OVERSIGHT OF THE IMMIGRATION ADVICE SECTOR
CONSULTATION

May 2009
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SCOPE OF THE CONSULTATION

<table>
<thead>
<tr>
<th>Topic of the Consultation:</th>
<th>The shape of future regulation of the Immigration advice and services sector.</th>
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<tbody>
<tr>
<td>Scope of the consultation:</td>
<td>The purpose of this consultation is to seek views from the public and other stakeholders on the scope and structure of future regulation of the immigration advice and services sector.</td>
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<tr>
<td>Geographical Scope:</td>
<td>United Kingdom wide.</td>
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<tr>
<td>Impact Assessment:</td>
<td>A partial impact assessment is attached at Annex A. If legislative amendments are proposed a further draft impact assessment will accompany the draft Immigration Simplification Bill later in 2009.</td>
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BASIC INFORMATION

<table>
<thead>
<tr>
<th>To:</th>
<th>This is a public consultation and anyone who wishes to do so may comment. However, organisations that provide or work with those who have obtained immigration advice or services and individuals who have received immigration advice or services are in particular invited to comment.</th>
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<tr>
<td>Duration:</td>
<td>This is a 12 week consultation starting on Thursday 14 May 2009 and closing on Thursday 6 August 2009.</td>
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<tr>
<td>Enquiries:</td>
<td>A copy of this consultation document is available on the UK Border Agency website <a href="http://www.ukba.homeoffice.gov.uk">www.ukba.homeoffice.gov.uk</a> and Home Office website <a href="http://www.homeoffice.gov.uk">www.homeoffice.gov.uk</a></td>
</tr>
<tr>
<td>How to respond:</td>
<td>Any comments should be sent by email to: <a href="mailto:ImmigrationAdviceConsultation@homeoffice.gsi.gov.uk">ImmigrationAdviceConsultation@homeoffice.gsi.gov.uk</a></td>
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<tr>
<td></td>
<td>Comments may also be sent to: Immigration Advice Consultation UK Border Agency 6th Floor Green Park House 26 Wellesley Road Croydon CR0 2AJ</td>
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<tr>
<td>Additional ways to become involved:</td>
<td>As this is a largely technical issue with specialist interests this will be a purely written exercise.</td>
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<tr>
<td>After the consultation:</td>
<td>A document summarising the response to the consultation will be published within 3 months of the closing date for this consultation, and this will be made available on the Home Office website.</td>
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<tr>
<td>Compliance with the code of practice on consultation:</td>
<td>This consultation is compliant with HM Government’s Code of Practice on Consultation.</td>
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</table>
The Consultation follows the Government’s Code of Practice on Consultation – the criteria for which are set out below:

**Criterion 1** – When to consult - Formal consultation should take place at a stage when there is scope to influence the policy outcome.

**Criterion 2** - Duration of consultation exercises - Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

**Criterion 3** - Clarity of scope and impact - Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

**Criterion 4** - Accessibility of consultation exercises - Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

**Criterion 5** - The burden of consultation - Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees’ buy-in to the process is to be obtained.

**Criterion 6** - Responsiveness of consultation exercises - Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

**Criterion 7** - Capacity to consult - Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

OVERSIGHT OF THE IMMIGRATION ADVICE SECTOR

CONSULTATION

INTRODUCTION AND BACKGROUND TO LEGISLATION ON THE PROVISION OF IMMIGRATION ADVICE AND SERVICES

Introduction

1.1 This paper sets out for consultation proposals to change the way immigration advice and services are regulated in the United Kingdom. If legislative changes are to be made the aim would be to include them in the Bill simplifying immigration law which is due to be published in draft in the autumn of 2009.

Comments are invited over a 12 week period ending on the 6 August 2009.

Background

1.2 To those seeking immigration advice or services, obtaining professional and accurate information or advice from a trustworthy person is important. Many of those requiring the services of an immigration adviser are often vulnerable and therefore an easy target for an unscrupulous person.

1.3 We set out in ‘Making Change Stick’, the narrative that accompanied the partial draft Immigration and Citizenship Bill published in July 2008, that “we want the advice available to be of the highest quality. Effective oversight of immigration advisers is therefore crucial. We will therefore consult on any necessary regulatory changes for inclusion in the full Bill.”

1.4 We believe that effective oversight of the immigration advice and services sector promotes high standards in the provision of immigration advice and services and means that strong sanctions are in place to deal with those seeking to exploit vulnerable people or cheat the immigration system.

