



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

## **SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS' CALL FOR EVIDENCE ON THE DRAFT LEGISLATIVE PROGRAMME: CITIZENSHIP, IMMIGRATION AND BORDERS BILL**

### **Summary**

The Government published the Draft (Partial) Immigration and Citizenship Bill in July 2008, for consultation (available, with explanatory notes, from the Home Office, UK Border Agency website: [www.bia.homeoffice.gov.uk](http://www.bia.homeoffice.gov.uk)).

This submission is produced in response to a call for evidence from the Parliamentary Joint Committee on Human Rights, which has prioritised this Bill within its legislative scrutiny role.

The Commission's view is that a range of aspects of the proposals, if implemented, will have far reaching human rights implications. The submission focuses primarily on areas which have received comment in previous consultation responses by the Commission. The areas covered include: reforms to the Common Travel Area; temporary residence restrictions; extension of Immigration Officer powers; reforms to British Citizenship requirements and entitlements; the deportation of non-UK citizen criminals; proposals on immigration detention and immigration bail; proposals on irregular working; appeal rights; fee charging powers and the potential introduction of an 'immigrant tax'; identity cards; and oversight of the UK Border Agency and family visa sponsorship.

1. The Northern Ireland Human Rights Commission (the Commission) is a statutory body created by the Northern Ireland Act 1998. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland

law and practice relating to the protection of human rights,<sup>1</sup> advising on legislative and other measures which ought to be taken to protect human rights,<sup>2</sup> advising on whether a Bill is compatible with human rights<sup>3</sup> and promoting understanding and awareness of the importance of human rights in Northern Ireland.<sup>4</sup> In all of that work the Commission bases its positions on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR), other treaty obligations in the Council of Europe and United Nations systems, and the non-binding 'soft law' standards developed by the human rights bodies.

2. The Commission welcomes the prioritisation of scrutiny of the Citizenship, Immigration and Borders Bill by the Joint Committee on Human Rights (JCHR). The JCHR's call for evidence quotes the Draft Legislative Programme as explaining that the Bill will:

[...] replace all existing immigration legislation with a simplified, clear and coherency legal framework to control our borders, manage migration and reform the path to citizenship.

3. The Commission has also prioritised this area and has submitted a range of responses to Home Office policy consultation exercises that cover matters now included in the Bill. While there are a range of other matters within the Bill that engage human rights compliance, this submission will largely focus on the specific areas covered by our previous responses. The Commission intends to prepare briefing papers for parliamentarians as the Bill progresses through both Houses, in which we plan to cover broader issues including our concerns on the refugee protection provisions.
4. Following examination of overarching issues, the areas covered in this submission are structured in accordance with each part of Part of the Bill itself. Where the Government has indicated that a matter not set out in the Partial Bill will be added to the Full Bill, this is included either in the relevant Part or in the Further Provisions section. The areas covered are:

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<sup>1</sup> Northern Ireland Act 1998, s.69(1).

<sup>2</sup> *Ibid*, s.69(3).

<sup>3</sup> *Ibid*, s.69(4).

<sup>4</sup> *Ibid*, s.69(6).

**Overarching issues**

- International standards
- Principles for human rights compliance
- Northern Ireland specific matters

**Part 1: Regulation and entry**

- Common Travel Area
- Temporary Residence Restrictions

**Part 2: Powers to examine**

- Extension of powers

**Part 3: Citizenship**

- Path to citizenship
- Public services

**Part 4: Expulsion powers**

- Deportation of "non-UK citizen criminals"

**Part 5: Powers of detention and immigration bail**

- Extension of powers

**Part 9: Illegal workers**

- Irregular working provisions

**Part 10: Appeals**

- Grounds for appeal

**Further provisions:**

- Fee charging powers: "An immigrant tax?"
- ID cards
- Oversight of UK Border Agency in Northern Ireland
- Family visitor sponsorship

## Overarching issues

### International standards

5. The Commission's response is informed by international standards, in particular, the European Convention on Human Rights (ECHR). Article 1 makes it clear that ECHR rights apply to all within the jurisdiction and not just to UK citizens. Other Articles, including 3, 5, 10, 11 and 14, are also engaged.
6. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) contains a range of standards in relation to racial discrimination, some of which apply universally and some others to citizens. Article 1 defines racial discrimination as:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The UN has issued a General Recommendation that clarifies the responsibilities of state parties to ICERD in regard to non-citizens.<sup>5</sup> This means that differential treatment based on citizenship or immigration status will constitute discrimination if it is not proportional and pursuant to a legitimate Convention aim.

7. The Commission welcomes the decision by the UK to remove its reservations against Article 22 and Article 37(c) of the UN Convention on the Rights of the Child (CRC). The Bill needs to be read in light of that decision.
8. The Commission reiterates its call for the Government to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). The ICRMW provides a framework of international standards around which the relevant provisions of the Bill should be structured. To the extent that the case for failing to ratify rests on a perception that any element of the ICRMW conflicts with domestic legislation, the economic interests of the state, or any other consideration, it is for the Government first to set out those arguments in detail, and then to devise means of addressing the obstacles to ratification.

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<sup>5</sup> General Recommendation No 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

## Principles for human rights compliance

### *Measures which engage human rights compliance*

9. The Commission recognises the right of the state to regulate migration, in ways that ensure respect for human rights. As the Committee will be aware any interference in human rights must be in pursuance of a legitimate aim, as well as being necessary and proportionate in pursuance of such an aim.
10. The Commission is concerned that many of the measures proposed are either not necessary or are disproportionate. The Commission notes that a considerable amount of official discourse and proposals appear to be based on notions of threats constituted by migration, and the need to control migrants with little credible evidence being put forward to support this case. There is also little evidence of an exploration of the complexity of migration or willingness to consider alternatives. This increases the risk of undue interference in human rights but also the risk that measures designed to combat phenomena, that are either exaggerated or more complex than presented, are likely to be largely ineffective and counterproductive.
11. Government will be aware that public opinion as regards the migration system is often heavily influenced by misinformation and racial prejudice, resulting in demands for the system to be more restrictive. The Commission would therefore suggest that an effective way of increasing public confidence in the system is to challenge misperceptions and combat racial prejudice. A recent example of this is discourse that conflates migrants with criminality. Following a range of reports carried in the media, largely in relation to EU migrants, the Association of Chief Police Officers (ACPO) issued a paper providing empirical evidence that the percentage of persons who offend within migrant communities was, in fact, roughly in line with the broader population.<sup>6</sup> By contrast, the first subheading in the section on EEA migrants in the Path to Citizenship consultation document is "Obeying

