Response from the Immigration Law Practitioners' Association to the Office of the Immigration Services Commissioner's Consultation to amend the Code of Standards and the Commissioner's Rules, June 2013

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 Home Office, and other consultative and advisory groups.

Section A

What approach should the OISC take in writing the new *Code* and *Rules*?

A1. Do you think the next version of the *Code* and *Rules* should generally take a principle-based or prescriptive approach? Please explain which of these approaches you favour giving your reasons.

A prescriptive approach.

In our experience, a prescriptive system of regulation makes it easier to explain to people what their obligations are and to help them understand when a particular course of action is unacceptable. ILPA has found that the Solicitors Regulation Authority's move to "outcomes based regulation" makes it harder to have discussions about the proper course of action to take in particular situation and that very frequently all involved fall back on discussion in the terms of the previous code. One solicitor member writes:

> *"…such regulations are down to individual lawyers to decipher and there is no clear guidance as to how* [they]*...should amend or altered their current methodology to ensure compliance with the regulatory outcomes. It is simply too subjective."*

This is our experience with solicitors. A regulated immigration advisor does not have to undertake either the academic or vocational stages of training undertaken by the Bar and by solicitors and thus the burden on the regulatory regime to ensure that advisors competently discharge their duties toward clients and the tribunal is a heavy one. ILPA is frequently approached by persons wishing to become regulated immigration advisors and we recognise that these persons come from a range of backgrounds. Some have a law degree or are foreign qualified lawyers. Others have no formal qualifications at all. Some have worked and/or continue to work with

refugees and migrants, as translators, community workers, social workers, etc. Others have never worked with this client group before. As set out in the consultation paper, the organisations regulated by the Office of the Immigration Services Commissioner are a diverse group, the consequences of poor advice can be very grave and it is often the case that those seeking such advice are reluctant to challenge their advisors. A prescriptive requirement such as Code 7

> *7. An adviser must keep a clear written record of all advice given, all work done, all transactions made on behalf of each client and all fees paid by each client, where fees are taken.*

is in our opinion preferable to a general statement that advisers should keep records, and a time limit such as Code 35

> *35. Upon the adviser being notified of any significant event they must promptly inform their client in writing and at most within three working days.*

is preferable to a statement of aspiration that advisors must notify clients promptly.

The Office of the Immigration Services Commissioner's latest *Annual Report*[1] has emphasised the difficulties that the Office has faced in assessing how Level 1 advisors might upgrade to Level 2 or 3, and in recognising the higher levels of competence needed and we consider that lessons can be learned from this work.

A2. Please explain what approach (principle-based or prescriptive) you think the Commissioner should take with respect to the following Codes:

a) Codes 19, 21 to 23
b) Codes 27, 28, 29, 30, 33, 48, 64 and 86
c) Codes 52 to 59, 81 to 86 and 91 to 95

See response to question A1.

As to a) ILPA considers that a prescriptive approach will best serve the objective of attempting to ensure that very disparate organisations with different levels of expertise, knowledge and awareness, and different client groups provide the best possible service.

ILPA declares an interest as to the provision of training as ILPA provides training and earns revenue from this. ILPA has no monopoly on training and an OISC-regulated advisor may fulfil all training requirements without receiving ILPA training.

In ILPA's view, the requirements as to training should remain prescriptive as to the numbers of hours required and the areas of practice which these should include. The Office of the Immigration Services Commissioner should retain the power to check that advisors have done the training that is required and that the training is

[1] For the year 2012- 2013, published 4 July 2013 and available at http://oisc.homeoffice.gov.uk/latest_information/press_releases/oisc_annual_report_2012_-_13/ (accessed 29 August 2013).

appropriate to their needs of their work. We consider that the same points apply to training to achieve accreditation at a higher level. One member writes

> *"I have come across clients who have not been given proper advice and the case has not been conducted up to standard. The new code should emphasise how the advisors' education and training are to be monitored."*

As to b) we agree with what is said in paragraph 32 of the consultation paper. As to paragraph 33, we consider that a written anti-discrimination policy is essential and that this should remain in the Code. The process of preparing and reviewing such a code and inducting new staff on it all support a culture of anti-discrimination within an organisation. Similarly with a complaints log. Regular reviews of a log where complaints are collected in one place can highlight weaknesses in an organisation and are a useful management tool. As to a supervisor's sampling of the work of a supervisee, the danger is that if less is put in the Code, that is seen as the minimum standard and attention is focused on that.

Client care letters record what has been agreed between advisor and client and are essential in the event of disputes, whether about payment or quality of advice.

