



Law Society
of Scotland

Consultation Response

Immigration and Scotland Inquiry

December 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Immigration and Asylum Sub-committee welcomes the opportunity to consider and respond to the Scottish Affairs Committee of the UK Parliament's Immigration & Scotland Inquiry. This response will rely heavily on the report of Dr Eve Hepburn entitled "[Options for Differentiating the UK's Immigration System](#)" which has been referred to in other evidence to the Scottish Affairs Committee.

Dr Hepburn's report outlines various options for differential immigration arrangements for Scotland; from soft law and policy options which can be introduced within the current devolution framework, to full devolution of immigration law and policy. The report demonstrates the huge variety of options available for reform of the UK's immigration system in order to better meet Scotland's needs.

Each of the proposals in Dr Hepburn's report will be addressed in turn.

Developing Scottish Migrant Integration & Reception Policies

Codifying the services available to and rights of migrants in Scotland would be welcome. It seems likely that the provision of language and orientation classes would assist those migrating to Scotland to familiarise themselves with the country, in particular, asylum seekers who, by definition, have not left their country of origin through choice.

Codification would provide those advising migrants, including solicitors, with an authoritative reference point to determine which services are available and from which providers. However, although many public services are devolved (such as housing, health, education, children's services, and policing), there remains a limit on what can be achieved in this area under current devolution arrangements. For example, conflict could arise between an integration programme aimed at community cohesion and measures designed to help identify those without leave to remain, which require a range of public and private service providers to check the immigration status of potential clients, customers and tenants, and which therefore has the potential to impact on lawfully resident migrants and UK citizens, as well as on service providers.

For instance, encouraging migrants to trust the police and report criminal activities could be seen as contradicting the increased criminalisation of immigration activities introduced by measures such as the

Immigration Act 2016.¹ A simple mistake in an application form can lead to a migrant committing a criminal offence: the system does not distinguish between those who have wilfully ignored immigration law and those who have made a simple mistake. Similarly information on housing, opening a bank account, and accessing free health care would need to be provided within the context of the UK wide legislation limiting access to such services.² Likewise, initiatives aimed at encouraging migrants to stay in Scotland are likely to conflict with the restrictive approach in the Immigration Rules which, in many cases, do not facilitate continued residence where the activity/purpose for which leave was granted comes to an end. Despite the effect on devolved areas of law, where immigration is concerned, the UK Parliament tends to retain control and could pass legislation inconsistent with the Scottish integration policy.³

In summary, developing a Scottish Migrant Integration and Reception policy and codifying existing arrangements would be welcome, however would only be capable of meeting Scotland's demographic and skills needs in a limited way unless such measures were accompanied by amendments to the substantive law.

International Outreach Activities in Immigration

We cannot comment on the merit in expanding international outreach activities, however, as with a Scottish migration policy, doing so may conflict with UK wide legislation on immigration. Advertising Scotland as a welcoming country of destination will be ineffective if, when applicants apply to come to Scotland, they are faced with a restrictive system aimed at reducing net migration. As such, this proposal in isolation would only be capable of responding to Scotland's demographic and skills needs in a limited way.

Increasing Scottish Influence in UK Decision-Making

Increasing Scottish influence in UK decision making could provide an effective means of ensuring that UK immigration policy responds to Scotland's demographic and skills needs. In particular, Scottish representation on the Migration Advisory Committee would be beneficial. Active review of the Scottish Shortage Occupation List would also be welcome to ensure the list genuinely reflects skills shortages in Scotland and can be updated and amended as necessary to meet the needs of the Scottish economy.

