ILPA's RESPONSE TO OVERSIGHT OF THE IMMIGRATION ADVICE SECTOR CONSULTATION

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Individuals and organisations registered with the Office of the Immigration Services Commissioner are among the membership. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups.

Q.1: Do you agree that it is beneficial for the immigration advice and services sector to remain regulated?

If yes, do you think current regulation works and, if not, why not?

ILPA understands and supports the objective need for regulating immigration advice and services and agrees that this is beneficial. There is an issue of whether there has been adequate resourcing of the regulator and of the effect of regulation on voluntary organisations. For example, ILPA remains concerned at the ease with which it now appears to be possible to be registered at Level 1, which ILPA understands to be because of current OISC resources. It is difficult to comment on the effect of the current regulation without taking into account the effect of the cuts in legal aid which, in ILPA's view, have had an extremely negative effect on the availability of quality advice and representation.

ILPA cannot comment definitively on the impact of the OISC on regulation of immigration advice and services. There remains some good advice and some bad advice.

Q.2: Do you think that the existing regulatory structure should be retained without any changes?

No. ILPA's view is that Option 1 does not address the weaknesses of the current system of regulating immigration advice and services.

The document does not provide any detailed assessment of the future structure, cost and working of the Legal Services Board to be able to understand at present how Option 3 would work, and whether it would be the best option for the future.

It is ILPA's view that any change must take into account adequacy of resources, the effect on the sector of the changes caused by the funding of legal aid, the constant

changing of immigration laws and rules and the effect on the client group which remains vulnerable.

It does not follow, however, that ILPA agrees to everything proposed in Option 2. ILPA's concerns are set out below.

Q.3: Do you agree that individuals who have been convicted of illegally providing immigration advice and services should be preventing [sic] from owning or participating in a regulated immigration advice organisation? If so, how long should that ban last?

ILPA agrees in general with the proposal that those finally convicted of illegally providing immigration advice and services should be prevented from owning or participating in a regulated immigration advice organisation, subject to the following:

- The sanction should not be applied automatically. There must be discretion for all the circumstances of the case to be taken into account.
- If a ban is considered to be the appropriate sanction after taking into account all the circumstances, the length of the ban must be proportionate to the seriousness of the offence, including the actual harm to or loss suffered by any individuals to whom advice / services were illegally provided.
- There must be a mechanism for an individual to whom a ban is applied to appeal against the ban and / or the length of the ban.

Q.4: Do you think combining regulated and exempted advisers into a single register would be helpful?

We assume that 'regulated' in this question is intended to mean 'registered'.

ILPA agrees that a single register makes sense, as long as the register makes clear to those using it whether organisations or individuals are commercial businesses or voluntary organisations, and therefore which organisations are going to make clients pay for advice and representation and which are not. If the regulator's website also gave easy access for potential clients to check the fees charged by a regulated individual or organisation, this would also be helpful.

Q.5: Do you think the introduction of Improvement and Prohibition Notices would be helpful?

ILPA supports action to ensure that advisory standards are raised and maintained. However, we do not think the case for improvement or prohibition notices has been adequately made and we do not understand what these are meant to add to the regulator's existing powers to enforce improvement, if these existing powers are used effectively. We would particularly raise the following questions:

- What do the proposed improvement notices add to the existing capacity of the OISC simply to send a clearly worded letter to an adviser setting out the OISC's concerns and how the adviser must meet them?
- What sanctions are intended to follow from failure to comply with an improvement notice or prohibition notice, and how do these differ from existing powers?

- What remedy would exist against the imposition of an improvement notice or prohibition notice? We should be concerned that there should be a right of appeal and a right to apply to the Immigration Services Tribunal for an interim ruling suspending a notice pending a full hearing.
- The Partial Impact Assessment (para 11) suggests that appealing where 'there is little hope of success' is part of the problem addressed. ILPA is aware of numerous cases where advisers have differing views of the likelihood of success but the case may still succeed. How is the regulator qualified to decide whether lodging an appeal or not is the best action in the client's interests?
- What is the intention behind prohibition notices? We understand that one purpose may be to prevent an organisation giving advice if all its qualified advisers (or all those at a particular level) have left. Clearly it would be undesirable for an organisation to do so. But an organisation would not be entitled to give advice in the absence of properly qualified advisers in any event, and anyone giving advice in the course of a business who was not properly qualified to do so would probably be committing an offence.
- Would the issuing of either an improvement notice or a prohibition notice be a matter in the public domain?