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<sup>6</sup> See: ACPO press release, 16 April 2008, [Online] Available: [http://www.acpo.police.uk/pressrelease.asp?PR\\_GUID=%7b017B1944-5CB2-43F6-BE22-E9AD91364597%7d](http://www.acpo.police.uk/pressrelease.asp?PR_GUID=%7b017B1944-5CB2-43F6-BE22-E9AD91364597%7d) [accessed 21 October 2008]; and 'Migrant crime wave a myth: police study – ACPO report concludes offending rate no worse than the rest of the population', *The Guardian*, 16 April 2008 [Online] Available: <http://www.guardian.co.uk/politics/2008/apr/16/immigrationpolicy.immigration> [accessed 21 October 2008].

the Law", with measures outlined to ensure that "EEA nationals will not abuse our welcome by committing criminal acts".<sup>7</sup> In reference to international commitments to challenge racism, the Government has a duty to challenge assumptions rather than encourage them by treating them as if they were true. General Comment 30 of ICERD urges states to:

Take resolute action to counter any tendency to target, stigmatize, stereotype or profile, on the basis of race, colour, descent, and national or ethnic origin, members of "non-citizen" population groups, especially by politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large;<sup>8</sup>

12. The principle of proportionality is of relevance to measures and the sanctions applied for offences. For example, if the Government builds a case that employing irregular workers is damaging to the public purse (for example, through reducing tax revenues) and imposes employer sanctions, there would need to be an explanation as to why the same sanctions are not imposed for practices that damage the public purse in a similar way, for example, through non-payment of the minimum wage.
13. When consulting on the consolidation process, Government had requested models from international practice to inform the process.<sup>9</sup> The Commission would draw attention to the existence of a broad and detailed international framework of principles that should underpin any such process. There is a range of international instruments, to many of which the UK is already a signatory, which provide the basis for a simplified structure. In particular, the International Labour Organization has recently produced a detailed multilateral framework on principles and guidelines for the regulation of labour migration.<sup>10</sup>

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<sup>7</sup> See: Home Office consultation document, *Path to Citizenship*, February 2008, paras 211-221. Two other issues are referenced – restriction to accessing benefits and learning English. Other prominent issues, including employment and housing rights abuses, are not referenced.

<sup>8</sup> General Recommendation No 30 (General Comments): Discrimination against non-citizens, Office of the High Commissioner for Human Rights, 1 October 2004, para 12.

<sup>9</sup> *Simplifying Immigration Law: An Initial Consultation*, June 2007.

<sup>10</sup> ILO [Online] *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, ILO, Geneva, 2006, available: [www.ilo.org/public/english/protection/migrant/download/multilat\\_fw\\_en.pdf](http://www.ilo.org/public/english/protection/migrant/download/multilat_fw_en.pdf).

## Northern Ireland specific matters

14. The Bill is UK-wide and deals with largely excepted matters in relation to the Northern Ireland Act 1998. However, there are a number of matters that engage specific impacts in relation to the particular circumstances of Northern Ireland which will be raised through out this submission. These include the land border with the Republic of Ireland, the differences regarding detention facilities, the differences in public administration, policing and the administration of justice, the impact of the legacy of conflict, the context and obligations under the Belfast (Good Friday) Agreement 1998, and the fact that a significant proportion of the population are Irish citizens.

### *Irish citizens*

15. The right to Irish citizenship for most persons born in Northern Ireland predates, but was reaffirmed in the Belfast (Good Friday) Agreement. The Agreement recognised rights to both British and Irish citizenship and identity, as follows:

...recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland.<sup>11</sup>
16. The nationalist community is a large proportion of the population. Over 400,000 Irish passports have been issued to Northern Ireland residents in the last 10 years.<sup>12</sup> While Irish citizens in the UK can exercise EEA treaty rights, Irish citizens are clearly not present in Northern Ireland purely on the basis of European community law. Irish citizens have a range of rights that date back to the 1920s, which will be impacted on by the proposals.

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<sup>11</sup> Paragraph 1(vi) Belfast (Good Friday) Agreement 1998. In Annex 2, the British and Irish Governments declare their joint understanding that the term, "the people of Northern Ireland", in the above paragraph refers to "all persons born in Northern Ireland and having, at the time of their birth, at least one parent who is a British Citizen, an Irish citizen or who is otherwise entitled to reside in Northern Ireland without any restriction on their period of residence".

<sup>12</sup> Irish Government figures indicate that 402,625 passports were issued to Northern Ireland residents between 1998 and 2008, with the annual figure doubling between 2002 and 2007 (source: *Irish News*, 2 July 2008).

## ***Territorial extent of the Bill***

17. Paragraph 46 of the explanatory notes to the Bill indicates that most of the Bill extends to Northern Ireland. There is indication that agreement will be required from the Northern Ireland administration on devolved aspects.

## **Part 1: Regulation and Entry**

### **Common Travel Area (CTA)**

18. The Partial Bill does not make reference to the Common Travel Area (CTA) between the UK and Ireland,<sup>13</sup> and is a matter on which the Government is currently consulting for inclusion in the Full Bill. Indeed, the Partial Bill does not make reference to the regulation and entry of Irish citizens which, as it stands, would render Irish citizens reliant on the exercise of European treaty rights. The Commission, in relation to this area and others impacting on Irish citizens, intends to examine the Full Bill for compatibility of the proposals with the Belfast (Good Friday) Agreement, the principles of non-discrimination, non-regression and broader international human rights standards.
19. The recent consultation document on the CTA puts forward proposals for major restrictions on freedom of circulation within the CTA. Little evidence is provided as to the necessity of these reforms which appear to be a product of government immigration control agendas relating to e-borders and identity cards. The proposals include checks on air and sea routes between the Republic of Ireland and the UK (including Northern Ireland). This will involve the introduction of full immigration controls for non-CTA nationals and measures to verify the identity of British and Irish citizens, along with monitoring and carriers liability on these routes. In relation to the land border between Northern Ireland and the Republic of Ireland, the Government is not proposing the reintroduction of bricks and mortar checkpoints but is proposing increasing mobile '*ad hoc*' checks on the land border that will "mirror activity in the Republic of Ireland".<sup>14</sup>

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<sup>13</sup> The Common Travel Area also covers the Crown Dependencies. The CTA dates back to the 1920s and was given full statutory recognition in the UK under Section 1(3) of the Immigration Act 1971 and Immigration (Control of Entry through the Republic of Ireland) Order 1972 (as amended).

<sup>14</sup> UK Border Agency, *Strengthening the Common Travel Area Consultation Paper* 24 July 2008.