The written evidence submitted to the Scottish Affairs Committee by the Rt Hon David Mundell MP on behalf of the Scotland Office and the UK Government suggest that "the Scottish list has broadly matched the wider UK Shortage Occupation List, which in the view of the independent Migration Advisory Committee (MAC), suggests that Scotland's skills needs are largely aligned with the rest of the UK." We

¹ There are a total of 89 immigration related criminal offences, 5 of which were recently introduced by the 2016 Act – see Report of the Migration Observatory entitled "Immigration Offences: Trends in legislation and criminal and civil enforcement" dated 12 October 2016 available [here](#)

² For instance the Immigration Act 2014, the Immigration Act 2016, and the Immigration (Health Charge) Order 2015

³ Calls for a legislative consent motion to be laid before the Scottish Parliament during passage of the Immigration Act 2016 were refused as the UK Government maintained the Bill related to the reserved matter of immigration, despite the impact on devolved areas of law – see article on the Scottish Constitutional Futures Forum by Sarah Craig and Tom Mullen [here](#).

note that there is no Scottish representation on the MAC. As highlighted by the written evidence submitted by the Convention of Scottish Local Authorities (COSLA), the MAC does not always accurately assess Scotland's skills needs (see paragraph 27 to 29 of COSLA's written evidence). We echo this sentiment and would welcome Scottish representation on the MAC as a method of addressing this issue.

It would also be beneficial to develop distinct salary levels for Tier 2 occupations in Scotland. At present Appendix J contains a list of Standard Occupational Classification codes and provides a required salary level for each. These provisions apply throughout the UK. However, for some occupations, the required salary level is difficult to obtain in Scotland. Gross average salaries vary throughout the different regions of the UK and a more nuanced approach, which recognises the different salary levels in the different parts of the UK, would be appropriate. In 2016 gross annual pay in London was £31,476 compared to £22,918 in Scotland.⁴

By way of example, the required annual salary for a "new entrant" trainee solicitor in Appendix J is £24,700. The Law Society of Scotland's recommended salary for a first year trainee solicitor is £18,000 and is £21,500 for a second year trainee solicitor. Whilst some firms may offer a salary above this recommended rate, many do not. A foreign national hoping to enter the Scottish legal profession is likely to face difficulty finding a training contract with a salary of at least £24,700.

Disparate salaries across the constituent parts of the UK is a real issue. If proceeding with this proposal, consideration would need to be given to the risk that introducing lower salaries for jobs in Scotland would condone and encourage the practice of paying staff based in Scotland a salary lower than those based in London, perpetuating and cementing the existing inequality. Further research and consultation may be needed to alleviate such a risk.

Scottish representation on the Migration Advisory Committee and the introduction of a Joint Ministerial Committee on immigration might assist with ensuring that the above points are represented. However, the success of this proposal would depend on the UK Government taking account of Scotland's distinct circumstances in their policy making in this area. If they did, this proposal would allow UK wide immigration policy to respond to Scotland's particular demographic and skills needs.

The need to address disparities between the UK wide immigration system and the different labour and skills shortages in the constituent parts of the UK will become even more pressing after Brexit. It is currently unclear whether the UK Government intends to subject EEA nationals entering the UK after Brexit to the Points Based System or whether a bespoke system will be created to deal with post-Brexit EEA migration. Alternatively, the Points Based System could be replaced with a new system which applies to both EEA and non-EEA nationals.

⁴ See SPICE Financial Scrutiny Unit Briefing, Earnings in Scotland 2016 (available [here](#)) at page 4.

Scottish Sectoral Agreements

Creating bespoke sectoral agreements that target the labour-market needs of specific sectors and industries in Scotland would increase the effectiveness of immigration policy in Scotland. There also appears to be support for the re-introduction of a Post-Study Work visa for Scotland as recognised by the Scottish Parliament's Devolution (Further Powers) Committee in February 2016.⁵ This could be limited to one year in duration and/or linked to the Shortage Occupation List to ensure the system is able to address a particular skills shortage. Under the current rules, students may struggle to find employment with a Tier 2 sponsor which meets all of the requirements of the Immigration Rules before the end of their studies and, where this is the case, are forced to leave Scotland when their studies come to an end.

