



Home Office

**PREVENTION OF ILLEGAL
WORKING**

**PROPOSED CHANGES TO
DOCUMENT LIST
UNDER SECTION 8 OF THE
ASYLUM AND IMMIGRATION
ACT 1996**

A consultation produced by the Immigration and Nationality Directorate of the Home Office.

21 July 2003

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Introduction

1.1 The purpose of this paper is to seek views on the likely impact of proposals to change the document list under section 8 of the Asylum and Immigration Act 1996, the law on preventing illegal working. We are currently discussing these changes with the Illegal Working Steering Group which is comprised of representatives from across a range of business sectors, the Trades Union Congress and the Commission for Racial Equality. We now wish to widen this process and consult further with employers and those organisations who have an interest in labour law or immigration matters in the United Kingdom. A list of all the organisations we have invited to comment on this document is shown in Appendix 2. We have targeted the consultation at organisations which are likely to take a direct interest in these proposals. We are keen though to receive comments from as wide a range of organisations as possible who may be affected by these proposals, so please feel free to circulate this document to those who you think may wish to comment but who are not on the consultation list.

1.2 It is available as a printed document and hard copies can be requested by ringing **0208 760 8720**. The document consists of this background paper, three Annexes and four Appendices :

- Annex A Draft Statutory Instrument: The Immigration (Restrictions on Employment) Order 2003
- Annex B Partial Regulatory Impact Assessment
- Annex C Questions for consultees
- Appendix 1 Description of documents which employers are currently required to check to obtain a defence
- Appendix 2 List of consultees
- Appendix 3 List of countries which are party to the European Economic Area Agreement, and those that will accede to the European Union in 2004
- Appendix 4 Further information on documents

How to respond

1.3 It would be helpful if you could send your comments to the email address below and set these out in response to the particular questions raised on the consultation in **Annex C**. We would ask that your responses **arrive no later than 13 October 2003** :

Email: sect8consult@homeoffice.gsi.gov.uk

or alternatively by post to

S8 Consultation
Immigration and Nationality Policy Directorate
6th Floor
Apollo House
Croydon
CR9 3RR

1.4 A non-attributed summary of responses to this consultation will be provided to all those who provide comments. It will also be available on request to others. Your views will be included unless you specifically indicate in your reply that you wish them to be confidential.

1.5 If you have any queries about this consultation, please ring Ed Mackie, Catherine Pool or Mary Batchelor on **0208 760 8720**.

Your views are valuable to us. Thank you for taking the time to read and respond to this document.

Background

2.1 The 2002 White Paper "*Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*" **[please make this a hyperlink to www.official.documents.co.uk/document/cm53/5387/cm5387.pdf]**

recognised that, for this country to prosper in the world economy, it is essential to manage the skills of those who want to come here and work legally. There are a number of legal routes for both highly skilled and low skilled workers to come here and we have been working to enhance and expand these and to provide new routes for those with particular skills. At the same time we must improve the way we tackle illegal working, which remains widespread across the economy and creates a range of damaging social and economic consequences for the nation.

2.2 We outlined in Chapter 5 of the White Paper **[grateful if you could link this]** a new strategy to improve the way illegal working is tackled in the United Kingdom, and set out a three-pronged approach to tackling the root problems associated with illegal working through:

- strengthening the UK Immigration Service's ability to enforce the offence;
- improving the way in which all Government agencies work together to tackle the problem; and
- engaging with employers to ensure that they will be able to improve their compliance with the law.

2.3 This consultation paper is about the changes we are proposing to make to the law on preventing illegal working - section 8 of the Asylum and Immigration Act 1996 - which will enable us to deliver our strategy on all of these three fronts.

Changes to the law on preventing illegal working

2.4 A significant step towards clarifying and strengthening the law on preventing illegal working was included in section 147 of the Nationality, Immigration and Asylum Act 2002 [**include link to www.hmso.gov.uk/acts/acts2002/20020041.htm**], which made changes to section 8 of the Asylum and Immigration Act 1996 [**link here to <http://www.legislation.hmso.gov.uk/acts/acts1996/96049--b.htm#8>**]. Section 8 makes it a criminal offence to employ someone who is 16 or over who:

- is not entitled to work in the United Kingdom (e.g. visitors, people here for medical treatment, asylum seekers who have not been given permission to work); or
- is not permitted to take the work that is being offered; and (in either case)
- does not come into a category where employment is otherwise allowed.

2.5 Section 8 provides a statutory defence for employers against prosecution for employing someone who is not entitled to take the work being offered. If an employer has a statutory defence he/she will not be prosecuted even if it turns out that the employee is not entitled to take the job. At the moment the defence works by employers being required, before the start of the employment, to check and record one of a list of documents that confirm the prospective employee's right to work. **Appendix 1 {please include link}** links to a list of the various types of documents which employers are required by law to check if they want to obtain a defence. The defence is forfeited, however, if it can be shown that the employer knew that they were employing someone illegally. Documents such as a driving licence, marriage certificate, National Health Service card, credit/debit card, bank statement, utility (e.g. gas, electricity) bills are not available for the defence because they do not confirm entitlement to work. They will not be included in the changes to the document list.

2.6 Experience has shown that the prevalence of fraudulent documents in circulation has made it difficult for an employer who is keen to comply with the law, as most are, to do so. The proposed changes to the section 8 defence contained at **Annex A {please include link}** intend to reduce the scope for fraud by increasing the security of the documents acceptable as evidence of compliance with the law. If introduced universally, a national entitlement/identity card has potential to be used as a single specified document to confirm a prospective employee's entitlement to work, and thereby to assist those employers who presently struggle to ensure the legitimacy of their employees. Possible introduction is some way off and that is why we are proposing to make the changes at **Annex A**. An assessment of the impact of the changes for businesses is also contained at **Annex B**, along with an assessment of a non-regulatory option for change and a legislative option that applies enhanced requirement to certain sectors.

