

# BAR STANDARDS BOARD

REGULATING BARRISTERS

## **Response to the LSB's Discussion Document on the Regulation of Immigration Advice and Services**

The Bar Standards Board (BSB) welcomes the opportunity to respond to the Legal Services Board (LSB) discussion document on the regulation of immigration advice and services. The BSB has a number of general comments:

1. The LSB will be aware that the BSB is currently consulting on a new Handbook, including an overall approach to risk (which will be supplemented by a further consultation on risk-based chambers monitoring). As a result of this on-going work, the BSB does not consider immigration advice and services to require development of a separate or tailored regulatory approach, specific to immigration services. Rather, the regulation of immigration advice and services will fit within the work the BSB is undertaking more generally for all areas of practice, to ensure that our approach as a regulator is more streamlined and consistent, and as far as possible informed by an assessment of risks, across all strands of work.
2. As the LSB has stated in its discussion document, the Bar Biennial survey in 2011 identified only 4% of barristers who indicated that they provide immigration advice and services, with only 2% stating that it is their main area of practice. It is evident that this area of work does not form a large part of the Bar's work. Moreover, in many cases barristers are instructed by a professional client or (under licensed access) by an immigration adviser who is him or herself regulated and therefore, other than in the minority of cases where work is accepted through the public access scheme, the barrister is likely to have little contact with the lay client. Whilst there are likely to be a high proportion of vulnerable clients in immigration matters, and the impact of poor service could result in serious adverse consequences for those clients that is equally true of other areas of legal practice such as criminal law or family law. Neither the scale of barristers' involvement in this area of practice, nor the impact should things go wrong, marks immigration work out as requiring special or different regulatory focus on the part of the BSB.
3. The BSB does not currently have any evidence to suggest that this area of work is in practice generating problems which would justify giving it immediate priority over other work strands to which the BSB has already committed significant resource. The BSB does hold some information on complaints data. Over the last 5 years the BSB has received 42 complaints relating to immigration, only 8 of which have been upheld. The 42 complaints received represents 1.2% of all complaints opened over the last 5 years, including those raised by the BSB itself. Although this is a very small percentage of the number of overall complaints received, the BSB accepts that this may not fully capture where the potential problems may lie. As the LSB has identified, the client base of those who require immigration advice and services can be a vulnerable one and also one where English is not the first language. These factors may make it less likely that a client would pursue or make a complaint when problems do arise. (Although in those cases where the work also involves a solicitor

as a professional client one would expect the solicitor to advise the client to complain where there were grounds for doing so).

4. All immigration advisers registered with the Office of the Immigration Services Commissioner (OISC) at either level 2 or level 3 have semi-automatic licensed access. In practice this means that as long as these individuals demonstrate that they are OISC registered, the BSB will approve them for licensed access. The BSB therefore has a stake in the quality of OISC regulation and approaches its own role on the basis that the OISC is taking adequate measures to assure this.
5. The BSB already has a significant programme of work for the coming year, which is detailed in its business plan. To take on additional work that was not factored into the business plan for 2012/13 will place an additional burden on resources and finance. Even if it were considered appropriate to prioritise this area over other planned work streams, it is highly unlikely that the BSB would be able to do so by the proposed deadline of the end of 2012. However, the more fundamental point is that the LSB has not presented evidence in its discussion document to suggest that there are actual risks not currently adequately mitigated by regulation. To the extent that any shortcomings in regulatory approach may have been identified (and quite what shortcomings are said to have been found is not clear), the LSB has not explained why these are not adequately addressed by the work stream on the regulatory standards framework, which is already in hand. Whilst the BSB agrees that the regulatory architecture of immigration advice and services is in itself complicated and creates anomalies in quality and accreditation arrangements, as well as in complaints handling, this does not necessarily mean that barristers practising in this area pose a greater risk to consumers and the public interest than those practising in any other practice area.
6. At the moment, apart from data on complaints and also data collected as part of the Bar Biennial survey, the BSB does not collect specific information in relation to the provision of immigration advice and services, nor do we require any specific requirements to be met in the Code of Conduct (the Code) before authorising individuals to carry out immigration advice and services. The Code obliges barristers only to take on work that is within their competence, in this as in any other specialist subject area. That approach focuses on the outcome (that consumers receive services from individuals who are competent to supply them) rather than setting out to prescribe a particular test for competence that must be passed before the services can be supplied. By way of example, barristers likewise must assess for themselves whether or not they are competent to advise in a mental health case involving a vulnerable client or any number of other comparable situations, in terms of risk and impact.
7. The BSB will be collecting some further evidence about this area of practice from the chamber's monitoring exercise. For this round of chambers monitoring, however, the BSB does not want to overload the questionnaire by seeking to cover too many different areas, as this would not be practical and counterproductive.

#### Direct access

8. Under the current arrangements in order to take on public access work a barrister must have more than three years' practising experience, must be properly trained and must have registered with the Bar Council as a public access practitioner. In March 2010 the range of work available under the scheme was widened to include immigration work. However the extent of work barristers are able to do in this area is

still limited due to the restriction on undertaking any work where the client is eligible for public funding.

