Introduction

1. This is the response of the Garden Court Chambers Housing Team to the Home Office consultation *Tackling Illegal Immigration in privately rented accommodation* (the consultation).

About us

2. The Housing Team at Garden Court Chambers is one of the largest specialist housing law teams in the country (27 barristers) and has a reputation for excellence in this area. We cover all aspects of housing law including security of tenure, unlawful eviction, homelessness, allocation of social housing, disrepair and housing benefit. We are particularly committed to representing tenants, other occupiers and homeless people.

3. Our work isn't confined to the courtroom. We also spend time training, advising and writing on housing issues. We were the first chambers to serve as a Legal Services Commission Specialist Support Service provider in housing law, and from 2004-2008 we offered specialist support and training under contract direct from the LSC.

4. More information can be found about Garden Court Chambers and all of our barristers at www.gardencourtchambers.co.uk.

Summary of our response

5. The consultation poses a number of questions. We have responded to these below. However at the outset we wish to raise a number of general concerns about the politics behind the consultation.

6. Checks by landlords and landladies would be a new stage in the privatisation of immigration control, a step change from the current system of checks by employers and educational institutions. For the reasons set out below, we consider that had the proposals been thought through adequately they would have been recognised as not workable. Checking immigration status is not a simple task. Individuals and families would be prejudiced as a result of problems with record keeping and delays in the Home Office, the First-tier Tribunal and the Upper Tribunal.

7. We consider that the proposals give rise to a real risk of increased homelessness, including of families, and of exploitation. We consider that the cost to local authorities of having to deal with homelessness persons in this way has not been considered adequately. It is on local authority social services departments that

the cost of housing unlawfully present migrants often falls. No adequate account has given as to how the extra cost will be met by local authorities.

8. We additionally consider that these proposals would add to the possibility of exploitation of tenants and prospective tenants by a small number of rogue landlords. Many migrants lawfully present are ineligible for social housing under Parts 6 and 7 Housing Act 1996 and depend upon finding private rented accommodation. Those who may be unlawfully present, or where there is some confusion as to their status, are even more dependent upon the private rented sector. We are concerned that a minority of private landlords do not comply with existing legal obligations, for example compliance with the Protection from Eviction Act 1977, with the obligation to register tenants' deposits (s.213 Housing Act 2004), with the obligation to provide a name and address for service (s.48 Landlord & Tenant Act 1987) or with repairing obligations.

9. Where a prospective tenant is identified as someone whose immigration status is either unclear or perhaps unlawful, some of those rogue landlords might be only too willing to let properties at higher rents and without compliance with landlords' legal obligations on the basis that the tenant has no choice.

10. We are also concerned that this will lead to an increase in street homelessness, as migrants will be considered ineligible for social housing and homelessness assistance and unable to secure private rented accommodation.

11. We estimate that there will be substantial costs for landlords in complying with these proposals and those costs will be passed onto the tenant or applicant for a tenancy. There is already considerable concern at the level of costs that prospective tenants are required to pay to private landlords and/or lettings agents, see Shelter's survey which found that an average of almost £350 was paid per let[1] and those sums were often not refunded if the tenancy was not granted. These proposals will result in prospective tenants paying substantially higher fees, which are unlikely to be refunded to them.

12. Finally, we believe that these checks will inevitably be operated in a manner which discriminates against the protected characteristics in the Equality Act 2010. We believe that landlords will be more likely to implement checks against people who are not white, or who appear not to speak English as a first language.

13. We are wholly opposed to these proposals.

Consultation question 1: The focus of this policy is to check the immigration status of people who are paying money to live in accommodation as their main or only home. Given this focus, do you think the following forms of accommodation should be included in the landlord checking scheme?

(i) Properties rented out for one or more person(s) to live in as their main or only home (Yes / no / don't know)

[1] http://england.shelter.org.uk/news/june_2013/letting_agency_fees_force_renters_into_debt

(ii) Homes which are not buildings – including caravans and houseboats – if they are rented as the tenants main or only home (Yes / no / don't know)
(iii) Homes which were not built for residential purposes – for example someone renting a disused office as their home, including "property guardians" (Yes / no / don't know)
(iv) Further forms of accommodation not described in the consultation (please specify further forms of accommodation) (Yes / no / don't know)

14. We do not consider that any of the forms of accommodation described in the question (or hinted at in subsection iv) should be included in the checking scheme.

15. We do not consider that there should be a checking scheme. We make points applicable to the types of accommodation in all of categories (i) to (iv) then points on specific proposals.

16. What is proposed is very different to the civil penalty system for employers which is, in its current incarnation, backed by the sponsor licensing system (whether the person subject to immigration control is also sponsored)and in practice the two are interlinked. It is not proposed to licence all private landlords and landladies (the government rejected proposals made by the previous government to have such a register[2]) and the costs and bureaucracy involved in so doing would be prohibitive. But this creates enormous challenges even in communicating with them. Landlords and landladies are no longer permitted to hold deposits other than via bond companies, see the Deposit Protection Scheme and the Housing Act 2004 as amended, but not all of them take deposits. As to those that do, case law on tenancy deposit schemes, where the landlord must place the deposit in an authorised scheme and provide information to a tenant, is instructive as an illustration of the practical difficulties in many cases of making landlords and landladies aware of new regulatory obligations and of ensuring compliance with them[3].

17. Employees and would-be employees have routes of redress if they are treated badly, including if they are victims of discrimination. It is much more difficult to challenge discrimination, victimisation and harassment by a private landlord or landlady under Part 4 of the Equality Act 2010. Private landlords and landladies come in all shapes and sizes and many manage the letting of their property with a minimum of formality. They may be relaxed about matters such as subletting or persons succeeding to the tenancy. According to the Department of Communities and Local Government, in 2010 individual private landlords and landladies had responsibility for 71% of all private rental properties in England[4]. That survey showed that 78% of all landlords and landladies in England had only one rental property.