2.7 We are proposing to make the changes to the statutory defence by means of legislation which has to be seen in Parliament before it can come into force. Depending on the outcome of this consultation (see paragraph 3.1), the Government would seek to introduce the legislation later this year. It could apply throughout the UK to all employment sectors or, as noted in the Regulatory Impact Assessment (RIA) at **Annex B {please include link}**, in different ways in different sectors. The new requirements would apply only to new employees who are taken on after the revised legislation is introduced.

2.8 We have followed a two-fold approach in producing the revised legislation at **Annex A**. Firstly, we have sought to ensure that those documents included are generally secure and secondly, not to unnecessarily increase the burden on employers in complying with the law. The main change from the current requirements is that we propose to establish two lists of documents. The first **[link to Part 1 of Annex A]** includes only documents that can stand **on their own** and are less susceptible to forgery or misuse. Thus, any single document on this list, checked and recorded, would provide a statutory defence. The second list **[link to Part 2 of Annex B]** consists of documents, or which we propose **two** must be checked and recorded as stipulated, to confirm eligibility to remain and work in the UK. In some cases, where the family name is different on the two documents (e.g. for a married woman), another document showing the reason for the name change will need to be checked and recorded.

2.9 Although under the new proposals employers will, in some instances, have to check and record two documents rather than one, we do not believe that this will significantly increase the regulatory burden on the majority of employers. Most people who apply for jobs will be those who have a single document – usually a UK passport. In other cases, we believe that many employers are already asking to see more than one document to be sure of having a claim to the statutory defence. In those cases no extra work will be required. Some employers will, of course, have to see an extra document. **Annex B [please add link]** assesses the impact on employers in more detail, including asking whether the imposition of the proposed legislation in certain, specified sectors may be a more effective way of reducing illegal working.

2.10 The Government welcomes views on any aspect of this consultation paper, but particularly on the issues set out in question format in **Annex C [please add link]**.

What happens next

3.1 Much will depend on the outcome of this consultation. If the general consensus is that the new requirements can be introduced with relatively little impact on employers, we will aim to introduce the legislation later this year, whether uniformly or in certain sectors. Should the consultation indicate a need to take this forward in another way, for instance introducing the new requirements on a trial basis to allow the impact to be evaluated, we will consider doing so. Possible alternative approaches are outlined in the partial RIA, however, we would welcome the views of consultees about all potential alternatives.

The Consultation Co-ordinator

3.2 If you have any complaints or comments about the consultation **process**, you should contact the Home Office consultation co-ordinator, Geraldine Lilley by email at geraldine.lilley@homeoffice.gsi.gov.uk. Alternatively, you may wish to write to the address below:

Geraldine Lilley
Consultation Co-ordinator
Home Office
7th Floor Orange Area

Dean Ryle Street
London SW1P 2AW

3.3 This consultation is being conducted in line with recommendations in the Code of Practice on Written Consultation issued by the Cabinet Office. The Code criteria are set out below:

- A Timing of consultation should be built into the planning process for a policy or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
- B It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
- C A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
- D Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others), and effectively drawn to the attention of all interested groups and individuals.
- E Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation.
- F Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and reasons for decisions finally taken.
- G Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

The full code of practice is available at: www.cabinet-office.gov.uk/servicefirst/2000/consult/code/ConsultationCode.htm

 STATUTORY INSTRUMENTS

2003 No.

IMMIGRATION

The Immigration (Restrictions on Employment) Order 2003

Made 2003

Laid before Parliament 2003

Coming into force 2003

The Secretary of State, in exercise of the powers conferred upon him by section 8(1) and (2A) of the Asylum and Immigration Act 1996⁽¹⁾, hereby makes the following Order:

Citation and commencement

1. This Order may be cited as the Immigration (Restrictions on Employment) Order 2003 and shall come into force on .

Interpretation

2. In this Order -

“the 1996 Act” means the Asylum and Immigration Act 1996;

“the Immigration Rules” has the meaning given in section 33(1) of the Immigration Act 1971⁽²⁾;

“Immigration Status Document” means a document issued by the Home Office containing an endorsement, which confirms that the holder has been granted indefinite or limited leave to enter or remain in the United Kingdom; and

“Registration Card” has the meaning given in section 26A(1) of the Immigration Act 1971⁽³⁾.

Conditions specified under section 8(1) of the 1996 Act

⁽¹⁾ 1996 c.49; subsection (2A) was inserted by section 147(2) of the Nationality, Immigration and Asylum Act 2002 (c.41).

⁽²⁾ 1971 c.77.

⁽³⁾ Section 26A was inserted by section 148 of the Nationality, Immigration and Asylum Act 2002 (c.41).

3. (1) The conditions specified in paragraphs (2) and (3) below, are the conditions specified under section 8(1) of the 1996 Act (no offence committed in employing a person who satisfies such conditions).

- (2) (a) The employee had limited leave to enter or remain in the United Kingdom which did not preclude his taking the employment in question;
 - (b) the employee applied to the Secretary of State for variation of that leave; and
 - (c) the employee is within the period during which an appeal could be brought or has a pending appeal under Part 5 of the Nationality, Immigration and Asylum Act 2002⁽⁴⁾, against refusal of that application.
- (3) The employee is permitted to work under the Immigration Rules.

Requirements for the purposes of section 8(2) of the 1996 Act

4. (1) The requirements referred to in paragraphs (2) to (5) are requirements for the purposes of section 8(2) of the 1996 Act⁽⁵⁾ (defence for a person charged with an offence under section 8 to prove that before the employment began any such requirement was complied with).

(2) There must have been produced to the employer either –

- (a) a document of a description specified in Part 1 of the Schedule, or
- (b) one document of a description specified in -
 - (i) each of sub-paragraphs (a) and (b) of paragraph 1 of Part 2 of the Schedule; or
 - (ii) each of sub-paragraphs (a) and (b) of paragraph 2 of that Part.

(3) The employer must have taken the steps specified in Part 3 of the Schedule to copy or record the content of any document produced to him in accordance with paragraph (2).

