ILPA RESPONSE to Consultation on the OISC's Code of Standards and Complaints Scheme

The Immigration Law Practitioners' Association (ILPA) is a professional membership association, the majority of whose members 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 consultative and advisory groups.

Impact Assessment

ILPA urges the OISC to ensure that an impact assessment is carried out prior to the implementation of any changes and looks forward to reviewing such an assessment when it is available.

Proposed Amendments to the Code of Standards:

Question 1:

Code 3 currently reads –

> *3. Within this Code 'adviser' means both an organisation or an individual providing immigration advice or immigration services in the course of business, whether or not for profit, within the UK, and includes a sole practitioner.*

This Commissioner proposes to amend this to read as follows:

> *3. Within this Code the word "organisation" means both a firm and an individual providing immigration advice or immigration services in the course of business, whether or not for profit, within the UK. This includes a sole practitioner.*

This Code's current wording is taken from section 82 of The Immigration and Asylum Act 1999 (the Act). In practice, the Commissioner has always regulated organisations and not individuals, acknowledging advice giving organisations as corporate identities separate from the individuals that run them. The proposed amendment makes the language in this Code more in keeping with this.

It remains important, however, for advisers to appreciate that, whether operating within a large company or alone, the Code refers to them and applies in its entirety[1].

The proposed amendment will also affect Codes 4-7; 9-17; 19-24; 29-38; 40-44; 48-50; 52; 54-55; 58-62; 65-68; 71-74; 78-84; 88; 90-95. Should the amendment be made, then the word "adviser" will be replaced by the word

[1] see Schedule 5, paragraph 3(3) of the Act

"organisation" in all of the above Codes. This amendment also is relevant to Questions 2 and 3 in this consultation.

Response to Question 1:

Do you agree with the change? SEE BELOW

Further comments:

We have been told that that this change has been proposed because of the outcome of cases before the Immigration Services Tribunal and because the Commissioner's powers have been held to be insufficient to stop an organisation, including an exempt organisation, from continuing to operate and having power only to stop an individual from continuing to advise or provide services. If this is indeed the thinking behind the change, it is not possible to discern from the explanation in the consultation paper. From the paper alone we were wholly confused as to the reason for these changes. We support the notion that the OISC should have power to stop both an organisation and an individual from continuing to provide immigration advice and services.

The drafting is unfortunate and requires further work. Organisation does not mean individual and to deem it to do so is clumsy. It is also unclear why the word "firm" has been substituted for "organisation" in the definition as opposed to added next to organisation. In the legal world, firm is the term normally used of a partnership as opposed to any other structure.

Question 2:

The terms "reckless" and "recklessly" are used in the criminal law to indicate when a person is aware of the potentially adverse consequences of their actions, but nevertheless proceeds. As Codes 13 (d) and 20 already include advisers acting "knowingly" or "negligently", the Commissioner feels the inclusion of the words "reckless" and "recklessly" to be unnecessary and proposes to delete these from those Codes. Their proposed replacement Codes are given below.

Current Codes 13 (d) and 20

> *13. An adviser must act in accordance with the laws of the UK.*
> *An adviser must at all times:*
> *(d) not knowingly, recklessly or negligently mislead those mentioned at (a) to (c) above, nor knowingly, recklessly or negligently permit themselves to be used in any deception;*
>
> *20. An adviser must not act in a reckless or negligent manner.*

The Commissioner proposes to amend these Codes to read as follows:

> *13. An adviser must act in accordance with the laws of the UK.*
> *An adviser must at all times:*
> *(d) not knowingly or negligently mislead those mentioned at (a) to (c) above, nor knowingly, recklessly or negligently permit themselves to be used in any deception;*
>
> *20. An adviser must not act in a negligent manner.*

Response to Question 2:

Do you agree with the change? NO

Further comments:

We disagree with the change. It appears to take as its starting point that all instances of recklessness are subsumed under either acting knowingly or negligently. No so. This is a matter of settled law.

There is a difference between my knowingly misleading you and my being reckless as to whether I mislead you or not. As to negligence, negligence in English law is inadvertent whereas recklessness is advertent. Reckless conduct should be covered and thus the word reckless should remain.

Consultation 3:

The current wording of Code 13 has led to an element of confusion as it has been argued that the requirement to "act in accordance with the laws of the UK" means that Code 13 only applies to immigration and asylum law. The Commissioner's duty under the Act clearly extends to the observance of all UK laws and not just those relating to immigration and asylum, and it is important that this is clear in the Code.

