ILLEGAL WORKING TASKFORCE
REGULATORY IMPACT ASSESSMENT FOR IMMIGRATION, ASYLUM AND NATIONALITY BILL

PUBLISHED ON JUNE 22 2005

TITLE OF PROPOSAL

Immigration Bill: illegal migrant working measures

PURPOSE AND INTENDED EFFECT OF MEASURE

i. Objective

2. The objective of the proposal is to deliver:

- improved compliance amongst generally law-abiding, but negligent employers;
- a strengthened means of dealing with employers who knowingly or deliberately hire illegal migrant workers but are not deterred by the existing enforcement process;
- a framework that distinguishes employers who employ an illegal migrant worker through negligence, including the extent of that negligence, from employers who knowingly do so.

ii. Background

3. In the five year strategy for asylum and immigration, *Controlling our borders: Making migration work for Britain* we committed to "introduce on the spot fines of £2,000 per illegal employee for employers caught using illegal workers". This forms part of a wider programme of reform to the immigration system, including strengthened border controls and the introduction of a new streamlined points based scheme covering routes of entry for workers and students. The proposals in relation to illegal working build on the strategy set out in the 2002 White Paper, *Secure Borders, Safe Havens: Integration with Diversity in Modern Britain* and the measures we have taken to implement that strategy.

4. The main control on illegal migrant working from an immigration perspective is section 8 of the Asylum and Immigration Act 1996 (as amended by section 147 of the Nationality, Immigration and Asylum Act 2002). This makes it a criminal offence to employ an individual over the age of 16 who does not have entitlement to be in the UK or whose status precludes them from undertaking the employment in question. Section 8 provides a defence for employers against a charge under the legislation. This can be attained by carrying out specified document checks prior to the point of recruitment to establish a person's entitlement to work and by retaining copies of the documents checked. A successful prosecution is likely where an employer has committed the offence (they are found to be employing an illegal migrant worker) and cannot establish the defence (they have not carried out the specified document checks).

5. During the course of 2004, a number of steps were taken to strengthen the section 8 regime. On 1 May that year, the Immigration (Restrictions on Employment) Order 2004 came into force. The order made under section 8 (as amended by section 147 of the Nationality, Immigration and Asylum Act 2004) strengthened the system of checks by employers on job applicants' entitlement to work, by revising the list of specified documents. The old list, which had included a number of documents prone to forgery, was replaced with two new lists. The first list contains secure identity documents which, individually, provide evidence of entitlement to work. The second list contains documents which can be accepted by employers in specified combination where, for example, the worker was unable to produce a document from the first list. The order also specified certain steps employers should carry out to satisfy themselves that the documents produced related to the job applicant concerned.

6. In October 2004, section 6 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 came into force. This made the existing summary offence under section 8 (punishable on conviction by a maximum fine of £5,000) triable either way. There is no limit to the level of financial penalty that may be imposed following conviction on indictment.

7. The Immigration Service has substantially increased its enforcement effort in relation to illegal migrant working. This includes apprehending more illegal workers and bringing legal action against more employers using illegal migrant labour (see *Figure 1)*. However, prosecution rates remain low.

Figure 1: Successful section 8 prosecutions against successful illegal working operations and illegal migrant workers detected, 1998-2004

Year	1998	1999	2000	2001	2002	2003	2004
Successful prosecutions	1	1	4	1	1	1	8
Successful operations						390	1098[1]
Illegal workers detected						1779	3332[2]

8. The courts also continue to impose fines far below the maximum, although account is taken of the defendant's ability to pay the fine and admission of guilt (see *Figure 2*).

Figure 2: Fines imposed following recent section 8 convictions, 2004-05

	Fines (£)	Costs (£)	Counts	Total fine/count (£)
1	150	55	1	205
2	165	35	1	200
3	650	70	3	240
4	5000		4	1250

[1] Figures may be distorted by improved reporting in this area by the Immigration Service.
[2] The enlargement of the EU on 1 May 2004 will have had an impact on the stock of illegal workers.

5	4000	55	4	1013.75
6	543		2	271.5
7	300	200	1	500
8	360		6	60
9	2000	50	1	2050
10	900	70	1	970

9. The prosecution figures for 2004 compare favourably with previous years. A further 22 cases were also considered during the year but were dropped due to insufficient evidence or on the advice of the CPS. There are a number of cases still under investigation. However, as a proportion of successful operations conducted, the prosecution of employers remains limited. No case has yet been pursued in the Crown courts.

iii. Risk assessment

10. Illegal migrant working is by definition a clandestine activity and there is limited data available on which to base detailed analysis of the scale and distribution of the problem. The existing level of illegal working and the changing annual stock of illegal workers in the United Kingdom are unknown. Also unknown are the numbers of employers hiring illegal workers, including the proportions who do so knowingly or through negligence. We know from the experience of enforcement officials that illegal migrant working can be by persons in temporary immigration categories who either overstay their leave or undertake employment precluded by their status, and by persons who have entered the United Kingdom unlawfully whose subsequent economic activity may be controlled by traffickers in some cases. Employers may have illegal employees in their workforce for various different reasons: by choice, through negligence, or because the employee has presented the employer with high quality forged documents showing entitlement to work.

11. When deciding whether to employ illegal workers, firms may take into account the relative wage to legal workers, the risk of detection, the fine resulting from any prosecution and any other costs such as those relating to loss of reputation. It may also include accompanying illegal behaviour such as avoidance of tax and national insurance on employee wages. The employer will take the risks and benefits into account here too. Where the risks of detection and the levels of fines are low, risk neutral or risk taking firms may be likely to employ illegal workers where the equivalent wage is lower. Most firms will not go through this process, possibly due to a moral or ethical approach to the law or to a general risk-averse attitude. The Government's starting point is that the majority of UK employers are law-abiding and will wish to comply with their legal obligation to avoid using illegal labour.