20. The human rights impact assessment conducted by Government on the consultation proposals indicates that no human rights implications derive from the reforms. However, from this Commission's initial consideration, the proposals would appear to have far reaching human rights implications for Irish, British and foreign nationals in Northern Ireland.
21. The Commission's greatest concern is with regard to the land border proposals. There is no implication that there will be any requirement or expectation for British and Irish citizens to carry travel or identity documents to cross the land border and the Government argues that its '*ad hoc*' checks will target non-CTA citizens. The clear questions are, how are those policing the land border going to tell who is a British/Irish citizen and who is not? Who, on indicating that they are not carrying particular travel or identity documents (and have no obligation to do so), will be allowed to proceed and who will be subject to arrest and detention until identity is verified?
22. The Commission would be concerned to ensure that any measures introduced regarding movement across the CTA do not constitute racial profiling and do not adversely impact on minority ethnic persons exercising freedom of movement within the CTA or EEA. Racial profiling is not a human rights compliant exercise and the Commission has consistently raised concerns at measures that may directly or indirectly constitute racial profiling. Racial profiling engages Articles 8, 10, 11 and 14 of the ECHR and other international standards, to which the UK is a party, such as Article 12 of the ICCPR.
23. The Commission is conscious of the concerns of sister organisations in the Republic of Ireland, namely, the Irish Human Rights Commission and the National Consultative Committee on Racism and Interculturalism (NCCRI). Both organisations have raised general concerns that new legislative proposals (in the Republic) may lead to increased racial profiling. In reference to practices of *ad hoc* immigration checks on the land border by immigration Gardaí, the NCCRI is concerned with regard to racial profiling and is encouraging such incidents to be reported as racist incidents. The Commission is, therefore, particularly alarmed at the proposal that land border activity in Northern Ireland will "mirror" that on the southern side of the land border.

## Temporary residence restrictions

24. The Commission raised concerns regarding the reporting and residence restrictions on those with limited leave to remain in the UK, brought in by Section 16 the UK Borders Act 2007. The Commission pointed out that there was no explanation why such a measure is needed, when it would restrict individuals' right to privacy and respect for family life under Article 8 of the ECHR, and to freedom of association under Article 11. By requiring individuals to live and remain in certain geographical locations, this approach will further stigmatise people who have not committed any crime and make them easy targets for attacks motivated by xenophobia and racism.
25. Clause 10 of the draft Bill retains this sweeping power to impose reporting, residence and other restrictions on all non-EEA migrants (that is, persons with temporary residence). Clause 10 also extends the range of persons to whom an individual can be obliged to report.

## Part 2: Powers to examine

### Extension of powers

26. The Commission has a range of concerns regarding existing powers and their exercise and is extremely concerned regarding the extension of wide and discretionary powers, including their use in-country, proposed in the Bill. The Bill proposes to allow designated officials, at any time or place in the UK, to exercise power to stop any individual to determine their identity and immigration status and subject them to detention for as long as they deem necessary to determine the same.<sup>15</sup> Failure to comply, including failing to "provide information or produce documents" in the "possession or control" of the individual constitutes a criminal offence punishable by a civil penalty or up to six months in prison.<sup>16</sup> Documents can be of any relevant description specified by the Secretary of State.<sup>17</sup> There is also a similar power to require an individual to submit to a medical examination or provide medical reports under the examination powers. Such powers are clearly grossly disproportionate and this part of the Bill requires significant amendment. The Commission cannot see how such sweeping powers could comply with Article 5 of the ECHR (liberty and security of person).

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<sup>15</sup> For detention powers see Part 5 of the partial Bill Clause 53(1)

<sup>16</sup> For sanction powers see Part 7 of the Partial Bill Clauses 101 and 102

<sup>17</sup> Clause 28(4)

## Part 3: Citizenship

### Path to citizenship

27. This section of the Bill implements proposals that had been detailed under the Home Office's Path to Citizenship proposals. During the consultation on "Path to Citizenship" the Commission expressed a range of concerns on issues which are retained in the present Bill.
28. For example, one of the concerns the Commission raised was that Government was in danger of leaving itself open to accusations of colonial discourse through the tone of the proposals. The reforms proposed to the immigration system do not affect the rights of EEA nationals. The tone of the proposals could be interpreted as British citizens holding a particular set of values that are not shared by non-Europeans and need to be nurtured or taught. The consultation document made repeated references to 'British values' and 'our values', a concept that is the subject of much debate with, in fact, no agreed notion of what exactly a distinctly 'British' set of values might be. The formula that Government chose for the purposes of the consultation was to ask people what they would most miss if they emigrated. The conclusion in the document contends that 'British values' are 'the NHS, tolerance, fairness and freedom of speech, a healthy disrespect for authority and yet a keen sense of order'. Other 'values' then implied in the document included 'paying your way' and 'obeying the law'. From this listing, it is apparent that there is little distinctively British about any of these values. The values listed are in fact largely universal.
29. The Commission is also deeply concerned at the move away from recognised human rights towards citizen's rights, explicit in the proposals. Where rights were mentioned in the consultation document, they were presented with the deeply flawed notion that migrants must earn them. Under the ECHR and a range of international human rights treaties, to which the UK is a party, migrants in fact have the same rights as UK citizens. While there is no human right to citizenship in the country one migrates to, rights are not conditional on citizenship. The International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, applies to everyone in the state. Article 2(3) of the ICESCR contains a concession to developing nations only, and requires them to give due regard to human rights and their national economy to determine the extent to which they can guarantee the economic rights in the Covenant to non-nationals. The UK

obviously does not fall within the remit of Article 2(3). In addition, the Concluding Observations of a number of treaty monitoring bodies have expressed particular concern at the situation of non-nationals in the UK. The only rights that can be the preserve of citizens are matters such as voting (for example, Article 25 of the ICCPR). The Commission believes that the core premise of the proposals is flawed because the net result is that a range of rights are dependent on citizenship and, even then, are tiered in accordance with the stages an individual reaches on the path to citizenship.

30. The central claim from Government is that citizenship aids integration, yet this is not evidenced or substantiated. Further, the underlying tone of the proposals is that those seeking to reside long-term in the UK should seek to become British by availing of citizenship and assuming British values. While there will be persons who wish to do this, it is important to recognise there will be also other long-term residents who do not.<sup>18</sup> The Government should recognise that it is a human right to hold an identity and a principle of human rights that no detriment should incur through holding that identity. The current ethos and letter of the proposals are not compliant in this regard.
31. The Commission welcomed the commitment in the Path to Citizenship consultation document that Government, in developing its proposals, will ensure they are consistent with the principles of the Belfast (Good Friday) Agreement. However, there is no reference to this in the proposals as set out in the Partial Bill.

