

# Regulation of immigration advice and services

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A discussion document for consultation

**For response by Thursday 24 May 2012**

**This discussion paper will be of interest to:**

Qualifying regulators under the Legal Services Act 2007

Approved legal regulators under the Legal Services Act 2007

Government bodies including OISC, LSC and UKBA

Providers of immigration advice and services

Legal representative bodies

Legal advisory organisations, particularly those providing immigration advice

Other third sector organisations, particularly those providing immigration advice

Consumer groups

Law schools/universities

Legal academics

Members of the legal profession

Think tanks

Political parties

Government departments, including the Ministry of Justice and the Home Office

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## Executive summary

1. The range of consumers who require immigration advice and services<sup>1</sup> is wide ranging, encompassing the most vulnerable asylum seeker to the largest businesses transferring staff from all over the world. It is a particularly challenging area of law, given the interactions required between the state and the individual, the issues at stake and the media focus on the individuals who receive advice. It is therefore essential that the bodies which regulate those who give immigration advice and services understand and proactively manage the risks to consumers.
2. There is also a particularly important public interest element to the regulation of immigration advice and services. Good quality immigration advice and services leads to better outcomes for those government departments and agencies that deal with immigration and asylum matters. With improvements in regulation of this area, we would expect to see fewer challenges to decisions, better argued cases and more timely justice.
3. On 1 April 2011, the Legal Services Board (LSB) became the oversight regulator for immigration advice and services in England and Wales for the Solicitors Regulation Authority (the SRA), the Bar Standards Board (the BSB) and the Institute of Legal Executives Professional Standards (IPS). This followed the commencement of Schedule 18 to the Legal Services Act 2007 (the 2007 Act), which transferred the oversight function for immigration advice and services in England and Wales from the Office of the Immigration Services Commissioner (OISC)<sup>2</sup> to the LSB. The SRA, BSB and IPS are known as *qualifying regulators* when they regulate immigration advice and services.
4. OISC is a non-departmental public body of the Home Office with statutory regulatory responsibilities. This document focuses on the approach and performance of the qualifying regulators, which fall within the LSB's remit,

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<sup>1</sup> As defined by Part V the Immigration and Asylum Act 1999, 'immigration advice' means advice which relates to a particular individual; is given in connection with one or more relevant matters; is given by a person who knows that he is giving it in relation to a particular individual and in connection with one or more relevant matters; and is not given in connection with representing an individual before a court in criminal proceedings or matters ancillary to criminal proceedings. 'Immigration services' means the making of representations on behalf of a particular individual in civil proceedings before a court, tribunal or adjudicator in the United Kingdom, or in correspondence with a Minister of the Crown or government department, in connection with one or more relevant matters. Relevant matters are: a claim for asylum; an application for or for the variation of, entry clearance or leave to enter or remain in the United Kingdom; an immigration employment document; unlawful entry into the United Kingdom; nationality and citizenship under the law of the United Kingdom; citizenship of the European Union; admission to member states under community law; residence in a member state in accordance with rights conferred by or under community law; removal or deportation from the United Kingdom; an application for bail under the Immigration and Asylum Act 1999 or under the Special Immigration Appeals Commission Act 1997; an appeal against, or an application for judicial review in relation to, any decision taken in connection with a matter referred to above.

<sup>2</sup> We use 'OISC' throughout this document when referring to both the Immigration Services Commissioner and her office.

rather than dealing with the performance of OISC which does not. However, we do comment on the overall regulatory architecture, where we believe that the overlap in regimes is a potential source of public detriment.

5. In our *Final Business Plan 2011/12*, we said that we would use thematic reviews to scrutinise areas that appear to present regulatory risk. In view of the transfer of oversight responsibility to the LSB, we undertook an assessment of whether the qualifying regulators are managing appropriately the risks in the provision of immigration advice and services, and in a way that is consistent with the regulatory objectives in the 2007 Act and the better regulation principles. We also sought to understand whether there are other issues of wider concern to the public interest in the qualifying regulators' approach. The review focused on private individuals rather than on businesses, although we consider that the findings are likely to be relevant to that group as well.
6. Our review has shown that:
  - a) There are significant problems with the overall regulatory architecture governing the provision of immigration advice and services. These stem from the fact that there are two overlapping statutory bases for regulation.
  - b) The qualifying regulators have an inadequate understanding of the market(s) in which immigration advice and services are provided. This means that there is little understanding of whether lawyers are providing good quality advice. As a result, there is over reliance on the Legal Services Commission (LSC) to manage risk. This is inappropriate in theory, given the qualifying regulators' direct responsibilities in this area, and ineffective in practice, as while legal aid covers most asylum work, it is likely that legal aid only funds a small portion of all immigration work.<sup>3</sup>
  - c) Access to redress differs: consumers who use a lawyer regulated by a qualifying regulator can take their complaint to the Legal Ombudsman; those using advisers regulated by OISC do not have this route of redress.<sup>4</sup>
7. The combination of these three issues means that it is likely that there is significant, avoidable detriment to consumers and, in parallel, the public interest. Examples include:

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<sup>3</sup> See paragraph 33.

<sup>4</sup> OISC has no formal redress powers. However, it can seek to secure redress through: re-direction to the organisation against which the complaint was made; recommendations as a result of an internal complaint investigation; by seeking an order from the First-Tier (Immigration Services) Tribunal; the complainant using the OISC complaint determination to pursue the matter through the civil courts; an OISC criminal prosecution.