12. In spite of the unknowns and the recent changes to strengthen section 8, the Government is concerned that the current means of enforcing the legislation remains cumbersome and inflexible. The level of fines imposed varies very widely, and the current number of prosecutions, though increasing,

restricts the deterrent effect of the legislation. Without changes to the mechanism for enforcing the legislation, the impact of section 8 will be restricted and this will not deter firms who are willing to break the law or are careless of their legal obligations. There is also a question mark over whether a simple strict liability offence, punishable by a fine, for which a due diligence defence is available is the most appropriate means of dealing with the deliberate use of illegal migrant labour. In serious cases involving trafficking, where a person has been involved in bringing illegal workers into the country, housing them and supplying their labour, the Immigration Service has sought to pursue action under the law on facilitation, section 25 of the Immigration Act 1971 (as amended), which attracts a custodial penalty. But this option cannot be exercised unless the employment is closely linked to the act of trafficking the workers into the United Kingdom and/or accommodating them.

13. Proposed changes to legislation are intended to reduce illegal employment by significantly increasing the risk and speed of receiving a penalty for non-compliance, proportionate to the level of non-compliant behaviour, in order to reduce the social and economic risks that continue to be posed by illegal migrant working in the UK. These risks are as follows:

- For the individual workers, poor working conditions, exploitation and inadequate health and safety. Migrants working illegally in the UK are vulnerable to exploitation, as they are unlikely to approach the authorities or seek recourse from an employment tribunal when they are mistreated or their rights are violated.
- For revenue streams, through non-payment of tax and national insurance by and for illegal workers.
- For immigration, as the availability of illegal work in the UK is a significant pull factor drawing migrants to the UK and undermining efforts to enforce a managed migration system.
- For legitimate trade and fair competition, as employers who use illegal migrant workers are able to undercut legitimate business. Information from the agricultural labour supply sector suggests that legitimate gangmasters are struggling to retain business as they are undercut by businesses that pay below the market wage (or do not pay the national minimum wage) or do not abide by workplace regulations.
- For the legal economy, as illegal working fuels the shadow economy and is often part of a pattern of illegality. Information from enforcement operations indicates that other forms of criminal behaviour on the part of the employer such as tax evasion, breaches of health and safety regulations, document forgery and facilitation of illegal entry can often accompany the employment of illegal migrant workers.
- For parts of the UK economy to become dependent on low skilled and exploited labour.

OPTIONS

14. A number of options to address these risks have been considered:

i. Do nothing
ii. Pursue non-legislative options
iii. Introduce on the spot civil penalties
iv. Create a new offence of knowingly employing an illegal worker
v. Create a continuing obligation for employers to check that employees do not work beyond the expiry of their leave
vi. Introduce on the spot civil penalties, create the knowing offence, and create a continuing obligation

i. Do nothing

15. The Government would continue to monitor the impact of current legislation and changes introduced in 2004. Research in the form of a survey of employers is planned for 2005, which may result in a greater understanding of the nature of illegal working and an evaluation of the impact of the 2004 changes.

ii. Pursue non-legislative options

16. Further efforts could be made to increase prosecution rates through investing additional Immigration Service resources in prosecution activity. The Government could invest additional resources in mounting information campaigns designed to encourage employer compliance, and work with particular sectors to encourage the development of codes of practice to embed compliant behaviour. The Government could also approach the Sentencing Guidelines Council over the issue of providing the courts with guidance on sentencing practice in relation to illegal working offences. These options could be pursued as an alternative to further legislative action, or to complement further strengthening of the legislative framework.

iii. Introduce on the spot civil penalties

17. A civil penalty regime could be introduced, modelled on the penalty scheme introduced to penalise road hauliers who carry clandestine entrants into the UK. The penalty regime would be used in place of pursuing prosecutions, particularly in cases of employer negligence, but would retain the system of document checks which provide employers with a statutory defence. Where an employer was found to be employing an illegal worker and had not asked to see appropriate documents, taken reasonable steps to verify the authenticity of documents provided, or made a copy of the relevant parts of the documents they would be issued with a civil penalty notice. The level of penalty could vary depending on the severity of the case. The Secretary of

State would publish a code of practice setting out the matters to be considered when determining the level of penalty. There would be arrangements for an employer served with a penalty to object to the Secretary of State on the grounds that they are not liable or that the penalty is too high, and a right of appeal to the civil courts. The right of appeal would not be dependant on an employer having first exercised the option of objecting to the Secretary of State. The requirements on an employer to conduct checks to establish a defence would remain largely unchanged from those in the Immigration (Restrictions on Employment) Order 2004.

iv. Create a new offence of knowingly employing an illegal worker

18. The current section 8 legislation does not distinguish between an employer who employs an illegal worker through inadequate recruitment practices – an act of negligence – and an employer who knowingly employs an illegal worker – an act of deliberate criminality. The current legislation makes clear that an employer loses his defence if he knew an employee was not entitled to work at the point of recruitment but, in terms of sanctions for non-compliance, the legislation treats all employers the same way regardless of knowledge.

19. Creating a knowing offence would remedy this. Where an employer knowingly employs an illegal worker (i.e. employs a worker in the knowledge that they are not permitted to undertake the work in question due to their immigration status) they would be liable to prosecution under this higher offence and would face much stiffer penalties, including a prison sentence. This offence would not be a strict liability offence, and it would be necessary for the prosecution to prove the offence beyond all reasonable doubt.

v. Create a continuing obligation for employers to check that employees do not work beyond the expiry of their leave

20. Currently, an employer benefits from a statutory defence if he recruits someone who enjoys temporary leave to remain at the time, but continues (knowingly or unknowingly) to employ that person after their leave has expired. Provided the employer carries out the correct document checks at the point of recruitment, he establishes a defence against conviction <u>once and for all</u> in respect of his contract of employment with that individual. By creating a continuing duty on employers to check their employees' entitlement after the point of recruitment this position could be rectified, providing more complete protection against the incidence of illegal migrant working and thereby reducing the risk of migrants working after the expiry of their leave. It would be possible to specify in secondary legislation that employees should carry out follow-up checks only on workers who have a temporary immigration status. It would also be possible to specify that such checks should be carried out at prescribed intervals.

vi. Introduce on the spot civil penalties, create the knowing offence, and create a continuing obligation

21. This option logically combines options (iii), (iv) and (v) to provide a coherent over-arching framework whereby civil penalties are used to deal with negligent employers and the higher level offence used in a small number of cases involving the deliberate use of illegal labour.