1.5 Since May 2001, the Office of the Immigration Services Commissioner (“OISC”), a Non-Departmental Public Body, has been responsible for oversight of the immigration advice and services sector in the UK.

1.6 The legislative basis for the current regulation of the immigration sector is Part V of the Immigration and Asylum Act 1999.

1.7 It is an offence to offer immigration advice and services without being registered, or exempted, by OISC. The only exceptions to this are those who are regulated by a Designated Professional Body, such as the Law Society of England and Wales and the Law Society of Scotland, their European equivalents, those who have been exempted by a Ministerial Order; those acting under the supervision of any of these and those acting for the Crown.

1.8 As at 31 March 2008 1,680 organisations and 4,061 individuals were being regulated by the OISC.

1.9 Since its creation, the OISC has driven up standards across the immigration advice sector. It has:

- Established a baseline for adviser fitness and competence
- Created a register which lists UK registered immigration advisers


2 Part V was amended by the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.
• Introduced a one stop complaints scheme for those in receipt of immigration advice and services – up to March 2008 OISC had received over 3,500 complaints about unregulated, OISC regulated and Designated Professional Body advisers.

• Prosecuted those who have provided immigration advice and services illegally – as at December 2008 there had been 77 prosecutions and 67 formal cautions administered.

1.10 In June 2007 the UK Border Agency set out its plans to fundamentally reform and simplify all immigration legislation. The consultation period on those initial plans concluded in August 2007 and an analysis of the responses was published in December 2007.

1.11 We are reforming the immigration law to make the legal framework clearer, more streamlined and easier for the public to understand. Changes in the law will support and enable the wider work to transform the immigration system and make it more effective. It will support quicker, easier and more efficient decision making and ensure both processes and likely outcomes are transparent. The availability of good quality advice on immigration matters to the public is also critical.

1.12 A high level analysis of the success of the OISC - including feedback from OISC and other stakeholders - confirmed that OISC was performing well as a regulator of immigration advice and services, but that there are a number of areas where regulation could be strengthened to raise the quality of advice across the sector, protect legitimate and professional advisers, and strengthen the protection for those seeking advice.

1.13 This consultation paper sets out a number of options for taking forward the regulation of the immigration advice and services sector as part of the wider reform of our immigration legislation.

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?
2.1 The effective regulation of the immigration advice and services sector is crucial to ensuring that the quality of advice provided to applicants is of the highest quality.

2.2 Effective regulation also ensures that those seeking to exploit vulnerable people or cheat the immigration system are prevented from doing so. Individuals engaged in providing immigration advice illegally may also be involved in other illegal activity, such as facilitation or providing false documents. Tackling illegal immigration advisers will therefore help reduce the harm caused to the public by immigration crime and assist the UK Border Agency in delivering its strategic objective of tackling border tax fraud, smuggling and immigration crime.

2.3 We have considered three options for the future regulation of the UK’s immigration advice and services sector for the purpose of this consultation.

2.4 The first option is to retain the existing regulatory framework broadly unchanged. The second option is to build upon the existing regulatory framework and make changes to reduce the potential for abuse and offer the public better value for money. The third option is to make immigration advice and services a reserved legal activity within the Legal Services Act 2007. These options are set out in more detail below.

2.5 Any changes to the regulatory framework that would increase the financial burden on businesses or the voluntary sector will not commence before 2011.

**OPTION 1**

**LEAVE OISC AND THE REGULATION OF IMMIGRATION ADVICE AND SERVICE BROADLY AS IT IS.**

2.6 The first option is to leave the existing legislative framework for regulation of immigration advice and services in place. This would mean that the OISC would continue to regulate the sector in the same way as it does now.

2.7 Maintaining the current regulatory framework has some advantages. There would be no new familiarisation costs or changes to guidance and training material. However, we believe that these benefits are small when compared to the overall benefits that strengthening regulation of the sector would bring. Amongst other things, enhanced oversight will help reduce exploitation of those people in most need of advice and will help reduce immigration crime.

**Proposals:**

- Retain existing legislation and regulatory framework.

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

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1 Consequential amendments would be required to reflect changes made by the legislation simplifying immigration law but this proposal would go no further than that.
OPTION 2
CONSOLIDATE OISC LEGISLATION, AMEND ITS FUNCTIONS AND REVENUE RAISING ABILITY

2.8 Our second option goes beyond consolidation of existing legislation relating to the Immigration Services Commissioner and includes new measures that are aimed at providing for greater levels of enforcement against those seeking to exploit individuals seeking immigration advice or services.

