

**RESPONSE BY THE JOINT COUNCIL TO THE CALL FOR EVIDENCE BY THE MERITS COMMITTEE ON
THE STATEMENT OF CHANGES TO THE IMMIGRATION RULES HC 59**

1. Joint Council for the Welfare of Immigrants (“JCWI”) is an independent, voluntary organisation working in the field of immigration, asylum and nationality law and policy. Established in 1967, JCWI provides legally aided immigration advice to migrants and actively lobbies and campaigns for changes in immigration and asylum law and practice. Its mission is to promote the welfare of migrants within a human rights framework.

Introduction

2. We welcome the opportunity to submit evidence in relation to this enquiry. This brief submission is structured in the following way. As per the Committee’s call for evidence, in part one we deal with the Government’s assessment of the equality impacts of these measures. In summary, our view is that the Government’s equality impact assessment is flawed and does not comply with basic statutory obligations in relation to discrimination/promotion of equality.
3. As the call for evidence invites submissions on other issues are considered significant, in part two we address the issue of human rights obligations under the European Convention on Human Rights. Specifically the Joint Committee on Human Rights had in the light of past experience recommended that immigration rule changes should be accompanied by a statement of compatibility with obligations under the Human Rights Act. In the case of rule changes of this kind, given that they potentially engage ECHR obligations, the Committee should raise this in any report it produces. In the final part of this submission we address the issue of a review as per the call for evidence. Specifically, we believe that a systematic proper evaluation of the impact of the changes, but also the operation of Points based system more generally from the perspective of equality based considerations should be built into the terms of any review.

A. Statutory duties to promote equality

4. Until such time as the Equality Act 2010 comes into force, existing equality based obligations are found in the Race Relations Act, Sex Discrimination Act and Disability Discrimination Act.
5. Section 71 (1) of the Race Relations Act 1976 imposes an obligation on the UK Border Agency to have '*due regard*' to the need to eliminate unlawful racial discrimination and to *promote* good race relations between different racial groups.
6. Section 76(A) of the Sex Discrimination Act requires that the UK Border Agency has *due regard* to the need amongst other things to: a. eliminate unlawful discrimination and b. *promote* equality of opportunity between men and women.
7. Section 49(A) of the Disability Discrimination Act 1995 requires the UK Border Agency to have *due regard* amongst other things to the need to a. eliminate unlawful discrimination under the Act and b. promote equality of opportunity between disabled persons and others and promote positive attitudes towards them and encourage their participation in public life.
8. All of the above extend to cases of indirect discrimination and are therefore broadly applicable in circumstances where neutral conditions apply but have a disparate impacts.
9. The UK Border Agency is required to publish its Equality Scheme detailing the way in which it complies with its obligations. There is presently a problem with the UKBA archives, and therefore in obtaining a copy of the most recent policy/its review. As we understand it however, the UKBA seeks to comply with the above obligations through the use of equality impact assessments for new policies, and subsequent reviews.
10. There are several observations that are relevant to the UKBA's equality impact assessment in the light of the above:
 - (i) There is no consideration whatsoever of the extent to which the proposals – an increase in pointing for tier 1 (General), a numerical cap for tier 1 (General) applications from outside of the country, and further limitations on the certificate of sponsorship

allocations meet the statutory requirement above in S71(1) RRA 1976 to promote good race relations. This means that the EIA is legally flawed, and so too arguably are the proposed rule changes. Compliance with the relevant obligation would require that s71 obligations are fully considered through the use of statistical evidence and input from migrants, and the 'host community'.

- (ii) There is no consideration of the extent to which the proposed measures would fulfil the aforementioned positive statutory gender and disability duties i.e. the promotion of equal opportunities for women and disabled people, and participation in public life and the promotion of positive attitudes for the disabled people. This means that that the EIA is flawed and the proposed rule changes are arguably unlawful.