We suggest that a great deal more detail is needed of the intention behind these new powers and the way in which it is proposed that they would operate. The lack of such detail is unhelpful in a consultation document. We do not see how those responding to it can be expected to endorse such proposals in the absence of such detail.

As a final point we note that in the Initial Impact Assessment (see paragraph 11) concern is expressed about unscrupulous advisors encouraging "applicants to pursue and submit cases to appeal when there is little hope of success". The suggestion here appears to be that, motivated by financial considerations, advisers encourage their clients to pursue hopeless applications and appeals. This, it is said, is "wasteful of public resources". We do not dispute that such practice may occur, and most certainly it needs to be addressed, but we do not think that the current proposals for improvement and prohibition notices will necessarily be an appropriate or effective tool, and we emphasize that good legal advice simply cannot be measured purely, or even at all, in terms of outcomes.

Advisers undertaking publicly funded work will already be bound by their contracts with the Legal Services Commission to apply the 'sufficient benefit' test (at initial application stage, under Legal Help) and the CLR merits test (on appeal, under Controlled Legal Representation). Moreover, such advisers are subject to the requirement (as a Key Performance Indicator) to achieve a minimum success rate of 40% on their appeals. ILPA has long argued against the 40% success rate Key Performance Indicator, which in ILPA's view risks encouraging advisers only to pursue to appeal those cases in which a successful outcome is a virtual certainty, to safeguard their contracts. In fact those same contracts make quite clear that (subject to the means test being satisfied) Controlled Legal Representation must be granted to pursue an appeal unless the prospects of success are 'clearly less than 50%'.

With these provisions in place it is hard to see what the current proposals would add.

Advisers undertaking only privately paying work are not subject to the foregoing provisions. However, what has to be borne in mind is that if a privately paying client insists that they want to pursue a particular application and/or appeal, even if it is apparently unmeritorious, then so long as they have been properly advised on what they may stand to lose by so doing, and so long as it is not vexatious, misleading or otherwise unethical for the adviser to be pursuing it, their instructions are a matter for them. In these circumstances, so long as a file contains a clear record of correct advice being provided to the client and the client's instructions at every stage in the process, an advisor should not be criticised, much less sanctioned or penalised by means of an improvement or prohibition notice, for acting on his or her client's instructions. This is what we mean when we say that good legal advice cannot be measured in terms of 'successful outcomes'.

Q.6: Do you feel the existing audit arrangement [sic] **of the OISC are effective? Would additional powers be helpful? Please explain.**

Again we are concerned at the lack of detail in this question. We understand that one proposal is that the regulator would gain powers to make unannounced audits. If this is the case, we do not understand why this is not spelled out in the consultation document or why views are not sought on this proposal.

ILPA recognises that the power to make unannounced audits should be available as a last resort for the regulator, when the normal methods of inspection and audit have failed, or the adviser has attempted to frustrate them. If it is to be introduced, clearly significant safeguards are needed. Whilst we appreciate that the intention is likely to be that such a power would only be invoked in rare cases, an informally expressed intention is no substitute for a clear and explicit policy with proper procedural and substantive safeguards. Decisions to enter workplaces are likely to raise questions under Article 8 of the European Convention on Human Rights, both in terms of the justification for the decision to do so and the procedure and planning which goes into making such a decision (see the decisions of the European Court of Human Rights e.g. in *Niemietz v Germany* (1993) 16 EHRR 97 and *Keegan v UK* [2006] All ER (D) 235 (Jul), (2006) 21 BHRC 189).

Whilst we recognise the difficulty with those who may seek to frustrate the process of investigation, it remains that in current law it is for the adviser to satisfy the OISC that she or he is properly qualified to act, and not for the OISC to prove that she or he is not. Advisers who obstruct the processes of the OISC can, and in ILPA's view should, be refused initial or continued registration, as occurred in the case of *Anglo-Chinese Education Consultancy v OISC*, IMS/2008/5/RCR, ImSeT, 12 January 2009.[1]

We ask also what the costs of planning and carrying out such audits would be and what cost-benefit analyses have been carried out which might suggest that doing so was the most appropriate use of the regulator's limited resources?

[1] 'The tribunal finds that the Appellant's failure, and continuing refusal, to provide relevant information rendered a full and proper assessment of his fitness impossible to assess. In the circumstances the Tribunal finds it was reasonable to refuse to re-register the Appellant and the Respondents' decision to do so is upheld.'