Strengthening regulation

2.9 We believe that there is merit in strengthening regulation to improve the effectiveness of the OISC and further protect those seeking immigration advice and services.

2.10 We have identified a number of areas where we think changes to OISC powers could be made to improve oversight of the immigration advice and services sector. We are considering a range of measures but we would welcome, in particular, your comments on the measures set out below and any suggestions you may have for other measures that would improve the operation or effectiveness of the regulator.

- We are considering whether there should be a power to prevent individuals who have been convicted of providing immigration advice and services illegally from owning or participating in a regulated immigration advice business.

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?

- The current distinction between Registered and Exempted advisers could be removed and replaced within a general framework of “Regulated” advisers. The regulator will have the power to remove those firms that have ceased to trade. We believe that a simplified record of all registered advisers would be beneficial for the public. Allowing the regulator to quickly remove firms that have ceased to trade will address the issue and ensure the public is directed to the right organisations.

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

- The regulator could have the power to issue improvement and prohibition notices against organisations. These notices would be used to improve performance and encourage compliance outcomes. Improvement Notices would be used to set out changes required by the regulator and Prohibition Notices would offer a quicker means of preventing an organisation or individual from undertaking a specific activity (e.g. giving immigration advice if the only qualified adviser has left the organisation). We believe that Improvement Notices could offer a very clear means for setting out the remedial action required by organisations. Prohibition Notices would protect the public by quickly preventing action that could be harmful.

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

- We believe that the audit work the OISC conducts is vital to ascertaining whether organisations and individuals are delivering to the appropriate standard. A review of the audit arrangements so that those individuals who currently seek to frustrate and delay the audit process are prevented from doing so.

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

Charging

2.12 We believe that the funding of OISC should be placed on a more sustainable footing in the long-term. The overall cost of regulation is currently heavily subsidised by the Government.
2.13 We are considering how to amend how regulation of the sector is funded. Treasury guidance on fees and charges advises that fees should be set to recover the full costs of the service provided although enforcement costs should not form a part of this. We therefore propose to move towards this full cost recovery for all regulatory costs other than for enforcement costs: a greater proportion of the OISC's regulatory costs would be paid for by fees levied from organisations providing immigration advice and services rather than from the public purse.

2.14 Recovering the full range of appropriate costs will require changes to primary legislation as the existing provisions only allow for fees to cover the cost of registration and continued registration.

2.15 We believe that it is right that regulated organisations meet the costs of regulation. Organisations that operate on a for-profit basis directly benefit from regulation in a number of ways. For example, the OISC acts against those who operate illegally and prevents them from undercutting regulated organisations. Regulation has also raised standards across the industry, which leads to the immigration advice industry being increasingly seen as more respectable, professional and providing a better quality of service.

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.)?

2.16 A significant proportion of the organisations providing immigration advice and services do so on a not-for-profit basis. As noted above, we believe that placing the funding of the OISC on a sustainable footing requires charging all those regulated for the full cost of regulation. However, we recognise that not-for-profit organisations play an important role in providing access to immigration advice especially in areas where there is little access to alternative providers.

2.17 We therefore need to decide to what extent the not-for-profit sector should be subject to cost recovery measures and whether any cost recovery regime should be arranged to levy variable charges depending on the characteristics of the organisation under consideration. For example, one option might be to develop a sliding scale of cost recovery which could be dependent on factors such as the size of the organisation, the work undertaken or regulatory risk posed, or whether organisations charge for services.

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.

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?

Summary of proposals:

- Bar those convicted of providing immigration advice illegally from participating in or operating an immigration advice business.
- Remove the terms ‘Registered’ and ‘Exempted’ advisers and replace with ‘Regulated’.
- Give the regulator powers to remove firms that have ceased to trade from the Register of Advisers.
- Give the regulator powers to issue Improvement and Prohibition Notices.
- Give the OISC access to inspect for audit work
- Require all who are regulated to pay a fee.
- Seek full recovery of costs of regulation.
OPTION 3
BRING REGULATION OF IMMIGRATION ADVICE UNDER THE LEGAL SERVICES ACT.

2.21 Our third option is for the regulation of immigration advice and services to be made a reserved legal activity under the Legal Services Act.

