



## **Detention Advice Service response to the Legal Services Board consultation on the regulation of immigration advice and services – May 2012**

### **About the Detention Advice Service**

The Detention Advice Service (DAS) is a registered charity that provides independent, confidential and free immigration advice, information and support to foreign national prisoners and immigration detainees.

DAS is authorised by the Office of the Immigration Services Commissioner (OISC) to provide immigration advice, and all DAS advice workers are Level 2 advisers. We also have a Quality Mark from the Legal Services Commission.

Based in Hackney, East London, DAS currently works directly in 12 prisons across London and the south of England, and has provided advice to more than 1,600 clients in these prisons over the past year. DAS also provides advice and information by telephone and post to prisoners and detainees held in sites that advice workers do not attend.

### **Response to the consultation**

We acknowledge the Legal Services Board's request that responses should reply to the questions set out by the consultation document. However, since many of the questions posed relate to matters beyond our expertise, we have chosen to submit general comments on an area of specific concern to us.

DAS fully supports efforts to ensure the robust regulation of immigration advice and services. As a result of our daily work with foreign national prisoners and immigration detainees, a marginalised and extremely vulnerable client group, we have a clear understanding of the damaging consequences of poor, incompetent and incorrect advice. In line with this, we would welcome the introduction of arrangements so that the Legal Ombudsman could consider complaints about OISC regulated entities and individuals, since this would ensure consistency in access to redress for all those receiving immigration advice.

We would also, however, emphasise the importance of further reforms to the regulatory arrangements ensuring continued access to justice for all, including the most vulnerable, and indeed the most unpopular groups.

We welcome the commitment in the consultation paper that the aim of any move towards making immigration advice and services a reserved legal activity "would be to ensure continued consumer choice and access to justice through a wide range of properly regulated and

controlled individuals and entities, rather than to exclude any category of provider from the market by moving to a system based on regulation of title.” Additionally, we welcome the reassurances given by the Legal Services Board – during both our meeting with them on 3 April 2012, and also during their meeting with ILPA on 19 April 2012 – that making immigration advice and services a reserved legal activity would not mean that only solicitors, barristers and legal executives could carry out the activity, and that OISC advice provision could continue to operate were such a change to be made. Although we have already, in our meeting with the Legal Services Board, set out reasons for the importance of maintaining access to OISC immigration advice provision for those in the prison estate, we would like to take the opportunity to submit this information in writing.

### *The need for immigration advice within prisons*

There is a very real need for immigration advice provision within the prison estate. The most recent annual statistics from the Ministry of Justice show that there are around 11,000 foreign nationals in prison in England and Wales; as such, they constitute approximately 13% of the prison population.<sup>1</sup> Just over 7,500 of the foreign nationals in prison are serving an immediate custodial sentence<sup>2</sup>, and the low threshold for deportation proceedings – for instance, any non-EEA national sentenced to 12 months custody or more will be subject to automatic deportation – means that a significant majority of these will face deportation action. A recent parliamentary written answer has highlighted that, as of 9 January 2012, there were 5,178 foreign national offenders currently serving a custodial sentence in England and Wales who were being considered for deportation.<sup>3</sup>

There are, in addition, a significant number of immigration detainees in the prison estate. No regular statistics are currently produced on the number of foreign nationals detained in prison under immigration powers following the completion of their custodial sentence: these detainees are not included in the quarterly statistics on detention issued by the Home Office. However, figures obtained by DAS under the Freedom of Information Act show that the population of detainees held in the prison estate across 2011 and in early 2012 has ranged from 457, at its lowest point, to a high of 610. At the end of January 2012 – the most recent month for which we have these figures – there were 595 foreign nationals being held in prison under immigration powers.<sup>4</sup> According to the most recent Home Office statistics, the total number of people in immigration detention facilities as at 31 March 2012 was 3,034;<sup>5</sup> those detained in prison can, therefore, be seen to represent just under 20% of the overall detained population.

