RESPONSE OF THE BAR COUNCIL TO THE LEGAL SERVICES BOARD DISCUSSION DOCUMENT "REGULATION OF IMMIGRATION ADVICE AND SERVICES"

Introduction

The General Council of the Bar (the Bar Council) welcomes the opportunity to comment on the Legal Services Board discussion document on the Regulation of Immigration Advice and Services ('the Paper').

The Bar Council is the governing body and the Approved Regulator (AR) for all barristers in England and Wales. It represents and, through the independent Bar Standards Board (BSB), regulates over 15,000 barristers in self-employed and employed practice. Its principal objectives are to ensure access to justice on terms that are fair to the public and practitioners; to represent the Bar as a modern and forward-looking profession which seeks to maintain and improve the quality and standard of high quality specialist advocacy and advisory services to all clients, based upon the highest standards of ethics, equality and diversity; and to work for the efficient and cost-effective administration of justice.

Reserved activity and mandatory accreditation

We deal below with the questions for consultation as they are set out in paragraph 58 of the Paper. We observe as a preliminary point, however, that there is no specific question about whether immigration services and advice should be a reserved activity, though the subject is raised at paragraph 10 of the Paper. The issue of mandatory accreditation is closely related to this and we deal with it here.

The effect of an order making immigration advice and services a reserved activity would be to bring a further tranche of practitioners within the remit of the LSB. A statutory investigation under the 2007 Act would be an expensive process. Proportionality requires that neither the cost of the investigation, nor an extension of the burden of two-tier regulation under the 2007 Act architecture, be imposed unless and until there is clear

evidence that it is necessary to embark on this course. The regulatory research the qualifying regulators (QRs) will undertake pursuant to paragraph 38 may be expected to cast light on these issues. So it would be premature for the LSB to take further steps following publication of conclusions from *Enhancing Consumer Protection* until, at the earliest, the QRs have completed their research and the LSB has assimilated the results.

Nor do we accept that mandatory accreditation for barristers is the way forward. There are already complaints procedures available with respect to the Bar that are sufficiently muscular to provide protection to consumers where and when needed. This applies to immigration work as it does to other areas of barristers' practices. We cannot see any 'public confidence gap' highlighted by the Paper with respect to the Bar. With solicitors/caseworkers accreditation has different levels corresponding to the complexity of the work. This would be entirely unworkable for the self-employed Bar who receive instructions in any one case in a range of legal activities (advice, drafting, advocacy). We cannot see any evidence of why a mandatory accreditation requirement is needed for an equivalent scheme for the Bar.

Questions 1- 7: the Bar Council's 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?

We welcome the LSB's recognition (at paragraphs 2 and 22 of the Paper) that good quality immigration advice and services lead to better outcomes for government departments. Advice and representation of asylum seekers and migrants by specialist lawyers, both barristers and solicitors, is undoubtedly in the public interest. We believe that the LSB should therefore take a cautious approach to regulatory changes that may act as a disincentive to the retention of high quality lawyers in this area. The impact of any regulatory changes – now or in the future - ought to be assessed with this in mind.

There appear to be three broad assertions within the Paper, as summarised in paragraph 6:

i. The two different but overlapping statutory bases for regulation in the immigration sector cause significant problems with the overall regulatory architecture;
ii. The QRs have inadequate understanding of the immigration sector; and
iii. Access to redress differs because clients of OISC advisers are unable to complain to the Legal Ombudsman.

The regulatory architecture has been determined by Parliament. The Immigration and Asylum Act 1999, and the OISC which the Act established, have made a major contribution to quality assurance in relation to those who would not otherwise be subject to regulation. We believe that the LSB should recognise this. We nevertheless have no difficulty with the third proposition. We have however had difficulty in ascertaining the evidential basis for the first two propositions, which is not contained in the Paper.

The Paper concludes (at paragraph 7) that the combination of the three issues means that 'it is likely that there is significant, avoidable detriment to consumers and, in parallel, the public interest'. We have serious concerns that the Paper does not present a balanced view of the sector. There are a number of non-regulatory or quasi-regulatory factors which drive standards up and which need to be recognised when considering supervision according to risk:

i. In the publicly-funded sector, many barristers and solicitors are highly committed to this area of law, working long hours for clients for considerably lower remuneration than some other areas of law. We recognise that a portion of the legal aid sector is motivated more by sympathy with clients than by assiduous application of legal principles. However, we do not believe that this is true of the legal aid sector as a whole: LSC regulation has caused a greater degree of professionalism in the sector already and will continue to do so.

ii. The publicly-funded sector perceives itself under threat from LSC regulation and funding cuts. The point is not whether the LSC contracting requirements are or are not unduly onerous: the perception exists. A greater regulatory burden runs the risk of acting as a further disincentive leading to exit from the sector and less choice for consumers.

iii. There is a wealth of informal mechanisms, such as the Refugee Legal Group for asylum and human rights specialists and the ILPA Economic Sub-Committee for business immigration specialists, which promulgate specialist knowledge and good practice. ILPA organises a year-round, comprehensive training programme. These mechanisms lead to a high degree of specialisation and up-to-date knowledge among those practitioners who use them. They are effective because they engage practitioners, and are peer-driven.

iv. The big City providers are departments in firms with, often, a worldwide reputation for quality legal services. At the Bar, there are a number of specialist Queen's Counsel. The Paper fails to capture or engage with the range of providers in the marketplace.

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?

The Paper concludes at paragraph 5 that its findings are likely to "read across" from private individuals to businesses. We would have welcomed discussion of the evidential basis for this conclusion. In our experience, the business immigration sector is substantially different, raising far fewer regulatory issues.

