Immigration Law Practitioners’ Association—Written evidence (LEG0029)

Introduction

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.

ILPA has been closely involved in the passage of immigration legislation since the organization’s inception. Its legal director, Alison Harvey, has worked on every piece of immigration legislation in parliament since the Asylum and Immigration Act 1996. ILPA’s involvement has included:

- Responding to government consultations, whether in writing or through attendance at meetings at the green paper and white paper stages of legislation and before;
- Proposing to government changes that it might wish to introduce through legislation in the field of immigration and asylum;
- Providing written briefings to parliamentarians on Bills introduced;
- Meeting with parliamentarians, in groups and individually, to discuss Bills introduced;
- Proposing amendments, drafting these and providing briefing;
- Coordinating NGO and other work on Bills;
- Liaising directly with the Bill team to raise concerns and make suggestions, including commenting directly on drafts proposed to address problems identified.
- Advising from the opposition advisors’ box during debates

ILPA contributed to the Hansard Society’s 2008 Report *Law In the Making* and has worked closely with the House of Lords’ Delegated Legislation and Secondary Legislation Scrutiny Committees to draw to their attention failings of the legislative process.¹

It is difficult in the field of immigration to make a meaningful distinction between the pre-legislative and legislative stages of a Bill because of the extent to which wholly new matters are introduced into Bills, by government, not to mention by the opposition amendments, during its passage. Some of these are measures government fully anticipated, when first it tabled the Bill, would be added to the Bill during its passage.

The proposals for tackling exploitation in the labour market were the subject of a consultation which ran from 13 October 2015 to 7 December 2015² in parallel with the passage of the Act through parliament. ILPA responded to the consultation³ and was among 93 agencies, including

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statutory organisations, trade bodies, labour providers, trade unions and non-governmental organizations to do so. The Bill as introduced to parliament on 17 September 2015 contained only outline provisions about the new role of Director of Labour Market Enforcement with many provisions introduced, following the consultation through government amendments to the Bill, in a 54-page document, for consideration at the first sitting of the House of Lords’ committee, with 100 further government amendments at House of Lords’ report stage, drawing criticism from parliamentarians about the reduced opportunity for scrutiny. Amendments to Part 5 of the Immigration Act 2015, dealing with asylum support, were introduced during the passage of the Bill. Parliamentarians, and those outside parliament, struggled to make sense of the cumulative effect of successive waves of amendments. Much of the detail of the support provisions is left to regulations and the impression was that this was in large part because the policy had not been fully worked out. A further consultation is expected. Yet we identify no practical imperatives why the Bill could not have waited for the matter to be resolved.

While in what follows we have sought to choose examples from recent legislation, the pain of which is more likely to be fresh in people’s minds, we do not consider that the problems we identify are in any way particular to one (or more) political parties being in government and every point we make could be made in respect of any immigration act since 1996. We are happy to provide further examples if the committee has the stamina to hear them.

1. **How effective are current practices in Government and Parliament at delivering clear, coherent, effective and accessible draft legislation for introduction in Parliament?**

In the field of immigration, they are not. It is to that field of law that we confine our remarks.

**Consultation**

Problems start early, at the consultation stage. The process of ‘green paper’ then ‘white paper’ has largely been lost. No coherent proposal for a piece of draft legislation is produced. Instead there are one-off atomised consultations on elements of such legislation which is no longer conceived of as forming a coherent whole, as the short titles (pre-amendment) of the Bills which became the Immigration Acts of 2014 and 2016 attest:

Bill 110 of session 2013-2014 (subsequently the Immigration Act 2014):

*Short title*

*Make provision about immigration law; to limit, or otherwise make provision about, access to services, facilities and employment by reference to immigration status; to make provision about marriage and civil partnership involving certain foreign nationals; and for connected purposes.*


5 See e.g. HL Deb 8 Jan 2016: cols 524-5 per Baroness Hamwee.

6 A number of which, following trenchant criticism by the House of Lords Select Committee on Delegated Powers and Regulatory Reform, are made subject to the affirmative procedure, see Delegated Powers and Regulatory Reform Committee, 17th Report of Session 2015/16: Immigration Bill, HL Paper 73, 22 December 2015 at: [http://www.publications.parliament.uk/pa/ld201516/ldselect/lddelreg/73/73.pdf](http://www.publications.parliament.uk/pa/ld201516/ldselect/lddelreg/73/73.pdf).
Bill 74 of session 2015-2016 (subsequently Immigration act 2016):

Short title

Make provision about the law on immigration and asylum; to make provision about access to services, facilities, licences and work by reference to immigration status; to make provision about the Director of Labour Market Enforcement; to make provision about language requirements for public sector workers; to make provision about fees for passports and civil registration; and for connected purposes.

The shape of these ‘baggy’ bills changes during their passage through parliament as new provisions, some not consulted on, are added.

