

# Regulation of immigration advice and services

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Summary of responses to consultation and LSB response

**July 2012**

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## Executive summary

1. This paper provides the Board's response to our discussion paper on the regulation of immigration advice and services.<sup>1</sup> The discussion paper sought views on the issues and risks that the Board had identified in the way in which immigration advice and services are currently regulated and set out requirements for qualifying regulators<sup>2</sup> to implement a coherent, evidence-based approach to manage risks to consumers and the public interest in the provision of immigration advice and services. It also sought feedback on the desirability and practicality of introducing arrangements so that the Legal Ombudsman can consider complaints about entities and individuals regulated by Office of the Immigration Services Commissioner (OISC).
  
2. Our review identified three key issues:
  - Problems with the regulatory architecture for immigration advice and services, stemming from the fact that there are two overlapping statutory bases for regulation.
  - Concerns about how qualifying regulators assure themselves of the quality of immigration advice and services being provided by those they regulate. In particular, we identified a lack of understanding about the market for immigration advice and services, a lack of information and data to inform the qualifying regulators' approach and a seeming reliance on the Legal Services Commission (LSC) to manage the risks presented in the market, even though legal aid funds only a small and diminishing portion of the market.
  - Differing access to redress. We were concerned that one of the key anomalies that the differing statutory bases for immigration advice and services creates is that consumers who use a lawyer regulated by a qualifying regulator can take their complaint to the Legal Ombudsman,

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<sup>1</sup>'Immigration advice and services' is used throughout this document to mean immigration advice and immigration services as defined by Part V of the Immigration and Asylum Act 1999. Under that Act, immigration advice is 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> The Law Society, The Bar Council and the Chartered Institute of Legal Executives (CILEx) are qualifying regulators. They have delegated that function to the Solicitors Regulation Authority (SRA), the Bar Standards Board (BSB) and Ilex Professional Standards (IPS) respectively.

whereas those using advisers regulated by OISC do not have this route of redress.<sup>3</sup>

3. The responses we received broadly agreed that these are indeed key issues in the regulation of immigration advice and services that are potentially causing consumer detriment. This response paper therefore considers whether the action that the qualifying regulators have stated they will take to tackle them are sufficient. We have also considered what further action by the LSB would be appropriate.
4. Based on our work and the responses that we received to our consultation, we consider that the qualifying regulators must base their approach to regulation on ensuring that the following outcomes are achieved for consumers:
  - a. the immigration advice and services that consumers receive is provided by practitioners who are technically competent and provide good quality advice and client care<sup>4</sup>
  - b. consumer detriment is minimised by quick and effective intervention against those advisers who do not meet minimum standards.
5. We welcome the efforts of Ilex Professional Standards (IPS) to target its approach to how it regulates its providers of immigration advice and services. Should its plans to develop a framework for ensuring competence, introduce an accreditation scheme for immigration advice and services and take an evidence and risk-based approach to regulating immigration advice and services be implemented, we consider that it has the potential to achieve these outcomes.
6. However, we do not consider that the actions<sup>4</sup> proposed by the Solicitors Regulation Authority (SRA) and the Bar Standards Board (BSB) in their consultation responses are of themselves sufficient to achieve these outcomes. Of key concern is the fact that neither response seems to recognise the necessity to take a more targeted approach to regulation in general and immigration advice and services specifically. Both consider that the requirements of their codes of conduct ensure sufficient protection of all consumers, including those of immigration advice and services. The SRA did however, provide a comprehensive response and demonstrated some understanding of the solicitors providing immigration advice and services,

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<sup>3</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.

<sup>4</sup> Under section 83 (5) of the 1999 Act, the Immigration Services Commissioner must, so far as is reasonably practicable, exercise her functions so as to ensure that those who provide immigration advice are "fit and competent to do so". Qualifying Regulators have no such obligation in relation to immigration advice.

albeit little about those consumers who receive it. However, the BSB does not have sufficient information about which barristers provide immigration advice and services and to whom. It is particularly important that this gap is filled before any expansion of public access.<sup>5</sup>

7. So, in addition to what they have proposed, we think that for the reasons set out in this document, the focus of the qualifying regulators (preferably working with OISC) must also be to each identify what needs to be done to ensure satisfactory quality across the board by all those who provide immigration advice and services. That must be combined with effective mechanisms for identifying and stopping advisers who provide unsatisfactory levels of quality. This process must identify key risk areas and lead to action on them.
8. At the very least we expect this work to include the following:
  - liaison with agencies such as UKBA, the Asylum Immigration Tribunal, the prisons estate and others who have firsthand experience of those needing immigration advice and services, to obtain evidence of performance, problems and issues
  - discussion with service providers and representative groups (for example, the Immigration Law Practitioners Association (ILPA)) to obtain evidence of performance, problems and issues
  - gathering evidence (from a wider base than consumer complaints) about consumers' experience of immigration advice and services
  - liaison with the LSC where performance issues are identified, in particular where it has taken action, for example contract termination
  - consideration of:
    - specific authorisation to provide immigration advice and services
    - consistent accreditation schemes
    - targeted CPD requirements
    - peer review of quality and consistency of advice
    - use of feedback to drive up quality and identify those who should not be allowed to provide immigration advice and services.
9. We therefore expect qualifying regulators to take immediate action to mitigate the risks to consumers in the provision of immigration advice and services<sup>6</sup> and will monitor their progress towards achieving the outcomes set out at

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<sup>5</sup> The BSB has proposed changes to its rules to allow a client to have the discretion to use a public access barrister even if they are eligible for public funding. See the BSB's recent consultation on changes to its public access rules, for further information: [http://www.barstandardsboard.org.uk/media/1063137/public\\_access\\_consultation\\_paper\\_new.pdf](http://www.barstandardsboard.org.uk/media/1063137/public_access_consultation_paper_new.pdf).

<sup>6</sup> In our consultation document, *Regulation of immigration advice and services – a discussion document for consultation*, we used the Oxera framework to set out the key risks that we consider there to be in the regulation of immigration advice (reproduced at Annex C of this document). We also sought views on those risks as part of the consultation. Qualifying regulators should consider all of these risks as part of their development work in this area. Further information about the Oxera framework for legal services is available at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).

paragraph four over the next 12 months. Failure to take action may lead to formal enforcement action by the LSB.

