ILPA response to the invitation to give views on the transparency section of the Home Office business plan (2011-2015)

Introduction

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency, and other 'stakeholder' and advisory groups.

General Observations

The business plan sets out the following premise as regards transparency:

> "*Greater transparency across government is at the heart of our commitment to enable the public to hold politicians and public bodies to account, to reduce the deficit and deliver better value for money in public spending.*"

We accept the premise that greater transparency can produce greater public accountability; and that in turn that this can have a role in delivering better value for money in public expenditure. However, we share the concerns expressed by the Chair of the Public Accounts Committee, the Rt Hon Margaret Hodge MP, that:

> "*...we all welcome the transparency as long as it is meaningful to the user... Just shoving out a whole load of information without having it properly interpreted doesn't actually help or inform at all.*"[1]

Specifically, in relation to the work of what is now the UK Border Agency, ILPA has previously identified the need for greater transparency as set out in the annexes hereto.[2] In so doing, we have highlighted how availability of underlying data and presentation of data is necessary to permit understanding of headline data.

The plan continues:

> "*This section* [on Transparency] *will set out the information that will enable users of public services to choose between providers, and taxpayers to assess the efficiency and productivity of public services, holding them more effectively to account. By publishing a*

[1] Uncorrected transcript of oral evidence of Sir Gus O'Donnell, Cabinet Secretary and Head of the Home Civil Service, and others before the Public Accounts Committee, Wednesday, 19 January 2011, Q82.

[2] For example, see our February 2008 submission to the Review of Border and Immigration Agency Statistics on 'Control of Immigration', to which we referred in our April 2010 response to the Home Office Statistics consultation on the publication of monthly asylum application statistics. Both responses are available in the 'Submissions' section of the ILPA website at www.ilpa.org.uk; and copies are provided with this response along with a copy of our June 2005 submission on immigration statistics.

wide range of indicators, we will enable the public to make up their own minds on how departments are performing..."

The opening statement here is troubling, and it is returned to at the close of this paragraph where reference is made to facilitating choice. It is not clear to us where the notion of users choosing between providers of public services applies in relation to the Home Office, and specifically in relation to the functions or services relevant to the input indicators and impact indicators set out in the plan; more particularly in relation to the UK Border Agency.

Those subject to immigration controls, for example, do not have a choice of dealing with the UK Border Agency or some other agency; and insofar as the UK Border Agency subcontracts some of its functions (e.g. to manage immigration removal centres, or provide accommodation for asylum-seekers), this does not entail any choice to the user. On the face of it, this aspect of the plan does not appear properly to be tailored to, or reflective of, the work and functions of the Home Office.

It follows that it is insufficient to consider transparency as a means to enabling taxpayers to assess the efficiency and productivity of the Home Office, although that is part of what transparency should provide.

Transparency needs to be seen also as a means whereby users, who in the case of the UK Border Agency will include people who are not (although they may become) taxpayers, and those who represent them, are able to assess efficiency and productivity. It ought to be linked to means to hold the Home Office to account.

ILPA's responses to previous consultations concerning statistics[3] relate to this; they indicate types of data or presentation of data that would be of particular use. In relation to our role, e.g. on Government and other advisory groups, we have highlighted the relationship between effective relationships and disclosure of management information:

> "*This vision[4] correctly identifies the value of stakeholders sharing their experience and expertise for the purpose of achieving the best policy solutions and their effective delivery, and improving the general understanding of the key issues. However, this vision is only attainable in circumstances where the dialogue between BIA and stakeholders is informed by detailed statistical data, which:*
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> a. *ensures or facilitates a mutuality of understanding of the effectiveness and effects of BIA policies and practices such that there is a sufficiently informed and shared basis for dialogue; and*
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> b. *enables comparison across related operational centres (e.g. between different BIA regions, between different entry clearance offices), comparison of operations year on year and consideration of processes by reference to cohort-based data that allows specified data-sets to be followed through processes (e.g. the asylum process) identifying outcomes at various stages, reasons for outcomes and speed of progress through processes.*"[5]

The input indicators and impact indicators which the plan suggests are essentially headline indicators. These neither provide an effective overview of the full range of the work and functions of the Home Office (or UK Border Agency) nor adequate explanation or

[3] See fn .1.
[4] The then Border and Immigration Agency published 'shared vision' regarding stakeholder arrangements.
[5] ILPA February 2008 submission to the review of Border and Immigration Agency statistics on 'control of immigration' *op. cit.*

information relating to the particular functions to which the indicators relate. The plan suggests that these indicators will not be the full picture of available data. We note that in his evidence to the Public Accounts Committee, Sir David Normington KCB, Permanent Secretary at the Home Office, made clear that, so far as the UK Border Agency is concerned, more detail will be provided by the operating plans for that agency being placed in the public domain[6]; and that there would be "*more impact indicators for the UK Border Agency than are in the* [Home Office business] *plan*"[7].