Code 13 currently reads:

13. An adviser must act in accordance with the laws of the UK.
An adviser must at all times:
(a) show due respect, politeness and courtesy to their client, the Asylum and Immigration Tribunal and the Commissioner;
(b) act objectively and fairly with respect to the client;
(c) be prepared to provide – e.g. to a member of staff of the Asylum and Immigration Tribunal, immigration judge or government immigration and nationality staff, including those at posts abroad – identification and confirmation of their authorisation by the OISC to provide immigration advice or immigration services under the Act at the authorised level;
(d) not knowingly, recklessly or negligently mislead those mentioned at (a) to (c) above, nor knowingly, recklessly or negligently permit themselves to be used in any deception;
(e) not seek to abuse any procedure operating in the UK in connection with immigration or asylum, including any appellate or other judicial procedure; and
(f) not advise any person to do something which would amount to such abuse.

The Commissioner proposes to amend the Code to read as follows:

13(a) An adviser must act in accordance with the laws of the UK.

(b)An adviser must at all times:

i. *show due respect, politeness and courtesy to their client, the Tribunal Service(Immigration and Asylum Chamber)and the Commissioner;*
ii. *act objectively and fairly with respect to the client;*
iii. *be prepared to provide – e.g. to a member of staff of the Tribunal Service (Immigration and Asylum Chamber), immigration judge or government immigration and nationality staff, including those at posts abroad – identification and confirmation of their authorisation by the OISC to provide immigration advice or immigration services under the Act at the authorised level;*
iv. *not mislead those mentioned at (i) to (iii) above, nor permit themselves to be used in any deception;*
v. *not seek to abuse any procedure operating in the UK in connection with immigration or asylum, including any appellate or other judicial procedure; and*
vi. *not advise any person to do something which would amount to such abuse.*

The Commissioner has also taken the opportunity of this consultation to make reference in this Code to the Tribunal Service (Immigration and Asylum Chamber)

Response to Question 3:

Do you agree with the change? SEE BELOW

Further comments:

We are at a loss to understand the problem or the solution.

We do not understand where the ambiguity lies in the original formulation.

We do not understand how splitting this paragraph into subsections (a) and (b) achieves the change claimed and resolves any ambiguity.

We can see no objection to the split and (a) and (b) numbering *per se*.

Question 4:

With the development of different business models, including people working in remote locations, the Commissioner believes that the current Code 27(a) needs updating as a supervisor may not be physically co-located with the person they are supervising. Notwithstanding this, it remains important that a supervisor is accessible to those they are supervising.

The current Code reads as follows:

Code 27 (a) requires that:

27. A supervisor must:
(a) be co-located with the person being supervised by them and readily accessible to them;

The Commissioner proposes to amend Code 27(a) to read as follows:

A supervisor must:
(a) work for the same organisation as the person being supervised by them and be readily accessible to them;

Response to Question 4:

Do you agree with the change? NO

Please explain below what you think will be the impact (costs or benefits) of this proposal?

An organisation seeking to provide the highest standards of supervision will wish to co-locate the supervisor and persons supervised. A supervisor who is in the same location as persons supervised can see and oversee what those being supervised are doing and also be approached directly with requests for support. Colocation is not a sufficient condition for adequate supervision, but we consider it to be a necessary one. Persons may spend some time working off –site, but the underlying arrangement will be that their place of work is one collocated with their supervisor.

An organisation not seeking to provide the highest standards of supervision will find it easier to cut corners by isolating supervisors from those supervised. We also consider that it is likely to be more difficult to demonstrate that the supervisor knew or ought to have known or poor practice if they are not located in the same place as those supervised.

Thus the proposal fails to support best practice and makes it harder to eradicate poor practice.

Question 5:

Codes 45 and 46 prohibiting the payment of referral fees are not in line with either the Solicitors Regulation Authority's (SRA)[2] or that of the Chartered Institute of Legal Executives' (CILEX)[3] regulations, which currently allow such fees to be paid. In contrast, the Bar Standards Board (BSB) has recently reviewed the payment and acceptance of referral fees and has decided to retain its prohibition of them[4]. The Commissioner is also aware that the SRA is presently discussing reversing its position on referral fees because of the dangers these fees may have for vulnerable consumers.

Codes 45 and 46 currently read as follows:

45. A regulated person must not demand or accept from any person a fee, commission or any other compensation for referring or recommending a client.

46. A regulated person must not offer or accept an inducement for taking on a client or offer such for referring a client to another person.

