EVIDENCE TO THE SPECIAL STANDING COMMITTEE ON THE IMMIGRATION AND ASYLUM BILL 1999

SUMMARY OF MAIN POINTS IN ILPA'S EVIDENCE

* ILPA is very concerned that the Bill will not have the effect that all of us want - fairer and quicker decisions in asylum applications with any removal only after full consideration and a comprehensive appeal. The denial of any right of appeal for those who have overstayed or who are treated as illegal entrants will mean that if they are refused, the only recourse to reconsideration of their case is an application for asylum or for consideration under the European Convention of Human Rights. Thus the 'unfounded' cases will continue to clog the appeal system. If there were a full right of appeal, on all the relevant facts of a person's case and the legal and compassionate aspects, this would go towards creating a just system.

* ILPA is concerned that the Home Office administrative systems will not be able to deliver the two-month decision-making target. We appreciate the problems caused by the office move and the malfunctioning computer system but see no reason to expect these to be resolved quickly or easily. If they are not, and if the 'faster' part of the package cannot be delivered, we see no way to justify keeping people living below the poverty line and socially excluded for a longer period.

* ILPA believes that a policy of dispersal of asylum-seekers, if coupled with continuing delays and with inadequate means of support, will lead to increases in begging, street-selling, squeegee merchants etc, in areas of the country which have no or little experience of this and which are more racially and culturally homogenous than many larger cities. We fear that this will lead to a growth of racism, discrimination or even attacks on asylum-seekers, if they are particularly visible and are new to the area. ILPA continues to believe that its description of the system proposed as an “apartheid” one to be entirely accurate (see paragraph 48 of briefing for Second Reading debate). ILPA maintains profound concerns about these proposals which are further summarised in the introduction to Part VI.

* ILPA is extremely concerned about the increase in powers of immigration officers, with no corresponding code of practice, programme of training or system of accountability. We see this as unnecessary for enforcing immigration control and fear that it could lead to

increased racial tension and discrimination. It is a retrograde step which will militate against non-discriminatory immigration control. Whilst ILPA welcomes the Home Secretary's announcement that the Race Relations Act will be amended to cover the immigration service, we fear that this will not have the desired impact. See further the concerns expressed in the introduction to Part VII of the Bill.

* ILPA believes that the extension of immigration criminal offences is unnecessary and misguided. There is no public policy aim to be served by charging and imprisoning failed asylum-seekers because they used 'deception' in their cases or in delaying removal.

* ILPA is very concerned that no draft rules or regulations are yet available in respect of any of the extremely wide rule and regulation making powers contained throughout the Bill. It is essential that these are made available as soon as possible – and at worst by the time the Bill comes to be considered on a clause by clause basis. Otherwise it will be extremely difficult to give a proper and considered view of the ramifications of many of the Bill's provisions.

ILPA's detailed briefing follows. Different co-ordinators have been responsible for each part of the bill. ILPA's Briefing for the Second Reading debate is attached which at page 2 contains the names and contact numbers of the co-ordinators who would be happy to speak about any aspect of this briefing. ILPA will continue to undertake work on the Bill and it may well be this document will not prove to be ILPA's 'final word' on any particular aspect or provision of the Bill.

PART I
IMMIGRATION: GENERAL

Clause 1

1. This clause allows the Secretary of State to make for provision for conditions of leave to enter to be set out in visas/entry clearance.

2. ILPA is concerned that additional duties will fall on Entry Clearance Officers [ECOs], making their work more complex. Given the commitment of the government to recover the cost of EC from fees, this will lead to a considerable increase in visa fees. What increase in ECO hours are anticipated as a result of these additional duties? What consequences is this likely to have for the level of visa fees?

3. The effect of the measure is to shift a higher proportion of immigration controls to ECOs and to reduce those exercised at ports of entry. As a result, visa nationals will shoulder a higher proportion of the costs of immigrations controls. Is it the government's intention that citizens of visa countries (mainly in low income brackets) should pay a higher proportion of the cost of immigration controls?

Clause 2

4. Clause 2 allows the SS to make further provision with respect the grant, etc, of leave to remain.

5. Sub-para (a) appears to relate to the use of IT innovations in grants of leave to remain [LTR] (machine-readable, bar codes, etc). (b) refers to 'the imposition of conditions'. Does this mean that conditions other than, length of time, employment restrictions/prohibitions/, public fund limitations, requirement to register with the police are envisaged? If so, what might these be?

Clause 3

6. This clause contains a new power to prescribe fees for applications. This has major implications for persons subject to control. Visa fees are already substantial. High levels of fees will deter many people from applying for variation.

Clause 4

7. This clause deals with exemption from controls for members of diplomatic missions. How would this be enforced? Does the Secretary of State envisage removing a member of a diplomatic mission who was recruited in the UK and whose LTR has expired?

Clause 5

8. Persons ceasing to be exempt. ILPA has no specific comments.

Clause 6: removal of certain persons unlawfully in the UK

9. This clause needs to be read with Schedule 12 paragraph 30(2). The effect of these provisions is to amend the system of immigration control in a significant way by the abolition of deportation appeal rights in all breach of condition and overstaying cases (previously 'section 3(5)(a)' cases under the 1971 Immigration Act). Hitherto a fundamental distinction was drawn between those who obtained lawful leave to enter and those 'illegal entrants' who did not (either by evading control or by employing deception to obtain such leave). The former were liable to 'deportation' subject to an appeal procedure; the latter by contrast have always been liable to summary removal without any right of appeal (a distinction made principally on the basis that such persons had never had lawful standing in the UK under the immigration laws).

10. Amendments introduced by the previous government severely restricted the right of appeal of deportees by restricting a full 'merits' deportation appeal to cases in which the intended deportee had last been given leave to enter more than seven years previously (section 5 Immigration Act 1988 refers). These proposals were criticized in the strongest terms by members of the current government, then in opposition. Yet the measures now introduced are even more draconian, abolishing all section 3(5)(a) appeal rights in all cases. There is to be no 'merits' appeal even for someone who has lived here for over ten years!

11. These new provisions will equate the majority of deportees with persons liable to summary removal as illegal entrants. No distinction will any longer be drawn between those who have held lawful status, but are in breach of one or more of their conditions of entry or stay, and those who have never been other than unlawfully present.

12. In the years since the passing of the 1971 Act the courts have, in response to particular initiatives by the Home Office, extended the definition of illegal entry well

beyond what was envisaged in 1971, to include deception, advertent or otherwise, and whether committed by the person concerned or by a third party. Even the matter of whether the deception is material to the grant of leave has become somewhat flexible, allowing much discretion to immigration officers.

13. The new provision will affect any person in breach of conditions. This could include, for example, a bona fide student working in circumstances where, had he or she known they needed to obtain it (many do not), permission to work would have been granted; an applicant who submits an application for further leave to the Home Office 'in time', only to have it returned for some small detail of the documentation to be clarified; an applicant who posts such an application by normal post a few days before expiry, only to have the letter delayed in delivery; a wife whose documents have been passed to her in-laws; a student whose application goes through his or her college; a person who passes papers to legal representatives for attention, only to have them inadvertently submitted late. It is plain that the applicant ought not to be penalized so harshly in any of such examples , by a total lack of any appeal right. Such people are not illegal entrants and ILPA believes that it is unconscionable that their otherwise blameless behaviour should attract such draconian consequences.

14. The Secretary of State will still, presumably, consider the individual's circumstances and reach a decision. But with no opportunity to establish what factors had been taken into account and no judicial oversight of decisions there will be no restraints whatsoever on the Home Office's conduct in such cases. Liability to summary removal provides no mechanism for ensuring compliance either with domestic law or other obligations. The absence of any in country meaningful appeal even where there might be strong compassionate reasons to allow a person to remain is fundamentally opposed by ILPA.

15. It will not be possible by these means to ensure justice, nor to avoid strong grievances being held. This change will engender tension and mistrust within established communities, and could lead to breaches of human rights obligations. The inevitable result would be an increase in applications for judicial review, and increases in ill-founded claims to asylum and (perhaps more well-founded) claims under clause 47 (actions contrary to the Human Rights Act). This is not a recipe for consistent decision-making, nor for quicker or fairer procedures.

16. It is not at all clear that there is any significant mischief which needs to be dealt with by way of this amendment that will not be dealt with under other provisions (the power of curtailment, one-stop appeals and so on). There are a very small number of 'repeat appeals' of deportees who have already had a variation appeal, but they are very few (456 in the last full year), and all would disappear as a result of these other provisions.

17. It has been suggested that removal is a less severe penalty than deportation, since in the latter there is a bar on return until revocation, while in the former there is no

formal bar. This is disingenuous. The immediate effect on the individual, and his or her family, is identical, and there is no real prospect of convincing an immigration officer to grant leave once the fact of removal is known. Indeed, the prospect of detention and removal at once, rather than after notice and appeal rights, of a person who may otherwise have a settled life or commitments in the UK will exacerbate tensions. Furthermore, persons can still leave voluntarily if any appeal is unsuccessful, thereby avoiding the signing of a deportation order in any event.

18. **Amendment** The whole provision is so counter-productive that ILPA's principal proposed amendment is the complete deletion of clause 6, and Schedule 12 paragraph 30(2) with the consequential re-numbering of all subsequent clauses and paragraphs.

19. The Bill proposes that there shall be exemptions from these arrangements, 'in such other circumstances as may be prescribed' (clause 6(4)), but no indication has been given by the government of what these might be. It is essential, if this proposal is to be adequately debated, that the government makes clear its intentions, and the Committee needs to require that the Minister at the least makes clear undertakings, or produces draft instruments to explain the intention. The same consideration applies to sub-clause (6), by which 'any requirements' may be applied, in accordance with (so far unseen) rules.

20. If it is the intention of government that this provision should only apply in certain cases (the guidance notes make no mention of rules under clause 6(4) confining its effect) then the clause should be amended to make the intention clear.

Clauses 7 and 8: FINANCIAL BONDS

21. These clauses provide a mechanism for the Secretary of State to require security to be given in respect of people applying for entry clearance and applying for leave to remain in the UK, such security to be forfeit if the person does not leave the UK.

22. Many people living in the UK desperately want to be able to provide some security to show their integrity and support their relatives' visit applications. This could help to dispel people's feeling that their integrity is in question, rather than that an official abroad is not satisfied about their visitor's intentions. But there are serious drawbacks to this proposal and it should be considered very carefully, and amended, before any pilot project takes place. If the drawbacks outweigh any benefits it provides, it should not be implemented but further training and support to ECOs to help them make correct and unbiased decisions should be given. It is to be hoped that the reintroduction of appeal rights for refused visitors will help to ensure that refusals are correct in law.

23. **The system must not be operated in certain parts of the world only, or mainly**. According to the 1997 Control of Immigration: Statistics, 23% of refusals of visas for temporary purposes took place in the countries of the Indian subcontinent, whereas the number of applications there was 14% of the total. Thus there is the potential for this to be used in a discriminatory way, mainly against people from particular areas. ILPA welcomes the Home Secretary's announcement of 24 February that the Immigration Service is to become subject to the Race Relations Act, but hopes the Committee will receive assurances from the Minister, and draft immigration rules, about how and where any power to take bonds will be used.

24. **The amount of any bond**. ILPA was concerned to hear that the Minister had suggested an amount of £5000-£10,000. This is an unrealistic and unfair amount for people on even an average salary to raise, let alone those below. If instead a bond were to be related directly to the sponsor's ability to pay, for example 10% or 5% of the income shown for supporting the potential visitor, this would be much fairer between applicants.

25. If the money had to be paid up front in the UK, it will mainly affect the less wealthy. It could lead to the growth of unofficial moneylenders and loan sharks, exploiting people unable to offer the security needed for a reputable bank loan and charging extortionate interest rates for these loans. It would also mean either sponsors making these financial arrangements in advance of a visa application being made abroad, or the case being referred from the British post abroad to the Home Office to seek a bond. Either of these would mean further delays in dealing with applications, a serious matter when the reason for the visit is urgent, such as a funeral. A legally-binding commitment or undertaking to pay, rather than the deposit of money, would again be a more equitable system**.**

26. **If the money were to be requested overseas**, it would probably most often come from the sponsor in the UK, and have to be sent overseas. This could lead to another layer of exploitation by agents abroad, who could claim that they needed this money before making an application; if this were false, the money might then be requested again by the entry clearance staff. It could lead to another opportunity for corruption, when touts and agents know that money may be required and some applicants will not know to whom they have paid it. It is even more difficult to check whether this is happening overseas than in the UK, or for family members here to know what has happened.

27. These questions arise only because the Bill does not make the government's intentions clear and the immigration rules which will explain it have not been published, even in draft, with the Bill. ILPA finds this very disappointing, emphasised by the Home Secretary's admission on 22 February that 'I cannot promise that drafts of all the regulations will be made available at this relatively early stage in the process'. His refusal to do so means that it is impossible to debate many parts of the Bill in any sensible way, as the detail of what is intended cannot be known.

28. The Explanatory Notes to the Bill, and the debate about bonds outside, focus on visitors. But this is not what the Bill says, it refers to people 'applying for entry clearance' (cl. 7(2)(a) or 'extend leave to enter or leave to remain for a limited period' (cl. 8). Thus the proposal could also apply to students, to working holidaymakers, to those needing medical treatment. If so, money could be deposited with the Secretary of State for substantial periods, and accrue significant interest. Whose would this be? If it is intended only to apply the bonds to visitors, the Bill should say so.

29. The Bill (cl. 7(3)) states that the bond is in order to secure that the person leaves the UK at the end of a period of limited leave given. Will the Minister confirm that this refers to the duration of the leave stamped on the passport (or given in any other way as provided by clause 1 or 2), rather than any shorter period which a person may have stated when applying for entry clearance? In the past, people who have stated they intend to stay for less than six months but whose plans change so they stay for longer than initially stated, but still leave within the six months period they were given, have been penalised.

30. If people are granted the leave for which they apply, under cl. 8, any bond given on their initial entry which might have been forfeit should be refunded. This should definitely be done if the person applies for, and is granted asylum, or is granted exceptional leave on asylum grounds, or is granted further limited leave but goes before that time finishes.

31. **The pilot project for bonds should take place in more than one British post**, so that its use can be monitored. If a post in India is chosen, so should a post in Pakistan, and also in an area with fewer perceived problems.

32. The bond proposal must be considered in conjunction with the restored right of appeal for family visitors (clause 41(3) to (5)) and with the entry clearance monitor (clause 14). Appeals will cost; but it must be ensured that the cost is not received twice. Entry clearance fees are intended to cover the whole cost of the entry clearance operation, which includes preparatory work for appeals. If there is a fee for an appeal, the entry clearance fees should be lowered. ILPA considers that an appeal should be available against both the decision to require a bond and the amount (at least where the rules confer a discretion on these matters).

33. Clause 14 provides for the continuation of the monitor of refusals without right of appeal. It is not clear which appeals the monitor will consider; on the face of the Bill, it is family appeals where the appeal fee has not been paid, but this is bizarre. The Minister should give an assurance of what he means by this. It should include all entry clearance refusals where there is no right of appeal, and the monitor should have enhanced powers to call for papers on cases she or he selects and to make unannounced visits to British posts

34. **Amendments** In clause 7(1), line 13: insert after ‘entry clearance’ ‘as a visitor’.

In clause 7(2)(b) add at end, line 19: but if it is not taken into account, the Secretary of State must give reasons for declining to do so.

After sub-clause 7(4), line 32, add new subclause: (5) The Secretary of State will not realise the security, and will repay any security deposited, if the applicant is recognised as a refugee or is granted exceptional leave or leave to remain under the immigration rules.

Clause 7(6), line 45 add at end: Provided that such security may not be more than 10% of the income declared by the sponsor in supporting a visit if required from the sponsor, or of the visitor’s income as declared to the British post, if required from the visitor.

Clause 8(2), line 13, add at end as 7(6).

Clause 8(3), line 18, add as in 7(4) above.

Clause 12

35. Clause 12 authorises the Secretary of State disclose information obtained by him in the exercise of his functions under the 1971 Immigration Act to a number of bodies connected with crime and law enforcement. However the final possibility is “any specified person”. ILPA is concerned at the potential breadth of dissemination of material provided by asylum applicants. These matters which are provided on terms that are understood to be confidential are often highly sensitive and potentially dangerous for others who remain in the countries of origin and strict supervision ought to be exercised of the use made of such information.

Clause 13

36. This amends section of the 1996 Asylum and Immigration Act by requiring the Secretary of State to issue a code of practice with a view to seeing that employers avoid unlawful race discrimination. When section 8 was debated ILPA and others warned of its potential for discriminatory practices. The Labour Party in opposition appeared to agree with such concerns and appeared to support the repeal of section 8. In ILPA’s view this is still the right course to take. There are other offences created by the 1971 Act which are ample to deal with racketeering. Exploitation of unlawful immigrant labour is deplored by us. But there are laws of general application to all employees concerning health and safety at work and employment conditions and these should be used. Our fears that section 8 would promote race discrimination have been borne out and we and, we understand, the CRE have no confidence that this will be changed by the adoption of the proposed code of conduct. Consequently our view remains that section 8 of the 1996 should be repealed.

Clause 15 and Part IX, Registrars of marriage

37. The Bill proposes a number of changes to the law governing the conduct of civil marriages, some of which are directly related to questions of immigration control while others are not. It is extraordinary that such significant alterations are proposed to an institution so fundamental to civil society as the ceremony of marriage in a Bill concerned with immigration.

38. There are a number of concerns arising from these changes, most relating to **clause 15**, which seeks to introduce a duty for registrars to report to the Secretary of State on 'suspicious' marriages, that is those which they suspect of being 'sham'.

39. It is objectionable that officials whose role and function is to assist in the celebration of the union of couples in marriage should simultaneously have to serve as immigration police (*see Amendments 4 and 6 below*). Regulations are proposed (clause 15(3)) to stipulate the manner of reporting (although these are not to be subject to any parliamentary scrutiny – see clause 134(4)(b) – *see Amendment 10 below*), but the matter of what should constitute grounds for suspicion is left entirely to the discretion of the registrar. Ungoverned suspicions will tend to amount to no more than stereotyping, that is, to prejudice (*see Amendments 1 and 2 below*).

40. In an initiative unconnected with this Bill, the government has announced its intention to extend the scope of the Race Relations Act 1976 to cover public services. Giving registrars duties dependent on suspicions concerning immigration intentions puts them in a position where they will be open to claims of discrimination, whether or not well-founded. This is invidious, and will be unwelcome to many conscientious officers (*see Amendments 4 and 7 below*).

41. Registrars will be required to judge whether a marriage is 'entered into by A for the purpose of avoiding the effect of one or more provisions of immigration law'. Some provisions of immigration law are notoriously difficult for a non-specialist to determine. What level of training will registrars receive? How, if they are not regularly called upon to make assessments, will this knowledge be reinforced and updated? (*see Amendment 5 below*)

42. The test also involves assessing the *purpose* for which a person seeks to marry. All the iniquities of the discredited 'primary purpose' test, abolished by this government soon after taking office, are thereby set to re-emerge in a new guise (*see Amendment 3 below*).

43. Checks are proposed only against marriages involving EEA nationals. Presumably it is thought that these provide a more ready means to evade immigration controls for those who wish to do so. It is not clear whether any intended guidance issued to

registrars will include the UK as an EEA state for these purposes. If the UK is not included, this measure is highly likely to amount to unlawful discrimination contrary to the European Treaties. If the UK *is* included, however, what justification is there then for leaving out of account those marriages where neither party is British nor a national of an EEA state? (*see Amendment 5 below*)

44. The Bill also appears to intend an extension of the power to refuse to conduct a marriage on the ground of lack of satisfaction that the parties are free to marry. **Clause 133** will insert a new s. 31A in the Marriage Act 1949, envisaging refusal on the basis of any 'representation' received, and although there is a right of appeal against such a decision, the damage will in many cases already be done, and a right of restitution against a person making a 'frivolous' representation is unlikely to be an effective remedy (*see Amendment 9 below*).

45. A decision not to allow a marriage to go ahead is potentially very significant: its importance is underlined by the fact that a wrong decision would be likely to amount to a breach of Article 12 of the European Convention on Human Rights (the right to marry and found a family), and so may leave the registrar open to action under the Human Rights Act (*see Amendments 8 and 9 below*).

46. This provision will introduce an onus on a couple to prove their eligibility to marry. How is this to be done? Although such a provision already exists in some countries, in the UK no comprehensive scheme for registering civil status exists. If the guidance to be issued by the Registrar General (see **clause 132(3)**) applies different standards for evidence of marital status to persons of different nationality, this is likely to amount to discrimination contrary to the Race Relations Act (and probably the equivalent Northern Ireland provisions) (*see Amendments 8 and 9 below*).

42. **Amendments** *Amendment 1*: Delete **clause 15**, and **Part IX**, and in **clause 134(4)(b)** delete '15(3) or'. Re-number clauses 16 to 129, and 134 to 138 consequently.

43. *Amendment 2*: Delete **clause 15**; re-number consequently [**this is ILPA's preferred option**].

44. *Amendment 3*: In **clause 15(1)** for 'has reasonable grounds for suspecting that the marriage will be a sham marriage' insert 'receives evidence proving that the marriage will be void'.

45. *Amendment 4*: For **clause 15(3)** insert

The registrar concerned must report his suspicion

(a) in the case of subsections (1)(a) and (b) to the Registrar General of Births, Deaths and Marriages in England,

(b) in the case of subsection (1)(c) to the Registrar General of Births, Deaths and Marriages for Scotland, and

(c) in the case of subsection (1)(d) to the Department of Finance and Personnel,

and in such manner and within such period as may be prescribed by regulations.

46. *Amendment 5*: For **clause 15(5)** substitute the following:

"Sham" marriage means a marriage which is

(a) entered into between a person who is

(i) a British citizen,

(ii) an EEA national,

(iii) a Commonwealth citizen with the right of abode in the UK, or

(iv) a stateless person, refugee, or person of any other nationality with indefinite leave to remain in the UK

and a person who is not within (i) to (iv) above; and

(b) entered into by the parties to the marriage with the purpose of avoiding the effects of those provisions of immigration law which are concerned with marriage or the status of married persons.

46. *Amendment 6*: For side-note to **clause 15** 'Duty to report suspicious marriages' insert 'Reporting suspicious marriages'; and in clause 15(3) delete 'must' and insert 'may'.

47. *Amendment 7*: **[This option is proposed as a second alternative to amendment 2 above.**] In **clause 15** insert new sub-clause (7) 'Persons carrying out duties under subsections (1) and (3) above shall have regard to section 16, and the code issued in accordance with that section shall apply to all such decisions and actions as are authorised by those subsections.'