(4) The employer must satisfy himself that each document produced in accordance with paragraph (2), appears to relate to the employee in question; in particular –

- (a) if a document contains a photograph, the employer must satisfy himself that the person photographed is the employee in question, and
- (b) if a document contains a date of birth, the employer must satisfy himself that the date of birth is consistent with the appearance of the employee.

(5) If either –

- (a) the name on a document produced under paragraph 1(a) of Part 2 of the Schedule differs from the name on a document produced under paragraph 1(b) of that Part; or
- (b) the name on a document produced under paragraph 2(a) of Part 2 of the Schedule differs from the name on a document produced under paragraph 2(b) of that Part,

a document must have been produced to the employer explaining the difference.

Revocation

5. The Immigration (Restrictions on Employment) Order 1996⁽⁶⁾ is hereby revoked.

⁽⁴⁾ 2002 c.41.

⁽⁵⁾ Subsection (2) of section 8 was substituted by section 147(2) of the Nationality, Immigration and Asylum Act 2002.

⁽⁶⁾ S.I. 1996/3225.

SCHEDULE

Part 1

Descriptions of documents for the purposes of article 4(2)(a)

Article 4(2)(a)

1. A United Kingdom passport describing the holder as a British citizen or as a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom.
2. A passport containing a certificate of entitlement issued by or on behalf of the Government of the United Kingdom, certifying that the holder has the right of abode in the United Kingdom.
3. A passport which describes the holder as a British overseas territories citizen and which indicates that that status derives from a connection with Gibraltar.
4. A passport or national identity card, issued by a State which is a party to the European Economic Area Agreement or any other agreement forming part of the Communities Treaties which confers rights of entry to or residence in the United Kingdom, which describes the holder as a national of a State which is a party to that Agreement.
5. A United Kingdom residence permit issued to a national of a State which is a party to the European Economic Area Agreement or any other agreement forming part of the Communities Treaties which confers rights of entry to or residence in the United Kingdom.
6. A passport or other travel document or a residence document issued by the Home Office which is endorsed to show that the holder has a current right of residence in the United Kingdom as the family member of a named national of a State which is a party to the European Economic Area Agreement or any other agreement forming part of the Communities Treaties which confers rights of entry to or residence in the United Kingdom, and who is resident in the United Kingdom.
7. A passport or other travel document endorsed to show that the holder is exempt from immigration control, has indefinite leave to enter, or remain in, the United Kingdom or has no time limit on his stay.
8. A passport or other travel document endorsed to show that the holder has current leave to enter, or remain, in the United Kingdom and is permitted to take the employment in question, provided that it does not require the issue of a work permit.
9. A Registration Card which indicates that the holder is entitled to take employment in the United Kingdom.

Part 2
Descriptions of documents for the purposes of article 4(2)(b)

Article 4(2)(b)

1. (a) A document issued by a previous employer, the Inland Revenue, the Department of Work and Pensions' Jobcentre Plus, the Employment Service, the Training and Employment Agency (Northern Ireland) or the Northern Ireland Social Security Agency, which contains the National Insurance number of the person named in the document; and

(b) either:-

(i) a birth certificate issued in the United Kingdom, the Channel Islands or the Isle of Man; or

(ii) a certificate of registration or naturalisation as a British Citizen; or

(iii) a letter issued by the Home Office before [●], to the holder, which indicates that the person named in it has been granted indefinite leave to enter or remain in the United Kingdom and is entitled to take employment in the United Kingdom; or

(iv) a letter or an Immigration Status Document issued by the Home Office, to the holder, endorsed with a European Uniform Residence Permit on or after [●], which indicates that the holder has been granted indefinite leave to enter or remain in the United Kingdom and is entitled to take employment in the United Kingdom; or

(v) a letter issued by the Home Office, to the holder, before [●], which indicates that the person named in it has been granted leave to enter or remain in the United Kingdom and is entitled to take employment in the United Kingdom; or

(vi) a letter or an Immigration Status Document issued by the Home Office, to the holder, endorsed with a European Uniform Residence Permit on or after [●], which indicates that the holder has been granted leave to enter or remain in the United Kingdom and is entitled to take employment in the United Kingdom.

2. (a) A work permit or other approval to take employment issued by Work Permits UK; and

(b) either:-

(i) a passport or other travel document endorsed to show that the holder has current leave to enter, or remain, in the United Kingdom and is permitted to take the work permit employment in question, or

(ii) a letter issued by the Home Office to the holder, confirming the same.

Part 3

Steps which must be taken to copy or record the content of a document produced to an employer

Article 6

1. In the case of a passport or other travel document, the following parts must be photocopied or scanned into a database, using the technology known as 'Write Once Read Many' –
 - (a) the front cover; and
 - (b) any page containing;
 - (i) the holder's personal details including nationality;
 - (ii) the holder's photograph and/or signature;
 - (iii) the date of expiry; and
 - (iv) the information referred to in paragraphs 1 (other than citizenship) and 2 of Part 2 and the endorsements referred to in paragraphs 6, 7 and 8 of Part 2 and paragraph 2(b)(i) of Part 3.
2. All other documents must be photocopied or scanned in their entirety into a database, using the technology known as "Write Once Read Many".

EXPLANATORY NOTE

(This note is not part of the Order)

Section 8 of the Asylum and Immigration Act 1996 provides that an employer commits an offence if he employs a person subject to immigration control who has attained the age of 16, if the employee has not been granted leave to enter or remain in the United Kingdom, or if his leave is not valid and subsisting or is subject to a condition precluding him from taking up employment.

Section 8(1) provides that the offence is not committed if the employee satisfies one of the conditions to be specified in an order made by the Secretary of State. Article 3 specifies these conditions. The conditions are similar to those specified in Part I of the Schedule to the Immigration (Restrictions on Employment) Order 1996, which is revoked by this Order. The condition specified in Article 3(2) of the Order differs from that specified in paragraph 2 of Part I of the Schedule to the earlier order, in that it has been modified to reflect the changes to the immigration appeals system brought about by the Nationality, Immigration and Asylum Act 2002. The condition now specified in Article 3(3) is identical to that specified in paragraph 3 of Part I of the Schedule to the earlier order.