[2] HC Report, 3 June 2013, col. 1232.

[3] See for example **Ayannuga v Swindells [2012] EWCA Civ 1789, [2013] H.L.R. 9, CA**

[4] *Private Landlords Survey 2010,* Department of Communities and Local Government, October 2011.

18. In 2013 Shelter estimated that some nine million people in England rent[5]. Tenancies are often granted for a short period, typically six to 12 months, and then renewed. Many persons will rent more than one property in the course of a year. Persons with sub-tenancies change perhaps more rapidly.

Risks of breach of equality and race discrimination laws

19. The consultation paper states:

> *34. Many landlords will meet a number of prospective tenants. There is no requirement to check the immigration status of all of them – only the people with whom the landlord actually proceeds. Checks should be performed on a non-discriminatory basis (i.e. without regard to race, religion or other protected characteristics as specified in the Equality Act 201020) on all adults who will be living at the property.*

20. This paragraph perfectly encapsulates the risk that racial profiling will take place before a tenancy is offered.

21. Three thousand pounds is a considerable sum and will cover the cost of many properties standing empty for months. It will cover a considerable amount of repair. In other words, a landlord or landlady would have an incentive not to accept a person who otherwise appears to be a model tenant if there is any risk of having to pay the fine. Any stereotype or prejudice might weigh with a person with multiple offers on the property, not because they feared having a particular individual as a tenant, but because they feared a fine, making the assumption that that person was more likely to be a person under immigration control whose documents would be complicated to check. When will a landlord perceive a risk of a fine? When will a landlady start worrying that a person's passport is false or otherwise unsatisfactory? All too often this is likely to depend on what people look like, what they sound like, what their names are and how those names are spelt, and what place of birth is identified in their passports. People from black and ethnic minorities would be likely to find it more difficult to rent property than the white population. Those with indefinite leave to remain, or permanent residence under European Union law, including those born in the UK, would be likely to find it more difficult to rent property than British citizens.

22. Were the proposals implemented, a landlord or landlady would be aware of the immigration status of their tenants and would know, and hold on file, all information that is contained in their passports or other acceptable documents. Will they keep that information confidential? Or store the documents safely? Or destroy them safely? There are risks to having private citizens hold such data on each other. Insofar as the Home Office is already sharing that information with members of the Credit Industry Fraud Avoidance Scheme (CIFAS) we consider it is likely that it is in breach of European Union law. See below.

[5] See http://england.shelter.org.uk/campaigns/fixing_private_renting (accessed 12 August 2013).

Need for letting agents to register with the Office of the Immigration Services Commissioner

23. If landlords and landladies are companies, or if they do not check the status themselves but contract with a third party company to do this on their behalf then that company will need to ensure that the checks are being done by a solicitor, barrister, legal executive or person registered with the Office of the Immigration Services Commissioner because advice on a person's status will fall within the definition of immigration advice under Part V of the Immigration and Asylum Act 1999. For all save regulated or exempt persons to give such advice is a criminal offence[6].

Effect on the private rented sector

24. We draw attention to comments that have been made by experts about the effect on the private rented sector. In 2012 the Joseph Rowntree Foundation estimated that some 75% of recent migrants in the UK are housed in the private rented sector[7]. Many are in poor quality and overcrowded accommodation.

25. On 3 July 2013 the Residential Landlords Association issued a news release with the results of a survey showing that 82% of landlords and landladies opposed the plans: *Landlords oppose Government's immigration plans*[8] The Chair of the Association, Alan Ward said:

> *The private rented sector is already creaking under the weight of red tape so it is little wonder that landlords are so clearly opposed to this flagship Government measure.*
>
> *"Whilst the RLA fully supports measures to ensure everyone in the UK is legally allowed to be here, this proposal smacks of political posturing rather than a seriously thought through policy.*
>
> *"For a Government committed to reducing the burden of regulation it is ironic that they are now seeking to impose a significant extra burden on landlords making them scapegoats for the UK Border Agency's failings.*

26. The above suggests that the scheme may make small landlords and landladies more reluctant to rent property. This could decrease the availability of rental property which could in turn drive prices up and make it easier for bad landlords and landladies to find tenants for unsafe and insanitary accommodation. Any scheme for

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[6] Immigration and Asylum Act 1999 s 84 read with s 91.

[7] *UK migrants and the private rented sector A policy and practice report from the Housing and Migration Network* John Perry February for the Joseph Rowntree, February 2012.

[8] Available at http://news.rla.org.uk/landlords-oppose-governments-immigration-plans/ (accessed 12 August 2013). The report defines "recent" as having arrived within the last five years.

demanding that landlords and landladies make checks would need to go hand in hand with much greater enforcement that currently occurs of legislation designed to protect people from poor housing, including where accommodation is tied to particular employment. It could concentrate available property in the hands of a smaller number of letting agents, who may have regional or local monopolies. This too could drive prices up.

Particular categories

Main and only home

27. The terms of the question illustrate the complexity of what is proposed. How is "main" home to be defined? If the definition is to be drawn from housing law then there is a vast amount of case law on this and similar phrases from cases under the Rent Act 1977, Housing Act 1985 and Housing Act 1988[9]. It is relevant whether a property is a person's "sole or main residence" in calculating council tax and there is considerable case law on what this means[10]. Under this case law whether a property is a person's main or only home depends on the facts of the individual case. It is extremely difficult for a landlord or landlady to ascertain whether a property is a person's main or only home, particularly when the person asserts that his or her main home is outside the UK.