- a) As the qualifying regulators have very little data on the provision of immigration advice and services, they are unable to identify areas of high risk and target regulation accordingly.
  - b) The qualifying regulators do not have any mechanism for assessing the quality of those they regulate who provide immigration advice and services. Although there is a compulsory accreditation scheme for those lawyers who provide legally aided immigration advice and services, there is no such requirement for those regulated by qualifying regulators who advise consumers who pay for advice themselves (the vast majority).
  - c) The qualifying regulators can intervene to enter, close down and seize the files of a failing firm. OISC has no such powers which may jeopardise the orderly transfer of client files and money. The LSC has already expressed concern about this in the context of the closure of large not-for-profit providers.
8. There are also much wider ranging issues for qualifying regulators to consider in their approach to regulation in this area. For example:
- the impact of changes to legal aid funding on the quality of lawyers undertaking this work
  - changes to the scope of direct access for barristers
  - the impact that any changes in regulation of immigration advice and services are likely to have on Black Minority Ethnic (BME) providers, who are more likely to be undertaking this work.<sup>5</sup>
- 9. As a result, we consider that the qualifying regulators must, by the end of 2012, implement coherent, evidence-based approaches to manage risks to consumers and the public interest in the provision of immigration advice and services.**
10. In the meantime, and subject to responses to this discussion document and our conclusions from our paper *Enhancing consumer protection, reducing regulatory restrictions*, which we will publish in April, we may consider whether to conduct a statutory investigation under the 2007 Act into whether immigration advice and services should be a reserved legal activity. Were we

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<sup>5</sup> SRA 2010 turnover data obtained for our Regulatory Information Review showed that 15% of BME firms (defined as firms with more than 50% of fee earners from a BME background) provided immigration advice and services, the highest of any category. According to a recent report published by the Bar Council, of those barristers who list immigration as their main practice area, 32% are BME – by far the highest proportion against all other areas of practice. Geoff Pike, Dilys Robinson, "Barristers' Working Lives A Biennial Survey of the Bar 2011," <http://www.barcouncil.org.uk> (January 2012)

to do this, our aim 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.

11. We will also consider in more detail with relevant parties during the consultation period the policy desirability and practical options for making a recommendation to the Lord Chancellor under section 165 of the 2007 Act. This would provide for the creation of a voluntary complaints scheme under section 164 so that the Legal Ombudsman could consider complaints about OISC regulated entities and individuals.

## Background

12. The LSB has been set up to reform and modernise the regulation of legal services in the interests of consumers, enhancing quality, ensuring value for money and improving access to justice across England and Wales. We aim to achieve this by pursuing our regulatory objectives<sup>6</sup> and providing regulatory oversight for the frontline approved regulators.<sup>7</sup>
13. The 2007 Act made a number of amendments to the Immigration and Asylum Act 1999 (the 1999 Act). This included making The Law Society, the General Council of the Bar and Institute for Legal Executives ‘qualifying regulators’ through their regulatory arms, the SRA, the BSB and IPS. This means that they are authorised to regulate immigration advice and services in England and Wales undertaken by their regulated community. Additionally, other legal services approved regulators may apply to the LSB to be designated as qualifying regulators for England and Wales.
14. Under the 1999 Act, immigration advice and services in England and Wales may only be provided by those authorised by a qualifying regulator, those regulated directly by the OISC or those exempted by Ministerial Order. Any other immigration work carried out in the course of a business is a criminal offence. The LSB does not have any responsibility for oversight of the OISC, which directly regulates those who provide immigration advice and services but are not authorised by a qualifying regulator.<sup>8</sup>
15. However, section 207 of the 2007 Act defines consumer to include not just those people who use services that are provided by those authorised by an approved regulator, but also those who use “any other services provided by a person which consist of or include a legal activity carried on by, or on behalf of, that person.” Therefore, while our oversight role does not extend to OISC, we do consider that it is necessary to consider all consumers of immigration advice and services and the overall regulatory architecture if we and the qualifying regulators are to assess what proportionate regulation and best regulatory practice looks like. This means that there are references to the work of the OISC throughout this document. There may well be lessons for qualifying regulators to learn from OISC given its specific focus on immigration advice and services alone.

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<sup>6</sup> As set out at Part 1 of the 2007 Act.

<sup>7</sup> The approved regulators as listed at Schedule 4 to the 2007 Act are The Law Society of England and Wales, the General Council of Bar, Council for Licensed Conveyancers, The Institute of Legal Executives, The Chartered Institute of Patent Attorneys, The Institute of Trade Mark Attorneys, Association of Law Costs Draftsmen, The Master of the Faculties.

<sup>8</sup> OISC directly regulates OISC advisers throughout the whole of the UK and is the oversight regulator for Designated Professional Bodies listed in the 1999 Act, which are: The Law Society of Scotland, The Faculty of Advocates, The Law Society of Northern Ireland and The General Council of the Bar of Northern Ireland.



16. Prior to 1 April 2011, when responsibility transferred to the LSB, OISC was also responsible for oversight regulation of the SRA, the BSB and IPS in their regulation of their members who undertook immigration advice and services. The OISC's approach was mainly focused on ensuring that complaints about both the service and conduct of immigration lawyers were handled effectively by the regulators, undertaking audits and monitoring the handling of complaints. The introduction of the Legal Ombudsman in October 2010 for complaints about service from all lawyers as well as anticipated improvements in the way in which the qualifying regulators handle complaints about conduct mean that it should not be necessary for the LSB to replicate the OISC's approach.

