

Asylum Support Partnership



Asylum Support Partnership response to “Oversight of the Immigration Advice Sector” consultation

August 2009

About the Asylum Support Partnership

The Asylum Support Partnership (ASP) consists of five lead agencies: Refugee Council, Refugee Action, Scottish Refugee Council, Welsh Refugee Council, and the North of England Refugee Service which is a sub-contractor of the Refugee Council. These agencies are contracted by the UK Border Agency (UKBA) to deliver a range of services to asylum seekers, refused asylum seekers and refugees across the UK. The Partnership advises asylum seekers on making applications to UKBA for asylum support payments and accommodation, and provides advice to refused asylum seekers who require assistance.

Introduction

As a partnership of agencies committed to promoting the rights and the welfare of asylum seekers and refugees, the ASP recognises the importance of high quality legal advice. In our role as reception assistants, our responsibilities include helping to ensure that asylum seekers understand the asylum process and are able to access legal advice: essential components of an asylum system that is fair. As a focal point for asylum seekers, they come in to our services throughout the process, suffering from a range of problems including the inability to find a lawyer or the poor quality of the services received.

Most of our caseworkers are qualified to give advice to OISC Level 1 and while some have OISC Level 2 and additional legal qualifications, our agencies almost always refer clients to independent legal representatives for the specialised legal advice that they require. Relevant matters dealt with by the ASP agencies in connection to immigration advice as defined by the OISC include applications for work permits and other immigration employment documents, and applications for travel documents. Given this role, our frontline services are well placed to comment on the impact of changes to the regulatory framework and the difficulties in accessing quality legal advice for asylum seekers.

Summary of response and main concerns:

The Asylum Support Partnership:

- believes that these proposals would impact upon the ASP's capacity to support vulnerable asylum seekers and refugees and would undermine the efforts of the Partnership to promote high quality legal advice and services.
- opposes the proposal to extend the regulation charging regime to include currently exempt not-for-profit advice providers, including the ASP agencies and Refugee Community Organisations (RCOs).
- believes that the costs incurred through regulation should be borne by the government in recognition of the benefits to all in society of free and equal access to good quality legal advice.
- believes that the OISC should work towards more effective regulation in order to protect clients and ensure that the advice they receive is of the highest quality. This can best be achieved through appropriate resourcing to reinforce existing powers and to establish a wide network of registered advisors.
- believes that an increase in the powers of the OISC is unnecessary and will place a further burden on the Commission itself and on the regulated advice providers. Any extension to the powers of the OISC should be based on firm evidence of need, of which the consultation provides very little, and should not further limit clients' access to appeal procedures.

Specific questions:

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

The ASP recognises the importance of regulating immigration advice in order to protect clients from incompetent or unscrupulous providers and to ensure that all organisations or individuals providing immigration advice reach the required standard of quality. However, it has been a significant and welcome feature of the current regulatory framework that those advisors who provide a free public service, and are therefore least able to afford the financial burden, are exempt from any fees. Regulation should not impact adversely on not for profit agencies that comply with their obligations and seek to provide the best service to their clients.

We recognise the benefits to immigration advisors of the comprehensive programme of training and support that the OISC offers. It may be worth noting that for the ASP agencies, OISC registration only relates to a very small proportion of our work, as the agencies advise on asylum support rather than giving legal advice on the asylum claim. However, for other organisations, we recognise that OISC training has helped to build their capacity to reach the necessary standards and to better understand their entitlement to provide immigration advice and services.

Importantly, the OISC is not the only regulator in the field. ASP agencies in England and Wales are also accredited to and audited by the Legal Services Commission (LSC) under the General Help Quality Mark, which has recently introduced a charging regime. The OISC Code of Standards, to which all providers must comply, has been partially matched to the LSC Quality Mark, in order to maintain consistency between the two schemes and to reduce duplication of effort by providers in meeting the auditing requirements. In practice, not-for-profit providers in England and Wales obtaining the Quality Mark will be partially passported for the purposes of the OISC scheme. They must, however, meet additional OISC requirements (relating to behaviour and competence), which are not covered in the Quality Mark. It would be helpful if

there was more cross-referencing between the two schemes in order to decrease the burden on advice providers and increase the efficiency of auditing arrangements.

In addition, Citizens Advice regulates its own bureaux, while the Law Society, the Law Society of Scotland and the Bar Council provide regulatory oversight of solicitors and barristers.

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

Partnership agencies have reported varied experiences of OISC regulation, ranging from 'light touch' and 'desk-based' to 'thorough' and 'useful'. However, as stated above, the OISC does not relate to the majority of the ASP's advice work. With no more information on the impact of the OISC auditing on the immigration advice sector, it is hard to make a judgement on whether current regulation arrangements are meeting their objectives.