A number of business immigration law providers are departments of large City law firms, sometimes with substantial presence in both the domestic and international markets. These firms will place regulatory and compliance issues at the core of their business. In addition, it

is our experience that most legal assistance provided to businesses relates to non-contentious matters. Business immigration services may involve a solicitor making representations to the Home Office or taking advice from Counsel, but there is in the vast majority of such cases no contemplation of litigation. The current exception is probably judicial review relating to the suspension and revocation of Tier 4 sponsor licences but this is not immigration law in the sense of seeking an immigration status for an individual.

We believe that it is important to take a proportionate approach to the regulation of business immigration advice and representation. Further regulatory demands or costs to specialist Counsel or to the City law firms may amount to a disproportionate economic burden and may act as a disincentive to providing services in this area of the law.

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?

We give our comments here about market indicators and risks.

The risks presented in the tables on pages 21 to 24 do not apply equally to all types of practitioners across the board. We recognise that a minority of unscrupulous practitioners may exploit for profit those migrants who are unfamiliar with the legal system and comparatively ignorant of what to expect from those who give legal advice. It is imperative that unscrupulous advisers leave the marketplace. It is however also imperative that this does not come at the expense of specialist, competent practitioners who should not suffer excessively burdensome regulatory processes to achieve this.

In terms of Black and Minority Ethnic (BME) providers, we do not dispute that 23% of all BME firms derive more than 50% of income from legal aid. In the forthcoming year all immigration work (bar victims of trafficking, challenges to detention, judicial review - bar exclusions - and domestic violence litigation pursuant to the immigration rules or the EEA regulations) will come out of scope for public funding. Consequently, until the impact that this will have on BME firms is known, it is too early to carry out a study of the issues set out in the Paper. We are aware from anecdotal evidence that the immigration sector fears that both barristers and solicitors who are dependent on publicly funded work will cease to practice in this field. This will have a direct impact on the assumptions contained in the accompanying tables to the Paper (for example see Immigration Table at page 22 which indicates that there is potential for the market to grow).

We are pleased that the LSB recognises the need to ensure continued consumer choice (paragraph 10). There is a perception among legal aid practitioners that the LSC is more interested in costs savings than in provision of quality legal services.[1] This had led to loss of

[1] We observe that while LSC regulation is in the public interest, it should not come at the expense of anti-competitive practices whereby good solicitors are driven out of the marketplace in exchange for low cost providers, at the risk of less real choice for clients who may feel obliged to pay for legal advice.

quality solicitors and presumably less real choice for consumers (for example, there have been some high profile retirements and movements in the last decade). There is a substantial risk that greater regulation will be a straw to break the camel's back if it entails bureaucracy at the expense of doing the job of law. We know anecdotally that practitioners are already concerned about loss of legal services in some regions of the country; this concern will only increase if quality providers drift away from the sector.

The Paper expresses concern (at paragraph 41) that consumers may be wrong to assume that a solicitor is automatically as competent as an OISC regulated adviser. Immigration law does not operate in a vacuum but is part of English law and, in particular, English public law. We would have concerns if this wider context, which favours trained lawyers, were to be marginalised or omitted as a market indicator when considering the regulatory architecture or consumer expectations.

We note the LSB's general policy that supervision of the regulated community at entity and individual level should take account of the risk presented (see paragraph 18). In this area of law, as in others, the Bar's view is that QCs contribute to the provision of high quality services to consumers. The rigorous, independent selection process, which includes equality and diversity criteria, ensures that appropriate appointments are made. We do not consider that a greater regulatory burden will highlight anything that the QC application process does not take into its purview. This is relevant to "market indicators" and "risks" across the tables.

The risks in relation to "Natural persons - non-legal aid" (page 22) include the potential for organised crime. It is not the task of the QRs to enforce the criminal law. Criminal justice issues lie within the competence of the police. There is the risk that regulatory goals will become distorted if they are founded on matters beyond the competence of the QRs.

The Paper notes (at paragraph 44) that there are no specific requirements to be met for somebody commencing this work from a wholly different type of practice. Risk factors include "quality" as meaning that there is no specific quality threshold to be met by a person in this area of law (page 22). We believe that immigration law is no different (in this regard) to other kinds of law, and have seen no evidence to show that this factor justifies any additional requirements being imposed on qualified lawyers.

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 tables appear to cover a substantial number of risks but there are no data to support the proposition that immigration clients with genuine complaints do not do so. We would caution against using anecdotal evidence of lack of genuine complaints: the issue is contentious and highly charged and, as such, anecdotal evidence may be unreliable in relation to this aspect of the debate about quality assurance in immigration law.

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?

Not applicable.

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

We note the BSB's proposals to carry out research and adopt an action plan on the basis of the data obtained. Since the underlying concern stems from the unusual dual architecture of regulation in this area, that exercise should include consideration of any material differences between regulation by the BSB and regulation by OISC. We would support the pooling and joint management of research work by the three QRs so far as practicable.

We are bound to observe, however, that the LSB could easily have ascertained the lack of data by making simple enquiries of the QRs. There is no reason to suppose that QRs would not then have responded positively to an invitation by the LSB to scope and undertake the necessary research. The research the LSB undertook prior to this consultation exercise – at the profession's expense - was therefore wholly unnecessary to support the finding at paragraph 38. The limited scope of that research also means that it is of no real value to the QRs, who must now conduct their own substantive research effectively from scratch. That is not an effective or efficient use of the profession's resources by the LSB, and oversteps the role of oversight regulator.

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?

We do not oppose the extension of the Legal Ombudsman to OISC regulated entities.

For and on behalf of the Bar Council

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