ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Comments of the Immigration Law Practitioners' Association on the Home Office consultation document *Freedom of Information: Consultation on Draft Legislation* (Cm 4355) and the draft Freedom of Information Bill.

Introduction

1. The Immigration Law Practitioners' Association (ILPA) welcomes the principle of the publication of the draft Freedom of Information Bill in advance of the legislative time-table. In the long term, we hope that this procedure will be used more often and that the additional opportunities for debate and for both public and parliamentary scrutiny will lead to improvements in the quality of legislation.
2. Our comments on the Consultation Document and on the draft bill are set out below. To place these comments in context, we first wish to outline the work of ILPA and the legal framework within which we operate.

The Association

3. The Association was first established in 1984 as an unincorporated association and became the Immigration Law Practitioners' Association Limited, a company limited by guarantee. ILPA currently has a membership of over 800 which includes lawyers, advice workers, academics and law students. The objects of the Association as set out in our constitution include

* to promote and improve the giving of advice to and the representation of immigrants from whatever part of the world whether coming to or intending to come to the UK for settlement or some limited purpose and to promote further and assist by whatever means the giving of advice to and representation of immigrants or emigrants to or from any other part of the world.

* to disseminate information and views on the law and practice of immigration and nationality in the UK and elsewhere.

* ...to make representations for and on behalf of immigration and nationality practitioners.

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4. Our members' clients range from asylum seekers - perhaps the most vulnerable people in the world - to rich investors seeking to enter in order to make a significant contribution to the economy. Our work can involve significant questions of human rights and may often be generated by political or social changes in other states. Current issues for the Association include the Immigration and Asylum Bill and the chaos in the IND Casework Directorate.

Immigration lawyers and the Code of Practice

5. ILPA welcomed the government's decision, made under the *Code of Practice on Access to Government Information,* to publish the Immigration Directorate's *Instructions to Immigration Officers* and the Asylum Directorate's *Instructions* and has worked with the Home Office to ensure that they reached a wide audience. The value of these to our members is a testament to the *Code* in particular and to the importance of freedom of information (FoI) provision in general.
6. The Instructions were released pursuant to the second edition of the *Code of Practice.* That edition included an amendment to the reasons for confidentiality set out in Part II. Para 5 of Part II includes as an exemption from the provisions of the *Code* for

> 'Information relating to immigration, nationality, consular and entry clearance cases...'

but goes on to say that

> '...information will be provided, though not through access to personal records, where there is no risk that disclosure would prejudice the effective administration of immigration controls or other statutory provisions.'

7. Although we welcomed the disclosure of the Instructions, we have our concerns about the way the *Code* is worded and we had hoped to see an improvement in the Bill. We have been disappointed.

What information does ILPA require?

8. ILPA and its members require information from government about the policies and procedures of the Home Office, the Immigration Service and many other bodies including the Foreign and Commonwealth Office, the Department for Education and Employment, the Benefits Agency and local authorities. We also require information about conditions in other states. There is one particular aspect of our work - the exercise of discretion outside the Immigration Rules - where we feel that a FoI Bill could be particularly valuable.

Immigration law and policy - the exercise of discretion outside the rules

9. The framework of immigration law in this country is set out in the Immigration Acts, in delegated legislation made under those Acts, and in the Immigration Rules. The Rules are made by the Secretary of State under Sections 3(2) of the Immigration Act 1971 and are

> 'rules of practice to be followed in the administration of the Act for regulating the entry into and stay in the UK of persons required by the Act to have leave to enter...'.

Statements of changes in the Rules are laid before parliament by the Secretary of State from time to time and are subject to a negative resolution procedure in a similar manner to delegated legislation.

10. What is important for present purposes is that the Immigration Rules do not provide a comprehensive code of all the practices regulating entry into the UK. Indeed the 1971 Act states that the Act does not require uniform practice as regards the admission of persons for employment or study or as visitors or dependants.
11. The effect of this rather unusual legal framework is to give the Secretary of State a considerable measure of discretion to grant leave to enter or remain in the UK outside the Immigration Rules. There exist a number of established policies, practices and so-called 'concessions' outside the Immigration Rules.

