ILPA to House of Lords Secondary Legislation Scrutiny Committee re The Immigration Act 2014 (Commencement No. 6) Order 2016 (SI 2016/11 (C.2)) and the Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) (Amendment) Order 2016 (SI 2016/9)

1. The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

2. These instruments come into effect on 1 February 2016. SI 2016/11 brings into effect ss 20 to 31 of, and Schedule 3 to, the Immigration Act 2014, the 'residential tenancies' scheme for the whole country. These provisions regulations were previously brought into effect for five areas in the West Midlands by SI 2014/2771.

3. SI 2016/9 amends the Immigration (Residential Accommodation) Prescribed Requirements and Codes of Practice) Order 2014 (SI 2014/2874) which sets out the prescribed requirements for identity checks which must be complied with by landlords, landladies and agents when entering into a residential tenancy agreement. Prayers against SI 2016/11 have been tabled in both houses, by Tim Farron MP in the Commons[1] and by Baroness Hamwee in the Lords. The comment in the Explanatory Memorandum to SI 2016/9

> ***Other matters of interest to the House of Commons***
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> *3.2 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.*

is not only surprising, it has proven premature.

4. The Explanatory Memorandum to SI 2006/09 references the Home Office evaluation[2] of the pilot carried out in the West Midlands. This was published on 20 October 2015, the day Committee stage of the Immigration Bill 2015-16 started in the House of Commons. The Immigration Bill 2015-16 provides for the extension of the scheme to encompass criminal penalties for landlords/landladies and their agents and for the summary eviction of tenants with no right to rent. The Joint Council for the Welfare of Immigrants carried out an independent evaluation and this was published on 3 September 2015[3].

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[1] See Early Day Motion 934 of session 2015-2016, http://www.parliament.uk/edm/2015-16/934

[2] Available at https://www.gov.uk/government/publications/evaluation-of-the-right-to-rent-scheme (accessed 16 January 2016.)

[3] http://www.jcwi.org.uk/sites/default/files/No%20Passport%20Equals%20No%20Home.pdf (Accessed 16 January 2016).

5. During the passage of the Bill that became the Immigration Act 2014 there was considerable discussion of the potential to trial the provisions in a particular area[4]. The government used the language of a "phased roll-out," the official opposition a "pilot": the distinction being that the former did not envisage that the results of the trial would have a bearing on whether or not the scheme were extended across the whole country, but rather how it should be extended. Nonetheless, the Minister, Norman Baker MP, said that the Government "want[ed] to take the matter slowly to ensure that it works properly"[5] and

> "*If it has worked properly, without encountering the concerns that Members on both sides of the Committee have rightly expressed, I have no doubt that it will be taken further. If serious problems have arisen, nobody, including my hon. Friend, will want to take the scheme further.*"[6]

6. The matter was also debated in the House of Lords[7]. Concerns expressed included[8]:
   - That an underground economy of "rogue landlords" would emerge, preying on those who could rent nowhere else;
   - That British citizens from black and ethnic minorities, as well as the settled and persons with limited leave to remain in the UK, would face unlawful discrimination in the housing market, including indirect discrimination;
   - That British citizens without passports or driving licences, and those leading chaotic lives, would be unable to rent;
   - Concerns about the complexity and the difficulties landlords and landladies would face in establishing whether their prospective tenant had a right to rent;
   - Concerns about the pressure on those types of housing (e.g. hostels) exempt from the scheme.

7. Concerns were also voiced that a trial in a rural area would not identify problems that would occur in an urban area[9] and that, in any event, a trial in an area persons could move out of would not test the scheme.

8. A Government amendment in the Public Bill Committee resulted in s 34(2) of the Act which provides of the right to rent provisions:

> *(2) If the draft of an instrument containing an order under or in connection with this Chapter would, apart from this subsection, be a hybrid instrument for the purposes of the standing orders of either House of Parliament, it is to proceed in that House as if it were not a hybrid instrument.*[10]

9. This was designed to deal with the possibility that an instrument introducing a trial in a particular area might fall to be considered as a hybrid instrument.