10. The LSB may use its enforcement powers if it considers that the acts or omissions of an approved regulator (including in its role as a qualifying regulator) have had, or are likely to have a prejudicial effect on the regulatory objectives. The ultimate sanction is the removal of qualifying regulator status by the Secretary of State, following provision of a report from the LSB.<sup>7</sup>
11. While our discussion document did not specifically seek views on whether the Board should investigate reserving immigration advice and services, many respondents commented on the desirability of doing so. Reservation would mean that only those authorised under the Legal Services Act 2007 (the 2007 Act) by an approved regulator would be able to provide immigration advice and services. (For the avoidance of doubt, it does not mean that all such advice and services would then be reserved to solicitors and/or barristers and/or chartered legal executives; anyone authorised to do so could provide immigration advice and services.) Although the separate regulatory architecture governing those regulated by OISC and the qualifying regulators provides a sub-optimal regulatory environment because of its inconsistency, it is already a criminal offence to provide immigration advice and services without authorisation from either OISC or a qualifying regulator. We therefore do not consider that it would be proportionate at this stage to pursue an investigation into whether immigration advice and services should be reserved.
12. However, we are currently considering a wide-ranging review of general legal advice for individual consumers. This review would aim to identify whether there are common risks and features across the provision of general legal advice that should attract a common minimum set of regulatory protections. This is likely to cover general legal advice relating to all legal services, which includes immigration advice and services.<sup>8</sup>
13. We can see real merit in pursuing the possibility of statutory redress for consumers who use OISC advisers. There is a mechanism in the 2007 Act for doing this and we do not therefore consider that it would be proportionate for wholly new legislation to seek to extend OISC's powers in this area, as was suggested in its response. In our view, to do so would exacerbate the problems of the current architecture, rather than begin to narrow them gradually over time. Rather, we strongly encourage the Legal Ombudsman

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<sup>7</sup> See the 2007 Act, Schedule 18, paragraphs 3 and 10.

<sup>8</sup> See our document *Enhancing consumer protection, reducing regulatory restrictions: Summary of responses to the discussion paper and decision document*, for background information about our plans for reviewing general legal advice. Available at: <http://www.legalservicesboard.org.uk>.

and OISC to discuss the Legal Ombudsman establishing a voluntary scheme for hearing complaints about OISC regulated entities and individuals, either as a free-standing scheme or in the context of a more general scheme.

## Introduction

14. 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>9</sup> and providing regulatory oversight for the frontline approved regulators.<sup>10</sup>
15. 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 the Chartered Institute for Legal Executives ‘qualifying regulators’. Regulation is carried out 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. Additionally, other legal services approved regulators may apply to the LSB to be designated as qualifying regulators for England and Wales.
16. 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 OISC or those exempted by Ministerial Order. Any other immigration work carried out in the course of a business is an offence under the 1999 Act. The LSB does not have any responsibility for oversight of OISC, which directly regulates those who provide immigration advice and services but are not authorised by a qualifying regulator.<sup>11</sup> However, on commencement of Schedule 18 to the 2007 Act in April 2011, OISC’s oversight of the qualifying regulators transferred to the LSB.
17. During 2011 we undertook a review of information available to us about the way in which immigration advice and services is regulated by the qualifying regulators. This was in order to assess whether the qualifying regulators were managing appropriately the risks in the provision of immigration advice and services, and were doing so in a way that was consistent with the regulatory objectives in the 2007 Act and the better regulation principles. We also sought to understand whether there were other issues of wider concern to the public interest in the qualifying regulators’ approach. As our review focused on private individuals only, we sought views in our discussion document as to whether our findings were also relevant to businesses.

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<sup>9</sup> As set out at Section 1 of the 2007 Act.

<sup>10</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>11</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.



18. The discussion document was open for consultation between March and May 2012. We received 15 responses to the consultation, from qualifying regulators, representative bodies and individual practitioners as well as the Legal Ombudsman and the Legal Services Consumer Panel. A full list of respondents, minus one who asked that their name and response not be published, is at **Annex A**. The discussion document and responses to it are available at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).
19. This response paper provides the Board's views on areas that were raised in the consultation that we did not specifically ask questions about, as well a summary of responses to the specific questions we asked and our response to them. It also sets out proposals for next steps.

## General issues

### Reservation of immigration advice and services

21. Legal services regulation works in two main ways. Firstly, there are six reserved legal activities listed at section 12 of, and Schedule 2 to, the 2007 Act. These activities may only be undertaken by individuals and organisations that have been authorised and are regulated by an approved legal services regulator. Immigration advice and services are not reserved under the 2007 Act, but under Part V, section 91 of the 1999 Act, it is an offence to provide such advice in England and Wales unless you are authorised by a qualifying regulator or OISC or exempted by Ministerial Order.
22. Secondly, some lawyers are regulated in respect of all of their legal work by virtue of the rules of their regulator and their title, such as solicitors and barristers. Once an activity is reserved under the 2007 Act, it can only be carried out by someone who has been authorised by an approved regulator. However, that does not mean that it can only be carried out by a solicitor, barrister or chartered legal executive. If immigration advice and services were to be reserved, existing approved regulators and other bodies could apply to the LSB to be allowed to authorise people to provide immigration advice and services.
23. The discussion paper did not specifically ask about whether the LSB should make a recommendation to reserve immigration advice and services under the 2007 Act. However, it did touch on the possibility of the Board considering in future whether a recommendation to reserve immigration advice and services would be the best means of safeguarding consumer protection. Therefore, several of the responses to the consultation made reference to reservation of immigration advice and services.
24. Where responses did consider reservation, they were broadly supportive of immigration advice and services becoming a reserved legal activity, with The Law Society stating that it would support such a move given that the regulatory position for immigration advice and services is “anomalous”. The SRA viewed reservation as a means of ensuring that all consumers of legal services “enjoy broadly equivalent protections” and that, for example, OISC’s lack of powers to intervene in failed businesses, demonstrated that this was not currently the case. The Legal Ombudsman stated that, if there were sufficient evidence, it could support reservation of immigration advice and services as long as categories of providers were not removed from the market. However, the Bar Council cautioned about the cost of conducting a

statutory investigation into reserving immigration advice and services and called for clear evidence before any such option was pursued.

25. OISC had a similar, but different view about reservation. It suggested that the problems that the LSB had identified in its discussion document were due to immigration advice and services being a small and fragmented part of the market that the LSB oversees. Rather than the LSB making a recommendation to reserve immigration advice and services, it suggested that OISC, as the specialist regulator for the sector, could assume responsibility for the regulation of immigration advice and services under the 1999 Act, regardless of the adviser's status, through the strengthening of its powers. This proposed arrangement would take immigration advice and services outside the 2007 Act entirely.