As to Code 86, ILPA has previously raised with the Office of the Immigration Services Commissioner, the Legal Services Commission, the Legal Standards Board and others the inadequacies of the current system for ensuring that clients can obtain their papers held by the advisor should their advisor go into administration, or close down[2]. The two large scale examples of this in recent years have been the closing of Refugee and Migrant Justice and the Immigration Advisory Service. In the latter case, ILPA intervened in the Bankruptcy Court to argue for proper retention of client files. We succeeded in an order for a three -month retrieval period during which clients could apply for their files held in the archive. Some clients who so applied were reunited with their files, but not all, as retrieval of the file ultimately depended on the agreement the auditor was able to reach with individual storage companies and on being able to find the file. There is currently no mechanism for protecting clients and ensuring that the obligation under the Code is met. ILPA urges the Office of the Immigration Services Commissioner as an interim measure to require organisations which are regulated to satisfy the Office of the adequacy of arrangements for storage of files and clients' access to them in the event of the business failing or the voluntaryorganisation losing funding. This can only be an interim measure and we suggest that the forthcoming immigration bill is an opportunity to review whether the Office of the Immigration Services Commissioner has adequate powers to step in where adequate arrangements have not been made to appoint an organisation to hold the files.

As to c), again ILPA supports a prescriptive approach. The management of even a small organisation is helped by having clear policies from the outset and a requirement to do so helps to underscore matters of importance. It enables the Office of the Immigration Services Commissioner or others, when carrying out an

[2] Summarised in ILPA's response to the Legal Services Board consultation the regulation of immigration advice and services, 24 May 2013, see http://www.ilpa.org.uk/data/resources/15464/12.05.24-ILPA-response-to-the-Legal-Services-Board-consultation-on-the-regulation-of-immigration-advice-and-services.pdf

audit, to be clear on the standards that the organisation has said that it will apply and thus to hold it to account against such standards.

We consider that Codes 91-95, dealing with experts and interpreters, could usefully be amplified.

A3. Please explain if you think there are any specific Codes or Rules where a principle-based or prescriptive approach would be particularly appropriate.

Please see our response to questions A1 and A2 above.

Section B

Should the *Code* and *Rules* be consolidated into one document?

B1. Please explain if you think that the *Code* and *Rules* should be consolidated into one document or if they should remain as two separate documents.

ILPA has no preference for one or for two documents. Cross reference is to be preferred to duplication and it is important to avoid two documents covering the same matter in different terms. If all matters can be encompassed without confusion in a single document this may be easier to work with.

B2. Please explain what Rule(s), if any, you feel should remain identified as specific rule(s) if the two documents were consolidated. In considering your answer you may wish to take into account the contents of paragraph 37 of the consultation document.

See ILPA's response to section A above. As discussed therein, ILPA supports the Office of the Immigration Service Commissioner's requirements remaining prescriptive, to provide clear guidance and to protect clients. We agree that rules 1, 6, 8, 10, 11 and 15 should remain as rules but we consider that all the current rules should remain as rules and that the rules could usefully be amplified as described in those responses.

Section C

Possible subjects for inclusion in the new *Code*

a) <u>New legal entity</u>

C1. Do you agree that a Code should be introduced that requires regulated organisations which wish to change their legal status before doing so to submit an Application for Regulation of a New Legal Entity?

Yes for the reasons given in the consultation document.

b) <u>Immigration advice and services provided via the internet</u>

C2. Do you agree that it is necessary for the *Code* to include specific regulation on the matters mentioned at paragraph 41 of the consultation document in respect of organisations which work via the internet?

Yes.

Many lawyers and advisors already make use of the internet to provide advice to their clients. With the growth of internet-only entry clearance applications this method of working is likely to grow, and should be regulated and recorded as is other advice. We agree with the statements in paragraph 41 that record keeping is of particular concern, and should add, not only of the client's electronic communications but of those of the advisor. Record-keeping is of particular concern, whether in hard copy or electronic copy. In our experience the discipline of keeping a hard copy file may help to ensure that all pertinent exchanges have been kept and we suggest that this be made mandatory. Where records are kept electronically, standards of back-up are particularly important.

C3. In addition to the matters mentioned at paragraph 41 of the consultation document, are there any other matters that you think the Commissioner should include in the *Code* with respect to the provision of immigration advice or services via the internet?

The appropriate use of disclaimers (e.g. that advice given cannot be definitive without sight of original documents) and rules as to when the use of such disclaimers is and is not appropriate.

ILPA is also concerned about the provision of generalist advice which is then relied upon as though it were advice on a particular case. Such advice can take many forms: factsheets, web pages, immigration advice given in television and radio programmes (in the latter case often aimed at the communities of Asian origin in the UK). These may be provided in a range of situations but are often a form of marketing for those providing the information. ILPA is keen that the use of the internet for high quality generic information continue, because otherwise people are likely to turn to web-based discussion groups, where people are not regulated because they are not giving advice as part of a business and where comments are unlikely to be hedged with the appropriate disclaimers, etc.

C4. If specific codes were introduced, do you think that these should be more principle-based or prescriptive?

There should be prescriptive codes. When it comes to matters of principle, the same principles are likely to carry across from face to face advice to advice given via the internet.

c) Outsourcing work

C5. Do you think that organisations should be allowed to outsource their work to other regulated organisations?