SOCIAL AND ECONOMIC BENEFITS

22. There is no significant environmental benefit to these proposals. This analysis therefore focuses on the social and economic benefits.

i. Do nothing

23. Persisting with the status quo offers few benefits. It would allow more time to monitor the effect of the changes made to section 8 in 2004. The changes to the document list have made it more straightforward for employers to check documentation as well as having removed documents susceptible to forgery. Following the extensive distribution of guidance on section 8 in 2004, employers are now more familiar with the current legal framework.

24. There would be no need for employers to digest new guidance or to change their recruitment/personnel procedures if no further changes were made. Immigration staff would require no additional training in order to continue to carry out current levels of enforcement activity.

25. Prosecution rates may continue to rise gradually, but with no guarantee that the level of fines imposed would increase. Ultimately, the level of deterrence/incentive to comply would be little changed from now.

ii. Pursue non-legislative options

26. There would be some social and economic benefits from pursuing non-legislative options. The development of industry codes of practice in sectors where there is a strong trade association capable of making self-regulation work in practice could help to embed compliant behaviour and reduce demand for illegal labour. The Government is exploring this option and will continue to do so regardless of other changes. Simply increasing current Immigration Service enforcement and prosecution activity without changing the legislative framework would enable UKIS to develop expertise over time with a familiar set of rules, possibly resulting in more section 8 cases being successfully brought before the courts. Focusing on raising the courts' awareness of the impact of illegal migrant working on the community, including by bringing more cases before the courts, may result in tougher penalties in future, but sentencing practice is likely to continue to vary from case to case.

iii. Introduce on the spot civil penalties

27. The introduction of on the spot fines would strengthen the ability of UKIS to penalise employers in a greater number of routine section 8 cases by providing a swift and straightforward enforcement mechanism. This would be achieved without the need to divert extra resources to increase the Immigration Service's prosecution capacity, enabling existing resources to be reserved for more serious cases. This is consistent with recommendation 8 of the Hampton Review final report, *Reducing administrative burdens: effective inspection and enforcement* (March 2005)[1]. The report's recommendations have been accepted by the Government.

28. Rather than pursuing a potentially long and drawn out prosecution process, with associated costs, the Immigration Service would issue a penalty notice. This notice provides the employer with a simple choice of accepting the penalty and paying promptly, therefore causing the minimum disruption to their business, or pursuing the matter through an objection process or by appeal to the County Court or Sheriff. The monetary costs would be less per case than enforcement through the current prosecution route, although no precise figures are available. However, the average cost of administering a penalty on road hauliers carrying a clandestine entrant, under the carriers' liability scheme, including the objection process and enforcing payment is estimated at £250. This compares to costs under the current prosecution system for illegal working which are estimated at between £1,000 and £2,000 per case in staff time alone.

29. There is likely to be an improved compliance rate as the simple straightforward nature of the scheme would enable the imposition of financial penalties on a greater number of non-compliant employers. The consequent higher risk of receiving a financial penalty would in turn encourage employers to recalculate the cost of not implementing thorough recruitment practices. The effect will be to reduce the work available to those without entitlement to employment in the UK and thereby reduce instances of illegal migrant working. The introduction of civil penalties would provide an opportunity to create a fairer, more consistent framework to govern the sanctions to be imposed on errant employers. A code of practice would be produced setting out the factors to be taken into account when determining the level of penalties and this will be subject to consultation. The level of penalty would vary depending on, for example, whether it is a first offence and the extent to which the employer has conducted checks (see figure 3). This will encourage employers to comply.

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[1] Recommendation 8: "The review recommends that the Better Regulation Executive should undertake a comprehensive review of regulators' penalty regimes, with the aim of making them more consistent. Administrative penalties should be introduced as an extra tool for all regulators, with the right of appeal to magistrates' courts unless appeals mechanisms to tribunals or similar bodies already exist. As part of that review penalty powers should be established in such a way that offenders can be deprived of all the economic benefit of long term illegal activity".

30. Changing the way in which the offence is enforced would not place any new burdens on employers. If employers currently adhere to good practice, they would not be required to make changes to their recruitment procedures. Largely the same document checks and reasonable steps would apply as set out in the Immigration (Restrictions on Employment) Order 2004 and in the accompanying guidance. The consultation accompanying this Order did not elicit any expected increase in costs, and employers have not advised us of an increased cost since the commencement of the Order. On the spot penalties should simply encourage more employers to adopt good recruitment practice.

31. A civil penalty system clearly signals to employers that the Government is not seeking to criminalise those who act negligently, but to encourage compliance with legislation.

iv. Create a new offence of knowingly employing an illegal worker

32. This would provide a specific means to tackle deliberately criminal employers separately from the merely negligent, which is lacking in the current regime. We would not expect many prosecutions under such an offence. The offence of knowingly employing an illegal migrant worker would be a useful addition to section 25 of the Immigration Act 1971 to enable the Immigration Service to tackle genuinely rogue employers, especially where the link to facilitation is less clear.

33. The offence of knowingly employing an illegal migrant worker would be triable either way. The maximum penalty on summary conviction would be a £5,000 fine or 6 months imprisonment[1]. On conviction following indictment, the maximum penalty would be an unlimited fine or two years imprisonment. This would send out a tough message to, and provide an appropriate penalty and deterrence for, employers deliberately using illegal labour, particularly with a view to the financial gains made by doing so and the associated harmful social effects of exploitation.

v. Create a continuing obligation on employers to check that employees do not work beyond the expiry of their leave

34. By making the offence on-going the current loophole is closed and employers can become liable if they employ someone beyond the expiry of their leave. This will further reduce the market of available job for workers without entitlement and will make this aspect of our immigration system more robust. It will enable the Government to share with the employer the responsibility of ensuring that migrants comply with the requirements attached

[1] This will increase to 12 months in England and Wales with the commencement of the relevant provisions of the Criminal Justice Act 2003 (remaining at 6 months in Scotland and Northern Ireland).

to their leave and will reduce the risk of migrants working after the expiry of that leave.

vi. Introduce on the spot civil penalties, create the knowing offence, and create a continuing obligation

35. The Government wishes to avoid the perception that the mischief of employing illegal workers is in any sense down-graded by the introduction of civil penalties. By simultaneously introducing a higher offence we ensure that we send out the strong message that while we do not want to criminalise simply negligent employers, we will take tough action against the rogue element who deliberately use illegal workers.