In the final version of the short title of the 2014 Act the words “to make provision about the acquisition of citizenship by persons unable to acquire it because their fathers and mothers were not married to each other and provision about the removal of citizenship from persons whose conduct is seriously prejudicial to the United Kingdom’s vital interests” were inserted, reflecting a radical change to the Bill during its passage through parliament. During debates at Committee stage of the Bill, it was accepted by Ministers and opposition that citizenship was not within the scope of the Bill; when government wanted to introduce deprivation of citizenship provisions at report stage, suddenly that was not the case. There was scarce any chance to raise the question of the scope of the Bill. Drafts of the Home Secretary’s proposals were circulating by early December 2013 but the amendment was tabled at the eleventh hour, the day before the Commons report and third reading. Mention is made on the parliamentary record of ILPA’s having briefed through the night to inform that debate.

In the 2016 Act the words “to make provision about the enforcement of certain legislation relating to the labour market” were substituted for ‘to make provision about the Director of Labour Market Enforcement’ in the short title, reflecting a broadening of the scope of the Bill to matters only tangentially related to immigration.

To have targeted consultations on parts of draft legislation it not an ill in itself, but it would be helpful to have a consultation that placed these within a (preferably coherent) whole. Meanwhile, the content of those atomised consultations is of concern. A good consultation process will set out the evidence and propose alternatives. It will often be the fruit of research. It is hard to find recent examples of this, but an older one would be the Cabinet Office’s Identify Fraud: a study of July 2002.

Increasingly Home Office consultations are designed to sell a policy and include ‘spin’ and leading questions designed to allow the Government response to the consultation to say “X% of respondents agreed with the statement”. ILPA responses to such consultations are frequently peppered with “This question does not admit of a yes or no answer.” The use of forms and drop down menus means that only the most determined of respondents can avoid answering ‘yes’ or ‘no’.

7 Immigration Bill session 2013-2014, Public Bill Committee cols 178-179.
8 30 Jan 2014: Column 1055.
9 See for example ILPA’s 14 April 2008 response to the Path to Citizenship green paper. The problem is not confined to immigration; see for example ILPA’s 24 January 2013, Response to Ministry of Justice Consultation on Judicial Review.

ILPA had already protested during the research at the very small number and narrow range of persons selected for interview, expressing particular concern at the lack of representation of those outside London and at the quality of the interview with the ILPA’s Legal Director, Alison Harvey, where the interviewer had appeared rushed and disinterested. The dominant trophy in the final report is apophasis: while claiming not to draw conclusions as to the effect of the Legal Aid Sentencing and Punishment of Offenders Act 2012 from a cohort of cases, the majority of which are not proceeding under the funding regime established by that Act, the document repeatedly does so. Other errors included making no attempt when describing represented and unrepresented applicants in the tribunal to identify how many of those applicants had representation funded by legal aid and how many were privately paying.

It is instructive to look at the parallel Department of Health\textsuperscript{10} and Home Office\textsuperscript{11} consultations on immigration health charges. It would appear that the two departments could not agree on the presentation of the evidence and questions to be asked and therefore had to issue separate consultations. The Department of Health Paper is a more careful and measured presentation of the evidence, the Home Office paper is more politicised, and peppered with leading questions, as demonstrated by ILPA’s responses, for example

\begin{quote}
1. Should all temporary migrants, and any dependants who accompany them, make a direct contribution to the costs of their healthcare? (Yes / No / Don’t know) [Equivalent to Department of Health Question 6] \\

The question does not admit of a yes/no answer because it is misconceived. The category of “temporary migrant” is misleading: large numbers of persons with limited leave are on a route to settlement. Such persons, along with other migrants whose stay is temporary, already make such a contribution through the payment of taxes: on income and Value-Added Tax, etc. and payment of National Insurance contributions. Income from taxation in the UK is not hypothecated and in such a context the language of a “direct” or “indirect” contribution is misleading.
\end{quote}

Consultation papers often come at a very short notice, with tight turn-around times and results that appear too late. The loss of the Cabinet office guidance requiring a 12-week consultation period is lamented. All the more so because rarely, if ever, are we given advanced notice of consultations with a short turn-around time. Instead we are expected to drop everything when they appear. It is necessary to be very selective in the responses attempted, to avoid the risk that responses become as thin as the consultation papers themselves, full of opinion not evidence.

There is a view among many respondents to consultations that because government will count responses and set out the percentage of respondents in favour or against a certain measure, more

\textsuperscript{10} Department of Health: Sustaining services, ensuring fairness: A consultation on migrant access and their financial contribution to NHS provision in England July 2013,

\textsuperscript{11} Home Office consultation, Controlling Immigration – Regulating Migrant Access to Health Services in the UK, July 2013
is more and many, separate responses are desirable. This leads to officials wading through a mass of, all too often similar but sometimes contradictory, responses rather than a smaller number of better pieces of work to which they would then have time to respond. Government has, we fear, made a rod for its own back.

We draw special attention to the Ministry of Justice consultation Immigration and Asylum Appeals: consultation on proposals to expedite appeals by immigration detainees of September 2016, which closes on 22 November 2016. The detained fast track was suspended following a series of judgments that it carried an unacceptable risk of unfairness, including that the fast-track procedure rules were ultra vires the powers of the Tribunal Procedure Committee, which has the power to make procedural rules ensuring that justice be done and that the tribunal system is fair. By “allowing one party to the appeal to put the other at serious procedural disadvantage without sufficient judicial supervision”, the rules were not securing these objectives and the Committee was acting out with its powers.

