

24 May 2012

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Dear Karen,

REGULATION OF IMMIGRATION ADVICE AND SERVICES

1. I am grateful for the opportunity to contribute to the discussion you have initiated on this topic. I note that the LSB's central and primary focus is on driving up the performance of qualifying regulators providing immigration advice and services through the requirement for them to implement coherent, evidence-based approaches to manage risks to consumers and the public interest in this area. I fully support that objective, and my Office is happy to work with the LSB and the qualifying regulators in any way possible to assist in achieving such an outcome.
2. As you are aware, the OISC has long experience of regulation and complaints handling in the immigration advice sector, and it possesses great expertise in this area. Its activities are fully in line with the LSB's Regulatory Objectives, and it ensures that individuals who are reliant on the services this sector provides (many of whom are among the most vulnerable members of society) receive an efficient, effective and customer-focussed service. For the benefit of other interested parties, I attach to this letter a copy of the consultation response I submitted last October to the LSB which sets out how my Office is a model of simple and accessible regulation.
3. The problems you identify in this Discussion Document essentially derive from the fact that the provision of immigration advice and services forms a very small and fragmented part of the legal services market which the LSB regulates. Statistics confirm that the number of organisations involved in such activity regulated by the qualifying regulators is significantly less than those regulated by the OISC. Moreover, my Office focuses exclusively on this very specific area, and it possesses undoubted expertise as a 'specialist regulator' for the sector, ensuring the continuing fitness and competence of immigration advisers throughout the UK.

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4. Given that the LSB is not seeking to make things more complicated, and given that you are concerned with work rather than title, the obvious solution would therefore be for my Office to assume full responsibility for the regulation of all activity relating to the provision of immigration advice and services, regardless of the adviser's status.

5. Clearly such a solution would require careful planning and implementation – and for me to be given additional statutory powers and resources. I have been discussing with the UKBA and the Home Office the need to update and strengthen the legislative provisions underpinning my Office, and this has been the subject of a recent Parliamentary Question¹. I therefore believe this is a viable option which merits serious consideration, and which could, and should, be addressed formally in subsequent consultations.

6. The remainder of my response addresses specific features of the immigration advice and services sector mentioned in your Discussion Document, and provides additional background and clarification to help facilitate the debate over the future regulation of legal professionals providing immigration advice and services.

7. Equality and Diversity. On the question of the responsibilities of regulators in relation to equality and diversity, it is worth noting that the majority of the OISC's constituency is made up of small BAME organisations and advisers; so here too a significant potential problem could be mitigated by reconfiguring the regulatory architecture to give the OISC responsibility for the whole area.

8. Failing Organisations. Reference is made to the qualifying regulators' powers to intervene in a situation where a firm is failing. This is a complex issue because there are many different circumstances which may constitute 'failure', and the document risks confusing a firm that has left the regulatory scheme with one where the regulator has concerns about a regulated firm and therefore seeks to stop the organisation from practising. Whilst it is true that the OISC retains no control over a firm once it has left its regulatory scheme, nor does it currently have a fund for holding files or power to direct them to be held by other OISC advisers, such powers could be acquired through legislation without in any way complicating or confusing the regulatory regime.

9. Ombudsman Function. Much is made of access to redress. It should be understood that it was a conscious decision by government to establish the OISC as a sectoral regulator, and to invest it with complaints handling duties and powers primarily to underpin its regulatory role and to ensure consumer protection, rather than to establish it as an ombudsman. I would not, however, be opposed to exploring the transformation of my complaints handling remit into a formal ombudsman function – subject to being given sufficient resources and the necessary statutory powers to achieve it. If this were not considered an appropriate solution, I would still support the OISC being given additional powers of redress so that I could handle complaints even more effectively – from whatever source they came.

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¹<http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120326/text/120326w0002.htm#1203263600009> 'Hansard', 26 March 2012, column 962W.