AND insert the following new clause 16 (re-numbering all subsequent clauses consequently):

"Code of practice

16(1). The Secretary of State must issue a code of practice as to the measures which a registrar carrying out functions within section 15 of this Act is to be expected to take, or not to take, with a view to securing that, while fulfilling the duties imposed upon him by that section, he also avoids unlawful discrimination.

(2) "Unlawful discrimination" means –

(a) discrimination in contravention of section 4(1) of the Race Relations Act 1976 ("the 1976 Act"); or 1976 c. 74

(b) in relation to Northern Ireland, discrimination in contravention of Article 6(1) of the Race Relations (Northern Ireland) Order 1997 ("the 1997 Order"). S.I. 1997/869 (N.I. 6).

(3) Before issuing the code, the Secretary of State must –

(a) prepare and publish a draft of the proposed code; and

(b) consider any representations about it which are made to him.

(4) In preparing the draft, the Secretary of State must consult –

(a) the Commission for Racial Equality;

(b) the Equality Commission for Northern Ireland;

(c) the Registrar General of Births, Deaths and Marriages in England;

(d) the Registrar General of Births, Deaths and Marriages for Scotland;

(e) in relation to Northern Ireland, the Department of Finance and Personnel;

and

(f) such organisations and bodies (including organisations or associations representative of local authorities or employees) as he considers appropriate.

(5) If the Secretary of State decides to proceed with the code, he must lay a draft of the code before both Houses of Parliament.

(6) The draft code may contain modifications to the original proposals made in the light of representations to the Secretary of State.

(7) After laying the draft code before Parliament, the Secretary of State may bring the code into operation by an order made by statutory instrument.

(8) An order under subsection (7) –

(a) shall be subject to annulment in pursuance of a resolution of either House of Parliament;

(b) may contain such transitional provisions or savings as appear to the Secretary of State to be necessary or expedient in connection with the code.

(9) A failure on the part of any person to observe a provision of the code does not itself make him liable to any proceedings.

(10) But the code is admissible in evidence in any proceedings (including proceedings under section 31A of the Marriage Act 1949) brought by a person claiming to have been affected by any decision, action or failure to act to which the provisions of the code apply.

(11)The Secretary of State may from time to time revise the whole or any part of the code and issue the code as revised.

(12) The provisions of this section also apply (with appropriate modifications) to any revision, or proposed revision, of the code."

50. *Amendment 8*: In **clause 132** insert new subclause (4):

'In preparing the guidance the Registrar General must consult –

(a) the Commission for Racial Equality;

(b) the Equality Commission for Northern Ireland.'

51. *Amendment 9*: In **clause 133(3)(a)**, for 'representation made to him, and' insert 'representation made to him (provided that he shall not take account of any representation where the person making it does not sufficiently identify himself), and';

AND in **clause 133(4)**, for 'the declaration of the Registrar General purporting to be sealed' insert 'the declaration of Registrar General containing details of the representation made to the superintendent registrar and purporting to be sealed';

AND insert new subclause (5) – 'For the purposes of subsection (3) a person sufficiently identifies himself if he provides a name and address which the superintendent registrar has reasonable grounds for believing to be genuine.'

52. *Amendment 10*: In **clause 134(3)** insert '(b) section 15(3)', and re-number sub-subclauses (b) to (d) consequently. In **clause 134(4)(b)** delete '15(3) or'.

Clauses 16 and 17: extending the offence of deception

53. These clauses create a new immigration offence, of a person seeking or obtaining 'the avoidance, postponement or revocation of enforcement action against him' by 'means which include deception by him'. The penalty, on summary conviction, could be six months imprisonment and/or a fine up to the statutory maximum or on indictment, two years and/or an unlimited fine. They also extend the crime of making a false statement to an immigration officer to cover anything said to an officer acting under any of the five major Immigration Acts.

54. The Home Office Explanatory Notes state that clause 16 is intended for use against asylum-seekers whose claims are unfounded and who seek to string them out by making further unfounded claims or applications to the courts. **But it is phrased much more widely than this** and ILPA has real fears that it will criminalise asylum seekers in a way that is wholly unwarranted. The breadth of the clause is quite staggering (far beyond its stated aim) making it an offence for <u>any</u> deception to be used either to obtain or seek to obtain leave to enter or remain or 'the avoidance, postponement or revocation of enforcement action'. It is of course only the latter category of case (in parenthesis) that reflects such stated aim. ILPA opposes the whole clause; alternatively, its scope should at the very least be narrowed so as to reflect the government's intention.

55. **The definition of 'deception' has been drawn very broadly** in court cases, and can include failure to give information which was not known to the applicant. Cases have also hinged on the 'credibility' of the person, always difficult to judge, particularly when there is no supporting evidence.

56. The concept of stopping people from leaving the country, when their immigration application has been refused and removal arrangements are in process, in order to arrest, prosecute, detain and sentence them, and then after all that make them leave, seems bizarre. This proposal, if implemented, will clog up the police's time, the courts and the prisons with people who will not be allowed to remain here and who

will suffer particularly while in prison due to the unfamiliarity of their surroundings, language, culture, religion etc.

57. At present, conviction and sentence happens most frequently for people who have sought to enter the UK, or sought travel in transit here, and are then found to be travelling on false documents. They are frequently prosecuted under the Fraud Act rather than the 1996 Asylum and Immigration Act, and are usually sentenced to some months imprisonment. This is neither a sensible use of resources nor consistent with international obligations: if people need to flee they can rarely obtain genuine documents and article 31 of the Refugee Convention makes clear that refugees must not be penalised on account of their illegal entry or presence

58. These clauses should be read in conjunction with clause 117, which allows immigration officers to 'use reasonable force' in exercising any of their powers under the 1971 and 1999 Acts. If a person resists an officer, whether knowing that he is an immigration officer or not, and thus secures a delay in removal arrangements, is that an extra crime?

59. In conjunction with clause 59 on 'appeals without merit'; if the Tribunal makes such a decision, and also suggests, or makes a finding, that deception was used, would that make a person liable to prosecution under s. 16?

60. The complicated possibilities this section suggests makes the availability and funding for provision of good legal advice and representation even more vital.

61. **Amendments** Delete whole of clause 16, lines 15 to 42 – the preferred choice.

62. Delete the whole of line 19 - sub-paragraph 24A(a) – and delete "(b)" in line 20 (to give effect to explanatory note's stated intention only).

63. In 24A(1), line 16, insert after 'citizen' the phrase 'and who has applied for asylum in the UK'.

64. In clause 16(3), line 34, delete 'to imprisonment for a term not exceeding six months, or' and line 37, delete 'to imprisonment for a term not exceeding two years or' and line 38, delete 'or to both'.

PART II
CARRIERS' LIABILITY

Clauses 18-20

1. This part of the Bill introduces a new kind of Carriers Liability sanction. It establishes a civil penalty able to be imposed on a wide range of people who are responsible for transporting clandestine entrants to the United Kingdom.

2. Whereas the existing Carriers Liability sanctions relate to the arrival of undocumented passengers to the UK on ships, trains and planes, these provisions are aimed at carriers who bring somebody who evades or attempts to evade immigration control, or who claims or intends to claim asylum, and who:

    - has arrived concealed in a vehicle, ship or aircraft, or;
    - has passed through or tried to pass through immigration control so concealed, or;
    - arrives in the UK having embarked abroad when so concealed.

    Clearly this is very widely drawn. And is aimed at those who never present themselves to immigration control at the port.

1. The penalty applies to each clandestine entrant. The clause sets out a range of responsible (i.e. liable) persons, including: the owner, operator or captain of the ship or aircraft; the owner or hirer of a vehicle; and the owner or hirer of a detached trailer. The meaning of "owner" includes; an operator of a ship, aircraft or vehicle; the agent of a ship or aircraft; and the holder of a vehicle under a hire purchase agreement. Once again, these provisions are widely drawn.

2. The clauses descend to some detail about the practicalities of who is responsible where a passenger is hidden in a trailer, (which may or may not be detached).

3. The clauses establish that it is immaterial whether the responsible person knew or suspected that the clandestine entrant was concealed, subject to 2 defences. Firstly there is a defence of duress. Secondly there is a defence if the carrier (1) had no reasonable grounds for suspecting that the clandestine entrant might be concealed; (2) had in place an effective system in operation to prevent the carriage of clandestine entrants; and (3) operated the system properly on the relevant occasion.

4. In relation to the second limb of defence, a code of practice, as yet unpublished, is provided for.

5. **Comment** The clauses are open to the general critique of carrier sanctions. They do not discriminate between asylum seekers and others - all suffer equally. The provisions effectively export and privatise UK immigration control.

6. Article 31(1) of the 1951 Refugee Convention prohibits penalties being imposed on refugees who arrive without documentation, if they travel directly to a country of safety. Whilst not imposing penalties directly upon refugees, this part of the Bill goes against the spirit of the Convention in that it applies penalties inter alia to those who bring refugees to the UK. If the refugees are not to be punished, why should the carriers be?

7. Currently, a significant number of asylum seekers reach the United Kingdom to claim asylum by lorry or other commercial road vehicle. Often these people come from countries where escaping by airplane is not an option - a recent example would be Kosovo. These provisions extend carrier sanctions to such vehicles and will prevent many asylum seekers from being able to avail themselves of international protection at all. In doing so the provisions make no distinction between those who get refugee status, and asylum seekers generally, and clandestine migrants generally.

8. ILPA would wish the legislation to maintain a distinction between those passengers who claim asylum shortly or immediately upon arrival, and those who enter clandestinely, and bring themselves to the attention of the authorities at a later date. ILPA considers that if there are to be extended carrier sanctions such as these provisions, only the latter group should precipitate penalties for carriers.

9. It is not clear from the Bill as drafted what the relevant standard of proof before the imposition of a penalty will be. The explanatory notes refer to a "civil penalty". The suggestion is that the liability would be established "on the balance of probabilities". Yet the material in relation to defences have the ring of provisions of criminal law. ILPA is of the view that the standard of proof should be the criminal standard of "beyond reasonable doubt" rather than the civil standard of "balance of probabilities". The clause should make this clear.

10. As for the defences, ILPA is concerned that the establishment of a duress defence will encourage carriers to make unfounded allegations against passengers in order to seek to escape liability. This may result in asylum seekers being charged with serious criminal offences such as assault, threats to kill or blackmail. The establishment of the defence will therefore have the indirect effect of further criminalising clandestine passengers, and therefore asylum seekers and refugees.

11. The clause is also objectionable in that the burden of proof on these defences rests on the carrier where in these proceedings it ought to be on the Crown to prove the negative as well as the positive elements of the crime

12. The absence of any indication as to the content of the code of practice (which plays a vital role in the second defence to these penalties) is also of concern. The terms of the code of practice are important and would present an opportunity for ensuring that the UK does not breach international obligations or the Human Rights Act in its treatment of clandestine passengers. The Bill should provide for consultation with human rights organisations as well as transport organisations in establishing the terms of the Code.

13. The clauses are also unreasonable in that they place an expectation on lorry drivers, many of whom are not unionised or otherwise protected, that they can and will insist on there being an effective "anti-clandestine" system (as defined by the code) before agreeing to drive a commercial vehicle to the UK, or otherwise risk a personal liability.

14. ILPA therefore recommends:-

    a. That there be no extension of carriers sanctions in this way.

    b. That the category of clandestine entrant (if retained at all) should exclude those who claim asylum immediately upon arrival.

    c. That a fall back position would be to exclude those who claim asylum immediately upon arrival and who ultimately obtain protection under the Refugee Convention, the Human Rights Act, or exceptionally.

    d. That the liability for the transporting of clandestine entrants should not extend to lorry drivers, bearing in mind the intrinsic practical difficulties of their ensuring that there are no clandestine entrants on their vehicles.

    e. That the code of practice for ensuring an effective system of control be made subject to consultation with road haulage organisations, trade unions, and with human rights organisations.

    f. That the defence of duress be removed from the Bill but that the code of practice be drafted in such a way as to prevent drivers or other operatives from being exposed to duress.

g. That the code of practice be available at the time of the consideration of the clauses by the House.

h. That the clause clearly specify the standards of proof to be applied, and that that standard of proof be the criminal standard of proof.

Clauses 21-23

17. These clauses (together with Schedule 1) set up the procedure by which, where a penalty is due, various types of vehicle can be detained and, with the leave of the court, sold in lieu of the payment of the penalty.

18. The most curious aspect of the procedure is Clause 22(4) 4 which provides that the detention of a vehicle is lawful under this section even if the penalty notice upon which the detention was based is subsequently established to have been ill-founded, providing the Secretary of State is not acting unreasonably by issuing the penalty notice. The potential loss to a carrier through the detention of a vehicle is considerable. To give the Secretary of State protection from the consequences of his arbitrary action so long as it is not unreasonable, as to give him far too much unfettered power. The mind of the Secretary of State, when imposing penalties such as this should be concentrated by making him liable for the financial consequences of all detentions which turn out to be ill-founded.

19. **Amendment** Delete sub paragraphs (4) and (5) of clause 22 and insert instead a clause making the Secretary of State liable for the detention of the transporter on the basis of an ill-founded penalty notice.

Clauses 24-28

20. Carriers' sanctions generally are objectionable to ILPA in principle in that they prevent the arrival at our borders of people who need and would otherwise have obtained protection here. They do not discriminate between that group, and those who have no claim to protection. They also in effect delegate and export immigration control to the carriers, who have not signed, and have no commitment to, the relevant international conventions.

21. ILPA is aware for instance of shocking cases which have come to light in France where personnel on ships have been convicted of murdering stowaways by throwing them overboard, rather than pay the financial penalty for bringing them undocumented.

22. These provision are against the spirit of the Convention and should be opposed in their entirety. For this reason ILPA has not sought to temper the harshness of these new provisions (which build on the regime already in place) with detailed amendments.

Clause 24

23. Clause 24 (1) adds to the contents of s25(6) of the 1971 Act, which sets out the offences of assisting illegal entry. It thereby widens the enforcement powers in current legislation. It deals with the punishments available to those who are convicted under the section, and in particular adds to the scope of the powers of forfeiture available where someone is convicted under s25(1). It provides that, where a driver of a vehicle is convicted (in addition to the existing provisions about the convictions of owners, directors of the owning company, or captains), the court can order forfeiture of the vehicle used in certain circumstances. ILPA's concerns are reflected in the general comments above.

24. **Amendments** Delete all.

25. Add a section which prohibits forfeiture or allows for a refund where the passenger in respect of whom the charge was levied is eventually allowed to remain in the UK as a refugee or under the Human Rights Act.

26. Add a new clause making it a criminal offence to prevent a claim for asylum by someone who has already arrived at our border. This is a provision which ILPA has canvassed in the past

27. Further, ILPA would like to know how many prosecutions have there been under s25 (1)(b) and (c), which were introduced by the 1996 Act?

28. Clause 24 (2) provides for the detention of a ship aircraft or vehicle which might later be the subject of a forfeiture order under s25 (6), where someone has been arrested for an offence under s25 (1), but not yet charged.

29. See the general comments above. There is no doubt that these changes will make transporters more likely to check harder to detect asylum seekers and others to prevent them from travelling, for fear of the more effective fine and enforcement regime. ILPA proposes the deletion of the whole clause.

Clause 25

30. Clause 25 consolidates and amends the material in the 1987 Carriers' Liability Act about carrier sanctions, and in the later SI about arrival via the Channel Tunnel, both

of which impose financial penalties on carriers bringing improperly documented passengers. The main change is a still minor one - the exclusion of taxis from the list of vehicles which can render the owner or operator liable to a fine in clause 25(8),

31. ILPA repeats its objections in principle to this type of provision, for the reasons set out above in the introduction. It proposes the deletion of the whole clause.

Clause 26

32. Clause 26 reproduces the material in the 1987 Act about transit visas.

33. The provision reproduces at sub-cause 26(3)(a) the power for an order under the provision to specify a description of persons subject to a transit visa and in particular that it may be made by reference to, not just nationality and citizenship, but also to *"origin or other connection with any particular country or territory*, but not to reference to race, colour or religion". It is ILPA's view that the italicized reference should be deleted as tending to undermine the anti-discriminatory prohibitions which appear later in the clause.

34. **Amendment** Delete "origins" to "territory"

Clause 27

35. This clause allows for the detention of any vehicle ship or plane used to carry passengers which is owned by someone on whom a carriers' liability charge is pending, and for the sale of that item if there is no payment of the charge within 56 days.

34. We repeat our point that the more draconian the powers available against carriers who bring (inter alia) refugees, the more refugees will be prevented from arriving here at all.

PART III
BAIL

Clause 29

1. This clause introduces a system of routine bail hearings for those detained under the 1971 Act or the 1993 Act, parallel to the existing bail structure under the 1971 Act (as amended).

2. ***Query*** The current procedures for bail are spread over several paragraphs of Schedule 2 of the 1971 Act. The Bill does not propose to alter these in any way. It seems sensible for the Bill to be amended so that the same rules, procedures and tests apply to all bail applications, whether elective or routine. This would need substantial redrafting of the Part III of the Bill and consequent amendment of the 1971 Act. Given the complexity of current provisions on bail the new regime can only compound the problems.

3. Sub-Clause 29(1): No Comment.

4. Sub-Clause 29(2): This clause appears to limit the Court's jurisdiction under Section 29 to consideration of release on bail. To ensure that the jurisdiction of the Court covers the legality of the decision to detain, it is suggest that the sub-clause be amended to omit the words "on bail".

5. **Amendment** In line 14, delete the words “on bail”.

6. Sub-Clause 29(3): This subclause confines the operation of the routine bail hearings to those detained under the 1971 Act who have *not* notified the SSHD in writing that they do not want their case referred to a Court. It is not clear that a detainee can change his mind after stating that he does not want to be referred to Court on the first occasion. Also, the use of the present tense means that the written notice could be given *after* the hearing should have taken place.

7. **Amendments I**n line 18, delete “notifies” and insert “has notified”. In line 19, after “Court” insert “on a particular occasion”

8. Sub-Clause 29(4): No Comment

9. Sub-Clause 29(5): This sub-clause sets the time period within which the second reference to the Court is to be made. It does not provide for further Routine bail hearings if a person remains in detention. Although elective bail applications would usually be possible, those with no representatives, or bad representatives, would be vulnerable. It is therefore suggested that the routine bail hearings should continue at regular intervals. A consequential amendment of Sub-clause 29(7)(b)(ii)

10. **Amendments** In line 27, delete “second references” and insert “further references”. After line 30, add “and again not less than every twenty eight days thereafter.”

11. Sub-clause 29(6): This purpose of this sub-clause appears to be to put the burden on the detainee. Again the use of “bail” seems to confine the Court’s jurisdiction.

12. **Amendment** In line 33, delete sub-clause (6) and insert:
    “(6) (a)A court hearing any case referred to it under this Section shall order the release of the detained person, if it considers
        (i) that the decision to detain the person was not in accordance with the law or with the rules applicable to the case; or,
        (ii) where the decision to detain involved the exercise of a discretion by the Secretary of State or an immigration officer, that the exercise of the discretion should have been exercised differently
    and in any other case, shall consider whether bail should be granted.
    (b) In all applications for bail under the Immigration Acts it shall be for the Secretary of State to prove that continued detention is justified.”

12. Sub-clause 29(7): There are no sanctions for non compliance with this. Also, amendments consequential on those to sub-Clause 5(b) are needed

13. **Amendments** In line 41, delete "second" and substitute "further". In line 41, delete "before the thirty-eighth day of following that on which he was detained" and insert "within three days of receiving the reference".

14. Sub-Clause 29(8): No comment.

15. Sub-Clause 29(9): No penalty is imposed on the Secretary of State for a failure to refer a detainee to Court for a bail hearing. The use of the phrase "as soon as reasonably practicable" is just not acceptable when the liberty of the individual is at stake. Given the Home Office past history of being unable to comply with time limits in appeals, there must be an amendment to deem detention unlawful if the SSHD does not bring the detainee before a Court.

16. Sub-Clause 29(10): The same comments as above apply.

17. Sub-Clause 29(11): Definitions section. Sub sub clause (c) allows the SSHD to specify which magistrates court is appropriate - **should be Lord Chancellor,** not the Home Secretary.

18. Sub-Clause 29(12): No Comment.

19. Sub-Clause 29(13) No Comment

20. Sub-Clause 29(14): The effect of this Clause is to limit its effect, and to exclude its provisions from the provisions for bail under the 1971 Act, etc. Bearing in mind the general comments above, this sub-clause really will need to be deleted as part of a wider redrafting of the provisions relating to bail.

Clause 30

21. This clause allows the Secretary of State to specify where a bail hearing under Clause 2 is to be heard.

22. As a matter of principle, ILPA believes that hearings relating to the freedom of the individual must be open to the public (unless privacy has been requested), and must be seen to constitute an independent review. This cannot be the case if a bail hearing takes place in a prison or a detention centre. For that reason, sub sub Clauses 30 (2) (c), (d) and (e) should be deleted.

23. **Amendment** In line 30, delete "(c) detention centres;" to end of line 33.

Clause 31

24. This Clause limits the power of a Court to release a detainee to cases where a recognizance is entered into.

25. Generally this clause is unobjectionable, but as the recognizance imposes restrictions on an individual, with consequences for non-compliance, it is important that the person released is aware of the conditions. For that reason, ILPA believes that notification of conditions must be in writing and in a language he understands; writing alone would not be sufficient to inform illiterate detainees.

26. **Amendment** At page 23, in line 3, insert after "place" "The conditions imposed under this section must be notified to the person bailed in writing and in a language he understands".

Clause 32

27. This Clause entitles a court to forfeit a recognizance or a bail bond. This power mirrors the powers to forfeit contained in paragraphs Paras 23 and 31, Schedule 2 , of the 1971 Act.

Clause 33

28. This Clause allows an immigration officer or police constable to arrest a person who has, or is about to break the terms of his bail. This Clause is effectively an updated version of the provisions at paras 24 and 33 of Schedule 2 of the 1971 Act. Sub-Clause (5) the use of "if need be by force" is new. ILPA believes that such force needs to be reasonable force. This is stated in clause 117 of this Bill. In the case of a constable, it is clear that force may often be necessary to execute a warrant, but there are considerable safeguards, and the police receive specialised training in how to handle such matters. None of that applies to immigration officers. An amendment may therefore be necessary

29. There must be some judicial oversight of an immigration officer taking someone back into custody. It may be that there is a very good reason, such as administrative error, which led the Immigration Officer to believe that the individual had breached a condition of bail. An amendment may therefore be necessary.