36. This consolidated system ensures that there is a credible and potent deterrent to employers who employ illegal workers. This will have a beneficial effect for compliance as well as offering a means to tackle deliberately criminal employers. The effect will be to address the risks associated with illegal working. Tackling the issue more effectively will reduce social harm by reducing the instances of employment and exploitation of illegal workers, increase revenue to the Treasury as legal workers replace illegal workers, remove unfair competition, and attack the nexus of criminality often surrounding the use of illegal labour.

37. On the spot penalties and a higher offence are compatible with the recommendations contained in the Hampton Review interim report, *Reducing administrative burdens: effective inspection and enforcement* (December 2004) commissioned by the Treasury. The review proposes strengthening penalty regimes and making action against rogue businesses quicker and more effective, including using administrative penalties to replace some offences that are currently prosecuted in a magistrates' court. Approximately 67 per cent of businesses responding to the Review's questionnaire believed tougher fines were needed in order to deal with rogue employers (D.31). The final report (March 2005) supports the overall framework stating, Administrative penalties, which are quicker and simpler than court proceedings, could reduce the burden of time and worry placed on businesses under threat of prosecution, while allowing regulators to restrict prosecution to the most serious cases, where the stigma of a criminal prosecution is required" (2.82).

SOCIAL AND ECONOMIC COSTS

38. There is no significant environmental cost to these proposals. This analysis therefore focuses on the social and economic costs.

i. Do nothing

39. Increasing compliance and penalising employers of illegal workers is contingent on Immigration Service prosecution resources, which are limited and it is unlikely that a substantially higher rate of prosecutions could be pursued. It is also unlikely that courts will impose higher fines on employers in breach of section 8. Continuing with this policy does not overcome the problem. Although there has been a recent increase in the number of section 8 prosecutions, by making no changes we do not expect a further significant increase. There will therefore be no greater incentive for employers to comply. As outlined in the risks of illegal working above, the continuation of illegal working has a number of severe costs.

40. Prosecutions are also a time-consuming and expensive means of enforcing a strict liability offence to which no guilt is attached. A typical case will be concluded in approximately 17 weeks, although some cases may take as little as 8 weeks and others where the defendant pleads not guilty can take more than 52 weeks. The estimated average staff time cost of a section 8 prosecution is between £1000 and £2000. Extra costs include some or all of the following: interpreters at approximately £120 per day; basic analysis of computer hardware at approximately £1000; fingerprinting at approximately £100 per document; and, handwriting analysis at approximately £1000.

ii. Pursue non-legislative options

41. There could be a cost to the Home Office of promoting industry codes of practice as we may wish to make a financial contribution to enable industries or sectors to produce and promote codes with specific reference to preventing illegal working. Codes of practice are unlikely to have an impact on employers already operating in the informal economy and therefore are unlikely to fully tackle the social costs of illegal working.

42. There are currently approximately 50 prosecution-trained Immigration Officers nationwide. They encompass a broad range of immigration activity and are not focussed exclusively on illegal migrant working. Increasing Immigration Service illegal working prosecution activity would be financially costly and time consuming requiring the training of more Immigration Officers to conduct prosecutions or, if remaining within current resources, would divert resources from other activities, which could have an adverse affect on immigration control. Training in section 8 prosecutions comprises part of a three week course which trains Immigration Officers in all aspects of immigration legislation where prosecutions apply, as well as in generic prosecution skills such as interviewing and the collection of evidence. This course is delivered by external trainers and costs approximately £15,000 for 12 officers, excluding opportunity costs. Increasing the number of prosecutions also increases the cost to the Immigration Service (see paragraph 40).

43. Increasing court awareness will form part of any strategy we pursue, but without other changes to legislation this is unlikely to result in a sufficient deterrent effect to substantially reduce the broader social costs of illegal

working. As part of **any** changes we would seek to liaise with the court service. However, sentencing practice will continue to vary on a case by case basis.

iii. Introduce on the spot civil penalties

44. A civil penalty scheme would require moving the current offence under section 8 from the criminal sphere into the civil. This move could be perceived as reducing the seriousness of the offence, but should be balanced against the increased number of employers who could be penalised under a more straightforward scheme. The maximum penalty under the scheme would be £2,000 per illegal migrant worker. This is less than the current maximum of £5,000 on summary conviction, but more than the average level of fine ultimately imposed in the courts (see figure 2). We will seek to consult on the level of intermediate fines to ensure the penalty system incentivises employer compliance (figure 3 sets out a possible system).

45. Civil penalties will have an impact on employers whose recruitment practices are inadequate or negligent. They will be more likely to face a penalty than employers operating good practice in recruitment until they improve their recruitment practices. A civil penalty regime will have a more limited impact on deliberately non-compliant employers who flout the law in pursuit of large profits and will therefore have a restricted effect on reducing the risks of illegal working in such instances.

46. On the spot fines will take up a portion of UKIS resources to ensure correct administration and oversight of the regime. It is estimated that the scheme would require a central team of approximately 12 Immigration Officers at an approximate annual cost of £480,000. There will be a cost in training enough Immigration Officers to enable the new regime to be widely implemented and not to be constrained as the prosecution process currently is by the limited availability of prosecution trained Immigration Officers. However, it is almost certain that less specialised training will be required to issue fines than to pursue prosecutions. Training in the carriers' liability civil penalties is conducted by the IND college and is therefore at opportunity cost only. We would expect the training for civil penalties for illegal working to also be conducted in-house. There will also be a small cost to educate employers of the changes to the way in which we intend to enforce the offence, and to distribute codes of practice. After changes to the legislation in 2004, we distributed guidance to all PAYE registered employers at a cost of approximately £450,000. It is also estimated that the cost to employers of familiarising themselves with new guidance would be approximately £27.2 million. This is based on 1.16 million of the 4 million businesses in the UK having employees[1], and assuming that it would take a Personnel and Industrial Relations Officer [2] (SOC 2000 classification 3562), on a median

[1] SME statistics 2003, Small Business Services Analytical Unit

[2] Standard Occupational Classification Personnel and industrial relations officers conduct research and advise on recruitment, training, staff appraisal and industrial relations policies and assist specialist managers

wage of £11.73 per hour, two hours to read through the guidance (1.16 million x £11.73 x 2 = £27,213,600).