Having a restriction printed on Biometric Residence Permits that states that individuals may only work in Scotland would be an effective way to address the concern (raised at paragraph 9 of the written evidence submitted by Migration Watch UK) that those granted leave to remain in Scotland on the basis of a Scotland-specific immigration category could relocate to other parts of the UK. The provisions of the Immigration Act 2016 which require employers, banks, and landlords to check the immigration status of employees, customers, and tenants respectively would also alleviate this risk as any breach of a condition requiring the migrant to reside in Scotland would come to light when these checks are conducted.

However, it is important to recognise that the options are not limited to re-introduction of the Post-Study Work visa. Temporary work permits for seasonal migrants could be administered through new sub-categories within Tier 5 of the Points Based System which already allows for certain categories of workers to come to the UK on a temporary basis (such as charity workers, domestic workers, and religious workers). As suggested by Dr Hepburn (at paragraph 264 to 266 of her report), a 'European Talent: Working in Scotland' scheme, following the model of the 'Fresh Talent' scheme, would be another option. As the House of Lords European Union Committee recently highlighted:

“...in the event that the UK Government does not secure a UK-wide agreement that adequately reflects Scotland's specific needs, there is a strong political and economic case for making differentiated arrangements for Scotland.

The Scottish economy has particularly pressing needs, including its reliance on access to EU labour, which is acute in sectors such as health and social care, agriculture, food and drink, and hospitality. We also note Scotland's demographic needs, and its reliance upon EU migration to enable its population (and in particular, that of working age) to grow. Scotland's more sparsely populated regions are disproportionately reliant both on EU migration and EU funding.”⁶

⁵ See 'Welcome to Scotland? A Report on Post-Study Work Visas', Devolution (Further Powers) Committee, SP Paper 915, 2nd Report 2016 (session 4), published 13 February 2016 (available [here](#)).

⁶ "Brexit: devolution", House of Lords European Union Committee, 4th Report of Session 2017-19, HL Paper 9, 19 July 2017, at paragraphs 205 – 206 (available [here](#)).

If bespoke arrangements for EEA migrants were agreed as part of the process of leaving the European Union, clarity about how such differentiated measures would fit with/alongside the existing immigration framework should be included in EU withdrawal legislation.

Bespoke visa schemes for Scotland, combined with expanding international outreach activities in relation to immigration to advertise these new arrangements, would be an effective way of ensuring that immigration policy meets Scotland's needs.

Devolving Administrative Aspects of Immigration

Dr Hepburn's proposal under this heading, in its present form, may be problematic in practice. It is unclear what is meant by a "work permit", what type of applications a Scottish Work Permit Office would actually be processing, and whether they would be empowered to make decisions on behalf of the Secretary of State for the Home Department (which may require further powers to be devolved).

Certificates of Sponsorship for Tier 2 visas are issued by the applicant's employer. Certificates of Acceptance of Studies for Tier 4 student visas are issued by the educational institution. Once a certificate has been issued, applications for the visa are made to the Secretary of State for the Home Department.

It is unclear whether Dr Hepburn's proposal envisages devolution of the process of issuing Tier 2 and Tier 4 licences to employers and educational institutions or whether it envisages devolution of decision making on applications for visas from Tier 2 and Tier 4 migrants.

Paragraph 271 of the report provides an indication of how this proposal may operate in practice:

"Thus, students applying to study at a Scottish University would send the relevant documentation (application, sponsorship agreement) to a Scottish Work Permit office in the first instance. Upon approval by the Scottish Work Permit office, applicants would then apply for a visa"

If it remains necessary to make the application for the visa after processing by the Scottish Work Permit office it is not clear what function this office would be performing. This would not simplify or streamline the process; it would appear to add a further layer of bureaucracy to an already complex system.

If the Scottish Work Permit office is part of the UK Home Office (rather than a department of the Scottish Government) and is therefore able to make decisions on applications, this could work. However, it is not clear how this would reduce decision making timescales, unless suitable local investment and local decision-making autonomy accompanied such measures.