Clause 34

30. This Clause requires the Lord Chancellor to make procedural rules for bail hearing held under Section 29. ILPA is concerned that the reference to rules of <u>practice</u>

should not be used to introduce criteria for granting bail, these should be on a statutory basis.

31. Sub-Clause 34(2): As with the conditions of release, it is important that the detainee understands what is happening, even more so if he is not represented.

32. **Amendment** At page 24, in line 35, after "Section 29" insert in writing and in a language he understands".

33. Sub-Clause 34(3): Under the Bail Acts, a detainee is allowed two full bail hearings, before the restrictions as to what can be argued. Also, this restriction will not apply to elective bail hearings under the existing provisions in the 1971 Act.

34. **Amendment** In line 42, delete "first reference" and insert "first and second references".

35. Sub-Clause 34(5): ILPA is concerned that all bail hearings should in principle be open to the public. However, we are concerned that the anonymity of asylum-seekers should be protected for reasons of their own safety. Therefore we propose an amendment to achieve this. In principle, as the need for an open hearing is so that justice can be seen to be done, hearings should only be in private when this is required by the interests of justice. Mere administrative convenience should not be a reason to deny public access to a hearing.

36. **Amendments** In line 2, delete "administration" and substitute "interests". At end of line three add "or if the detainee requests that the hearing be heard in private".

37. Sub-clause 34(6) allows the Secretary of State to authorise his own officers to conduct hearings in Magistrates' Courts. It does not, however, give rights of audience in these courts those who are not qualified solicitors or barristers. Given that clause 34(2)(b) envisages non-qualified representatives representing detainees at routine bail hearings, amendments to this Bill are necessary, as are consequential amendments of the Magistrates Court Acts.

Clause 35

38. This Clause permits bail hearings to be conducted by live video link. ILPA is very concerned about this provision. It is of paramount concern in hearings relating to the liberty of the individual that the detainee be produced. It would also put the detainee at a great disadvantage in giving evidence, and it will lead to the objectification of the detainee. It will also make virtually impossible for the detainee to instruct his representative in confidence.

39. **Amendment** In line 10, delete Clause 35.

Clause 36

40. This Clause allows the Home Secretary to make rules to allow immigration bail hearings to be heard by magistrates.

41. As a point of principle, we believe that one of the parties to a hearing should not be able to dictate when and where it is to take place. For that reason, we believe that it should be for the Lord Chancellor to make these rules.

42. **Amendments** In line 25, delete "Secretary of State" and insert "Lord Chancellor". In line 39, delete Sub-Clause 4 and renumber.

Clause 37

43. This Clause allows the Home Office to make grant to voluntary organisations to provide advice and assistance to detainees. ILPA believes that legal aid should be extended to cover bail hearings.

PART IV
APPEALS

Introduction

1. ILPA's general concerns and comments about the appeals provisions were set out in the second reading briefing (paragraphs 24-35 refer). Detailed analysis of Part IV, together with relevant schedules, follows.

2. The corollary of the contents of Part IV is the complete repeal of Part II of the 1971 Immigration Act. **It is clear however that all the ramifications of such repeal have not been appreciated.** Thus for example the recently established Special Immigration Appeals Commission (1997 Act refers) will be deprived of much of its jurisdiction since appeals under 2(1)(a) to (c) of that Act are predicated on the existence of provisions in Part II to the 19971 Act. And similar concerns arise with various provisions of the *Immigration (European Economic Area) Order* which again rely on the existence of Part II provisions in the 1971 Act. No doubt the

Government will give urgent consideration to such matters, in addition to all those raised below. Further, ILPA is concerned at the failure to replicate section 21 of the 1971 Act anywhere in the Bill. The power to refer matters back to the appellate authority is an important one - as was expressly recognised by Lord Bridge in *Al Mehdawi* [1990] Imm AR 140. If not an oversight ILPA fundamentally opposes such repeal which is a wholly unwarranted repeal of an important safeguard (for example in 'fresh evidence' cases).

Clause 38

3. ILPA welcomes the retention of the Immigration Appeal Tribunal. However, ILPA has concerns as to how the Tribunal will function. ILPA opposes the routine use of single member Tribunals in contested cases; and the idea that such appeals would be primarily 'paper' ones it regards as profoundly objectionable and without parallel in any other jurisdiction. See schedule 2 comments below.

Clause 39

4. See schedule 3 comments below.

Clause 41

5. This clause reproduces the right of appeal contained in s. 13 Immigration Act 1971 against refusals to grant leave to enter, entry clearance, certificates of entitlement. ILPA makes no specific comments.

Clause 42

6. This clause imposes limitations on the rights of appeal contained in cl 41 above. The limitations are the same as the existing limitations in s13(3)-(5) 1971 Act. However, the clause re-introduces the right of appeal against a refusal of entry clearance for family visitors subject to the appellant paying a fixed fee in order for the appeal to be entertained.

7. ILPA supports the restoration of appeals for family visitors. However, ILPA notes that 'family visitor' is not defined and is to be given such meaning as may be prescribed (cl 42(9)) and would urge a definition which is sufficiently broad so as to include (for example) persons in same sex relationships. ILPA hopes that the term will not be defined so as to exclude prospective appellants based on the distance of their relation to the sponsor or indeed so as to preclude all but relationships through blood or marriage.

8. Insofar as the clause anticipates procedures for the exercise of the right of appeal, ILPA would urge that there ought to be a right to an oral appeal and, for that right of appeal to be meaningful.

9. ILPA is concerned at the introduction of fixed fees for appeals as we believe that, in principle, access to justice in this context should not be dependant on the payment of fees. ILPA would further suggest that the fees should not be fixed at such a level so as to be either prohibitive of or a disincentive to an appeal. It is further suggested that the fee ought to be refunded on a mandatory basis unless the adjudicator dismisses the appeal for the reasons given already by the entry clearance officer.

10. **Amendment** Cl 42(5) add: "(d) and the Secretary of State shall in such regulations provide for the mandatory re-payment of such fees where an appeal is dismissed for the reasons given by the Entry Clearance Officer"

11. **Questions** ILPA has a number of concerns which are reflected by the following questions which it is hoped the government is able to answer. Is it possible for an indication to be given as to be given as to the width of the 'family visitor' for the purposes of cl 42 ? Will the definition of 'family visitor' be restricted to particular relations by virtue of blood/marriage and, if so, what will be the extent of any such restrictions ? Will the definition be broad enough to cover those in same sex relationships ? What will be the likely cost to appellants of bringing and appeal under this clause ? Will appellants be entitled to an oral hearing with legal representation at their appeal?

Clause 43

12. The clause provides for a right of appeal against decisions of the SSHD to refuse <u>to grant further leave</u> and permitting such an appeal even though the limited period has ended.

13. ILPA would point out that the rights of appeal provided by cl 43 are not as extensive as those provided for by existing s14(1) 1971 Act under which a person may appeal, in addition against refusals to vary leave, against any variation of leave, i.e. as regards the imposition or variance of conditions or duration (for example curtailment in relation to which the current immigration rules provide extensively). **ILPA opposes the withdrawal of such important rights of appeal, in particular in circumstances where the SSHD is contemplating increasing the scope of the power to give/refuse/vary leave (see amendments to s3 1971 Act contained in clause 2 of the Bill).**

14. ILPA is further particularly concerned that such this apparent restriction of appeal rights was not the subject of any consultation, nor do the explanatory notes indicate

that there is any intended change to existing appeal rights in this way. If the adverse consequence identified is simply the result of a drafting error, then it should clearly be amended as indicated below. Quite apart from ILPA opposition to such change, the restriction appears in any event to be inconsistent with the terms of cl 43(2) which contemplates rights of appeal against a refusal to vary leave (which seems to include 'conditions' as well as a refusal to grant further leave).

15. ILPA is further concerned to note that cl 43(2) anticipates the withdrawal of the Variation of Leave Order 1976. This appears to be inconsistent with para 1(1) schedule IV which suggests that leave will be "continued" while an appeal is pending. It would be wholly unfair for applicants for further leave to become bereft of their leave and the benefit thereof (for example the right to work lawfully in the UK if their leave so entitles) during the period of any delay in the first instance determination by SSHD as to their right to further leave.

16. **Amendments** In cl 43(1) delete "to refuse to grant further" and insert: " or against any variation of the leave (whether as regards duration or conditions) or against any refusal to vary it". (The effect here is to restore the right of appeal against any variation of leave or a refusal to vary leave as is the case at present under s14 1971 Act).

17. In cl 43(2), delete "even though the limited period has ended".

18. Add new cl 43(3) "The leave of a person mentioned in cl 43(2) who makes an application as further mentioned in cl 43(2) continues to have effect by virtue of this section until such time as a decision is made upon the application to vary leave or, if the person appeals under this section against the decision relating to that application, until such time as that appeal ceases to be pending. Nothing in this sub-section is to be read as affecting the validity of any further leave that a person may be granted when a decision is made upon the application to vary leave".

19. The effect here is to ensure that a person continues to have lawful leave to enter/remain in the UK during the time it takes to make a decision on an 'in time' application to vary leave when leave would otherwise expire and for that leave to continue during any period that the appellant is appealing against a negative decision on that application. It places the 1976 Order (above) on a statutory footing and also renders effective the provisions of paragraph 1(1) of schedule IV which would otherwise only have effect in those cases in which a refusal was issued and an appeal initiated at a time when the applicant still had an extant grant of leave by the Secretary of State.

20. **Questions** Is it intended in cl 43 to restrict rights of appeal in 'variation' cases to circumstances where the SSHD refuses to grant further leave as cl 43(1) states (notwithstanding the apparent contrary indication in cl 43(2)) and to thereby preclude appeals against other variations of leave as is presently provided for by s14(1) 1971

Act? If so, what is the justification for this restriction especially in the light of the envisaged enhanced powers to vary leave as contained in cl 2 of the bill ?

21. Does cl 43(2) anticipate the abolition of VOLO ? If so, how is this consistent with the effect of paragraph 1(1) of schedule IV to the Bill ?

22. If the Variation of Leave Order is to be abolished, does this mean that, for example, a person who applies for a variation of their leave who enjoys extant leave with no working restrictions, will cease to be working lawfully in the UK (and in respect of whose employment, an employer will fall foul of the illegal working sanctions in the 1993 Act) as a result of a delay in dealing with their application notwithstanding the fact that the application is subsequently successful without even the need to resort to an appeal ?

Clause 45

23. This clause provides for the right of appeal for persons who are subject to the only two remaining categories of persons who may be subject to 'deportation' (as opposed to administrative removal under cl 6). Paragraph 30 to schedule 12 of the Bill amends s3(5) 1971 Act to the effect that the power of deportation remains only in respect of those whom the Secretary of State determines that their presence in the UK is not conducive to the public good and in respect of those who have a family member who is being deported.

24. ILPA fundamentally opposes the abolition of in-country appeals on the merits of deportation in respect of those who have breached conditions of leave and/or overstayed (see comments in relation to cl 48 below). It is hoped that, in relation to 'conducive' and family deportation cases, the wide ranging list of factors contained in the current immigration rules, which set out the matters which must be taken into account by the Secretary of State and also by the appellate authorities, will remain.

25. ILPA welcomes the apparent intention of the legislation to allow an appeal to the adjudicator in the first instance in deportation cases with an appeal thereafter to the Immigration Appeal Tribunal. ILPA believes that there is no reason in principle why appeals under these provisions should enjoy only one tier of appeal in contradistinction to all other appeals before the Immigration Appellate Authority with the exception of certified appeals.

26. The explanatory notes say "under the Bill, deportation will be reserved for cases where removal is conducive to the public good or recommended by the Court; these cases will now all go to the adjudicator at first instance or to the Special Immigration Appeals commission". ILPA would have welcomed a provision in the Bill which did indeed give a right of an appeal to an adjudicator against a recommendation of deportation made by a criminal court. Unfortunately the Bill does not do this and so

the unsatisfactory position remains that where criminal courts recommend deportation the only appeal is within the criminal system against such recommendation. But of course the effective decision is made by the Secretary of State and against this there is no appeal. **ILPA would welcome an amendment to give effect to the terms of the explanatory note** so as to avert this long unsatisfactory anomaly. Further the reference to the SIAC in the explanatory notes is also flawed: see 'introduction' at paragraph 2 above.

27. Amendments Delete paragraph 30(2) of schedule IV; delete cl 48(1)b) of the Bill and ; Delete cl 6. The effect is to restore the existing position as regards those persons who are to be enforced against by way of deportation and to enable the same to an in-country right of appeal on the merits of their cases.

Clause 47

28. Clause 47(1) confers a right of appeal against decisions on entry and stay on the ground that the decision breaches the person's human rights.

29. This clause creates a new ground of appeal against adverse decisions concerning entry and stay. The effect of sub-clause (1) is that the right of appeal is against decisions made by the Home Office or an immigration officer. But the clause does not provide any appeal on human rights grounds against decisions made by entry clearance officers in British posts overseas; it should do. Their decisions may well impinge on the human rights of family members who are in the UK and whose rights under the ECHR the government is committed to protect.

30. Sub-clause (2) defines what is meant by a breach of human rights in this context: it means any act or omission that is unlawful under section 6(1) of the Human Rights Act 1998. Section 6(1) makes it unlawful for a public authority to act in a way that is incompatible with any of those rights under the European Convention on Human Rights ("ECHR") incorporated into UK law.

31. In the context of immigration decisions the most relevant ECHR rights are:

    a. The right to life guaranteed by Article 2 of the ECHR.
    b. The prohibition on torture or inhuman or degrading treatment or punishment contained in Article 3
    c. The right to respect for private and family life contained in Article 8.
    d. The right to enjoy the rights guaranteed by the ECHR without discrimination on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin - article 14.

32. In a number of cases the European Court of Human Rights has held the United Kingdom to be in breach of the ECHR in the area of immigration decision-making. For example, in 1985 the Court rules that the different rules on the admission of husbands and wives violated the ECHR's prohibition on discrimination and the rules on the admission of spouses had as a result of the ruling to be changed (*Abdulaziz, Balkandali and Cabales case*). In 1996 the court rules that the proposed return of a Sikh activist to India would expose him to a risk of torture or inhuman or degrading treatment contrary to Article 3 (*Chahal* case). In 1997 the Court ruled that the deportation of an AIDS sufferer to a country which lacked any treatment or other support for AIDS patients was a violation of the prohibition on inhuman and degrading treatment (*D v United Kingdom*).

33. The introduction of this new right of appeal to an adjudicator is to be welcomed. Under the present law adjudicators and the Immigration Appeal Tribunal are not entitled to allow an appeal on the ground that the decision appealed against was made in breach of ECHR rights. The new appeal right will enable adjudicators and the Tribunal to consider the facts of the case and allow the appeal of satisfied that the decision violates the appellant's rights under the ECHR.

Issues of concern/possible amendments

34. It is unclear whether the omission of entry clearance officer decisions from the new human rights appeal framework is deliberate or accidental. Decisions to refuse entry clearance are as likely to violate human rights as Home Office or immigration officer decisions, particularly in cases involving applications by close family members to join their relatives in the United Kingdom. Current Home Office policy is to expect spouses (of British nationals) who are here illegally to go abroad and apply for entry clearance to join their British spouse. Persons who pursue this option and are then refused entry clearance would not, as the clause is presently drafted, be able to appeal against the refusal on human rights grounds.

35. Sub-clause (5) provides that an appeal "may" be allowed if the adjudicator or Tribunal decides that the decision appealed against is in breach of the appellant's human rights. This appears to give a discretion not to allow the appeal even in cases where the decision violates the United Kingdom's human rights obligations. This is unacceptable. The substitution of "shall" for "may" in line 18 would cure this defect and ensure that an appeal will succeed in all cases where the decision appealed against has been shown to be in violation of the ECHR.

36. At present clause 47 contains no prohibition on removal or deportation in cases where a person exercises their right of appeal on human rights grounds. Where the person is appealing against removal as an illegal entrant or, for example, as an overstayer then clause 48(3) would entitle them to exercise their appeal right on human rights grounds before removal. However the new provisions do not prohibit removal of persons

refused entry who seek to exercise their clause 47 appeal rights (save where the person arrived with entry clearance), on the ground that their removal would, for example, violate their right to enjoyment of family life.

37. Furthermore, it is of particular concern that cl. 47(1) contains an obvious lacuna. It needs to also include decisions which <u>if carried out</u> would constitute a breach of the Convention.

Clause 48

38. This clause creates a new framework of appeal rights for those liable to removal for being in breach of the immigration laws whether on the ground of entering illegally, overstaying the time-limit on their stay or breaching conditions of stay (for example, working illegally).

39. The clause confers a right of appeal against the giving of removal directions but only on the ground provided for in sub-clause (2) that "in the facts of his case there was in law no power to give them on the ground on which they were given". The effect of this limitation on the ground of appeal is that illegal entrants can only challenge removal on the ground that did not enter illegally. This adds nothing to present appeal rights. The clause gives a like power to remove overstayers; they, too, can only appeal on the ground that they are not, or were not overstayers**. But far more important, such appeal right is of no practical significance whatsoever since it is exercisable only after removal.** Given the 'narrowness' of such appeals in any event and the removal of deportation appeal rights for overstayers ILPA proposes that sub-clause (3) be deleted so as to enable an in country appeal solely on 'power in law'. See further below.

40. The effect of sub-clause (3) the appeal against removal directions can only be appealed against from abroad after removal, save in cases where the person appeals on human rights grounds or an asylum grounds. This will have the effect of reducing present appeal rights available to persons being deported for overstaying or breach of conditions. At present such people may appeal against deportation - while in the United Kingdom - on the ground that on the facts of the case they are not liable to deportation: see section 15, Immigration Act 1971 and section 5 Immigration Act 1988.

41. The clause contains a further very substantial reduction in the appeal rights of overstayers or persons in breach of their conditions. At present, provided they have been in the United Kingdom for at least 7 years such people can appeal against deportation on the ground that discretion should be exercised differently. This involves an adjudicator or the Tribunal considering whether relevant criteria set out in the Immigration Rules (HC395, paragraph 364) have been weighed up correctly. These criteria include the person's length of residence, connections with the United Kingdom, employment record, domestic circumstances and any compassionate

circumstances. If the clause is enacted then in future adjudicators and the Tribunal will have no power to review the way in which Home Office officials have exercised discretion, apart from the limited power to consider whether there has been a breach of the European Convention on Human Rights.

42. The removal of a right of appeal on compassionate grounds is deeply objectionable and will mean that many decisions on expulsion from the United Kingdom are not subject to any effective independent review. There are many cases where a person's removal from the United Kingdom would not breach the European Convention on Human Rights but should nonetheless be regarded as wrong in principle because of the hardship that would result from expulsion

43. During the passing of section 5 of the Immigration Act 1988 (which removed the right of appeal on compassionate grounds from persons here less than 7 years) Alun Michael said that: "It will harm people with humanitarian reasons for wishing to remain in the UK. They may have families here, they may have been here for many years and have no roots overseas, or they may be doing valuable jobs in the community, yet they will be prevented from challenging the decision to expel them from Britain. It also means there will be no opportunity for the independent appellate system to consider and decide on the compassionate circumstances of a person subject to immigration control who seeks to remain here. It must be wrong that people who are well rooted in the community should have their right of appeal removed…" [Standing Committee D, 12.1.88 col. 481]. These words are equally apt comment on the effect of clause 48.

44. The reduction in deportation appeal rights effected by the 1988, with the result that officials have no independent check on the quality of their decisions, largely accounts for a very substantial increase in the number of deportation decisions made from a figure of 860 in 1987 to 5240 in 1997. The system of immigration appeals was established in 1969 following the recommendations of the Wilson Committee in 1967 which concluded: "However well administered the present control may be, it is fundamentally wrong and inconsistent with the rule of law that power to take decisions affecting a man's whole future should be vested in officers of the executive, from whose findings there is no appeal."

45. Clause 48 goes considerably further than section 5 of the 1988 Act in reducing in-country rights of appeal: not only will there be no appeal at all on compassionate grounds but the present right of overstayers to challenge the legality of the decision to deport them by appealing to an adjudicator before deportation is implemented will be abolished. This can only increase the number of challenges to deportation by way of application for judicial review in the High Court. The appeal from abroad after removal is an ineffective remedy: the appellant cannot be present at the appeal hearing, has no opportunity to give live oral evidence and may have difficulty instructing competent representatives from overseas.

46. The Home Office has argued that "removal" is a less drastic measure than "deportation". But such distinction is illusory (see clause 6 commentary above).

Clauses 49 - 50

47. These clauses reproduce, with minor amendment provisions that already exist in the Immigration At 1971, section 17. These provisions confer aright of appeal against the destination to which a person is to be removed or deported.

48. Although these clauses largely reproduce existing provisions of the 1971 Act, as a result of other changes in the Bill, the effect is that persons being removed under clause 6 as overstayers (or for breach of conditions) will no longer have a right of appeal against the destination to which they are to be removed. At present someone who is being deported will be able to object to their destination and an adjudicator can order deportation to a different country or territory if satisfied that the person will be admitted to that different country. By reason of clause 6 overstayers will in future not be subject to deportation but will instead be liable to removal. However clause 49 does not introduce any right of appeal against destination for those liable to removal for overstaying. This right to object to destination is limited to persons refused entry, persons being deported and those being removed for having entered illegally in breach of a deportation order. The removal of a right of appeal against right of appeal is a particular matter of concern in view of the removal of the right to appeal on compassionate grounds.

Clause 51

49. This clause gives rights of appeal in asylum cases in broadly similar terms to s. 8 1993 Act. It is however a cause for concern that cl. 51(2) refers to "a person who has limited leave". ILPA's understanding of cl. 43 is that a person does not need to have a limited leave when refused a variation application in order to appeal (in other words 'VOLO' is to become 'redundant'). Assuming such analysis to be correct cl. 51(2) requires amendment so as to reflect the cl. 43 poisition.

50. **Amendments** Cl. 51(2) insert the phrase "and applies before the end of that period for his leave to be varied" after "united Kingdom" and before "may appeal" (line 34). See confusion as to inter-relationship with cl. 43 above.
51. Cl. 51(5) by addition at end of '… or the ECHR' (for the purposes of clarity arising on the present drafting of cl. 47).

52. **Question** Is ILPA's analysis of the 'VOLO' position correct and/or intended?