28. Or is the Home Office to operate its own free-standing definition? This will result in considerable confusion for those landlords and landladies with some familiarity with the other definitions.

Caravans and Houseboats

29. We refer the Home Office to section 1 of the Rating (Caravan and Boats) Act 1996, passed as a consequence of the decision of the Lands Tribunal in *Atkinson (V)) v Foster and others*. This serves as a warning that case law that develops under any penalty regime introduced may have knock-on effects in housing law with consequences for other government departments.

30. If a person rents a caravan and caravans are outside the scheme, and the person spends more time the caravan than in a flat which is within the scheme, will the landlord or landlady of the flat be required to check that person or not? What if the person's "main" home is outside the UK? Will the landlord or landlady be clear

[9] The notes in the Encyclopedia of Housing Law and Practice regarding the test at s.2 Rent Act 1977 (occupies "as his residence") cite at least 26 cases decided in the higher Courts; the notes to the test at Housing Act 1985 and Housing Act 1988 refer to those 26 cases and cite an additional seven. Those are all reported cases decided in the higher Courts. In our daily practice, we regularly appear in the County Court on cases that turn on whether or not a tenant has failed to occupy property as his or her residence or his or her only or principal home.

[10] *City of Bradford Metropolitan Borough Council v Neil Anderton HC* [RA 1991]; *R (on the application of Williams) v Horsham District Council HC* [RVR 2003]. CA [RA 2004]; *Bennett v Copeland Borough Council*, [2003] RVR 296[2003] EWHC 990 (Admin).

about whether they are required to check the person or not? Will the landlord or landlady be required to carry out spot checks?

31. At what point does a stationary caravan turn into a house, or a property originally built as, for example, a public house, chapel or office turn into a house?

Property guardians

32. The question of property guardians is one of considerable complexity in housing law[11].

Further forms of accommodation

33. These appear to include anywhere a person lives that they do not own under an arrangement that involves money changing hands. These are many and various. Is the term confined to buildings? Does the accommodation have to be classed as a property in housing law?

34. Establishing these classificatory systems should not, we suggest, be a top priority for immigration officials.

Consultation question 2: Do you think the following forms of accommodation should be excluded from the landlord checking scheme?

(i) Social housing rented to tenants nominated by local authorities or to households provided accommodation under the homelessness legislation (Yes /no / don't know)
(ii) Privately rented accommodation offered by the local authority to a person to whom a homelessness duty is owed (Yes / no / don't know)
(iii) Sales of homes, including those purchased on a leasehold or shared ownership basis (Yes / no / don't know)
(iv) Accommodation provided by universities and other full-time educational Accommodation provided by employers for their employees (Yes / no / don't know)
(vi) Tourist accommodation such as hotels and guest houses providing short-term accommodation to tourists and business travellers (Yes / no / don't know)
(vii) Short term business and holiday lets (Yes / no / don't know)
(viii) Hostels providing crisis accommodation to homeless and other vulnerable people (Yes / no / don't know)
(ix) Hospital and hospice accommodation for patients (Yes / no / don't know)
(x) Care homes for the elderly (Yes / no / don't know)
(xi) Children's homes and boarding schools (Yes / no / don't know)
(xii) Other forms of accommodation not described above (please specify other forms of accommodation) (Yes / no / don't know)

[11] See '*Who guards the guardians*', Giles Peaker, Journal of Housing Law, January 2013.

35. We do not agree that there should be a checking scheme.

36. We consider that none of the types of property listed above should be part of a checking scheme.

37. The list illustrates the complexity of the scheme. Insofar as any scheme would make it more difficult for British citizens, persons lawfully present and others to find accommodation in the private rented sector, these are the types of alternative accommodation likely to be put under pressure.

38. As to "privately rented accommodation offered by the local authority to a person to whom a homelessness duty is owed", what would happen if it turned out that as a matter of law no duty was owed to the person under the homelessness legislation? Would the landlord be liable for having failed to carry out the check? What happens where the duty is discharged and the person continues to be a tenant of that same privately rented accommodation. Has any consideration *at all* been given to the subtle and various ways in which s 193(5)-(12) of the Housing Act 1996 regulates the cessation of duties owed to homeless persons? If not, why not? In the absence of such consideration this proposal looks administratively unworkable and chaotic.

39. As to "sales of homes, including those purchased on a leasehold or shared ownership basis", is it intended that sellers would have to check the status of those to whom they sold their property? This would be a whole new scheme on top of a scheme to check the status of tenants.

40. As to "Accommodation provided by employers for their employees" save in the case of tied accommodation etc. most such accommodation is provided through a separate private landlord or landlady.

41. As to "tourist accommodation such as hotels and guest houses providing short-term accommodation to tourists and business travellers and "short term business and holiday lets", we are familiar with bed and breakfasts in seaside towns being used to house persons seeking asylum or homeless households because they are cheap. It is not straightforward to designate accommodation as being or not being "tourist accommodation and guest houses".

42. As to "short term business and holiday lets" see the response to question 3 below. It is unclear why both the type and duration of the tenancy are both considered relevant and this appears to introduce further complication.

43. As to "hostels providing crisis accommodation to homeless and other vulnerable people" we anticipate that such accommodation would come under considerable pressure from those unable to rent elsewhere. Shortages in such accommodation would hit hardest the very people for whom it is designed.

44. As to "hospice accommodation for parents" and "care homes for the elderly", what would be intended to happen in a non-commercial arrangement where

a person takes a dying friend or family member into their own home to care for them? Would they be expected to check that person's documents?