10. Complaints Handling. It is important to understand that the well-established processes for complaints handling by the OISC are less confusing and more consumer-focussed than those in the legal services sector. The Discussion Document recognises that my Office considers both service and conduct complaints against those it regulates and encourages resolution at the earliest stage; whereas in the legal services sector the Legal Ombudsman deals only with complaints about service, whilst those concerning conduct must be handled by sectoral regulators such as the SRA. The Document does not, however, highlight that the OISC's powers extend beyond just England and Wales to cover the whole United Kingdom. Nor does it recognise that the OISC may receive complaints about any person or aspect of service regardless of where regulatory responsibility lies. Directing all complaints about the provision of immigration advice and services to the OISC would therefore result in a simpler, more comprehensive, transparent and efficient arrangement than currently exists in the legal services sector.

11. Voluntary Arrangements. I am not entirely clear about what is envisaged by 'voluntary arrangements' for the Legal Ombudsman to consider complaints against OISC regulated entities and individuals using powers under section 164 of the Legal Services Act when I have been given such responsibilities by statute. However, for all the reasons mentioned above, I cannot see that it would be desirable, or necessarily beneficial to consumers, to introduce yet another layer of complexity – and potential confusion – into the system. Such a move could also make achieving my primary statutory role more difficult.

12. Information Sharing. The Discussion Document states that there is no mechanism for using information about complaints to provide a complete picture of the services consumers are receiving. However, there is nothing preventing all of the regulators from working together to achieve this. Indeed, when I performed the function of oversight regulator for the qualifying regulators it was recognised that there needed to be good relationships and flows of information and co-operation in investigations activity, and I was well placed to act as a focal point for this. It should be noted that the OISC has also published statistics concerning the total volume of complaints received over the years. My Office remains perfectly content to share information, and it has Memorandums of Understanding with the Legal Ombudsman, the SRA, the Bar Standards Board and CILEx which covers this issue.

13. In conclusion, I would reiterate that I see significant advantages in rationalising the regulation of immigration advice and services by assigning full responsibility to the OISC, and I trust that this option will be fully explored. But, in the meantime, I acknowledge the recognition that the qualifying regulators may be able to learn lessons from the OISC given its specific focus in this area, and my Office stands ready to work with them to improve the service they provide for customers of their respective regulated bodies.

Yours sincerely,

Suzanne McCarthy
Immigration Services Commissioner

10th October 2011

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Dear Mr Mackay,

ENHANCING CONSUMER PROTECTION, REDUCING REGULATORY RESTRICTIONS

1. I am grateful for the opportunity to contribute to the discussion the Legal Services Board (LSB) is leading on the scope of legal services regulation in England and Wales. Rather than addressing the specific questions posed by the discussion document directly, I am confining my comments to the regulatory regime for which I am responsible.
2. It is quite proper for the LSB to include immigration within this exercise – and highly appropriate that you should describe it as a ‘special case’. Indeed, I believe that my Office is a model of *‘simple and accessible regulation that helps providers deliver imaginative and consumer focussed services while giving consumers confidence that regulation helps them without burdening them with costs or preventing them from accessing services in the way that suits them best’*, and demonstrates the inappropriateness of a ‘one-size-fits-all’ approach.
3. Immigration regulation plays a vital part in securing the public interest. My Office – which regulates the provision of immigration advice and services throughout the United Kingdom in accordance with the requirements of the Immigration and Asylum Act 1999, as amended – constitutes an essential element in realising the nation’s strategic immigration policy and ensuring that the system is not abused. Not only does my Office effectively concern itself with the fitness and competence of its directly regulated advisers, but it also provides an essential service in identifying, deterring, and, where necessary, personally bringing prosecutions against those who seek to operate illegally. At an individual level, the regulatory regime provides access to justice regardless of legal or ethnic status or the ability to engage effectively with the administrative system. The great majority of the just over 1,800 OISC regulated organisations are small and medium sized BME organisations, and these play an important role in their respective communities.