### **Public services**

32. This section is not set out in the Partial Bill, but the intention to include this in the Full Bill in relation to citizenship is referenced in the Bill's introductory document.<sup>19</sup> The Commission wishes to comment on two main areas. First, on proposals to further examine the eligibility criteria for public services and, second, on proposals to further impose immigration enforcement duties on a broader range of public sector actors.

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<sup>18</sup> One measure of this could be for the Government to ascertain the proportion of EEA long-term residents in the UK who wish to accede to British citizenship.

<sup>19</sup> *Making Change Stick: An Introduction to the Citizenship and Immigration Bill*, Home Office, July 2008.

## ***Eligibility criteria***

33. The Bill's introductory document outlines the following proposal for the Full Bill:

### ***Limit access to services to those who earn it***

In taking forward our proposals for earned citizenship, we need to simplify the current complex legislation on access to benefits and services and make it as clear and consistent as possible. We will establish a cross-Government working group to review the various terms used by different Departments to establish whether a person is 'resident' in the UK for the purpose of qualifying for access to certain benefits and services. A number of different legal terms are currently used, including 'ordinarily resident', 'habitually resident' and 'lawfully present'. Our objective will be to ensure that these terms operate and interact with each other as logically, simply, and effectively as possible; and in a way that meets our policy objective of ensuring that migrants can only access benefits and services where they have 'earned' the right to them. In Scotland public services are devolved and we will need to work with Scottish Ministers.<sup>20</sup>

34. The Commission is currently conducting an investigation into the extent to which existing legislation, guidance, and practice in relation to homeless provision and social support for migrants, asylum seekers, refused asylum applicants, and non-UK national family members complies with international human rights standards. This was prompted by a range of concerns around individuals being unable to access their rights.
35. While the Commission welcomes legal clarity over criteria, about which it is concerned, regarding the potential for regression in the above exercise. Further, the Commission reiterates its concern of the flawed notion that matters, such as access to essential services and social protection, which constitute basic human rights, require to be 'earned'.
36. In relation to general rights to social security, the Commission draws attention to Article 9 of the ICESCR, to which the UK is a party. This should be read with Article 2(2) of the same Covenant which prohibits discrimination on the grounds of nationality. The respective ICESCR General Comment on the right to social security indicates that non-nationals should be able to access non-contributory schemes and that any restrictions, including a qualification period, must be

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<sup>20</sup> *Ibid*, p8; NB Public services in Northern Ireland are also devolved.

proportionate and reasonable.<sup>21</sup>

37. There is reference in the Path to Citizenship consultation document to the Department of Health and the Home Office undertaking a joint review of the rules governing access to healthcare. Under Article 12 of the ICESCR everyone has the right to the highest attainable standard of physical and mental health. Article 2(2) of the same Covenant prohibits discrimination on the grounds of nationality. On the specific issue of primary and emergency medical care, the authoritative interpretation of the Covenant indicates that there should be no restrictions on entitlements in relation to nationality or residency or immigration status.<sup>22</sup>
38. Case law in the UK's domestic courts and the European Court of Human Rights also shows that access to healthcare has implications for the State's duties under Article 8 of the ECHR and, ultimately, Article 2 (the right to life) and Article 3 (the right to be free from inhuman or degrading treatment or punishment). Where migrants might be singled out for having certain forms of health care refused, Article 14 (the non-discrimination clause) is also engaged. Without having access to the detail of the joint review at this stage, the Commission can only remind Government of its obligations under international law and trust that Government will also consult on the implementation of the review in due course. It, of course, would not be acceptable for migrants and members of their families to be expected to pay for certain types of healthcare that could be life saving, that might be a danger to the public if not treated (for example, certain vaccinations) or that would lead to treatment by health professionals or immigration officials crossing the threshold of Article 3 ECHR.<sup>23</sup>

### ***Immigration enforcement duties on public sector***

39. The Government response to the Path to Citizenship consultation document outlines the following proposal:

As now, temporary residents will have no access to social assistance, social housing or homelessness assistance. Additionally we are, in the context of the forthcoming

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<sup>21</sup> General Comment 19, 4 February 2008, UN Economic and Social Council, para 37.

<sup>22</sup> *Ibid.*

<sup>23</sup> The undertaking of a joint review of the rules governing access to healthcare by is referenced in paragraph 191 of the Path to Citizenship consultation document.

Immigration and Citizenship Bill, looking at how information on those here unlawfully, obtained by local authorities when dealing with applications for housing and homelessness assistance, might be shared with UKBA, so that appropriate action, including removal from the UK where appropriate, can be taken.<sup>24</sup>

40. The intention of the proposal is to extend immigration officer duties to those dealing with persons presenting as homeless or otherwise seeking housing support. The Commission has previously expressed concerns regarding the impact of further imposing immigration control duties on public sector staff and fears that such a measure would deter vulnerable persons who have fallen into irregular status, or who are unsure of their status, from seeking essential support in this area from for fear of detention or deportation.
41. In Northern Ireland, a young Ukrainian woman suffered so severely from frostbite in December 2004 that she was forced to have both legs amputated. The case received wide media attention. Reportedly, the woman had been on a work permit but had lost her employment. In circumstances where indigent persons are at severe risk, the state has positive duties under Article 3 of the ECHR to prevent such persons from undergoing suffering of a kind that could engage Article 3. Such practice being adopted in the context of the Bill, may actively discourage migrants (including children) from accessing potentially life saving essential services and therefore engage human rights compliance.

## **Part 4: Expulsion powers**

### **Deportation of “non-UK citizen criminals”**

42. The Commission set out, and reiterates its, concerns regarding the automatic deportation of “foreign criminals” in its briefings to the UK Borders Bill. The Commission argued that by imprisoning and then deporting foreign nationals, Government is punishing people twice for the same crime. Each case ought to be judged on its merits and not on a ‘one size fits all’ approach when non-UK nationals are involved. Deportation is one of the most serious steps that any state can take against an individual within its territory, and it should not be applied automatically in any circumstance; proper consideration must be given to each case by an impartial judge not motivated by political considerations.

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<sup>24</sup> *The Path to Citizenship: next steps in reforming the immigration system government response to consultation*, Home Office, July 2008, p20.