17. In our paper, *Enhancing consumer protection, reducing regulatory restrictions*,<sup>9</sup> published in July 2011, we set out the three themes that we see as the core of our vision for the legal services market:

- consumer protection and redress should be appropriate for the particular market
- regulatory obligations should be at the minimum level to deliver the regulatory objectives
- regulation should live up to the better regulation principles in practice.

18. In addition, our paper *Developing Regulatory Standards*,<sup>10</sup> published in December 2011, set out that we consider that best regulatory practice for legal services regulation must consist of four constituent parts. These are:

- an outcomes-driven approach to regulation that gives the correct incentives for ethical behaviour and has effect right across the increasingly diverse market
- a robust understanding of the risks to consumers associated with legal practice and the ability to profile the regulated community according to the level of risk
- supervision of the regulated community at entity and individual level according to the risk presented

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<sup>9</sup> Available at: [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).

<sup>10</sup> Ibid.

- a compliance and enforcement approach that deters and punishes appropriately.
19. We consider that only with the effective implementation of all of the constituent parts of regulation will a more flexible consumer focused and responsive regulatory regime for legal services emerge. This will result in a regulatory regime that delivers efficient and appropriate regulation for practitioners while ensuring that the public and consumers are protected from unacceptable levels of risk. In so far as we would ever decide to recommend the creation of a new reserved legal activity, we would only consider reservation to appropriately regulated entities and individuals, rather than on the basis of a specific legal title.
20. These themes underpinned our review of the regulation of immigration advice and services.

## Introduction

21. We undertook an investigation into immigration advice and services in particular because:

- we wanted assurance that the way in which regulation is currently undertaken by the qualifying regulators is consistent with the statutory requirements of the 2007 Act, in particular the regulatory objectives<sup>11</sup> and the better regulation principles; and
- it is necessary for the LSB to have a clear understanding of the market should it need to consider an application to regulate immigration advice and services from another legal services regulator.

22. There is also an important public interest element in the regulation of immigration advice and services. Access to good quality, affordable immigration advice and services is obviously important for those consumers who need it. However, it also benefits those government departments and agencies, such as the UK Border Agency and HM Courts and Tribunal Service, that deal with immigration and asylum matters. This is because good advice will lead to better outcomes – fewer challenges to decisions, better argued cases and more timely justice. Poor quality immigration advice and services affect the Government’s ability to make robust and timely decisions about individuals’ status and hence may have a deleterious impact on the effectiveness and perception of immigration policy as a whole.

23. Information provided to the LSB as part of our review of information about the legal services sector undertaken in 2011, showed that in 2010 there were around 110,500 solicitors regulated by the SRA, 14,700 barristers regulated by the BSB and 7,100 legal executives regulated by IPS. IPS rules mean that only 27 of its members can provide immigration advice and services. Neither the SRA nor the BSB place restrictions on solicitors or barristers. This means that there are around 125,300 lawyers who could provide immigration advice and services.<sup>12</sup>

24. In reality, just over 3,000 solicitors say that they practise in immigration advice and services (2.8%)<sup>13</sup> and 4% of barristers indicate they practise in this area,

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<sup>11</sup> The LSB’s paper, “The regulatory objectives” published in July 2010 and available at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk) sets out the regulatory objectives as we apply them to our work and that of the approved regulators.

<sup>12</sup> Taken from information collected by the LSB for its Regulatory Information Review of the legal services market, available from the LSB upon request.

<sup>13</sup> LSB analysis of The Law Society’s ‘Find a Solicitor,’ database available at [www.lawsociety.org.uk](http://www.lawsociety.org.uk), undertaken as part of the LSB’s Regulatory Information Review.

with 2% stating that this is their main area of practice.<sup>14</sup> While 27 legal executives are on IPS' immigration register, the vast majority of those work for solicitors' firms or OISC regulated firms and thus are effectively dual regulated.<sup>15</sup>

25. During summer 2011, we sought views from a range of organisations and regulators involved in immigration advice and services. We also reviewed publicly available data and information about the make-up of supply and demand of immigration advice and services.
26. This work has led us to the conclusion that there is likely to be significant consumer detriment because the qualifying regulators are not regulating immigration advice and services in a way that is consistent with the requirements of the 2007 Act. In addition, the complex regulatory architecture that exists for immigration advice and services presents the additional risks of gaps and overlaps in regulation, differences in approach (for example, for intervention powers and accreditation schemes) that are not justified by evidence and an overall lack of data and information about the market as a whole.

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<sup>14</sup> Geoff Pike, Dilys Robinson, "Barristers' Working Lives A Biennial Survey of the Bar 2011," available at [www.barcouncil.org.uk](http://www.barcouncil.org.uk) (January 2012).

<sup>15</sup> IPS' immigration register has been closed to new entrants since 2004. Any new member of ILEX who wishes to provide immigration advice and services in independent practice must be regulated by OISC for immigration advice and services. Further information about IPS' immigration register is available at: [www.ilex.org.uk](http://www.ilex.org.uk).

## The issues

27. During the course of our work to date, both in our discussions with interested parties and in the information that we have collected, there have been three recurrent themes that have arisen:
- a) **Regulatory architecture:** there are significant problems with the overall regulatory architecture governing the provision of immigration advice and services. These stem from the fact that there are two overlapping statutory bases for regulation.
  - b) **Quality and accreditation arrangements:** the qualifying regulators have an inadequate understanding of the market(s) in which immigration advice and services are provided. This means that there is little understanding of whether lawyers are providing good quality advice and a reliance on the LSC for 'regulating' a small segment of the market.
  - c) **Complaints:** access to redress differs - consumers who use a lawyer regulated by a qualifying regulator can take their complaint to the Legal Ombudsman but are unable to do so if the adviser is regulated by the OISC.