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[4] E.g. Public Bill Committee 7 November 2014, col 229 ff.
[5] Col 242.
[6] Col 442.
[7] Report stage of the Immigration Bill, **3 Apr 2014 : Column 1081**
[8] 7 November 2013, Col 229-241
[9] Col 240.
[10] 7 November 2013, col 277.

10. An amendment was tabled in the Public Bill Committee that would have made the extension of the scheme subject to the affirmative procedure.[11] Resisting it, the Minister, Norman Baker MP, said

> *Both I and my colleague the Immigration Minister have said that we want to ensure that the landlord provisions `work properly. It is of course our intention to have a proper evaluation at the end of the limited application of the provisions. If that application is successful, there will then be a case for taking the provisions further; if the application has not been successful, nobody will want to take them further. That is just common sense. An evaluation will therefore take place.*[12]

11. The division on the amendment was called by Government backbencher Dr Julian Huppert MP, who voted with the opposition against the Government. The vote was lost[13].

12. Debates in the House of Lords raised similar concerns [14].

13. In the House of Lords at Committee stage, the Minister Lord Taylor of Holbeach highlighted concerns about discrimination and about "the vulnerable" accessing accommodation. He observed "I do not want to lay too great a store by the codes, but those codes exist, and I do not want to lay too great a store by racial discrimination legislation, which would clearly apply in such circumstances."[15] He said

> *The Government's intention is that the provisions relating to landlords and their agents will be subject to a phased implementation on a geographical basis. This will allow a proper evaluation of the scheme to ensure that it delivers its objectives without unintended consequences such as discrimination…*
>
> *We intend to work with bodies such as crisis in conducting the evaluation. It will not be an evaluation in which the Government examine their proposals on their own in isolation. The first phase and evaluation will also enable the Government to develop and deliver suitable support services for landlords and tenants…The Government have agreed that we will initiate the first phase from October 2014; that a formal evaluation will be produced; and that decisions on implementing the scheme more generally will be taken in the next Parliament on the basis of this proper evaluation*[16].

14. At Report he said

> *I understand the desire of noble Lords to ensure that the landlords' scheme is "workable" and that the provisions are tested and carefully evaluated. Indeed, it is our intention to adopt a carefully phased approach to implementation and to ensure that we get the guidance and support services absolutely right before considering wider implementation beyond the first phase. … one of the reasons why the rollout is important is that we need to check to see if there are any adverse implications in this policy* [17].

[11] Public Bill Committee, 12 November 2013, col 358
[12] 12 November 2015, col 361-2.
[13] *Ibid.* col 363.
[14] See e.g. Lords Committee stage 10 March 2014, Col 1634ff
[15] 12 March 2014, col 1801.
[16] 10 March 2014, col 1648.
[17] 3 April 2014, col 1089.

15. Announcing the Government's intention to set up a formal consultative panel, Lord Taylor of Holbeach identified:

> *…obvious areas that it would be sensible for any proper valuation to cover including the ease with which landlords and tenants can comply with the new checks and access the necessary guidance and support services… Any decisions on a wider rollout will be taken in the light of the evaluation.* [18]

16. In the light of the above, the question that will fall to be debated on the prayers is whether the Government's evaluation and its response to it, deliver on the commitments it gave to both Houses.