In the absence of any clear proposals, we are unable to provide any further answer to this question.

Q.7: Do you agree that the cost of regulation should be paid for by the sector? Do you have any preferences on how fees are levied (e.g. per organisation/per adviser etc.)?

No, the cost of regulation should not be entirely paid for by the sector. The availability of good immigration, asylum and nationality advice and representation benefits all of society and its regulation for the not-for-profit sector should be paid for through general taxation. While there is a shortage of competent, affordable or free immigration advice, much of the immigration advice which is available is through the not-for-profit sector, such as Citizens' Advice, or community organisations. Immigration is somewhat different from other areas of advice because the consequences of wrong, negligent or incompetent advice and representation are much more severe for the client than in many other areas of law. People who receive bad advice may lose cases they should have won; they may be wrongly removed from the country and returned to danger, including torture or death; families may not be able to remain together or be reunited; or people may remain illegally unnecessarily and may not know about their entitlements and options. This adds to insecurity in society and to people not knowing or being able to access their rights. Ensuring that advice is properly regulated and that illegal or bad advice is stopped is a government responsibility.

If fees are levied on the commercial sector, they should be charged by organisation (not by individual) so that the size and nature of the organisation can be taken into account in setting the level of the fee. The advice given is in the context of the organisation, so that even knowledgeable and experienced individuals will not be registered/exempted if the organisation in which they operate is not properly resourced, structured and managed, for example if they are not properly supervised, do not have access to relevant publications, are not insured or do not publish their fee scales. Individuals leave organisations, or become more highly qualified, while organisations are more likely to remain broadly the same size and carrying out broadly the same work. There should be a sliding fee scale relating to the size of organisations, rising more steeply for larger organisations than the OISC fee levels do at present.

ILPA is concerned that the Partial Impact Assessment published with the consultation document suggests that a decision on increasing fees has already been made, as the summary states as a Key Assumption that 'higher costs are being imposed on the sector.' ILPA urges that the government consider fully all responses to the consultation before making a decision on changing the funding of regulation.

Q.8: Do you think that full cost recovery should be sought from the not-for-profit sector? If not, please explain why you think a public subsidy would be appropriate.

No. Many providers of immigration advice and help are small refugee community organisations, or Citizens Advice Bureaux, providing basic immigration advice as

well as many other services. Funding for most community organisations is very tight anyway: they do not have the money to pay extra fees. They rely on trusts and charitable funders, which generally want to fund the core work of the organisation - the benefits it provides to its clientele - rather than to pay fees to a regulator. Without extra funding, organisations might have to cut back on their advice work, or other areas where they serve their clients, to pay the regulatory fee. Losing a substantial amount of immigration, nationality and asylum advice would have serious effects on a particularly vulnerable group of clients and would lead to more, not fewer, inappropriate applications being made to the UK Border Agency by unrepresented individuals. Alternatively, organisations might cease to register with the regulator, but individuals, without a framework, might start doing more than signposting, not recognising that their helpfulness had strayed into giving immigration advice. All those doing this valuable work are likely to do it better with a clear framework governing their work. As the changes in legal aid mean there are fewer solicitor providers of immigration advice, the voluntary sector is vital and needs to be encouraged, rather than deterred by having to pay extra fees for regulation. Further reduction in free advice means that individuals needing advice may suffer severe hardship, or go into debt, in order to pay for the advice they need.

Citizens Advice Bureaux are often funded partly by local councils, and again a fee to a central government regulator cannot be a priority for them. Nationality Checking Services are run directly by local councils and are currently OISC Level 1 regulated; local authorities should not have to move money around in budgets to pay fees to regulate a service which the UK Border Agency has encouraged them to provide. Provisions in the Borders, Citizenship and Immigration Act 2009 envisage an even greater use of the Nationality Checking Services in connection with 'earned citizenship.' Transferring fees between different levels of government is not a sensible use of public money.

The UK Border Agency is at present making massive profits from its immigration application fees, which have recently been raised again, many to very much higher than cost recovery levels. A settlement visa from abroad, for example, costs £585, but the unit cost of issuing one is £379. An application for indefinite leave to remain in the UK costs £820 but costs £318 to process. These exorbitant fees are a direct cost to immigration applicants; they should not also have to pay on top of this towards a regulator. Fees income could be used to subsidise regulation of advice, which would also help the UK Border Agency as it would help to improve the standard of applications.