Having regard to the foregoing, and what we have said in response to previous consultations to which we have referred[8], we limit our further comments to four matters set out under discrete subheadings below.

Input indicators

Of the five indicators identified in the plan, two relate to the UK Border Agency:

- cost per passenger processed at the UK border
- cost per decision for all permanent and temporary migration applications

Our primary concern in relation to these indicators is that clear explanation needs to be given as to how these are calculated.

Impact indicators

Of the eight indicators identified in the plan, six relate to the UK Border Agency:

- net migration to the UK
- annual level of tax revenue that is protected through detecting goods where excise duty has not been declared
- clearance of passengers at the border within published standards
- percentage of migration applications decided within published standards
- percentage of asylum applications concluded in one year
- passport applications delivered on time

Our primary concerns in relation to these indicators are as follows. Some need a clear explanation as to how these will be calculated – e.g. what is meant by 'concluded' in relation to asylum applications? Some risk giving false indications, and encouraging perverse outcomes, unless equal consideration is given to providing additional data – e.g. indicators that focus on percentage of applications concluded within a specified standard or other target period, cannot safely be considered in isolation from data as to how long those applications not concluded within the relevant period are taking to conclude and how many such applications are at any one time outstanding; and if focus is simply on the stated indicator there is a risk that where the relevant target is missed, the importance of the application is relegated below that of new applications to which the target applies[9]. There are examples of good practice: UKvisas, the international group of the Agency, publishes targets for a certain percentage of cases, but also targets for cases overall.

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[6] Uncorrected transcript of oral evidence of Sir David Normington and others before the Public Accounts Committee, Tuesday, 30 November 2010, Q4-Q6.
[7] Q19 *op. cit.*
[8] See fn 1.
[9] In his February 2010 report *Asylum: Getting the Balance Right? A Thematic Inspection* , the Chief Inspector of the UK Border Agency highlighted concerns regarding performance targets. The Home Affairs Committee stated similar concerns in its Fourth Report of Session 2010-11, *The Work of the UK Border Agency*, HC 587, January 2011. While the relevant concerns in these reports relate to asylum claims, the general concern is no less applicable to non-asylum applications.

A particularly egregious example of perverse outcomes was dealt with by the Court of Appeal in *R(S) v Secretary of State for the Home Department* [2007] EWCA Civ 546. We set out a lengthy extract from the lead judgment of Carnwath LJ in view of the importance of this issue:

> *17. On 1 January 2001 a new factor came into play. A "Public Service Agreement" (PSA) between the Home Office and the Treasury set a target requiring that 60% of applications lodged on or after 1 January 2001 should be decided within 60 days. The evidence as to this is in the statement of Dr McLean, Assistant Director in the Asylum and Appeals Policy Directorate of the Home Office. I will set out the relevant part in full:*
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> > *"Priorities as regards business planning had been set in terms of reducing backlogs of outstanding applications and delivering timely, high quality decisions, rather than in terms of specific groups of cases or types of application, other than those set out in fast track processes. On 1 January 2001 a Public Service Agreement (PSA) target was introduced requiring that 60% of new asylum applications resulted in a decision and service thereof within 61 days of the application being made. New applications were defined as those lodged on or after 1 January 2001 and therefore did not include the asylum application made by Mr. S. (PSA targets are written in HM Treasury's Spending White Paper and are agreements between HMT and Government Departments. They aim to articulate in clear, specific and measurable terms the top level national priorities for the period of the spending review. PSAs are a clear commitment to the public on what they can expect for their money and each agreement sets out explicitly which Minister is accountable for delivering the target underpinning that commitment.) In late 2001 and early 2002 levels of performance were approximately 40%, at which point a number of changes were introduced to increase productivity, including the concentration of case working capacity on new asylum applications the subject of the PSA target so that any case that could not be decided and served by day 61 would be put aside until such time as resources allowed. There were, however, supplementary targets relating to processing times for older cases, but these were subordinate to the objective of meeting the PSA target. (Putting a case "on hold" means not sending the case for interview/decision until such time as instructions are issued by senior managers to begin processing cases.)"*
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> *18. Collins J commented:*
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> > *"Thus the old cases were shelved while the PSA targets were sought to be achieved. It is difficult to see how this could be said to be fair since it clearly worked to the detriment of such as the claimant (and there were no doubt many in his position) whose application had not been dealt with by 1 January 2001. There is a suspicion that those such as the claimant were sacrificed so that it could be said that the Government was meeting a target of dealing with at least 60% of applications within 2 months. And it seemed particularly unfair to him when he saw his cousin and others who had entered at the same time as him with similar claims being granted ELR and subsequently ILR."*
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> *19. I agree, save that I would go further. It is more than suspicion. We must take the frank evidence of Dr McLean at face value, on the assumption that, if there had been any other considerations relevant to the claimant's case, he would have mentioned them. Thus, although he refers to "supplementary targets" for older cases, I deduce from the lack of detail, and his statement that they were "subordinate" to the PSA target, that they have no practical bearing on this case. In my view the only reasonable inference from his evidence is that during 2001 the targets set by the PSA became the determining factor in setting the*