17. In ILPA's view, it does not. First, although it was raised by Lord Avebury in the debates on the Bill that became the 2014 Act, and although ILPA has raised it repeatedly in formal responses and at meetings with the Home Office ever since, the position of persons seeking asylum who do not live in Home Office accommodation but in the private rented sector has never been addressed. Indeed, they are replicated in the new bill. Lord Avebury explained the problem succinctly:

> ***Lord Avebury (LD):*** *.. Can my noble friend elucidate what provisions are being made for documents to be produced by those who are occupying rooms in private houses because they are not covered by the provisions of Schedule 3, to which he has referred? They deal only with the accommodation that is provided to most asylum seekers under the 1999 Act when they cannot afford to pay for accommodation of their own. However, there is still an important residual group of people who find space in private houses. They will need documentary proof that they are allowed to live in those houses and thus ensure that landlords are not breaching the conditions by taking them in.*[19]

18. The problem arises because the definitions in the Act work on the basis of having leave, whereas most persons seeking asylum are on temporary admission . The Minister's reply evidences that he did not understand the question, for he refers to "failed asylum seekers", not the cohort under discussion. He went on to say "the Home Office will provide the necessary documentation to show that they have a right to accommodation.[20]" But subsequently the Home Office declined to do this. Instead, it requires landlords and landladies to telephone a helpline. But why should they do this, when all the evidence is telling them clearly that the person does not have the right to rent because it tells them that to have the right to rent a person must have leave?

The evaluation

19. As to the evaluation more generally, the Minister described this as "extensive[21]" but the sample size is tiny. An online survey had 68 responses, 60 of which (c.90%) were from students[22]. Two-thirds of the tenants surveyed in the Home Office evaluation were white,

[18] *Ibid*., col 1090.
[19] 12 March 2015, col 1800.
[20] *Ibid*.
[21] HC Deb 1 December 2015, col 207.
[22] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468955/horr84.pdf

giving a sample size of 23 tenants visibly from ethic minorities[23]. Some questions in the online survey received as few as five responses. Only 62 landlords and landladies surveyed had taken on a new tenant since the implementation of the scheme. The majority of tenants involved in the research had not moved property since the start of the trial. The evaluation document itself acknowledges that the evidence base is not robust because of the small sample size.

20. Nonetheless, the findings do not appear to lay all concerns to rest. It was found that only 42% of landlords and landladies surveyed had read the code of practice on illegal immigrants and the private rental sector and only 29% had read the code on avoiding discrimination. The old and the new codes are of comparable length[24]. Of the 109 checks undertaken on the online Landlords Checking Service Tool, just 15 resulted in the landlord being informed that the tenant did not have the right to rent. That the other 94 referrals were made, evidences the feared confusion. More than half of landlords/landladies were members of landlord/landlady membership bodies. This is not representative as the majority of landlords/landladies in the UK are not members of professional bodies, Almost 60% of landlords/landladies with only one property felt poorly informed or uninformed about the 'right to rent' scheme. Small-scale landlords/landladies make up 78% of landlords as was described in oral evidence to the Public Bill Committee. The Joint Council for the Welfare of Immigrants in its evaluation[25] found that landlords/landladies found the checks and the Codes confusing and difficult to understand and undertook checks incorrectly.

21. Less than a third of tenants felt informed and many were unaware of the scheme. Most of those who were aware were students, a group specifically targeted by way of an information campaign during the pilot.