12. For example, there is the so-called long residence concession under which indefinite leave to remain may be granted to a person who has been here for fourteen years or more. The domestic worker's concession allows for those who entered the UK on condition that they work for a particular employer and who can satisfy the Secretary of State that they left their employer following violence or abuse - often fleeing conditions amounting to slavery - to be granted leave to remain in the UK.
13. Because so much of the work of ILPA members involves this exercise of discretion outside the Rules, information about the effect of these policies is particularly important. ILPA and its members are in constant correspondence with the Home Office, making what are, in effect requests for the disclosure of information about the extent and the detail of government policies. Of course, our letters and those of our members are rarely expressed as such. We also rely extensively on written answers to parliamentary questions. The more significant letters and answers are circulated in our regular mailings and may be published in Tolley's *Immigration and Nationality Law and Practice* (which is edited by the Association) or in other professional publications. These sources of information (which can be as insubstantial as a poor copy of a facsimile sent to one of our members) can often acquire immense importance for clients. They can give rise to far-reaching legal consequences and obligations and may create a right to remain in the UK for large groups of individuals.
14. A recent example is instructive. The so-called 'backlog clearance measures' to clear the large backlog of asylum applications which have not yet been determined were described in outline in last year's White Paper *Faster Firmer Fairer*. Further details of the effect of the policy on applications for family reunion by those granted leave to remain in the UK as a result of the policy were then given in a letter from the Asylum Policy Directorate to Asylum Aid which was circulated in our mailing. That letter, and the original announcement in the White Paper, was then supplemented by target dates for the implementation of the policy provided in a Written Answer in January. No single document set out the full extent of the policy.

The draft Bill

Scope (Clause 1)

15. We welcome the scope of the Bill and the order-making power to designate further authorities.

General right of access (Clause 8)

16. The Association is disappointed that the general right of access is so restricted by exemptions and that the Bill does not begin from a presumption of openness. Paragraph 1 of *The Code of Practice on Access to Government Information* sets out the principle that information should be disclosed unless the harm likely to arise from disclosure would outweigh the public interest in making the information available. The *Code* sets out various exemptions based on tests of harm or prejudice. The White Paper *Your right to Know: The Government's Proposals for a Freedom of Information Act (Cm3818)* saw the tests for harm in the *Code* as insufficient and proposed that

> 'the test to determine whether disclosure is to be refused should normally be set in simple and demanding terms' (Paragraph 3.7) and proposed tests of 'simple harm' and 'substantial harm'. '

17. The Bill as drafted carries no such presumption of openness and its tests are widely drawn, rather than being set in simple and demanding terms. It proposes to place on a statutory footing the much weaker test of 'prejudice' from the Code. The Association regrets this, notwithstanding the fact that the disclosure of Immigration Directorate's Instructions under the *Code* has been of great benefit to us.

Discretionary disclosures (Clause 14)

18. The Association accepts the need for some limitation on the freedom of access to government information and would accept proposals which allowed for a measure of flexibility or discretion in the wording of necessary exemptions. But this clause is

quite frankly objectionable. Clause 14(3) obliges the public authority making a discretionary decision to have regard to all the circumstances of the case including

(a)the public interest in allowing public access to information...,and

(b)whether the disclosure to the applicant of the information in question would be in the public interest.

19. Our main concern is that the Bill as a whole attaches no primacy to the public interest. It is merely one factor for the authority to take into account and is far more restrictive than the *Code*.

20. The effect of the proposal to require an applicant to supply further information about the reasons for requesting information and as to any use which he proposes to make of the information (Clause 14(4)(b)) would be to prevent an application for information an application about a policy which we might, at some point in the future, wish to query and to prevent perfectly proper requests for information which left clients' names confidential.

21. As we have explained above, the dissemination of information is central to our work and the imposition of the proposal to impose conditions restricting use or disclosure of information (Clause 14(6)) would make any disclosure under the clause of little use to us.

The exemptions

International relations (Clause 22)

22. The Bill proposes to class as exempt information which would, or would be likely to prejudice the UK's international relations (Clause 22(1)(a)). Our members who deal with applications for asylum under the 1951 UN Convention Relating to the Status of Refugees might have hoped that an FoI Bill could lead to greater access to information held by the government about other states, such as information held by entry clearance posts abroad. The Home Office Country Information Unit makes valuable information available to our members for asylum cases; we had hoped that

FoI legislation would enable us to build on this. We are concerned that the Bill will have the opposite effect.