47. However, these costs would be incurred whether or not this option is pursued as employers will need to be provided with new guidance in line with the introduction of the points based system for the admission migrant workers.

48. There is concern that employers may regularly appeal to the County court or Sheriff potentially negating many of the benefits attached to the proposed changes. Ensuring that there are incentives for employers to quickly discharge their liability can mitigate this risk. This could be achieved through ensuring a civil penalty is set at an appropriate level in accordance with published codes of practice. However, for comparison, in 2004, 1001 penalties were imposed on road hauliers found to be carrying clandestine entrants. Of these 651 went to the objection stage, and only seven went to appeal.

iv. Create a new offence of knowingly employing an illegal worker

49. Although prosecution costs would be higher than currently for standard section 8 cases, the penalties on successful conviction would be much higher and we anticipate only a small number of cases being brought under this new offence. Prosecutions under a higher offence would help in addressing the nexus of serious criminality that can surround illegal working and its high social and economic costs as set out under the risks above.

v. Create a continuing obligation for employers to check that employees do not work beyond the expiry of their leave

50. In addition to the cost of familiarising themselves with guidance as set out above, there is also a potentially higher cost to employers in terms of the burden on their human resource practices, if they are required to keep track of those employees whose immigration status is temporary, particularly if this involves introducing new procedures for specific groups of workers. However, as the current legislation has been unclear on this point, there may be a proportion of conscientious employers who already conduct such checks on employees as part of good recruitment practice. There would clearly be no additional cost to such employers.

51. The new legislation would not operate retrospectively, so employers would not face new duties in respect of individuals they currently employ. The stock of workers subject to post recruitment checks will increase yearly as migrants working prior to the changes not subject to checks return home or change employers in the UK, and new migrants who are subject to checks arrive. The Labour Force Survey indicates that the current stock of non EEA foreign

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with negotiations on behalf of a commercial enterprise, trades union or other organisation. Average male hourly earnings in 2002 for this occupation was £12.54 and for women £10.93

nationals in employment in the UK who entered into the country in the last five years is approximately 450,000[1]. Assuming current immigration trends continue this figure can be used to illustrate the number of migrant workers who would be subject to post recruitment checks five years after the continuing obligation comes into effect.

52. Assuming employers are required to conduct checks on temporary migrant workers every 12 months the projected cost to business of a continuing obligation in the fifth year after its introduction would be approximately £1.3 million. This is based on the assumption that it will take an employer approximately 0.25 hours to check a document and (as above) an average wage of £11.73 an hour (0.25 x 11.73 x 450,000). However, this additional cost will not be distributed across all UK business, but will be borne by businesses who use migrant labour. This figure also assumes that migrants stay with the same employer for more than 12 months. This figure will therefore be less, as a portion of migrants will change employers more frequently than 12 months.

53. There will be a cost to IND in dealing with employees who have entitlement to work but require documents to prove their status and will be unable to sustain delays in receiving confirmation when faced with a follow-up check by their employer. In 2003, there were approximately 350,000 grants of extension of leave to remain in the UK. IND will need to assist these people in proving their entitlement to work while their applications are processed should their current documents expire during that process.

54. A further social cost may be a consequent reluctance on the part of employers to employ temporary migrant workers given the greater administrative burden of carrying out follow-up checks in relation to this group. This may result in employers passing up the opportunity to employ or retain productive workers, impacting on business efficiency. Strengthening the system of employer sanctions also carries with it the risk of employers acting in a manner contrary to the Race Relations Act. A code of practice would be issued to mitigate this risk.

vi. Introduce on the spot civil penalties, create the knowing offence, and create a continuing obligation on employers

55. UK Immigration Service management data indicates that less than five per cent of enforcement operations against illegal working result from intelligence provided by an employer and approximately a third are planned in co-operation with the employer. There is a risk that the proposed measures may discourage employers from reporting instances of illegal working or assisting in operations. However, where an employer approached the Immigration Service, the extent of their cooperation would mitigate the level of fine imposed thereby reducing this risk (see figure 3 below).

[1] This figure excludes nationals working in the UK from the new EU Member States, who would have been non-EEA nationals prior to Accession.

56. There is a risk that those without entitlement to work will be forced out of the conventional job market as most generally law-abiding employers improve their recruitment practices. These workers may therefore be at greater risk of exploitation by deliberately non-compliant employers who may also be involved in more serious criminality. The new 'knowing' offence provides a response to this problem.

57. Illegal migrant workers can often be paid less than the national minimum wage. By reducing instances of illegal migrant working, there is a potential unquantified cost to the consumer should, for example, prices for particular goods and services increase as a result of employers using legal labour, paying the national minimum wage (or above), and thereby increasing their labour costs. Alternatively, supply chains may be able to absorb any increased labour costs such that they are not passed on to the consumer.

EQUITY AND FAIRNESS

58. See attached race equality impact assessment at Annex A.

CONSULTATION WITH SMALL BUSINESS: THE SMALL FIRMS' IMPACT TEST

59. Preliminary consultation with the Small Business Service (SBS) indicates some concern that proposals may impose more stringent or arduous measures on employers and stresses the importance of guidance on any changes being short, straightforward, easily accessible and widely publicised. SBS also state that it can be difficult for a small firm, with no dedicated human resource function, to be able to undertake or pay for as stringent a check as larger companies. Concern was also expressed that although it was reasonable to require employers to check somebody's eligibility to work and fine them if they fail to do so, employers should not be expected to police migration policy.