43. The current provision in relation to the expulsion of foreign criminals and members of their family includes exceptions under clauses 38 and 39. As the Partial Bill stands, this removes the exemption for Irish Citizens under Section 33 (1)(b) of the UK Borders Act 2007. Without prejudice to the Commission's overall concerns regarding blanket deportation, and, in general, the prospect of persons being returned to jurisdictions to which they have no ties, this could also lead to a circumstance where an Irish citizen resident and imprisoned in Northern Ireland is then expelled to the Republic of Ireland. It will be important to obtain clarification as to Government's intentions to this regard.
44. The Commission is aware of a number of unaccompanied minors coming to Northern Ireland and seeking asylum. The Commission is aware that unaccompanied minors are, for the most part, referred to as disputed minors by the UKBA; and, in one case, an individual, later confirmed to be a 15-year-old, spent eight days in a police custody suite. This 'culture of disbelief' may lead to wholly inappropriate arrangements being made for individuals who are in fact children. The continuation of the provision whereby a minor's age is determined on the age of conviction by what the Secretary of State "thinks" their age is (clause 39(2)) is inappropriate.

## **Part 5: Powers of detention and immigration bail**

### **Extension of powers**

45. Paragraph 27 of this submission earlier raises concerns regarding the sweeping powers in the Partial Bill to detain anyone in the UK for examination.

### ***Immigration bail***

46. Clauses 62 and 59 introduce immigration bail which includes reporting, residence, financial securities and electronic monitoring. A particular concern of the Commission, in regard to this proposal, is the subordination of the Tribunal to the Secretary of State (or an immigration officer acting on their behalf), in a range of matters. This includes a veto for the Secretary of State as to whether the Tribunal should grant immigration bail when a persons removal is imminent and there is no pending appeal (clause 62(2)(c)); no power for the Tribunal to cancel a bail condition imposed by the Secretary of State; the Secretary of State being able to amend and impose



additional bail conditions after the Tribunal has granted immigration bail (clause 68); and only the Secretary of State, and not the Tribunal, being able to grant bail seven days from a person's arrival in the UK (clause 68(2)(b)).

47. It is inappropriate for a member of the executive to usurp functions of the judiciary. The Commission notes issues of human rights compliance transpiring when this has occurred. For example, the concerns of the UN as regards the subordination to a government minister, rather than an independent judge, of important aspects of control over inquires into murders in Northern Ireland under the Inquiries Act 2005. The UN urges the UK "as a matter of particular urgency" to conduct independent and impartial inquiries.<sup>25</sup> This serves as an example of the inappropriateness of the Secretary of States' powers in relation to immigration bail.

### ***Police powers to 'designated officials'***

48. The Commission expressed concerns, on the passage of the UK Borders Bill, at extended powers for immigration officers designated by the Secretary of State. This included giving immigration officers the power of arrest and detention at ports, for up to three hours, of anyone suspected of non-immigration offences pending the arrival of a police constable. The Commission noted that these are extraordinary powers for immigration officers to be given and potentially engage Articles 5 and 14 of the ECHR. The Commission maintains these concerns with their continuation in clause 57 of the present Partial Bill.
49. A particular concern was that the UK Borders Bill did not address the level of training immigration officers will be expected to undergo in advance of exercising such powers. The appropriate benchmark, given the nature of the powers, would be the training undergone by police officers and the Commission argued that detaining individuals, who are liable to arrest under the stipulated sections of the Police and Criminal Evidence Act 1984, or the Police and Criminal Evidence (Northern Ireland) Order 1989, should be left to police officers. The Commission expressed concerns that the Secretary of State may designate officers who he/she thinks are "fit and proper for the purpose and suitably qualified" and that given the nature of the powers that are to be extended to

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<sup>25</sup> Concluding observations of the Human Rights Committee on the UK, Ninety-third Session, Geneva, 7-25 July 2008, para 9.

a civilian force, this Commission did not consider that the Secretary of State's opinion is a sufficient criterion. These concerns are maintained by the Secretary of States' powers to designate officials under clause 24 of the Partial Bill.

50. The Partial Bill will extend the powers beyond ports to international railway stations. This presently, in Northern Ireland, could mean the following stations: Belfast Central, Portadown, Newry, Lisburn, and Lurgan. The introduction of effectively a new and potentially inadequately skilled and inadequately accountable, group of officers with police powers into these Northern Ireland stations could have a range of human rights implications.
51. More generally, as the Committee will be aware there is also a particular policing context within Northern Ireland including specific contexts for human rights compliance, and different structures for oversight and accountability. The proposals indicate the examination of a proposal by ACPO for the introduction of a new police force into Northern Ireland, and the rest of the UK, as a free standing border police force. Government proposals will be outlined in a forthcoming policing green paper. Such proposals, if ever appropriate in relation to Northern Ireland, should be developed in the context of its particular policing circumstances.

### ***General immigration control orders?***

52. The Commission is alarmed at the potential implications of the Interpretation clause regarding the meaning of detention under the proposed Bill (clause 70). The clause seems reminiscent of the Control Orders regime and outlines that persons who *cannot* be subject to detention for a number of specified reasons will be treated as if they were out on immigration bail. The specified reasons are that a person who cannot be removed for "legal, practical or administrative resource reasons".<sup>26</sup> The impact is that a person is considered out on bail even though their detention under the Bill would be illegal. This is clearly inappropriate. As set out in clause 116 of the Partial Bill, breaching immigration bail conditions could lead to a level 5 civil penalty or up to six months imprisonment. Circumstances can be foreseen where an individual's detention is illegal, but the individual is imprisoned for breaching an inappropriately imposed (and potentially impractical) immigration bail condition.

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<sup>26</sup> Clause 70 explanatory notes to Partial Bill.

## Part 9: Illegal workers

53. Clause 152 defines “illegal worker”. The Commission has concerns that this term is misleading, stigmatising and is not the term used in international standards, where terms such as irregular worker are used.
54. Clearly, while a person can be working without authorisation the person him- or herself is not “illegal”. It is a long established basic principle of human rights that everyone has the right to recognition everywhere, as a person before the law.<sup>27</sup> The use of such terminology confuses matters regarding legal entrance to a jurisdiction and permission to take up employment. The vast majority of migrants entering the UK do so lawfully, remain lawfully and, if applicable, work lawfully. It is also the case that there are a range of reasons (including being victims of abuse) why persons fall into an irregular status. Further, the vast majority of unlawful work practices in the labour market do not involve migrants but include all those engaging in a range of forms of, for example, tax evasion. The use of the term ‘illegal worker’ in this context leaves the impression that most unauthorised workers are migrants, and *vice versa*. Addressing the small overlap between migration and unlawful working by using a term like “illegal workers”, runs the risk of sending a message that the two issues are equally problematic and are, to an extent, the same issue. In responding to the consultation on irregular working, the Commission noted that there was no mention of the words “exploitation” nor “vulnerable migrants” in the proposals (although both terms were used once in the Ministerial foreword); however, the term “illegal” was used 65 times, conflating immigration with criminality rather than placing discussion of migration in a rights-based framework.<sup>28</sup>
55. The Partial Bill appears to largely replicate the measures introduced under the Immigration, Asylum and Nationality Act 2006. The Commission reiterates its concerns that there is little reference to ensuring the human rights of migrant workers in the pursuance of the stated aims. The areas of action singled out largely focus on sanctions or restrictions potentially impacting on the rights of migrants, rather than preventing unauthorised working through rights-based

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<sup>27</sup> Article 6, Universal Declaration of Human Rights.