23. Whilst the grant of refugee status by one state is not to be interpreted as a hostile act by the state from which the refugee seeks refuge, none the less it is possible to envisage situations in which this Clause could prejudice applicants for refugee status. In a recent case, the House of Lords held that female victims of domestic violence in a particular state were refugees under the 1951 Convention. If a similar case were to arise in relation to another state, and an immigration lawyer sought information about the status of women in that state from the Country Information Unit, the Foreign Office or from a consular post, such information might be considered sensitive and damaging, particularly if sensitive trade negotiations were under way. We do accept that there are circumstances in which information about other states should remain confidential but the 'prejudice' test is too wide and potentially damaging to our clients.

Information which would or would be likely to prejudice the operation of immigration controls (Clause 26(1)(e)

24. This Clause appears to be an attempt to strengthen the wording of the exemption in the *Code* although it is hard to see how the distinction between the 'administration' (in the *Code*) and the 'operation' of immigration controls would affect disclosure of information in practice.

25. The Immigration Acts set out a number of administrative and criminal sanctions which the government can enforce against those in breach. Police officers have powers of arrest under the 1971 Act and under the Police and Criminal Evidence Act. In our view, these sanctions, together with Clauses 25 (1) and 26(1)(a) of the draft Bill, should be sufficient. We do not think that there can be any justification for any wider provision.

26. We are concerned that the effect of this clause would restrict the flow of information to those advisers who act quite properly, if robustly, in advising their clients on how they may lawfully obtain leave to enter or remain in the UK. There is a world of

difference between such advice and the giving of improper advice on how to flout the Immigration Rules. Where improper advice is given, there are professional sanctions and criminal offences (such as assisting illegal entry). The forthcoming Immigration and Asylum Bill proposes a system of registration. This will in time become a sanction against those who give improper advice. If the government is concerned about the giving of improper advice, it should invoke the existing or indeed the proposed sanctions.

Decision making and policy formulation (Clause 28)

27. We have no doubt that many other bodies will make representations on this point. But we wish to place our views on record. A good deal of our work is connected with representations about the development of immigration policy, such as the various policy concessions outside the Immigration Rules and the policies and procedures of (for example) the IND. We are concerned that the effect of this clause would be to restrict the valuable flow of information from government to our members and, as a result, the flow of information from our members to government. This two way exchange of information is undoubtedly beneficial to both parties. It gives government the ear of our members and undoubtedly makes for better policy-making. We are concerned that this Clause will severely restrict our ability to engage in proper and democratic debate in support of our objectives.

The duty to confirm or deny (Clause 8(1)(a))

28. The sub-clause gives an individual a right to be informed that a public authority does or does not hold the information requested by an applicant. But where the exemptions apply, the so-called 'duty to confirm or deny' does not arise. So an applicant can have no way of knowing if particular classes of information are held. This adds to our concern that our existing channels of inquiry and communication will be limited by the Bill.

Effect of disclosure (Clause 37)

29. Our concerns are merely amplified by this Clause, the so-called 'jigsaw' clause, which says in effect that where a disclosure would not in itself be, nor be likely to be a disclosure of exempt information, it shall be take to have that effect if other exempt information became available at the same time. This could be applied to restrict the disclosure of, for example, part of a paper on a foreign state on the ground that another part of the paper was exempt. Thus preventing the disclosure of material which was not of itself exempt.

Parliament

30. We have already explained how much we rely on written answers in particular for information which we often then disseminate to our members. By a resolution of each House of Parliament, *The Code of Practice* was adopted as the standard to which civil servants are required to prepare answers to parliamentary questions and to supply other information to parliament. Paragraph 53 of Part I of the Consultation Paper refers to further discussions about the inclusion of Parliament and bodies accountable to it within the Bill. In remarks to the Campaign for Freedom of Information, the Home Secretary confirmed his wish to dovetail parliamentary proceedings with the FoI regime. In our view, this would be a fundamental incursion upon parliamentary privilege and the sovereignty of parliament. It would have the effect of dramatically reducing the amount of valuable information we receive via written answers and debates in *Hansard* as well as from the proceedings of committees.

Other concerns

31. The Association has many other concerns, particularly about the enforcement provisions and the lack of a suitable remedy for those wishing to challenge decisions about disclosure. It is likely that applicants under the *Code* have a more effective remedy in the form of a complaint to the Parliamentary Commissioner for Administration (the Ombudsman) whose decisions are usually followed than they

will have under the Regime proposed in the Bill. Others will no doubt provide a more comprehensive critique of the Bill. What we have sought to do in this paper is to outline the background to our work and to raise those issues which particularly affect us.

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