Partnership agencies have reported shortcomings in the service provided by the OISC, including the failure to conduct follow-up audits, lack of acknowledgement of the departure of registered advisors, or lack of response to queries including entitlement to perform a particular service. However, there is no evidence to suggest that the introduction of new investigatory powers or penalty notices would improve this situation. Instead, it may be more appropriate to enable and resource the OISC to use the powers it has more effectively. If its powers are to be extended then we would expect to see adequate remedies and safeguards in place to prevent the misuse of such powers.

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

Yes we do. However, the ASP would like to see more evidence of the impact of the OISC regulatory regime on the immigration advice sector, including an evaluation of what currently works and does not work within the system.

Any proposals to amend the existing regulatory structure should be based on the principle that audit arrangements are intended first and foremost to improve the quality of and access to legal advice, for the benefit of the client.

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

The ASP agrees that the regulator should seek to prevent convicted immigration advisors repeating unlawful behaviour in order to protect vulnerable clients. However, some smaller advice agencies and RCOs may be unaware of the legal requirements and this should constitute a legitimate defence against penalisation. Furthermore, there must be a mechanism for appeal against conviction, any sanction imposed should be subject to discretion for the individual circumstances, and the length of the ban must be proportionate to the seriousness of the offence.

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

The ASP supports the proposal of a single register but stresses that it should be designed with the client needs in mind. The list should specify clearly which advisors charge for their services and which do not, where in the country the advisor is based, what sort of immigration advice they provide (i.e. asylum or managed migration) and the level of advice.

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

It is unclear what problem this proposal is intended to fix, although it appears to relate to a perception that the OISC has insufficient power to do a proper job. As mentioned under Q.1, there is little evidence to support this perception, and a more cost-effective approach would be to equip the OISC to use its existing powers more effectively.

There is very little information provided on the nature and purpose of the Improvement and Prohibition Notices. The consultation documents does not specify what practices would incur a Notice, what sanctions would follow from a failure to comply with the Notice, and what right of appeal exists to those who believe they have been wrongly issued with a Notice. It is also unclear what these Notices add to existing powers. Under current arrangements an auditor can already send a strongly worded letter to an advisor setting out the OISC concerns and suggesting remedial actions. On a more serious level, an individual or organisation that provides immigration advice and services but is not registered or exempted from the scheme is committing a criminal offence and is therefore liable to a fine and/or up to two years imprisonment.

On closer inspection, the proposals appear to be an attempt to target the submission of '*numerous speculative or unfounded applications to UKBA...*' and to tackle those who '*encourage applicants to pursue and submit cases to appeal when there is little hope of success*'.¹ While no details are given on the number of unsuccessful applications that are necessary to incur a Notice, this does suggest some form of further merits test.

Under the 1999 Immigration and Asylum Act the Commissioner is obliged to promote good practice in immigration advice. The OISC is also required to ensure that those who provide immigration advice or immigration services among other things are fit and competent to do so and do not abuse immigration or asylum procedures, including appeals, or provide advice that would lead another person to do so. However, there is already a mechanism in place to deal with this, in the form of the LSC contractual obligations, and it is unclear if this is an attempt to raise the bar higher.

The Partnership is concerned that clients are already experiencing difficulty accessing legal advice due to the need for LSC-contracted solicitors to apply the 'sufficient benefit' test at the initial application stage, and the CLR merits test, before taking up an appeal. Furthermore, they must show that they have been successful in 40% of appeal cases in order to retain legal aid funding. Both these requirements lead solicitors to exercise a high level of caution when agreeing to take on a case, including cases that have a valid claim to some form of protection². The result is that asylum seekers and refugees are deprived of the very means with which to mount an effective challenge to the refusal of their asylum claim and consequently they may be forced to return to face persecution in their country of origin or end up unlawful and destitute in the UK.

It is inappropriate for the OISC to make the judgement as to whether launching an appeal is in the best interest of the client, and issue Improvement or Prohibition Notices to ensure compliance with the government's immigration policy objectives. It is the role of the OISC to investigate and judge the quality of legal advice based not on outcomes but on the evidence laid before it both in the documentation submitted by the provider and during an audit at the provider's premises. Where malpractice motivated by financial considerations occurs (therefore

¹ Impact Assessment of proposals to address oversight of the immigration advice sector within the Immigration Simplification Bill, page 5, paragraph 11.

² The Asylum Appellate Project found that solicitors had wrongly refused Controlled Legal Representation in over 80% of cases, and almost a third of all asylum seekers who were refused Controlled Legal Representation had a valid claim to some form of protection. Asylum Appellate Project, Second Year Report.

excluding the not-for-profit sector) there is a need for remedial action. However, we are not convinced that Notices are the most appropriate way to deal with this.

Q.6 Do you feel the existing audit arrangement of the OISC are effective? Would additional powers be helpful? If so, please explain.