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4. The UK's regulatory framework for immigration advice and services has developed in a uniquely consumer focussed way, ensuring a good freedom of choice. Consumers of immigration advice and services are often among the most vulnerable – and even disadvantaged – members of society. Under the current system they have the opportunity to obtain advice and services not only from any of the three levels of advisers regulated by my Office (working in both the for-profit and the not-for-profit sectors), but, alternatively, in England and Wales from solicitors, barristers and members of ILEX. Further, an important feature of the regulatory arrangements – which may provide a useful model for other sectors – is that non-practising legal professionals (who are thus not regulated by their respective professional bodies) who wish to provide immigration advice or services in the UK, would need to apply, and be admitted into, the OISC scheme, before being able lawfully to do so.

5. Consumers using OISC regulated advisers can take advantage of the comprehensive protection available under the existing regulatory regime. First, my Office ensures that all OISC regulated advisers are fit and competent to provide advice and services at the appropriate level. Specifically, applicants are tested and their organisations examined before being allowed entry into the regulatory scheme or moving up to a higher advice level within it; their work is subject to regular audits (the frequency of which is determined according to Better Regulation Principles by an assessment of risk to clients and the public); and they are required to meet annual continuing professional development requirements. Second, I operate a Complaints Scheme which allows me to investigate allegations made by clients and others of improper behaviour by an OISC regulated adviser be it relating to service or conduct, and the conclusions of such investigations are an important part of my sector monitoring tools. Increasingly, I am encouraging OISC advisers to resolve complaints from clients themselves using their organisation's OISC approved complaint schemes in order to reduce the regulatory burden. Third, I have the power to curtail those advisers who are found to be working in contravention of the OISC regulatory scheme by removing their organisation's authority to operate or by laying a disciplinary charge against them before the First Tier (Immigration Services) Tribunal.

6. My Office embraces both the letter and the spirit of Better Regulation Principles. We constantly seek to act proportionately in the regulatory burdens that we place upon the regulated sector, whilst ensuring that a robust enforcement regime is deployed. Although my Office ensures that due process is always observed, we are able, because of our close, but arms length and independent relationship with the United Kingdom Border Agency (UKBA) and other parts of Government, to be acutely sensitive to policy developments in this area that will impact on advisers and the timeliness of the advice they give.

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7. Inevitably there is scope for the regulatory regime over which I preside to be strengthened, but only in respect of introducing additional safeguards to the existing legislative framework. A public consultation undertaken in 2009 by the UKBA confirmed that, not only should the OISC continue, but its statutory powers should be enhanced. It is hoped that the Government will be able to find a suitable legislative vehicle during the term of this Parliament.

8. In the meantime my Office is constantly adjusting the balance of its activities to address areas of greatest concern. We are placing increasing emphasis on identifying and preventing unregulated, illegal activity in the provision of immigration advice and services. There are two distinct strands to this: one relates to individuals deliberately seeking to circumvent legislative requirements; the other to people who may genuinely be unaware of the requirement to be regulated. In connection with this I am keen to raise greater awareness of the OISC regulatory regime and the role we play in the sector among advisers, potential clients and the public generally.

9. The OISC Investigations and Intelligence Team seeks out and prosecutes with the support of other law enforcement bodies and on its own those who flout the law. I see this as important field of activity, and I am looking to optimise its effectiveness by introducing strategies to enhance identification and targetting.

10. In conclusion, I stand ready to provide the LSB with such information as it requires, and I look forward to holding further constructive discussions with you. However, I would commend the LSB and other interested parties to study my 2010/11 Annual Report where full details of the current OISC regulatory regime are explained. This will confirm that both outputs and outcomes are being delivered by my organisation in a highly efficient manner making optimal use of the resources available to us. Furthermore, it will demonstrate not only that the OISC's aims and operation are fully in line with the LSB's Regulatory Objectives, but that the existing regime remains fit for purpose in delivering effective regulation of that part of the immigration advice and services sector not operating under the professional bodies to the benefit of consumers and society more generally.

Yours sincerely,

Suzanne McCarthy
Immigration Services Commissioner