



The Law Society

LSB Discussion Document - Regulation of immigration advice and services

Law Society response

24th May 2012



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The Law Society is the professional body for over 140,000 solicitors in England and Wales. It negotiates on behalf of the solicitors profession, lobbies regulators, Government and others. It also works closely with stakeholders to improve access to justice for consumers.

We welcome the opportunity to respond to the Legal Services Board's discussion document on the regulation of immigration advice and services.

In preparing this response, we have sought the views of the Law Society's Immigration Law Committee. The Committee is comprised of specialist practitioners who have considerable experience in all areas of immigration advice and representation.

We note that this document is a discussion paper and as such does not put forward any firm policy proposals. We trust that any proposals arising from this discussion paper will be subject to a full and thorough equality impact assessment as well as further consultation.

As an over-arching comment, we are concerned that the LSB is taking a particular approach to immigration services and the role of regulators in respect of these services that could potentially have significant ramifications for the regulation of legal services generally. 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. While a number of clients in the immigration market are among the most vulnerable in the population and clearly need protection, the market also involves a wide range of other consumers and, to that extent, is not very different from many other sectors. It is not clear to us that immigration practice requires special treatment in the way suggested by the paper.

We agree, however, that the regulatory position is anomalous and would support the view that immigration advice should become a reserved legal service under the full supervision of the LSB.

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?

The paper provides a very full analysis of the regulatory issues that may be relevant to immigration practice. All of these are relevant to other areas of practice. However, there appear to be a number of assumptions in the paper which need to be challenged and, in addition, an approach being taken to

immigration work that is likely to be cumbersome and expensive and which does not appear to be justified by the nature of immigration work and which may be disproportionate, given the relatively small number of practitioners in the sector. Solicitors, in particular, are subject to extensive training requirements and duties to act in their clients' best interests and only where they are competent to do so. They are heavily protected by insurance, professional rules and investigatory and intervention powers when these go wrong. There is no evidence to suggest that these mechanisms are inappropriate for immigration work.

It is suggested throughout the consultation that the approved regulators have an inadequate understanding of the market and as a consequence have little understanding of whether the advice given by practitioners is of good quality or not. This inference is not backed up with evidence of a lack of understanding by approved regulators of the market. Neither is evidence provided that suggests that the regulators are unable to distinguish between good advice and bad.

The paper also appears to under-estimate the role of the market in dealing with quality and setting standards. While it is obviously the role of the regulator to set minimum standards, to deal with misconduct and to ensure that standards are maintained, it is inevitable that the market will play a role too. At one end of the scale, businesses and regular purchasers will be well able to make decisions about the quality and competence of individual lawyers. As a bulk purchaser, the Legal Services Commission (LSC), is well placed to require standards that it believes are appropriate for those who are receiving money from the public purse – these might be at a higher (or lower) level than a privately paying client might require but they do set a standard. This is achieved through the Law Society's Immigration and Asylum Accreditation Scheme (IAAS). It seems to us to be both proportionate and appropriate for a regulator to take the view that these mechanisms are working and assuring quality for a particular part of the market so that the regulator does not need to intervene.

We agree that neither of these mechanisms is perfect and that there may be parts of the market that require further attention, particularly now that public funding is reduced. The Society believes that it may well have a role in providing further adjuncts to the accreditation scheme to assist towards this and in providing greater consumer information. It does not follow that it is proportionate or necessary to require accreditation for all practitioners. This, of itself, could be a barrier to the provision of legal services or a factor that increases prices in a market where many clients may be vulnerable and where fees are not always high.

The paper suggests that as the number of immigration (non-asylum) cases funded by legal aid amounts to approximately 10% of the numbers of visas granted, that high numbers of clients/consumers were seeking advice not funded by legal aid. However, the number of visas and the number of

immigration legal cases do not necessarily correlate. Many cases will arise from in-country applications or appeals. Furthermore, a significant number of visas may have been granted without any recourse to legal advice or been provided through colleges and workplaces. Indeed it is possible that a consumer may have sought advice on a fee paying basis from a practitioner who operates a mixed-practice of publicly funded and private cases.