Pressed, very hard, by the Home Office, the independent Tribunal Procedure Committee, which makes rules for tribunals, including, following a battle with the Home Office, the Immigration and Asylum chambers, consulted on whether it should make rules for appeals in a new detained fast track. It concluded that it should not and Mr Justice Langstaff wrote to the Home Office to this effect on 12 February 2016. The Ministry of Justice consultation bears a striking resemblance to the submissions the Home Office put before the Committee. It purports to be to ‘gather additional evidence to help Government formulate policy and…to be able to assist the Tribunal Procedure Committee by providing a considered Government Policy position which has taken consultation responses into account.’ But one of the questions is

Do you agree that the Government should take power in primary legislation to introduce and vary time limits for different types of immigration and asylum appeals?

In other words, do you agree that the Government should continue to arrogate to itself the role of the independent Tribunal Procedure Committee? This is consultation as threat.

**Drafting**

We see no reason why organizations outside government such as ILPA, with relevant expertise, should not be consulted on first drafts of proposed legislation, not just on policy principles. We often have technical comments to make which are only possible to identify when we see the

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12 Written Statement made by: The Minister of State for Immigration (James Brokenshire) on 2 Jul 2015.
16 Paragraph 12
17 See the Immigration Act 2014, s 7, which enjoins upon the Tribunal (and the Special Immigration Appeals Commission – see Schedule 9, Part 2, paragraph 10) to make rules to prohibit repeat bail hearings within 28 days, unless there is a material change. The prohibition is re-enacted in paragraph 12 of Schedule 11 to the 2016 Act but with a difference. While section 7 of the 2014 Act implicitly allowed a bail application to be heard since all that is prevented is ‘release’ on bail within 14 days from the date on which bail has been granted, paragraph 12(2) provides instead that a person must not be ‘granted’ immigration bail by the First-tier Tribunal without the consent of the Secretary of State. This appears to be designed to achieve that the case not be listed for hearing at all, not the approach the Tribunal Procedure Committee had taken in making rules.
legislation. We are also in a position to spot problems. This can be illustrated by comments on drafting we have made during the passage of Bills.

During the passage of the Bill that became the Immigration Act 2014, ILPA spotted that the way in which the Home Office had drafted its appeals provisions meant that it would not be possible to bring an appeal against a decision to refuse entry to the UK on human rights grounds, and thus it would not be possible to bring such an appeal at all, given that out of country appeals were to be limited to human rights grounds, if the Bill came into force.\(^{18}\)

While we did not agree with the loss of appeal rights, we had no wish for our clients, ourselves, judges, tribunal judges and the Home Office to have to grapple with defective legislation. We raised the matter with the Bill team, who confirmed that it was the Government’s intention that the Bill provide for an appeal against a refusal of entry (e.g. to join a spouse, partner or parent) on human rights grounds. We proposed an amendment for the Public Bill Committee; the government subsequently tabled an amendment to address the problem we had identified.

More recently, when the first commencement order for the Immigration Act 2016\(^{19}\) appeared, we spotted that in commencing s 34, making it a crime to work without permission so to do, the Government had failed to make provision for persons on temporary admission given permission to work (in almost all, if not all, cases, persons seeking asylum who had waited for a decision on their initial application for over 12 months).\(^{20}\) The drafting would have left a person on temporary admission who works in the position of committing a criminal offence by so doing regardless of whether they had Home Office permission so to do. ILPA raised this with the Home Office and received confirmation that it would address this. On 5 July 2016 The Immigration Act 2016 (Transitional Provision) Regulations 2016 (SI 2016/712) were tabled. These provided for a person at large by virtue of paragraph 21(1) of Schedule 2 to the Immigration Act 1971(b) (temporary admission or release from detention) to be treated for the purposes of the new s 24B(2) of the Immigration Act 1971 as if the person had been granted leave to enter the United Kingdom and for any restriction as to employment imposed\(^{21}\) to be treated for those purposes as a condition of leave.

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18 New s 82 of the Nationality, Immigration and Asylum Act 2002 inserted by the Bill imported the definition of a human rights claim contained in s 113 of the that Act. That read

“human rights claim” means a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom would be unlawful 2 under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention) as being incompatible with his Convention rights.”

We could see that other parts of the Bill did envisage out of country human rights appeals.

19 The Immigration Act 2016 (Commencement No. 1) Regulations 2016 SI 2016/603 (C.44).

20 The offence of illegal working (inserted by s 34) was brought into force by SI 2016/603(c.44) on 12 July as was the offence of employing an illegal worker (s 35). Section 24(9) of the Immigration Act 1971 inserted by s 34(3) of the Immigration Act 2016 ensures that those on immigration bail within the meaning of Schedule 10 Part 1 who have permission to work are not committing a criminal offence and by operation of that section nor is an employer under s 21(1A) of the Immigration, Asylum and Nationality Act 2006 inserted by s 35 (assuming for the sake of argument that the drafting is not defective in this respect). But Schedule 10 part 1 was not brought into force. The transitional provisions pertaining to the transition from temporary admission to immigration bail can be found at paragraph 13 of Schedule 10 to the Act.