Section 8(2), as substituted by section 147 of the Nationality, Immigration and Asylum Act 2002, provides a defence for an employer who proves that before the employment began any relevant requirement of an order of the Secretary of State under subsection (2A) was complied with. Subsection (2A) was inserted by section 147(2) of the Nationality, Immigration and Asylum Act 2002.

Subsection (2A)(a) states that an order may require the production to an employer of a document of a specified description. Article 4(2)(a) specifies these descriptions of documents.

Subsection (2A)(b) states that an order may require the production to an employer of one document of each of a number of specified descriptions. Article 4(2)(b) specifies these combinations of documents, which if produced provide a defence.

Article 4(3) specifies the steps that an employer must take to copy or record the content of a document produced to him in accordance with the Order.

Article 4(4) states that when a document is produced in accordance with the Order, the employer must satisfy himself that the document appears to relate to the employee in question. If the document contains a photograph, the employer must check the likeness of the photograph and if the document contains a date of birth, the employer must check it to satisfy himself that it is feasible.

Article 4(5) states that where two documents are produced under either paragraph 1 or paragraph 2 of Part 2 of the Schedule, and the name which appears on the documents differs, a document must be produced explaining the difference.

By virtue of section 8(3), the defence is not available in any case where the employer knew that his employment of the employee would constitute an offence under section 8.

PARTIAL RIA

1. Title of proposal

The Immigration (Restrictions on Employment) Order 2003 (DRAFT). [**Insert link to Annex A**]

2. Purpose and intended effect of the measure

(i) *The objective:*

Revises the secondary legislation under section 8 of the Asylum and Immigration Act 1996 (as amended by section 147 of the Nationality, Immigration and Asylum Act 2002). The secondary legislation seeks to improve the security of the documentation that an employer must check and record to obtain a statutory defence from prosecution under the Act. It is proposed to do this by creating two categories of document that can be used as a statutory defence. The first category contains documents that are deemed to be secure enough to stand alone; for example, a UK passport. The second category contains documents that need to be checked and recorded alongside a second document, for example, a National Insurance number and a UK birth certificate, to achieve a similar level of security. This reflects both the varieties of purposes of these documents and the differing levels of security attached to them.

This change is intended to reduce the "pull factor" of illegal work in the UK, by making it more difficult for those who seek to work illegally to do so.

There is no accurate means of estimating the numbers involved in illegal working. The most reliable indicators suggest that the number could run into several hundreds of thousands. There are therefore no accurate indicators that could give a measure of the reduction in illegal working that we hope to achieve.

This secondary legislation could apply throughout the UK, however an assessment is also being made as to the impact of introducing this enhanced legislation in certain, specified sectors only. The sectors included would be those where illegal working is deemed to be particularly prevalent.

(ii) *The background:*

Illegal working takes many forms ranging from "cash in hand" undeclared work by individuals through to highly organised operations. At their worst these involve people trafficking, exploitation, unfair competition, dangerous working conditions and fraudulent deception of the Exchequer.

The main control on illegal working, from a migration perspective, is section 8 of the Asylum and Immigration Act 1996, which places a requirement on employers

to satisfy themselves that new employees are permitted to take the employment they offer to them. The maximum penalty is £5,000 per illegal employee, although currently the number of prosecutions is at a low level, mainly because of the widespread use of forged documents by illegal workers. Employers can avail themselves of a statutory defence to the charge of employing someone illegally by checking and recording one of a number of documents, specified in Part II of the Schedule to the Immigration (Restrictions on Employment) Order 1996 (SI 1996/3225). [Insert [link here to http://www.legislation.hmso.gov.uk/si/si1996/Uksi_19963225_en_1.htm](http://www.legislation.hmso.gov.uk/si/si1996/Uksi_19963225_en_1.htm)]

The *Secure Borders, Safe Haven* White Paper, published in February 2002, stated that: "...the apparent availability of illicit work, even where it is at the expense of legitimate business, acts as a pull factor for more would-be migrants."

The White Paper went on to say, about documentation in particular:

"The Government intends to ensure that present enforcement arrangements are strengthened by:

Reducing scope for fraud by limiting the range of identification acceptable as evidence of Section 8 compliance. For asylum seekers, replacing the present paper based Standard Acknowledgement Letter with an Application Registration Card which will provide much better protection against forgery and counterfeiting and allow fast verification of identity."

This highlights the main reasons for the proposed change, as part of the Government's wider strategy on encouraging the clear separation of the asylum and economic routes of entry to the UK.

(iii) *Risk assessment*

The secondary legislation is part of an overall package of measures, designed to reduce the risk posed:

- For workers – in terms of pay rates, working conditions, job availability, job exploitation and health and safety.
- For revenue streams and wealth generation - resources not being used productively and non-payment of tax and national insurance.
- For some, undeclared income from illegal working supplements fraudulent benefit claims.
- For immigration, the availability of work in the UK and the lack of effective measures to control this makes a mockery of a managed migration system for key workers. Asylum seekers who work whilst being provided with accommodation and other support may be committing fraud.
- Distortion of legitimate trade through unfair competition.
- Undermines the UK's legal system.

3. Options

Option 1: No change

The availability of illegal work in the UK would continue to act as a "pull factor" for those seeking to enter the UK illegally. Greater numbers of asylum seekers could continue to commit fraud by illegally working in the UK whilst claiming benefits, thus failing to reduce the pull factor. It would also undermine our efforts to create an effective system of managed migration, impacting adversely on those who seek to use legal routes to come to the UK. It would also lead to a longer-term negative impact on those people entitled to work in the UK, who may be forced out of the job market.

Option 2: Introduce the revised secondary legislation as proposed

Employers may find the new legislation difficult to adjust to. Some people who are entitled to work in the UK may find it more difficult to prove this entitlement. Forgers and others seeking wilfully to break the law may be able to negate the increased security provided by the "two list" system of documentation. Without an increase in enforcement activity, little real change may be embedded.