Taking into account the approach of the other legal regulatory bodies, the Commissioner is inviting comment on whether these Codes should be relaxed completely to allow referral fees to be paid generally or to some extent under certain conditions.

Such a relaxation all or in part would be in line with the Regulators' Compliance Code's[5] requirement that "[R]egulators should consider the impact that their regulatory interventions may have on economic progress, including through consideration of the costs, effectiveness and perceptions of fairness of regulation". However, against this is the need to ensure adequate consumer protection.

When these Codes were introduced in 2000, there were credible reports of interpreters and others using undue influence when referring applicants on their arrival in the UK to advisers who would pay a fee to them as a result. This situation was made even more serious by the fact that, in many instances, the clients were confused, vulnerable and largely ignorant of the UK's immigration and asylum system. Consumer protection remains a concern as it is possible that, if the prohibition on the payment of referral fees was abolished all or in part, client choice might be reduced with referrals being made more because of the attraction of receiving a referral fee rather than it being in the best interests of the client.

The Commissioner welcomes views on this issue, and whether these Codes should be retained, abolished or amended to allow the payment and acceptance of referral fees to a greater or lesser extent, and, if such payments should be allowed, in what circumstances.
Options include:

1. Do nothing

2. Insert a new Code 45 to read as follows:

   An organisation must ensure that no financial arrangements they have in place will affect the independence of their advice or ability to act impartially. This includes any introduction or referral arrangements.

3. Allowing referral fees, but ensuring full disclosure to the client that such an arrangement exists and that the organisation referring and the organisation receiving the referral are both acting in the client's best interests. Suggested Codes reflecting the above are given below

   45. Organisations must ensure that any client whose case is to be the subject of a referral t is made fully aware of any financial arrangements they have with any organisation they recommend,

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[2] http://www.sra.org.uk/solicitors/handbook/code/part3/rule9/content.page
[3] http://www.ilex.org.uk/pdf/IPS%20Code%20of%20Conduct%20May%2010%20final.pdf
[4] http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-ii-practising-requirements/
[5] http://www.bis.gov.uk/files/file45019.pdf

whether or not regulated by the OISC, and that the client is given sufficient time to reflect upon this information before being asked to give their consent to the referral.

46. The decision to refer a client to a particular organisation or to receive a referral from a particular organisation must be in line with Code 9 (an adviser must act in their client's best interests and before their own) and Codes 15 and 16 relating to conflicts of interest. Organisations must be able to demonstrate that the client was provided with options in relation to the referral and was able to make an informed choice.

4. Complete abolition of Codes 45 and 46.

Response to Question 5:

Do you agree that a change is required? NO

What factors, such as informed consent and client vulnerability, do you think should be taken into account when considering changing the prohibition on referral fees?

The ban on referral fees should be maintained.

The consultation has been somewhat overtaken by events, in particular sections 56 to 60 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 and the debates that led to their passage. While they do not directly affect the OISC, as they are concerned with personal injury cases we consider that they are evidence that the tide is turning against referral fees. The Solicitors Regulation Authority is in mid-consultation and it would be very strange for the OISC to change its rules to align its position with the Solicitors' Regulation Authority when the Solicitors' Regulation Authority is reviewing its position.

The OISC is dealing solely with those who advise, represent and provide services to persons under immigration control. Their client group will include a high proportion of persons unfamiliar with UK systems, without extensive networks in the UK, without English as a first language. Many will come to their legal representatives through intermediaries. Those intermediaries should be disinterested.

We recall the Bar Standard's Board's summary of its position in its February 2010 *Response to the Legal Services Board Consumer Panel Investigation into Referral Arrangements:*

*"**Summary Position:***

1. *The BSB remains against the use of referral fees, either in cash or as a benefit in kind, and wishes to maintain their prohibition for the Bar and encourage their prohibition for other lawyers too.*

2. *The BSB regards the use of referral fees as against the public interest and, in particular, the consumer interest.*

3. *The BSB views the use of referral fees as compromising the independence of lawyers.*

4. *The BSB views the use of referral fees as at best a distraction and at worst an obstacle to lawyers" professional and ethical obligation to act in the best interests of the client.*

5. *Where referral fees are currently permitted, the BSB deprecates the lack of actual transparency in their use, where clients are not usually aware they are a factor in the legal representation they receive.*

6. The BSB believes that the incidence of referral fees in the legal services market is a distortion of competition in that market.