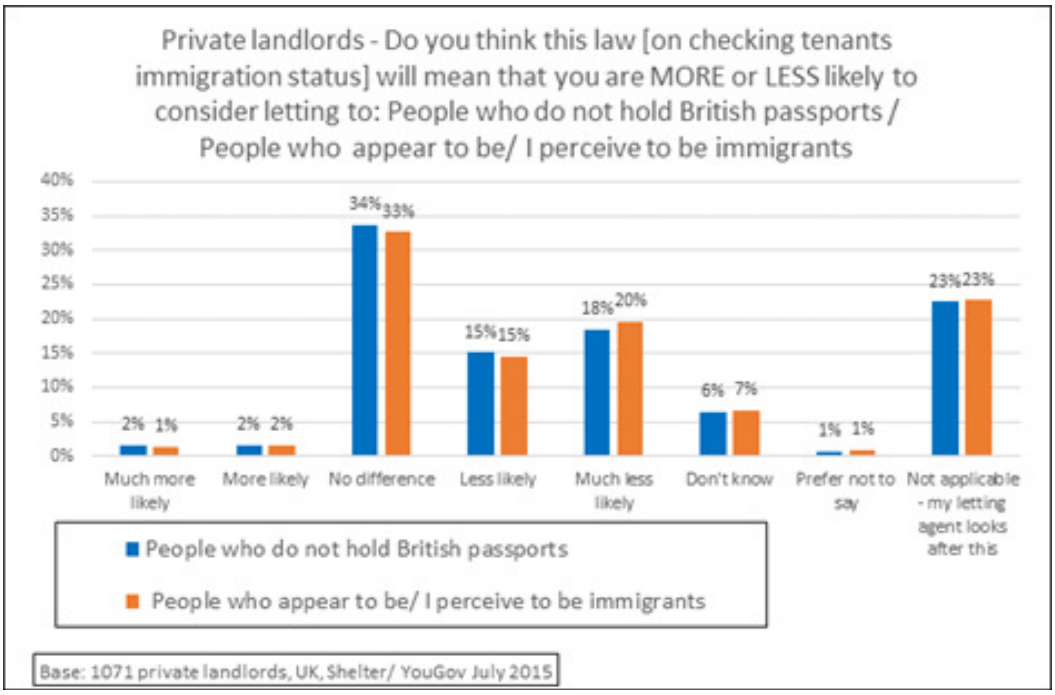
22. Eight voluntary and charity sector organizations stated that they found evidence of exploitation by landlords/landladies of people without the right to rent as a result of the scheme. Evidence was reported by charities and voluntary organizations of increased homelessness as a result of the scheme (six organizations); difficulties findings accommodation among those with the right to rent but complicated documentation (seven organizations); and discrimination on the basis of nationality (seven organizations). We have not identified changes made to address these concerns.

23. The Minister, the Rt Hon James Brokenshire MP, suggested that the evaluation found "no hard evidence of discrimination[26], but it is unclear what he meant by "hard". The report states that 'verbatim comments… suggest that there were a small number of instances of potentially discriminatory behaviour'. These results are largely based on a mystery shopper exercise which looked only at discrimination 'on the grounds of race'. The evaluation found that the Black and Minority Ethnic "mystery shoppers" were less likely to receive a prompt response, were asked to provide more information and received discriminatory comments even though overall they appeared to secure property. Landlords and landladies, agents and tenants, identified discrimination including a tenant refused when they had time-limited leave; preference for tenants where their 'right to rent' was easy to check; and preference for tenants with local

[23] Immigration Bill 2014-2015, Public bill Committee, 29 October 2015, col 253.
[24] See https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice/code-of-practice-on-illegal-immigrants-and-private-rented-accommodation
[25] http://www.jcwi.org.uk/blog/2015/09/03/right-rent-checks-result-discrimination-against-those-who-appear-%E2%80%98foreign%E2%80%99
[26] *Ibid.*

accents or who did not appear to them foreign. The independent evaluation conducted by JCWI found evidence of discrimination due to having a foreign accent or name, or not having a British passport.

24. This should be added to the evidence already available. A YouGov poll was conducted for Shelter. This showed



25. The evaluation does not address whether the aims of the scheme have been met, for example whether those without leave have found it more difficult to obtain accommodation and whether they have left the UK as a result. It states that109 irregular migrants came to the attention of the Home Office as a direct result of the 'right to rent' scheme but this number is made up of referrals provided by internal Home Office teams, external organizations including government departments, police referrals and public allegations and thus seems more to do with normal enforcement activity than with the scheme. Indeed, elsewhere, the report states that just 26 referrals of irregular migrants were specifically related to the scheme. Only five civil penalty notices were issued to landlords/landladies a result of the scheme.