Clause 52

53. Limits cl. 51 appeal rights in certain circumstances. Cl. 52(1)-(2) replicate 'national security' limitations presently contained in para. 6, sch. 2 of 1993 Act. Note personal decision required of SSHD in all cases. 52(6) replicates para. 2, sch.2 1993 Act. **ILPA opposes cl. 52(7)**; although it replicates s8(3A) of 1993 Act (as amended by para. 2, sch. 3 of 1996 Act) it could leave a persons without any right of appeal in deportation cases (where for example) through negligence of adviser the cl. 51(3)(a) appeal right was not exercised. The 'old' s. 8(3) ('but a person may not bring an appeal under both paragraph (a) and paragraph (b) above') was more than sufficient to prevent any duplication of appeals. Further, ILPA is concerned as to how persons who claim asylum after the making of a decision to make a deportation order (cl. 51(3)(a) (non cl. 6 'removal' type cases) and persons who claim asylum after refusal to revoke a deportation order (perhaps as refugees 'sur place'). How is it intended that their 1951 Convention claim be appealed?

54. **Amendment** Cl. 52(7) omits words in brackets and substitute "and he has exercised it". This would deal with the aim of the 1996 amendment without leaving certain asylum seekers without an appeal right.

Clause 53

55. Appeals in 'safe third country cases'. ILPA has always opposed the withdrawal of 'in-country' appeal rights in 'safe third country' cases. This was an appeal right which the Government in opposition had promised to 'give back'. Cl. 53(2) replicates s 3(1) of the 1996 Act. But it must be read in the light of cl. 54(2) which prevents the exercise of such appeal right before removal from the UK. Since neither ss 2 or 3 of the 1996 Act are to be repealed there will be no change.

56. **Amendments** see cl. 54 below.

Clause 54

57. 'Miscellaneous' limitations on appeal rights in cls. 51 and 53. The *effect* of cl. 54(1) is the same as the limitation on the exercise of appeal rights in third country cases (*i.e.* only under cl 51/s. 8 1993 Act). But it is unclear whether cl. 54(2) is intended to prevent an in-country appeal where the country of proposed destination is not designated under s. 2(3) of the 1996 Act. If so this is a completely unjustified 'tightening' which ILPA opposes. It would seem not to be the case from cl. 54(3) but cl./ 54(2) as drafted already precludes all persons from appealing before removal. Further, the phrase "as respects any matter arising" in cl. 54(2) is ambiguous: it cannot exclude any ECHR matter sought to be raised. Even although 'certificated' cases under s. 2 1996 Act apply only to the 1951 refugee Convention it is quite possible that such cases could raise ECHR matters.

58. **Amendments** Cl 54(2): substitute 'is not entitled to' for 'may' so as to revert to 1993 Act position. Cl. 54(3): omit. 'In-country' third country appeals were a much more effective and efficient means of challenge. Now innumerable applications are made in third country cases for judicial review which is neither efficient nor cost effective – especially since the effect of the grant of leave to apply for judicial review in respect of any particular country is to frustrate all removals to such country.

59. **Question** Will the Government to confirm that there is no intention to withdraw 'in-country' appeal rights in third country cases where 'third country' is <u>not</u> designated. Why will not the Government fulfill its promise whilst in opposition of restoring third country appeal rights? It would plainly save the public purse given the cost to the legal aid fund of third country judicial reviews.

Clause 55

60. The 'one stop' appeal procedure. ILPA opposes this procedure. It is the corollary of the withdrawal of deportation appeal rights provided for by cl. 6 of the Bill. ILPA believes that there should be a 'full' deportation appeal right at which adjudicators could substitute their discretion for that of the Secretary of State. Such an appeal should also cover 'illegal entrants' as well. ILPA's views are well known to the Government; indeed, they were consistently shared by them in opposition, in particular during the passage of the 1988 Act when deportation appeal rights were curtailed. It is ironic that even the Conservative Government at that time would likely not have got away with the complete withdrawal of deportation appeal rights The increase in numbers of asylum applications is a reflection of a far more troubled world producing much greater numbers of asylum seekers; that this should be sued in justification of the compete withdrawal of appeal rights (so the 'innocent' manifestly suffer) is indefensible.

61. It is entirely unclear how the 'one stop' procedure will work in practice. If implemented it would be far more sensible to introduce some kind of 'minded to refuse' procedure at which time the putative appellant could raise matters. Cl. 55 (1)(b): must such appeal right have been exercised?. *When* will the 'notice' under cl 53(3) be served (presumably when notice of refusal of ELE/R is given). How can a person be expected to know about all the 'concessions', all the more so in an RLE case. *If* all is predicated on a refusal and service of notice of decision, what will happen to the 'appeal' whilst the matters raised in the statement are considered. But it does seem that 'any additional grounds' in cl. 55(3) is wide: note that the cl.55(5) matters are not exhaustive of cl. 55(3), but sets down requirements in respect of three types of additional grounds (but not the only ones).

62. **Amendments** Cl. 55(1) Insert after "if" the following "the Secretary of State is minded to refuse an application for leave to enter or remain in the United Kingdom

and the applicant would have a right of appeal against such decision under this Act". Omit completely sub. cl. (1)(a) and (b) as drafted. See comments above: otherwise it is difficult to envisage how this will work in practice.

63. Cl. 55(3): substitute for "relevant" the word "dependant".

64. [**Consequential amendment** to sch. 4, part I, para. 4(2) by addition of "or putative appellant within the meaning of cl. 55(1)" so as to make clear that the right to legal representation applies in such 'one stop' cases.]

65. **Question** What is it anticipated might be covered by cl. 55(2)? ILPA would want to see the proposed definition of family in cl. 55(6). What are the notice requirements intended to be?

Clause 56

66. Penalties for failure to comply with the 'statement' provisions. Broadly speaking grounds, concessions, asylum and ECHR issues only able to be raised on appeal if not in 'statement' if SSHD considers that the applicant had a reasonable excuse for the omission.

67. Whether asylum/ECHR is raised solely as delaying tactic manifestly a matter which itself must be justiciable before the appellate authorities; no justification whatsoever for this to be simply a matter for SSHD. Ditto 'reasonable' excuse under cl. 56(9) covering all matters. .

68. **Amendments** Add at end of sub-cl. (9) "unless at the hearing of any appeal the adjudicator, special adjudicator or tribunal (as the case may be) considers that the applicant had a reasonable excuse for the omission". See comment for reason for amendment. The Secretary of state ought not be concerned that his view of 'reasonable excuse' would be subject to scrutiny by the appellate authority. The consequences of not taking such approach would be absurd, since judicial review would be required to be sought on the sole issue of 'reasonable excuse'.

69. Add as new sub-cl. (11) "Subsection (9) above shall not apply where the adjudicator, special adjudicator or tribunal (as the case may be) considers that an appellant's human rights have been breached or where any removal would be a breach of the [1951 Refugee] Convention". This is crucial, lest the appellate authority will be completely powerless to stop any breach: even a person's who has no reasonable excuse could be at risk of (for example) treatment contrary to Article 3 ECHR if removed.

Clause 57

70. Requires SA to consider 'additional grounds' in asylum appeals. This would appear to make the asylum appeal with any element of 'one-stop' a 'mixed appeal'.

71. **Amendments** Insert new sub-clause (3)(c) as follows "and may allow the appeal on any of the additional grounds raised". Without such amendment sub-cl. (3) is otiose.

72. Substitute the word "statement" for the word "notice": this is for the sake of consistency. The 55(3) obligation is on the applicant to 'state' certain matters in a notice; Cl. 55(4) refers to the contents of the 'statement'.

73. **Questions** What is the appeal jurisdiction? No equivalent of 58(2) ('may allow an appeal on any one of them').

Clause 58

74. Requires adjudicator or Tribunal to consider 'additional grounds' in relation to cl. 43 appeals.

75. This provision is very confusing. Cl. 58(2) would appear to contemplate a further decision to be taken by SSHD ('but the SSHD refuses the application for leave'). It is for precisely this reason that ILPA suggests the form of 'minded' procedure referred to above. Further, ILPA considers that sub-cl. (5) is ill conceived. It should allow (at least) for the possibility of a person becoming a 'refugee sur place' on account of recent changes in his/her country of origin.

76. **Amendment** Delete sub-cl. (5) because of 'refugee sur place' point.

Clause 59

77. Penalties for proceeding with an appeal to the Tribunal in cases considered by the Tribunal to have "no merit" if such appeal subsequently is dismissed. ILPA is fundamentally opposed to this provision. The explanatory notes make clear that the power will be exercised if no leave is required. [The present position is that leave *is* required.] Plainly this is with an eye to cutting out judicial review. ILPA's reasons for opposing this provision are at para. 33 of its second reading briefing. If there is to be such provision it should only bite where appeals are considered an abuse of the process of the court, and not merely when believed by the tribunal to be without merit.

78. **Amendment** Delete clause. **Alternatively,** amendments must ensure that the provision can only bite where appeals are pursued that are an abuse of the process of

the Court. Furthermore, ILPA is particularly concerned at possibility of an appellant being personally liable.

Schedule 2

79. Schedule 2 makes provision for the Tribunal. The effect of paragraph 1(3) is to abolish lay members. Paragraph 6(3) provides that the jurisdiction of the Tribunal may be exercised by a single member and by direction of the President under 6(4), in circumstances specified by the President. Such circumstances may relate either to a category of cases or to a specific case.

80. ILPA is aware of discussion about the possibility of appeals to the Tribunal being 'paper' appeals (without a right to an oral hearing). ILPA is fundamentally opposed to any such proposal which is virtually unheard of. It is unthinkable that the fact that there was a full civil trial prior to appeal to the Court of Appeal might be put forward as reason to support an argument that appeals top the Court of Appeal should be considered without a hearing. Whilst on occasions it is appropriate to dispense with oral hearings (for example where a case is to be remitted and such remittal is unopposed), this could never be appropriate where a party objects to such course. ILPA seeks confirmation from the Government that it has no such intention.

81. ILPA would oppose the routine use of single-member Tribunals in place of 'lay members' who are to be abolished. Tribunal members tend to be recruited from among the ranks of Adjudicators. An appeal to the IAT could amount to no more than a second appeal to an Adjudicator, or a sort of 'peer review' – especially given the practice of having adjudicators sit as part time Tribunal members and in view of the fact that under the Presidency of Pearl HHJ Tribunals are taking the view findings of fact by special adjudicators can be reviewed in an increasingly broad range of circumstances. ILPA does not believe that persons should be able to serve simultaneously as Adjudicator and as Tribunal member.

82. At the same time, it is clearly important that Tribunal members should have expert knowledge of immigration and asylum law and practice. A major problem at present is the poor quality and lack of experience of some members - and this cannot be said to apply simply to the lay members. There is no guarantee that such expertese will be obtained from persons legally qualified for seven years (paragraph 1(3) refers). Given in particular the wide ranging impact that cl. 47 will have on decision making it is desirable that the necessary expertese for appointment as a Tribunal member be more widely based than is provided for by paragraph 1(3). Academics with relevant experience would be another obvious candidate as might some lay practitioners with long experience in the field.

83. As for the composition of the Tribunal in 'a specified case or category of case', ILPA would object to the use of directions by the President, which could be varied as and when he sees fit, rather than, as at present, the use of statutory instrument (the Procedure Rules). ILPA seeks clarification as to the intended use of such power, in particular in its reference to 'a specified case'. It would be objectionable if identical cases falling within the same category could be dealt with differently, and therefore

there should be no power to vary the composition of the IAT from case to case, only (if at all) from category to category.

Amendments

- Replace 6(3) with wording of Sch 5, Part II, para 12 of the 1971 Act [provides for 3-member Tribunals], omitting the wording requiring one member to be legally qualified.
- Consequently, in 6(4) replace 'But the President may direct that' with 'Rules of procedure laid down by the LC under Sch 4, Part I, para 3 of this Act may provide that'. Present 6(5) would then be deleted and 6(6) (which would become new 6(5)) would need to be amended to read '"Specified" means specified in the Rules of procedure.'
- Again in 6(4), omit 'case or' (effect is to say that the Rules should apply to categories of case and not to individual cases).
- Again in 6(4), insert 'uneven' before 'number' (presently there cannot be an even number of members hearing a case, for good reason, in that majority decisions would obviously be a little tricky if there were).
- To prevent persons acting as both adjudicators and IAT members, in para 1, insert: '(4) No person holding office as an Adjudicator under Section 39 and Schedule 3 of this Act shall at the same time be qualified for appointment as a member of the Tribunal'.
- Add to qualifications for appointment that the person shall have had experience of immigration/asylum law and practice.
- Insert, in para 1, a sub-para (5), allowing for the appointment of non-legal members of suitable professional or academic standing.

84. ILPA re-affirms its insistence that draft rules of procedure should be available to the Committee. At the very least ILPA requires immediate clarification of the intended and/or anticipated use of single member Tribunals.

Schedule IV

Paragraph 1

85. Paragraph 1(1) appears to 'continue' an extant leave where a person appeals pursuant to cl.41 or cl.43 (on entry refusals and variation refusals) during the pendancy of the appeal

86. See comments as to cl 43 above. It is noted however that this position appears to be inconsistent with cl 43(2) and also with paragraph 1(4) of schedule IV which appears to provide protection against being required to leave the UK where none would appear necessary pursuant to the terms of paragraph 1(1), schedule IV. As noted above there should be a uniform provision in all cases where a variation application has been made during the currency of existing leave. Whether the Home Office thereafter reaches a decision before that leave expires should be immaterial. ILPA proposes that in both cases the applicant should be treated as lawfully in the UK until that decision has been made and any appeal which the applicant is entitled to bring whilst in the UK is still pending.

87. Paragraph 1(2) reproduces the existing s14(5) (added by IA 1988 s10 schedule paragraph 3) to the effect that a variation appeal lapses when a deportation order is made. ILPA makes no comment.

88. Paragraph 1(3) reproduces existing s14(1) 1971 Act which prevent variations from taking effect so long as an appeal to which it relates is pending.

89. Paragraph 1(4) replicates the protection from removal while an appeal is pending under s14(1). The sub-para appears to be inconsistent with sub-para 1 (above) in that, if leave is continued during the pendancy of the appeal, this protection is otiose

90. **Amendment** Delete sub-para 1(4).

Paragraph 2

90. This sub para replicates s18 1971 Act as also applied by para 4 sched 2 1993 Act and rules of procedure which provide for notice etc requirements.

Paragraph 3

91. This paragraph provides generally for rules of -procedure governing appeals

Paragraph 4

92. This paragraph contains further general provisions as to procedure but, in addition, seeks to enable appeals to be determined without hearings and without consideration of the merits of the appeal in prescribed circumstances.

93. ILPA opposes the power provided to enable the IAA to dismiss appeals without consideration of the merits (paragraph 4(1)(b)). In particular, in cases involving applications for asylum/human rights issues, it cannot be right that an appeal may be dismissed without investigation of the merits by reason of a failure of a party to attend an appeal or to comply with (often onerous) directions for the further conduct of an appeal issued by the IAA. These failings may have nothing whatever to do with the merits of the case and to preclude the safeguard of independent review may result in removals contrary to article 33 1951 Convention and/or breaches of ECHR.

94. Paragraph 4(1)(d) allows the procedure rules to prescribe circumstances in which the Tribunal may seek to set aside a determination of the Tribunal. This is a new power and appears to contemplate the Tribunal setting aside earlier determinations in certain circumstances for example the production of fresh evidence not available to the IAA which might have effected the outcome of the appeal. ILPA would suggest that such power ought to be extended to Adjudicators/Special Adjudicators in cases where, for example, there is no right of appeal to the Tribunal and/or an appellant has not sought to appeal or leave to appeal was refused.

95. ILPA welcomes this additional avenue of redress but opposes the creation of this power as an alternative to request to references back to the IAA by the Secretary of State (s21 having been omitted along with the rest of part II 1971 Act: see paragraph 2 of introduction above). ILPA would urge that the s21 remedy co-exists with the right of the IAA to re-open issues. The rationale for this is that there are cases in which the Secretary of State, wholly aside from the view of the IAA, considers that the advice of a specialized independent review body in order to determine the case on the basis of the fresh material presented (see *Khaldoun* [1996] Imm AR 200 CA, *Bello* [1995] Imm AR 537 and the terms in which the Secretary of State at present responds to requests to make a reference pursuant to s21).

96. **Amendment**: Delete paragraph 4(1)(b).

97. ILPA is concerned that unrepresented appellants do not face the dismissal of their appeals without a hearing, particularly on the basis of a technical breach of directions. Even in these cases the material produced by the appellant in paper form may give cause for concern so that they cannot be safely removed or consistent with their human rights. There is a second concern that the rules should couple any residual power to deal summarily in cases where appellants do not attend should be accompanied by a power to reconsider such decisions if it later emerges that there was a good reason for the appellant's non attendance.

98. 4(1)(c) does not appear to make sense, seeming, in the final part, to envisage that an appeal could be remitted to an adjudicator for evidence to be obtained by the adjudicator, but that the Tribunal would then determine the appeal. It seems unlikely that this rather odd process is what is intended.

99. 4(1)(d) is not clear: it may intend that the Tribunal could set aside a refusal of leave, or it may intend that fresh evidence could persuade the IAT to re-open a case. The prospect of rival Chairs overturning each other's determinations, e.g. on sexual orientation cases or the dangers faced in certain countries, is unedifying. Clarification of the intention of this needs to be sought.

100. 4(2) comes as a surprise to many of us, but it is, as was pointed out, present in the 1971 Act (Section 22(3)), albeit with very slightly different wording ('shall have the right' as opposed to the present 'is to have the right'). However, it is also worth pointing out that the 1984 and 1996 Rules interpret this very weakly. Para 26 in each case is apparently intended to meet the requirement, but in fact in each case limits itself to saying that parties 'may act in person or may be represented'. Attention needs to be paid to this paragraph as it presently appears, in order to ensure that the 'right' is enforceable, and that it means 'opportunity', rather than just being an optional extra. ILPA does not imagine that when the 1971 Act was drafted, the shortfall in representation was anything like as acute as it is now, and so issues of opportunity did not arise.

101. ILPA suggests an **amendment** providing that no appeal shall be heard unless the appellant has been given an adequate opportunity to find representation, and that directions against the appellant shall not be enforced under 4(1)(b) if the reason for failing to comply is lack of representation or inadequacy of representation.

102. Furthermore, ILPA believes that the right to be legally represented must exist from the stage of the service of a Section 55 notice (if not indeed from the commencement of the application for asylum). The Home Office's argument that applicants do not need representation at interview, because all they have to do is tell the truth, is in itself objectionable; but such observation becomes completely redundant when applicants are being asked to raise ECHR points or 'prescribed concessions' at the time of refusal.

Paragraph 9

103. This paragraph 'keeps' certified asylum cases. ILPA welcomes the abolition of the 'white list' but oppose the retention of certification as a whole. The express intention of this part of the Bill, as explained by Jack Straw in the second reading debate, is to give the Tribunal greater authority and to cut down the use of judicial review. Certification has the opposite effect in each case.

104.Moreover, as certification applies only to 1951 Convention cases, the effect could be to deprive appellants of recourse to the Tribunal when they have strong points of law relating to the ECHR or to 'prescribed concessions'. One way round this might be to say that certification does not apply if the appeal to the IAT is on points not related to the 1951 Convention.

105.Paragraph 9(3) is of course particularly objectionable since it penalises people for not having passports, a matter which is irrelevant to a fear of persecution, and would indeed affect worst of all those whose fear of persecution by the state is greatest. The Home Office regularly refuses asylum to people who do have valid documents, and so to penalise those who do not is curious to say the least.

106.Amendments

- 2(1): replace 'may' with 'shall'.
- 4(1)(b): Insert before 'enabling': 'save where the appellant is not represented'.
- 4(1)(c): Delete from 'or' onwards and replace with (depending on what we think it is meant to mean) *either* 'or to direct that further evidence be obtained with a view to determining the appeal itself' *or* 'or for further evidence to be obtained with a view to determination by the adjudicator'.
- 9: delete
- 9 (alternatively): delete (3)
- 9 (alternatively again): in 9(2) insert at the end 'on any point relating to the Convention' [meaning the 1951 Convention].

Paragraph 10

107. Paragraph 10 is largely reflective of section 19 of the 1971 Act. Paragraph 10(3) in particular restates part of section 19(2). But an issue that has been of concern to ILPA for some time (adjudicators reviewing facts not in issue between the parties on the face of the Home Office's refusal letters and/or explanaoptry statements) prompts the following question. Is paragraph 10(3) intended to mean that the Adjudicator may review facts which the decision maker e has accepted, i.e. facts on which the decision was <u>not</u> based? Is it the intention of Parliament to have a system where all matters are open, and if so, have they thought through the implications for this in terms of length of hearings, time spent on preparation, etc? (See the letter sent to Mr Latter by ILPA and Asylum Aid last year.). **A simple amendment would clarify this: add the phrase "in issue" between "question of fact" and "on which the decision or action was based".**

108. Further, ILPA notes that the duty to comply with any directions given is only implied (paragraph 10(6) refers). Section 19(3) of the 1971 includes the following: "it shall be the duty of the Secretary of State and any officer to whom directions are given to comply with them". **It is important that paragraph 10(5) be amended to**

like effect as section 19(3) of the 1971 Act by the addition of the same phrase at the end of sub-paragraph (5).

109.Paragraph 11

110.This deals with the Tribunal's jurisdiction and is broadly similar to its existing jurisdiction (section 20 Immigration Act 1971 refers). Again, however, sub-paragraph (5) should be amended in the same terms and for the same reason as sub-paragraph (5) of paragraph 10.

PART V
IMMIGRATION ADVISERS AND IMMIGRATION SERVICE PROVIDERS

Clause 61

Definition of "relevant matters": clause 61

1. Not included in this list are rights under the European Convention of Human Rights/the Human Rights Act 1998 so far as they impinge on the right to enter, or remain in the UK or to resist removal from the UK. Given the introduction of a new right of appeal on these grounds (clause 47) this is an important omission.

Providing advice in the course of a business clause 61(2)

2. In the 2nd reading debate, 22 February 1999, Humfrey Malins MP asked whether Members of Parliament could continue to give advice in their constituency surgeries without requiring to be registered. Mike O'Brien said that they would not. Initially he said this was because they would not be acting for profit (col 73). However, cl 61(2) defines the provision of immigration advice in terms that makes it clear that the profit element is immaterial. Later in the debate the Minister said that MPs would not be caught because they were not acting in the course of a business (col 121).