Consultation question 3: The Government wishes to exclude tourist accommodation and short-term business and holiday lets from immigration checks because these do not usually represent the person's main or only home. However, the Government considers checks should be made if the person stays there for an extended period of time. After what duration of stay should an immigration check be required?

(i) At the end of one month;
(ii) At the end of two months;
(iii) At the end of three months;
(iv) At the end of four months;
(v) Longer than four months;
(vi) Don't know?

45. None of the above; there should not be checks.

46. The proposal is unworkable. See our comments on "main home" above. Some business lets are a main home; some are not. Some are short term; some are not. A partner or friend of may come to live in the property. A person may take over a business let as their own tenancy. A person may occupy a business let for a very short period, but where the property is nonetheless their main or only home, for example those who move to a new city to work and are looking for a permanent home.

47. The distinction between a holiday let and a let for a place that is a person's main home is not clear cut: some people end up staying in "holiday lets" for very considerable periods, letting out their "main home" or allowing family or friends to live there.

48. Many students would not regard the property they rent as their main home – they may be studying away from their main home, which, for younger (and not so young) students, may be the parental home.

49. What happens when a number of tenants live in the property, arriving and leaving at different times?

50. Either an exception would be made for short term lets, or it would not. If it is, it is likely that the result will be a series of short-term lets as a means of avoiding having to check.

Consultation question 4: The Government is interested to know whether it is appropriate to include lodgers and sub-tenants in the policy. Should the policy apply to:

(i) Owner-occupiers taking in paying lodgers where the lodger is living there as their main or only home (Yes / no / don't know)?

(ii) Tenants of privately rented accommodation taking in lodgers or sub-tenants as their main or only home (Yes / no / don't know)?
(iii) Social housing tenants taking in paying lodgers or sub-tenants where the lodger is living there as their main or only home (Yes / no / don't know)

51. None of the above. See our comments on "main home" above.

52. We anticipate that if this sort of agreement were made subject to the duty to check lodgers or subtenants records this would lead to a large number of these arrangements going undeclared, being hidden and, if discovered, presented as friendly, non-commercial transactions, with the consequent evasion both of tax and of obligations under legislation designed to protect standards of accommodation.

53. The prohibition on discrimination under Part IV of the Equality Act 2010 is very much less robust in the case of "small premises" into which category these arrangements appear to us to fall.

54. Small premises are defined as premises where the person or their relatives reside and intend to continue to reside in another part of the premises and the premises include parts shared with residents who are not members of the first person's household. The premises must include accommodation for at least one other household and be let or available for letting on separate tenancy agreement(s), and not normally sufficient to accommodate more than two other households. The premises are also small if they are not normally sufficient to provide residential accommodation for more than six persons in addition to the first person and their relatives.

55. The prohibition of discrimination, harassment and victimisation under the Equality Act 2010 applies to the characteristic of race in the let of small premises but otherwise it will be lawful to discriminate in the disposal (etc.) of tenancies in small premises. A visa may reveal other things about a person, for example that they are in a civil partnership and thus their sexual orientation. A landlord or landlady in "small premises" could treat people differently on this ground.

56. As to discrimination on the grounds of race, this may be very difficult to prove unless advertisements bar particular nationalities as there are a multitude of reasons that an individual can advance for not sharing their home with another person and the burden of proving that it was not one of the these but the lodger's nationality that led to the refusal of a particular lodger or licensee (or tenant) is a heavy one. A claim against a landlord or landlady for discrimination is brought in the county court but no statistics are available to show how often such cases succeed. We suggest the Home Office obtain and publish information on whether there have been any and/or any successful claims against landlords and landladies of small premises under the Equality Act 2010.

57. Arrangements where an owner occupier takes in a paid lodger are often very informal. The sums of money changing hands can be very low. The arrangements are often at the lower end of the rental market. Lodgers or licensees have less protection from eviction under the Protection from Eviction Act 1977 than those who are sole occupants of property under a formal tenancy. The chances of a

landlord or landlady's taking fright and putting lodgers who are ill-placed to find alternative accommodation onto the street, retaining deposits including money deposited against payment of any possible fine under these measures, are high.

58. An approach that includes sub-tenants would be unworkable. How would responsibility be assigned, and how would it be aligned with having knowledge of, and responsibility for, a person's being in the property? However, an approach that excluded sub-tenants might result in subtenancy becoming the preferred arrangement, with the role of head tenant becoming a specific paid job. Landlords and ladies often impose restrictions on subtenancies; this would encourage them to do the reverse.

Consultation question 5: If the Government does decide to include lodgers and subtenants, then who should be held liable for making the migration checks on the lodger or sub-tenant?

(i) Always the landlord's/owner occupier's responsibility;
(ii) Always the tenant's responsibility;
(iii) Unless they specifically agree otherwise, the landlord;
(iv) Unless they specifically agree otherwise, the tenant;
(v) Don't know?

59. The question reveals why the policy would be unworkable.

60. Were i) and ii) chosen we should anticipate considerable confusion over the strict liability nature of the offence with a likely prevalence of a belief that it is possible to transfer liability by contract.

61. As to options iii) and iv): the landlord or landlady will not always know about a sub-tenancy and may be far away. A sub-tenancy may be of short duration and be informal. How does one distinguish a short-term subtenant from a visitor or someone minding the property when a tenant is on holiday etc.? Relationships between subtenants and tenants vary considerably, some may be very informal and a means of helping out a friend, even though money may change hands to cover bills and out of pocket expenses. Relationships between a subtenant and other tenants may be complex. Where there is more than one tenant in the property, who is responsible for the subtenant? What does 'joint and several liability' mean in this context?