### **LSB response**

26. Although the separate regulatory architecture governing those regulated by OISC and the qualifying regulators provides a sub-optimal regulatory environment, it is already a criminal offence to provide immigration advice and services in England and Wales without authorisation from either OISC or a qualifying regulator. Authorisation is a key feature of reservation and therefore, it would not be proportionate at this stage to pursue an investigation into whether immigration advice and services should be reserved. In our view, it is more proportionate to first monitor the effect of any changes being made by the qualifying regulators, their progress on the areas we want them to consider (see response to Question 6) and progress that OISC and the Legal Ombudsman make about redress (see response to Question 7).
27. However, we are currently considering a wide-ranging review of general legal advice for individual consumers. This review would aim to identify whether there are common risks and features across the provision of general legal advice that should attract a common minimum set of regulatory protections. This is likely to cover general legal advice relating to all legal services, which includes immigration advice and services.<sup>12</sup>
28. While we recognise the important role that OISC has to play as a specialist regulator of immigration advice and services, we do not agree with OISC's assessment that removing immigration advice and services from the 2007 Act altogether would provide a satisfactory solution to the issues that we have identified with regulation in this area. A key reason for this is that the 2007 Act

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<sup>12</sup> See our document *Enhancing consumer protection, reducing regulatory restrictions: Summary of responses to the discussion paper and decision document*, for further information about our plans for reviewing general legal advice. Available at: <http://www.legalservicesboard.org.uk>.

already provides potential solutions to many of the issues that have been identified with OISC's own powers. In our view, it is therefore not necessary to instigate primary legislation in the way that OISC suggests.

29. We are also concerned that such an approach, at least in the absence of even wider statutory change, would not resolve the current inconsistencies in consumer protection. For example, it would not provide consumers with the right to take a complaint to the Legal Ombudsman. It would also mean that the regulation of immigration advice and services was not necessarily consistent with the 2007 Act's regulatory objectives and other requirements. Additionally such an approach would lead to dual regulation for solicitors, barristers and chartered legal executives (and therefore potentially increased costs would be passed on to consumers) since they would be subject to OISC regulation for immigration advice and services and approved regulator regulation for all other legal advice.
30. We would therefore encourage OISC to consider whether it could become a qualifying regulator in the future. This, in our view, would equip it with many of the powers that it considers it lacks and which may hinder it in some of its regulatory work. We do not think that any of the current arrangements in place for OISC which may make such an approach complicated, such as its relationship with the Home Office, and its remit over Scotland and Northern Ireland, are of sufficient magnitude that they cannot be resolved in order to improve the regulatory framework for immigration advice and services.
31. We will also continue discussions with the UK Border Agency (UKBA) to consider further the most effective approach to the regulation of all immigration advice and services.

### **Lack of evidence to underpin the LSB's assertions**

32. Some of the responses, most notably the BSB's, raised concerns about the lack of evidence in the paper to underpin the LSB's assertions about the regulation of immigration advice and services. For example, the BSB stated that the LSB had "not presented evidence ...to suggest that there are actual risks not currently adequately mitigated by regulation".
33. There was also the view, held by The Law Society, the BSB and the Bar Council that there was nothing to suggest that immigration advice and services necessitated any more focus than other areas of law. For example, the BSB stated that it "does not currently have any evidence to suggest that this area of work is in practice generating problems which would justify giving it immediate priority over other work strands". It cited the limited number of complaints against barristers about immigration advice and services to

support its view. The Law Society stated that the “issues about the lack of information held by regulators about the immigration services market, could apply just as well to other areas of the legal services market”.

34. In contrast, the SRA thought that the “complex patchwork” of regulation suggested that the review by the LSB had been “both timely and needed”.

### ***LSB’s response***

35. We note the BSB’s recognition that it does not have any evidence to suggest that there are problems in the provision of immigration advice and services that are more serious than those in other areas. However, in our view, it is impossible for the BSB to assert that there are no problems in this area if cannot demonstrate the risk management and data gathering processes which would enable it to make such a judgement on an evidential basis.
36. Our initial assessment of immigration advice and services has suggested consumer detriment occurring in the area. This was based on a review of the information about the market that has been published as well as an extensive range of meetings with individuals and groups involved in the direct provision of immigration advice and services. We do not consider that the BSB’s reliance on the Bar Council’s biennial survey, which is based on a sample, and does not collect specific information about who provides immigration advice and services, is sufficient to be able to assess the risk to consumers and target regulation appropriately.
37. We agree that there is a lack of data and research in this area; indeed this was a key theme of the discussion document. Our concern is that regulators are not taking ownership of this issue and are unable to demonstrate that they understand the consumers of the services that those they regulate provide advice to. While complaints data can provide important information about the market, reliance on complaints data alone is inconsistent with best regulatory practice. Not only do we know that consumers are reluctant to complain,<sup>13</sup> but the case for regulation in this area rests on broader public policy objectives to do with the integrity of border control in which the consumer voice will not be paramount. However, we welcome the SRA’s and IPS’ commitment to further understanding the area.
38. We also accept that immigration advice and services are not unique in this respect. There is limited information about most other areas of the legal

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<sup>13</sup> Research undertaken by YouGov in June 2011 found that just less than one quarter (22%) of users of legal services who were dissatisfied with the service they received did not pursue a complaint. When asked why, 34% felt it was not worth it and a further 34% were so fed up with the process that they just let it go. <http://www.legalservicesboard.org.uk>.

services market. However, we do not agree that this should be a reason for inaction. Indeed, immigration advice and services may be a good starting point for qualifying regulators wishing to take a more targeted and risk based approach to regulating by activity and to then extend the approach they develop for immigration advice and services across all of the activities that they regulate.

## **OISC**

39. We were pleased to receive responses from a small number of OISC regulated organisations which were, in general, supportive of the role that OISC plays in the regulation of immigration advice and services. In particular, they stressed the importance of ensuring that any changes to the regulation of immigration advice and services do not impact on the provision of immigration advice and services by those currently regulated by OISC. Some perceived the real problem with the market as being poor quality solicitors' firms.
40. In its response, the Legal Services Consumer Panel noted the advantages of OISC being a specialist regulator, which means that it has designed an authorisation scheme that is specifically for individuals and entities wishing to provide immigration advice and services. The Panel highlighted its desire that the currently ongoing Legal and Education Training Review results in activity-based authorisation.

## ***LSB response***

41. It is not our intention that a conclusion for this work should be to limit or restrict the provision of immigration advice and services to those with a professional title. The key focus of our discussion paper was to drive up the performance of the qualifying regulators in this area.
42. We note the Legal Services Consumer Panel's comments in relation to the design of the OISC scheme and how, as a single activity regulator, it is closer to the risk-based system of regulation that the LSB is encouraging approved regulators to take across the legal services market. We would therefore suggest that there may be lessons to be learnt by qualifying regulators from OISC's approach. Indeed, we see this as an area where OISC and qualifying regulators might more generally seek to pool experience and practice on a regular and more systematic basis than at present.
43. However, we would caution that despite entry level requirements, there remains a lack of analysis about whether OISC's approach is securing the right outcomes for consumers and, indeed, who users of OISC regulated advice services are and what their requirements are.

