ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

Solicitors Regulation Authority

By email to freedominpractice@sra.org.uk

27 July 2010

Dear Sir/Madam

Solicitors Regulation Authority Consultation on outcomes-based regulation

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, including UK Border Agency and other 'stakeholder' and advisory groups.

ILPA would like to draw to the attention of the Authority in the context of this consultation some matters particularly pertinent to regulation of solicitors practising in immigration and asylum.

ILPA responded to the Authority's *Review of Professional Accreditation Scheme* in 2008. We refer you to the comments made therein. ILPA is aware that accreditation and reaccreditation in immigration and asylum has now passed back to The Law Society. In moving to its new regulatory model the Authority will need to take into consideration the split of responsibilities between itself and The Law Society. ILPA and the Legal Aid Practitioners Group have put before The Law Society our suggestions for reaccreditation by training courses and we append a copy of that letter to this response. The suggestions for structured training courses made therein may also be of more general interest to the Authority in the context of question 20 of the consultation which asks whether there are additional approaches the authority could take to improving pre- and post-qualification training?

In its 2008 response ILPA noted that accreditation is not compulsory for those practising in immigration and asylum is not compulsory but is made a compulsory requirement for those doing legal aid work by the Legal Services Commission's requirement that all those doing such work (solicitors and non-solicitors regulated by the Office of the Immigration Services Commissioner) be accredited under The Law Society scheme.

It will be vital that clarity between the different roles of the Solicitors Regulation Authority, the Legal Services Commission, and The Law Society (providing accreditation) be achieved. For example, frequent reference to the prohibition

contained in the Immigration and Asylum Act 1999 on providing immigration advice or services in the course of a business whether or not for profit is incorporated into the Code of Conduct, but when it comes to the Proceeds of Crime Act 2002 and the Money-Laundering Regulations 2007 (SI 2007/2157) the information provided by The Law Society is much more detailed than that provided by the Solicitors Regulation Authority in the Code of Conduct or otherwise. Immigration practitioners seeking to understand the implications of the law on money-laundering Act for their practice have tended to turn to The Law Society rather than the Solicitors Regulation Authority. It can be difficult to know where to start to look.

The role of the Legal Services Commission is relevant more broadly, and while our comments centre on immigration they may well have resonance in other areas of law.

Section V of the consultation paper refers to

> *"…new regular reporting and notification requirements on firms as part of the authorisation process and continuing monitoring in order to assess risk;"*

First, we highlight that the Legal Services Commission already requires very detailed reporting from the firms with which it contracts, imposing a very high bureaucratic burden on firms. We trust that by consulting with legal aid practitioners the Authority will be in a position:

a) to learn from the Legal Services Commission's mistakes and avoid the collection of large quantities of information that it is time-consuming and costly to produce and that yields little substantive information of benefit

b) to ensure that wherever possible it avoids unhelpful overlap with the information collected by the Legal Services Commission. Practitioners should not be put in a position where they need to collect almost, but not quite, the same information for both, or the same information in different formats and thus have to do the work twice.

We strongly recommend that the Authority talk to practitioners about their experience of working under Legal Services Commission contracts as part of the work toward outcomes based regulation.

Secondly, the Legal Services Commission funding regime imposes enormous pressures on good practice. Quite simply, it does not pay for it and creates many perverse incentives that militate against good practice. For example, in immigration and asylum the Commission's focus on 'outcomes' in the form of certain key performance indicators introduced perverse incentives into the scheme. A key performance indicator related to success rate at appeal risked having the effect of making it more difficult for those with complex cases to find representation, and to have a similar effect where those whose cases were behind a big test case in the higher courts, and thus almost certain to fail at first instance, were concerned. The interaction between this key performance indicator and the merits test, particularly, for example in 'detained fast-track' asylum cases, where the failure rate on appeal can

be as high as 97% per cent[1] was a matter of grave concern to ILPA. ILPA's influencing work resulted in the Commission agreeing not to include detained fast-track cases in counting toward the key performance indicator, and also to ensure that failure to meet the indicator was a trigger for further investigation, rather than a breach of the contract.

The Solicitors Regulation Authority needs to be prepared to take up the case of professional standards with the Commission and insist that it ensures that it is providing adequate funding and support for good practice.

Other matters

In a previous version of the Code of Conduct a link was provided to the Law Society Gazette to a practice note on immigration. There was no direct hyperlink. This was unhelpful for those wishing to consult the note, but it also gave rise to doubts as to the precise status of the practice note: was it part of the Code of Conduct or not? It is important to avoid such confusion.

It is vital that a regulator is accessible to practitioners and that they receive prompt, clear and full responses on their enquiries as to their obligations. We recall the article *Doing the Right Thing* by Peter Williamson, then Chair of the Solicitors Regulation Authority Board in the Law Society Gazette.[2] ILPA concurs with his comment:

> *"As I have repeatedly said, the SRA's only hope of success is to regulate in partnership with the profession."*

In the same article Mr Williamson wrote:

> *"Some critics have said that the SRA is over-secretive and that one of the reasons solicitors feel vulnerable when dealing with us is that they have no idea of what to expect. We have been contrasted with the Bar Standards Board in this respect.*
>
> *This criticism disregards a big difference between solicitors and virtually all the other professions: many solicitors have custody of client funds.*
> *The majority of SRA investigations are of a financial nature."*

While it may be the case that the majority of investigations by the Authority are of a financial nature, in ILPA's experience in the field of asylum and immigration concerns are as likely to be about the quality of advice raised as about matters solely, or even in part, financial. Ministers in the previous Government appeared to take delight in 'bashing' immigration lawyers.[3] A regulator has a role to play in setting such politicised concerns in their proper perspective by providing clear information that allows it to be seen that many lawyers are not giving cause for concern. But a regulator must also be able to investigate concerns, including those voiced by other

[1] See ILPA's *The Detained Fast-Track: a best practice guide*, January 2008, available from *www.ilpa.org.uik/pub.html*
[2] 12 June 2008
[3] See e.g. Home Affairs Committee *Managing Migration: The Points-Based System* HC 217, July 2009, paragraph 144; Asylum-seeker charities are just playing the system, says Woolas, The Guardian, 18 November 2008

members of the profession, with no political axe to grind, but simply with the client's file before them, about poor quality work by other advisors. The client group in immigration and asylum are unlikely to be familiar with the intricacies of the UK legal and regulatory system, may not be familiar with English and, in ILPA's experience, will often be loathe to complain about their legal representatives. In such circumstances the onus on the regulator to be able to tackle questions of quality, for the good of the clients, and indeed the good name of the profession, is a heavy one.

Alison Harvey
General Secretary
ILPA

26 July 2010

Annexe: CPD plus proposal, ILPA and LAPG letter to The Law Society of 19 May 2010