3. We think that this should be explored further. MPs, of course, receive a salary. Might it not be said that the constituency advice is part of their job and therefore is part of their "business". If there is something special about MPs, we would ask whether there is also something special about MPs' advisers, secretaries or assistants. Is there a similar principle which would protect local councillors who may also be asked for advice?

Clause 62

4. This establishes the Immigration Services Commissioner

Appointment of the Commissioner: clause 62(2)

5. The Bill provides that the Commissioner should be appointed by the Secretary of State. We consider that this is wrong. The advisers and representatives whom the Commissioner will be regulating will be constantly in an adversarial relationship with the Secretary of State. This means that this regulatory function is unlike many of the regulators who are appointed by the minister of the department most closely connected with their subject matter. Independence of advisers is critical. Independence of the regulator is also essential. We think that the Commissioner should be appointed by the Lord Chancellor.

The exercise of the Commissioner's functions: clause 62(5)

6. Clause 62(5) provides a list of criteria which the Commissioner must observe. Although we think that this is probably intended, the Bill should make clear that these are criteria to be applied in the exercise of functions given elsewhere in the Bill. These criteria should not become free-standing functions of their own. If they were, the Commissioner's functions would be considerably enlarged and be of uncertain span.

7. We propose inserting after "must exercise his functions" the words "as otherwise conferred on him by this Act."

The general prohibition: clause 63

8. This provision sets out the basic principle that immigration advice and services should only be given by certain categories of persons who (in general) are subject to some degree of supervision and regulation.

9. The Bill gives a power to the Commissioner to exempt people from the requirement to register (cl.63(4)(a)) and the Secretary of State the power to prescribe by order people who can give immigration advice or services without infringing the general prohibition.

10. We understand that the Home Secretary intends one or other of these powers to be used to allow not-for-profit organisations to continue to provide advice without registering. If this understanding is correct, we do not see why the Bill should not say so.

11. We do not understand why the Commissioner should be given a general power to make exemptions unconstrained by rules, regulations or (apparently) any principles for which there is democratic accountability.

12. We think that there could usefully be the possibility of partial exemptions so that, for instance, a person might be exempt from registration for the purpose of giving advice, but not exempt (and so required to register) for the purpose of representation.

Schedule 5

The Commissioner's Rules: Schedule 5 para 1

13. Paragraph 1 allows the Commissioner to draw up rules regulating any aspect of professional practice. Paragraph 1(2) requires him to consult with such persons engaged in the provision of immigration advice and services as he considers appropriate.

14. We think that the consultation requirement should be the same as for the Code i.e. the Commissioner should be required to consult the designated bodies (essentially the legal professions) as well as such other bodies as he considers appropriate.

15. The members of the designated bodies could (conceivably) become subject to the Rules if their body's designation is withdrawn. In any case, consultation with the designated bodies is mandatory in the case of the Code even though the Code will not (initially) apply to persons authorised by a designated body. Thirdly, the Rules are likely to regulate conduct which is similar to conduct regulated by the designated bodies in relation to their own members. The Commissioner should be required to draw on their experience and take account of any comments on draft rules which they may make.

16. We propose that para 1(2) should say:

> "Before making or altering any rules, the Commissioner must consult:
> each of the designated professional bodies; and
> such other person appearing to him to represent the views of person engaged in the provision of immigration advice or immigration services as he considers appropriate."

Extension of the scope of the Code: Schedule 5 para 3

17. This paragraph allows the Secretary of State after consulting the Commissioner and with the consent of the Lord Chancellor to extend the Code to any designated body.

18. We are concerned that the government should be given this power (even in the form of a reserve power) in relation to legal professionals. We consider that it impinges on the fundamental principle of professional independence. We also think that it is unnecessary. In practice the Commissioner's Code is likely to be referred to in disciplinary proceedings even if it is not binding. The powers of persuasion of the Lord Chancellor and Secretary of State should not be underestimated.

Investigation of complaints: Schedule 5 Paragraph 4

19. Paragraph 4 gives the Commissioner power to investigate complaints in relation to a number of matters.

20. Paragraph 4(2)(c) refers to "an alleged breach of the Code". We believe that this should be amended to add "by a person to whom the Code applies". This would match the corresponding provision in paragraph 4(2)(d) in relation to a complaint that the Commissioner's Rules have been breached.

Complaints relating to the designated professionals

21. Paragraph 4(2)(e) allows the Commissioner to investigate complaints that persons authorised by one of the designated professional bodies or their employees are in breach of their professional rules.

22. We believe that there should not be duplication of regulation in this fashion. It creates many potential problems. Suppose the regulatory authority was already investigating the complaint. It makes no sense to have this duplicated. There is a further risk of differing interpretations of the designated body's rules and it is the professional bodies who should interpret their own rules. The person subject to the investigation will have to respond to questions from two different sources although both are investigating the same alleged default. In our view, if the Commissioner receives a complaint in relation to a person authorised by a designated professional body or an employee of such, he should refer the matter to the relevant regulatory body. If it is said that the Commissioner has powers of investigation that the professional bodies do not, this can be resolved by giving the regulatory bodies of the professions comparable powers. We understand that the Office for the Supervision of Solicitors is going to make such a suggestion.

The exclusion of Crown and government employees

23. The closing words of paragraph 4(2) exclude from the Commissioner's jurisdiction two groups.

24. The first are those who are excluded from s.63(1) by s.63(4)(b). S.63(4)(b) refers to employees of exempt persons. We cannot see why they should be excluded from the

Commissioner's jurisdiction if their employers are subject to it. We wonder if this is a drafting error.

25. The second group are those in s.63(5). These are essentially Crown servants or agents. We agree that the Commissioner should not have jurisdiction over immigration advice given to the Crown or government departments. However, there are occasions when civil servants give advice to individuals about their own or their family's immigration position and rights. We are aware of complaints that on occasions advice given to individuals by the Public Enquiry Office at the Home Office in Lunar House has been woefully incompetent. We see no reason why the Commissioner should not be able to investigate these complaints.

Consultation on the complaints scheme

26. The paragraph requires the Commissioner to establish a complaints scheme. We think that it would be sensible for the Bill to require the Commissioner to consult with the designated bodies and such other persons as he considers appropriate in the same way as he is required to consult over his Rules and Code.

Power to enter premises: Schedule 5 para 6

27. This paragraph gives the Commissioner authority to enter premises of registered persons and require production of documents or information with the sanction of cancellation of registration for those who refuse access.

28. These are draconian powers particularly when it is recalled that these advisers will be giving legal advice and the documents on their premises will be related to that advice. Whether or not they are formally protected by legal professional privilege they come squarely within the spirit of the principle that such documents will remain confidential save in exceptional circumstances.

29. In our view it is quite wrong that the Commissioner can act in this way without any judicial supervision. Compulsory entry on to premises should be approved in advance by a Crown Court judge. This principle is accepted in the context of the investigation of even serious criminal offences where special procedure and exempt material cannot be the subject of an ordinary search warrant, but must have the specific warrant of a Crown Court judge.

30. There is a drafting error in paragraph 6(1)(b) which should cross refer to paragraph 4.

Commissioner's powers on conclusion of investigation of complaints: Schedule 5 para 8

31. After investigating a complaint the Commissioner can lay before the Immigration Services Tribunal a disciplinary charge against a "relevant person". These include registered persons, persons employed by or working under the supervision of a registered person. An exempt person under s.63(4)(a) is also a relevant person. We understand that not-for-profit organisations are likely to be exempted from registration. Notwithstanding exemption (in effect from the registration fee), the not-for-profit sector will still be subject to the investigation powers of the Commissioner and the disciplinary powers of the Tribunal. We support this. However, we do not understand why these powers of the Commissioner and Tribunal are limited to the exempt body itself. In our view they should extend to those working in or under the supervision of the exempt person.

32. In other words, paragraph 8(2)(e) should be amended to read: "a person to whom section 63(4) applies".

Commissioner's status, remuneration, staff etc. Schedule 5 paras 9-22

33. These provisions make various administrative provisions for the Commissioner and his staff.

34. We have commented previously that the Commissioner must be and be seen to be quite independent of the Secretary of State. For the same reason we think that it is wrong that the administrative provisions should be under the control of the Secretary of State.

35. Consequently, we believe that the Lord Chancellor should be substituted for the Secretary of State in the following paragraphs: 10(2); 11; 12(1); 12(2); 13; 14(1); 15(1);15(2); 16;17(1); 17(2); 18(1);18(2)19(1); 19(3).

Clause 65: Designated professional bodies

36. This section designates legal professional bodies whose members will not require to be registered with the Commissioner.

De-designation

37. The clause also reserves to the Secretary of State the power to "de-designate" a professional body. In addition to a duty to hear representations from the body concerned, the section requires the Secretary of State to obtain the approval of the Lord Chancellor (or the Scottish ministers).

38. This would be an extremely drastic power. It would prevent solicitors (or barristers) from acting in a wide variety of cases which in some way or other impinge on

immigration matters. It is dangerous to leave such a power to the Secretary of State even with the requirements referred to above. We think that the Secretary of State should, in addition, be required to obtain the consent of 4 of the most senior judges: the Master of the Rolls (head of the Court of Appeal Civil Division); the Lord Chief Justice (head of the Queen's Bench Division); the President of the Family Division; and Vice Chancellor (as head of the Chancery Division).

Fees payable by the designated bodies

39. The clause requires the designated bodies to pay fees to the Commissioner for the purposes of meeting the costs incurred by him under Part V.

40. We oppose this provision.

41. We anticipate that the number of advisers likely to apply for registration will be small especially if the registration fees are of the order of £6,000 as has been suggested in discussions with the Home Office and the Regulatory Impact Assessment. If the number shrinks and the fee correspondingly increases, the number of advisers will become smaller still.

42. The temptation to look to the professional bodies to make up the Commissioner's income will be overwhelming.

43. The professions should be responsible for their own disciplinary functions and we have commented previously that we oppose the potential for duplication in the Commissioner's investigation of complaints.

44. The Bill gives the Commissioner a reserve duty to see how the professional bodies are carrying out their disciplinary functions, but this cannot be more than a relatively small part of his intended functions. It would be unprecedented to charge the professions for this function.

45. The professions would have to consider how to pass on the fee to their members. Although it could be passed on to all members, there will no doubt be strong pressure to pass all or a large part to those whose work is primarily immigration. This will add further financial disincentive to those who practice in a field that is not lucrative.

Clause 68

Disciplinary charge upheld by the Immigration Services Tribunal

46. This clause sets out the Tribunal's powers if it upholds the complaint. It can order repayment of all or part of the adviser's fees, but there is no other remedial order which it can make.

47. We think that this is insufficient and the Tribunal should be able to award compensation to the client or person intended to be the beneficiary of the advice. Even this is inadequate because what the client will have suffered is not readily measured in monetary terms. A preferable alternative would be for the Tribunal to have the power to remit the matter either to the Home Office or to the appropriate tier of the Immigration Appellate Authority for them to re-consider the matter in the light of the Immigration Services' Tribunal's findings as to the adviser's behaviour or omissions. It would be sensible to give a like power to the disciplinary bodies of the professional bodies (who are in any case given increased powers by clause 69).

PART VI
SUPPORT FOR ASYLUM SEEKERS

ILPA gratefully acknowledges the contributions made to this part of our briefing by the Child Poverty Action Group, the Public Law Project and Shelter.

We include commentary on all clauses of Part VI, but our proposals for amendments and new clauses should not be taken as exhaustive at this stage.

Introduction

1. Part VI deprives asylum seekers and others subject to immigration control of access to mainstream benefits. It creates an alternative for asylum seekers, but not for the others, based on enforced dispersal around the country and support in kind rather than cash. It is complicated, socially divisive, costly, and will cause hardship.

2. The justification offered in the White Paper is that the scheme is for temporary support only, pending the determination of an asylum claim within 2 months or an appeal within 4 months thereafter. In ILPA's view there is therefore no excuse for seeking to introduce the scheme in advance of these targets being met, or thereafter for failing to put a limit on the time which an asylum seeker may be subjected to the scheme.

3. As to the belief that cash benefits are a magnet to baseless asylum claims, surely the most effective disincentive would be the certainty of quick disposal. ILPA believes the government should be challenged to meet its own targets instead of imposing the burden of this expensive new support bureaucracy on the taxpayer and inflicting hardship on all asylum seekers, including those whom it will subsequently recognise to have been genuine all along.

4. Among the many iniquities of the scheme as presently proposed, ILPA has particular concerns about:

a. The redefinition of "subject to immigration control" in such a way as to cause confusion and difficulty for non-EEA residents of the United Kingdom.

b. The attempt to deny access to the courts by withdrawing support from destitute asylum seekers who apply for judicial review of unlawful adverse decisions. This is especially worrying in the light of the statistics that, for example, in 1996/97 where leave to move for judicial review was granted the success rate in immigration cases was 81% as compared to 41% in criminal cases, 68% in homelessness cases and 55% in all other cases [Legal Action July 1998].

c. Potential breaches of European Convention on Human Rights articles against discrimination and protecting rights to family and private life and to the peaceful enjoyment of property.

d. The proposed establishment of an asylum support appeals system to be controlled of one of the parties to the appeal rather than independently by the Lord Chancellor's Department.

e. The scale on which key features of the scheme, which have profound implications for the welfare and civil liberties of the individual (not only asylum seekers), are excluded from the primary legislation, and thus from Parliament's scrutiny, and are instead entrusted to unchecked regulation-making powers conferred on this and future Secretaries of State.

f. The future impact on social and health service provision arising from the fact that the proposed dispersal scheme ignores its implications for the long term settlement prospects of those ultimately recognised to be refugees, among whom the Home Office's own research shows there to be "a high incidence of stress-related health problems and homesickness", and that

> ". . . the contribution of non-medical services and support can reduce or even alleviate many of the stresses they experience . . . the existence of a "like-ethnic community" and contact with other family members can be critical in providing much needed social and cultural support. Those without this kind of support face a three to four times higher risk of depression. Therefore the family members, friends and community groups can and should play an important part in the practical and psychological settlement of refugees."
>
> [Home Office Research Study No.141, The Settlement of Refugees in Britain, p.82]

The same Home Office study concluded that:

". . . the community group is central to the settlement of refugees, so that policy must be compatible with the growth of concentrations of sufficient strength in particular areas to allow a thriving community of cultural expression and mutual support to survive. Where the size of a particular cultural group warrants it, several such concentrations might be encouraged in order to lessen the resource demands on any one local authority, but a policy of individual dispersal would plainly be inhumane, given the strong needs of newer arrivals in particular for emotional and social support in a context of familiar language and custom.

[p.110 - our emphasis]

Clause by clause analysis

Support scheme - clauses 73-82

Clause 73

5. Defines terms for the specific purposes of this Part of the Bill. The scheme is to exclude from mainstream benefits those (other than unaccompanied children) who are "subject to immigration control" (as defined in clause 95(4)), and to empower the Secretary of State to provide "support" for some, but not all, of those excluded. He is given no power to provide support to anyone other than asylum seekers (as here defined) and their dependants (as here defined). So definitions are crucial.

6. Clause 73(1) Definitions. An "asylum seeker" is over 18. This is a device to protect unaccompanied children being from excluded from Children Act assistance under Clause 99. Children with their parents are covered by the "dependants" provision (see below).

7. A "claim for asylum" is limited to claims under the Refugee Convention and the Human Rights Convention Article 3 (prohibition of torture and inhuman or degrading treatment). As this stands the Secretary of State could not provide support, even if he wished to, to those claiming under Article 2 (right to life), Article 4 (prohibition of slavery) or Article 8 (right to family life) or any other Article of the Human Rights Convention or on any other compassionate grounds. Such applicants would have to distort their claims to qualify for support. And where such claims only become apparent during the course of an unsuccessful Refugee/Article 3 appeal the Secretary of State will be powerless to provide support while considering a Special Adjudicator's recommendation or further representations.

8. **Amendments** In line 24 delete "Article 3 of" so that the entire Human Rights Convention is included. Further, add something positive to include wider compassionate circumstances.

9. An asylum seeker's "dependant" is defined so as to exclude unmarried partners, children other than sons and daughters, sons and daughters over 18 (however vulnerable), and all other relatives or household members whatsoever unless they fall into "such additional category, if any, as may be prescribed".

10. The Secretary of State has no discretion as to who he may regard as a dependant, unless the regulations (whose contents we can only guess) confer it. A much wider definition is required or the price will be on the one hand hardship, and on the other a proliferation of asylum claims by actual dependants who do not meet this restrictive definition and thus have no access to support unless they themselves claim asylum.

11. Furthermore the narrowness of the present definition may lead to interference with the right to family and private life under ECHR Article 8.

12. **Amendments** Define "child of" to mean any minor who is de facto dependant on the asylum seeker.

13. Delete lines 31-32 and insert new subclause (c) "is a member of his household".

14. Import the definition of "household" European Community law (see also 73(5) below).

15. Clause 73(2) Confirms that "support" under s74 includes support provided under arrangements made by the Secretary of State under that section.

16. Clause 73(3) The Secretary of State's power to support asylum seekers ends when their claims are "determined". This sub-section seeks to define when that is, and to allow a period of notice (eg for vacating accommodation provided under Part VI), beyond the date of disposal of the claim or appeal.

17. This is badly drafted. It gives the Secretary of State no power to continue support in successful cases while a recognised refugee's mainstream benefit claim is processed, or in unsuccessful cases while the Secretary of State himself is considering Special Adjudicator's recommendations or post-appeal representations, or pending judicial review.

18. We will need to see the Regulations to judge how they are actually likely to impact both on successful and unsuccessful applicants. In any event, some basic safeguards should be built into the primary legislation, not left to the vagaries of future regulations.

19. See also our comments in the introduction above about the exclusion of those seeking judicial review.

20. **Amendments**

(1) replace (a) with:

"on the next working day after the Secretary of State notifies the claimant of his favourable decision on the claim, or"

(2) new sub-clause (b):

"if the claimant has been notified of an unfavourable decision on his claim, on the next working day after the expiry of the prescribed period for giving notice of appeal unless within that period the claimant does give notice of appeal, or"

(3) old sub-clause (b) becomes sub-clause (c), but insert "next working day after" before "the day" in line 11

(4) add at end of line 12:

", save that such period shall be extended whenever it is necessary or reasonable to do so to avoid hardship to the claimant

(5) insert new sub-clause:

"The period referred to in section 3 above shall in any event be deemed to be extended

- in the event that the claimant indicates an intention to apply to bring judicial review proceedings in respect of his asylum claim or any other aspect of his immigration status, for a period reasonably long enough to enable him to do so, and

- for so long as any such proceedings, and any further appeal arising from them, remain pending, and

- whether or not judicial review proceedings are proposed or taken, for so long as the Secretary of State has under consideration further representations in respect of the claimant's immigration status

21. Clause 73(4) Defines when an appeal is disposed of. We understand that "Part III is a clerical error and that "Part IV" is intended. Even so, it seems that this would not cover appeals beyond the Immigration Appeal Tribunal.

22. If that defect were corrected, and if confirmation is given that the effect of the definition is that the notice period in sub-clause (3) could not be triggered until the claimant had notice of the determination and the notice period for any possible further appeal by either party had expired, then it would be acceptable.

23. **Amendment** Drafting amendment to include appeals to the Court of Appeal, Court of Sessions and House of Lords, whether brought by the asylum seeker or the Secretary of State.

24. Clause 73(5) This intends to ensure that households of asylum seekers with dependant children continue to be supported at the end of the process by extending the definition of "asylum-seeker" in such cases until departure from the UK.

25. This would protect only the sons and daughters of asylum seekers their spouses, not any other child of the family or household, unless our suggested amendments to 73(1) in respect of the definitions of "child of" and "household" are accepted (see above).

26. The wording fails to allow for the fact that some asylum claims will succeed. As it stands would prevent such families from ever leaving the asylum support system for mainstream benefits.

27. **Amendment** **A**dd to line 18 ", unless he and the child are granted leave to enter or remain in the United Kingdom in which case the provision in section 73(3)(a) applies"

Clause 74

28. This is the very foundation of the scheme. The section confers powers, but no duty, on the Secretary of State to support asylum seekers, and defines the broad ambit of those powers.

29. Clause 74(1) Allows, but does not oblige, the Secretary of State to support apparently destitute asylum seekers and their dependants.

30. It is shocking that no duty is imposed. Is Parliament really willing to permit a future Secretary of State to withhold support? And if it is unthinkable that a Secretary of State ever would, then what possible argument can there be against making it a duty?

31. Ordinary humanitarian considerations aside, we stress that among asylum seekers there are inevitably at least some who will in due course be recognised as refugees to whom the UK owes international duties (not favours) under the 1951 Convention.

32. Also worrying, both here and in the numerous other places that it occurs in Part VI, is the subjectivity of the "who appear to the Secretary of State to be . . ." proviso. This needs to be replaced with objective tests throughout.

33. Another recurrent theme is the tucking of potential time bombs behind the scenes, into regulations whose contents are not disclosed to us. Here it is the period within which an asylum seeker must be "likely to become destitute" before he can be supported that is "to be prescribed". So if the asylum seeker is in a pretty bad way, but the Secretary of State reckons he won't actually hit destitution level until tomorrow week, and if the prescribed period is 7 days, then the Secretary of State is prevented from providing any support today.

34. **Amendments**

(1) line 27 delete "may" and insert "shall"

(2) line 29 delete "or" and insert "and/or"

(3) line 31 delete "appear to the Secretary of State to be" and insert "are"

(4) line 32 delete "within such period as may be prescribed"

35. Clause 74(2) Enables regulations to be made to exclude some asylum seekers and their dependants from the support scheme, even though they are destitute.

36. This is dangerous, and the example given in the Explanatory Notes of someone who had previously caused serious damage to property is not reassuring. Why should deliberate exposure to destitution be inflicted rather than the normal sanctions of the law? What safeguards would the regulations give the accused asylum seeker? To what standard would the allegation against him have to be proved? Would he have rights of appeal? The right to be supported while the appeal is pursued?

37. And what would prevent a Secretary of State from making regulations to exclude certain classes of asylum seeker? Those who made their claims "late" or were deemed to be "without foundation" or come from a particular country?

38. Child Poverty Action Group has commented on this sub-clause:

"We do not want to see people excluded from support. This can happen under certain provisions of social security law and always creates problems, hardship and anomalies."

39. Amendments

(1) delete sub-clause 74(2)

OR

(2) add after "excluded" in line 34:

", save that the prescribed circumstances may not be connected to the timing, place, manner or substance or any other aspect of the asylum claim"

40. Clause 74(3) Defines destitution as the lack of either adequate accommodation or the means to meet essential living needs or both.