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<sup>1</sup> Ministry of Justice (2012) *Offender management caseload statistics 2011 tables*, table A1.20 – available at <http://www.justice.gov.uk/downloads/statistics/mojstats/omsq-q4/omsq-q4-2011-annual-tables.zip>

<sup>2</sup> Ministry of Justice (2012) *Offender management caseload statistics 2011 tables*, table A1.20.

<sup>3</sup> <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120301/text/120301w0002.htm#1203016800024>

<sup>4</sup> [http://www.detentionadvice.org.uk/uploads/1/0/4/1/10410823/foi\\_21786\\_response.pdf](http://www.detentionadvice.org.uk/uploads/1/0/4/1/10410823/foi_21786_response.pdf)

<sup>5</sup> Home Office (2012) *Immigration statistics January-March 2012* – detention briefing available at <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q1-2012/detention-q1-2012>

The consequences of deportation are grave, and it is essential that those facing it are able to access immigration advice. Moreover, foreign national prisoners and prison detainees are often extremely vulnerable. In addition to facing the very significant barrier of language – which is exacerbated by the fact that deportation and associated papers served by the UK Border Agency (UKBA) are written entirely in English – many will be additionally vulnerable as a result of mental health problems, drug and/or alcohol dependency and poor physical health; some are asylum seekers and refugees; some – often women – are victims of trafficking; female prisoners may also face the added distress of being separated from their children, for whom they are often the sole or primary carers. It is, therefore, particularly important that foreign nationals in prison are supported to understand their situation, and to make an informed decision about it.

#### *Current provision of immigration advice in prisons*

The need for readily accessible immigration advice for foreign nationals held in prison is clearly recognised by the Prison Service’s own guidance, in the form of Prison Service Instruction 52/2011, which sets out that “it is important that prison establishments ensure that both UKBA and independent immigration advice are available for prisoners to access when it is required.”<sup>6</sup> Similarly, the Prisons Inspectorate highlights the importance of “access to accredited, independent immigration advice and support agencies”<sup>7</sup> for foreign national prisoners in *Expectations*, the document which sets out the detailed criteria it uses to appraise and inspect prisons.

In spite of this clear guidance, however, and in spite of the significant numbers of foreign nationals in prison who are facing deportation, accessing immigration legal advice remains very difficult. Unlike in immigration removal centres, where detainees have access to the Detention Duty Advice scheme, there is no co-ordinated provision of immigration advice across the prison estate. Indeed, a regularly conducted survey by Bail for Immigration Detainees (BID) has revealed consistently low levels of access to legal advice for foreign nationals in prison. The most recent survey, conducted across the detention estate in November and December 2011, found that just 32% of immigration detainees who had previously been in prison had received immigration advice whilst there.<sup>8</sup>

Where immigration advice is provided within prisons, it is predominantly given by OISC regulated organisations. DAS is the primary provider of immigration advice in the prison estate, and currently works in 12 prisons across London and the south of England: Belmarsh, Bristol, Bronzefield, Bullingdon, High Down, Isle of Wight cluster (Albany, Camp Hill and Parkhurst), Reading, Pentonville, Wandsworth, and Winchester. Additionally, we provide advice via telephone and post to prisoners and detainees held in prisons across England and Wales that

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<sup>6</sup> p.17; Ministry of Justice (2011) *PSI 52/2011: Immigration, repatriation and removal services* – available at <http://www.justice.gov.uk/downloads/offenders/psipso/psi-52-2011.doc>

<sup>7</sup> p.41; Her Majesty’s Inspectorate of Prisons (2012) *Expectations: Criteria for assessing the treatment of prisoners and conditions in prisons* – available at <http://www.justice.gov.uk/downloads/about/hmipris/expectations.pdf>

<sup>8</sup> See ‘Extract from BID surveys of legal representation for immigration detainees across the UK detention estate’, attached with this response.

our advice workers do not attend. Migrant Helpline, another OISC regulated organisation, works directly in two foreign national-only prisons, Canterbury and Bullwood Hall, as well as additional prisons in the Kent area.