2.22 The Legal Services Act, which received Royal Assent on 30 October 2007, reforms the way in which legal services are regulated and provided in England and Wales. The Act establishes an oversight regulator, the Legal Services Board, and an independent legal complaint handling body, the Office for Legal Complaints, which will administer an ombudsman scheme. Approved regulators will still be responsible for dealing with professional misconduct. The Act also provides opportunities for more efficient and consumer friendly ways of delivering legal services through Alternative Business Structures. Different types of lawyer and non-lawyers will be able to work together in innovative ways, including in ‘one stop shops’.

2.23 The Act already includes provision which transfers OISC’s oversight functions in respect of the Designated Professional Bodies in England and Wales to the new oversight regulator, the Legal Services Board. This includes oversight of the Law Society of England and Wales, the Bar Council and the Institute of Legal Executives. However, the new arrangements are not yet in place. The date for the commencement of these provisions will be determined following the results of this consultation and after discussion with the new Legal Services Board, OISC and the Designated Professional Bodies. It is anticipated that the Legal Services Board and Office for Legal Complaints will become fully operational in 2010.

2.24 Under this option immigration advice and services would be added to the list of reserved legal activities within the Legal Services Act. The existing regulator, the OISC would become an approved regulator that will grant rights to authorised persons with its activities overseen by the Legal Service Board. Consumer complaints that are not satisfactorily dealt with in-house by immigration advisers, could be referred by consumers to the Office for Legal Complaints. The Act makes different provision for lawyer and non-lawyer managers of Alternative Business Structures. Immigration advisors authorised by OISC would be treated as other regulated persons are, for example solicitors, under the Alternative Business Structures regime.

2.25 The diagram at Fig.1 shows how the regulation of the sector would look under this option.

2.26 In addition to the new regulatory structure outlined above, we would also propose introducing the same new powers for the OISC as outlined in option 2. We believe these powers would enable the OISC to operate more effectively as an approved regulator.

Territoriality

2.27 The Legal Services Act only applies to England and Wales. Therefore an alternative regulatory framework would be required for immigration advisers in Scotland and Northern Ireland.

2.28 The existing OISC regulatory arrangements for immigration advisers could continue in Northern Ireland and Scotland. Alternatively, the introduction of similar legislation to the Legal Services Act in either Scotland or Northern Ireland could be vehicles for providing a regulatory framework similar to that provided by the Legal Services Act.

2.29 The Scottish Government is consulting on regulation of Scottish legal services (http://www.scotland.gov.uk/Publications/2008/12/29155017/0) and a Legal Profession Bill is planned for introduction in June 2009 in the Scottish Parliament. That Bill could be a vehicle for providing changes to the regulatory framework in Scotland.

2.30 In Northern Ireland the Legal Services Review Group has made a number of recommendations on how the legal professions in Northern Ireland should be regulated. A
copy of their report can be found at http://www.dfpni.gov.uk/legal_services.pdf

2.31 HM Treasury guidance on the appropriate levying of fees outlined in option 2 would also be applicable for this policy option. Therefore similar changes would be made to how the regulator recovers its operating costs. In addition, the costs of the regulatory regime established by the Legal Services Act will be funded by a levy on the approved regulators. This levy would be in addition to the costs of running the approved regulator.

2.32 The Legal Services Board has published their first business plan for consultation. The Board will also determine how costs will be levied on approved regulators and a further consultation specific to this issue is expected later this year. In accordance with the Legal Services Act, the levy must be apportioned between leviable bodies ‘in accordance with fair principles. Until those consultations are completed it is not possible to estimate what portion of the costs might fall to OISC as an approved regulator.

Summary of Proposals:

- Immigration advice and services become a reserved activity under the Legal Services Act.
- Bar those convicted of providing immigration advice illegally from participating in or operating an immigration advice business.
- Remove the terms ‘Registered’ and ‘Exempted’ advisers and replace with ‘Regulated’.
- Removal from regulation of firms that have ceased to trade from the Register.
- Give the OISC access to inspect for audit work
- Introduction of Improvement and Prohibition Notices.

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

Fig 1

Office for Legal Complaints

Legal Services Board

Approved Regulator
OISC

Providers of Immigration Advice and Services
OUR CURRENT PREFERENCE

3.1 We have not reached a firm conclusion on which of the options to pursue. We will listen carefully to the views raised by stakeholders during the public consultation exercise and fully consider the costs and benefits of each option before reaching a final decision.

3.2 The impact assessment at annex A sets out the current estimated costs and benefits of each of the proposed options.

3.3 On the basis of current available information we believe that the second option, consolidating the OISC related legislation, and strengthening its powers and revenue raising ability, offers the best approach for providing effective oversight of the sector and protecting the public.