41. This is welcome to the extent that the definitions such as they are are couched in objective terms, and allow some flexibility in provision, but minimum standards need to be set here in the primary legislation. Also the proviso "or any means of obtaining it" is a worrying licence to pressure people into scraping around for support from elsewhere - see further comment under 78(3).

42. **Amendments**

(1) in 74(3)(a) insert "and suitable" before "accommodation"

delete “or any means of obtaining it”

(3) add to 74(3)(b)

"For this purpose 'essential living needs' means the costs of day to day living, including but not limited to food, household fuel, the purchase, cleaning, repair and replacement of clothing and footwear, weekly laundry costs, miscellaneous household and personal expenses such as toilet and pharmaceutical items [that are not available to him without charge on prescription], cleaning materials, window-cleaning, the replacement of small household goods (for example, crockery, cutlery, cooking utensils, light bulbs, etcetera) and such other needs as are essential to the individual asylum seeker given his particular circumstances and those of his dependants."

Note: If being in receipt of s.74 support is going to be a “passport” to free NHS prescriptions then the words within square brackets are useful. If not, they may be omitted. In any event the point about free prescriptions (and other benefits to which income support is a “passport”, such as free school meals) needs to be clarified.

43. 74(4) Treats the asylum seeker and his dependants as a unit for destitution test purposes.

44. Clause 74(4) Deals with matters to which the Secretary of State must have regard in determining the adequacy of an applicant's existing accommodation.

45. The matters to be considered are concealed in regulations whose contents are unknown. This is unsatisfactory. Minimum standards at least should be guaranteed by the primary legislation.

46. **Amendments**

(1) In 74(5)(a) after "must have regard to" insert

"(i) the special needs of the person concerned and/or his dependants, if any, and

(ii) the welfare of the person concerned and/or his dependants, if any, and

(iii) the protection of any children of the person concerned or otherwise in the accommodation or its near vicinity, and

(iv) public health, and

(v) other [such matters . . . .]"

(2) delete "but" from the end of 74(5)(a) and delete the whole of 74(5)(b)

47. Clause 74(6) Dictates what the Secretary of State may not have regard to in determining whether a person's accommodation is adequate.

48. These prohibitions are unmitigated by any allowance for the particular circumstances of a case. So the Secretary of State is apparently forbidden even to consider the appropriateness of a vulnerable young person sharing accommodation with older adults, or with those of the opposite sex. And he is not allowed in any circumstances to consider whether location contributes to the adequacy of accommodation. A top floor flat for a wheelchair user? Remote accommodation with no street lighting or bus service for a single parent with young children? 300 miles away from your brother, or from the only other person you know in this country? These things will just be the luck of the draw. The Secretary of State would be breaking the law if he allowed them to even to feature in his consideration.

49. **Amendments**

(1) delete 74(6)

OR

(2) amend 74(6)(b)

- to incorporate a prohibition on overcrowding

(4) to specify that the Secretary of State must have regard to the suitability of those with whom the individual asylum seeker is expected to share, and that factors to be taken into account in relation to this include age, gender, ethnic, political and religious background and health.

(4) In 74(6)(d) add “save that the suitability of the location in relation to the safety, welfare, dignity, right to family and private life and any special needs of the asylum seeker and his dependants must be taken into account”.

(4) add at end of 74(6) “provided in all cases that it is reasonable and suitable for the person and his dependants to continue to occupy the premises” (wording from Housing Act 1996).

50. Clause 74(7) Deals with the Secretary of State's determination of whether or not a persons's essential living needs are met.

51. This is remarkable for being a clause totally devoid of substantive content. What the Secretary of State must and may not have regard to are both to be specified in regulations whose contents are undisclosed. This is a blank cheque indeed, giving no framework or objective criteria for the exercise of the Secretary of State's power.

52. **Amendment**

(1) delete 74(7) and replace with

"In determining the extent to which a person's essential living needs are met the Secretary of State shall take account of the person's income and capital as if he were calculating entitlement to income support under section 136 SSCBA 1992."

53. Clause 74(8) Allows the Secretary of State to specify certain items or expenses as being, or not being, part of essential living needs. **Yet again the substance is to be tucked away in secondary legislation.**

54. **Amendment** In line 19 delete ",or are not,".

55. Clause 74(9) Allows support to be provided subject to conditions. This is hopelessly wide. What conditions? Decided by who? On what criteria? With what sanctions?

56. The scheme allows support to be provided by persons other than the Secretary of State, including persons who are not politically accountable. Are such persons to be empowered to determine the 74(9) conditions subject to which an asylum seeker may be supported?

57. **Amendments**

(1) add "but the conditions may not be related in any way to the claimant's asylum application, or to his choice of legal representative or the exercise of his rights of appeal or access to the High Court"

AND

(2) add "save that no conditions may be imposed, either generally or in any particular case, without the express authority of the Secretary of State"

58. Clause 74(10) Provides that the conditions must be set out in writing. The clause is silent as to the form this writing is to take or who is to do the setting out or in what language.

59. **Amendment** To rectify the above.

60. Clause 74(11) Provides that a copy of the conditions must be given to the supported person. Again there is silence as to language.

61. **Amendment** Add "written in a language which he understands".

Clause 75

62. Clause covers the ways and means by which support may be provided.

63. 75(1) Specifies that support may be provided by way of accommodation, essential living needs, or expenses (other than legal and other prescribed expenses) connected to the asylum claim and any associated appeal.

64. Again powers without duties are conferred.

65. The definitions are all purely subjective to the Secretary of State. They need to be replaced with objective reliance on the plain meaning of the words, perhaps with assistance from the definitions of similar concepts in homelessness and benefits legislation.

66. There is no provision for asylum seekers to be accommodated with or near their de facto dependants other than those within the narrow clause 3 definition. Combined with existing clause 76(2) (which obliges the Secretary of State to disregard any preferences such asylum seekers may have to be accommodated together) this is a violation of ECHR Article 8 which must have been overlooked by the Secretary of State when he made his statement of compliance in respect of the Bill.

67. **Amendments**

(1) in line 25 delete "may" and insert "shall"

(2) in 75(1)(a) delete "appearing to the Secretary of State to be"

(3) in 75(1)(a) add "and suitable" before "accommodation"

(4) add at the end of 75(1)(a) "having regard to all relevant matters including, but not limited to, the health, safety, welfare and any special needs of the claimant and his dependants, if any, and the suitability of its location for the long term resettlement of the claimant and his dependants, if any, in the event of a favourable outcome to the asylum claim."

(5) add "and/or" at the end of 75(1)(a)

(6) in 75(1)(b) delete "what appear to the Secretary of State to be" and insert "all the"

(7) delete "or" and insert "and/or" at the end of 75(1)(b)

(8) in 75(1)(c) delete "what appear to the Secretary of State to be"

(9) delete the brackets and their contents in 75(1)(c)

(10) drafting is needed to cover the Article 8 point - here and/or in clause 76

68. 75(2) Allows for flexibility in the ways in which support is provided in exceptional circumstances.

69. The meaning of "exceptional" here looks rife for litigation. This provision seems to be poor relation to a Community Care assessment in the mainstream benefits system. It is not clear whether "other ways" means "different ways" or "additional ways" ie whether you just get the same value delivered in a different package, or if you get more. Provision for both is needed. For example, support in “other ways” might be include providing direct labour to modify accommodation for the use of a disabled

claimant, or it might need to include provision for more expensive food for someone on a special diet.

70. **Amendments**

(1) in line 35 delete "the Secretary of State considers that"

(2) in line 36 delete "he may" and insert "the Secretary of State shall"

(3) in line 37 after “ways” add “which may be additional to the support provided under section 75(1),”

(4) in line 37 delete "he considers" and insert "are"

(5) in line 38 after “to be” add “suitably”

71. 75(3) Provides that support will not be wholly or mainly by cash payments except in exceptional circumstances in particular cases.

72. The exceptional circumstances are not defined, so we may predict litigation on this clause too. Presumably fire, flood or mayhem necessitating sudden relocation would be covered, but nothing is specified.

73. There would be no need to contemplate what constitutes an "exceptional" circumstance if the underlying insistence on non-cash support were omitted. Benefits in kind are more expensive to provide and administer. and as to their supposed magnetic effect on asylum seekers, please refer to our introductory comments above.

74. Child Poverty Action Group has commented as follows on the proposed established of a system based on payments in kind:

- It is not a modern system, but harks back to the principles of the workhouse.
- It creates an apartheid system for the delivery of material support with asylum seekers being treated differently and thus made identifiable.
- Creating an identifiable group will encourage anti-immigrant and anti asylum seeker feelings as existed in Germany.
- It will be an inefficient and expensive system to operate by the government’s own admission.

- It could only conceivably be justifiable if the government were able to deliver on the six months processing of claims and appeals deadline which Jack Straw has admitted will not be achievable in the near future.

75. **Amendment** Delete 75(3)

76. 75(4) Allows for regulations to exempt whole categories of case from the prohibition against providing support wholly or mainly by cash payments.

77. Again this is simply unnecessary if the non-cash basis of the scheme is removed.

78. **Amendment** Delete 75(4) consequentially on deleting 75(3)

79. 75(5) Takes the power of secondary legislation so far as to allow the Secretary of State actually to repeal 75(3) by regulation. What doubts does the government have about the feasibility of its cashless scheme that it feels the need of such a get out clause?

80. **Amendment** Delete 75(5) consequentially on deleting 75(3)

81. 75(6) Specifies that "specified" in sub-clause 4 means specified in an order under sub-clause 4. ILPA makes no specific comment

Clause 76

82. This covers supplemental matters to which the Secretary of State must and may not have regard to when exercising his clause 74 powers.

83. 76(1) Requires the Secretary of State to have regard to the temporary nature of the accommodation, to the desirability of providing it in areas where there is a ready supply, and to whatever else may be prescribed but is not here divulged.

84. Again much too much is left to regulations. Safeguards and minimum standards are required in the primary legislation.

85. Amendments

(1) drafting addition needed to 76(1)c) to specify some minimum positive standards - possibly along the lines of our suggested amendment (4) under clause 75(1) above

AND

(2) reorganize so that existing 76(2)(a) becomes new 76(1)(c), and 76(1)(c) becomes new 76(1)(d)

86. 76(2) Forbids the Secretary of State to have regard to the preferences of the asylum seeker or his dependants as to locality.

87. The breaches of ECHR Article 8 which this will cause will be all the more grave because of the vulnerability of the persons upon whom they will be inflicted.

88. Amendments

(1) delete 76(2)(a)

OR

(2) make provisos as in our suggested amendments (2) and (3) to clause 74(6) above

OR

(3) reorganize as in suggested amendment (2) under 76(1), above

89. 76(3) Allows the Secretary of State to amend (1) and (2) any which way he chooses. No comment except yet again on the breadth of powers which Parliament is being asked to delegate.

90. 76(4) Covers matters to be taken into account in respect of essential living needs.

91. This is another clause entirely devoid of specific content. Again Parliament is being asked to sign a blank cheque to allow this and any future government to make whatever regulations it sees fit.

92. Amendments

(1) delete 76(4)

OR

(2) drafting may be needed to set minimum standards by reference to, for example, the definition of essential living needs in our suggested amendment (3) under 74(3) above

89. 76(5) Empowers the Secretary of State to cap the total expenditure in respect of essential needs for an individual

90. This is crucially dangerous. It means that a person who had his exceptional needs met under clause 75(2) could find his basic package of provision correspondingly reduced so as to stay within the cap. So some essential living needs would not be met, which is contrary to the stated purpose of this part of the bill.

91. Child Poverty Action Group has pointed out that where there were dependant children this would also contravene the UN Convention on the Rights of the Child.

92. Furthermore a cap on individual expenditure would penalise claimants for ineffective purchase cost controls on the part of the Secretary of State and his suppliers.

93. If the proposed scheme is to be enacted at all this subclause must be deleted or fundamentally amended.

94. Amendments

(1) delete sub-clause 76(5)

OR

(2) amend so that expenditure under 75(1)(c) (costs related to appeals) and 75(2) (exceptional provision) is excluded from the cap

OR

(3) specify that the limit may not be less than 90% of what would be the claimant's income support applicable amount plus 100% of any relevant premiums

(4) Note: - there is no way to deal with the inefficient cost control point except by deleting this capping provision altogether and/or by returning to a cash benefit system.

99. 76(6) Provides that expenses met in connection with a supported person's asylum appeal are to be treated as essential living needs for the purposes of the expenditure cap under 75(5).

100. This is pernicious, and would mean, for example, that the claimant called for interview who was housed far from his port of arrival, or whose appeal was heard at a distant location or was subject to adjournments, could find expenditure on his food or other daily needs reduced by the amount of his fares.

101. Amendments

(1) delete 76(6) whether or not 75(5) survives

OR

(2) if 75(5) survives add "not" after "section 75(1)(c) is" in line 41

102.76(7) Gives the Secretary of State power to disregard claimants' preferences as to the way in which support is to be given.

103.This is a welcome contrast to his obligation to disregard preference as to location of accommodation, but, this is not saying much because, as usual, the power is uncircumscribed.

104.**Amendment** Delete 76(7).

Clause 77

105.This provides that an asylum seeker ceases to be a person for whom support may be given either upon leaving his provided accommodation or, where essential living needs only have been provided, upon leaving his notified address.

106.Thus does the support system become a direct tool of internal immigration control. Not only is this a sanction on breach of temporary admission conditions, but also an asylum seeker may be penalised for simple error or delay in notification (or in the Secretary of State recording a notification?) of a change of address.

107.There is a safety net in 76(6) which allows for the provision to be disapplied in certain circumstances by regulation, but yet again we do not know what the regulations will say.

108.Basic safeguards need to be built into the primary legislation.

109.Amendments

(1) safeguards to be drafted to protect those leaving their accommodation to escape violence or harassment or for some other compelling reason

(2) add to 77(2) "and, where leave to enter or remain in the United Kingdom has been granted, becomes entitled to a lump sum resettlement grant"

Note: this idea needs developing and may require further enabling clauses eg in s74 itself

(3) add to 77(4) "but he is entitled to reapply at any time"

(4) drafting needed to provide for authority to be given in appropriate circumstances for transfers of address without interruption to the provision of support

Clause 78

110. This empowers the Secretary of State to make whatever other regulations he pleases with respect to his s74 powers. Sub-clauses indicate particular circumstances which regulations might cover, but nothing is excluded so the power is essentially untrammelled.

111. This is a blank cheque indeed. The breadth of the power is dangerous in itself, and its application potentially pernicious, for example:

78(2)(a) Provides for "prescribed levels" and a "prescribed kind" of support without giving any clue as to what these might be, while 78(2)(b) permits the Secretary of State to deviate from these standards in unspecified circumstances and, presumably, in either direction.

112. **Amendment** Minimum standards to be incorporated into the primary legislation.

113. 78(3) Contemplates regulations requiring the Secretary of State to take into account support or assets that "might reasonably be expected to be otherwise available" to the claimant.

Both limbs of this are objectionable:-

78(3)(i) The concept of support that "might reasonably be expected to be otherwise available" will place pressure on claimants' relatives, friends and communities (other, apparently, than the wider community of which the Secretary of State himself is part) to support them.

It also raises the spectre of denying support to someone because he "might reasonably be expected" to receive it from such sources but in fact is not, and is destitute.

It risks churches and other charitable organizations becoming barriers to statutory support because claimants "might reasonably be expected" to turn to them - or of such charities being inhibited in their work for fear of this effect.

It is contrary to the 1951 Convention for the government to seek to absolve itself of responsibility for those whom it will subsequently recognize to be refugees by

devolving its international obligations on to private individuals such as friends and relatives in the UK.

It conflicts with the Human Rights Act, being contrary to the ECHR Article 14 anti-discrimination provision because the pressure to provide community support will inevitably fall disproportionately heavily on ethnic minority communities.

78(3)(ii) The concept of assets that "might reasonably be expected to be otherwise available" raises the spectre of demanding that personal possessions (which may be a vulnerable asylum seeker's last tangible memento of a lost way of life) be sold and the proceeds exhausted before an asylum seeker could qualify for support.

It breaches Article 1 of the 1st Protocol to the ECHR which protects the right to the peaceful enjoyment of possessions.

114.**Amendments** to 78(3)

(1) delete 78(3)

(2) in line 41 delete "or might reasonably be expected to be"

(3) provide specific safeguards so that people are not pressurised to seek support from strangers or from people whom they have cause to fear or to be embarrassed to approach (eg abusive or estranged family members)

(4) specify assets that may not be taken into account - eg exclude "wedding, engagement or eternity rings or any equipment or tools you use for work" as the MEANS1 assessment form for civil legal aid does - but this may need to be expanded to make it of more multicultural applicability, or to include a general "sentimental value" proviso

115.78(4) Provides for procedural regulations in relation to applications for support.

116.This subclause is devoid of any safeguards whatsoever for applicants.

117.Amendments

Provision is needed for

(1) the procedure, including review and appeal rights, to be explained or otherwise made available to him in a language the claimant understands

(2) the information provided by the applicant to be held in confidence and not disclosed to those who will determine the asylum claim except at the request of the claimant

(3) ensuring that nothing to do with the asylum claim, choice of representative or exercise of appeal or other legal rights could constitute a reason not to entertain an application for support

(4) prescribing the ambit of the enquiries to be made by the Secretary of State and ensuring that they do not include the claimant's national authorities or otherwise breach confidentiality

(5) safeguards in relation to notification of changes of circumstance in view of the potential criminal consequences of error - refer to 87(1) below

Clause 79

118. This provides for the temporary provision of support in emergency circumstances prior to full assessment under the Secretary of State clause 74 powers.

119. The stated aim is unobjectionable, but once again why is no duty imposed and why is the test of destitution rendered wholly subjective to the Secretary of State? And why on earth, if the rationale of the provision is designed to meet emergencies, hedge it about with all the clause 74 provisos on the exercise of the power?

120. There is also a potential problem that one of the unresolved issues could be whether or not a claimant is indeed "an asylum seeker" under the 73(1) definition - for example a claim may not yet be recorded or the Secretary of State may not yet have decided whether a 2nd application amounts to a fresh claim.

121. Amendments

(1) line 7 delete "may" - insert "shall"

(2) line 9 insert "persons who are or may be"

(3) line 10 insert "persons who are or may be"

(4) line 11 delete "it appears to the Secretary of State may be" and insert "are or may be"

(5) delete sub-section (3)

Clause 80

122.This allows local authorities to provide support in accordance with arrangements made by the Secretary of State under s.74 in the ways "mentioned" in 75(1) and (2).

123.The Secretary of State's powers are not delegated. This is an enabling clause via "arrangements" to be made by him.

124.The methods open to the local authorities are limited to 75(1) and (2). Clarification is needed as to whether they are also empowered to make exceptional payments under 75(3) as these are themselves expressed to be payable under 75(1) and (2).

125.80(2)(b) contemplates such arrangements being made with a "person" other than the local authority. The chain of responsibility and control seems thin.

126.**Amendment** Introduce checks on who "another person" might be?

Clause 81

127.This enables the Secretary of State to force local authorities and certain types of housing association (registered social landlords) to co-operate in providing accommodation.

128.There is a safeguard in 81(3) against a housing association being required to act beyond its powers, but nevertheless this represents an unwarranted interference in the affairs of the voluntary sector by giving the Secretary of State non-reciprocal coercive powers against them

129.It appears to conflict with the ECHR protection of the right to enjoyment of private property.

130.Clause 82

131.Provides for the designation of "reception zones".

132.This enables the policy of enforced dispersal of asylum seekers to be implemented.

133.In 82(2) we encounter Part VI's one and only consultation process. It is striking, however, that no procedure is actually specified and there is no suggestion that the Secretary of State need act on the results of the consultation.

134. There is an odd "or" in 82(3) which suggests that the Secretary of State could commandeer accommodation even if it were only temporarily unoccupied.

135. There is a dangerous lack of attention to the provision of legal services to asylum seekers in the reception zones.

136. **Amendment**

add to 82 (2)

He must in any event consult the Legal Aid Board, the Law Centres Federation and the National Association of Citizens' Advice Bureaux and no area may be designated unless the Legal Aid Board is satisfied that adequate provision for competent legal advice and assistance is available to any asylum seekers and their dependants who may be accommodated in the area under section 74.

Under clause may be accommodated in the area under Section 102 - under proposed amendments insert:

lines 21-22 delete "and the persons occupying them"

Under Proposed New Clause insert the following after the note on our proposed 73A. It could be 73B or 73A (ii):-

when any question arises with respect to a child, or with respect to any household which includes a child, the child's welfare shall be the Secretary of State's paramount consideration in the exercise of his powers under this part of the Act.

Note

This derives from the wording of s1(1) of The Children Act 1989. It requires the Secretary of State to have regard to the standards of the general law in respect to children.

Asylum Support Appeals - clauses 83-85 and Schedule 8

Clause 83 and Schedule 8

137. This clause provides for appeals to Asylum Support Adjudicators. Some (but not much) further provision about these Adjudicators is in Schedule 8.

138. Schedule 8 is really only half a schedule. It deals only with adjudicators and makes no provision for funding for premises, interpreters or administrative support or for the conduct of appeals.

139.Who are the Asylum Support Adjudicators to be? They should certainly not be asylum Special Adjudicators, but preferably should have a background in welfare and housing provision.

140.Who will appoint and supervise them? It certainly ought not to be the Secretary of State who will be one of the parties to the appeals that the Adjudicators are to hear.

141.Amendments

(1) amend para 55 of Schedule 12 to make Asylum Support Adjudicators subject to the supervision of the Council on Tribunals

(2) provide for their appointment and supervision by the Lord Chancellor's Department

(3) amend Schedule 8 to give the necessary funding powers and to require the provision of basic facilities such as interpreting

(4) amend Schedule 8 to limit the length of appointment of Asylum Support Adjudicators to, say, 5 years

Clause 84

142.Specifies when the right of appeal to an asylum support adjudicator arises.

143.As things stand the unsuccessful applicant will remain without support while appealing, while the partially successful will have no appeal remedy in respect of the amount or type of support offered. This means that the only remedy in such cases will be by way of judicial review.

144.Amendments

(1) to provide for appeals against the level or type of support offered

(2) for provision of emergency support pending appeal against refusal

(3) for appeals against termination of support to have suspensive effect

(4) to require the Adjudicator to substitute his own decision in all cases OR to specify the circumstances in which referrals back might be made

(5) in the event of a referral back to provide that support is to continue while the Secretary of State deliberates

(6) in the event of a referral back to guarantee a further appeal (with suspensive effect) against a further adverse decision

Clause 85 and Schedule 8

145. Empowers the Secretary of State to make procedure and other rules regulating the conduct of appeals.

146. It is wholly unacceptable for the appeal system to be regulated by one of the parties to it. It is also unacceptable for fundamental matters affecting the just conduct of appeals, including the burden of proof, to be relegated to secondary legislation.