- (iii) 'Access difficulties'¹ are arguably not outside of the scope of the EIA in so far as statutory requirements relating to discrimination goes. Neutral requirements applicable to all with disproportionate impacts for certain groups can legally fall foul of all of the above statutory obligations where they are not shown (as is the case here) on the evidence to be justifiable. It is not difficult to see that an increase in the pointing threshold, and a cap may have discriminatory effects for certain groups. The Equality and Human Rights Commission² for example found that tier 1 (when the lower pointing threshold was applicable that 75 points were required for educational qualifications, salaries and age) was generating a low approval rate for those coming from underdeveloped countries (nationality was used as a proxy for race). Its impact was considerably higher for in country applications due to prevailing racial discrimination in the labour market- Bangladeshi and Black African men earn 25% less than their white counterparts, and the treatment by UK employers of qualifications obtained in African and some Asian countries. Equally it is noteworthy that the most extensive users of tier 1 are of Indian and Pakistani origin.³

¹ See Migration Interim Limits (PBS Tier 1 and Tier 2), impact assessment, p.15.

² See Kofman, E, Lukes S, and D'Angelo, A and Montagna, N. (2009) The Equality Implications of Being a Migrant in Britain, Equality and Human Rights Commission, p.24-40.

³ Salt, J (2009) International Migration and the United Kingdom, Report of the United Kingdom SOPEMI Correspondent to the OECD, 2008.

B. Human rights obligations

11. The proposals engage the right to private and family life under Article 8 ECHR given that the new pointing requirements are to apply to tier 1(General) in country applicants.

12. The Joint Committee on Human Rights previously noted the lack of parliamentary scrutiny the immigration rules receive and concluded in the light of previous experiences:

56. We recommend that the Government accept that where a change to the Immigration Rules engages a Convention right ..., it does not have an unfettered power to make changes to the Rules, and that where a change would lead to an interference with a right such as the right to respect for home and family life, the requirement that any such interference be in accordance with the law requires that such changes should be prospective only. We also recommend that changes to the Immigration Rules should always be accompanied by a statement as to the compatibility of the changes with the ECHR.⁴

13. In the light of the very significant and potentially problematic implications that these changes may have for families who are already in the UK through changing the Tier 1 (General) criteria - applicable on extensions, this is something that in our view should at a minimum be sought in this instance. More generally however we should say that we consider this to be problematic as it will lead to applicants who are on the verge of their leave expiring, being required to fulfil new 'retrospective' criteria. This will inevitably mean that some applicants who have reorganised their lives, and relocated to the UK in the expectation that they are likely to be able to remain, will fall foul of these changes.

⁴ JCHR, 20th Report Highly Skilled Migrants: Changes to the Immigration Rules (2006–07), HL Paper 173 HC 993 para. 52-56

C. The need for a review

14. Specifically, we believe that systematic proper evaluation of the impact of the changes, but also the operation of Points based system more generally from the perspective of equality based considerations should be built into the terms of any review. As the Equality and Human Rights Commission noted in its report:⁵

A proper evaluation of the equality implications of the PBS requires systematic analysis of the impact and outcomes of the scheme which has not been undertaken for the various tiers. The Canadian Gender-Based Analysis (GBA), applied by CIC to the Immigration and Refugee Protection Act, may offer one example. Status of Women Canada (2002) defined GBA as:

... a process that assesses the differential impact of proposed and/or existing policies, programmes and legislation on women and men. It makes it possible for policy to be undertaken with an appreciation of gender differences, of the nature of relationships between women and men and of their different social realities, life expectations and economic circumstances. It is a tool for understanding social processes and for responding with informed and equitable options.

It compares how and why women and men are affected by policy issues.

Gender-based analysis challenges the assumption that everyone is affected by policies, programs and legislation in the same way regardless of gender, a notion often referred to as gender neutral policy...

A similar kind of analysis could usefully be applied to understanding the implications of other social relations and differences, and the interactions between them... as for example between gender, nationality and age....

⁵ See Kofman, E, Lukes S, and D'Angelo, A and Montagna, N. (2009) The Equality Implications of Being a Migrant in Britain, Equality and Human Rights Commission, p. 40.