### *The regulatory architecture*

#### *Arrangements*

28. The system of regulation for immigration advice and services is complex. Immigration advice and services are unique in their status as legal activities that can only be provided by regulated individuals, but are not 'reserved' under the 2007 Act. A combination of regulators operates under different legislation – the 2007 Act for the SRA, the BSB and IPS, overseen by the LSB, and the 1999 Act for the OISC. In addition, the LSC imposes contractual requirements on firms that provide legal aid immigration and asylum services.

#### *What this means*

29. This architecture creates different statutory objectives, governed by two different Acts, with different powers of intervention in failing firms, different access to redress and different approaches to regulation (including requirements for accreditation).
30. In addition, those operating in the market who wish to provide legal aid funded advice must meet the LSC's requirements, which has led to it becoming a

regulator by proxy for its particular segment of the market. The LSC, as the sole purchaser of legally aided immigration advice and services, must ensure value for money and effective and efficient use of public funds in its commissioning and procurement of legal advice.

31. It does this through a broad range of contract requirements, including requiring membership of The Law Society's Immigration and Asylum Accreditation Scheme (IAAS), requiring providers to report against performance indicators that measure outcomes and performance, and auditing case files to ensure that cases meet the minimum merits required for funding.
32. The LSC is also well informed about the providers it contracts with, recording information such as the number of cases a provider undertakes, the average cost of the case and the location of the provider. This enables it to target its resource appropriately in order to meet its value for money requirements. While the LSC's requirements will not necessarily be consistent with those required by the 2007 Act, its approach means that the LSC goes beyond the requirements of the qualifying regulators for immigration advice and services that are funded by legal aid.
33. This is inappropriate in theory, given the qualifying regulators' direct responsibilities in this area, and ineffective in practice, as legal aid is likely to only cover a small segment of the overall immigration advice market. While we do not know the total number of immigration legal cases, around 53,500 immigration (non-asylum) cases were funded by legal aid in 2010/11 in England and Wales. There were 457,000 visas issued for the year ended March 2011 in the UK. This suggests that immigration advice and services may be sought for many more consumers than those funded by legal aid. However, we recognise that not all of those issued with a visa will have required legal advice, that the visas issued cover all of the UK and that there may be other consumers who would have required legal advice about their immigration status but who were not issued with a visa that year.<sup>16</sup>
34. Under LSC funding arrangements, almost all asylum cases are eligible for legal aid. It is therefore likely that legal aid funds the vast majority of the asylum advice market.

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<sup>16</sup> Figure for immigration (nationality and visit visas) matters reported taken from Legal Services Commission, "Statistical information pack for financial year 2010-11" [www.legalservices.gov.uk](http://www.legalservices.gov.uk) (July 2011) and are for England and Wales only. Figure for visas issued for the year ending March 2011 taken from Home Office, Control of Immigration: Quarterly Statistical Main Tables – Q1 2011 (January to March 2011) "Table 0.1: Out of country visas to the United Kingdom issued and in country extensions of leave by employment and study categories, year ending March 2011," <http://homeoffice.gov.uk>.

35. The qualifying regulators also appear to have significant gaps in their knowledge and understanding of the immigration advice and services market. This means they have insufficient evidence to assure themselves that the requirements under the 2007 Act are being met, including the requirement for proportionate and targeted regulation. Nor can they know whether the risks to consumers and the public interest caused by the fragmented nature of regulation in this area are managed appropriately.
36. Anticipated changes to legal aid funding mean that as services are taken out of the scope of legal aid, those consumers with the protection that was provided by the LSC's arrangements, as well as those government agencies that may have also been in need of assurance, will no longer be able to attain it.<sup>17</sup>
37. There is also an important equality and diversity element that regulators of immigration advice and services must consider. BME solicitor firms and barristers are more likely than others to undertake immigration advice and services and therefore any problems with the regulatory architecture will disproportionately impact on those firms and barristers, as would any changes in regulatory approach.<sup>18</sup>

#### *What the qualifying regulators need to do*

38. The qualifying regulators need to consider what information they need to collect to regulate immigration advice and services effectively. This means being able to identify the risks to consumers and take proportionate action to mitigate those risks.

### **Quality and accreditation arrangements**

#### *Arrangements*

39. The approach to the standards required to provide immigration advice and services is inconsistent across the qualifying regulators. There is a voluntary quality scheme, IAAS, run by The Law Society, which accredits advisers to one of three levels.<sup>19</sup> Under the LSC's contract requirements, membership of

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<sup>17</sup> The Legal Aid, Sentencing and Punishment of Offender Bill 2010 is currently passing through Parliament. The Government is proposing to remove from scope immigration cases where the individual is not detained, including those relating to citizenship, leave to enter or remain for visits, study or employment and deportation. Based on 2008/09 figures, this is anticipated to mean a 41% reduction in Legal Help immigration cases and a 29% reduction in Legal Representation immigration cases. (House of Commons Justice Committee, "Third Report, Government's proposed reform of legal aid" (March 2011) <http://www.publications.parliament.uk>)

<sup>18</sup> See note 4 above.