We recognise that having two separate and overlapping statutory bases for regulation in the immigration sector can lead to regulatory confusion and potential consumer detriment. For example, as we made clear in our 4 November 2011 response to the LSB's 'Enhancing consumer protection, reducing regulatory restrictions', we have concerns about the ability of the Office of the Immigration Services Commissioner (OISC) to manage firms that cease to operate. OISC does not have powers akin to intervention, the effect being that, upon the failure of a firm under the OISC remit, administrators with little if any experience of the legal services market take control of live files, with many clients being unsure as to where or who those files would have been passed. This would not be the case where a firm is regulated by the SRA and an intervention or administration can be conducted by an experienced practitioner. We consider that this needs to be addressed.

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?

We agree that many of the issues pertinent to client experience of immigration services will apply both to private individuals and commercial bodies. However, differences occur in the way that the two types of clients may raise complaints. However, there are significant differences between the private client sector and the business sector – as is recognised by the limited scope of the Legal Ombudsman. Businesses tend to have greater resources and a greater ability to choose their suppliers and seek redress from them. A firm that offered services entirely to businesses is likely to pose fewer risks than one dealing entirely with more vulnerable clients.

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

The tables in our view seem to outline consumer risks reasonably comprehensively. It is a concern that they do not appear to deal with the viability of the supplier base and the need for proportionate regulation.

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

The questions are logical but we are concerned that they propose a counsel of perfection in a way that may well be disproportionate for regulators when set against apparent risks and burdensome on practitioners. Many of these will apply across other sectors.

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

We believe the Solicitors Regulation Authority would be best placed to address this question based on the risk assessment procedures they currently have in place.

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

The discussion paper suggests that there is an inadequate understanding on the part of the regulators about the markets in which immigration advice is being provided. It is extrapolated from this that the regulators do not have an adequate understanding of whether lawyers are providing good advice in immigration services or not. We do not believe there is evidence to show that more regulation is required for solicitors working in the immigration sector than any other.

We acknowledge that the two overlapping statutory bases for regulation in immigration services may provide for possible regulatory gaps between those regulated by OISC and those regulated by the approved regulators, such as the SRA. We believe the regulatory framework set by the SRA to determine the minimum standards for its authorised persons is robust and appropriate. However, we accept that it may be possible that non-authorised persons are operating in this area and creating consumer detriment as a result. As such, if strong evidence was provided that suggested regulatory gaps would be best covered by making the provision of immigration advice and services a reserved activity under the Legal Services Act 2007 we would not have significant objections on principle. However, we would only support this if any regulatory burdens are proportionate to their desired outcomes.

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?

If the weight of evidence collected suggests that reservation of immigration activities was the preferred way forward, then all regulated persons conducting the work would come under the remit of the Legal Ombudsman (LeO).

We believe that difficulties will arise where activities come within the remit of LeO without them becoming reserved and, therefore, regulated under the criteria of the Legal Services Act 2007. If the provider is not suitably regulated, there will be significant difficulties in enforcing co-operation, enforcement of adjudications and payment for the Ombudsman's services.

Those regulated under the Legal Services Act 2007 currently pay for the Ombudsman's service. The Act ensures that they cannot be expected to subsidise unregulated providers or those regulated under different statutory frameworks. We are concerned that there is a risk that providers might sign up voluntarily to the Ombudsman's service, only to ignore their adjudications at a later date, leaving consumers badly let down. It is important to recognise that the right to complain does not exist in a vacuum. Regulated providers must provide a proper complaints process alongside positive duties with regard to service and cost, and there are disciplinary sanctions for failure.

While having a complaints handling service is a helpful addition for consumers, regulation which ensures a proper standard of services in the first place is likely to be far more important to them. The Legal Services Act 2007 provides a route for activities to become regulated, and accordingly come under the remit of LeO, and the appropriate means for that would be reservation.