3.4 Building upon the existing successful regulatory framework as set out in option 2 would ensure that we take what works from the current system and improve upon it with measures that protect the public and offer better value for money. It also means transitional costs are minimised whilst the benefits from more effective regulation are maximised.

3.5 Our proposals to strengthen regulation of the advice sector will allow for more appropriate intervention where abuse or improper activity is taking place.

3.7 Getting regulation of the immigration advice and services sector right means a system of penalties and sanctions that remove the financial benefits of non-compliance; fewer individuals offering poor quality or illegal immigration advice; well advised applicants able to make rational choices on the basis of their need; fewer unsuitable individuals profiting from the immigration advice sector; a risk-based and proportionate approach to enforcement by the regulator; greater proportion of regulatory costs paid for by the sector; and increased public confidence both in the immigration advice market and the wider immigration system. It is our expectation that irrespective of which option is chosen the regulator will be subject to the Regulators’ Compliance Code.

3.8 We believe it is important that regulation of the sector is consistent and robust across the UK. The third option, making immigration advice and services a reserved activity under the Legal Services Act, would require a different regulatory framework being adopted in England and Wales from that in Scotland and Northern Ireland. It is not clear what those frameworks would look like in practice and it might be that there would be considerable cost implications in establishing a regulatory scheme in each jurisdiction. A memorandum of understanding would need to be established between each of the jurisdictions to ensure that standards are consistent and to minimise the risk of unscrupulous advisers exploiting the different regulatory approaches.

3.9 In addition the third option imposes a levy on approved regulators to meet the costs of the Legal Services Board and Office for Legal Complaints. It is not clear at this stage what costs would be levied on the sector if option 3 was pursued.

3.10 As previously highlighted, it is anticipated that the Legal Services Board will be fully operational in 2010. It may be that extending its oversight function to immigration advice and services will impact on that timetable, resulting in a delay in realising the benefits of the legal services reform agenda.
3.11 Option 1, leaving the OISC and the regulation of immigration advice as it is, would mean that we fail to take the opportunity to improve the effectiveness of regulation and offer better value for money.

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

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

4.1 Responses to the Paper should be submitted by 6 August 2009.

4.2 The paper is available on the Home Office website and a link email address is provided there to respond.

4.3 Alternatively, you may wish to respond to: ImmigrationAdviceConsultation@homeoffice.gsi.gov.uk

4.4 If you wish to respond by post, please send to:

Immigration Advice Consultation,
UK Border Agency,
6th Floor Green Park House
26 Wellesley Road Croydon
CR0 2AJ

4.5 If you are responding via post we would also appreciate an electronic copy in either a word or .pdf format to allow us to collate responses more easily.

RESPONSES: CONFIDENTIALITY & DISCLAIMER

4.6 The information you send us may be passed to colleagues within the Home Office, the Government or related agencies.

4.7 Furthermore, information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

4.8 If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

4.9 Please ensure that your response is marked clearly if you wish your response and name to be kept confidential. Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

4.10 Individual contributions will not be acknowledged unless specifically requested.

4.11 Representative groups are asked to give a summary of the people and organisations they represent when they respond.

4.12 The Department will process your personal data in accordance with the Data Protection Act – in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

CONSULTATION COORDINATOR

4.13 If you have a complaint or comment about the Home Office’s approach to consultation you should contact the Home Office’s Consultation Co-ordinator, Nigel Lawrence. The Co-ordinator works to promote best practice standards set by the Cabinet Office, advises policy teams on how to conduct consultations and investigates complaints against the Home Office. He does not process your response to this consultation.
4.14 The Co-ordinator can be emailed at: nigel.lawrence@homeoffice.gsi.gov.uk or written to at:

Nigel Lawrence
Consultation Co-ordinator
Home Office Performance and Delivery Unit
3rd Floor, Seacole Building
2 Marsham Street
London
SW1P 4DF

4.15 Please do not send your response to this consultation to Nigel Lawrence.

ALTERNATIVE FORMATS

4.16 You should contact the above address should you require a copy of this consultation paper in any other format e.g Braille, large font or Audio.

WHAT WILL HAPPEN NEXT?

4.17 We expect to publish a summary of responses within three months of the closing date for this consultation, and this will be made available on the Home Office website.

4.18 If any legislative changes are to be made the regulation of the immigration advice and services sector they will form part of wider legislation aimed at simplifying the immigration legislative framework. A draft bill would be published in advance of introduction.