21st April 2006

The Clerk to the PLA Bill
Justice 2 Committee
Room T3BO, Scottish Parliament
Edinburgh
EH991SP

Dear Sirs,

Scottish Parliament: Justice 2 Committee
Legal Profession and Legal Aid (Scotland) Bill

I herewith enclose the comments of the Office of the Immigration Services Commissioner regarding the aforementioned proposed legislation.

Given that the Immigration Services Commissioner has a statutory function with regards to complaints concerning immigration matters made against members of the Law Society of Scotland and the Faculty of Advocates, I was somewhat concerned that I was not formally notified of the ongoing consultation. It would be appreciated if you would keep my Office appraised of future developments.

The OISC has commented on the Bill as currently drafted, with all complaints concerning immigration advice or service excluded from the work of the Commission and remaining with the OISC by virtue of section 47.

We assume, given the explanatory notes, that at some future point in time section 47 will be modified to bring complaints against members of the Law Society of Scotland and the Faculty of Advocates within the Commission’s remit, with complaints relating to immigration advice and services against advisers remaining with the OISC.

Close future co-operation between all relevant parties in order to ensure that the legislation is precise and fully protects the public will, in our view, be very important.

Yours faithfully,

Suzanne McCarthy
Immigration Services Commissioner

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The Office of the Immigration Services Commissioner (OISC) was established under Part V of the Immigration and Asylum Act 1999. It is an independent, executive Non-Departmental Public Body sponsored by the Home Office.

The 1999 Act makes it a criminal offence for an adviser to provide immigration advice or services in the United Kingdom, unless he/she is:

- Registered with the Immigration Services Commissioner;
- Exempted by the Immigration Services Commissioner;
- A member of a Designated Professional Body (DPB) (e.g. a solicitor); or
- Exempted by Ministerial Order.

It is also a criminal offence to offer immigration advice or services whilst unregulated.

The powers vested in the Commissioner by the 1999 Act include the following:

- To regulate immigration advisers in accordance with the Commissioner’s Rules and Code of Standards;
- To promote good practice by those who provide immigration advice and immigration services;
- To establish a scheme for the investigation of relevant complaints;
- To arrange for the publication of information about the Commissioner’s function;
- To maintain a register of OISC authorised advisers;
- To prosecute those acting outside of the Scheme; and
- To monitor the effectiveness of how the Designated Professional Bodies regulate their members in respect of their provision of immigration advice and service.

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1 All organisations, including those exempt by Ministerial Order must abide by the OISC’s Code of Standards. Registered organisations must comply also with the Commissioner’s Rules.
Office of the Immigration Services Commissioner

As stated, everyone who gives, or offers to give, immigration advice must be regulated. Generally, this results in a consumer choosing between a solicitor regulated by a DPB, e.g. the Law Society of Scotland, and an adviser regulated by the OISC.

While the Bill proposes to exclude immigration advice and services by virtue of section 47, there are, however, matters contained within the Bill that have the potential to cause both confusion and unintended overlaps in the respective functions of the OISC and the Scottish Legal Aid Board.

The proposed Bill covers two distinct matters: legal complaints and legal aid. As drafted, it would appear that section 47 is applicable to both matters.

We assume that the inclusion of the Register of Advisers would enable legal aid to be made available to non-solicitor organisations/advisers, for example Citizens Advice Bureaus and Law Centres, and we would support such a change.

The Bill does not define advisers, although it does define registered advisers. If “adviser” is synonymous with “practitioner”, then section 47 appears to prevent them from applying for legal aid in respect of immigration work. Thus advisers, including CABs, will not be eligible to apply for legal aid in respect of immigration work, and, in the long term, if solicitors withdraw from the immigration sector, there would be little likelihood of the non-solicitor sector bridging the gap.

While the OISC fully supports the proposal that all complaints pertinent to immigration advice and services should be excluded from the Commission’s remit since they are already subject to OISC regulation, the current proposal does appear to lack clarity.

With respect to the generality of the proposals we have particular concerns as explained below.

Access to legal advice

The proposal that all solicitors will be required to pay a levy and thereafter a fee per complaint received, even if the complaint is found to be unsubstantiated, in our opinion, it is likely to result in a decline in the number of solicitors willing to provide immigration advice and/or other legally aided matters once complaints about them begin to be brought before the Commission or even prior to that if they take the view that such complaints might be forthcoming.

The cost of legal advice

Given that solicitors will be expected to fully fund the Commission, it would appear inevitable that some, if not all, of the costs will be passed back to their clients. Any increase in legal costs without requisite offsetting by increases in Legal Aid fees may result in many people having difficulty in finding legal advice. Those who are either so well off that the cost does not matter or so poor that they are automatically granted legal aid funding will be the only ones certain of not being denied access to justice. This
could impact most on the vulnerable. Further, given that Legal Aid fees are likely to be fixed, it is probable that solicitors will be less inclined to take on legally aided work.

**The potential for the diminution of legal standards**
While some solicitors will continue to practice as such, it is feasible that others could chose simply to trade under the title "lawyer", a term not reserved. Further, they would not need to be a practicing member of the Law Society.

This would mean that they were outside the regulatory ambit of the Law Society and would not need to comply with matters such as Continuing Professional Development. If this were to be the case in the long term, then the quality of service and access to good service would be prejudiced.

We believe that there should be strong links between those who identify defects in conduct and those who regulate/ provide training/ set standards. Then if gaps in ethics, knowledge etc. became apparent, they can be promptly addressed.

