

# Refugee Council

## policy response



## Refugee Council response to the UK Border Agency Consultation *Oversight of the Immigration Advice Sector*

August 2009

### About the Refugee Council

The Refugee Council is a human rights charity, independent of government, which works to ensure that refugees are given the protection they need, that they are treated with respect and understanding, and that they have the same rights, opportunities and responsibilities as other members of our society.

We achieve this mission by:

- supporting refugees and working with them as they build a new life
- speaking up for refugees and ensuring that refugees themselves have a strong voice in all areas of UK life
- building links with people from across our society to increase mutual understanding of refugees
- making the case for a fair and just asylum system
- taking a leading role in helping to build up a vibrant, sustainable and successful refugee sector in the UK and internationally

### Summary of response and main concerns:

#### **The Refugee Council:**

- is strongly opposed to the proposal to extend the charge for regulation to agencies that provide free advice services, such as refugee community organisations.
- believes that these services should be regarded as a public service and not be subject to regulatory fees.
- believes that those that do charge for their services should not be expected to subsidise those who do not.
- believes that the OISC needs to improve its ability to monitor and respond to issues but attributes shortcomings to a lack of resources not a lack of powers.
- does not believe that the case has been made which justifies the additional powers being sought. The problems outlined by way of justification ought to be tackled through existing regulatory powers.

- is concerned by the implication that OISC may see itself as operating by considering some form of merits test.
- is concerned that immigration law logically ought to be under the inclusive umbrella of the Legal Services Board and there is insufficient information in the Consultation document to explain why this is not the preferred option.

## Introduction

Amongst our key stakeholders are the numerous refugee community organisations (RCOs) which provide advice and support for their communities. These are commonly organisations struggling for their very survival on restricted budgets, relying substantially on the work and support of volunteers. What funding they do receive is usually grant aid from charitable or government sources and earmarked for a specific project or purpose. Many will not be able to afford the £400 charge proposed in this Consultation document. It is the impact of the proposal to charge the costs of regulation to all on the register, ending the current exemption for those organisations that do not charge for their services, that concerns us most about the proposals contained in this Consultation. The Refugee Council believes that the proposal has serious implications for refugees and asylum seekers ability to access high quality immigration advice services provided by voluntary and community services.

## Background to regulation

The Refugee Council welcomed the regulation of immigration advice when it was introduced in 1999. We were pleased that action was taken to tackle unscrupulous advisers exploiting desperate and vulnerable people in an environment where the provision of immigration advice was completely unregulated. Our concern when regulation was introduced was that it should not impact adversely on RCOs who were, and remain, crucial providers of advice to refugees and asylum seekers.

RCOs are a crucial and much-used source of advice and information available to refugees. This is one of the bedrocks of refugee support and advice. We believe these organisations should be exempt from this charge, as they rely on small amount of specific project income, and they are playing a vital role in providing advice, information and supporting their community members during initial stage of settlement and facilitating their long term integration in the UK. They also play a very important role in holding their communities together through organising social, cultural, leisure activities, and complementing services of other mainstream organisations including statutory bodies and voluntary sector organisations.

The Refugee Council's concerns when regulation was introduced were that it would be very difficult to draw the line about what does or does not fall within the overall framework and that RCOs would struggle to meet the standards and the cost of regulation. We did not suggest that RCOs should come outside regulation entirely, since bad immigration advice is bad advice, no matter how well intentioned it is. Fortunately, the pragmatic and sensible approach was adopted by the Commissioner whereby any organisation giving immigration advice was required to reach the required standard of quality but, providing they were not charging for their services, they would be exempt from any fees.

Underpinning this approach was the Commissioner's far sighted programme of training and support to organisations to enable them to reach the necessary standards and enable them to understand what the constraints of regulation represent. This has led to a substantial number of RCOs becoming regulated by the OISC and has enabled them to offer advice services to their communities with confidence. The fact that they have been able to satisfy the Commissioner also greatly enhances their profile as an agency that people can approach with confidence and on whose services and advice they may rely. This in turn makes them more attractive to potential funders and also means they can work with other agencies on an equal footing.