60. The Government intends to consult employers, including small businesses, on the proposals during the passage of the Bill. Should a new scheme be launched the Government would undertake to issue guidance to all UK employers. Guidance will also be available on-line and free of charge from a dedicated helpline. The Government will also seek to consult small business in detail on the implementation of any changes. The level of penalty under the new scheme would also take into account an employer's ability to pay.

61. Research with employers, including small businesses, to help evaluate the impact of legislation on employers' recruitment practices is due to commence in 2005, subject to Ministers' agreement. This will not deliver results in time to be included in any public consultation on measures contained in this assessment.

COMPETITION ASSESSMENT

Background

62. Illegal working is a clandestine activity. As a consequence there are problems in understanding its full extent. UK Immigration Service operations are intelligence lead and focussed on removing illegal workers. Records of operations are unlikely to be fully representative of the overall problem and anecdotal evidence is that illegal working is more extensive and widespread. Knowledge of illegal working activity used here inevitably involves some degree of speculation.

63. Illegal working can take many forms. There is no practical limit to the sectors of the economy where it can occur. The illegality of the worker can result from a variety of abuses or transgressions of the immigration system from clandestine entry to overstaying a visa. The evidence is that the more common features of jobs that illegal workers fill are those with poor pay and conditions, are temporary or seasonal and are predominantly manual or low skilled. Often there is little scope for innovation though it is possible that widespread use of cheap illegal workers will slow the introduction of new technology in some cases.

64. Employing illegal workers is a criminal offence and is therefore a regulation that already impacts upon firms. However, some firms do employ illegal workers as a means of gaining a cost advantage over rivals or to simply remain in business. By impacting on existing employment practices this legislation will remove unfair competition between firms, though it is also possible that the resulting market structure will lack overall competitiveness if a small number of firms dominate.

65. Firms may employ workers indirectly through labour providers. Though it will be the provider rather than the firm that firm that is liable to the penalty, the deterring illegal working in this way will have a direct impact on the firm and the markets in which it operates.

Compliance

66. This competition assessment will deal with the impact of improved deterrence and enforcement against illegal working on firms and markets.

67. The compliance process has fixed costs and will therefore have a greater impact on smaller firms. However, as the processes for pre-recruitment checks should already be in place there will be no additional costs for small firms or set-up or ongoing costs on new firms under options (iii) and (iv) beyond those identified for previous legislation (Immigration (Restrictions on Employment) Order 2004). The introduction of any requirement to carry out follow-up checks beyond the point of recruitment (option v) would have a

greater impact on businesses and particularly those employing migrant workers over longer periods, than a business with a more frequent staff turnover that employs people for shorter periods.

68. The main effect of this policy will be a significant increase in deterring firms from employing illegal workers. This may result in some firms experiencing a shortage of workers at the existing wage, reduced output and in some cases higher output prices. Anecdotal evidence in some sectors is that firms queue for cheaper workers (both legal and illegal). This is likely where price competition is high amongst a large number of firms and there is little scope for wage increases. Elsewhere firms may be behaving opportunistically or criminally in order to maximise profit.

69. Where firms are forced to pay higher wages (including to the national minimum wage where illegal workers have been paid below this) it is inevitable that some will become uncompetitive and go out of business. In these cases there would be less competition. The sectors where illegal working is seen to be a problem are all sufficiently competitive to withstand this impact.

Sectors

70. UK Immigration Service Operations have found illegal working across a range of firms and industries. The following sectors accounted for over three quarters of UK Immigration Service operations in 2003/04:

- Hospitality (Hotels, Pubs & Restaurants)
- Car Washes/Garages
- Sex Industry
- Retail
- Cleaning Agencies
- Food Production/Processing

71. In addition to these, agriculture and construction should also be considered. The sex industry will be ignored for the purposes of this competition assessment, as illegality involving migrants in that sector tends to be dealt with under the law on trafficking.

72. In the past the agricultural sector has been found to be a significant employer of illegal workers. The extent to which this is still the case post accession is unclear, as large numbers of workers from the New Member States under the Workers Registration Scheme are employed in the sector. Though it is likely to be reduced, it is reasonable to assume that illegal employment continues in parts of the sector.

73. The construction sector is not prominent in the operational data as construction sites are difficult places to conduct operations. Illegal working is known to occur in the sector and operations are often conducted away from sites.

74. The markets within the hospitality, car wash, garage, and cleaning sectors are characterised by competition between large numbers of relatively small firms. Any impact on individual firms is unlikely to affect the overall structure of these sectors.

75. In the retail sector, if illegal workers are found they are usually working in small independent specialist retailers. Sometimes they will be found in supermarkets, both independents and the large chains. This is a sector where there are large firms with significant market share. Two firms have more than 10% share of the grocery market (by till receipts) with another having around 10%. However, the top three firms take less than 40% of consumer spending in this market. Illegal working is not known to be a significant problem in this sub sector and it is unlikely that the policy would have a major impact on the smaller independent grocers and therefore change the existing structure.

76. In agriculture and the food processing sectors, illegal working is thought to be concentrated in labour intensive tasks such as picking, washing and packing produce where there is little scope for mechanisation. These markets involve a large number of relatively small farms and businesses. It is not thought that illegal working occurs to any great extent in the sectors where the large agribusinesses operate and market concentration is higher.

77. There is a high level of price competition in the grocery sector and the supermarkets have some buying power. Where food production results in higher output prices it is possible that buyers will look to source produce from suppliers outside the UK.

Assessment conclusion

78. In conclusion, there is little evidence that this legislation will have any significant impact on the structure of any of the affected markets.

ENFORCEMENT AND SANCTIONS

Civil penalties

79. Civil penalty notices will be issued on the spot by individuals authorised by the Secretary of State. In most cases this will be an Immigration Officer. The penalty notice will be issued to an employer who is found to be employing illegal migrant workers and who is unable to provide evidence of appropriate document checks that would establish a statutory defence. Published guidance will clearly set out how an employer can ensure they are not liable to a penalty. This guidance will incorporate the document list and reasonable steps currently provided for under section 8. A published code of practice will set out matters which the Secretary of State will consider when deciding the amount to impose in any case. The maximum penalty imposed under the scheme will be £2,000 per illegal migrant worker employed, but the amount of

penalty will take into account mitigating factors, for example whether it is a first offence, whether any checks have been conducted, and whether the employer approached and/or cooperated with the Immigration Service. *Figure 3* gives an example of how an appropriate level of penalty may be determined.