<sup>19</sup> The three levels are Level 1 (accredited), Level 2 (senior) and Level 3 (advanced). The scheme also provides for one off probationary membership. The Law Society, "Immigration and Asylum Accreditation Scheme Guidance," (February 2012) <http://www.lawsociety.org.uk>

IAAS is compulsory for lawyers that provide legally aided immigration advice and services. Its membership is not limited to solicitors, and barristers in independent practice as well as non-solicitors employed in a solicitor's firm or an OISC regulated body may join. IPS is currently working on an immigration accreditation scheme for its membership.<sup>20</sup>

40. On the other 'branch' of the regulatory architecture, the OISC has a specific duty to ensure that advisers it regulates are competent to provide immigration advice or services. OISC advisers are accredited at one of three levels depending on the type and complexity of the work involved. OISC also requires its advisers to undertake training on a regular basis (CPD) that is specific to immigration advice and services. The OISC and The Law Society schemes are similar enough for the OISC to allow those with IAAS accreditation to join its scheme without the need for reaccreditation (although the same does not apply for those with OISC accreditation wishing to join IAAS).

#### *What this means*

41. Research, commissioned by the Legal Services Consumer Panel,<sup>21</sup> found that consumers felt unable to judge the quality of legal services for themselves and that all solicitors were assumed to be technically competent. This suggests that a consumer might assume that a non-IAAS accredited immigration solicitor is automatically as competent as an OISC accredited adviser to provide them with advice about immigration. This may be true. However, there is no evidence of activity by qualifying regulators to assure themselves both of whether this principle is true at the general level and to find ways of assuring themselves that it is true in individual cases.
42. The existence of both voluntary and compulsory quality schemes for immigration advice and services (through The Law Society and the OISC respectively) could provide qualifying regulators with valuable information about how effective the schemes are at managing the risks around poor quality advice by mapping against other information such as complaints about service or conduct.
43. Indeed, the Legal Services Consumer Panel recently recommended that regulators should "collect data on scheme membership and examine how membership of credible schemes could be recognised within risk-based

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<sup>20</sup> See note 14 above.

<sup>21</sup> Vanilla Research, "Quality in Legal Services report prepared by Vanilla Research for the Legal Services Consumer Panel," [www.legalservicesconsumerpanel.org.uk](http://www.legalservicesconsumerpanel.org.uk) (September 2010)



regulation.”<sup>22</sup> According to figures from The Law Society, there are 1,255 members of IAAS. However, only 663 of these are solicitors and of the remainder, eight are members of ILEX and 584 are neither ILEX members nor solicitors.<sup>23</sup> This suggests that only 22% of solicitors who say that they provide immigration advice and services have any level of accreditation. Therefore, if qualifying regulators were to rely on such schemes for any information, it would be appropriate to ensure that they understand whether current schemes are fit for their purposes.

### *What the qualifying regulators need to do*

44. The qualifying regulators should consider whether they have the evidence to demonstrate that they are satisfied that current arrangements provide an acceptable level of quality and technical standards for all of those they regulate. There are no specific requirements to be met for somebody commencing this work from a wholly different type of practice.
45. In particular, we would want to understand how the SRA assures itself that all solicitors (and those that work under their supervision) are, and remain, technically competent in this area both in its supervision of individuals and entities. IPS is the only qualifying regulator who appears to be making moves towards a regulatory approach to assuring quality in this area.

## **Complaints**

### *The arrangements*

46. As regulation of immigration advice and services is governed by two different sets of regulatory arrangements (those in the 2007 Act and those in the 1999 Act) there are different arrangements for handling complaints.
47. Consumers who have a complaint about a lawyer regulated by one of the qualifying regulators must first complain to that lawyer. The lawyer must explain to the consumer how to make a complaint. If they are not satisfied with how their complaint is considered, or if they receive no response, they may complain to the independent Legal Ombudsman. The Legal Ombudsman will consider a complaint about service or refer the complaint to the qualifying regulator if it is about conduct. Ways in which the Legal Ombudsman may resolve a complaint include requiring the lawyer to apologise, to put right an error or to pay compensation or costs.

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<sup>22</sup> Legal Services Consumer Panel, “Voluntary quality schemes in legal services,” [www.legalservicesconsumerpanel.org.uk](http://www.legalservicesconsumerpanel.org.uk) (November 2011)

<sup>23</sup> Figures provided by The Law Society for membership as of December 2011.

48. OISC considers both service and conduct complaints against those it regulates and encourages resolution at the earliest stage. It has some ombudsman like arrangements however, it does not have such formal requirements as, nor the redress powers of, the Legal Ombudsman.<sup>24</sup>

#### *What this means*

49. The different approaches result in different schemes and rules, which in turn means that outcomes will vary depending on whom the adviser is regulated by.

50. The arrangements also mean that there is no mechanism for using information about complaints to provide a complete picture about the services that consumers are getting.

51. The widely held anecdotal view of those we spoke to about this work was that immigration advice and services clients tend not to complain and are more likely to change their lawyer than pursue a complaint. However, we have not seen any data to support this. Figures that we have obtained from the Legal Ombudsman show that since it opened in October 2010, 'immigration and asylum' cases account for 3.4% of all cases closed. The vast majority (98%) of all cases about immigration and asylum were about solicitors.<sup>25</sup>

52. However, it is impossible to know whether the number of complaints is particularly high or low since there is no information about the total volume of immigration advice and services cases.

#### *What the qualifying regulators need to do*

53. In order to regulate this area effectively, we consider that qualifying regulators need to use complaints information about the organisations providing immigration advice and services. This point would be particularly applicable to the SRA, given the proportion of complaints to the Legal Ombudsman about solicitors providing immigration advice and services.

54. We would also like to consider, with all of the relevant bodies, whether there might be any policy desirability for all service complaints about immigration advice and services to come within the jurisdiction of the Legal Ombudsman.

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<sup>24</sup> OISC has no formal redress powers. However, its moral and regulatory authority means that there are a number of ways in which its actions may help. (Also see footnote 4.)