21 Under paragraph 21(2) of the 1971 Act.
ILPA was sighted on successive drafts of what became s 65 and Schedule 9, part 9 to the Immigration Act 2014, amending nationality law as far back as there are persons living to provide rights to register as British citizens for those born illegitimate. This was a response to amendments, sponsored by ILPA, tabled at a late stage during the passage of the Act and presented a challenge to the most skilled of draftspersons. Very different approaches were tried in different drafts. We spotted some matters that needed to be corrected, for example that a reference to the Human Fertilization and Embryology Act should be to the 1990 Act and not the 2008 Act. Other corrections were spotted by parliamentary counsel and/or officials, of which our favourite was the need to provide that the applicant’s parents were married “to each other”, rather than just ‘married’.

Amendments to the Nationality Immigration and Asylum Act 2002, effected by s 17 of the Immigration Act 2014 permit the Secretary of State to certify cases as clearly unfounded, as cases in which the appellant should be returned to a safe third country and under s 94B of the 2002 Act, the “appeal first; deport later” which will be expanded to a “remove first appeal later” regime on 1 December 2016 when s 63 of the Immigration Act 2016 comes into effect. The Secretary of State can issue the relevant certificate after an appeal has been brought in-country, but rather than bringing the appeal to an end it suspends the appeal such that it may only be continued after the appellant has left the UK. This novel suspension of an appeal, initiated in-country, does not sit easily with s 78 of the Nationality, Immigration and Asylum Act 2002. Section 78 is not amended by the 2014 Act or by the Immigration Act 2014. It prohibits the removal, or requiring to leave, of a person who has brought an in-country appeal. The effect of a certificate after the bringing of such an appeal may be frustrated by the prohibition on removing or requiring the appellant to leave the UK.

It is our understanding that at least some primary legislation, and a considerable amount of secondary legislation, is prepared by the department rather than by parliamentary counsel. While officials may have detailed knowledge of the detail and workings of the provisions, they are less likely than parliamentary counsel to have the drafting skills required in such a complex field. Ideally, their drafts would always be reviewed by parliamentary counsel.

2. Are there mechanisms, processes and practices at this stage of the legislative process that hinder the development of ‘good law’?

Failure to consolidate

The complexity that has developed in UK domestic law is readily attested to by the presence on the statute book of fourteen Acts on immigration law (discounted from this are Acts relating exclusively to nationality law) as well as significant amendments to immigration law in other statues such as the Crime and Courts Act 2013 and the Justice and Security Act 2013. Each Act amends ones that has gone before and adds new freestanding provisions. Every rule change generates complex transitional provisions. Immigration law is encroaching on other areas of law with immigration status relevant to social welfare entitlements, housing, licensing etc. An extra

22 19 Mar 2014 : Column 179, amendment 79A in the name of Lord Avebury.
23 The Immigration Act 2016 (Commencement No. 2 and Transitional Provisions) Regulations 2016 SI 2016/1037 (C 74)
level of complexity is added where these other matters are devolved but are being amended from Westminster on the grounds that immigration is reserved.

The result is that in immigration, consultees struggle to understand what they are being asked; Parliament does not understand what laws it is passing and parliamentary counsel struggle to get complete and adequate instructions as evidenced by the number of corrective government amendments that have to be made as Bills go through parliament.24

Those who do not subscribe to costly commercial legal support services are unlikely to be able to read the law in its consolidated form. In areas such as powers of entry, seizure search and retention, enlarged (again) by Part 3 of the Immigration Act 2016, immigration officers now have multiple overlapping powers and it is extremely unlikely to be clear to those on whom such powers are used under which particular provision the immigration officer is acting at any given time. Cases are denied legal aid, wrongly, because abstruse points of law are not understood by those deciding the applications for funding.

In June 2007, the then Border and Immigration Agency launched a consultation on simplifying immigration law. That same month, during the passage of the UK Borders Bill, Baroness Scotland of Asthal, Minister of State at the Home Office, said25 (Hansard):

This Bill is the last part of a jigsaw and, after it is complete, there will be an opportunity for us to look at the issue of simplification. It is for that reason... that last week the Border and Immigration Agency launched a consultation on simplifying the immigration laws, something for which both Houses have been calling for some time... the simplification project is designed to hone existing legislation and eradicate duplication.

The summer of 2008 saw the publication of an incomplete draft of such a Bill entitled the draft (partial) Immigration and Citizenship Bill. Ultimately, however, no simplification Bill was introduced and instead parliament was presented with the Borders, Citizenship and Immigration Bill in January 2009. During the passage of that Bill, Lord West of Spithead, Parliamentary Under-Secretary of State, Home Office, said:26

The simplification Bill, which is heading rapidly towards 400 clauses—this is a complex and serious Bill on which people are working very hard all the time, so it cannot be rushed forward—will cover all immigration legislation since 1971 and will not cover the ground again on citizenship.

He also announced that later that year, the Government would publish a draft immigration simplification Bill. This it did, although this draft Bill, while building on the previous year’s draft (partial) Bill was also incomplete. Moreover, given the parliamentary timetable and then forthcoming election, and perhaps a degree of ‘fatigue’ at the failure to present a full Bill in 2009 following scrutiny of the 2008 draft Bill (by the Home Affairs Select Committee and the Joint Committee on Human Rights), the 2009 draft Bill received far less parliamentary attention than its subject matter deserved.