No, for the reasons which have prevented this up till now.

Organisations regulated by the Office of the Immigration Services Commissioner with a Level 3 advisor should be able to brief barristers where licensed to do so under the Licensed Access Scheme and in accordance with its rules.

C6. If you think that the outsourcing of work should be allowed between organisations, all or in part, please explain what restrictions or controls, if any, you think should be imposed.

N/A.

d) Organisation or individual adviser

C7. The Commissioner proposes that references to "adviser" in the *Code* should be replaced with the word "organisation" except where the obligation is clearly an individual one. Do you agree with the proposal?

No.

Anyone giving advice or providing representation in immigration cases should retain responsibility to ensure that he or she is acting to the appropriate professional standards, ethically and legally, and is keeping his or her knowledge up-to-date.

We do agree however that organisations should also be responsible and should not be able to evade responsibility by scapegoating individual advisors. Regulatory activity takes place in relation to the organisation as well as individuals. Individuals should retain responsibility but the organisation should have vicarious liability as well. Employment law offers a precedent. The employer is responsible if the employee was acting in the course of their employment, and regardless of whether the employee has now left the organisation. To avoid liability employers must ensure that they have taken all reasonable steps to prevent the prohibited acts or omissions from occurring.

e) Identifying the actions of specific advisers

C8. Do you agree with the proposal contained in paragraph 47 of the consultation document which states that organisations should be required to ensure that the individual within their organisation who actually undertakes a specific piece of work is clearly identified on any material contained in the client's file and specifically in any communication sent to the client or to a third party?

Yes.

f) Client notification of and approval of payment

C9. Do you agree with the proposal contained in paragraph 49 of the consultation document that a code should be introduced that prohibits payments being taken from a client account or from a client's credit/debit card without the client having been given at least five clear working days' notification of the intention to do so and to have authorised the payment?

We do not consider that this is workable. When an application is made to the Home Office, the fee must be paid for the application to be valid. If a five day notice period meant that the application was late, this would seriously prejudice the client. Therefore any general rule must be subject to exceptions, even if these require specific authorisation. A member observes

> *"Whilst there should clearly be guidance and practices in place … a five clear working days' notification may cause undue delay …Money within client account and the withdrawal of such funds and for which purpose ought to be agreed nonetheless at the outset and stated within the client care letter.*
>
> *Clearer guidance and regulations on record keeping of client account records and office account records similar to the SRA Account Rules will be well received."*

g) Other suggestions for inclusion in the new *Code*

C10. Please make any suggestions for other matters which you think should be considered for inclusion in the new *Code*.

The Code currently makes no mention of persons who lack capacity. It makes no mention of children. Consideration should be given to making specific provision for such persons in the Code.

One of ILPA's objects is to 'promote further and assist by whatever means the giving of advice to and assistance and representation of immigrants to ... the United Kingdom' hence its interest in the regulation of immigration advisors. ILPA advocated for many years for the regulation of advisors prior to this being identified as government policy in the 1998 White Paper *Fairer, faster, firmer: a modern approach to immigration and asylum*[3] that preceded the Immigration and Asylum Act 1999.

ILPA has long expressed concerns that it is too easy to qualify as an immigration advisor at level one, given the range of work that is permitted at that level. All Points-Based applications sit within level one, although these may involve making applications for persons who have no leave. All family applications sit within level one although these, especially since Statement of Changes in Immigration Rules HC 194 came into force on 9 July 2012, are technically highly complex and also involve

[3] Cm 4018, 27 July 1998.

work in the highly contested field of Article 8 of the European Convention on Human Rights.

Alongside this anxiety runs one a different one. There are a significant body of persons who do not qualify for legal aid but have limited means. Their number has increased with the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, with the removal of immigration from the scope of legal aid. We are concerned that:

- The boundary between that which is not regulated ("signposting) and that which is regulated is not always clear and in any event ill-understood;
- Persons are put off assisting migrants and refugees by the requirement to become regulated.

We consider that there is merit in exploring whether Level one might be split into two:

- A lower level – carved out of the bottom end of the current level one, with clearly delineated boundaries, designed for those working in not for profits who want to be able to offer assistance with routine notifications and very basic matters, such as they might do in the fields of welfare benefits or family law for other clients. Small migrant community and voluntary organisations may be the first source of advice and help for members of their communities and may want to be able to give basic information and signposting to other organisations who can help when an application is to be made.
- A level at which the range of work currently permitted at Level one is permitted but where the entry test and monitoring subsequent to entry is much more stringent, to ensure that those who are making complex applications such as these have a higher level of knowledge and expertise than is required of Level 1 advisors at present.

We consider that such a division has the potential to protect clients and advisors alike and better to recognise the advice being given at each level. ILPA stands ready to discuss this proposal in more detail if that would be of assistance

Adrian Berry
Chair
ILPA
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