<sup>25</sup> Figures provided by the Legal Ombudsman, January 2012.

55. While it is outside of the LSB's powers under the 2007 Act, one further option for addressing the inconsistency in redress arrangements may be for OISC to be given more redress powers. Any decision on this issue would be for the Home Office, rather than the LSB.

## **Risks to consider and questions for regulators**

56. The issues that we have considered above raise questions about the approach to the regulation of immigration advice and services taken by the qualifying regulators. In the broadest sense, the regulatory architecture means that the regulators cannot effectively manage risks because information about the market is fragmented and dispersed, where it exists, between the qualifying regulators, OISC and the LSC.
57. We have used a structured analytical framework to provide an initial assessment of the likely risks and these are set out on the tables that follow. Further information about the framework and how we have used it is at Annex A.

Immigration		Market indicators	Risks	Questions for qualifying regulators
Research, Advice, Representation (paper, litigation, otherwise), Representation (in person)	Natural persons – legal aid	<p><i>Summary:</i> The area of the market we know most about due to involvement of publicly funded purchaser.</p> <p><i>Size of the market:</i> In 2010/11, there were around 53,500 non-asylum immigration claims.<sup>i</sup></p> <p><i>Value of the market:</i> Total claim value of £24m in 2010/11 and average claim value of £442.<sup>ii</sup></p> <p><i>Make up of provision:</i> Split by solicitors (181) and not-for-profit (56) firms providing both immigration and asylum.<sup>iii</sup></p> <p><i>Outcomes:</i> 70% success rate for immigration legal aid (against 89% success rate in civil).<sup>iv</sup></p> <p><i>Accreditation or quality measures:</i> Membership of Law Society IAAS scheme required by legal aid contract. Legal aid KPIs.</p> <p><i>Complaints:</i> Unknown about this segment of the market specifically.</p>	<p>Scope changes in legal aid could lead to a decrease in quality as there will no longer be the requirement for accreditation.</p> <p>Scope changes could lead to less understanding of the market – SRA may not be utilising LSC information in its approach. LSC information may not be comprehensive enough for the SRA.</p> <p>Significant number of cases going out of the scope of legal aid (see note 18).</p> <p>Potentially vulnerable client group (based on assumption that they would qualify for legal aid).</p> <p>Higher proportion of BME firms undertaking legal aid work – 23% of all BME firms derive more than 50% of their income from legal aid compared to 7% of White firms.<sup>v</sup></p> <p>Different requirements of LSC and SRA lead to inefficiencies.</p>	<p>What do regulators know about this client group? How is regulation targeted at the risks they face?</p> <p>What do regulators know about the providers in this market?</p> <p>Do they understand potential impacts of their actions for BME providers?</p> <p>Do regulators make appropriate use of data and understand complaints about legal aid providers?</p> <p>How will regulators ensure that LSC understanding of the market is not lost when scope changes take effect?</p> <p>How certain are the regulators that they, rather than the LSC, are regulating providers?</p> <p>Do regulators understand the potential impact of changes to legal aid funding on quality?</p>

Immigration		Market indicators	Risks	Questions for qualifying regulators
Research, Advice, Representation (paper, litigation, otherwise), Representation (in person)	Natural persons – non-legal aid	<p><i>Summary:</i> Market served by non-legal aid solicitors and OISC regulated advisers; subject to different regulatory requirements.</p> <p><i>Size of the market:</i> Do not know total size of market in England and Wales. Some indication from the number of visas issued for UK (460,000 visas issued in year ending March 2011).<sup>vi</sup></p> <p><i>Value of the market:</i> Do not know the total value. Our analysis suggests that at least 45% of solicitor immigration and asylum turnover comes from privately paying clients.<sup>vii</sup> However, this does include turnover of OISC regulated firms.</p> <p><i>Make up of provision:</i> There are around 3,900 regulated OISC advisers, in around 1,900 organisations.<sup>viii</sup> This compares to approximately 3,000 solicitors and approximately 590 barristers<sup>ix</sup> who say they offer immigration legal services.</p> <p><i>Outcomes:</i> No information on outcomes.</p> <p><i>Accreditation or quality measures:</i> For OISC advisers, accreditation at one of three levels is a regulatory arrangement. Accreditation not a regulatory requirement for persons authorised under the 2007 Act.</p> <p><i>Complaints:</i> Data from the Legal Ombudsman shows that it closed 229 cases relating to service about immigration and asylum advice between October 2010 and January 2012. We do not know the split between legal aid and non-legal aid.<sup>x</sup> There were 291 complaints about OISC regulated advisers (conduct and service) and 32 complaints about other regulated advisers in 2010/11.<sup>xi</sup></p>	<p>Quality – no requirement for 2007 Act authorised persons to be accredited or subject to specific quality threshold.</p> <p>Untargeted regulation – anyone authorised under the 2007 Act can provide immigration advice and services.</p> <p>Differing approaches to complaints resolution provide different outcomes for clients.</p> <p>Potential for this section of the market to grow given the changes in legal aid funding and to include more vulnerable consumer mix.</p> <p>Public interest not being best served if advice is not of sufficient quality.</p> <p>Potential for organised crime in this area.</p>	<p>How are regulators assured of quality in immigration advice and services?</p> <p>Do regulators know who is providing immigration advice and services and where they are located?</p> <p>Do regulators know or need to know what the success rates for the work are and/or how to measure them so they can focus appropriately?</p> <p>Do regulators understand this segment of the market and the changes that are likely to happen?</p> <p>Is there sufficient information to identify and risk assess individuals who move between regulators?</p> <p>Do regulators understand potential impacts of their actions for BME providers?</p> <p>Do regulators make appropriate use of data and understand complaints about these providers?</p> <p>What mechanisms do regulators use to ensure they are managing the risks of organised crime?</p> <p>What are the impacts of potential changes to arrangements for direct access to barristers for these consumers?</p>