62. We can envisage an elaborate system of written agreements purporting to shift liability growing up, without any real assumption of liability anywhere in the system.

Consultation question 6: If you are a current or prospective tenant or lodger, and you are in the UK legally, would you readily be able to provide one of the forms of documentation that are in the list? (Yes / no / don't know / NA)

63. N/A because we are not current or prospective tenants or lodgers.

64. But we are familiar with dealing with persons under immigration control and are aware of just how complex the documentation is and how difficult it can be to understand. A "UK passport" does not mean that a person is a British citizen. There are many types of UK passport and some people who hold a UK passport are not exempt from immigration control. A naturalisation certificate does not prove that a person has British citizenship. The person may have renounced that citizenship subsequently or have had it taken away. A person with a right of abode certificate is not necessarily a British citizen.

65. Many EEA nationals and non-EEA nationals who are lawfully present are still reliant on leave to remain that is endorsed in passports, e.g. those who applied for indefinite leave to remain before the end of February 2012 when Biometric Residence Permits were introduced for all.

66. The Home Office does not issue letters saying that a person has an outstanding appeal. Communications come from the Tribunals. There are currently very severe delays at the Tribunals. It can take over two months or even longer to receive a Notice of Hearing.

67. Family members of EEA nationals are not required to obtain EEA family member residence cards, etc. The introduction of these checks would force such family members to obtain documents if they wish to rent accommodation and raises questions under European Union law.

68. The proposals do not make any provision for those who have made in-time but invalid applications and then resubmitted them within 28 days as permitted by the Immigration Rules or those who overstay without making an in-time application but fit within the Immigration Rules and the 28-day concessions for overstayers.

69. Getting in touch with the Home Office enquiry services can be time-consuming. They may give different answers at different times. This can be as a result of their understanding of a person's status or because the Home Office database has not been updated, the latter is a problem that can last for considerable periods.

70. A very much larger operation than the employers' checking service would be required. Large numbers of additional staff (or subcontractors) would be needed. They would have to be trained and quality control would be required. The online guidance mentioned at paragraph 54 would have to be drafted. If wrong information were given, there would need to be schemes for redress and compensation. How is all this to be paid for at a time when cuts are being made to government expenditure?

71. It is stated in paragraph 99 of the consultation paper that while landlords and landladies need not check children they may have "to satisfy themselves that the people concerned are children." It is a complicated matter, with potentially grave consequences, to have professional social workers call into question a child's age, as is set out in the Supreme Court decision of **R (A) v Croydon LBC**[12]. To set up a

[12] [2009] UKSC 8, [2009] 1 WLR 2557, SC

scheme where private landlords and landladies are doing so can only run counter to the Home Office's duties under section 55 of the Borders Citizenship and Immigration Act 2009 to safeguard and promote the best interests of a child.

72. Many workers and students secure accommodation before they arrive in the UK. Checks prior to agreeing the tenancy are not possible in these cases. Where a person is confident that a visa will be awarded, or is prepared to take the risk, they may secure accommodation before they have leave. The proposals would make this impossible. While it is suggested in the consultation paper that an agreement could be made conditional upon a satisfactory check on arrival, neither the person letting the property nor the person renting is likely to be enthusiastic about an agreement that could be voided at such a late date. Proposals such as this one do not inspire confidence that the realities of the rental market have been fully understood.

73. We do not understand the meaning of a "Home Office letter of authorisation" for those who do not have leave. Provision needs to be made for those without leave. If an employee becomes an overstayer s/he can stop work. The equivalent in this regime is to become homeless. *Inter alia*, we do not consider that making the children of those here without leave homeless is compatible with the duties of the Home Office under section 55 of the Borders, Citizenship and Immigration Act 2009. Nor has any adequate consideration been given to the result burden on local authority social services departments who often bear the burden and cost of accommodating otherwise homeless unlawfully present migrants.

Consultation question 7: **Are you in receipt of welfare benefits? If so, do you have in your possession a letter that is less than three months old and which evidences your entitlement to benefits that you could show to a landlord? Which benefits does this relate to?**

74. N/A. But we are lawyers accustomed to dealing with tenants and lodgers who are privately renting and in receipt of welfare benefits. It is not infrequent for persons with lawful leave and British citizens leading chaotic lives, including those who have mental health problems, to find it extremely difficult to lay their hands on documents evidencing entitlements. These are people who already find it difficult to secure private rented accommodation.

75. We also question the value of including this question in the consultation as those persons on welfare benefits answering the consultation are, as evidenced by their responding to the consultation, more aware of these matters and more concerned by them than the population as a whole. It is therefore to be anticipated that they are more likely to be able to evidence their status. Any statistical reporting of the answers to this question will need to be adjusted for bias in the sample.

Consultation question 8: **What other evidence have you used to demonstrate your identity for official purposes?**

76. N/a.

Consultation question 9: When the requirement for employers to check employees' migration status was introduced, the Home Office estimated that employers would take on average two hours to familiarise themselves with the new requirements. Do you think the time required for landlords to familiarise themselves with the new requirements would be:

(i) shorter than two hours;
(ii) about two hours;
(iii) longer than two hours;
(iv) don't know?

77. iii) Longer than two hours. The main employers' guidance for the current civil penalty scheme for employers runs to some 89 dense and difficult pages; simply to read it takes very much more than two hours. Currently, the page of the Home Office website dealing with Preventing Illegal Working[13] provides links to some eight separate current documents, totalling some 194 pages. List A of acceptable documents[14] goes on for 12 pages and list B for 11[15]. These lists include combinations of documents that do not prove definitively that a person has the right to work in the UK and fail to cover many situations when a person does have the right to work in the UK.