147. Amendments

Note: some, but not all, of the following might more appropriately be included in an expanded Schedule 8

(1) to provide that the rules are to be made by the Lord Chancellor's Department

(2) to guarantee the right to legal representation at appeal hearings

(3) to provide legal aid for advice, assistance and representation in relation to asylum support appeals

(4) to guarantee the right to a hearing, or at least to place the onus on the Adjudicator to justify disposal in any other way without the Appellant's consent

(5) to provide official interpreters at hearings

(6) to specify in the primary legislation that the burden of proof is on the Secretary of State in appeals against refusal or cessation of benefit, and on the Appellant in appeals against level or type of support

(7) to give Adjudicators power to summons witnesses

(8) to give Adjudicators power to award travel expenses to Appellants and witnesses (otherwise, for example, a witness might not be able to afford to come to court to explain why the Appellant cannot reasonably be expected to turn to him for support)

(9) generally this section should be amended as relevant along the lines of Schedule 4 paras 3 and 4 which deal with the Lord Chancellor's rules of procedure in relation to asylum appeals, with additions as indicated above.

(10) in relation to 85(3) (or its equivalent in any amended clause), to provide that regard be had to the interests of justice, not just to speed and practicality, in making the rules

Criminal Offences - clauses 86-90

Clause 86

148. This creates an offence of making false representations with a view to obtaining support for oneself or another under Part VI.

149. This is extraordinarily draconian. Failure to notify a change in circumstances "without reasonable excuse" becomes a criminal offence, even if not done "knowingly", and as it stands the change of circumstances need not even be material in any way. And for such heinous crimes one could go to prison!

150. Apart from terrorising asylum seekers (and their advisors or anyone else on whom a duty to report changes in an asylum seeker's circumstances might be imposed by 78(4)(e)) it is difficult to see what this achieves that is not already covered by the ordinary criminal law on fraud and attempt.

151. Amendments

(1) delete clause 86

(2) add "knowingly" before "fails" in 86(1)(c)

(3) add "material" before "change of circumstances" in 86(1)(c) and (d)

(4) in 86(2) delete "imprisonment for a term not exceeding three months or to"

Clause 87

152. This creates an offence of making dishonest representations with a view to obtaining any benefit or "advantage" for oneself or another under Part VI

153. Again it is not clear why this is required in addition to the general law on fraud, but the conduct it is aimed it is undeniably objectionable, being by definition dishonest.

154.**Amendment** Add "material" before "change of circumstances" in 87(1)(c) - see comment on equivalent provision in 86

Clause 88

155.Creates offences of obstructing functionaries in the course of their duty and of failure to give information under Part VI

156.This appears to be a charter for officialdom to pry without any safeguards for anyone else.

157.Those who could fall foul of this provision are not restricted to claimants but could apparently include, for example, anyone or any organization whom the official on behalf of the Secretary of State took it into his head to suppose might be able to support the claimant. It could perhaps even include legal advisors as there is no express saving provision as to professional privilege.

158.Why should anyone have a greater duty to supply information to Part VI functionaries than to the police? And why should enquiries under Part VI not generate the protection of at a least a modified right of silence?

159.Amendments

(1) delete 88(b)

OR

(2) in 88(b) delete "neglects" - the onus should at least be on the official to seek the information, not on the rest of us to volunteer it or figure out what it is that maybe we should be volunteering

(3) add "knowingly" before "refuses", and "material" before "question", before "information" and before "document"

Clause 89

160.This creates an imprisonable criminal offence of failing to maintain in accordance with an undertaking to be responsible for maintenance and accommodation.

161.No account is taken of the possible reasons for the "refusal or neglect" to maintain, eg that the claimant may have been abusive to the person who gave the undertaking.

This is inconsistent with recent Home Office recognition of the problems of domestic workers and spouses who suffer abuse.

162.The provision would appear to be otiose in any event because the Secretary of State can either refuse to support the claimant if it is really still reasonable to expect him to look to his sponsor, or if not can enforce the undertaking and seek to recover the cost from the sponsor through the courts in the usual way.

163.Amendments

(1) delete clause 89

OR

(2) provide safeguards for the protection of sponsors

Clause 90

164.Provides for bodies corporate and their officers to be guilty of the criminal offences in clauses 86-89.

165.This could place support scheme Assistants working for voluntary organizations at risk from the more draconian of the clause 86-89 measures unless amendments such as are outlined above are passed.

Financial provisions - clauses 91-94

Clause 91

166.This covers payments to local authorities in respect of expenditure incurred under the support scheme.

167.A fair scheme would allow local authorities not only reimbursement of the direct costs of support under Part VI, but also top up funds for their basic health and education budgets to take account of the special needs of refugees and asylum seekers. Clause 91 does not preclude this, but amendment is needed to oblige the Secretary of State to do it.

168.Specific provision for grants for asylum seeking and refugee children in schools would be welcome.

169. Under Part VI asylum seekers' children will not be eligible for free school meals because their parents will not have access to the "passport" benefits, JSA and income support.

Clause 92

170. Enables the Secretary of State to make grants to voluntary organisations not only in respect of support ("of whatever nature") to asylum seekers but also "connected matters".

171. Are refugee resettlement programmes "connected matters"? What about accountability?

Clause 93

172. Provides for the recovery of expenditure made as a result of misrepresentation or non-disclosure, whether or not fraudulent.

173. This echoes Social Security recovery legislation, but the echo is inappropriate because here we are dealing not with a system regulated by clear rules but with a wholly discretionary scheme.

174. The government needs to clarify whether it intends merely a recovery clause regardless of the reason for the expenditure, or whether it is intended, as we submit it should be, to be linked to misconduct.

175. As it stands there is a danger that recovery proceedings could be taken against an applicant, or someone else assisting him with his application, for expenditure incurred as a result of failing to disclose something that the person was unaware of, eg that there was a church charity that might have offered accommodation.

176. The clause is open to absurdly and perniciously wide interpretation. If an asylum seeker receives a food parcel, or his child is given a meal at a friend's house, must he disclose this as materially affecting the level of support he needs on pain of recovery of the "excess"? And does the donor of the parcel or the meal also have a duty of disclosure?

177. **Amendment** Either delete entirely, or amend to allow recovery only where misconduct has caused the expenditure.

Clause 94

178.Enables the Secretary of State to pursue sponsors in the Magistrates Courts for recovery of money in respect of s74 asylum support provided to persons for whom a maintenance undertaking was in effect.

179.The need for this is unclear. What evil is it intended to meet that is not met by the existing law? Who could and could not be caught by it?

Exclusion from benefits and services - clauses 95-99

Clause 95

180.This clause redefines persons "subject to immigration control". It excludes all of them (not just asylum seekers) from jobseekers allowance and all other mainstream social security benefits. It then provides for some (but not all) of those who are not asylum seekers to be readmitted to benefit eligibility. Those excluded include lawful permanent residents in the UK and other tax payers.

181.The whole concept behind this clause is objectionable. ILPA believes access to subsistence, disability and child benefits should depend upon need, not immigration status. Clause 95 allows the Secretary of state to abandon large groups of people to life well below the poverty line.

182.These include people whose stay has not been formalised, those who were admitted on the basis that they could maintain themselves, but whose circumstances have changed, any sponsored immigrant and those who are exercising an in-country right of appeal. As Clause 96 makes clear, unlike asylum seekers, such people will not be permitted to use the Secretary of State's scheme in the event of destitution.

183.Once again the Secretary of State has chosen not to allow Parliament to consider the terms of any exceptions, leaving these to delegated legislation.

184.If the clause is to survive at all, ILPA believes it is critical that an alternative to "person subject to immigration control" in subclause (4) be found. See further comment below.

185.95(1)Lists the benefits excluded. They are all means tested and are the most basic safety net benefits, without which a financially eligible claimant would be at risk of destitution.

186.95(2) Extends the provision to Northern Ireland.

187.95(3) Allows for some unspecified category of person to be excluded from the exclusion. Who is this intended to cover? ILPA understands that the Benefits Agency has been informed that it is intended to use this provision to ensure that, in the short term at least, the status quo is maintained and that, for example, permanent residents who originally entered on a sponsorship undertaking could have access to income support after 5 years. If this is so the government should say so. In any event it is simply not good enough for something so fundamental to the welfare of residents of this country to be prey to the vagaries of secondary regulation in this way.

188.95(4) Redefines "person subject to immigration control" in a dangerously confusing way. The expression does not accurately describe the class of persons to which it relates and will be easily confused, for example by Benefits Agency staff, with the identical phrase in earlier legislation still in force. There is a very real danger that permanent residents who are subject to immigration control in law because they have never taken British Citizenship will be unlawfully excluded from benefit as a result of this confusion.

189.**Amendments**

(1) delete clause 95

OR

(2) in 95(1) delete all benefits relating to disability

(3) in 95(1) delete child benefit

(4) in 95(3) add "and in any event does not apply to anyone with indefinite leave to remain in the United Kingdom, or recognized refugees or those granted exceptional leave to remain in the United Kingdom"

(5) in 95(4) line 24 delete "A person subject to immigration control" and insert "A person without permission to stay or with permission to stay that is qualified"

Clause 96

190.Excludes destitute persons subject to immigration control (as defined in 95(4) from the provisions of the National Assistance Act, although it preserves the rights of those who require s.21 residential accommodation where their needs arise for reasons other than destitution (eg. pregnancy, age, illness, disability, or 'other circumstances'

191.To a destitute person subject to immigration control has access to no relief whatsoever unless he applies for asylum in order to bring himself within the s74 asylum support scheme. Is this really the government's desired effect?

192.It is noteworthy and scandalous that there is no provision for exempting anyone subject to immigration control from this exclusion. In contrast to clauses 97-98 (below) there is no proviso that the exclusion does not apply to people within the clause 95(3) exemption. The effect is that destitute "persons subject to immigration control who are not asylum seekers are excluded from s21 accommodation and nothing is substituted in its place.

193.As it stands clause 96 leaves a vulnerable group without any state protection from homelessness, a scenario the courts have described as unacceptable in a civilised nation.

194.Another effect is that a failed asylum seeker at the end of the process who no longer qualifies for s74 support or accommodation will have access to no alternative statutory relief whatsoever, regardless of how long it may take the Secretary of State to effect his removal from the United Kingdom, whether because of difficulties in travel documentation or for any other reason. An indeterminately sized sub-class of vagrants with no incentive to respect or remain in contact with any authority whatsoever is in the making here.

195.**Amendment** Delete clause 96

Clause 97

196.This clause provides for the exclusion of persons subject to immigration control from various statutory provisions under the Health Services and Public Services Act 1996, the National Health Service Act 1977 and the Housing Act 1996.

197.The effect is to withdraw health and social services from people who need them through no fault of their own or of their sponsors. Access to these services is triggered by need resulting from aging, which is unavoidable, and from illness and mental disorder which may not have been anticipated at the time of entry to the United Kingdom, let alone planned for. The services are, for the most part, ones that can only be provided by the state so turning to relatives or community groups does not represent an alternative.

198.What is achieved is the most pernicious and distasteful form of social exclusion: the denial of help to the vulnerable, elderly and sick for no other reason than their national origins.

199.These provisions are in some respects even more exclusionary than Clause 96 which at least preserves the rights of those who require s. 21 National Assistance Act 1948 residential accommodation where their needs arise for reasons other than destitution (eg pregnancy, age, illness, disability, or 'other circumstances').

200.For asylum seekers who are destitute there is, for what it is worth, the Secretary of State's scheme, but under clause 97 other destitute "persons subject to immigration control" lose their right to residential accommodation and absolutely nothing is substituted in its place.

201.This becomes even more objectionable when the nature of what is taken away is fully understood. The Public Law Project has commented as follows on these provisions for excluding needy people from access to community care:-

202.97(1) The Health Services and Public Health Act 1968: s45 gives the Secretary of State power to direct that certain services may and must be provided by local authorities to promote the welfare of elderly people. If Clause 97 is passed in its present form local authorities would be prevented from, for example, providing meals on wheels services to elderly people who entered under a sponsorship agreement. It would also prevent such people from receiving help from social workers if they are abused, neglected or ill.

203.The concept of a 'person subject to immigration control' extends to those with an outstanding appeal. It follows that an elderly person, who applies to remain on grounds that they are unfit to travel and is refused, will be deprived of all of these services pending their appeal.

204.Confusion about the meaning of "person subject to immigration control" will inevitably restrict access to services by the elderly Black and ethnic minority population who remain entitled. Their take up of these services is already considerably lower than that of the elderly population as a whole (see Caring for Ethnic Minority Elders, Age Concern 1998).

205.97(2) The National Health Service Act 1977: para 2 Schedule 8 is focused solely on arrangements for the prevention of illness, assisting people who are ill and those who need aftercare. The current directions impose a duty to provide day centres for people suffering from mental disorders, and arrangements for training and paid work for such persons. Even more importantly, these directions provide the framework for social work services for the identification, assessment, diagnosis and social treatment of mental illness.

206.n relation to other illnesses, the directions empower local authorities to provide day centres, occupation and work at such centres, meals (including meals-on wheels), advice and support from social services, night sitter services, and facilities for

recuperative holidays, social and recreational activities. Specific provision may also be made for people with alcohol or drugs dependency problems.

207. Again, withdrawing these basic facilities will result in deprivation and social exclusion of vulnerable people. An overseas student who becomes clinically depressed or suicidal will lose the help he or she would have had from social services. A husband who is admitted under a sponsorship agreement and is taken seriously will not qualify for meals on wheels which might otherwise be provided if his wife is working.

208. **97(3) and 97(4) Housing Act 1996**

209. These subclauses exclude "persons subject to immigration control" as defined in clause 95 from the duties of local authorities to homeless persons, and from access to local authority housing waiting lists.

210. But, as Shelter has pointed out to us, the Housing Act already excludes persons subject to immigration control as defined in the Asylum and Immigration Act 1996, subject to regulations designed to re-admit to eligibility certain classes of person (including refugees and people with exceptional leave to remain).

211. ILPA agrees with Shelter that these clauses are nonsensical unless there is a substantial difference between the 2 definitions of "subject to immigration control", in which case they are wilfully obscure and confusing.

212. What is the point of saying, as the inserted sub-clauses (2A) say, that the housing regulations cannot prescribe certain persons subject to immigration as being eligible when it is the very point of the regulations in question to do just that? The absurdity is illustrated by the need to insert sub-clauses 2(B) to undo at least part of the damage and restore some people to eligibility.

213. We reiterate our position that deprivation of fundamental rights is a matter that should be debated properly, not left to delegated legislation.

214. **Amendment** Delete clause 97.

Clause 98

215. Excludes those subject to immigration control from certain provisions of the Social Work (Scotland) Act 1968.

216. Neither this nor clause 99(2) appears to take account of the establishment of a Scottish Parliament.

217.A**mendment** Delete clause 98.

Clause 99

218.Excludes from the Children Act s17 those whose needs arise from destitution and "may" be met by support under s74.

219.The "may" is worrying. What of the child whose destitute asylum seeking parents "may" qualify for s74 support but have disentitled themselves by rejecting an offer of accommodation in a far flung location? Is the child to be separated from them and taken into care for the lack of s17 powers to meet his needs within his family? It appears so, since the Children Act s.20 duties and powers to accommodate children apart from their parents are not excluded by this clause. Is this a result that the government intends?

220.A**mendments**
delete clause 99

in 99(1) line 27 and 99(2) line 38 delete "may be" and insert "are being"

Miscellaneous and surveillance - clauses 100-103

Clause 100

221.Makes the Secretary of State a corporation sole for property conveyancing purposes. No comment

Clause 101

222.This gives powers without safeguards for the invasion of a supported person's home, using "reasonable force if necessary", to check on who is living there and whether the accommodation "is being properly treated".

223.This represents an outrageous flouting of civil liberties which as drafted may well go even further than the government intends since it applies not only to accommodation provided by the Secretary of State under the s74 scheme, but to any accommodation provided to anyone who is being supported under the scheme. So for example a

relative or neighbour or kindly church member who puts up a supported asylum seeker may have his or her home invaded under this provision.

224. And if that is unintended and unacceptable, why is it acceptable for an asylum seeker accommodated anywhere else to be open to such unchecked invasion of privacy?

225. The provision breaches the most fundamental expectations of privacy and security within one's own home, and excludes supported persons from the basic protections of the ordinary law on the searching of premises and the powers of landlords.

226. It is another breach of ECHR article 8 (right to private life), and probably article 14 (anti-discrimination), that has evidently escaped the Secretary of State's notice when he conferred his compliance statement on the Bill. We direct his attention to it now, and to the recent judgement in the case of *Mcleod v United Kingdom* (Times, 1 October 1998).

227. Amendments

delete clause 101

No replacement is necessary because property is already adequately protected by the general law, and specific provisions could also be included in the conditions provided for in clause 94(9)

Clause 102

228. This obliges anyone who appears to have any involvement with premises used for accommodation under the scheme to give whatever information the Secretary of State requires about the premises or the people occupying them.

229. This is another potentially draconian provision whose purpose is unclear. The government should be asked to clarify. If it is intended to encourage snooping on accommodated asylum seekers and their visitors then it is to be deplored and opposed. If, however, it is intended to enable the Secretary of State to exert control over providers and the standards of provision then it is to be encouraged, subject to clarification and safeguards, including safeguards as to the confidentiality of information obtained about individual asylum seekers.

230. **Amendments** As may seem appropriate in the light of any clarification obtained.

Clause 103

231. Requires persons "conveying postal packets" to provide information to the Secretary of State for use in relation to criminal offences under Part VI, and for checking the

accuracy of information and for "any other purpose relating to the provision of support to asylum seekers".

232. This is very wide, as to both the persons to whom and also the purposes for which it applies.

233. Do I "convey a postal packet" if I take a mis-addressed letter back to the post box? Or give a letter to a previous occupant the next time I see him?

234. If the clause is intended to be aimed at those who convey postal packets in the course of business then it should say so.

235. What is the ordinary law about the conveyers of postal packets providing information for use in the prevention, detection, investigation and prosecution of criminal offences? Does this add anything?

236. **Amendment** Delete 103(1)(c)

PROPOSED NEW CLAUSES

(1) Insert after existing clause 73:

73A It shall be the duty of the Secretary of State to make arrangements with a view to ensuring that officials of his department and all other providers of assistance to asylum seekers and their dependants operate the provisions of this Part of this Act and exercise their functions in such a way as shall best promote the welfare of asylum seekers and their dependants, if any, who require assistance under this Part of this Act.

Note:

This derives from Conservative legislation underlying the Supplementary benefits legislation which was in force from 1980-1988. It imposes a duty on the Secretary of State to operate the system for the benefit of its recipients.

(2) Clause to be drafted to provide for the establishment of the post of independent Asylum Support Commissioner with a duty to monitor the operation of the scheme, to keep statistics as to ethnic origin and gender and to report annually to Parliament

(3) Clause to be drafted to provide

that Part VI shall to cease to apply forthwith to any asylum seeker whose asylum application remains undetermined 2 calendar months from the date on which it was made, or whose appeal remains undetermined 4 calendar months after notice of appeal was given

OR

for increased levels of support and/or the additional payment of lump sums of cash and/or the opportunity to change location and/or a lower eligibility threshold for support in the event that an asylum application remains undetermined 2 calendar months from the date on which it was made, or that an appeal remains undetermined 4 calendar months after notice of appeal was given.

(4) When exercising his duty to make provision for the essential living needs of asylum seekers and their dependants under clause 74 the Secretary of State shall exercise his powers in accordance with all the articles of the UN Convention on the Rights of the Child.

PART VII
POWER TO ARREST AND SEARCH

Introduction

1. ILPA objects, as a matter of principle, to the wide-ranging attempt to criminalise asylum seekers and others seeking to enter or remain in the United Kingdom contained in Part VII of the Immigration and Asylum Bill.

2. It believes that the introduction of further criminal sanctions into what should be an administrative and humanitarian process is ill-conceived and potentially breaches Article 31 of the Convention on the Status of Refugees and a number of the rights contained in the Human Rights Act 1998.

3. It also believes that the new criminal sanctions place further unnecessary burdens on the police and prison services, which are already over-stretched, and are inappropriate in the context of the victimless nature of immigration offences.

4. The MacPherson Report correctly identified the need for an improved police complaints system, effective monitoring of the use of police powers and the acknowledgement and eradication of institutional racism within the police force. Until the recommendations of the Report have been implemented, ILPA believes it would be inappropriate and potentially abusive to expose thousands of members of black and ethnic minority communities, who are asylum seekers or who seek leave to enter or remain in the United Kingdom, to further criminal sanctions.

5. ILPA also notes that the Bill contains no provision for the training of immigration officers in the use of reasonable force or the exercise of the wide ranging powers to enter, search and arrest. Neither does the Bill provide for any form of public accountability.

6. This is particularly of concern when the Bill further fuses the differing roles being carried out by immigration officers. They are already expected to be primary fact finders and to reach decisions as to whether or not leave to enter or remain should be granted and at the same time are often the officers responsible for arresting an overstayer or illegal entrant. This in itself breaches the principle of separation of powers.

7. However, the provisions in the Bill go much further and provide them with, for instance, powers to seize and retain evidence, upon which they will later adjudicate, or to arrest an asylum seeker who has used deception to enter the country, before any consideration has been given to the substance of his application for asylum.

Clause 104

8. The clause reproduces existing powers for immigration officers to arrest without warrant for immigration offences contained in section 24 (other than section 24(1)(d)) and section 25(1) of the Immigration Act 1971. It also provides immigration officers with the power to arrest anyone who has used any deception to enter or remain in the United Kingdom contrary to Clause 16 of the Bill, anyone who harbours an overstayer or illegal entrant or anyone who obstructs an immigration officer or anyone else who is implementing the Immigration Act 1971.

9. The introduction of a power to arrest, without first obtaining a warrant, a person reasonably suspected of using any deception to enter or remain in the United Kingdom compounds the unacceptably wide nature of the offence being created by Clause 16. It is particularly of concern, as it is a measure which specifically targets asylum seekers, in breach of Article 31 of the Convention on the Status of Refugees.