7. The BSB believes that the incidence of referral fees in the legal services market leads to an overall increase in the cost of legal services."

The Faculty of Advocates in Scotland takes a similar approach, with its guide to the Professional Conduct of Advocates stating

> *"9.12 Referral Fees.*
> *Counsel may not enter into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work, or for recommending or introducing counsel to the client or an instructing agent."*

The Bar of England and Wales and the Faculty of Advocates have histories that go back to the 13th century and professional standards and codes of ethics that have developed over centuries. They are well placed through their history and traditions to resist the effect of referral fees in "compromising the independence of lawyers" and being "at best a distraction and at worst an obstacle to lawyers' professional and ethical obligations." Despite all this they consider that they would be ill-advised to take the risk.

The Solicitors Regulation Authority said in its *Proposed ban on referral fees in personal injury cases Discussion paper* of 12 June 2012:

> *"27. Experience of referral arrangements before the ban was lifted in 2004 was that some people and businesses would go to great lengths to justify their arrangements and a considerable amount of investigation was needed to get to the bottom of them. There may be attempts to "get round" the ban as well as cases where it is unclear whether or not there is a breach"*

This note of caution should be heeded by a regulator with limited resources.

The consultation paper uses the past tense in its

> *"When these Codes were introduced in 2000, there were credible reports of interpreters and others using undue influence when referring applicants on their arrival in the UK to advisers who would pay a fee to them as a result. This situation was made even more serious by the fact that, in many instances, the clients were confused, vulnerable and largely ignorant of the UK's immigration and asylum system."*

Despite the use of the past tense, the consultation paper does not suggest that anything has changed. We are unaware of any evidence that the situation has changed.

Do you prefer any of the options given above, and, if so, which one?

Option 1.

If you agree that a change is required, but you do not like any of the options listed, please provide wording that you think may be more appropriate.

Please explain below what you think will be the impact (costs or benefits) of these options?

Please see above. The introduction of referral fees risks the exploitation of migrants, refugees and their family members, distortion of the market as far as regulated immigration advisors are concerned, persons going to legal advisors who are not the best for their case and a burden on the OISC's resources as a regulator.

Please explain below what you think the scale of referrals might be if the codes were abolished in whole or in part?

This requires assessment by the OISC in an impact assessment. We should be happy to comment on such an assessment once it has been prepared.

Do you think there are any risks associated with any of the above options?

See above. Options 2 to 4 are fraught with risks difficult to manage or mitigate.

Amendment to the Complaints Scheme

Question 6:

Since 1st November 2011, the Complaints Scheme has not required the burden of proof to be the criminal standard[6]. Considering this, the reference to that standard in paragraph 30 has been deleted.

The Commissioner now proposes to change the wording in the final sentence of paragraph 30 from "**will**" invite to "**may**" invite to make it absolutely clear that this invitation is entirely at her discretion.

Paragraph 30 of the Complaints Scheme currently reads:

> *Having had sight of available evidence, and noting the nature of the alleged breach or breaches are such that require the criminal standard of proof - i.e. beyond reasonable doubt - the Commissioner may provide the person complained of a reasonable opportunity to make oral representations. In such circumstances, the Commissioner will invite the respondent to make oral representations in respect of the complaint or part of a complaint.*

The Commissioner proposes to amend the paragraph to read as follows:

> *Having had sight of available evidence, and noting the nature of the alleged breach or breaches, including allegations of criminal behaviour, the Commissioner may provide the person complained of a reasonable opportunity to make oral representations. In such circumstances, the Commissioner may invite the respondent to make oral representations in respect of the complaint or part of a complaint.*

[6] see the Consultation on Changes to the Office of the Immigration Services Commissioner's Complaint Scheme - Standard of Proof http://oisc.homeoffice.gov.uk/servefile.aspx?docid=227

Response to Question 6:

Do you agree with the change? NO

Further comments:

As to the reference to the criminal standard, ILPA considers that whatever the controversy over the appropriate standard, it is uncontroversial that the complaints scheme should reflect the standard agreed upon and being used.

As to the question of oral representations, *audi alteram partem*. ILPA considers that a person should have the right to make oral representations when an allegation with potential consequences that could include losing their right to continue in their chosen occupation is made against them. The obligation on the Commissioner to invite a person to make oral representations should remain. If a change in wording is desired the change could be to emphasise that while the Commissioner must make the invitation, it is entirely up to the person whether they wish to make such representations. We consider that the present wording places no obligation on the respondent, but this could be made explicit.

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Chair
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