## Summary of responses to consultation and LSB response

**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?**

44. The three key issues identified by the paper were: problems with the regulatory architecture for immigration advice and services, concerns about quality and accreditation arrangements and inconsistencies in how complaints were dealt with. There were mixed views as to whether the issues the LSB had identified were the right ones. However, broadly respondents agreed that the regulatory architecture and differing complaints handling processes were problematic and the majority of respondents who were not legal services regulators or their professional bodies agreed that quality in the provision of immigration advice and services was a significant issue.
45. The SRA commented that the issues identified in the paper were a good starting point for understanding the key issues so that the LSB can decide whether to conduct a statutory investigation into reservation. However, ILPA did not agree with the issues identified and, amongst other concerns, highlighted the need to ensure that competent providers are recognised and supported and that those who do provide high quality advice are not the subject of “mistrust” by government agencies such as the LSC and UKBA.

### *Regulatory architecture*

46. Many respondents agreed that there were problems in the regulatory architecture governing the provision of immigration advice and services. While the Legal Services Consumer Panel noted the “comfort” that regulation of all immigration advice and services provides, it stressed the importance of each regulator exhibiting “key minimum ingredients”. As a starting point it considered that “consumers should be afforded sufficient protection irrespective of who provides immigration advice”. One respondent called for “equalising regulation” so that consumers have the “freedom to choose a provider, safe in the knowledge that they will be receiving a service which adheres to the same minimum standards”.
47. The Law Society, IPS and CILEx highlighted concerns about the problems that the differing statutory arrangements for immigration advice and services potentially create, including OISC’s lack of intervention powers and the fact that not all people who need immigration advice and services have access to an independent complaints body. However, a response from an individual OISC adviser stated that “OISC are by far the most pro-active when it comes

to regulating and policing the immigration advisers in their jurisdiction. The SRA [is] not equipped to regulate or police immigration advisers specifically". The Bar Council noted that the regulatory architecture has been determined by Parliament and that in its view, there was no evidence of any problems with it.

48. CILEx and IPS refuted the LSB's view that qualifying regulators' understanding of the market was inadequate, citing the development of IPS' new arrangements for the accreditation and regulation of immigration advice and services. However, their response recognised the "regulatory maze" that currently exists for consumers of immigration advice and services which makes it "difficult for consumers to assess the quality of services" and that the current regulatory architecture "fails to ensure that all immigration advisers are qualified, skilled in the area of work in which they practise and are insured; and that their consumers have access to an independent complaints body". The response suggested that one way to address this may be by requiring immigration advice and services to be regulated in line with the regulatory objectives of the 2007 Act.
49. There was also some dispute in responses about the LSB's assertion that the LSC acts as a 'regulator by proxy' for the immigration advice and services legal aid market. In particular, the SRA stated that it had not seen any evidence to support this view. ILPA also did not agree that the LSC is a regulator by proxy, as in its view, the LSC's activities are limited to setting the requirements for what it will pay for. If a person fails to meet the LSC's requirements, it does not "do anything about that person's work for privately funded clients".
50. However, the Bar Council's view appeared to differ, with references to "LSC regulation" in its response and its statement that "LSC regulation has caused a greater degree of professionalism in the sector already and will continue to do so". CILEx and IPS sought further clarification about the risk of different LSC and SRA requirements leading to inefficiencies. The Legal Services Consumer Panel noted that changes in legal aid funding, due to shortly come into effect, mean there will be greater importance on the effectiveness of the qualifying regulators and OISC, given that the "checks and balances" deployed by the LSC will no longer apply.

*LSB response (regulatory architecture)*

51. To many of the respondents to the consultation, reservation of immigration advice and services would be the most effective way to address the issues that the regulatory architecture creates. It would certainly provide a solution to the fact that regulation is governed by two different statutory arrangements



and ensure that consumer access to redress is consistent and that regulation is statutorily governed by the regulatory objectives.

52. However, as set out at paragraphs 26 – 31, we have not been convinced of the benefits of conducting an investigation into reservation. Our preference is that the qualifying regulators improve their approach to regulation of immigration advice and services. Immigration advice and services is already a densely regulated activity yet this has not prevented the problems that we have identified occurring. We therefore agree with the Legal Services Consumer Panel’s assessment that the starting point must be sufficient consumer protection and that qualifying regulators need to ensure that such protection is in place. In particular, the qualifying regulators must base their approach to regulation on ensuring that the following outcomes are achieved for consumers:
- a) the immigration advice and services that consumers receive are provided by practitioners who are technically competent and provide good quality advice and client care<sup>14</sup>
  - b) consumer detriment is minimised by quick and effective intervention against those advisers who do not meet minimum standards. (This outcome is also important given the potential for organised crime to be involved in this area of law in particular.)
53. While the qualifying regulators have the powers at their disposal to ensure this, OISC lacks the equivalent consumer protections to those in the 2007 Act. There may therefore be an argument for increasing OISC’s powers. In the Board’s view, an immediate change that could be made to enhance OISC’s consumer protection powers would be for those advised by OISC regulated entities and individuals to have rights of redress to the Legal Ombudsman. We explore this point further in our response to Question 7 below.
54. We note the reflections upon the role of the LSC in the immigration advice and services market. While clearly, LSC is not a formal regulator, in our view, it may be that if the LSC were able to get better assurance from qualifying regulators about the arrangements that they have in place for ensuring quality and other standards, it would have less need to introduce its own requirements. For example, if the SRA required immigration specific accreditation, the LSC may be less likely to require The Law Society’s Immigration and Asylum Accreditation Scheme (IAAS) as a contractual requirement. We would therefore encourage the qualifying regulators to explore this further with the LSC to establish whether there areas where the

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<sup>14</sup> Under section 83 (5) of the 1999 Act, the Immigration Services Commissioner must, so far as is reasonably practicable, exercise her functions so as to ensure that those who provide immigration advice are “fit and competent to do so”. Qualifying Regulators have no such obligation in relation to immigration advice.

LSC is performing functions, notably the specification of performance standards, that would be best left to the regulator, or indeed that duplicate work that qualifying regulators are already doing.