78. It is not just a question of "familiarisation" – a system of record keeping needs to be set up, anyone helping needs to be educated and questions arise when documentation is not straightforward, as is frequently the case.

79. And immigration law keeps changing; keeping up to speed and understanding the implications of changes are a huge challenge. For landlords and landladies, as for smaller employers and those with a low turnover of staff, it is not a case of familiarising themselves once and then being experts; it is more likely to be something they have to re-learn each time they do it. Our immigration lawyer colleagues tell us that In the last 12 months there have been statements of changes in immigration rules in July 2012 (twice), September, November, December (twice), January, February, March (twice), April and July 2013. These run in total (inclusive of explanatory notes, but exclusive of explanatory memoranda and amended guidance) to some 740 pages. A number were brought in with little or no notice. For example the January changes were published on 30 January and came into force on the 31st. The second December changes were printed on 20 December (the Thursday before the Christmas, with Christmas day falling on the Tuesday) and came into force on New Year's Eve. The first December changes were printed on 12 December and came into force on 13 December amending the rules previously laid which had been

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13 http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/ (accessed 12 August 2013).

14 *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 14. Available at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/preventingillegalworking/currentguidanceandcodes/comprehensiveguidancefeb08.pdf?view=Binary (accessed 12 August 2013).

15 *Full guide for employers on preventing illegal working in the UK*, UK Border Agency May 2013, page 26

due to come into force on that date. The September 2012 changes were printed on 5 September and came into force on 6 September. The second July changes were brought into force "with immediate effect" on 20 July 2013, *inter alia* amending rules laid on 9 July 2013. Even where a longer lead in time was given, rules did not always appear at once on the Home Office website and only those scouring the parliamentary lists of publications were aware that they exited at all.

80. It also takes time for landlords and landladies to familiarise themselves with data protection obligations.

Consultation question 10: When the requirement for employers to check employees' migration status was introduced, the Home Office estimated that employers would on average take 15 minutes to check the migration status of an employee. Do you think the time required for checking the migration status of a tenant would be:

(i) shorter than 15 minutes;
(ii) about 15 minutes;
(iii) longer than 15 minutes;
(iv) don't know?.

81. iii) Longer than 15 minutes. The estimate for employers was an enormous underestimate. One complex case can take many hours. See the response to question 9 above.

82. We understand that it can take more than 15 minutes or more to get through to a Home Office enquiry line, a requirement where a person holds one of a number of types of document. Landlords and landladies with one or two properties may not be used to the same levels of administration and red tape as employers. If they only have a new tenant once every year or two, they are going to need to familiarise themselves with the process all over again every time. This we see in the case of small employers.

83. We highlight the situation of landlords and landladies with a visual impairment. They may be the sole person in charge of letting a property. How will they perform the checks unassisted without incurring additional costs? We anticipate that those costs will be passed onto the tenant.

Consultation question 11: If the landlord or agent undertaking the migration status check has a specific enquiry that needs to be answered by email, what would be the maximum acceptable response period:

(i) one to two working days;
(ii) three to five working days;
(iii) More than five working days but less than two working weeks;
(iv) Two to three working weeks;
(v) Don't know?

84. None of the above. The private rental market is extremely competitive; without an immediate response many landlords and landladies will let to the tenant

whose British passport they can see at once. This may be even more the case for letting agents keen to let the property to the first suitable tenant.

85. Some people will only hold a type of document that has to be verified with the Home Office checking service. The employer's service takes some five days (the service standard is five days[16], we understand that the actual time is longer, 5.3 days). That may already cause delays in a recruitment process and lead to difficulties in managing other applicants for the job, but this is as nothing compared to the problems it is likely to cause in the private rented sector. These people will simply be unable to compete with other prospective tenants for accommodation. It will always be quicker and easier to let to the other tenants.

Consultation question 12: If you are a letting agent, would you be willing to provide a checking service on the prospective tenant's migration status? (Yes / no / Don't know)

86. N/A. But extra costs to those letting property could arise from this proposal. These could be passed onto tenants. Monopolies by letting agents, members of CIFAS, etc. could develop, distorting the housing market and driving up rental costs, whether in particular areas or more broadly.

87. We anticipate that letting agents who express a willingness to provide a checking service have not understood what this would entail. Letting agents would be required to register with the Office of the Immigration Services Commissioner, as described in our response to question 1 above. See also our response to question 9 above.

88. There is already substantial concern at the level of fees charged to prospective tenants, see Shelter's survey and campaign to End Letting Fees[17]. These proposals will add considerably to costs paid by prospective tenants, which are unlikely to be refunded to them.

Consultation question 13: If you are a letting agent who would be prepared to provide a checking service, would you be willing to have liability transferred to you for carrying out the check? (Yes / no / don't know)

89. N/A. But we assume that in a number of cases the answer will be "for a price." That price could result in some properties being taken off the market by landlords and landladies unwilling to pay that price or unable to charge rent that would make it worthwhile to do so and could drive up prices in the private rented sector for all. They may opt for short term or business lets instead if this exempts them from the scheme.

90. Landlords do retain liabilities when they instruct a letting agent. Under the Equality Act 2010, section 109 the principal is vicariously liable for the prohibited

[16] See http://www.ukba.homeoffice.gov.uk/business-sponsors/preventing-illegal-working/support/ecs/ecsstep3/

[17] http://england.shelter.org.uk/news/june_2013/letting_agency_fees_force_renters_into_debt

conduct of their agent. Thus the landlord is liable if the letting agent refuses to let to a particular prospective tenant because of race, sex, sexual orientation, etc. or treats a prospective tenant less favourably, regardless of whether the landlord instructed the letting agent to discriminate or knew that the agent was discriminating. Section 110 of the Act makes the agent liable if they do something which would be prohibited conduct if done by the principal.