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24 See, for example, Lord Bates described in his 1 March 2016 letter to Baroness Fookes, the Chair of the overworked Select Committee on Delegated Powers and Regulatory Reform, as “yet another” Delegated Powers memorandum on the Bill which became the Immigration Act 2016.


The draft Bill was not consolidating legislation. It proposed to change and augment the law at the same time as consolidating it. ILPA predicted that the result of this would be that the Bill would collapse under its own weight and this it did. The project has not been revisited and the impossibility of adequate pre-legislative or legislative scrutiny grows.

Successive waves of legislation provide opportunities for Governments to extend their powers with little scrutiny. It was said in debates on the Maritime Enforcement provisions of the Bill which became Part 8 of the Immigration Act 2016 that the provisions were unobjectionable because similar powers had been taken in the Modern Slavery Bill and the explanatory notes to the Bill highlight the specificity of the offences and the targeted nature of the provisions. The argument that maritime enforcement powers are unobjectionable because similar provision has already been made in other legislation appears in the explanatory notes to the Policing and Crime Bill. Each time, the scope of powers is extended, considerably, from powers in respect of three separate offences in the Immigration Act 2016 to powers in respect of all offences in the Policing and Crime Bill.

The current system is one which produces injustice because persons cannot become aware of, or exercise their rights. This injustice is exacerbated because there is no legal aid for immigration (as opposed to asylum) cases and yet those affected by it are in many cases denied permission to work or access to other than subsistence support, so there is no prospect of their paying for it themselves. They cannot get assistance from non-lawyers because, under s 84 of the Immigration and Asylum Act 1999, it is a criminal offence to give immigration advice if not a solicitor, barrister or legal executive or registered with the Office of the Immigration Services Commissioner.

Legal aid is spent on asylum cases and judicial reviews to clarify the law. These cases also take up court time. The complexity of the law makes it more difficult to scrutinise the Home Office or to know what to expect of it, which leads to a lack of accountability and a failure to root out costly poor practice or to implement the law as parliament intended.

**Portmanteau legislation**

Increasingly, portmanteau legislation looks to have been produced due to lack of time or because policy has yet to be thought through rather than because it is appropriate. We provided the example above of the provisions of Part 5 of the Immigration Act 2016 on support services.

A particular concern is provisions that say ‘in particular’ and then provide a very detailed, but non–exhaustive list of powers that could be taken in secondary legislation. Parliament ends up focusing on the details of these provisions and ignoring that the powers are at large. Examples are the Immigration Act 2014 s 38(3) (Immigration Health Charge) and the provisions on marriage and civil partnership in Part 6 of that Act which include, but by use of ‘in particular’ obscure, very broad information sharing powers.

**Failure adequately to consider the devolved administrations**

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27 E.g. Immigration Bill Public Bill Committee, 13th sitting (afternoon) Hansard, col 475 (10 November 2015) per the Rt Hon James Brokenshire MP ‘The provision permitting powers to be exercised by accompanying officers reflects existing powers under other legislation—most notably, the powers recently considered by the House in the Modern Slavery Act 2015.’


The Immigration Acts 2014 and 2016 are riddled with “Oops we forgot Scotland” amendments made during the passage of that Act. For example Schedule 8 paragraph 2, inserts a new s 28D(2A) into the Immigration Act 1971 to provide that provisions for multi-entry warrants for immigration officers do not extend to Scotland, where such warrants are not permitted to the police. This section typifies the approach: the Act makes provision which reflects the situation in England and then separate provision is made for Scotland, rather than the situation being reviewed across the UK as a whole and a decision take as to which, the English or the Scots’ (or other devolved administration) approach, to prefer.

Devolution featured heavily in the report on the Bill by the House of Lords Select Committee on the Constitution and was extensively debated in the Lords. Lord Hope of Craighead proposed amendments to provisions of the Bill dealing with illegal working in licensed premises, residential tenancies and support under Part 5, saying:

*It is a feature of the Bill that the provisions which apply to England and Wales are set out in full and we are debating them, line by line, as we ordinarily do; but although the Bill applies to Scotland, Wales and Northern Ireland, it does not set out the measures which deal with certain devolved matters relating to those Administrations. That has three consequences. First, this House - or, indeed, this Parliament - is not able to debate the detail of the legislation. ... Secondly, as I understand the purpose of these provisions, it is not intended that the devolved legislatures should legislate on these matters either... Thirdly, the measures which seek to apply these provisions in relation to Wales, Scotland and Northern Ireland are to be contained in a statutory instrument.*

*Here the Minister is proposing to take measures in relation to Scotland with regard to devolved matters. If he was not to seek the consent of the Scottish Parliament, there may be really considerable consequences.*

The then Minister, the Rt Hon Lord Bates, said in reply

*I concur with the view that these are very important issues: they are not trivial issues but are very substantial. ... In respect of illegal working in licensed premises, to which the noble and learned Lord referred, we have not had time to amend the Bill but have published draft regulations so that our method and intent are clear.*

*... As with the right-to-rent scheme in the 2014 Act, we believe that the extension of these provisions to the whole of the UK has only consequential impact on devolved legislation and remains for an immigration purpose.*

*We have not sought to put the residential tenancies provisions for Scotland or Wales in the Bill or to publish draft regulations. This is because both the Scottish Parliament and the Welsh Assembly have been legislating in this space. ... With the law in flux in Wales and Scotland, we had to decide whether it was worth amending the law only to need to re-amend it a few months later, and we thought that once was better.*

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31 *Hansard*, HL, cols 1754ff (15 March 2016).
...the dispersal of migrant children is not an area in which Wales, Scotland or Northern Ireland have competence to legislate, and their consent is therefore, in our opinion, not required for the UK Government to legislate in this area.