### *Quality and accreditation*

55. Responses addressing quality and accreditation were the most varied, ranging from being fully supportive of full, activity specific accreditation of all immigration advice and services, to being completely against any training additional to the general training that those regulated by qualifying regulators currently receive. The response from the Bar Council asserted it did not accept that “mandatory accreditation for barristers is the way forward”, rather complaints procedures were sufficient to protect consumers where necessary. It also stated that QCs “contribute to the provision of high quality service to consumers”. The BSB’s view was that while more research may be necessary to identify if there is a problem, this in itself does not mean immigration advice and services are a problem area. It did not consider that immigration advice and services should be given priority over other areas, particularly given that they are a small area of work for barristers. It also stated in its response that “whilst there are likely to be a high proportion of vulnerable clients in immigration matters, and the impact of poor service could result in serious consequences for those clients that is equally true of other areas of legal practice such as criminal law or family law”.
56. The Law Society said that there was no evidence to suggest that the general training and requirements for solicitors were inappropriate for immigration advice and services work. It suggested that it was “both proportionate and appropriate” for regulators to take assurance from the market, for example, from the standards required by the LSC as a bulk purchaser. The Bar Council too highlighted the market’s role in ensuring standards, providing several examples of “non-regulatory or quasi-regulatory factors which drive standards up”. In contrast, Cambridge Immigration Law Centre stated that “simply being a member of a [qualifying regulator]...does not guarantee a minimum level of competent advice”.
57. The Law Society suggested that it may have a role in furthering its accreditation scheme to assist consumers by providing them with more information about it. However, it cautioned that this did not mean it was in favour of mandatory accreditation for all immigration practitioners. Central Law Training, which administers IAAS, called for a single accreditation scheme for all immigration providers, including those regulated by OISC, to ensure an identical minimum standard. This was reflected in several other responses with the Legal Services Consumer Panel highlighting its

assessment of IAAS<sup>15</sup> and suggesting that membership of a suitably reformed IAAS could be a condition of providing immigration advice and services. The Panel also thought that there was an “urgent need for the qualifying regulators to demonstrate that they are only authorising individuals and entities who are competent in this field”.

58. Some responses also highlighted concerns that consumers do not know about the levels of accreditation that the person they are instructing has, nor whether they have received an acceptable quality of service. One respondent in particular suggested that given that those in need of immigration advice and services can often feel isolated, they may be more likely to use firms owned by members of their own community, even though such firms may not be the most competent. This view was reflected in a response from an OISC practitioner who suggested that some providers are using non-qualified members of certain communities to attract customers from that community.

*LSB response (quality and accreditation)*

59. We consider that qualifying regulators must, as a matter of urgency, undertake an evidence based assessment of the quality of immigration advice and services and take immediate steps to address issues that they identify. We know that consumers feel largely unable to judge quality and tend to fall back on personal recommendations, or failing these, third party recommendations. However, even personal recommendations can lead to poor quality experiences.<sup>16</sup> While we note that the comments received in consultation responses suggested that those using immigration advice services may be more likely to use firms owned by members of their own community, research suggests that this is not the case for people in ethnic minorities more generally.<sup>17</sup> We therefore urge qualifying regulators to explore further how and why consumers choose their adviser in order to inform their risk assessments.
60. We are pleased to see that IPS is already making progress in this area and will be basing its approach on a data collection exercise to quantify the key

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<sup>15</sup> Legal Services Consumer Panel, *Voluntary quality schemes in legal services*, [www.legalservicesconsumerpanel.org.uk](http://www.legalservicesconsumerpanel.org.uk) (November 2011)

<sup>16</sup> See *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)

<sup>17</sup> See *Consumer research study 2008 a study of public attitudes towards solicitors conducted on behalf of the Solicitors Regulation Authority*, <http://www.sra.org.uk/documents/consumer-reports/consumer-research-2008.pdf> (February 2009), which found that of people in ethnic minorities who have used a solicitor in the last five years, of most importance was the office of the solicitor being in the local area, with 71% believing it is either very or quite important. The majority of people in ethnic minorities did not consider whether their solicitor is the same ethnicity as they are as important, with 81% saying it was not very or not at all important. Similarly, research undertaken by the Legal Services Research Centre into criminal legal aid found that when asked what factors were important to them when choosing a solicitor, only seven out of 1,142 respondents referred to ethnicity, *Transforming legal aid: Access to criminal defence services*, [http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices\\_29092010.pdf](http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/2010/TransformingCrimDefenceServices_29092010.pdf) Dr Vicky Kemp, Legal Services Research Centre, (September 2010).

risks. We would encourage the SRA and the BSB to do the same. IAAS and OISC's accreditation scheme currently represent the only accreditation schemes for immigration advice and services and should be used as a starting point for any further work. We would urge regulators to assess information that is available about these schemes to better understand whether or not they are an effective means of addressing risk, and improving quality and standards.

61. The LSB considers that such dialogue should form part of a wider programme of work to ensure that both policy and practice by qualifying regulators is underpinned by a solid basis of evidence to assess both general and specific risks in the provision of immigration advice and services. This work should include:
- Liaison with agencies such as UKBA, the Asylum Immigration Tribunal, the prisons estate and others who have firsthand experience of those needing immigration advice and services, to obtain evidence of performance, problems and issues.
  - Discussion with service providers and representative groups (for example, ILPA) to obtain evidence of performance, problems and issues.
  - Gathering evidence (from a wider base than consumer complaints) about consumers' experience of immigration advice and services.
  - Liaison with the LSC where performance issues are identified, in particular where it has taken action, for example contract termination.
  - Consideration of:
    - specific authorisation to provide immigration advice and services
    - consistent accreditation schemes
    - targeted CPD requirements
    - peer review of quality and consistency of advice
    - use of feedback to drive up quality and identify those who should not be allowed to provide immigration advice and services.
62. We note the BSB's assertion that risks to clients of immigration advice and services are no more than in other areas of legal practice, providing criminal law as an example. Although only a small number of barristers may provide immigration advice and services, the impact of poor quality advice on consumers is nevertheless significant, and it may be that barristers who do not regularly provide immigration advice and services pose different risks to those that do. In any event, risks to clients of poor quality criminal advocacy are already being addressed through the development of a Quality Assurance Scheme for Advocacy. While we note The Law Society's point that regulators could take assurance from other market mechanisms, such as the LSC

requirements, we are yet to be presented with any evidence of regulators doing this.

### *Complaints*

63. Almost all respondents agreed that inconsistency in complaint handling arrangements and powers was problematic. The Legal Services Consumer Panel in particular, highlighted the risk of further complexities in complaints handling emerging as the legal services market continues to evolve. For example, as requirements for non-commercial bodies to be licensed as Alternative Business Structures come into effect, this may impact on some bodies currently regulated by OISC.
64. In relation to complaints, IPS thought that there needed to be improvements in the sharing of data and information by the Legal Ombudsman. ILPA also stressed that complaints information should be used by regulators and that anecdotal evidence about complaints should not be dismissed, however it cautioned that complaints data alone “did not provide a clear picture of quality”.
65. The Legal Ombudsman stated that it would welcome improvements to make access to redress for complaints consistent for consumers. Its solution was for a voluntary Legal Ombudsman scheme that would provide for all those regulated by OISC to have complaints against them heard by the Legal Ombudsman.
66. OISC thought that an extension of its powers, either to establish it as a formal ombudsman or to provide additional powers of redress, would go some way towards addressing the LSB’s concerns about redress. OISC’s view was that its complaints handling arrangements were “less confusing and more consumer-focused than those in the legal services sector” given that it handles complaints about both conduct and service. It therefore suggested that it should hear all complaints about immigration advice and services, not just those against OISC regulated individuals.