10. Furthermore, Clause 16 does not define what actions will amount to obtaining or seeking to obtain "avoidance, postponement or revocation" of enforcement action. Neither does it state that a person will only become liable for prosecution under this Clause after his asylum application has been considered and any appeal rights exercised. ILPA, therefore, believes that judicial scrutiny should be introduced to ensure that all those asylum seekers forced by necessity to use false documents to escape persecution are not arrested, as a matter of course. It also believes that such arrest powers should only be implemented after an asylum seekers has had her application determined and he has exhausted any appeal rights.

11. ILPA is also concerned about the lack of definition of what amounts to obstruction in the 1971 Immigration Act and the lack of judicial scrutiny before arrest, when the powers of arrest are being exercised by immigration officers with no legal or other appropriate training and experience.

12. Amendments
Delete reference to 24A in section 28A(1)(a).

Delete sub-sections 28A(5) - (9).

OR

Add new (2) and re-number the following sub-sections

"(2) And sub-section (1) will not apply to an offence under section 24A until the suspect's application for asylum has been determined and he has been able to exercise any appeal rights arising from the decision reached."

AND

Insert after "name" in sub-section 28A(7)(a): "and the suspect is capable of understanding the language in which he is being asked to give his name and he is not in need of assistance from an appropriate adult by reason of age, mental incapacity or any other disability".

Insert after "service" in sub-section 28A(7)(c): "and the suspect is fluent in the language in which he is being asked to give his name and he is not in need of assistance from an appropriate adult by reason of age, mental incapacity or any other disability".

13. **Questions** In section 26(1)(g) who are those "other persons lawfully acting in the execution of this Act"? Does it include the Secretary of State for the Home Department? What actions will be classed as obstruction for the purposes of section 26(1)(g)? What actions will amount to the avoidance, postponement or revocation of enforcement action for the purposes of section 24A? What is the justification for treating most immigration offences as if they were serious arrestable offences?

Clause 105

14. The clause enables an immigration officer to enter any premises by force in order to search for and arrest a person wanted for an immigration offence contrary to sections 24(1)(a), (b), (c), (d), (e) or (f) (illegal entry and overstaying), section 24A (deception) or section 25(2) (harbouring a person who is an illegal entrant or overstayer), once he has obtained a warrant.

15. ILPA believes that no warrant should be granted to enable premises to be searched for someone suspected of committing an offence under section 24A until the suspect has had his asylum application determined and has been able to exercise any appeal rights.

16. It is also opposed to unlimited force being used to enter premises. This is particularly so when the warrants obtained will often relate to a suspect's home and there are, therefore, likely to be children present and there may also be other people present who themselves have been the victims of torture and persecution in the past.

17. **Amendments**

Insert in the second line of section 28B(2) and in the third line of sub-section (4) before the word "force", the word "reasonable".

Add new sub-section (5) (and re-number (5) as (6)):

"(5) It shall be a condition of the grant of any warrant under this section, that the immigration officer or constable must be accompanied by an interpreter fluent in the first language spoken by the suspect and also by an appropriate adult, if there is any possibility of there being minors, or those who are mentally incapacitated or suffering from any other disability on the premises."

Add new sub-section (7):

"(7) Sub-section (5) only applies to offences under section 24A if the suspect has already had his application for asylum determined and has exhausted all of his appeal rights."

18. **Question** What justification is there in permitting the use of unlimited force to enter premises under such warrants?

Clause 106

19. Section 25(3) of the 1971 Immigration Act and clause 104 of the Bill provide immigration officers with the power to arrest those suspected of facilitating illegal entry, without needing to apply for a warrant. Clause 107 provides them with a new power to enter any premises to search for and arrest such suspects, without a warrant.

20. ILPA believes that such a power to enter and search without a warrant should be restricted to cases where the suspect has been facilitating illegal entry for profit or reward. It believes it is oppressive and unnecessary to provide such powers where a suspect has merely assisted a friend or relative to enter the country.

21. **Amendments**

Add at the end of sub-section (1): "where it is reasonably believed that the person has facilitated such entry for profit or reward".

Add at the end of sub-section (4): "in a language and form which the suspect is able to understand and in circumstances where he is not prevented from understanding the

nature of the warrant and the identity of the immigration officer by age, mental incapacity or any other disability".

Clause 107

22. The clause provides immigration officers with the power to apply to a justice of the peace for a warrant to enter and search any premises for evidence relating to an immigration offence under section 24(1)(a), (b), (c), (d), (e) or (f), section 24A and section 25 of the Immigration Act 1971.

23. ILPA is opposed to granting immigration officers the power to enter premises with which the suspect may have little or no direct connection. It will mean that community centres, advice agencies, churches, hostels and the homes of friends and relatives of the suspect can be searched. It will also mean that material wholly unconnected to the suspect's case will be examined and read and that work with other members of the community, who may themselves be vulnerable, will be disrupted.

24. The likely cumulative affect of such warrants being issued will be to discourage communities and organisations from offering support and assistance to those who may, at some time in the future, be suspected of immigration offences. This will further isolate and stigmatise asylum seekers and those seeking leave to enter or remain in the country and expose them to further risk of racist attack.

25. In the Police and Criminal Evidence Act 1984 similar powers are only given to police officers under section 8 of that Act in relation to serious arrestable offences.

26. **Amendments** Delete the clause in its entirety.

Insert a new section 28D(e) and renumber (e) as (f):

Section 28D(e) will then read:

"the immigration officer has made reasonable enquiries to establish:

(i) a substantial connection between the premises and the suspect;

(ii) the nature of the premises themselves;

(iii) whether they have previously been searched and, if so, how recently; and

(iv) that the proposed search will not have an adverse effect on the work carried out at the premises for people other than the suspect.

Add at the end of sections 28D(2) and (3): "in a language in which they are fluent".

27. **Question** Should immigration officers not be required to carry out the same stringent enquiries that a police officer must undertake before seeking to obtain a warrant for non-serious arrestable offences?

Clause 108

28. The clause provides immigration officers with powers to enter and search premises after there has been an arrest, at a place other than a police station, for an immigration offence and also where a person has been arrested or detained under Schedule 2 of the 1971 Immigration Act.

29. ILPA believes that sub-section 28E(2) is too wide and is oppressive and that sub-section 28E(3) does not provide a sufficient safeguard.

30. Amendments

Add at the end of sub-section 28E(5): "and it is necessary to seize it in order to prevent the evidence being concealed, lost, altered or destroyed".

Add at the end of sections 28E(6) and 25A(8): "or are items of excluded or special procedure material".

Add new sub-section 28E(5) and re-number the subsequent sub-sections.

28E(5) will then read:

"A relevant document is one which is material to the offence for which the suspect was arrested."

31. **Question** What evidence will be seen to be relevant evidence for the purposes of sub-section 28E(3)(a)?

Clause 109

32. The clause provides immigration officers with powers to enter and search premises after there has been an arrest for an offence contrary to section 25(1) of the

Immigration Act 1971, that is facilitating illegal entry or harbouring illegal entrants or overstayers.

33. ILPA believes that such a power to enter and search premises after arrest under this section should be restricted to cases where the suspect has been facilitating illegal entry for profit or reward.

34. Amendments

Insert new sub-section 28F(6) and re-number the subsequent sub-sections.

The new sub-section 28F(6) will read:

"If the person who was in occupation or control of the premises is in detention at the time of the search, a copy of the record referred to in sub-section (5) shall be given to him and, if he was in police detention at the time the record shall form part of his custody record."

Insert in section 28F(7), after "legal privilege": or items of excluded or special procedure material".

35. **Question** What evidence is likely to be found on the premises of a person who had facilitated the entry of, for instance, her brother who was an asylum seeker?

Clause 110

36. The clause provides immigration officers with the power to search a person who has been arrested for an immigration offence at places other than police stations. The immigration officer will also be able to search a suspect's headgear.

37. Police Officers were specifically not given such a power under the Police and Criminal Evidence Act 1984, because of concern about obliging those who covered their heads in public for religious reasons to remove their headgear. ILPA believes that this power has the potential of causing offence to a number of different communities and also sparking off incidents of public disorder.

38. ILPA also believes that in the context of searching for identity documentation and other material relevant to an immigration offence, there can be no justification for searching a person's mouth.

39. Amendments

In section 26G(5) delete from "headgear" in the 4th line to "mouth" in the 5th line and in section 25B(5) in the 3rd line delete "headgear" and in the 4th line delete from "but" to "mouth".

Add new sub-section (6) in both sections and re-number the subsequent paragraphs to read: "Nothing in this section authorises an immigration officer to make any physical contact whatsoever with the arrested person's body."

ADD new subsections 28G(10) and 25B(11):

"Sub-section 3(b) shall not apply where the person arrested is not able to fully comprehend the reason for any such search, whether by reason of language, mental or other disability or age. In such circumstances, any such search should only be carried out at a police station and in the presence of an interpreter and/or appropriate adult".

Insert in 25B(8) in 3rd line after "legal privilege": "or items of excluded or special procedure material".

40. **Questions** Is it proposed that women will be asked to uncover their heads and reveal their faces in a public place and in front of men or that Sikhs will be asked to remove their turbans? What will happen if the person arrested does not understand sufficient English to comprehend the reason and justification for the search and resists the proposed search? What happens when an immigration officer attempts to search a suspect and a hostile crowd gathers?

Clause 111

41. The clause provides immigration officers with the power to search or strip search a suspect who is already being detained at a police station.

42. ILPA is opposed to immigration officers being given powers to search those already in police custody. The suspect will already have been subject to a search undertaken by the Custody Officer, or on his behalf, under Section 54 of the Police and Criminal Evidence Act 1984 when he arrives at a police station. In most situations, an immigration officer will not attend the police station until some hours later.

43. This means that the suspect is likely to be searched by the police and an immigration officer. Subjecting a person to a second search is arguably oppressive and is likely to be perceived by the suspect as an act of intimidation. This is particularly so if the person concerned is an asylum seeker, who has in the past been detained and/or tortured in his country of origin.

44. Furthermore, clause 111(3) will not offer the suspect any protection when he is held in police detention at a place other than a police station as the custody officer's role is restricted to the supervision of a suspect once he is booked in to the police station.

45. ILPA believes that the only reasonable rationale for giving immigration officers such powers is that they may be able to identify whether the evidence found on a suspect is relevant to an immigration offence. That rationale can simply be met if the Bill provides for immigration officers to have full access to all items found on a suspect on reception into a police station or when searched in police detention at a place other than a police station.

46. The Custody Officer will not as a matter of course have required the suspect to undergo a strip search. However, Clause 111 would enable an immigration officer to strip search a suspect, as the only type of search prohibited by clause 111(8) is an intimate search, and yet there are no safeguards included in the Bill and no codes of practice attached to the Bill which would provide the suspect with any safeguards in relation to such a potentially intrusive procedure. Nor are there any firm proposals to provide appropriate training for immigration officers in such procedures.

47. **Amendments**

In Clause 111(2) delete all after "at any time" and insert "have access to the record made, as part of the custody record, of all items found on the suspect".

Delete sub-clause (3) and (4) and (5)

In sub-clause (6) delete "seized under subsection (4)(b)" and insert: "recorded which the immigration officer has reasonable grounds for believing is evidence relating to the immigration offence in question". Re-number sub clause (6) as (3).

In sub-clause (7) insert after "seizure" "and given the name of the immigration officer retaining the evidence".

Re-number sub-clause (7) as (4). Add new sub-clause (5): "The person from whom something is seized must be given a record in writing in a language which they can fully understand of these reasons within twenty four hours and also be provided with copies of any documents seized within the same time period. If he is incapable of understanding the reasons by reason of age of mental disability, such reasons should be given in the presence of an appropriate adult and any such copies given to them."

Delete sub-clauses (8) and (9).

Clause 112

40. The clause provides rights for occupiers of premises or persons previously in control of material seized during a search to have a record of what has been seized and to have access to and copy the material.

41. ILPA believes that the powers granted to immigration officers in section 281(6) are excessive and unjustifiable in the context of nature of the criminal proceedings referred to in Part VII of the bill. It also believes that any attempt to withhold evidence, which may be relevant to any future immigration appeal by the applicant, would frustrate the appeal rights contained in Part IV of the bill. It would also potentially breach article 6 of the European Convention on Human Rights, which will be incorporated into UK law, when the Human Rights Act 1998 comes into force in 2000.

42. **Amendments**

In sub-sections 281(5) and 25D(5): delete "in a reasonable time" and insert "within one week".

Delete sub-sections 281(6) and 25D(6).

Clause 113

43. The clause imposes conditions which must be complied with before a warrant under clause 112 can be issued.

44. This raises the concern that an immigration officer can apply for warrants in connection with third party premises, for example the Medical Foundation, advisers on panel, or the Refugee Council.

Clause 114

45. The clause imposes limitation on the execution of warrants obtained under 28K(2).

Amendments INSERT "a maximum of two" after "authorise". And

INSERT NEW (3)

"If there is reason to believe that those in occupation cannot fully comprehend the purpose of the warrant, whether by reason of language, mental or other disability or age, the Immigration Officer must be accompanied by a suitable interpreter and/or appropriate adult."

Clause 115

46. The clause defines the meaning of premises and items subject to legal privilege as used within part VII of the Immigration and Asylum Bill.

Clause 116

47. This clause extends the power to detain to potentially a large number of immigrants. **It is unacceptable as it puts no time limit on detention.**

Clause 117

48. The clause provides immigration officers with the power to use reasonable force when exercising any power under the Bill or the Immigration Act 1971.

49. There is no definition of reasonable force within the Bill. Furthermore, the use of force is not restricted to the implementation of powers specifically given to immigration officers in the Bill, which would equate with the power to use reasonable force given to police constables by section 117 of the Police and Criminal Evidence Act 1984. Clause 117 of the Bill also provides immigration officers with the power to use reasonable force in relation to any powers conferred on them by the Immigration Act 1971. In addition, the use of reasonable force is not restricted to powers related to the investigation of immigration offences, but could also apply to the determination of applications and the exercise of other administrative powers. It could also apply to intimidatory questioning of applicants whilst in detention.

50. **Amendments**

Insert before "the 1971 Act" in the 2nd line of clause 117: "Part III of".

Insert before "this Act" in the 2nd line of clause 117: "Part VII of".

OR

Add at the end of clause 117: "to enter premises".

51. **Question** Will the Secretary of State for the Home Department accept vicarious liability for the actions of immigration officers when the force used exceeds that which is reasonable?

PROTECTION FOR THE DETAINEE: CODES OF PRACTICE

ADD FURTHER CLAUSES

xx (1) The Secretary of State shall issue codes of practice in connection with -

(a) the exercise by immigration officers of statutory powers -

(i) to search and arrest;
(ii) to enter and search premises;
(iii) to search persons;

(b) the seizure of material found by immigration officers on persons or premises.

(2) The disciplinary code operating in relation to immigration officers exercising the powers contained in Part VII of the Bill shall be attached to the said Code as an appendix.

XX (1) When the Secretary of State proposes to issue a code of practice to which this section applies, he shall prepare and publish a draft of that code and shall consider any representations made to him about the draft and may modify the draft accordingly.

(2) This section applies to a code of practice under section .. above.

(3) The Secretary of State shall lay before both Houses of Parliament a draft of any code of practice prepared by him under this section.

(4) When the Secretary of State has laid the draft of a code before Parliament, he may bring the code into operation by order made under statutory instrument.

(5) No order under subsection (4) above shall have effect until approved by a resolution of each House of Parliament.

(6) An order bringing a code of practice into operation may contain such transitional provisions or savings as appear to the Secretary of State to be necessary or expedient in connection with the code of practice thereby brought into operation.

(7) The Secretary of State may from time to time revise the whole or any part of a code of practice to which this section applies and issue that revised code, and the foregoing provisions of this section shall apply (with appropriate modifications) to such a revised code as they apply to the first issue of a code.

XX (1) A failure on the part of an immigration officer to abide by any of the provisions of the code shall raise a presumption against the admissibility of any evidence or other material thereby obtained in any hearings before the Immigration Appellate Authority.

(2) It will also lead to disciplinary charges being laid against the immigration officer(s) concerned.

IMMIGRATION COMPLAINTS AUTHORITY

ADD FURTHER CLAUSES

XX The Secretary of State for the Home Department shall establish an independent Immigration Complaints Authority to deal with complaints arising from the exercise by immigration officers of the powers contained in Part VII of the Act.

XX Part VII of the Act shall not come into force until such an Authority has been established and is fully functional.

AMEND CLAUSE 138 OF THE BILL

ADD new sub-clause (3) and re-number the subsequent sub-clauses

(3) will state that "Part VII of the Act will not come into force until all immigration officers have received training on the use of reasonable force, suitable and safe methods of restraint and the legal limitations of their powers to arrest, to enter premises, to search and seize materials."

SANCTIONS FOR NON-COMPLIANCE

ADD NEW SUB-SECTION TO 1971 Act

Add new Section 19(1)(a)(iii) to Immigration Act 1971

(iii) that the only evidence material to a dismissal of the appeal has been obtained in breach of clauses 105 to 114 or 117 of the Immigration and Asylum Act 1999.

PART VIII
DETENTION CENTRES AND DETAINED PERSONS

General concerns about detention

1. Although opposed in principle to the private control of detention, ILPA welcomes the Bill's proposals to put the contracting out of detention functions on a statutory framework. We do, however, have the following point s of concern:

    a. the Bill fails to provide statutory rights or protection for detainees;

    b. there are inadequate controls on employees of private companies, unlike Crown servants;

    c. there is inadequate training for private employees as compared to Prison Officers;

    d. for any safeguards to be effective, all the rules which will apply to detention of immigrants must be transparent. Performance standards must be published, including the requisite training standard for custody officers and escort personnel; and

e. visiting committees must have statutory obligations and powers to take actions after upholding complaints made to them so that they constitute effective external supervision.

Minors

2. There are no special statutory rules governing the immigration detention of minors. ILPA believes that no minor should be detained purely for immigration reasons. Although the Home Office acknowledges that minors should not be detained, it is implicit in the White Paper (at para 12.6) that minors are detained. Nothing in this Bill takes any steps to prohibit this. The excuse in the White Paper that it is difficult to determine whether a person is over 18, and the reference to reliable medical evidence, is not tenable. ILPA believes that where there is doubt as to whether to detain, detention cannot be justified, unless it is manifestly clear that the individual concerned is an adult. The evidence relied on by the Immigration Service that a minor is over 18 is often a forged or dubious passport. The Immigration Service doubt the authenticity of the document as evidence of identity , but are happy to rely on it as evidence of age.

3. It is our experience that the Immigration Service never seek to obtain medical evidence from an appropriate specialist. That is invariably left to the individual's legal representative. It is our experience that even when expert medical evidence is produced, it is rarely accepted, and a bail hearing becomes necessary.

4. Under various statutes, including the Children Act, local and central government have duties towards minors, particularly those who are vulnerable, such as unaccompanied minors. This necessary for the UK to comply with its international obligations under the Convention on the Rights of the Child. This includes immigration detainees who are detained within the local authority's area of responsibility. In our experience, very few local authorities take these responsibilities seriously. The proposed amendments to the Children Act proposed by Clause 99 of the Bill can only exacerbate the problem.

5. The protection of minors, and getting them released, is dependent almost entirely on the initiative and quality of the minor's legal representative, rather than any steps taken by the Immigration Service, the Home Office, or Social Services departments

Clause 123

6. This Clause mandates the Secretary of State to set up a Visiting Committee for each detention centre.

7. ILPA believes that there is a need for appropriate avenues for complaints to be made, both externally and internally, to ensure proper independent review of detention conditions. This should be analogous to the existing situation in Prisons, such as resort to the Prison Ombudsman, or Area Office.

8. Information on conditions of detention, powers of officers complaints should be made available to detainees in a language they can understand, as is the case with prisons.

9. ILPA therefore urges that there should be amendments to the Bill to achieve these ends.

Clause 124

10. This Clause gives the Secretary of State power to make rules for the regulation and management of detention centres. See general comments above

Clause 125

11. This Clause creates Detainee Custody Officers and provides for their regulation, which is further dealt with in Schedule 9. See general comments above

Clause 126

12. This Clause gives detainee custody officers the power to discharge their functions. See general comments above.

Clause 128

13. This clause prevents those employed in detention centres from disclosing details of particular detainees.

14. At first glance this appears to be a sensible clause, but the reference in sub-clause (1) to a "detained person" presumably does not apply to a person *previously* detained. Also, does the prohibition on disclosure mean the person could refuse to answer questions while under oath?

15. **Amendment** In line 7, after person, insert "whether that person is still detained or not".

Clause 129

16. This Clause grants powers to a constable to act outside his area of jurisdiction when accompanying a person to or from a detention centre. No further comment

Schedule 9

17. Paragraph 1 Creates the offence of obtaining a certificate of authorisation by false pretences. No comment

18. Paragraph 2 These are wide powers and their exercise should be supervised. To that end, it is suggested that records should be kept of the occasions on which they are used. ILPA is concerned that these powers could be used to insist on the removal of headgear, which could give offence on cultural or religious grounds. For that reason, we would suggest deletion of the references to headgear.

19. Amendment
In line 29, delete "headgear".

After sub-paragraph 4, insert new sub-paragraph
"(5) The details of any exercise of powers under this Paragraph must be noted in a register kept for this purpose which must be open for inspection."

20. Paragraph 3 This seems to allow unqualified or certified persons to carry out the duties of detainee custody officers, which undermines the whole purpose of custody officers. These persons are not likely to have had the appropriate training. Short-term is not defined and this therefore constitutes a loophole in the safeguards, such that they are, provided by this Bill.

21. Paragraph 4 See comments on paragraph 6

22. Paragraph 5 See comments on paragraph 6

23. Paragraph 6 It is submitted that as the punishments envisaged under paragraphs 4 and 5 of this Schedule are greater that those in which apply in ordinary cases of assault, then a detainee custody officer ought to be readily identifiable as such, as applies to Paragraphs 2 and 3. To that end, ILPA proposes the following amendment.

24. **Amendment** In line 22, delete "paragraphs 2 and 3" and substitute "this Schedule"**.**

Schedule 10

25. Subject to the appropriate safeguards on the exercise of the power granted under this Schedule, ILPA has no comments to make, with the exception of paragraph 6.

26. Given the wide and divergent range of items which different detention centres do not allow to be conveyed within, it is suggested that a standard list be drawn up, and that the items on the list be placed on a notice clearly displayed outside the detention centre. Further, the list of prohibited items should be confined to those which would cause difficulty within the centre, not such things as paper handkerchiefs for personal use.

Schedule 11

27. No comment.

PART IX
REGISTARS OF MARRIAGES

See Part 1 and commentary on clause 15.