The use of secondary legislation to implement certain provisions in the devolved administrations means that where provisions are found to be incompatible with the Human Rights Act 1998 the regulations will be able to be struck down, whereas provisions of primary legislation can only be declared incompatible. Add to this the question of the borderline between devolved and reserved matters and we can anticipate litigation, in particular in Scotland. The UK Government has indicated that it does not consider that legislative consent motions are required for these extensions. See for example the letter of the Rt Hon James Brokenshire MP, Minister for Immigration and Security, to Margaret Bruges MSP, Minister for Housing and Welfare in the Scottish government, on the residential tenancies provisions.32

The question of how devolution is handled in immigration is all the more pertinent in the context of Brexit. As Sarah Craig, Maria Fletcher and Nina Miller-Westoby set out in their paper for ILPA’s EU referendum series,33 while immigration is a reserved matter, matters affected by immigration status, for example welfare entitlements in Scotland, are devolved. Devolved matters on which there is immigration legislation in Northern Ireland include:34

- health and social services
- education
- employment and skills
- social security
- housing

Further devolution could bring aspects of the rights of EU/EEA nationals within the legislative competence of devolved administrations. Without clarification of which matters are within the competence of the devolved administrations, or require legislative consent, the scope for the devolved administrations to reach their own settlement on the scope of, for example, rights of EEA nationals post a Brexit, is reduced despite the potential for different successor arrangements to be made by the English, Welsh, Northern Irish and Scottish administrations.35

Devolution adds considerably to complexity not only in drafting but in implementation. For example, the provisions of Part 7 of the Immigration Act 2016 requiring public sector workers in customer facing roles to speak English extend across the UK but only in respect of reserved matters, although it would be open to the devolved administrations to make similar identical provision for matters within their competence.

Drafting

32 13 October 2015, at:
http://data.parliament.uk/DepositedPapers/Files/DEP2016-0300/2015-10-13_JB_to_Margaret_Burgess_MSP.pdf

33 EU Referendum position paper 12: The implications for Scotland of a vote in the EU referendum for the UK to leave the EU, 1 June 2016, see http://www.ilpa.org.uk/resources.php/32192/eu-referendum-position-paper-12-the-implications-for-scotland-of-a-vote-in-the-eu-referendum-for-the

34 Cabinet Office and Northern Ireland Office, Devolution settlement: Northern Ireland, 20 February 2013.

35 See for example the discussion in George Kerevan’s It’s complicated, but Scotland can stay in the single market, here’s how 31 October 2016, available at http://www.thenational.scot/comment/george-kerevan-its-complicated-but-scotland-can-stay-in-the-single-market-heres-how.24207
Acts such as the Immigration Acts of 2014 and 2016 show evidence of very different drafting styles by different parliamentary counsel (and/or the department?) Some parts appear more skilfully drafted than others. As an example of area where we think the drafting not as clear as in others are the provisions of s 45 and Schedule 7 on bank accounts\(^{36}\) and Part 7 on Language requirements for public sector workers.

**Poor explanatory memoranda**

It is of concern when explanatory memoranda and other government materials are used to obfuscate rather than to clarify the purpose of legislation\(^{37}\). The Constitution Committee picked up on this in the drafting of what became s 61 of the Immigration Act 2016. It drew attention to what became subsections 61(3) to (5) of the Act under the heading ‘retrospective legislation’. \(^{38}\)

When it published the bill that became the Immigration Act 2014 the government published with it a number of factsheets. These were broadly factual, albeit with a little light spin,\(^{39}\) and provided a way for non-lawyers to read into the proposals. Fact-sheets were also produced for the Bill which became the Immigration Act 2016\(^{40}\) but by this time spin predominated over substance and they were not documents to which we could usefully direct NGOs.

ILPA highlighted in its 2011 response to the consultation on family migration which preceded the writing of immigration rules addressing Article 8 of the European Convention on Human Rights\(^{41}\) that the presentation of the case of Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34 in the consultation was misleading. Despite this, the presentation was also misleading in the Human Rights Memorandum which accompanied the Bill which became the Immigration Act 2014, s 18 of which addresses Article 8. The case is cited in the context of a discussion on precariousness without explaining that the applicants in *da Silva* were successful, despite Ms da Silva’s having remained unlawfully in the Netherlands and having established her private life and family life when her status was ‘precarious’, a term used in the Bill. The Supreme Court describing the Rodrigues case in ZH (Tanzania) [2011] UKSC 4 at 20 as

\[\ldots\text{a relatively recent case in which the reiteration of the court’s earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of}\]

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\(^{36}\) See e.g. the two uses of the term “disqualified person” : for the purpose of s 40A and generally s 40A(3), person in the UK who requires leave to enter and remain but does not have it and for whom the Secretary of State considers that a bank account should not be provided (Schedule 7 para 2 inserting s 40A(3)) into the Immigration Act 2014). But, for the purpose of s 40D, a person who, following a check under s 40C(1), was determined to be such a person (s 40D(9) inserted by Schedule 7 para 2).