Figure 3: Example table of level of penalties per illegal migrant worker

<table>
<tr><td rowspan="10">UKIS visit with an offence committed</td><td rowspan="3">3rd or more</td><td rowspan="3">£0</td><td colspan="2">£2,000 max.</td><td colspan="2" rowspan="3">£2,000 automatic max.</td></tr>
<tr><td>Less £250 Approach</td><td>Less £250 Co-operation</td></tr>
<tr><td colspan="2">£1,500 min.</td></tr>
<tr><td rowspan="3">2nd</td><td rowspan="3">£0</td><td colspan="2">£1,500 max.</td><td colspan="2">£2,000 max.</td></tr>
<tr><td>Less £250 Approach</td><td>Less £250 Co-operation</td><td>Less £250 Approach</td><td>Less £250 Co-operation</td></tr>
<tr><td colspan="2">£1,000 min.</td><td colspan="2">£1,500 min.</td></tr>
<tr><td rowspan="3">1st</td><td rowspan="3">£0</td><td colspan="2">£1,000 max.</td><td colspan="2">£1,500 max.</td></tr>
<tr><td>Less £500 Approach</td><td>Less £500 Co-operation</td><td>Less £500 Approach</td><td>Less £500 Co-operation</td></tr>
<tr><td colspan="2">£0</td><td colspan="2">£500 min.</td></tr>
<tr><td colspan="2"></td><td>Full</td><td colspan="2">Partial</td><td colspan="2">No</td></tr>
<tr><td colspan="2"></td><td colspan="5">Nature of checks completed</td></tr>
</table>

80. If an employer disagrees with the penalty they can object to the Secretary of State or appeal to the County Courts (or Sheriff in Scotland). The grounds for objection would be if the employer believed they were not liable to the penalty, or if they believed the penalty was too high in view of their financial position. On considering an objection the Secretary of State may cancel, reduce, uphold or increase a penalty. A County Court may cancel, uphold or reduce the penalty. There were 1001 penalties imposed under the civil penalty scheme for road hauliers carrying clandestine entrants in 2004 and 651 objections were made. Of the penalties objected to, 22 were upheld, 518 reduced, 83 cancelled, and none were increased. If an employer does nothing about a penalty notice, then the penalty can be recovered as a debt.

81. The system of penalties would not be a means to raise revenue. Money received through paid penalties would go directly to the Treasury. There is no financial incentive to the Home Office to issue penalties.

Higher offence

82. Prosecution trained Immigration Officers or the police could pursue a prosecution under the higher offence of knowingly employing an illegal worker. This offence is likely to be used in a small number of extreme cases and a high standard of proof would be required. The possible sanctions for this offence would include a custodial sentence up to a maximum of two years and an unlimited fine.

MONITORING AND REVIEW

83. A central administrative team will monitor the imposition of penalties and administer the objection process. The Home Office 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. The Bill of which these proposals would form a part will be reviewed three years after introduction.

CONSULTATION

i. Within Government

84. Policy leads have consulted with the Immigration Service and its operational arm, including the central administrative unit for the civil penalty system for road hauliers under the carrier's liability legislation and prosecution teams. There has been some informal consultation with the Commission for Racial Equality.

85. Other Government Departments have been consulted directly by policy leads, notably the Department for Trade and Industry, including the Small Business Service, and the Treasury. We have also consulted with the devolved administrations and all domestic Departments through writing to the DA committee.

ii. Public consultation

86. We intend to undertake a targeted consultation through the Home Office Illegal Working Stakeholder Group, whose members include both employer and employee representatives. We will conduct a wider public consultation prior to secondary legislation and implementation.

SUMMARY AND RECOMMENDATION

The Government proposes to proceed with option (vi), introducing on the spot civil penalties, creating the knowing offence, and creating a continuing obligation on employers to check the status of employees with limited leave after the point of recruitment. This option provides a framework which distinguishes negligent employers of illegal migrant workers from those who knowingly do so. Civil penalties offer an efficient, effective and flexible means of dealing with negligent employers in greater numbers than under the current prosecution-based system while the 'knowing' offence provides a tough measure for those who exploit illegal workers. By creating an on-going duty to check migrant workers' status this option also closes an existing loophole and will help prevent the continued employment of migrant workers after the expiry of their leave.

DECLARATION

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs.

Signed:

Date:

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Annex A

RACE EQUALITY IMPACT ASSESSMENT

Background

The current Immigration Bill contains provisions to strengthen the law on the prevention of illegal migrant working. These build on previous reforms of the existing legislative framework – section 8 of the Asylum and Immigration Act 1996 – under which it is a criminal offence to employ a person subject to immigration control who does not have the right to be in the United Kingdom or whose conditions of stay preclude the employment in question. These proposals form part of the Government's wider five-year strategy to reform the immigration and asylum system, including measures to tackle abuse and introduce a new points based system to replace current routes of entry for workers and students. The impact of other aspects of this strategy on race equality will be assessed separately.

The Government believes that measures to tackle illegal migrant working are necessary because:

- the availability of employment to immigration offenders encourages people to enter the United Kingdom and/or remain illegally, posing a risk to the immigration system;
- the use of illegal migrant workers is often associated with exploitative employment practice, non-payment of the national minimum wage, poor working conditions including health and safety, and revenue evasion;
- the use of illegal workers at sub-national minimum wage levels and/or involving revenue evasion can distort legitimate competition and undercut law-abiding businesses.

During the course of 2004, the Government strengthened the existing section 8 regime by:

- improving the security of system of document checks operated by employers to avoid using illegal workers and committing the section 8 offence; and
- increasing the maximum penalty for the section 8 offence by making it triable either way.