Option 3: Codes of practice, leading to self-regulation in sectors where illegal working is prevalent

This option suggests introducing codes of practice, requiring the same or higher levels of security than the draft SI, in sectors where illegal working is particularly prevalent. It may prove very difficult to define, either legislatively or administratively, what constitutes a particular sector. Such an approach would also potentially discriminate against those sectors in terms of competitiveness. This also has the potential to cause confusion amongst employers, unsure whether the new arrangements apply to them or not. Ultimately, there would be no compulsion on employers to comply.

Option 4: Introducing the proposed new secondary legislation in specified sectors in which illegal working is prevalent; maintaining the status quo for the rest of the UK

The provisions of the 1996 Order could be replicated for some sectors and entirely new provision, based on the draft SI, made for others. The new provisions, which could initially apply to only some sectors, could be extended to other sectors at specified dates in the future, thereby replacing the old provisions at those times. It may prove very difficult to define what constitutes a particular sector. Such an approach would also potentially discriminate against those sectors in terms of competitiveness. This also has the potential to cause confusion amongst employers, unsure whether the new arrangements apply to them or not.

4. Benefits

Option 1: No change

If the secondary legislation was not changed but the guidance to employers revised appropriately, then there will be greater clarity amongst employers as to what their obligations are. Current practice should not have to change, although we would seek to increase compliance by raising awareness of the existing legislation.

Option 2: Introduce the revised secondary legislation as proposed

Increased level of difficulty for those seeking to break the law and therefore an improved chance of obtaining a successful prosecution against those who do. We believe that this would not be a substantial change in current practice for most legitimate employers. An increased level of security should lead to greater certainty for employers when seeking to employ someone, therefore there is less likelihood that the employee will subsequently be removed by the Immigration Service.

Option 3: Codes of practice, leading to self-regulation in sectors where illegal working is prevalent

The Government is already engaged with the key sectors where illegal working is particularly prevalent (agriculture, construction, catering, hospitality, food processing) with contract cleaning the only major exception. We can focus our resources more effectively and have a clearer picture of the impact that we are having on illegal working. Less of a burden on business in general, than if every sector had to comply with the new arrangements.

Option 4: Introducing the proposed new secondary legislation in specified sectors in which illegal working is prevalent; maintaining the status quo for the rest of the UK

As under Option 3, we are already engaged with the key sectors where illegal working is particularly prevalent (with contract cleaning the only major exception). We can focus our communication and compliance strategies more effectively and have a clearer picture of the impact that we are having on illegal working. We would be unlikely to impact adversely on businesses in sectors where we maintained the status quo.

Business sectors affected

Option 2 will cover all UK employers. However, Options 3 & 4 could be made to apply only to certain sectors. Should Option 4 become the preferred choice, then the economic sectors in which we would seek to apply the enhanced requirements are: agriculture, catering, contract cleaning, construction, hospitality, clothing/textiles and the provision of temporary workers.

The current legislation applies to all UK employers.

Issues of equity and fairness

Option 2 would apply to all employers equally, as does the current legislation. Employers with a large turnover of staff would be most likely to be affected by having, in some cases, to store two forms of identification. However, informal

consultation suggests that many employers already see it as best practice to check and record more than one form of identification when employing someone. These businesses would clearly be better placed to adjust to the change in legislation.

Options 3 and 4 would clearly impact only upon certain sectors, although there would be no compulsion on employers in those sectors, under Option 3, to comply. However, all employers in affected sectors, whether administratively or statutorily, would be expected to comply to the same level. Those that did not would enjoy a competitive advantage.

5. Costs

(i) *Compliance costs*

Option 1: No change

No change in costs.

Option 2: Introduce the revised secondary legislation as proposed

We are assuming a marginal increase in costs. In some cases, although not all, as certain documents will continue to be accepted as sufficient to obtain a statutory defence (including a UK passport), a second document will have to be seen and recorded. The Government will produce the relevant guidance material, so the costs will fall in three areas; informing job applicants of the slightly amended documentation requirements; time spent looking at and recording the second document (over and above the time spent on the first document); and storage of the copy of the second document.

The Labour Force Survey suggests that there are approximately 7 million “job changes” in the UK every year. A “job change” can be defined as when a person moves from one job to another job, or from outside employment to a job. At each job change (unless this is a job change within a company or organisation), employers seeking a statutory defence should check and copy a document or combination of documents.

Analysis suggests that, of the 47 million UK passports currently in circulation, approximately 32 million are held by people of working age. We are making the assumption that these passport holders will account for the vast majority of job changes that take place in the UK every year. Therefore, the option of checking and recording just one document will remain in most cases. However, there will be others who need to use a combination of documents, with cost implications. We must also take account of the fact that it is likely that a substantial proportion of current job changes are accompanied by the checking and recording of a National Insurance Number, to meet section 8 requirements.

For the purposes of this RIA we need to make an assumption about what proportion of these job changes will require employers to check and record an additional piece of documentation. To answer this question we need to look at the available data and analysis of the UK workforce.

We know that migrants represent a significant and growing minority in the UK. Currently, 3.6 million people of working age are foreign-born, representing about 10% of the working-age population (or 4.8 million people of all ages – about 8% of the total population). Approximately half of those who are foreign-born have UK nationality. The largest proportion of the migrant population was born in other countries within the European Union (23%). Around 75% (22.7 million people) of the working-age UK-born population are in employment, compared to an employment rate of around 64% (1.8 million people) among migrants of working-age⁷.

Based on this information, it is difficult to make assumptions as outlined above. More information is required on the number of documents that are currently checked and recorded by UK employers, as best practice. We also require further information on the likely costs to be expended on training staff, amending in-house documentation and processing additional documentation. Therefore, we would welcome comment from consultees about the likely costs of this option.

Option 3: Codes of practice, leading to self-regulation in sectors where illegal working is prevalent

We are assuming a marginal increase in costs for employers in sectors where illegal working is prevalent. We would seek to work with employers to introduce codes of practice for voluntary compliance with the higher standard outlined in the draft SI. The Government will work with affected sectors to produce the relevant guidance material, so the costs will fall in three areas; informing job applicants of the slightly amended documentation requirements; time spent looking at and recording the second document (over and above the time spent on the first document); and storage of the copy of the second document.