\(^{37}\) For other legislation and rules see e.g. ILPA’s evidence to the Secondary Legislation Scrutiny Committee on statement of changes in immigration rules HC760 of 4 December 2012 at [http://www.ilpa.org.uk/resources.php/16435/ilpa-briefing-for-house-of-lords-secondary-legislation-committee-on-consultation-practice-4-december](http://www.ilpa.org.uk/resources.php/16435/ilpa-briefing-for-house-of-lords-secondary-legislation-committee-on-consultation-practice-4-december). The explanatory memorandum to Statement of Changes in Immigration Rules HC887, laid before parliament on 3 December 2016, despite being very detailed, made no mention of a change to when a person would be treated as a refugee’s unmarried or same sex partner, requiring two years cohabitation (not an easy requirement for many refugees to fulfil) rather than a relationship subsisting for two years.

\(^{38}\) House of Lords Select Committee on the Constitution, 7th Report, Session 2015-16, HL Paper 75, paragraphs 29 to 34.

\(^{39}\) See https://www.gov.uk/government/collections/immigration-bill


\(^{41}\) HC 194, 13 June 2012.
the best interests of a child caught up in a dilemma which is of her parents' and not of her own making”.

The House of Lords’ Select Committee on the Constitution has grappled with misleading explanatory memoranda in its work on the Bill which became the Immigration Act 2016. In *R (B) v Secretary of State for the Home Department (No 2)* (2015) EWCA Civ 445, currently pending before the Supreme Court, the Court of Appeal held that while it is accepted that the power to impose bail conditions also extends to someone who could be detained even if they are not actually detained immediately prior to the grant of bail, the powers conferred by paragraphs 22 and 29 of Schedule 2 to the Immigration Act 1971 should extend only to individuals who are or could be lawfully subjected to immigration detention pending deportation. The Court further held that where, as in the case it was considering, there was no realistic prospect of the person's deportation taking place, subjecting them to immigration detention pending deportation would not be lawful. Once the legal basis for detention falls away, so does the legal basis for imposing bail conditions; the power to impose such conditions being dependent upon the possibility of lawful detention. The effect of the Court of Appeal's judgment was to make the imposition of bail conditions unlawful in circumstances in which the person concerned could not lawfully be subject to immigration detention.

This is addressed by Schedule 10 which provides that bail conditions can be set in relation to individuals who are either ‘detained’ or ‘liable to detention’ under relevant immigration powers. A person is liable to detention if they could be detained were it not for the fact that a ‘legal issue’ or practical difficulty presently precludes or impedes their removal from the UK (Nationality, Immigration Act Asylum Act 2002, section 67).

Pending the coming into force of Schedule 10, s 61(3) provides that the 1971 Act powers can be used ‘even if the person can no longer be detained’ provided that they are ‘liable to detention’. Section 61(5) provides that: ‘The amendment made by subsection (3) is to be treated as always having had effect.’ This means that the provisions will have retrospective effect, as is acknowledged in the Explanatory Notes to the Bill:

‘This clause is retrospective in its effect because it is intended to clarify the law following a recent Court of Appeal judgment … on when immigration bail conditions can be imposed. The Court of Appeal judgment disturbed previously settled case law in this area. If the Court of Appeal's judgment stands (it is under appeal) then it will have a significantly limiting impact on judges' and the Home Office's ability to impose bail conditions and manage individuals, including those who pose a risk to the public where deportation is being pursued’.42

The House of Lords Select Committee on the Constitution questioned the use of the word ‘clarify’:

34. The statement that these provisions ‘clarify’ the law is questionable. The Court of Appeal has determined what the relevant provisions of the Immigration Act 1971 mean—and what, in law, they have always meant. The Government now wishes to revise what those provisions mean. The effect of clause 32(5) [now 63(5)] will therefore be to change the law and to do so retrospectively. ... the rule of law requires government to act according to law, and from that perspective the retrospective provision of a legal basis...

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42 Explanatory Notes to the Immigration Bill, Bill 79, 2015-16-EN, paragraph 168.
for executive action is constitutionally suspect and calls for a clear justification. To the extent that such a justification is provided by the Government, it appears to turn upon considerations of administrative convenience and to rely upon the fact that the Court of Appeal’s judgment disturbed what the Government considered to be a settled understanding of the legal position. We recognise that the Government was acting in accordance with its understanding of the law, but once that action has been judged to be unlawful we would expect a greater justification for changing the law with retrospective effect than simple administrative convenience.

