will also issue revised and simplified guidance for employers on their responsibilities under the civil penalty scheme and how to conduct right to work checks. We will reinforce the obligation to conduct pre-employment checks 'in a non-discriminatory manner by applying them to all applicants and at the same

point of the recruitment process'. We will consult employers to ensure that the guidance meets their needs and clearly explains their responsibilities. We will work with employers' organisations to effectively publicise the changes to the scheme and employers' obligations in performing these duties.			
SCS sign off	K ARMSTRONG	**Title**	Head of Asylum, Criminality and Enforcement Policy
I have read the available evidence and I am satisfied that this demonstrates compliance, where relevant, with Section 149 of the Equality Act and that due regard has been made to the need to: eliminate unlawful discrimination; advance equality of opportunity; and foster good relations.			
Directorate/Unit	Immigration and Border Policy Directorate	**Lead contact**	S MURRAY
Date	10 October 2013	**Review Date**	4th quarter 2015

Retain the completed PES for your records and send a copy to SDAT@homeoffice.gsi.gov.uk and your relevant business area Equality and Diversity Lead.

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