## Legal aid and access to advice

The other major development in the immigration advice field since regulation was introduced is the severe limitations on the funding of legal aid.<sup>1</sup> This has led a large number of immigration practitioners to stop working in the field. Those that continue to practice immigration law do so under growing pressures of cost and time. Criteria such as the merits test, with its 40% success target,<sup>2</sup> operate to discourage practitioners from taking cases to appeal. The result is that asylum seekers and refugees are finding it increasingly difficult to get legal advice and will increasingly turn to links and contacts within their own communities. The last thing that the Refugee Council would want to see is this crucial safety net being compromised by an inability of RCOs to afford the costs of regulation.

We will now address the specific questions within the Consultation document.

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

Yes, the Refugee Council believes that it is beneficial.

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

Our main experience of regulation stems from the fact that Refugee Council's own advisers are registered at Level 1. Our impression as an exempted provider is that the OISC is under resourced to carry out the full range of its functions. For example since our original audit and registration in 2003 the only other review has been an online assessment of advisers in 2007/8. As advisers join us and leave we notify OISC, but their record keeping has sometimes been poor and documents go missing.

When we have had a particular query, such as whether our advisers are entitled to cover a new legal advice issue, such as assisting in the completion of various forms, we have not always been able to get prompt, or indeed helpful, advice and guidance from OISC.

We are concerned about the rudimentary nature of the register on the website which it is not easy to interrogate within the general geographical sort list. Thus, for example, it is difficult to create a list of Level 2 Advisers which are RCOs offering free immigration advice in a particular area and not possible to find details of individual advisers.

Our Advisers have also reported significant difficulties accessing online materials and registering Continuous Professional Development, due to on-going problems with OISC's website.

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

We do not see the problems that there are with OISC as due to a lack of powers, but believe rather that they are under resourced and unable to effectively use the powers it has. The additional powers being sought ought to be unnecessary if the current system was functioning effectively.

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<sup>1</sup> The number of hours allowable for initial legal aid work for asylum was restricted to five in April 2004. In 2007 the government introduced a fixed fee allowance for asylum work. Both measures led to significant numbers of experienced immigration practitioners leaving the field.

<sup>2</sup> It is a requirement of the legal aid immigration contracts that suppliers are successful in 40% of the appeals they agree to fund.

There may be some merit in bringing this area of law under the general framework of the Legal Services Board.

See our responses to questions 5 and 10.

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

It is difficult to answer this question with the limited information in the Consultation document. The Refugee Council believes that it is clearly desirable to prevent people repeating unlawful behaviour but it depends how this power is exercised. A great deal depends on the nature of the offence and the opportunity to display whether any remedial action has been effective.

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

Yes. The fact that some organisations are exempt from the fee does not necessitate two separate registers. The database should simply make clear which organisations charge for their advice and which do not. The client wants to know whether s/he is going to be charged not whether the organisation has had to pay a fee to be registered. We recommend that a single database register be developed which can then be sorted by area according to the level of advice offered and what the charges are, if any.

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

It is difficult to form a view on the need for these additional powers without more information about the scope of existing powers and the extent to which they have been effectively used and found wanting. If additional powers are needed then they should clearly be provided for but our assumption has been that the various problems outlined in the Consultation document to explain the need for these additional powers ought to be addressed by the routine procedures of regulation.<sup>3</sup>

The whole purpose of regulation is to ensure compliance at a certain level and subject this to regular review. If in the process of review a provider no longer meets the required standard it can be required to take various actions or lose their regulated status. If breaches are sufficiently serious, such as continuing to give immigration advice even though the qualified person has left, then providers are, we assume, committing a criminal offence and can be threatened with prosecution. The demand for these additional powers rather suggests that this basic regulation is ineffective and there is a desire for powers to attack the most obvious shortcomings rather than getting the system itself to work.