Response to the evaluation: the revisions made in the instruments

26. Providing that a report to the Home Office under the scheme must be made via the Gov.uk website or by telephone, as opposed to in writing as previously and removing the requirement for a report to be accompanied by a copy of any documents relating to the occupier retained by the landlord or agent are very minor changes.

27. Allowing expired biometric residence documents and immigration status documents as part of Right to Rent checks is sensible. The Home Office refuses to do this for entry to its own buildings, and ILPA has repeatedly complained about this unnecessary bureaucracy

28. Permitting letters to be used does not look set to reduce complexity, because these must be in a specified form. Whose letters will the landlord/landlady doubt? Whose trust? Reliance on letters has the potential to assist landlords and landladies but may increase discrimination.

29. Taken as a whole, these changes do not appear to constitute a substantive response to the concerns identified in the evaluation.

30. There is reason to be concerned. Local authorities do not appear to be ready to deal with the scheme. In Barking & Dagenham for example a Homelessness Draft Strategy and Equality Impact assessment laid just after Christmas do not take any account of the landlord checks. The strategy was discussed at the statutory community safety partnership meeting and when asked why the borough had failed to address the impact of the landlord checks the response was that they were unaware. The City of London, Havering and Waltham Forest similarly do not yet appear to have a plan.

The revised code of practice

31. The revised code[27] is not simple. Two extracts, among the many that could have been chosen, will serve to illustrate this:

> ***1.5 References in this Code of Practice***
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> *In this Code, references to:*
> - *'EEA or Swiss national' refers to citizens of EEA countries or Switzerland. The EEA countries are: Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the UK.*
> - *'Illegal immigrants' means people who seek to evade immigration controls and enter and/or remain in the UK without the legal right to do so.*
> - *'Landlord' means a person who lets accommodation for use by one or more adults as their only or main home. This includes people who take in lodgers and tenants who are sub-letting. References to 'landlord' also include agents who have accepted responsibility for complying with the Scheme on behalf of landlords, except for when agents are specifically and separately referred to.*
> - *'Leave to enter or remain in the UK' means that a person has permission from the Home Office to be in the UK. Permission may be time-limited or indefinite.*
> - *'Non-EEA nationals' means the nationals of countries outside the EEA.*
> - *'Occupier' means a person who is, or who will be, authorised to occupy the property under the residential tenancy agreement, whether or not they are named on that agreement.*
> - *'Residential tenancy agreement' includes any tenancy, lease, licence, sub-lease or sub-tenancy which grants a right of occupation for premises for residential use, provides for the payment of rent, and is not an excluded agreement. See section 3 for further information about 'residential tenancy agreements' and excluded agreements.*
> - *'Right to rent' means allowed to occupy privately rented residential accommodation in the UK by virtue of qualifying immigration status.*
> - *'Statutory excuse' means the steps a landlord can take to avoid liability for a civil penalty.*
> - *'Tenant' means the person or persons to whom the residential tenancy agreement is granted.*

[27] https://www.gov.uk/government/publications/right-to-rent-landlords-code-of-practice/code-of-practice-on-illegal-immigrants-and-private-rented-accommodation

2.2 Those with a time-limited right to rent

Those who are not British citizens, EEA or Swiss nationals or do not fall into ii above will have a time-limited right to rent if:

- *they have valid leave to enter or remain in the UK for a limited period of time; or*
- *they are entitled to enter or remain in the UK as a result of an enforceable right under European Union law or any provision made under section 2(2) of the European Communities Act 1972. For instance, qualifying family members of EEA nationals under the Immigration (European Economic Area) Regulations 2006 and those who derive their right to reside in the UK directly from the EU Treaties. These people have a right to reside in the UK as a matter of fact and will be able to obtain documentary evidence to demonstrate this. A landlord will not be liable for a civil penalty if they let accommodation for occupation by someone with a time-limited right to rent, but to maintain an excuse against a penalty a landlord will need to conduct follow-up checks (as detailed in section 5.2). 1 British citizens, EEA and Swiss nationals are "relevant nationals" as defined in s21(5) of the Immigration Act, and so cannot be disqualified from occupying premises under a residential tenancy agreement under s21(1)*