### *LSB response (complaints)*

67. We address comments about complaints in our response to Question 7 below.

**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?**

68. Almost all respondents agreed with this assessment. The Law Society noted that the scope of the Legal Ombudsman recognises that there are “significant differences between the private client sector and the business sector”. The SRA also highlighted this point. CILEx and IPS thought that while the findings would be relevant to businesses, it would be to a different extent as they are more sophisticated clients.
69. The Bar Council thought that business immigration advice and services were “substantially different”, raising far fewer regulatory issues and stressed that it did not want to see any further regulatory burdens on those providing immigration advice and services to businesses.
70. One response cautioned against creating an even more inconsistent system if those providing advice and services to individuals were regulated differently from those providing advice to businesses.

### **LSB response**

71. We accept the suggestion that the regulatory needs of large businesses are unlikely to pose as many risks as those for individual consumers. However, regulators may need to further explore the different needs of all consumer types – the needs of a large corporation are very different to those of an individual consumer but the difference between an individual consumer and a SME may not be so great. While we note that large firms cannot complain to Legal Ombudsman, micro-enterprises can. The LSB’s work on understanding small businesses’ use of legal services might therefore assist regulators to better understand this segment of the market.<sup>18</sup>

**Question 3: Do the tables in the discussion document cover all of the risks to each consumer type? What other risks should qualifying regulators be concerned about and actively managing? (The tables from the discussion document have been reproduced at Annex C.)**

72. There was general agreement about the risks that the LSB had highlighted although several additional risks were provided by respondents. These are set out below.

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<sup>18</sup> The *Small Business Framework*, a report jointly commissioned by the LSB and the Legal Services Consumer Panel from researchers from University College London and Kingston University, considers how small businesses identified and responded to legal problems. The report was published on 17 July and is available at [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).

73. The Bar Council stressed that while it was important to ensure that “unscrupulous advisers” left the market, this should not come at the expense of those who were competent and specialist. Its view was that immigration advice and services were no different to other parts of law and that it operated within the wider remit of English law.
74. The Legal Services Consumer Panel highlighted the dangers of applying labels to groups which are “not homogenous in make-up”. It also highlighted the risks to the asylum legal aid sector of changes to legal aid funding.
75. The BSB thought that the key risk for all consumer types would be that those providing the advice are not competent to do so and hence give poor advice. While immigration advice and services consumers may be a particularly vulnerable group, in its view, the existing rules in its code of conduct managed the risks to the group.
76. The Law Society thought that the tables covered the consumer risks. However, it suggested that they should also deal with the “viability of the supplier base and the need for proportionate regulation”. This was echoed by several other respondents.
77. Central Law Training (CLT) suggested that consumers “often proceed to instruct an OISC registered representative in the mistaken belief that they are instructing a practising solicitor or barrister” for example, so called “non-practising barristers” or solicitors who are not on the Roll. It proposed a standard accreditation scheme to address this.
78. CILEx and IPS also highlighted the risk of “poor quality advice resulting in applicants pursuing cases when there is little hope of success and as a result wasting public resources and reducing public confidence in the immigration system”.
79. ILPA disputed that all of the risks could be reduced so tidily. It highlighted additional risks which mainly focused on bad advice and also covered perverse incentives created by legal aid arrangements, poor decision making by UKBA and outcomes focused regulation.
80. The SRA did not believe that changes to the scope of legal aid funding will necessarily result in additional risks for consumers, stating that “although the Government’s decision to cut public funding may entail some additional risk regarding the quality of work, we do not believe that this is a necessary consequence”.

## LSB response

81. We welcome responses to the question. We would like to see the qualifying regulators manage the risks to consumers, highlighted above and in the tables which we have reproduced at **Annex C**, more proactively.
82. Although a code of conduct can set outcomes for consumers, regulators need to assess the risks to those outcomes being achieved and target their regulation accordingly. We would therefore expect the BSB to more proactively understand the outcomes for consumers of immigration advice and services that its code of conduct seeks to achieve and how it proposes to measure those outcomes and identify and mitigate the risks to them.
83. We note the concerns highlighted by CLT about consumers not necessarily knowing who their adviser is. Ideally this should not matter as one would expect all consumers to get access to a minimum standard of quality of advice and have consistent access to redress. However, in the absence of such arrangements, we would suggest that all regulators, including OISC, consider how they ensure that consumers of immigration advice and services understand the different protections available to them depending on who they seek their advice from.
84. We were surprised with the SRA's assessment that legal aid funding changes would not necessarily create additional risks for consumers. In order to establish what happens in practice, the SRA should monitor this area carefully and ensure that it has sufficient evidence to assess the risks to consumers and how they change when legal aid changes come into effect.

**Question 4: Do the tables in the discussion document (reproduced at Annex C) 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?**

85. There was broad agreement that the questions posed by the tables were comprehensive but many respondents made additional comments about the information contained within them.
86. The BSB did not answer this question directly, stating that, while it accepted that there were problems with the regulatory architecture and the complaints system, it did not agree that special arrangements should be made for immigration advice and services work or that it should be dealt with in isolation. It cited a consultation it had undertaken on authorisation to practise



in 2010, which had shown no support for putting in place specific authorisation for immigration advice and services.

87. The Law Society thought the questions logical but was concerned that they proposed a “counsel of perfection that may well be disproportionate for regulators when set against apparent risks and burdensome on practitioners”. It too made the point that many of the questions would apply to other legal services activities.
88. The Legal Services Consumer Panel stressed the importance of finding out about the consumer experience of immigration advice and services. It considers that a lack of research in this areas means that key risks could be missed.
89. CLT warned against making any assumption that the absence of a complaint meant good service had been provided. CLT also suggested that regulators consider how they know good quality advice had been provided regardless of the outcome of the case.
90. CILEx and IPS thought that we had asked the right questions on the whole, however, they suggested more emphasis on competence assessment.
91. The Bar Council thought that the tables covered a number of risks but cautioned against using anecdotal evidence in relation to complaints.

### **LSB response**

92. We are of the view that a broad approach to regulating all legal activities is increasingly inconsistent with the better regulation requirement to target regulation only at cases in which action is needed. One size does not fit all consumer types and needs, nor does it address different types of risk. Some areas of law are more likely to be accessed by more vulnerable consumers than others. Immigration advice and services are an area of law that encompasses particularly vulnerable clients. As noted in paragraph 37, the case for regulation is founded on broader considerations than the consumer interest alone.
93. We therefore consider that immigration advice and services (and other activities) do warrant a targeted approach – this is not the same as seeking ‘perfection’. We consider that the SRA and the BSB should be following IPS’ example and consider activity specific authorisation for immigration advice and services.