Consultation question 14: **If you are a letting agent who would be prepared to provide a checking service and accept liability, would you charge extra to check the migration status of a prospective tenant? (Yes / No / Don't know)**

91. N/A. But see response to question 14 above.

Consultation question 15: If you are a landlord who does not currently use a letting agent, would this policy prompt you to use a letting agent in the future if they agreed to accept the responsibility for checking the migration status of tenants? (Yes / no / don't know/N/A)

92. N/A. But in what sense would the letting agent be "accepting responsibility"? They might carry out the initial check but what would be their relationship with the landlord or landlady in the case of sublets, or visitors or changes to a person's status? In such circumstances what come back if any would the Home Office have against the letting agency which would surely argue that it had acted reasonably, used best efforts, satisfied due diligence requirements etc? Home Office enforcement of employer sanctions has come under considerable scrutiny[18] and we have no doubt that it will be scrutinised to see whether this is enforcement in name only.

93. Would landlords or landladies have to sue a letting agent in negligence to obtain redress if checks were not carried out properly, as would be the case if a lawyer failed to carry out a client's instructions appropriately? What duty of care does the letting agent owe to them? Small landlords and landladies may be put at risk of exorbitant charges.

Consultation question 16: For properties rented out to a corporate tenant (i.e. a company), who should be responsible for making checks on people living in the property?

(i) The landlord;
(ii) The company that rents the property;
(iii) It is up to the landlord and company to agree but, in the absence of explicit agreement, the landlord should be responsible;

[18] UK Border Agency's operations in the North West of England An Inspection of the Civil Penalties Compliance Team – Illegal Working March - April 2010, Chief Inspector 18 November 2010. See also *Inspection of Freight Searching Operations at Juxtaposed Controls in Calais and Coquelles, the report of a pilot inspection contained in the Chief Inspector's 2008-2009 Annual Report.* See also the Home Affairs Select Committee Fourth Report of session 2013-2014, *The Work of the UK Border Agency (October-December 2012),* HC 486 published 13 July 2013.

(iv) It is up to the landlord and company to agree but, in the absence of explicit agreement, the company should be responsible;
(v) Don't know.

94. The question reveals why the policy would be unworkable.

95. A company does not necessarily have control over whether one of its employees invites someone to stay with them in their flat. Whatever the terms of disclaimers and contracts, it would not necessarily know if they did so. A company might be under an obligation to notify the person letting the property; and might try to pass the obligation onto an employee. But in how many cases would this amount to more than a series of written agreements? Pinpointing where fault lay, and making that person responsible for the penalty would be extremely difficult and could give rise to litigation.

96. We consider that it should be open to the parties to a contract to agree the terms of that contract and therefore options iii) or iv) are to be preferred to options i) and ii).

Consultation question 17: If a tenant provides evidence showing they have limited leave to remain in the UK, when is the next time that the landlord or letting agent should be required to repeat the check of their immigration status?

(i) Immediately after their leave to remain expires (however soon after the initial check or far into the future that may be);
(ii) after a year (regardless of when their leave expires);
(iii) after a year or when their leave expires, whichever is later;
(iv) whenever the tenancy is renewed / renegotiated;
(v) don't know.

97. Establishing when a person's leave expires is not always easy. A landlord or landlady may find it difficult to establish at the outset when the prospective tenant's leave is due to expire. A judgement as to when leave is due to expire will constitute immigration advice if provided in the course of a business, whether or not for profit, by a third party. Thus, for example, a letting agent's identifying when leave is due to expire, see the response to question 1 above.

98. Many lets are for a period of six months. It would be oppressive for those letting property and tenants and intrusive for tenants, to require landlords to check documents every six months. How could it be established that a landlord or landlady had not simply taken a pile of photocopies at the beginning of the tenancy and signed one every six months?

Consultation question 18: If you are a landlord or letting agent: assuming that the legislation, enquiry service and guidance are in place by March 2014, what is the earliest date by which you will be ready to undertake checks on new tenants?

(i) April 2014;
(ii) July 2014;

(iii) October 2014;
(iv) January 2015;
(v) later;
vi) don't know.

99. We are not landlords or letting agents.

Consultation question 19: If the Secretary of State issues a notice of liability requiring the recipient to pay a penalty, it is proposed that the recipient should have the opportunity to deny liability and/or claim that one or more of a list of 'statutory excuses' exists, so that a penalty should not be payable. These objections must be considered by the Secretary of State, following which there is a further right of appeal to the courts. Do you think this approach provides sufficient safeguards for landlords and letting agents against a notice of liability issued unfairly? (Yes / no / don't know)

100. This level of generality does not enable an answer to be given to the question.

Consultation question 20: If a landlord or letting agent is found to have an illegal adult migrant as a tenant, they may be subject to a penalty. Do you consider that the following penalty levels (per adult illegal non-EEA migrant) are:

(i) too low;
(ii) about right;
(iii) too high;
(iv) don't know.?

£1,000 per migrant for landlords or letting agents who have not received an advisory letter or notice of liability within the past three years

£3,000 per migrant for landlords or letting agents who have received an advisory letter or notice of liability within the past three years

101. All too high. We consider that the likelihood of a landlord or landlady's failing to make an adequate check is high. We consider that even where they use their best efforts to make an adequate check the likelihood of their getting it wrong are high. We consider that this is in very large measure due to the complexity of immigration law, the plethora of documents to be checked and the inadequacy of Home Office systems. Landlords and landladies should not be penalised for the shortcomings of the Home Office.