However, the Government has concluded that the legislative framework should be strengthened further by replacing the current section 8 offence with a system of civil penalties for employers who negligently employ illegal workers by failing to carry out proper checks and a new criminal offence of knowingly employing illegal migrant workers, punishable by up to two years imprisonment following conviction on indictment. The new civil penalty system and "knowing" offence would apply to employers who continued to employ migrant workers beyond the expiration of their lawful immigration status. The Secretary of State would specify in secondary legislation the steps employers should take to avoid liability for the service of a civil penalty.

The objectives of these further reforms are:

- to differentiate between negligent employers and those who deliberately flout the law, providing a proportionate response to each.
- in creating the system of civil penalties, to make it easier for the Immigration Service to deal with negligent employers for whom prosecution is a disproportionate response. This would enable the Immigration Service to use their scarce prosecution resources more effectively, and the greater risk of receiving a financial penalty will create a greater incentive for employers to carry out proper checks. The civil penalty system would provide a fairer and more consistent way of dealing with negligent employers than the current system of prosecutions which result in wide differences in the level of fine;
- to close a loophole in the current section 8 regime, whereby an employer faces no sanction if he continues to employ someone whose leave to remain and/or permission to work in the United Kingdom expires during the period of employment;
- to enable the Immigration Service and police to take effective action against those who deliberately use illegal workers.

Overall, the regulatory burden on employers, in terms of executing pre-recruitment checks, would remain the same, but there would be a continuing requirement to re-check the documents of certain categories of worker at intervals after the point of recruitment to confirm their continuing entitlement to work in the United Kingdom.

Assessment of relevance to and impact on race equality

A statutory system of employer sanctions in relation to illegal migrant working can impact on race equality in a number of ways:

- the sectoral and geographical distribution of illegal working might mean that employers from some communities or racial groups may be more likely than others to face investigation or enforcement action. Enforcement action is carried out on the basis of intelligence about the likely incidence of illegal migrant working. Current intelligence suggests that illegal migrant working is most likely to take place in the following commercial sectors, which are characterised by seasonal or temporary low-skilled work:

    - hospitality (restaurants, hotels and pubs)
    - car washes/garages
    - food production
    - retail
    - cleaning agencies
    - factories/warehouses
    - nursing homes
    - construction
    - sex industry

- The current enforcement priority for the UK Immigration Service is for removals of failed asylum seekers to exceed the number of unfounded applications by the end of 2005. This also impacts on decision-making in relation to which businesses or premises are visited by the Immigration Service, using finite resources, when intelligence indicates the incidence of illegal working. In each case, however, the race or nationality of the employer will not be the operative factor in deciding whether to visit the business or apply a sanction. Where there is evidence of more serious organised criminality involving illegal working, such as people trafficking, forgery or money laundering, the police generally take the lead and determine operational priorities for the investigation.

- the existence of effectively enforced employer sanctions may have an impact on the job seeking population, insofar as the threat of a sanction may make an employer more cautious about employing a worker who is or might appear to be a foreign national. This may give rise to unlawful race discrimination in extreme cases.

- a system of prescribed document checks by employers may disadvantage particular groups if they are less likely to be able to produce one of the documents listed as being acceptable as proof of entitlement to work.

- a system requiring employers to carry out follow-up checks on migrant workers with a temporary immigration status would require workers in the affected categories to demonstrate their continued requirement to work, necessitating the possession and production of certain specified documents. Workers with a continued right to reside and work on the United Kingdom, such as British citizens, EEA nationals and foreign and commonwealth nationals with settled status would only be subject to a single check at the point of recruitment, as their status is very unlikely to change during their contract of employment. No follow-up checks would be required in relation to these groups. However, persons subject to immigration control who did not enjoy settled status would also be subject to follow-up checks by their employers at intervals post recruitment. This would affect migrant workers in the new tier scheme who enter the United Kingdom as:

    - highly skilled migrant workers (until they acquire permanent settlement)
    - skilled migrant workers (until they acquire permanent settlement)
    - low skilled workers
    - students and specialists

- Those workers who could not demonstrate their continued entitlement to work, because they have been refused further leave to remain or further permission to work, or who have allowed their status to lapse, would face dismissal;

- controls on the use of illegal migrant labour may result in ill-feeling in certain communities who may feel particularly targeted by the legislation.

Mitigation and Monitoring

List of specified documents and consultation

Prior to implementing the changes to the system of document checks by employers in 2004, the Government carried out a full public consultation exercise. It also discussed the proposed changes in detail with the Illegal Working Stakeholder Group, membership of which includes the Commission for Racial Equality, the TUC and bodies representing employers in the sectors affected by illegal working. The secondary legislation implementing the new document checks – the Immigration (Restrictions on Employment) Order 2004, which came into force on 1 May 2004 – was carefully devised to enable those with an entitlement to work in the United Kingdom to demonstrate it without undue difficulty. The list of specified documents produced was sufficiently inclusive to avoid people with a lawful entitlement to work being unable to prove it to their prospective employer.

The system of employer checks to be introduced in relation to the new civil penalty scheme will be more or less the same as provided in the current Immigration (Restrictions on Employment) Order, with the exception that follow-up checks will be required in respect of migrant workers with a temporary immigration status. The Government will consult employers (including the Illegal Working Stakeholder Group) and representatives of black and minority ethnic communities on the level of support migrant workers and their employers will require from the Home Office in order to comply with the new legal framework.

Code of Practice

As part of the legislation, the Government would provide for the production of a statutory code for employers, setting out the steps required to avoid breaching the prohibition on unlawful race discrimination in the Race Relations Act 1976 and the Race Relations (Northern) Ireland Order 1997 whilst complying with the new legislation on the prevention of illegal migrant working. The provisions of the code will be fully reflected in the guidance to be issued to employers, setting out their legal obligations in this area.

Monitoring

The Home Office will work with the Commission for Racial Equality, the Equality Commission for Northern Ireland and other relevant stakeholders to devise an effective way of monitoring the impact of the changes on race equality. This will include examining employment tribunal cases to establish whether the changes have given rise to an increase in the number of

substantiated claims of unlawful race discrimination. The new legal framework would apply equally to all employers in the United Kingdom, and the Government will continue to work with employers in establishing the need for legal migrant labour and in tackling the use of illegal workers.