<sup>28</sup> *Prevention of Illegal Working – consultation on the implementation of new power to prevent illegal migrant working in the UK: Response of the Northern Ireland Human Rights Commission, Belfast, July 2007.*

protection. The aims of the legislative proposals, of reducing irregular working, could be addressed through a range of alternative measures that carry with them less potential to interfere with human rights. Interventions to prevent irregular working must not be formulated so as to lead to destitution and impair access to fundamental socio-economic rights, particularly for vulnerable groups within the migrant worker population.

56. The International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as outlining rights in relation to favourable conditions of work, has a number of relevant provisions including Article 11 regarding the right of everyone to an adequate standard of living including adequate food, clothing and housing. The state has positive duties under Article 3 of the ECHR to prevent persons from undergoing suffering of a kind that could amount to inhuman and degrading treatment.
57. Rights-based strategies should enable the state to pursue the legitimate aim of eliminating irregular working without violating the human rights of migrant workers. It is a basic principle of international standards that migrant workers should not forfeit rights in their employment in pursuance of that legitimate aim. Authoritative interpretation of ICERD in relation to application to non-citizens states:

...while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.<sup>29</sup>

58. The Commission's view is that the emphasis ought to be on removing the financial incentive for employers to take on workers in an irregular situation, and on addressing factors that can push employees into an irregular situation. We would urge the consideration of a human rights-based approach that focuses on tackling such causes of and incentives. This would include reduction of vulnerability to exploitation through equality of protection, access to social protection, measures to enhance fairness in decision making and more flexible migration systems.

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<sup>29</sup> Paragraph 35 General Recommendation No 30 (General Comments): *Discrimination against non-citizens*, Office of the High Commissioner for Human Rights, 1 October 2004.

59. There is a commercial incentive for rogue employers and agents to employ persons in irregular status. This partly arises from the current 'doctrine of illegality' within UK employment law, that effectively means persons whose work becomes unauthorised have no access to employment rights and hence little or no comeback against malpractice. This paradoxically provides rogue employers with an incentive to push workers into irregular status in order to underpay workers or engage in other forms of exploitation. This is in the knowledge that migrant workers lack of recourse to employment rights, combined with the threat of denunciation to immigration authorities, means complaints are unlikely to be made let alone pursued. Provision of access to employment rights in such circumstances tackles the incentive to employ irregular workers and hence can reduce irregular working. While this does not preclude the state imposing sanctions on the irregular worker, it does retain their rights not to face exploitation and remove employer incentives to employ irregularly. Such remedies are referenced in the International Labour Organization (ILO) Multilateral Framework principles.<sup>30</sup>
60. In the Republic of Ireland, casework research has indicated a distinct pattern of exploited migrant workers having been pushed into irregular status. The Migrant Rights Centre Ireland (MRCI) documented 89 cases of workers who had sought assistance due to exploitation.<sup>31</sup> Of these, 85 had entered Ireland under the work permits system, but 52 were either in irregular status or about to become so by the time they had approached the MRCI for assistance. Within Northern Ireland, while there is no similar statistical evidence in reference either to Work Permits or to those who are pushed into not registering with the Workers Registration Scheme, there is ample evidence that exploitation of migrant workers occurs.<sup>32</sup> While the measures proposed involve stronger sanctions against employers, they do not provide corresponding protections for exploited workers, and this can increase vulnerability to exploitation and deterring persons from coming forward, contrary to the aims of the policy. This could render such interference neither proportionate nor legitimate.

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<sup>30</sup> ILO, *Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, Geneva, 2006, para 11.3.

<sup>31</sup> MRCI, *Briefing Paper: Migrant workers who become undocumented in Ireland*, Dublin, 2006.

<sup>32</sup> See for example: McVeigh R, *Migrant Workers and Their Families in Northern Ireland: A Trade Union Response*, Irish Congress of Trade Unions, Belfast, 2006.

61. The ILO guidance mentioned above – the ILO Multilateral Framework on Labour Migration – spells out the need to “[implement] policies that ensure that specific vulnerabilities faced by certain groups of migrant workers, including workers in an irregular situation, are addressed” (Guideline 4.4) and “[ensure] that labour migration policies are gender-sensitive and address problems and particular abuses women often face in the migration process” (4.5). The guidance recommends measures including “providing for effective remedies to all migrant workers for violation of their rights, and creating effective channels for all migrant workers to lodge complaints and seek remedy without discrimination, intimidation or retaliation” (10.5). Such standards are particularly relevant in the context of a significant number of exploited workers being in an irregular situation.
62. A further area for improvement is the quality of immigration decision-making. The Law Centre (Northern Ireland), in response to a previous consultation, voiced “significant concerns” about the quality of decision-making. It noted that 33 to 40 per cent of appeals against a decision to refuse an extension of leave to remain are successful or, in other words, incorrect decisions were made in the first instance. It is reasonable to suppose that if the system is perceived as unfair, this increases the likelihood of irregular working. It is significant that the Law Centre (NI) also noted the lower success rate of appeals made when outside the UK.<sup>33</sup> Therefore, the proposals for “tougher checks abroad” may exacerbate this.
63. Realistically, migrant workers will almost certainly arrive in areas where there is a demand for their labour; they will arrive through official channels or, if that opportunity is denied, through irregular means. Equally, employers will always source migrant workers when there is an unmet demand for labour, through official channels or, if such channels do not exist, through irregular means. Systems which place burdens on migrant workers or employers that are perceived as unnecessary, disproportionate and not for a legitimate purpose are likely to lead to significant numbers of migrant workers and employers establishing informal irregular arrangements. In reducing irregular working, there is a need to ensure that systems are sufficiently flexible to meet demand for labour, and are fair and proportionate so as not to

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<sup>33</sup> Law Centre (NI), *Submission on Selected Admission: Making Migration Work for Britain*, Belfast, December 2005.

place unnecessary or disproportionate burdens that may impair the rights of migrant workers.