**Question 5: For qualifying regulators, can you answer the questions we have asked in the tables (see Annex C)? What information do you use to actively manage the risks posed to each type of consumer? What about the risks to the public interest?**

94. The BSB's response to this question (as well as Question 2 and Question 4) was that it did not view immigration advice and services as requiring different treatment to any other area of law, stating that it "does not accept the proposals that the LSB has set out on what the qualifying regulators need to do...or the proposed timeframe". It therefore did not address the questions posed by the paper.
95. IPS stated that it will be in a position to address all of the questions once its work on developing its arrangements for regulation of immigration advice and services had been completed.
96. The SRA provided a full assessment of how it operated against the questions we asked and stated that it would be able to "implement coherent, evidence-based approaches to manage risks to consumers and the public interest in the provision of immigration advice" as part of its wider, risk-based regulation of providers of legal services. It considered that it already had this capacity.

**LSB response**

97. We were disappointed to see that, of the three qualifying regulators, only the SRA attempted to answer the questions. However, we are pleased that IPS has this work well in hand and we welcome the efforts of IPS to target its approach to how it regulates its providers of immigration advice and services.
98. We do not consider that the actions proposed by the SRA and the BSB are of themselves sufficient to achieve our desired outcomes for consumers of immigration advice and services (set out in our response to Question 1 above). Of key concern is the fact that neither seems to recognise the necessity to take a more targeted approach to regulation of immigration advice and services specifically. Both stated in their responses that the requirements of their codes of conduct ensure sufficient protection of all consumers, including those of immigration advice and services. The SRA did, however, provide a comprehensive response and demonstrated some understanding of the solicitors providing immigration advice and services, albeit little about those consumers who receive it.
99. However, the BSB's response shows that it has insufficient information about which barristers provide immigration advice and services and to whom. This means that we cannot be sure that it is regulating immigration advice and

services effectively. A lack of evidence is not evidence of itself that there are no problems. It is particularly important that this gap is filled before any expansion of public access.

100. In addition to what they have proposed, we want each of the qualifying regulators (preferably working with OISC) to identify what needs to be done in order to ensure satisfactory levels of quality.

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

101. Many of the responses which did provide suggestions for additional areas of work in this area proposed some form of research. The SRA called for joint action between the regulators, the LSB and the LSC. The Bar Council expressed some support for some research in the area, although thought that the LSB's work to date in this area had overstepped its role. The Legal Services Consumer Panel also thought there was a need to commission consumer research in this area. The BSB considered that little further action was necessary due to a lack of evidence of major problems. However, it did suggest that a consumer survey undertaken by the LSB or qualifying regulators may be an option and that it may be appropriate to review accreditation arrangements.
102. Other suggestions included:
- ensuring consumers are better educated to select the right provider
  - improved sharing of information and intelligence between the qualifying regulators as well as by the Legal Ombudsman
  - implementation of a single unified and robust accreditation scheme, based on IAAS and immigration specific CPD
  - agreeing a minimum standard if qualifying regulators are to run their own accreditation schemes, to ensure parity between the schemes.

**LSB response**

103. We welcome the suggestions of the BSB and the SRA for joint working. In our view, given the nature of immigration advice and services, it would be appropriate for the qualifying regulators to work together, with the Legal Services Consumer Panel, to develop their approach to regulation of immigration advice and services. However, we do not want progress by individual regulators to be slowed down by the potential difficulties of agreeing and co-ordinating a joint approach.

104. In our view, the most urgent attention needs to be given to understanding the quality requirements for immigration advice and services and we would therefore expect a research based assessment of quality to be a particular focus for the qualifying regulators. There may also be an opportunity for OISC to be involved in such work – any research into quality of immigration advice and services would necessarily have to cover advice provided by OISC regulated advisers. Since the consultation, the LSB has undertaken an extensive piece of consumer research into the experiences of individual consumers with legal needs. We would encourage all regulators to study this carefully.<sup>19</sup>
105. We also welcome suggestions of better intelligence and evidence sharing amongst those involved in the regulation of immigration advice and services and would encourage regulators to take this forward with other bodies involved in immigration advice and services and feed their approach into their action plans.

**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?**

106. Generally responses were favourable to this suggestion, with the Legal Services Consumer Panel emphasising that membership of the scheme would have to be mandatory for OISC advisers through OISC's Code. The Legal Services Consumer Panel suggested that consumers may be choosing immigration advice and services providers based on a false sense of security and stressed the importance of eroding barriers to complaining which were more likely to be experienced by more vulnerable consumers. CILEx and IPS highlighted the benefits of having all service complaints data held by one organisation.
107. However, The Law Society thought that it would be preferable for regulation to ensure proper standards and service in the first place and therefore that the most appropriate route to Legal Ombudsman for OISC regulated entities would actually be through reserving immigration advice and services. The SRA too commented that while a voluntary scheme would be an improvement, a statutory scheme would be preferable. It stressed the importance of ensuring that the Legal Ombudsman's powers under a voluntary scheme should be equivalent to those in its scheme for solicitors.
108. The Legal Ombudsman stated that it would welcome improvements to the existing system of complaints and would be keen to ensure that any

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<sup>19</sup> See [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk) for *The Legal Services Benchmarking* report, published on 17 July 2012 and prepared for the LSB by BDRC continental. The report looks at how individual consumers identify and respond to legal problems.

arrangements under a voluntary scheme would have to be mandatory for OISC practitioners through its code of conduct. The Legal Ombudsman would also be keen to ensure that a voluntary scheme was as similar as possible to its existing service.

109. ILPA thought that there was a risk that such a change could potentially mislead consumers into wrongly believing that an OISC adviser was regulated by a qualifying regulator, if its complaints were considered by Legal Ombudsman.
110. Only OISC was not in favour of such a change. It considered that a more appropriate solution to address concerns about redress may be for OISC either to transform into a formal ombudsman scheme or for it to get additional powers of redress.

### **LSB response**

111. The fact that OISC recognises that it does not have the powers it needs in relation to complaints is significant. However, we cannot support additional legislation for an increase in OISC's powers because the 2007 Act provides a route to complaints about immigration advice and services being heard by an ombudsman (ie the voluntary scheme provisions).
112. While we accept that there is a risk of creating more confusion in how complaints are handled we do think that this can be effectively managed by signposting arrangements between OISC and the Legal Ombudsman. In our view, any risk is outweighed by the additional protections that the Legal Ombudsman scheme would provide for consumers.
113. We do not consider that there is confusion in how conduct and service complaints are considered under the 2007 Act, as suggested by OISC in its response to Question 1. All consumers can complain to Legal Ombudsman, which, if it identifies a conduct element to the complaint, refers that part of it to the relevant approved regulator.
114. It is also important to remember, as highlighted by the Legal Services Consumer Panel in its response to Question 1, that the new licensing regime for non-commercial bodies may impact on some non-commercial bodies which are currently regulated by OISC. When the transitional period for non-commercial bodies in the 2007 Act ends, any non-commercial organisations which provide a reserved legal activity, will have to become an Alternative Business Structure and thus come within the remit of the 2007 Act and the Legal Ombudsman. This risks making the existing redress arrangements for complaints all the more unfair.