9. The BSB is considering proposals to amend the public access rules so that clients would have the discretion to use a public access barrister even if they are eligible for public funding and also barristers under three years call would be able to undertake public access work.
10. The BSB recently conducted a survey on public access work. The survey showed that just over 5% of the 414 barristers taking part in the survey identified immigration as an area of practice where they accepted instructions through the public access scheme. Although there are only a small percentage of barristers accepting immigration work in this way, this may change when some immigration and asylum cases are brought out of the scope of legal aid, meaning there will be some people only entitled to partial legal aid. The proposed changes in the public access rules mean that those who are eligible for partial legal aid would be able to instruct a public access barrister, which may ultimately be a more cost-effective option for them. The changes to the public access rules should therefore be timely and provide an alternative option for those affected by the changes to legal aid. The changes should also assist the BSB in furthering the regulatory objectives in relation to immigration advice and services; in particular improving access to justice, protecting and promoting the interests of consumers, promoting competition in the provision of services and encouraging an independent, strong, diverse and effective legal profession.

Below are responses to the specific questions posed by the LSB:

**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?**

11. The BSB agrees with the first and third key issues that the LSB has identified (regulatory architecture and complaints). However on the second issue identified by the LSB (quality and accreditation arrangements), whilst the BSB accepts that more research may be needed to identify whether there is a problem in this area, this in itself does not mean this is a problem area, especially given the lack of evidence. As a result the BSB is of the view that this should not be a priority, particularly for the BSB, given the small amount of immigration work barristers actually carry out. The BSB does not accept the proposals that the LSB has set out on what the qualifying regulators need to do in this area, or the proposed timeframe. Rather, the BSB believes that the appropriate course is to push on with the work that is already in hand on the Regulatory Standards Framework and new Handbook (and to gather further information via chambers monitoring).

**Our review focused on private individuals (legally aided or not), rather than small and medium sized enterprises or other business. 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?**

12. The BSB agrees that the issues identified are likely to affect small and medium sized businesses in the same way as private individuals. The BSB has no evidence to suggest otherwise.

**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?**

**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?**

**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?**

13. The BSB's view is that the key risk for all consumer types identified in the tables will be the same and that would be, that those giving immigration advice are not competent to do so and give poor advice.
14. The BSB does agree that the consumer base for those seeking immigration advice and services may be particularly vulnerable, however the risk identified is already mitigated by existing rules in the Code. Specifically the general rule requiring barristers to undertake CPD, should ensure that barristers keep their knowledge up to date and rules in part 6 of the Code should ensure that a barristers should not accept work in this area if they lack sufficient experience or competence to handle the matter. In relation to public access, the public access rules specifically state that a barrister may not accept direct instructions from a lay client if it would be in the best interests of the client or in the interests of justice for the client to instruct a solicitor or other professional client.
15. There are no special accreditation requirements that a barrister has to undertake before providing other specialist work, and the BSB considers immigration work to be no different in this respect. Whilst the BSB accepts that there are problems in this area in relation to the regulatory architecture and complaints system, it does not agree with special arrangements needing to be put in place solely for immigration advice and services, or that it needs to be dealt with in isolation from other areas of work.
16. Whether specific arrangements needed to be put into place was consulted on in the development of authorisation to practise arrangements consultation (issued in June 2010). As part of this consultation the BSB posed the question of whether all barristers with a practising certificate should be authorised to provide immigration advice and services and if not what should be the basis for deciding which barristers should be authorised to carry out this type of work. The responses to that consultation provided no support or agreement to putting in place specific authorisations for immigration advice and services.
17. At the moment the BSB's main source of information about risks is the complaints data it has. Although this data has limited value as a source of information, the very fact that there are so few complaints suggests that this area of work is not a major problem amongst barristers.

**What further action should the LSB and qualifying regulators, jointly or individually, be undertaking on this issue?**

18. At the moment the BSB considers that little further action is needed given the lack of evidence that there are major problems in this area. The LSB or qualifying regulators could potentially consider carrying out a consumer survey in this area, and taking a more detailed look at the accreditation arrangements, however such action may be disproportionate, given the absence of evidenced problems.

**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?**

19. Introducing voluntary arrangements between the Legal Ombudsman and the OISC would mean that the complaints process would be more streamlined and consumers would have the same recourse to redress in the event of a complaint against all qualified people providing immigration advice and services. However, the practicality of such arrangements would need to be addressed with the OISC and the Legal Ombudsman.

Conclusion

20. Whilst the BSB recognises the need to assess the risks to clients in this area of practice, it believes that it would be premature (and potentially disproportionate) to require qualifying regulators to have implemented new systems by the end of the year, specific to the regulation of this area of practice, in the absence of clear evidence that this is necessary to protect clients and the public interest.

**Bar Standards Board  
May 2012**