For avoidance of doubt, it is not ILPA's suggestion that the for-profit sector should subsidise the not-for-profit sector: it should be a public subsidy in the public interest to maintain the not-for-profit community sector.

Q.9: Do you think a sliding scale for recovering costs from the not for profit sector would be helpful? What factors should it take into account?

ILPA does not think that the not-for-profit sector should be charged for regulation, for the reasons given above.

If it is decided that the not-for-profit sector should be charged, it is essential that this is not on a full-cost basis and that there is a sliding scale, with the smallest refugee community organisations and other community groups not being charged, or paying only a nominal amount. It is vital that the fee should not deter small organisations from being regulated – community groups are often the first port of call for advice by the most vulnerable people in society and are regulated at Level 1 to enable them to give basic advice, to have access to the training which the regulator offers and to know enough to know when they can responsibly give advice or when they need to refer people on. As trusted organisations who speak the language of particularly vulnerable groups and who may be the only place individuals know about where they can obtain advice, they will have to give basic advice or signposting anyway. It is much better that they should be part of a regulated structure with access to information and training from the regulator. If the fee is prohibitive, they will simply be unable to pay it.

Any fees charged should be on a sliding scale established by the number of advisers accredited in an organisation, on a more steeply inclined scale than the current OISC scale. At present an organisation with 1-4 advisers pays £1700 to register, between £1700 and £424 per adviser, while an organisation with 10 or more advisers pays £2300, a maximum of £230 per adviser, in some cases significantly less. This is not sensible, as larger organisations are better able to absorb costs, without passing them all on to clients in higher fees. The suggestion in the Partial Impact Assessment that there could be an annual fee of £980 per adviser (or organisation – the document does not make a clear distinction) is completely unrealistic for small community and refugee organisations. Even the minimum fee of £400 suggested could lead to such groups ceasing to give immigration advice.

Q.10: Do you think making [providing?] **immigration advice and services should be a reserved activity under the Legal Services Act? Please give your reasons.**

Our view is that there is currently insufficient information available for us to offer a meaningful response to this question. After the Legal Services Act provisions have been in force for some time it will be clearer how capturing by statute activities which solicitors and barristers undertake as 'reserved activities' has improved the quality of work undertaken by those professions and the advice and services provided to their clients. The changed regulatory procedures, and whether there has been a consequent increase or reduction in the number of complaints received by the relevant professional regulators and the Legal Services Board, will also have operated for the existing definition and it will be clearer whether its processes could improve areas of work initially left out of it, and whether OISC or any successor could become an 'approved regulator.' In other words, our view is that the case for making the provision of immigration advice and services a reserved activity is yet to be made but we believe the question should be raised again in the future.

Q.11: Do you agree with our intended approach?

ILPA broadly prefers the proposal in Option 2 to consolidate and strengthen the existing regulatory regime to the other Options. However, it will be clear from the remainder of this response that we remain unconvinced of the merits of some of the

proposed changes. As the Legal Services Board has not yet started its work, we believe it would be right to wait until it is up and running, and any teething problems sorted out, before extending its remit, but this should remain an option for the future.

ILPA opposes the proposal that not-for-profit voluntary organisations should have to pay for their regulation and believes that the benefits of regulation should be paid for from general taxation.

Q.12: Are there other changes in regulation would you like to see?

At present there is no system for immigration advisers similar to the Solicitors Regulation Authority powers of intervention in cases where a solicitors' firm closes down, or is required to cease work. If a regulated (or unregulated) immigration adviser closes down, there is often no way that their clients can find out what has happened, or obtain their papers and documents back. The Solicitor's Regulation Authority has a recognised process where the clients are informed and their files kept securely until they request them or another solicitor takes over the work. This is a serious matter, as any new adviser needs to know what has happened before and often this is simply not possible. The regulator should have the responsibility to provide such a service. When a firm disappears, or is stopped from trading, there should be power for the regulator to go in and hold files securely and to notify the clients at their last known address that the adviser is no longer regulated and they can obtain their files from the regulator. This service should also be publicised on the regulator's website, so that clients and other advisers would be aware of how they may be able to find their documents and papers about their case. ILPA realises that this service would require further resources but it is an important aspect of any effective regulation of advice.

Alasdair Mackenzie
Acting Chair
ILPA
6 August 2009