102. The person letting the property may have received an advisory letter through no fault of their own. It would be wrong to penalise them for having been unlucky.

103. As described in response to question 1, many landlords and landladies are private individuals, not letting agents. It will be costly to pay a third party to do the checks for them. Costs of checks are likely to be passed on to tenants making it

harder to find accommodation in the private rented sector. Tenants may be required to deposit a sum equal to the maximum possible penalty with a landlord or landlady along with any other deposit required for the property. This would put those put rental properties beyond the reach of some tenants. For many of those who could pay, it would tie up a considerable part of their available capital, and deny them the use of that sum or any interest on it. Tenants and potential tenants should not be penalised for the shortcomings of the Home Office.

Consultation question 21: The Government is considering whether the policy should apply to lodgers and sub-tenants. If it is decided that it should apply to them, the Government is minded to apply lower penalties to those landlords who take into their home up to two lodgers or sub-tenants, if their lodger(s) and sub-tenant(s) are found to be illegal adult migrants. Do you consider the following penalty levels (per adult illegal non-EEA migrant) for such landlords are:

(i) too low;
(ii) about right;
(iii) too high;
(iv) don't know?

£80 per migrant for a landlord who has not received an advisory letter or notice of liability within the past three years

£500 per migrant for a landlord who has received an advisory letter or notice of liability within the past three years

104. Too high. See answer to question 20 above. This applies in the same way to this question. See also the response to question 4 for just some of the reasons not to extend any scheme to these arrangements.

105. In the case of lodgers, licensees or subtenants, these agreements are often for considerably lesser sums then formal tenancies. In many cases there will be no formal paperwork and the landlord or landlady will not be accustomed to keeping records. In this group there are likely to be landlords and landladies who will find it most difficult to comply with any duties imposed.

106. As described in response to question 21, we anticipate that many landlords and landladies would simply demand the sums, perhaps always the higher sum, in addition to any other deposit required.

Consultation question 22: Should local authorities in England and Wales be able to take a person's previous record of complying with this policy into account when deciding whether that person is fit and proper (or competent) to hold a licence for (or manage) a House in Multiple Occupation? (Yes / no / don't know / NA)

107. No. In general we support the notion of linking enforcement regimes. For example, employers exploiting migrant workers may also pay scant regard to health

and safety[19]. However, in this case, because of the fatal shortcomings of the proposed scheme, we consider that the chances of a landlord doing their very best falling foul of the scheme are very high and that this approach would penalise landlords and landladies who are fit and proper persons to run houses in multiple occupation. We should have greater confidence in local authorities making their own checks.

108. The higher the stakes on compliance the more landlords and landladies are likely to take a risk adverse approach and discriminate against migrant tenants, black and ethnic minority tenants and persons, including British citizens, who do not hold a UK passport.

Consultation question 23: Should local authorities in Scotland or the Housing Executive for Northern Ireland be able to take a person's previous record of complying with this policy into account when considering licence applications for a House in Multiple Occupation? (Yes / no / don't know)

109. No. Reasons are as for question 22 above. We should have greater confidence in local authorities and the Housing Executive making their own checks.

Consultation question 24: [To be answered by landlords and letting agents] **Given that you are already subject to the Data Protection Act, does the requirement to check tenants' migration status add substantially to the work you need to do in order to be compliant with the Data Protection Act? (Yes / No / don't know)**

110. We are not landlords or letting agents, But we comment that landlords and landladies', including private individuals who are landlords and landladies, obligations under the Data Protection Act 1998 include:

- to register with the Information Commissioner's Office (ICO) as a data controller; and
- to implement appropriate technical and organisational security measures against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and not to keep personal data for longer than is necessary for the purpose for which it was originally collected.

111. While the proposals will not add any new obligations that do not already exist, the proposals will increase the amount of personal data that landlords and landladies hold about their tenants meaning that it is more likely that a breach will occur.

112. Excessive data collection, where a person has no real option but to hand over their personal data may also breach Article 8 of the European Convention on Human Rights. Landlords and landladies may well find that they violate Article 8

[19] *Hard Work; Hidden lives, the full report of the TUC Commission on vulnerable employment*, 7 May 2008.

ECHR as regards these proposals even though they are not core public authorities for the purposes of the Human Rights Act 1998. It appears that little or no adequate consideration has been given to this risk. Data protection law is vastly more complicated than this consultation appears to grasp, as we have already made clear to the UK Border Agency and the Home Office.

Consultation question 25: [To be answered by landlords and letting agents] On average, how long do you keep records of your past tenants?

(i) Dispose of immediately after the tenant's departure;
(ii) Up to a year;
(iii) Longer than a year;
(iv) Don't know.

113. N/A. We are not landlords or letting agents. But In our experience, "keep records" is a rather grandiose term for what often happens in practice when dealing with small-scale private landlords. A tenancy agreement may be kept while the tenancy is current; it may not always be easy to locate. In the case of lodgers and tenants there may be nothing in writing at all. How long it is retained will very often depend simply on when an individual landlord or landlady is motivated to sort out papers and thinks "I do not need that any more". As a consequence tenants face a greater risk of identity theft and fraud and landlords and landladies of breaching their statutory obligations under the Data Protection Act 1998 and any contractual obligations under the tenancy agreement.

114. If landlords and landladies retain personal data any longer than the specified 12 months the tenant would be entitled to complain to the Information Commissioner's Office that their personal data had been held for longer than is reasonably necessary and legally allowed.

115. As to destruction, what guarantee is there that the landlord or landlady will dispose of documents safely in a way that does not put the tenant at risk of identity fraud?

116. We hope that the Home Office will reconsider these proposals and withdraw them.