The costs would therefore represent a proportion of those outlined under Option 2. However, as stated above, these requirements would be voluntary, and employers in these sectors may choose instead to simply follow the requirements of the 1996 legislation, rather than the suggested best practice example, as defined by the draft SI.

Option 4: Introducing the proposed new secondary legislation in specified sectors in which illegal working is prevalent; maintaining the status quo for the rest of the UK

For the bulk of the economy, there would be no change, so the costs would be as under Option 1. However, for the specified sectors covered by the enhanced regime, the costs would be as under Option 3, although compliance would be mandatory rather than voluntary.

(ii) *Other costs*

Not possible to calculate. However the risks associated with Option 1 in terms of a lack of change in the law would have obvious cost implications, as outlined in the *Risk Assessment* section (above).

⁷ MIGRANTS IN THE UK: A descriptive analysis of their characteristics and labour market performance, based on the Labour Force Survey (2001) by Russel Haque, Department for Work & Pensions, December 2002

(iii) *Costs for a typical business*

Not possible to calculate. We believe that, in many cases, businesses are already meeting the increased security standard in the proposed new legislation. These businesses will not face any increased costs. However, for those businesses that do no more than comply with the existing legislation, there will be an increased cost in three areas, as outlined under the discussion of costs for Option 2 above. Clearly where there is a greater level of staff turnover, this will lead to increased storage and "checking" costs, as compared to a business with a low level of staff turnover. However, many of these job changes will involve UK passport holders, who may produce that single document, sufficient for an employer to claim a statutory defence.

We would welcome comment from consultees about the likely costs to a typical business.

6. Consultation with small business

Informal consultation with the Small Business Service suggests that many small businesses are infrequently involved in the recruitment process. The recruitment process is clearly where any additional costs would fall. However, we believe practice amongst small businesses broadly reflects practice in all business in that many firms already operate to the higher standard of security which we are seeking to make a legislative requirement. It would be helpful to hear from consultees about current practice as regards checking and recording documents.

7. Competition Assessment

Under Option 2, it is intended that the proposed, revised secondary legislation will apply to all employers in the UK, as the current legislation does. The current legislation appears to have had no negative impact on competitiveness and the new legislative requirements, applying equally to all employers, are expected to follow that model.

Options 3 and 4 clearly impact on some sectors and not others. However, within those sectors, all employers would be expected to follow the higher standard. The difficulties arise with Option 3 because employers who refuse to comply with the voluntary code will not face any legal sanction and may see it as a cost benefit to employ people at the lower standard of security as defined in the 1996 Act. This would not be the case under Option 4.

8. Enforcement and sanctions

Section 8 of the 1996 Act is currently enforced almost entirely by the Immigration Service, although the police do occasionally investigate alleged breaches.

Non-compliance with the documentary requirements of section 8 does not lead automatically to prosecution. The act of checking and recording a document is only designed to give the employer access to a statutory defence. An employer

can satisfy himself or herself that the employee is entitled to work in the UK without choosing to record any form of documentation, although best practice should dictate that checks on documentation are made. Should the Immigration Service investigate and find that an individual is entitled to work in the UK, no offence will have been committed, even if no documentary proof of this entitlement was recorded.

In order to avoid unlawfully discriminating when seeking to comply with the provisions of section 8, employers should ensure that they treat all job applicants in the same manner. Employers should not make assumptions about an applicant's right to work, or immigration status, on the basis of their colour, race, nationality or ethnic or national origins or the length of time they have been in the UK. Acting in such a manner would be a breach of the Race Relations Act.

An offence is only committed where an employer employs someone who has no right to work in the UK. Should that employer have checked and recorded documentation as set out in the secondary legislation, then he/she will have a statutory defence to the charge, even if the employee was subsequently found to have no right to work in the UK. The defence is forfeited, however, if it can be shown that the employer knew that they were employing someone illegally.

Any proposed change to the secondary legislation will not change this structure of enforcement. What it will change, in certain cases, is the number of documents that an employer may have to see and record to give himself/herself a statutory defence to this charge.

Prosecutions and convictions under section 8 are few in number:

1997 - 0 prosecutions, 0 convictions
1998 - 1 prosecution, 1 conviction
1999 - 23 prosecutions, 9 convictions
2000 - 32 prosecutions, 23 convictions
2001 - 65 prosecutions, 1 conviction

Whilst we are seeking to increase the number of successful prosecutions, it is unlikely that these will increase dramatically. Realistically, we would estimate that the number of successful prosecutions is unlikely to exceed 500 in any calendar year.

9. Monitoring and review

Despite the fact that we envisage only a marginal change in the activities of compliant businesses, the effectiveness of the amended legislation or the voluntary codes of practice will be kept under review.

Firstly, we intend that the Illegal Working Steering Group (IWSG)⁸ chaired by the Immigration Minister, will review the impact of the legislation or codes of practice in terms of how they change the behaviour of employers. As noted above, we do not believe that there will be a major change in the behaviour of compliant employers. The IWSG, which meets approximately every 2-3 months, can discuss the impact six months and twelve months after introduction. The minutes of IWSG meetings are published on the Home Office website [[link here to http://www.ind.homeoffice.gov.uk/default.asp?PageId=3671](http://www.ind.homeoffice.gov.uk/default.asp?PageId=3671)], and are therefore publicly available.

Secondly, through visits by the Immigration Service to workplaces, we will assess the impact of the revised legislation or code of practice on migrants seeking work. We would envisage that employers who seek to flout the law in its current form will find that more difficult to do and therefore we will be better placed to bring prosecutions against them.

10. Consultation

(i) *Within government*

The initial review of policy on illegal working involved the Department for Transport, Her Majesty's Treasury, the Foreign and Commonwealth Office, the Department for Trade and Industry, the Department for the Environment, Food and Rural Affairs, the Department for Work and Pensions, the Department for Culture, Media and Sport and the Cabinet Office. Representatives from the devolved administrations were also invited to contribute as they saw fit.