35. As we have previously stated, there needs ‘to be a compelling reason in the public interest for a departure from the general principle that retrospective legislation is undesirable.’ …The House may wish to assure itself that sufficient justification has been advanced for the use of retrospective legislation in this instance. 43

In the event, the House took little interest in the point. 44

Paragraph 5 of Schedule 1 to the Immigration Act 2014 amended s 146(1) of the Immigration and Asylum Act 1999. Prior to amendment this licensed the use of force by immigration officers in exercising powers under the 1999 Act or the Immigration Act 1971. Paragraph 5 would amended this to license the use of force by immigration officers exercising powers under “the Immigration Acts”, comprising ten Acts – including the 1971 and 1999 Acts, the Bill and any future legislation included in the definition of the immigration acts45 The explanatory memorandum to the Bill stated this was mere clarification.46 This is incorrect. An extension of statutory license for the use of force is not mere clarification.

Confusing statements can also mislead the Home Office itself. In the case of Kiarie, currently pending before the Supreme Court, the Court of Appeal47 found that the Home Office had been applying the wrong legal test in the “deport first; appeal later” cases for which provision is made by s 17 of the 2014 Act, inserting s 94B into the Nationality, Immigration and Asylum Act 2002. The Home Office had made a mimetic substitution of the test of “serious irreversible harm” if removed, one example of a breach of human rights, for the legal test, a breach of human rights. The first-tier Tribunal judge in the case had fallen into the same error. In the Court of Appeal, Lord Justice Richards despaired at the complexity of the commencement provisions pertaining to the new appeals regime, saying that he was “appalled by the complexity of that legislative jigsaw.”

Pepper v Hart [1992] UKHL 3 has arguably increased the extent to which Ministerial statements are made to obfuscate rather than to illuminate the content of legislation. Ann Dummett raised the concerns as early as 2001 in her introduction to her Ministerial Statements: - The Immigration Exception in the Race Relations (Amendment) Act for ILPA.48 Ministers are speaking for future judicial reviews and endeavouring to place on record what they want the legislation to mean.

44 See the debate at Hansard, HL cols 1649-1659 (1 February 2016).
45 Clause 66(5) of the Bill includes “the Immigration Act 2014” (i.e. the current Bill) among the Immigration Acts as listed in section 61(2) of the UK Borders Act 2007
46 Explanatory Notes to Immigration Bill as brought from the Commons, HL 84, paragraph 49
47 At [2015] EWCA Civ 1020.
3. Are there improvements that could be made at this stage of the process that would result in law that is more easily understandable by users and the public?

**Better quality consultation**

See comments above. It would be helpful to have guidelines as to quality and we should view with interest proposals to ensure that consultations could be reviewed prior to publication and challenged where evidence had not been collated, or was poorly presented.

Government should be urged to cease counting and publicising numbers of responses to consultations and to encourage organizations to collaborate on responses or to endorse all or part of each other’s responses where possible. It is indeed of interest to know that scarce any respondents agreed with a proposal, as in the recent consultation on fees in the Immigration and Asylum Chambers of the Tribunal.  

**Better work with the devolved administrations**

See comments above.

**Consult specialist organizations on draft legislation, not just on policy.**

See comments above.

**Provide helpful tools**

Keeling Schedules are essential where immigration legislation is concerned. They were helpfully produced for the Appeals provisions of the Nationality Immigration and Asylum Act 2002 as amended by the Immigration Act 2014. The Bill team shared them with ILPA and they were subsequently made publicly available.

Tracked changes versions of Bills are also an incredibly useful resource and were produced for the 2016 Act.  

We have long lobbied the parliamentary website to attach Ministerial letters to the pages dedicated to bills and not to have them only in the depositary. The late Lord Avebury also advocated this. It has now been addressed. It is of tremendous importance as very often what is said in letters is just as important as what is said in the debates, including in the context of Pepper v Hart.

**Constrain the powers of Government**

Use can be made of recommittal procedures where large numbers of amendments are presented at a late stage, as was done during the passage of the Bill which became the Nationality, Immigration and Asylum Act 2002. It might be helpful to have guidance for the Houses of Parliament on when recommittal would be required. Government could be required to identify to parliament, or to relevant committees, whether a Bill was complete before it was presented to

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49. Tribunal Fees, The Government Response to consultation on proposals for the First-tier Tribunal (Immigration and Asylum Chamber) and Upper Tribunal (Immigration and Asylum Chamber) Lord Chancellor and Secretary of State for Justice, Cm 9325, September 2016.


51. See e.g. for Bill that became Immigration Act 2016 http://services.parliament.uk/bills/2015-16/immigration/documents.html
parliament, or whether it was likely to need amendment during its passage, and parliament could then have powers to decide whether an incomplete Bill should proceed or wait. It would also be helpful to have guidance as to when government amendments would require a bill to be paused, for example until particular committees were able to report.

Loathe as we are to increase the workload of already stretched committees, there is potential for committees to be asked to review consultations the questions ask, on matters likely to result in legislation and to identify any misleading presentation of the evidence, or spin.

The allocation of more time for Bill, and longer periods between different stages of Bills, would also be helpful. During the passage of both the Immigration Acts 2014 and 2016 we were working round the clock to keep up during committee stage, and needed more time to scrutinize the legislation properly.  

Timescales for Bills should be such as to allow time to submit comprehensive evidence to the Public Bill Committee and for this to be published and considered by those giving oral evidence.

11 November 2016

52 See our briefings on the Bills, and on previous bills, links from left hand column at http://www.ilpa.org.uk/pages/parliamentary-briefings-submissions-and-responses.html