programme. All other considerations, including fairness and consistency in the treatment of individual applicants, were ignored in order to meet the target. "

We acknowledge that the UK Border Agency has stated that it has no intention of making focus on a timescale for concluding asylum cases an overriding or primary target. We understand that several performance indicators have been developed with a view to endeavouring to ensure, at least so far as asylum cases are concerned, the problems highlighted in the *R(S)* case are not repeated; and that such performance indicators are designed to avoid exclusive or overriding focus on e.g. new (as opposed to older) cases or the speed (as opposed to quality) of decision-making. We understand that it is intended to try to develop a more sophisticated approach to performance indicators.

Nonetheless, the choice of the one year conclusion target (or standard) as the high-level measurement, against which the public are invited to assess the efficiency and effectiveness of the UK Border Agency in relation to asylum, is a concern. It risks creating a public focus, and thereby a political focus, on a target that could undermine efforts to ensure a more sophisticated approach. Consideration should be given to whether this is a desirable target at all; we suggest that it is not and that it is a hostage to fortune. At a minimum, there needs to be a political and organisational commitment to the more sophisticated approach; and, to support that, an understanding of how the UK Border Agency and/or Ministers will resist public and political pressure, which may arise, focused the conclusion within one year.

The matters set out under the next subheading are relevant to the question of impact indicators. In particular, the need for the impact of the Home Office and UK Border Agency upon the Ministry of Justice budget is a key matter for which any impact indicator is missing from the plan.

Cross-Government impact

Having considered the business plan and the evidence of Sir David Normington (and others) to the Public Accounts Committee[10], it remains of considerable concern that the plan fails to address significant cross-Government impact. In that evidence session, the Chair, the Rt Hon Margaret Hodge MP, raised the issue of "*where action taken by one Department has an impact elsewhere*"[11]. The short discussion that followed focused on areas where there were shared objectives across Government departments.[12] However, very little consideration was given to where there is a cross-Government impact that does not relate to a shared objective. The closest the oral evidence got to addressing this was:

> "*...if there are financial risks at one Department knocking on to another Department, of course, our spending teams will be picking that up and be working with those Departments to actually resolve those sorts of tensions – hopefully proactively rather than reactively.*"[13]

This is important since the Home Office plan is intended to be one among many. If there is to be transparency, such plans ought not to be considered in isolation. The aim of transparency ought not to be so considered.

ILPA has a particular concern regarding the impact of the Home Office and the UK Border Agency, in relation to legislation, policy and practice, upon the courts, Legal Aid fund and Ministry of Justice budget. We have raised this on a number of occasions with the UK

[10] *Op. cit.*
[11] Q97 *op. cit.*
[12] See Q100 *op. cit.* response of Ian Watmore, Chief Operating Officer, Efficiency and Reform Group, at the Cabinet Office; see also Sir David Normington's response to the same question.
[13] See Q101 *op. cit.* response of Ray Shostak, Director General, Performance Management, HM Treasury.

Border Agency and the Legal Services Commission, highlighting for example the very poor record of the UK Border Agency in undertaking or ensuring any/adequate, Legal Aid Impact Assessments (and indeed other assessments) in relation to its legislative, policy and operational initiatives[14]. We have written to the Minister for Immigration on this subject concerning the UK Border Agency's ongoing asylum review (Asylum Improvement Project)[15]. Most recently we have provided an initial response to the current Ministry of Justice consultation on legal aid[16], where we state:

> "*Tackling the behaviour of Government departments would result in savings not only in cases it is proposed to take out of the scope of legal aid, but in cases that the Government proposes should still receive legal aid funding and also in cases where people already do not receive legal aid but are paying their own legal costs. The savings, which would benefit individuals, could be huge. When this was raised with the Minister at the All Party Parliamentary Group on Legal Aid in December 2010, he noted that all departments are looking to make cuts in their own budgets. However, ILPA is aware of no evidence that suggests that the UK Border Agency is examining how it could take steps that would reduce expenditure in the Ministry of Justice, whether on legal aid or in the courts.*
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> *Moreover, legal aid plays an essential part in ensuring that Government departments spend money wisely, and as parliament intended.*"

This is the sort of consideration that we should expect to be included in a plan appropriately designed to address, and provide transparency in so doing, the matters highlighted in the Prime Minister's May 2010 letter[17] to Government Departments on opening up date, where the Prime Minister writes:

> "*Greater transparency across government is at the heart of our commitment to enable the public to hold politicians and public bodies to account, to reduce the deficit and deliver better value for money in public spending.*"

That statement is reproduced in the Home Office plan. It is simply inadequate that the Home Office plan fails to address such an important aspect of the Home Office cost to public funds. This is all the more concerning since, in relation to Legal Aid, the general impression has been permitted that drivers of cost to both the Home Office/UK Border Agency budget and the Ministry of Justice/Legal Services Commission budget are largely or solely (particularly in relation to the latter) migrants and legal representatives (in the

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[14] In May 2008, this led to a meeting between ILPA, the UK Border Agency, Home Office, Ministry of Justice, Legal Services Commission and Department for Business, Enterprise and Regulatory Reform. This related particularly to the failure by the UK Border Agency/Home Office to undertake any meaningful or effective regulatory, including Legal Aid, impact assessment in relation to the introduction of Statement of Changes in Immigration Rules HC 321, despite obvious and profound impacts related to those changes, which introduced mandatory re-entry bans such that many migrants would face long-term exclusion from the UK if they elected to leave the UK or were forcibly removed from the UK. As ILPA pointed out after the event (since there was no notice or consultation prior to HC 321), this introduction substantial disincentive for many migrants to make a voluntary departure, or seek to regularise their immigration status; and a corresponding substantial incentive for such migrants to 'go to ground' or to pursue claims, appeals and judicial review applications in the UK, including in circumstances where previously ILPA members had advised and assisted with returns to countries of origin to make applications for entry to the UK under the Immigration Rules. This meeting has not, however, led to any significant improvement.

[15] ILPA wrote to Damian Green MP, Minister for Immigration, on 4 August 2010. A copy can be made available if desired.

[16] Our initial response remains available in the 'Submissions' section of the ILPA website at www.ilpa.org.uk/submissions.menu.html

[17] See http://www.number10.gov.uk/news/statements-and-articles/2010/05/letter-to-government-departments-on-opening-up-data-51204

terminology of the plan – 'users') whereas the former has for many years added considerably to the costs of the latter (and indeed to its own costs) by failing meaningfully or effectively to address such matters as:

- the need for the Home Office/UK Border Agency to consider whether it is appropriate to bring in new laws or procedures, especially in haste, with provisions drafted in haste and the worse for that
- the quality of UK Border Agency decision-making
- the conduct of the Home Office/UK Border Agency as a litigant

A plan (and input indicators and impact indicators), which fails to address such issues, will not meet the aim of transparency since it disguises the real cost and causes of cost to public funds.

Of course, it is not only in connection with the Ministry of Justice that relevant cross-Government impact arises. For example, we have recently written to the UK Border Agency, HM Revenue & Customs and Department for Work and Pensions concerning recourse to public funds for those subject to immigration control[18].

The Archive and access to information

A key element of transparency is that an Agency is able to identify what its policy was at any given time and that those using its information are able quickly and easily to ascertain what has changed, and when. This is particularly the case when a matter may arise at an appeal hearing, years after the event.

This is a big problem in the UK Border Agency. We recall the comments of Lord Justice Longmore:

> *"I am left perplexed and concerned how any individual whom the Rules affect (especially perhaps a student, like Mr A, who is seeking a variation of his leave to remain in the United Kingdom) can discover what the policy of the Secretary of State actually is at any particular time if it necessitates a trawl through Hansard or formal Home Office correspondence as well as through the comparatively complex Rules themselves. It seems that it is only with expensive legal assistance, funded by the taxpayer, that justice can be done". AA(Nigeria) v SSHD* [2010] EWCA Civ 773, Court of Appeal, Lord Justice Longmore at para 87.