115. We therefore encourage OISC and the Legal Ombudsman to consider the feasibility of transferring OISC service complaints to the Legal Ombudsman as we think that this could provide a fairer route to redress for all consumers of immigration advice and services. The Legal Ombudsman will be developing its approach to a general voluntary scheme during 2012/13.
116. We accept that there is an issue around the fact that OISC's remit extends to Scotland and Northern Ireland to work through. However, we do not think this necessarily presents an insuperable obstacle to a voluntary jurisdiction for OISC entities in England and Wales. To us, the benefits of maximising consumer access to redress by utilising an arrangement already in place, outweigh the status quo in which OISC has to rely on moral authority, rather than statutory powers, to seek to secure redress.

## Next steps

117. The focus of each of the qualifying regulators (preferably working with OISC) must be to identify what needs to be done to ensure satisfactory quality across the board by all those who provide immigration advice and services. That must be combined with effective mechanisms for identifying and stopping advisers who provide unsatisfactory levels of quality. This process must identify key risk areas and take action on them. We expect this work to be significantly progressed over the next 12 months.
118. At the very least we expect this work to include the following:
- Liaison with agencies such as UKBA, the Asylum Immigration Tribunal, the prisons estate and others who have first hand experiences of those needing immigration advice and services, to obtain evidence of performance, problems and issues.
  - Discussion with service providers and representative groups (for example, ILPA) to obtain evidence of performance, problems and issues.
  - Gathering evidence (from a wider base than consumer complaints) about consumers' experience of immigration advice and services.
  - Liaison with LSC where performance issues are identified, in particular where it has taken action, for example contract termination.
  - Consideration of:
    - specific authorisation to provide immigration advice and services
    - consistent accreditation schemes
    - targeted CPD requirements
    - peer review of quality and consistency of advice
    - use of feedback to drive up quality and identify those who should not be allowed to provide immigration advice and services.
119. In progressing this work over the next 12 months, we expect qualifying regulators to measure their progress against the outcomes set out below:
- a) the immigration advice and services that consumers receive is provided by practitioners who are technically competent and provide good quality advice and client care<sup>20</sup>
  - b) consumer detriment is minimised by quick and effective intervention against those advisers who do not meet minimum standards.
120. We will review qualifying regulators' progress in this area over the next 12 months and if we continue to have concerns about qualifying regulators' ability

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<sup>20</sup> Under section 83 (5) of the 1999 Act, the Immigration Services Commissioner must, so far as is reasonably practicable, exercise her functions so as to ensure that those who provide immigration advice are "fit and competent to do so". Qualifying Regulators have no such obligation in relation to immigration advice.

to regulate immigration advice and services effectively, we will consider using our formal powers under the 2007 Act. The Board can take enforcement action under the 2007 Act if it considers that the acts or omissions of any approved regulator in its role as a qualifying regulator have had, or are likely to have a prejudicial effect on the regulatory objectives. The Board's ultimate sanction is to recommend the removal of qualifying regulator status.

121. While we are not seeking at this stage to commence a statutory investigation into whether immigration advice and services should be reserved, we are currently considering a wide-ranging review of general legal advice for individual consumers. This review would aim to identify whether there are common risks and features across the provision of general legal advice that should attract a common minimum set of regulatory protections. This is likely to cover general legal advice relating to all legal services, which includes immigration advice and services.
122. We will also encourage OISC and Legal Ombudsman to discuss a voluntary scheme for complaints about OISC advisers further.



## **Annex A: list of respondents to the consultation**

The Bar Council

Bar Standards Board (BSB)

Central Law Training (CLT)

Cambridge Immigration Law Centre (CILC)

Legal Services Consumer Panel

Detention Advice Service (DAS)

Immigration Law Practitioners' Association (ILPA)

Ilex Professional Standards (IPS) Chartered Institute of Legal Executives (CILEx)

Legal Ombudsman

M. Maddah

Office of the Immigration Services Commissioner (OISC)

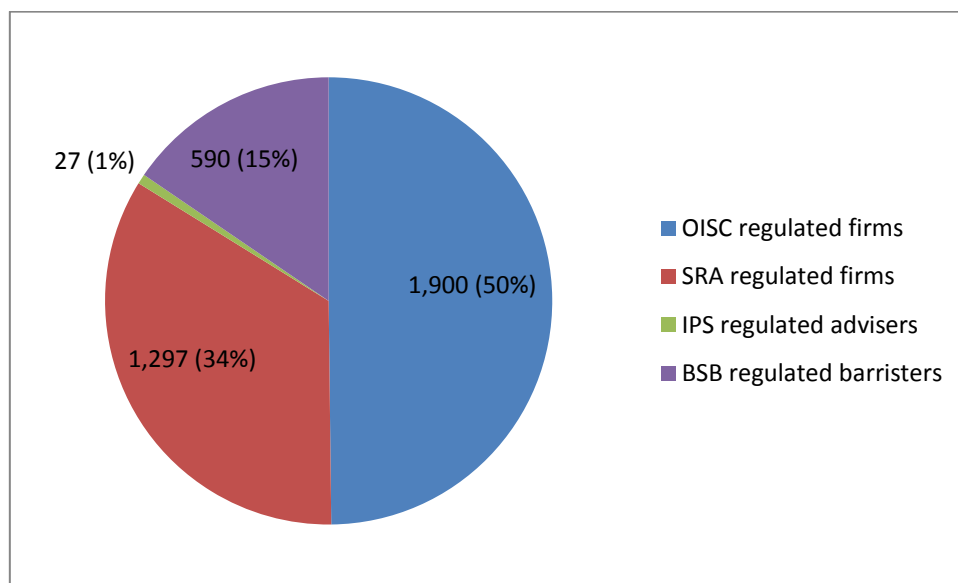
Solicitors Regulation Authority (SRA)

The Law Society

Visa Legal

Responses are available at: [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk)

## Annex B: make up of immigration advice and services providers by regulator



### Notes

Figures for IPS and BSB relate to individuals, rather than firms.

Figures for BSB regulated barristers are based on a sample.

## Annex C: assessment of risks in the regulation of immigration advice and services (reproduced from discussion document issued March 2012)

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)	<p style="text-align: center;"><b>Natural persons – non-legal aid</b></p> <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.</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?</p> <p>Do regulators know who is providing immigration advice 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>	Particularly vulnerable client group due to nature of advice needed.	<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)	<p style="text-align: center;"><b>Natural persons – non –legal aid</b></p> <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>

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## Notes to the tables

<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).