(ii) *Public consultation*

The draft secondary legislation was sent to members of the Illegal Working Steering Group on 25 April 2003. This document, along with the proposed draft SI, will be sent to stakeholders in early July 2003. Consultees are invited to submit their comments on the draft secondary legislation and this RIA **by 13 October 2003**.

11. Summary and recommendation

The Government has a clearly stated policy to tackle illegal working. Strengthening the legislation, which provides employers with a statutory defence to the charge of employing an illegal worker, is a key step towards this aim. The Government believes that by tightening up the law in this area it will be easier to target non-compliant employers and bring successful prosecutions. In turn, this should lead to a reduction in the pull-factor and its associated problems. The Government therefore believes that the benefits of this outcome substantially outweigh the marginal, additional costs which we expect compliant employers may have to bear.

⁸ Members of the IWSG (as at 21 July 2003): Confederation of British Industries, Trades Union Congress, National Farmers' Union, British Chambers of Commerce, British Hospitality Association, Commission for Racial Equality, Construction Skills Certification Scheme, Health and Safety Executive, Small Business Service, Recruitment and Employment Confederation, Marks & Spencer Plc, J Sainsbury Plc, NHS Employment Policy Branch.

QUESTIONS FOR CONSULTEES ARISING FROM THE PROPOSED LEGISLATION AT ANNEX A

1. What impact will the proposed new documentation requirements have on recruitment practices?

The changes proposed at **Annex A [link]** mean that employers will, in some instances, be required to check and copy more than one document for a new employee in order to obtain a statutory defence. We expect that the majority of new employees will possess one of the single documents stipulated in the new requirements, but would welcome views as to how far you believe that recruitment practices could be affected by the new dual document requirements.

2. How well are the requirements for employers under the current legislation understood?

It will be important that the changes to section 8, however they are taken forward, are communicated to employers in a way that is clear and allows you to understand what is required of you. Paragraphs 2.4. and 2.5 of this consultation paper set out the law as it stands at present and how to obtain a statutory defence from prosecution (the list of documents currently available for the defence is at **Appendix 2 [link]**). To help our thinking about how to communicate the changes we would welcome your views as to how far the guidance documents and other help available on the current requirements have allowed employers to understand the law and their role in complying with it.

3. Will everyone who is legally entitled to work in the UK be able demonstrate this to employers via the proposed document or combination of documents specified?

We are committed to ensuring that everyone who has permission to work in the UK is able to continue exercising this right, and that the proposed document changes outlined at **Annex A [link]** do not prevent employers from obtaining a defence for specific groups of entrant. By way of example, the Standard Acknowledgement Letter has been removed from the list of documents but has been replaced with an Application Registration Card (ARC) so that asylum seekers who have permission to work are able to demonstrate this to employers, who will also have a defence by checking such a card. We would welcome comments from employers and other interested parties to see whether or not the proposed documentation requirements achieve this objective.

4. Will these proposed new requirements provide a greater degree of security in terms of demonstrating an individual's entitlement to work in the UK?

The widespread availability and use of fraudulent documents by those seeking to work illegally in the UK is one of the main barriers to employers being able to fulfil their responsibilities under Section 8. This had lead in some instances to compliant employers employing illegal workers who the Immigration Service have subsequently removed from

their workforce and the country. We have sought to address this compliance issue by specifying more secure types of documents which employers are required to check in order to obtain a defence for a new employee. We would welcome your views as to whether the proposed new documentation requirements will provide a more secure indication than those currently available in respect of whether a potential new employee has permission to work. What other measures would you like to see used in order to deliver greater levels of document security?

5. What further assistance would you like to see the Government provide in order to assist compliance with these new requirements?

The Home Office established a dedicated Employers Helpline along with comprehensive free guidance leaflets for employers when Section 8 legislation was first implemented in 1997. Revised guidance will be issued when the new requirements are introduced. There is also a dedicated section on the IND website [[link here to http://www.ind.homeoffice.gov.uk/default.asp?pageid=17](http://www.ind.homeoffice.gov.uk/default.asp?pageid=17)] which provides up to date information for employers. We are keen to build and develop these information sources and to make them more employer-focused in their outlook. We would like the views of employers and other groups as to how we might improve the communication process so that a sufficient amount of information is available to assist employers and other groups in complying with the law on preventing illegal working.

6. If the enhanced legislation was to be introduced on a sector-specific basis (or voluntary codes of practice adopted), to which sectors should it apply?

The problem of illegal working is particularly severe where the availability of work is greatest. It is therefore unsurprising that lower wage employment sectors, such as catering, cleaning and hospitality are particularly affected. Other sectors are also disproportionately affected, such as the construction industry and seasonal employment areas including agriculture. But the problem is not limited exclusively to these areas. We would like the views of consultees on which sectors we should seek to target, if a sector-specific approach is to be adopted.

COMMENTS SOUGHT FROM CONSULTEES ARISING FROM THE DRAFT REGULATORY IMPACT ASSESSMENT

1. More information is required on the number and type²⁷ of documents that are currently checked and recorded by UK employers for each new employee, as best practice in terms of complying with section 8.
2. We also require further information from UK businesses on the costs that are likely to be incurred on training staff, amending in-house documentation and processing additional documentation as a result of the proposed documentation changes to section 8.

In each case it would be helpful if costs could be made in respect of a typical business.