ILPA has long pressed the UK Border Agency to establish an archive, and indeed a publicly facing archive of its guidance. On 15 September 2005 Stephen Murray, Guidance Project Manager in the UK Border Agency, wrote a letter to ILPA, stated to be written at the request of then Chief Executive f the UK Border Agency, which stated:

> *"...we are working to establish a central repository for caseworking and operational instructions. This will include a sophisticated archiving facility which will be accessible to all IND staff. As you will appreciate this is a major undertaking and, on current plans, we do not expect to have the archive in place until the end of 2006. However, once it is established we will be happy to consider whether elements could be shared via the IND website."*

On 1 April 2008, David Willis of the UK Border Agency wrote to ILPA that the Agency aimed

[18] ILPA letter to Jonathan Sedgwick, Deputy Director, UK Border Agency and others, 23 November 2010.

> *"...to create a central repository of archived guidance and we currently plan to do this by amending the requirements set out in the guidance framework. I will keep you informed of the progress on this."*

There are many other examples of ILPA's raising the matter in the minutes of stakeholder meetings. The lack of such an archive frequently causes delay in court cases, and increases the costs to the Legal Services Commission or paying clients. It may also lead to injustice, where the case turns on an old policy and that policy cannot be found. We recall the Minister of State, Liam Byrne MP's comments to the Public Bill Committee considering the UK Borders Bill on 6 March 2007 (Morning session, col 152), made in the context of discussions on guidance on the exercise of immigration officers' powers:

> *'The points with which I have particular sympathy are twofold. First, it is essential that operational guidance is in place, that immigration officers understand the role that they are expected to play and that the public can see what kind of guidance we are putting in place. Secondly, it is important that that operational guidance is discussed at length with stakeholders in order to get what is often very valuable advice from organisations such as the Immigration Law Practitioners' Association…I am delighted to say that that stakeholder group includes ILPA. As the hon. Member for Ashford said, that organisation is in daily, if not hourly contact with many of the consequences of the immigration system. Its advice is often extremely helpful and we are grateful for it.*
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> *Therefore, the guidance that we draw up, on the basis of that consultation with stakeholders, is and must be publicly available. It is vital that it be subject to public scrutiny and to the degree of transparency to which I alluded earlier. '*

The Rt Hon John Reid MP, when he was Home Secretary, also drew attention to these problems. In his Written Ministerial Statement of 23 May 2005 statement to parliament on foreign national prisoners (*Hansard* HC, 23 May 2005 col 79WS) he stated

> *'...the criteria governing which individuals should be considered for deportation appear to have been varied over time on authority which is unclear. They have then not been consistently applied. For example, the derivation of the inclusion of those convicted of three or more offences over a five-year period in the criteria, as set out by my predecessor on3 May, is unclear. I have ordered the policy officials to audit trail all policy criteria and the process by which they ensure that guidance is both clear and consistently applied.'*

Work remains ongoing but there is much to do and there is no public archive of older policies, save insofar as one can identify snapshots on the National Archives website. Meanwhile new difficulties are emerging, for example:

- Guidance on applications under the Points-Based System has not been gathered in one central place in the 'Policy and Guidance' but is scattered across the website. All too frequently the only way to find this guidance is by trawling the news releases pages of the website, but this involves trawling through a large number of more ephemeral (we chose our words with care) news releases.
- The Entry Clearance Guidance and Instructions have an index but no table of contents and it is difficult to identify particular instructions in them. A similar problem is emerging with the Agency's modernised guidance.
- Version numbers and dates are not always clearly recorded on guidance despite efforts that have been made to standardise this.

An indicator on the keeping of accurate records could usefully form part of the transparency part of the business plan.

Personal data

The business plan sets out a short information strategy which takes as its premise:

> "*The Transparency Programme fundamentally changes the way in which we consider the data we hold – it is no longer 'our data' but should be viewed as 'public data' which we as a department hold and maintain for all. As such data will be made available for all, with certain exemptions on grounds of personal privacy and national security: there is a presumption in favour of transparency and opening up government data.*"

We accept that such a premise is in accord with the general premise regarding transparency, to which we have referred above. However, it highlights wider concerns regarding data, in particular that the Home Office, like other Government departments and public bodies, should be scrupulous to ensure that only such data as is necessary for, and proportionate to, the carrying out of legitimate functions is collected, and that its use and storage is similarly limited. In accordance with such aims, legislative powers to take, use, store and pass on data must provide for clearly defined and limited purposes and circumstances in which such data may be taken, used, stored or passed on. This would accord with wider concerns regarding transparency, accountability and proportionality of Government intervention, as expressed for example in the Full Coalition Agreement of May 2010 in relation to civil liberties where the following was stated:

> "*We will be strong in defence of freedom. The Government believes that the British state has become too authoritarian, and that over the past decade it has abused and eroded fundamental human freedoms and historic civil liberties. We need to restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness.*"

ILPA
31 January 2011