Consolidation

32. The Explanatory Memorandum to SI 2016/9 provides

> ***Consolidation***
>
> *7.5 The Government has concluded on balance that it is preferable to amend the 2014 Order rather than to revoke and replace it on this occasion, but in the event of any further amendments will give consideration to consolidation.*

33. Given the confusion identified in its own evaluation and the evidence of lack of preparedness elsewhere, we do not understand on what grounds it could have been concluded that on balance it were preferable to amend the 2014 Order.

Impact

34. It is not satisfactory that the Home Office has used only the Impact Assessment prepared for the consultation that preceded the Immigration Act 2014[28], one which takes no account of matters raised since and no account of the Immigration Bill 2015-2016, in particular the provisions thereof on summary eviction.

35. ILPA set out in its response to that consultation that it regarded the estimates therein as wrong, relying on very detailed evidence from employers and the employers' helpline[29], and that it considered that the burden on landlords and landladies would be very much heavier than assumed.

36. The Memorandum states "10.2 The impact on the public sector is minimal." It refers to training of the Home Office team only. It says nothing about the impact on local authorities. The evaluation does not probe concerns such as

[28] (HO0094)' dated 25 September 2013.

[29] Available at http://www.ilpa.org.uk/resources.php/20798/ilpa-response-to-the-home-office-consultation-tackling-illegal-immigration-in-private-rented-accommo

- Any increase in homelessness applications, or demands on social services, including from persons with a right to rent but unable to evidence this in the required fashion or requests for referrals and nominations from the local authority where these would bring the tenant into a category exempt from the checks.
- Impact on local authority advice services (for landlord and/or tenant) or other direct services (for example the local authority being asked to provide letters or support a person discriminated against/taking action against a discriminating local authority landlord)
- Responsibilities for checking, including the position of housing associations.

It does not calculate the costs of training and familiarisation for local authorities.

37. It is stated in the Explanatory Memorandum that "The changes brought about through this order will reduce the regulatory burden of the scheme further by making it easier to conduct a Right to Rent check, as well as to make reports to the Home Office." This wholly ignores the effect of the 2015-2016 Act and the introduction of new criminal offences and new powers to evict.

Effect of the 2015-6 Immigration Bill

38. This has not been factored in. The Bill moves the scheme onto a new footing: one backed by criminal sanctions. Clause 13 would create four new criminal offences, two that can be committed by landlords and landladies, and two that can be committed by their agents, when the landlord, landlady or agent knows or has reasonable cause to believe that a person does not have a right to rent. The offences carry a maximum five year prison sentence. These offences, and the full explanations quoted above, indicate that the landlord/landlady is not being asked to perform a tick-box document check, but to consider whether the tenant does have a right to rent.

39. Under the 2014 Act it sufficed for a landlord or landlady to conduct periodic checks on a tenant's immigration status. They were then protected from a civil penalty until the next check was due, even if the tenant's status changed. Now it is proposed that if the Secretary of State gives notice in writing to the landlord or landlady that the person has no right to rent the landlord or landlady will face the criminal penalty if they continue to rent to the tenant even though the next check is not yet due and can be required to evict the tenant. It would be an implied term of a residential tenancy agreement that a landlord or landlady could terminate a tenancy if adult occupying the premises do not have a right to rent. The powers to put people out on the street can be used against families with children. Courts will be obliged to issue an Order for Possession and will have no discretion in the matter. **A** landlord or landlady's notice to quit can be enforced as though it were an order of the High Court.

Summary

40. As stated above, the question that will fall to be debated on the prayers is whether the Government's evaluation and its response to it, deliver on the commitments it gave to both Houses. We suggest that they do not.

Adrian Berry Chair ILPA 18 January 2016