*The importance of OISC immigration advice provision in prisons*

Whilst we recognise that the level of OISC provision operating within the prison estate is unable to match the huge level of demand that exists, we would emphasise that without this provision, significantly fewer foreign national prisoners and prison detainees would get access to immigration advice than is currently the case. It is our experience that prisoners can find it extremely difficult to access external immigration advice provision. There is often a dearth of information about immigration solicitors within prisons, and the lack of legal aid immigration solicitors in certain areas, particularly outside major cities, means that some are simply unable to obtain legal advice via this route; this was highlighted by prison staff who attended our annual conference in December 2011.<sup>9</sup>

Indeed, from April 2013, when the legal aid cuts contained in the Legal Aid, Sentencing and Punishment of Offenders Act come into force, it will be impossible for foreign national prisoners who wish to challenge deportation proceedings to get legal advice and representation from a solicitor unless they are able to pay for it themselves, since deportation and removal cases will be taken out of scope of the legal aid scheme. The majority of foreign national prisoners do not, however, have the financial means to pay for legal representation.

As such, it is vitally important that OISC advice provision remains readily accessible to foreign national prisoners and prison detainees. Although, currently, we are not able to represent prisoners and detainees if they wish to challenge deportation action, there is and will remain a very real need for the advice and assistance we provide – particularly in a post-legal aid cuts environment, when advice from solicitors will be out of reach of most foreign national prisoners. We regularly come into contact with foreign national prisoners who simply do not understand their situation: as we have already highlighted, papers served by UKBA are written in English, and are not translated for those who have a limited grasp of the language. They are, moreover, faced with the complexities of both the criminal justice and immigration systems, and the complicated nature of the interaction between these.

Apart from the basic importance of ensuring that those facing severe sanctions are properly informed about their circumstances and their legal rights, ready access to immigration advice within the prison estate can help to mitigate the anxiety and distress that prisoners may experience as a result of their situation.<sup>10</sup> In turn, it supports prisons and their staff to provide a decent regime, and to meet their obligations to prisoners and detainees. It can also help to ensure more timely outcomes – if prisoners do not understand their situation, they will be unable to make an informed decision, which can frustrate processes.

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<sup>9</sup> p.26; DAS (2011) *Foreign national prisoners – All you need to know: Annual conference report* – available at <http://www.detentionadvice.org.uk/uploads/1/0/4/1/10410823/dasconfreport2011.pdf>

<sup>10</sup> See p.26, DAS (2011) *Foreign national prisoners – All you need to know* – available at <http://www.detentionadvice.org.uk/uploads/1/0/4/1/10410823/dasconfreport2011.pdf>

It is crucial, therefore, that reforms to the regulatory arrangements for immigration advice and services do not exclude providers working in 'niche' areas with marginalised, vulnerable groups. Rather, as the Legal Services Board has indicated, they should be focused on strengthening the regulation of a wide range of providers operating across the full breadth of the market.

**For further information about this submission, please contact Gemma Lousley, Advice/Information Worker at the Detention Advice Service, at [gl@detentionadvice.org.uk](mailto:gl@detentionadvice.org.uk), or on 0207 254 6888.**

**Extract from BID surveys of legal representation for immigration detainees across the UK detention estate**

	SURVEY 1 Nov-Dec 2010	SURVEY 2 May-June 2011	SURVEY 3 Nov-Dec 2011
Sample size*	134	147	134
Proportion of sample who had been in prison immediately prior to IRC	60%	65%	52%
Of those detainees who had been in prison, proportion who had received some immigration legal advice while in prison**	<b>22%</b>	<b>58%</b>	<b>32%</b>

\*A one in four sample of all open BID cases at the start of the two week data collection period, excluding post-sentence detainees held in prison at the time of survey.

\*\*Respondents who had come to an IRC direct from prison were asked:

- a. Did you get any legal advice on your immigration case (e.g. deportation, your family situation in the UK, an asylum claim) while you were in prison?
- b. If yes, who gave you that advice? [Prompts: criminal lawyer, immigration lawyer, DAS, UKBA, prison staff, other]

This second question was used to weed out those who answered ‘yes’ to the question about receiving immigration legal advice in prison, if this turned out to be another type of advice altogether from a prison officer, or from UKBA staff.

AT 9 May 2012