**An increase in the provision of illegal immigration advice**
If the number of solicitors providing immigration advice decline, it is unlikely that the shortfall could be met in the medium or short-term by regulated advisers. (Currently, the OISC regulates 76 CABs and 23 other advisers in Scotland.) We are concerned that unregulated and unscrupulous persons, preying upon vulnerable clients who are not familiar with UK law and practice, could fill gaps in provision that might arise. This would expose clients to the risk of fraudulent practice and poor advice.

**The prospect of confusion to consumers as to what is meant by registered advisers**
The legislation as drafted will require SLAB to establish a Register of Advisers; persons approved by the Board to give advice and assistance. The OISC is also statutorily required to provide a register of advisers – persons who are fit and competent to provide immigration advice and services. The term ‘registered adviser’ would therefore apply twice with different meanings to the same individual with the potential for confusion, both to consumers and to advisers. Since it is a criminal offence to provide immigration advice or services while not regulated, we would not wish to see a situation arise whereby individuals could assume that by being registered by SLAB they were not required to register with the OISC.

In the interim, given that the definition of complaint in section 34 of the Bill is much wider than that in the 1999 Act and the powers for redress to the consumer available to the Commission will be greater than those available to the OISC, it is possible that persons may attempt to have their "immigration" complaint taken on by the Commission, especially if it is about the conduct of the solicitor rather than the standard of the service. Accordingly, there will need to be a clear Memorandum of Understanding between the Commission and the OISC ensuring that all relevant complaints are transferred to the OISC.
Office of the Immigration Services Commissioner

Having regards to the detail of the Bill and associated documentation, our comments are as follows.

Section 3 We note that the Commission will expect clients to complain to their legal provider in the first instance. The OISC does not require this since, in some instances, the complaint may relate to the threatening behaviour of the adviser(s). Indeed, it is often from such complaints that the OISC can establish criminal activity.

In addition, there is the prospect that solicitors, in dealing with a complaint at local level prior to it being referred to the Board, may be tempted to negotiate with the client to reduce the likelihood of the complaint progressing. While this may result in some clients getting a prompt and appropriate remedy, others, not fully aware of the implications, may settle without the benefit of any independent input.

Section 4 While accepting that the Clementi Review in England and Wales advocated the splitting of complaints into conduct and service, the OISC believes that addressing matters of complaint holistically can be beneficial in identifying the problem, the potential solution and the appropriate sanction. If a matter is split and addressed as two separate issues then there is the danger that the underlying issue needing to be addressed could be diminished and not dealt with as seriously as it should be.

Section 8 We note that the Commission will be the first and final arbiter of complaints. We find this surprising given that the OISC has an independent Tribunal to oversee its decisions where they affect livelihood, a step that was established in order to provide transparency and compliance with Human Rights legislation.

Section 23 We note that the Commission will be required to make rules as to practice and procedure. Sub-section 5 details those to be consulted. While professional organisations and consumer groups are included, there is no reference to other regulators. Given section 47, we believe that other regulators, including the OISC, should be included in such consultations. This would assist in reducing double regulation and the possibility of introducing contradicting requirements.

Section 30 We believe that the production of best practice notes, should be subject to the same consultation procedures as detailed in section 23.

Section 34 The definition of a complaint as stated is very wide. While it is appreciated that clients should be able to raise all valid concerns, the definition appears to be so wide ranging that it goes beyond both conduct and service and could encourage vexatious or mischievous complaints.

The fact that the client has to make no contribution to the cost of the investigation, with solicitors etc. paying for all aspects even when the complaint is unfounded, could, we believe, result in a substantial increase in the number of complaints and related costs, but not necessarily in any improvement in the quality of advice.
Section 45 proposes changes to the Scottish Legal Aid fund to:

- Establish a Register of Advisers;
- Define advice and assistance;
- Define registered advisers; and
- Define an Adviser Code.

All of the above relate to persons who are not solicitors or advocates. As such these terms could relate to persons who provide immigration advice or services as well as other legal advice. These persons could also be regulated by the OISC either as registered or exempted advisers, notwithstanding whether or not section 47 applies.

As previously stated we are concerned about the prospects of confusion, either inadvertent or deliberate, that might arise from there being two methods of registration and two registers of advisers.

Section 47 relates to work undertaken by practitioners that is excluded from the Bill. While the definition of practitioners is focused on solicitors and advocates, it does go wider than this. Accordingly when, if at some point in the future section 47 is amended, the issue of the regulation of paralegals and others who are neither regulated by the Scottish Law Society or Faculty of Advocates nor by the OISC in respect of immigration complaints will need to be carefully considered.

Financial Memorandum
The OISC was established in 1999 and moved to its current office in 2003. Accordingly it has recent knowledge in respect of set-up costs etc. Based on this knowledge, the OISC notes the proposed costs for the establishment of the new Commissioner. Given the intended size of the organisation, we are surprised at the apparently low set-up and operating costs.

If these costs do substantially increase, the levy and cost per complaint will presumably also increase, which could have a further detrimental affect in the reduction of legal firms/solicitors. Further, the assumption that there will be 50 – 60 staff, which, given our knowledge of the Law Society of Scotland and the Faculty, seems to be a marked increase in resources for the new body compared to the numbers in the current organisations doing this work.

Office of the Immigration Services Commissioner
21st April 2006