**DOCUMENTS CURRENTLY PROVIDING A STATUTORY DEFENCE
UNDER SECTION 8(2)(a) OF THE 1996 ASYLUM AND IMMIGRATION
ACT**

You can find a list of documents that currently provide a defence by going to the following link;

[Please include link to
<http://www.ind.homeoffice.gov.uk/default.asp?PageId=85>]

Appendix 2

LIST OF CONSULTEES

Cabinet Office
Crown Prosecution Service
Department for the Environment, Food and Rural Affairs
Department for Work and Pensions
Department for Education and Skills
Department for Trade and Industry
Department of Health
Health and Safety Executive
HM Customs and Excise
HM Treasury
Inland Revenue
Office of Government Commerce
Northern Ireland Office
Scotland Office
Wales Office

Amnesty International
Association of London Government
British Red Cross
Commission for Racial Equality
Convention of Scottish Local Authorities
Employment Lawyers Association
European Union Migrants' Forum
Greater London Authority
Immigration Advisory Service
Immigration Legal Practitioners' Association
Immigration Service Union
Institute for Public Policy Research
Joint Council for the Welfare of Immigrants
Justice
Justices' Clerks' Society
Law Centres Federation
Law Society
Law Society of Northern Ireland
Law Society of Scotland
Liberty
Local Government Association
Magistrates' Association
Medical Foundation
National Association of Citizens' Advice Bureaux
Northern Ireland Association of Citizens' Advice Bureaux
Oxfam
Public and Commercial Services Union
Refugee Action
Refugee Council
Refugee Legal Centre
Save the Children

Scottish Association of Citizens' Advice Bureaux
Scottish Association of Law Centres
Trades Union Congress
UKCOSA (Council for International Education)
United Nations High Commissioner for Refugees

Alliance of Independent Retailers
Amicus MSF
Association of Licensed Multiple Retailers
Bakers, Food and Allied Workers Union
Berkeley Scott PLC
British Apparel and Textile Confederation
British Beer and Pub Association
British Chambers of Commerce
British Hospitality Association
British Retail Consortium
British Woodworking Federation
Business Services Association
Chartered Institute of Management
Cleaning and Support Services Association
Confederation of British Industries
Construction Confederation
Construction Employers Federation (NI)
Construction Skills Certification Scheme
Country Land and Business Association
Engineering Employers Federation
Ethical Trading Initiative
Ethnic Minority Business Forum
Federation of Bakers
Federation of Master Builders
Federation of Small Businesses
Food and Drink Federation
Forum of Private Business
Fresh Produce Consortium
Fusion Personnel
Gas and Water Industries National Training Organisation
GMB
Horticultural Trades Association
Hospitality Training Foundation
Hotel and Catering Industry Management Association
House Builders Federation
Independent Retailers Confederation
Institute of Directors
J Sainsbury
Knitwear, Footwear and Apparel Trades
Labour Relations Agency (NI)
"Legal Island" Solicitors (NI)
Marks and Spencer
National Consumer Council
National Farmers' Union

National Federation of Roofing Contractors
National Market Traders Federation
National Specialist Contractors
NHS Employment Confederation
Recruitment and Employment Confederation
Restaurant Association
Royal College of Nursing
Scottish Chambers of Commerce
Scottish Forum of Private Business
Scottish Salmon Growers Association
Small Business Council
Small Business Service
Society of Asian Businesses
Transport and General Workers' Union
UK Warehousing Association
Union of Construction, Allied Trades and Technicians
Union of Shop, Distributive and Allied Workers
Unison

COUNTRIES (OTHER THAN THE UK) WHICH ARE MEMBERS OF THE EUROPEAN ECONOMIC AREA (EEA)

Austria
Belgium
Denmark
Finland
France
Germany
Greece
Iceland*
Ireland
Italy
Liechtenstein*
Luxembourg
Netherlands
Norway*
Portugal
Spain
Sweden

*These countries are not members of the European Union, but as EEA members, their nationals have the same immigration rights as EU citizens under European Community law.

COUNTRIES THAT WILL GAIN FULL MEMBERSHIP OF THE EU IN MAY 2004

Cyprus
Czech Republic
Estonia
Hungary
Latvia
Lithuania
Malta
Poland
Slovakia
Slovenia

NB From 1 June 2002 nationals of Switzerland have also had the same rights as EEA citizens to undertake employment without any immigration restriction.

FURTHER INFORMATION ABOUT DOCUMENTS IN LISTS AT ANNEX A

The information below gives additional details, where necessary, about documents included in Parts 1 and 2 of the Schedule to the draft Statutory Instrument at **Annex A**.

PART 1

- Item 1* “Right of Abode” means right to enter and remain in the UK without permission. All British citizens and some Commonwealth citizens have that right.
- Item 2* A certificate of entitlement is a coloured sticker put in a non-UK passport to show right of abode. It looks rather like a visa.
- Item 4* A number of the countries that are part of the European Economic Area Agreement (see **Appendix 3**) have national identity cards. These can be made of card, plastic and/or be laminated. The important point is to be sure that such a card says that the person is a national of the EEA country.
- Item 5* A UK residence permit is a small blue (or pink for Swiss nationals) card which contains the photograph of the holder among other things. It is issued by the Home Office to EEA nationals to confirm their residence here.
- Item 6* There are a number of travel documents, which look like passports, that are issued by the Home Office to people who cannot obtain a national passport. The residence document is a stamp in a passport giving the details stated in Item 6.
- Item 9* The Registration Card is an Application Registration Card issued to asylum seekers by the Home Office. If the asylum seeker has been given permission to work, this is shown on the back of the card.

PART 2

- Item 1(a)* The sorts of document that will show a national insurance number are: a pay slip, a P45, a P60 or a national insurance number card (either a plastic card or a cardboard one)
- Item 1(b)(ii)* Certificates of naturalisation and registration are A4 sized certificates, with the Home Office crest at the top, which say that the person named on them is a British citizen.
- Item 1(b)(iii)* The Home Office issues a number of letters confirming that the person named in them has been granted indefinite leave to enter or remain (or leave to enter or remain until a certain date – see item 1(b)(v)). They all

have the address of the Immigration and Nationality Directorate (IND) at the top.

Item 1 (b)(iv) An Immigration Status Document is new type of IND letter that will begin to be issued shortly confirming the grant of refugee status and some categories of humanitarian leave to remain. The European Union Residence Permit is a security sticker that replaces ink stamps and will be issued to non EEA nationals or those who do not have a visa to come here. It will be placed in a passport or on a letter and it will show the leave to enter or remain granted to the customer.

Item 2 (a) “Other approval to take employment issued by Work Permits UK” will normally take the form of a letter or certificate giving details of the employment permitted.