We are particularly concerned about references in the Impact Assessment which suggest that one purpose of Improvement notices is to "Prevent those who currently seek to frustrate and delay the process from continuing to do so"<sup>4</sup>. In the outline of "The problem" there is reference to advisers encouraging "applicants to pursue and submit cases to appeal when there is little hope of success".<sup>5</sup>

<sup>3</sup> See for example 1999 Immigration and Asylum Act; Schedule 6 Registration, Section 3 (5): "If the Commissioner considers that an applicant for continued registration is no longer competent or is otherwise unfit to provide immigration advice or immigration services, he must cancel the applicant's registration".

<sup>4</sup> Impact assessment: Regulatory changes paragraph 26

<sup>5</sup> Ibid paragraph 11

Taken together these references seem to suggest that the OISC regulator is implicitly conducting some form of merits test, making assessments of the likelihood of success at appeals for a range of cases and serving a notice on the organisation if it felt it was acting inappropriately. It is difficult to envisage what the trigger would be for such a notice to be served and in any event this goes way beyond the role and powers of the OISC. The Refugee Council believes that the independence of the regulation of immigration advice must be protected. The OISC's role is to ensure that those giving such advice are competent and qualified to do so and not to form views on the content of the advice given in particular cases.

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

See responses to questions 1 and 5 above.

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 Refugee Council does not believe that the whole cost of regulation should be borne by those that are regulated. Many of the organisations currently exempted from the charges are refugee community organisations providing essential information, advice and referral for their communities. The majority of these are charitable organisations entirely dependent for their funding either on statutory sources or institutional voluntary charitable funding. Where they have funding for this work they may be able to pass on the cost but in such cases the money would be coming from the public purse. Many RCOs will not be able to pass on the cost and will be faced with either ceasing giving any immigration advice or risk acting unlawfully.

Many RCOs give advice and assist with form filling and explaining procedures on a wide range of issues such as applying for travel documents, settlement and integration, life in the UK certificates and ESOL, naturalization and British passports, visiting and studying in the UK and how to find employment. In cases where they are precluded from helping at their level they form a vital link between the client and more expert advice by way of referral and practical help. This can be vital in situations, such as where an individual is detained and needs help with, for example, finding and liaising with a solicitor, interpreting, form filling and assisting with preparatory work that maximises the effectiveness of the legal adviser. It is important in this situation where activities may be borderline in terms of regulation to have a sound basic understanding of what can and cannot be done in the context of that regulation.

It is far better to have such organisations within an overall regulatory framework, properly trained and informed, subject to inspection, and aware of their regulatory limitations than it is to have them outside and beyond the regulatory processes. RCOs perform a public service at little or no cost and should not be expected to pay for the cost of their regulation as they simply do not have the resources to do so.

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.

See Q.7. The Refugee Council believes that many small advice providers such as RCOs will simply be unable to pay the fee and will be severely limited in their continuing ability to help their communities.

We also believe that those providers that do charge for their services can be expected to pay a fee for their registration. It would not, however, be reasonable to expect them to subsidise those that remain exempt.

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?

The Refugee Council does not believe that those who do not charge for their service should pay any fee. We propose that those providers that do charge should pay a fee based on a sliding scale according to turnover.

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

The Refugee Council does not believe that immigration law should be kept outside the overall regulatory framework of the legal system in the UK. Inclusion in that framework would ensure that the regulation of immigration advice is independent of all other immigration considerations. The reasons advanced against Option 3 seem to rest on the complexity of working with different legal systems but there is insufficient information to indicate why these practical problems cannot be overcome.

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

We do not believe it is right 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 Refugee Council is concerned that the OISC does not appear to be adequately resourced to perform its existing regulatory functions. We believe it should be sufficiently resourced to perform the full range of its current functions.

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