This has been answered in Questions 1 and 5.

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 (eg. per organisation/per adviser etc.)?

The immigration advice sector can be divided into those who charge for their services and those who do not. The ASP considers it appropriate to apply a fee to those advisors who charge for their services and therefore make a profit. This fee could be on a sliding scale according to the size of the advice provider.

For the ASP position on charging not-for-profit advice providers, see below.

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.

This proposal, which follows closely behind the introduction of a fee of between £750 and £1,500 to attain the LSC General Help Quality Mark, will have serious implications for RCOs and other small advice giving agencies that will not easily be able to absorb the costs of regulation. Community groups, often regulated at OISC Level 1, provide a trusted resource for the most vulnerable and isolated people in society. Many exist on a limited budget, often funded by trusts and charities that will finance only the core work of the organisation and not the costs of regulation. Some may be forced to pass the costs on to people accessing their services which would, in turn, further restrict access to legal advice for the most vulnerable. Some agencies may be forced to abandon the OISC registration and will no longer be able to provide immigration advice. This will leave clients with fewer advisors to choose from and, as a result, it may be even harder for people seeking asylum or with humanitarian or refugee status to access their rights and entitlements in the UK. This may be further impacted by recently announced Government proposals to increase revenue by charging for immigration services. Clients may receive no or bad advice and may lose cases they should have won. They may be wrongly removed from the UK and returned to face torture and death. Such a scenario undermines the government's efforts to guarantee the provision of good quality legal advice at the earliest opportunity; the foundation of a fair and efficient asylum system.

There is no doubt that it makes sense to keep advice agencies providing legal immigration advice within the OISC regulatory framework for everyone's benefit. Some RCOs tell us that the OISC accreditation has been a benefit to them in terms of the capacity building, advice and support offered by the Commissioner. This in turn has contributed to improving the level of service offered to their communities as well as enhancing their profile as a voluntary agency when it comes to submitting funding applications.

In the case of publicly funded advisors, including the ASP, grants are provided by central government, local authorities or the Legal Services Commission. If these agencies opt to pay the fee and continue with the OISC regulation, they may be able to pass the cost on to the funders, in which case it will still be met by public funds and would simply involve moving money between different parts of the government. As smaller agencies withdraw from the OISC regulation, their clients will most likely come to the ASP seeking assistance and advice, placing an even greater pressure on an over-stretched resource and ultimately increasing UKBA costs. If the ASP were obliged to absorb the cost of registration within its existing budget, with

no additional funds made available, we would be forced to divert money away from essential services and may, therefore, need to reconsider the value of continuing with the OISC registration.

Severe limitations on the funding of legal aid have already led to a large number of immigration practitioners ceasing to work in the field. The ASP often sees asylum seekers who have difficulty accessing legal advice. According to evidence collected by ASP frontline services, in several areas the majority of clients have only been able to find a solicitor to represent them until their initial asylum refusal. In several areas the majority of clients are unable to find a solicitor to represent them either through appeal stage or post-appeal, and there are gaps in meeting specific needs at all stages. A number of solicitors firms have closed since the legal aid cuts in 2004 and some have explained that this is a direct result of the cuts³.

Efforts to charge not-for-profit advisors for immigration regulation is further undermined by the lack of evidence to suggest that not-for-profit advisors are guilty of incompetent or unscrupulous behaviour. In many cases, the voluntary sector offers a model of good practice in the delivery of good quality non-legal advice and support services. Furthermore, ASP caseworkers are uniquely placed to gather reports from asylum seekers and refugees on whether they are able to access adequate and high quality legal advice. At least three of the Partnership agencies receive regular reports of poor quality legal advice in their regions. In this way, the ASP contributes to the monitoring of clients' legal advisors and raises clients' awareness of their own rights and responsibilities.

The ASP is concerned that these proposals undermine the principle that not-for-profit advice providers perform a public service free of charge and, therefore, should not pay a fee to provide advice. The costs incurred through regulation should be borne by the government in recognition of the benefits to all in society of free and equal access to good quality advice. The OISC should be adequately resourced to perform the functions it was commissioned to undertake. The addition of further investigatory arrangements will in our view simply add to the financial strain under which the OISC is currently struggling.

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?

No, there should be no charge applied to the not-for-profit sector.

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

As we do not provide legal advice we will refrain from answering this question.

Q.11 Do you agree with our intended approach? Please give reasons.

We do not agree with the proposal to charge the not-for-profit sector for the cost of regulation.

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

The OISC should be adequately resourced to carry out the functions it was set up to perform. The OISC and the LSC should cross-reference their auditing arrangements to decrease the regulatory burden on registered advice providers.

³ Long term impact of the 2004 Asylum Legal Aid Reforms on access to legal aid. Refugee Action, May 2008.