Asylum		Market indicators	Risks	Questions for qualifying regulators
Research, Advice, Representation (paper, litigation, otherwise), Representation (in person)	Natural persons – legal aid	<p><i>Summary:</i> All asylum seekers are currently entitled to legal aid funding for their application provided the case is within the merits criteria for legal aid. Applications in the UK for asylum are decreasing.<sup>xii</sup></p> <p><i>Size of the market:</i> In 2010/11 there were 67,973 asylum legal aid cases.<sup>xiii</sup></p> <p><i>Value of the market:</i> £51m, with an average claim value of £751.<sup>xiv</sup></p> <p><i>Make up of provision:</i> 237 contracted organisations, 56 (24%) of which were not for profit.<sup>xv</sup></p> <p><i>Outcomes:</i> 61% success rate.<sup>xvi</sup></p> <p><i>Accreditation or quality measures:</i> Membership of Law Society IAAS scheme required by legal aid contract. Legal aid KPIs.</p> <p><i>Complaints:</i> Unknown about this segment of the market specifically.</p>	<p>Particularly vulnerable client group due to nature of advice needed.</p>	<p>What do regulators know about this client group? How is regulation targeted at the risks they face?</p> <p>How assured are the regulators that they are not over reliant on the LSC monitoring providers in this segment?</p> <p>What are the information sharing arrangements in place for advisers switching regulators?</p>

Asylum		Market indicators	Risks	Questions for qualifying regulators
Research, Advice, Representation (paper, litigation, otherwise), Representation (in person)	Natural persons – non –legal aid	<p><i>Summary:</i> Some indications that detained clients are paying for legal services. May be not all those entitled to legal aid are receiving it or that some people who are no longer entitled to legal aid due to merits still pursue their case with private funding.</p> <p><i>Size of the market:</i> Research by Bail for Immigration Detainees suggested up to 27% of detained asylum seekers have paid for advice (although this is only one part of the asylum market).<sup>xvii</sup></p> <p><i>Value of the market:</i> No information found.</p> <p><i>Make up of provision:</i> SRA code of conduct requires solicitors to advise clients if they may be eligible for legal aid. OISC rules require advisers to explain that clients may be able to obtain the same advice and assistance for free. The BSB's public access rules prevent a client who may be eligible for public funding to instruct a public access barrister.</p> <p><i>Outcomes:</i> No information found.</p> <p><i>Accreditation or quality measures:</i> OISC advice is accredited.</p> <p><i>Complaints:</i> Unknown about this segment of the market specifically.</p>	<p>Advisers may miss cases that would pass the merits test for legal aid.</p> <p>No quality assurance required for solicitors.</p> <p>Some parts of the client group may be particularly vulnerable.</p>	<p>Do regulators understand this segment of the market?</p> <p>What is the size of the market?</p> <p>Are lawyers charging for this advice? If so, do regulators understand why?</p>



## Questions for discussion

58. The questions we would welcome responses on are:

**Question 1:** Do you think we have captured all of the key issues? Do you agree with the sections setting out what qualifying regulators need to do? If not, what in your view, is missing?

**Question 2:** Our review focused on private individuals (legally aided or not), rather than small and medium sized enterprises or other businesses. However, we consider the findings are likely to be relevant to those groups as well. Do you agree, or do you have evidence to suggest otherwise?

**Question 3:** Do the tables on pages 21 to 24 cover all of the risks to each consumer type? What other risks should qualifying regulators be concerned about and actively managing?

**Question 4:** Do the tables on pages 21 to 24 ask the right questions of qualifying regulators? What other information should the qualifying regulators collect to demonstrate that they are able to effectively manage the risks posed in the regulation of immigration advice and services?

**Question 5:** For qualifying regulators, can you answer the questions we have asked in the tables on pages 21 to 24? What information do you use to actively manage the risks posed to each type of consumer? What about the risks to the public interest?

**Question 6:** What further action should LSB and qualifying regulators, jointly or individually, be undertaking on this issue?

**Question 7:** What are your views on the desirability and practicality of introducing voluntary arrangements so that the Legal Ombudsman can consider complaints about OISC regulated entities and individuals?

## Next steps

59. We expect the qualifying regulators, by the end of 2012, to implement coherent, evidence-based approaches to manage risks to consumers and the public interest in the provision of immigration advice and services.
60. Subject to responses to this discussion document and our conclusions from our paper *Enhancing consumer protection, reducing regulatory restrictions*, which we will publish in April, we may consider whether to conduct a statutory investigation under the 2007 Act into whether immigration advice and services should become a reserved legal activity.
61. We will also consider in more detail with relevant parties during the consultation period the policy desirability and practical options for making a recommendation to the Lord Chancellor under section 165 of the 2007 Act. This would provide for the creation of a voluntary complaints scheme under section 164 of the Act so that the Legal Ombudsman could consider complaints about OISC regulated entities and individuals.
62. We will publish our response in early summer 2012.

## How to respond

63. We would welcome views about this discussion document and the questions it poses by 5 pm on **Thursday 24 May 2012**. The consultation period will last for 12 weeks.