Scottish businesses employing non-EEA nationals are often unhappy with the cost and complexity of the Tier 2 system. Any reforms should be designed to ensure the system is simplified and accessible to members of the public. At present, the rules governing Tier 2 applications are contained within Part 6A, Appendix A, Appendix B, Appendix C, Appendix K, and Appendix J of the immigration rules. The rules regarding application procedure in Part 1 of the rules also apply. The drafting is, at times, dense and

impenetrable leaving certain requirements open to interpretation. Since April 2015, there has been no right of appeal to the First-tier Tribunal (Immigration & Asylum Chamber) against refusal of an application under the Points Based System which has removed an important layer of scrutiny. Previously, the meaning of the rules could be analysed and honed by judges of the Tribunal, resolving inherent ambiguities and providing clarity for applicants and their advisors. Without this right of appeal, ambiguities in the rules remain unresolved. The immigration rules should be clear, intelligible, and accessible. Wholesale reform of the Points Based System may be necessary to achieve this objective. The Law Commission for England and Wales have recognised the need for simplification of the immigration rules by including this objective in their 13th Programme of Law Reform.⁷

Scottish Visa Sponsorship Schemes

The introduction of Scottish visa sponsorship schemes would allow the immigration system to respond to Scotland's distinctive needs. However, the current Points Based System is not designed in such a way so as to allow for regional variations within existing visa categories. More extensive reform would therefore be required than Dr Hepburn's report anticipates.

Under the current points system, the points are essentially irrelevant and, in fact, there is merely a list of requirements for an applicant to meet. If they do not meet the requirements, their application will not be approved. They cannot build up points in another area in order to be successful. For instance, the requirements for entry clearance as a Tier 1 (Investor) are contained in paragraph 245EB of the Immigration Rules. This paragraph lists six requirements for the visa, only one of which refers to an ability to earn a given number of points (in this case 75 points under paragraphs 54 to 65-SD of Appendix A). In accordance with Table 7 in Appendix A an applicant will earn 75 points where they have "...money of his own under his control held in a regulated financial institution and disposable in the UK amounting to not less than £2 million; and has opened an account with a UK regulated bank for the purposes of investing not less than £2 million in the UK." The assignation of 75 points to these two additional requirements is entirely arbitrary; an applicant either will or will not meet the requirements described. All requirements of paragraph 245EB must be met before an application for entry clearance can be granted.

Other categories, such as Tier 2 (General), are more reliant on the accumulation of points. For instance, points are earned for passing the Resident Labour Market Test or benefiting from an exemption from the test (30 points), earning an appropriate salary (20 points), meeting the English language requirement (10 points), and having sufficient funds to cover maintenance (10 points). However, as with Tier 1 (Investor), the points are meaningless as the rules only allow for one method of accumulating the required points. An inability to meet the English language requirement (leading to a deficiency of 10 points) cannot be corrected by earning an additional 10 points in another area (such as earning a higher salary). Furthermore

⁷ <https://www.lawcom.gov.uk/13th-programme-of-law-reform/>

additional requirements are contained in paragraphs 245HB(a), (g), (h), (l) and (q), none of which lead to an award of points however which nonetheless must be met before the application can be granted.

Where there is only one method of earning the required number of points, the points become irrelevant. The system would operate in the same way without the assignation of points for certain requirements.

In light of the above, it would be difficult to incorporate incentives for applying through regional schemes, such as an ability to gain additional points for moving to Scotland or for obtaining sponsorship from the Scottish Government, into the current categories of the Points Based System. The system does not allow for dispensation of certain requirements (such as permitting a lower salary or a lower financial threshold for the maintenance requirement) where other desirable attributes (such as a willingness to work in a certain region) are present. In order to ensure the system was workable, there would need to be separate categories within the Points Based System which apply specifically to Scotland, for instance a Scotland specific Post Study Work visa as discussed in the section on Scottish Sectoral Agreements section above.