64. There is evidence that many migrant workers are unaware of regulations they face. Research into the experiences of the Lithuanian migrant worker population in Northern Ireland has indicated that many were unaware of the Worker Registration Scheme.<sup>34</sup> Not registering carries sanctions of removal of the right to work and removal of the right to social protection. The Commission would, therefore, welcome a commitment to ensuring the availability of adequate and accessible information on regulations faced by migrant workers. Such information should also contain, or signpost, information on the rights of migrant workers.
65. The inclusion under clause 155 of the issuing of a Code of Practice to prevent unlawful discrimination in recruitment practices is welcome. However, such guidance is only likely to prevent racial discrimination in the course of implementing duties to check documents if it is given the same prominence in publicity and implementation campaigns and all other contexts as the duties themselves. Otherwise, it is likely employers will become much more aware of the duty to check than of the duty not to discriminate.

## **Part 10: Appeals**

### **Grounds for appeal**

66. The Commission notes that consultation is currently underway on the immigration appeals process. The Commission urges that no regressive steps are put in place as regards the right to appeal, grounds for appeal and onus of proof requirements.

### **Further Provisions**

#### **Fee charging powers: "An immigrant tax?"**

67. A proposal that may be further outlined in the Full Bill is the double taxation of non-EEA migrants and immigrants for public services to which they may (or may not) be entitled. Inclusion of this matter in the Bill is referenced in the introductory document as "ensuring migrants contribute a

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<sup>34</sup> Sannino P and McAliskey B, *A Pilot Study of the Self-Identified Needs of "Migrant Worker" Populations in the Armagh-Dungannon Area*, South Tyrone Empowerment Programme, 2005.

little extra to the cost of local services".<sup>35</sup> At present, clause 190(4) of the Partial Bill empowers the Secretary of State to charge a fee for immigration and nationality-related applications that is over and above the cost of processing the application (and related services / processes), although the explanatory notes do not make explicit reference to this power being used for this purpose and thus detail remains unclear. The proposal was outlined in greater detail in the Path to Citizenship consultation document as a fund to "help alleviate the transitional pressures that migration can bring". The manner in which monies would be raised was stated as:

...through increases to certain fees for immigration applications, with migrants who tend to consume more in public services – such as children and elderly relatives – paying more than others. We will work closely across Government to develop a clear and transparent methodology for the appropriate surcharge.<sup>36</sup>

68. The Government response to the Path to Citizenship consultation retains the proposals indicating that the immigrant tax will apply each time an immigration fee is charged (and as such will not apply to EEA nationals or refugees), and that migrants who bring dependants will pay an additional fee per dependant.<sup>37</sup>
69. While arguing that the fund is to alleviate pressures from migration the Path to Citizenship consultation document actually quotes research by the Institute for Public Policy Research (IPPR) showing clearly that migrants have a positive influence on public finances. The Commission welcomed the inclusion of this research but raised concerns that the proposal by Government, in fact, discounted it in favour of the unsubstantiated claim that migrants bring with them a transitional pressure on public services. Should Government wish to present evidence of 'transitional pressure', it is difficult to see how this can be blamed on migrants accessing services they are entitled to and paying taxes for. There is a danger, in this regard, that Government is leaving itself open to accusations of scapegoating (non-EEA) migrants for problems that are in fact a product of inadequate and flexible planning by the state in relation to largely EEA-migration.

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<sup>35</sup> *Making Change Stick An introduction to the Immigration and Citizenship Bill* Home Office July 2008 p4 Managing Local Impacts

<sup>36</sup> The Path to Citizenship: next steps in reforming the immigration system, Home Office, February 2008, paragraph 207

<sup>37</sup> The Path to Citizenship: next steps in reforming the immigration system - government response to consultation, Home Office, July 2008 p24



70. The proposal appears to overlook the fact that migrants through payment of exactly the same taxes as citizens are already paying for public services and social protection. An approach expecting that (non-EEA) migrants should pay twice for services they are receiving is out of line with international standards.
71. In relation to migration for employment, the UK is a party to the International Labour Organisation Convention C97. Article 6 of C97 is a non-discrimination clause, in which the state commits to treatment no less favourable than that which it applies to its own nationals for immigrants lawfully within its territory in relation to a number of matters including “employment taxes, dues or contributions payable in respect of the person employed”.<sup>38</sup>
72. A relevant core UN instrument (in relation to migrant workers and their families) is the ICRMW.<sup>39</sup> While the UK is yet to ratify to this instrument, it nevertheless provides authoritative guidance as to international standards. Article 48 states:
1. Without prejudice to applicable double taxation agreements, migrant workers and members of their families shall, in the matter of earnings in the State of employment:
    - (a) Not be liable to taxes, duties or charges of any description higher or more onerous than those imposed on nationals in similar circumstances;
    - (b) Be entitled to deductions or exemptions from taxes of any description and to any tax allowances applicable to nationals in similar circumstances, including tax allowances for dependent members of their families.
  2. States Parties shall endeavour to adopt appropriate measures to avoid double taxation of the earnings and savings of migrant workers and members of their families.
73. In specific reference to social security, a General Comment on the ICESCR, to which the UK is a party states:
- Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able

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<sup>38</sup> Migration for Employment Convention (Revised), 1949.

<sup>39</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly resolution 45/158 of 18 December 1990.

to benefit from that contribution or retrieve their contributions if they leave the country.<sup>40</sup>

74. The UK is a party to the European Social Charter, in relation to migrant workers from other (Council of Europe) member states. Article 19(5) states:

[the state party undertakes] to secure for such workers lawful within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons.

75. Contrary to this position, the proposals, as set out above, entail dual taxation of migrants, including migrant workers, for services. Further, the implication from the proposals is that it is those with the highest number of dependants bringing the greatest pressure. This suggestion can be compared to the 'poll tax' proposals, where families are charged 'per head' for the consumption of public services and where it is the already seriously disadvantaged that are most adversely affected. Dependants and, in particular, children of migrants have their own inalienable rights under the UN Convention on the Rights of the Child: rights that are not dependent on their immigration status or that of their parents or, indeed, on the economic contribution of their parents. The simple fact is that working migrants already pay taxes that are intended to fund public services. Where any transitional pressures are identified, these ought to be funded in exactly the same way that additional pressures emerging from any other large family or vulnerable group of individuals are.

76. In relation to the proposal, Government has indicated that:

...public antipathy to migration can be driven by a perception of unfairness, in that some migrants are perceived to receive more from the state than they contribute – and this can adversely affect community cohesion.<sup>41</sup>

77. The Commission is aware that such perceptions occur within Northern Ireland. For example, until the recent perceptions as to the causes of house price increases were sharply changed by the 'credit crunch', there were a number of instances, including racist attacks, where migrants were being

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<sup>40</sup> General Comment 19, 4 February 2008, UN Economic and Social Council, para 36.

<sup>41</sup> *The Path to Citizenship: next steps in reforming the immigration system - government response to consultation*, Home Office, July 2008, p22.

blamed for rising house prices. The Commission, however, reiterates that, when speaking of perceptions, the appropriate response is to actively challenge them, rather than allowing perceptions to drive policy.