64. On page 25 of this discussion document, we have posed specific questions to help inform our next steps. We would be grateful if you would reply to these questions, as well as commenting more generally on the issues raised. Where possible please link your comments to specific questions or parts of the paper rather than making general statements.

65. We would prefer to receive responses electronically (in Microsoft Word format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Email: [consultations@legalservicesboard.org.uk](mailto:consultations@legalservicesboard.org.uk)

Post: Karen Marchant  
Legal Services Board  
7th Floor, Victoria House  
Southampton Row  
London WC1B 4AD

Fax: 020 7271 0051

66. We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our decision document.

67. We are also keen to engage in other ways and we would welcome contact with anyone with an interest in this work during the consultation period.

## Complaints

68. Complaints or queries about this process should be directed to Nicholas Baré, Consultation Co-ordinator, at the following address:

Nicholas Baré,  
Legal Services Board  
7th Floor  
Victoria House  
Southampton Row  
London WC1B 4AD

Or by e-mail to: [Nicholas.Bare@legalservicesboard.org.uk](mailto:Nicholas.Bare@legalservicesboard.org.uk)

## Annex A: The Oxera framework for monitoring the legal services sector

Oxera's framework<sup>26</sup>, published in September 2011, looks at the legal services market by framing the provision of legal services by type of client, type of problem and the legal service activity. These three characteristics form the basis of data collection and market insight. A law firm is grouped for analysis with other law firms providing the same services for the same types of client; they can then be differentiated in such a group by more traditional data – numbers employed, turnover, etc. The market is defined by the features of competition within the market rather than simply the traditional legal structure of a legal firm. We believe that this represents a step forward in thinking for the sector, providing for the first time a credible framework for analysis and supports the development of new industry nomenclature, to understand and describe the changes taking place.

We expect approved regulators (including in their role as qualifying regulators) to use the Oxera framework as their basis for analysis and understanding of the market(s) they regulate. This will also enable common regulatory risks to be identified and resolved effectively. Oxera identifies the following consumer types:

- individuals using legal services for their own purposes, funded by legal aid (natural persons – legal aid)
- individuals privately funding legal services for their own purposes (natural persons – non-legal aid)
- small and medium size enterprises, without in-house legal teams, using legal services, including charities and corporate firms (legal persons – small)
- large purchasers of legal services (legal persons – large)
- where the purchaser is Government for its own purposes, for example, criminal prosecution or judicial review.

We have applied the Oxera framework to the provision of immigration advice and services, focusing only on individuals. In terms of activity, we consider that immigration advice and services covers the full range of legal problems the Oxera identifies (research, advice, representation in person and representation otherwise). However, we further split immigration advice and services into 'immigration' and 'asylum' as we believe that as legal aid changes take effect, information about consumers will increasingly need to be analysed this way.<sup>27</sup>

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<sup>26</sup> *A framework to monitor the legal services sector*, Oxera, September 2011, [http://www.legalservicesboard.org.uk/news\\_publications/latest\\_news/pdf/a\\_framework\\_to\\_monitor\\_the\\_legal\\_services\\_sector.pdf](http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/a_framework_to_monitor_the_legal_services_sector.pdf)

<sup>27</sup> Changes in legal aid funding, currently being taken through Parliament as part of the Legal Aid, Sentencing and Punishment of Offenders Bill 2010, are likely to lead to a significant number of immigration cases currently funded under legal aid arrangements being removed from scope (see footnote 17).

## Notes to the tables on pages 21 to 24

<sup>i</sup> Legal Services Commission, “Statistical information pack for financial year 2010-11” [www.legalservices.gov.uk](http://www.legalservices.gov.uk) (July 2011).

<sup>ii</sup> Ibid.

<sup>iii</sup> Legal Services Commission, “Statistical information pack for financial year 2010-11” [www.legalservices.gov.uk](http://www.legalservices.gov.uk) (July 2011). Some of these not-for-profits may be regulated by OISC.

<sup>iv</sup> The LSC define the ‘success rate’ as the “proportion of cases where the client received a benefit compared to all cases completed”(Ibid).

<sup>v</sup> Figures based on LSB analysis of SRA data for Regulatory Information Review. BME is defined as solicitor firms with more than 50% of fee earners from a BME background. The Regulatory Information Review is soon to be published and is available from the LSB upon request.

<sup>vi</sup> See paragraph 33.

<sup>vii</sup> Figure is based on our analysis of SRA 2010 turnover data as part of our Regulatory Information Review. While the figure is for immigration and asylum, in reality there is likely to be very little income from asylum work (see table on p24).

<sup>viii</sup> Figures as of December 2011, provided by OISC in February 2012.

<sup>ix</sup> Figures taken from LSB Regulatory Information Review.

<sup>x</sup> Information provided by the Legal Ombudsman, January 2012.

<sup>xi</sup> OISC, “Annual Report 2010/11” [www.oisc.homeoffice.gov.uk](http://www.oisc.homeoffice.gov.uk) (July 2011).

<sup>xii</sup> Home Office, “Monthly asylum application tables” [www.homeoffice.gov.uk](http://www.homeoffice.gov.uk) (November 2011).

<sup>xiii</sup> Legal Services Commission, “Statistical information pack for financial year 2010-11” [www.legalservices.gov.uk](http://www.legalservices.gov.uk) (July 2011).

<sup>xiv</sup> Ibid.

<sup>xv</sup> Ibid.

<sup>xvi</sup> Ibid.

<sup>xvii</sup> Bail for Immigration Detainees & Information Centre, “Provisional results of a survey of levels of legal representation for immigration detainees across the UK detention estate,” [www.biduk.org](http://www.biduk.org) (June 2011).