Alternatively, there could be alterations to other sections of the rules (which are not concerned with points allocation) to create separate provisions for Scotland. An example of this is the Scottish Shortage Occupation List. In terms of reducing income requirements/monetary thresholds for migrants moving to Scotland, this could be done by introducing a Scotland specific Appendix J (which contains the required salaries for Tier 2 migrants) as outlined in the Scottish Sectoral Agreements section above. However, this approach would not allow for the type of extensive variation envisaged by Dr Hepburn's proposal. In order for this to be achieved, new sub-categories within the Points Based System would need to be created. Alternatively the system could be replaced with an entirely new, simplified, system as mooted above.

Payment of a deposit which is returned if a migrant remains within their allocated region and endorsing Biometric Residence Permits (BRP) with regional restrictions could be effective ways of ensuring any Scotland specific system operates as intended. Requiring migrants to sign a statement confirming they will remain within a certain region and requiring them to confirm their address throughout their stay could also be worthwhile, however may be less effective than a deposit scheme and BRP restrictions.

Dr Hepburn's proposal appears to envisage a system where the Scottish Government would issue certificates of sponsorship which would then enable applicants to apply under one of the Scotland specific categories of the Points Based System. Certificates of Sponsorship are currently allocated to employers who then assign a certificate to a particular applicant. It is unclear how a Scottish Government Certificate of Sponsorship would interact with the existing scheme. Scotland specific sub-categories of the Points Based System could operate without the additional hurdle of obtaining a second certificate of sponsorship from the Scottish Government. It is already necessary for employers to specify a place of work on a Certificate of Sponsorship so distinguishing Scottish certificates from certificates issued for the remainder of the UK would not be problematic. Employers are also required to select a visa category when allocating a Certificate of Sponsorship; this would enable employers to select a Scottish sub-category where appropriate.

Restrictions are placed on the number of Certificates of Sponsorship available for Tier 2 (General) applicants applying from abroad. It is suggested that the Scottish Government could be empowered to decide how many restricted Certificates of Sponsorship to issue each month. This would allow the Scottish Government to have control over the number of Tier 2 migrants coming to Scotland. This would be welcome as when the monthly cap is met, job offers with higher salary levels are given priority and this places Scottish employers at a disadvantage compared to London employers. Given the current suggestion that EU nationals may fall within the scope of the monthly limit once the UK leaves the EU we anticipate that the limit will be exceeded on a more regular basis after 2019, and a separate Scottish allocation would alleviate some potential problems.

A further reason Scotland requires a distinct approach to immigration policy is to reflect the differences in the size of businesses. As at March 2017, 99% of Scottish businesses were Small and Medium sized Enterprises (SMEs).⁸ The Devolution (Further Powers) Committee of the Scottish Parliament's report on Post-Study Work visas, published in February 2016, highlighted that SMEs are often deterred from becoming registered sponsors under the current system (administered through Tier 2 of the Points Based System) due excessive cost and complexity.⁹ This has a disproportionate effect on Scotland.

In summary, creating a system of Scottish sponsorship within the current Points Based System would allow immigration policy to respond to Scotland's specific skills and demographic needs, however it is likely to be difficult to incorporate such a system into the existing categories of the Points Based System due to the nature of the rules, which are not as reliant on accumulation of points as the name suggests. Creating additional categories for Scotland, with their own requirements and points allocation, would be simpler and more desirable. For instance categories such as Tier 1 (Post Study Work – Scotland) could be introduced under Tier 1 and Tier 2 (General – Scotland) could be introduced under Tier 2. This would be similar to the fourth proposal in Dr Hepburn's report: Scottish Sectoral Agreements. In relation to the process of issuing Certificate of Sponsorship to employers, to be allocated to applicants, the current system would not need to be changed significantly in order to accommodate Scotland specific sub-categories within the current Points Based System.

⁸ "Businesses in Scotland 2017", A National Statistic publication for Scotland, at page 5 (available [here](#))

⁹ 'Welcome to Scotland? A Report on Post-Study Work Visas', Devolution (Further Powers) Committee, SP Paper 915, 2nd Report 2016 (session 4), published 13 February 2016, at paragraph 42 to 45 (available [here](#))

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