## **ID cards**

78. The Commission's view is that the National Identity Register and linked ID cards unduly infringe the right to privacy under Article 8 of the ECHR. The fact that the different regime set out in the UK Borders Act 2007 (UKBA 2007) only applies to non-EEA nationals engages Article 8 along with Article 14 (non-discrimination).
79. Government intends to repeal the UKBA 2007 under the Full Bill but, in the absence of any indication to the contrary, clearly intends to replicate or even extend its provisions within the same. Measures under "locking down identity" include "one comprehensive power for UKBA to obtain biometrics from classes of individual it needs to".<sup>42</sup>
80. The Commission would like to see the new Act withdrawing the identity cards scheme for non-EEA migrants introduced by the UKBA 2007. The Commission is deeply concerned as regards the general potential of the National Identity Register and its linked ID cards, particularly in Northern Ireland, to exacerbate racial discrimination. This danger is markedly increased by the different NIR Identity Card scheme set out in the UKBA 2007 to the scheme for other UK residents set out in the Identity Cards Act 2006 (the 2006 Act). Without prejudice to our overall opposition to the scheme, the present Bill could remove the directly discriminatory aspects of the ID cards regime by removing UKBA 2007 provisions that are different to the 2006 Act. Such differences include:
  - Children are subjected to the ID cards regime under the UKBA 2007 (The scheme for other UK residents under the 2006 Act is for over 16s).
  - Compulsory Registration: The level of compulsion for registration is absolute in the non-EEA migrants UKBA 2007 scheme.
  - The UKBA 2007 scheme for non-EEA migrants is backed by a severe sanctions regime incorporating civil penalties (fines) and immigration sanctions including an obligation to effectively

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<sup>42</sup> *Making Change Stick: An Introduction to the Immigration and Citizenship Bill*, UK Borders Agency 2008, p8.

leave the country.<sup>43</sup> There is also the sanction of not issuing an ID card. Sanctions apply in relation to compulsion to register,<sup>44</sup> maintain data and use the card in particular circumstances.<sup>45</sup>

- The 2006 Act contains the power to allow the provision of public services to be conditional on identity checks. In the 2006 Act this excludes public services which are provided for free. However, such services are included for those subject to compulsory registration.<sup>46</sup>
- There are protections in the 2006 Act against requirements to produce actual identity cards for matters other than public services or when alternatives are not available. However, the legislation exempts non-EEA migrants and others subject to compulsory registration from these protections.<sup>47</sup>

## Oversight of UK Border Agency in Northern Ireland

81. The Full Bill also proposes to legislate to extend the Office of the Police Ombudsman for Northern Ireland (OPONI) to investigate malpractice by UKBA staff.
82. The Commission strongly supports this and has in the past urged for legislative changes enabling the OPONI to investigate complaints against UKBA staff to be introduced as a matter of urgency. The Commission awaits the proposals and urges that:

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<sup>43</sup> Immigration sanctions are, namely, the 'disregarding' or refusal of an application to enter or stay in the UK, or a variation (curtailment) or cancellation of a person's existing permission to enter or remain in the UK. The basic penalty for initial failure to comply with a primary requirement will be one-quarter of the maximum statutory penalty (currently £1,000). See: *Code of Practice Compulsory Identity Cards for Foreign Nationals*, Home Office consultation document, February 2008.

<sup>44</sup> For persons compelled to register, this can encompass being subjected to interview, photographing, fingerprinting, other biometric information and to "otherwise provide" unspecified "information" required by the Secretary of State (See: Section 7 of the *Identity Cards Act 2006*).

<sup>45</sup> The *Code of Practice Compulsory Identity Cards for Foreign Nationals*, Home Office consultation document, February 2008 references duties to report lost, stolen, altered or damaged cards, when information has become false or misleading or incomplete, and a requirement to "comply with any other requirement specified in the biometric registration regulations" it also references "the requirement to use the card in particular situations" however, these circumstances are not set out in the document; Section 5(1). *UK Borders Act 2007*, provides powers for Ministers to make regulations requiring the use of the ID card for non-EEA migrants, and to disclose personal information for immigration purposes or other "specified" circumstances where a "question arises" about a persons status in relation to nationality or immigration.

<sup>46</sup> *Identity Cards Act 2006*, Section 13(2).

<sup>47</sup> *Ibid*, Section 16(2)(3).

- the powers given to the OPONI should not be inferior to the comparative powers given to the Independent Police Complaints Commission (IPCC) in England and Wales;
- that the OPONI should be properly resourced to carry out the function and should not be expected to redirect its existing resources;
- and that the OPONI powers to investigate complaints should not be restricted to a threshold of serious incidents

In relation to the latter, a broad remit would mean that the OPONI would be in a position to identify potential systemic problems in the way in which BIA staff carry out their duties.

### **Family visitor sponsorship**

83. Government has indicated that the Full Bill will have provisions in relation to sponsoring family visits, namely, to “make sure that sponsors obtain a licence and face sanctions including civil penalties and jail if rules are broken”.<sup>48</sup> These measures were consulted on in the Visitors Consultation Paper of 2006. The Commission questioned the necessity and proportionality for such measures which engage Article 8 of the ECHR (right to family life) and Article 14 of the ECHR (non-discrimination) and raised issues including:

- Opposing any regressive steps that make it more difficult, either through increased cost or requirements, for persons to have contact with their family members.
- Urging a flexible approach whereby visitor categories are not over defined or restrictive to individual circumstances, arguing categorisation of separate visitor visas will create its own problems whereby visitors visit the UK for more than one reason. For example, an applicant who wishes to do tourism in London and who then spends the weekend visiting family in Belfast? If a simpler tourist visa is applied for, will the individual be sanctioned if ‘caught’ also visiting family members?
- In relation to the definition of a family member, in addition to the categories listed in consultation there may be other persons who have genuine family ties. ECHR case law has held establishing such ties are a question of fact and degree and has indicated in particular circumstances foster parents, step parents, adoptive relationships and cohabitantes as constituting family relationships. Clearly there also needs to be cultural competence in decision

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<sup>48</sup> *Making Change Stick: An Introduction to the Immigration and Citizenship Bill*, UK Borders Agency 2008, p8

making on what constitutes close family ties given cultural differences in family groupings.

- Government is proposing to ban any one other than British citizens and those with indefinite leave to remain in the UK from acting as a sponsor for a family visitor. The Commission opposes as both disproportionate and discriminatory any attempt to impose an effective blanket ban on persons of other nationalities on ever receiving a visit from family members whilst temporarily resident in the UK.

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