



Law Council
OF AUSTRALIA

Migration Amendment (Regulation of Migration Agents) Bill 2017

Legal and Constitutional Affairs Legislation Committee

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
The problems with dual regulation	6
Regulation of the legal profession	7
Consumer protections and remedies	8
Professional indemnity insurance	8
Trust money and trust accounts	9
Complaints handling	9
General approach	9
Consumer matters	10
Conduct matters	10
Knowledge of migration law and procedure	11
Transitional issues – holders of restricted legal practising certificates	12
Recommendations	14

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the following in the preparation of this submission:

- Migration Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section and
- The Law Society of South Australia.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to make this Submission to the Legal and Constitutional Affairs Legislation Committee on the *Migration Amendment (Regulation of Migration Agents) Bill 2017* (the Bill).
2. Schedule 1 of the Bill seeks to give effect to Recommendation 1 of the 2014 Independent Review of the Office of the Migration Agents Registration Authority, (the “Independent Review”) that lawyers who hold practising certificates be removed from regulation by the Migration Agents Registration Authority, so that they are regulated entirely by their relevant state and territory legal profession body when practising migration law.
3. The Bill intends that, from 1 July 2018, a legal practitioner who holds a practising certificate will not be permitted to be registered as a migration agent.
4. The Law Council strongly supports removing dual regulation of lawyers when practising migration law. The Law Council has consistently advocated against dual regulation of the legal profession as an unnecessary and costly regulatory burden for legal practitioners, and a source of confusion and uncertainty for their clients.
5. The Australian legal profession is comprehensively regulated under robust State and Territory legal profession regulatory laws and arrangements, which include comprehensive complaint handling and disciplinary measures, and consumer protections more extensive than those available under the *Migration Act 1958*.
6. The Law Council notes concerns that the elimination of dual regulation could have consequences for some migration agents, such as those who hold what is referred to as a “restricted” legal practising certificate, i.e. a practising certificate that requires the holder to complete a period of supervised legal practice or satisfy other requirements before being authorised to engage in unrestricted legal practice.
7. The Law Council recommends that provision be made for a transitional period, of 2 years, to enable these affected migration agents to complete the steps required by their legal profession regulatory bodies to have the restrictions on their practising certificates lifted.

The problems with dual regulation

Since 1992 legal practitioners practising migration law have been regulated as migration agents under the federal *Migration Act 1958* when providing immigration assistance, in addition to being regulated as legal practitioners under the State and Territory legal profession laws.

As at 31 December 2016 there were 6684 registered migration agents, of which 2241 (33.5%) held a legal practising certificate.¹

The *Migration Act 1958* attempts a distinction (as a basis for regulatory delineation) between “immigration assistance” (where registration by a legal practitioner as a migration agent is currently required) and “immigration legal assistance” (where registration by a legal practitioner as a migration agent is not required). However, as the Law Council noted in its submissions to the Independent Review, legal practitioners have a duty to provide comprehensive legal advice to their clients which addresses all relevant legal issues. The distinction between “immigration assistance” and “immigration legal assistance” is, for all practical purposes, illusory for a legal practitioner.

The Law Council has previously noted that under the present scheme it is practically impossible for a legal practitioner advising on migration law issues to provide legal services in this area without also being compelled to be registered as a migration agent. Migration law is the only area of legal practice subject to two separate regulatory regimes.

Dual regulation has adverse consequences for both legal practitioners and consumers.

For legal practitioners, the adverse consequences of dual regulation include:

- the uncertainties and compliance burdens of two separate legislative regimes and the associated differences in law, regulatory policies, practices and procedures of multiple regulatory bodies applying to the same area of legal practice;
- the annual cost of two registration fees – one for registration as a migration agent and one for the renewal of a legal profession practising certificate; and
- being subject to two practice and conduct regimes – a statutory code of conduct for migration agents under the *Migration Act 1958*, as well as the ethical rules and other professional obligations of legal practitioners.

For consumers, the adverse consequences of dual regulation include:

- uncertainty about whether immigration assistance is being provided as a legal service;
- uncertainty about whether the provider is a legal practitioner properly authorised to engage in legal practice, or a migration agent authorised to provide immigration assistance;
- uncertainty about whether the issues being dealt with require the services of a legal practitioner, particularly when the distinction between ‘immigration assistance’ and ‘immigration legal assistance’ is unclear;
- uncertainty about whether communications for advice of immigration law matters attracts client legal privilege;

¹ *Migration Agent Activity Report: 1 July to 31 December 2016*, Office of the Migration Agents Registration Authority, Department of Immigration and Border Protection,

- uncertainty about where complaints are to be made and how they will be resolved when immigration assistance is provided by a legal practitioner;
- uncertainty about the consumer protections and remedies available, including whether the consumer has access to fidelity fund compensation; and
- lack of access to a greater number of legal practitioners for migration law matters because of the costs, compliance burdens and restrictions imposed by the current regime requiring registration as a migration agent.

The amendments proposed by the Bill will resolve these adverse consequences by recognising that when a legal practitioner undertakes immigration work for a client, that work is legal work regulated under comprehensive legal profession laws, with all of the attendant professional obligations and consumer protections and remedies of the legal profession laws.

Regulation of the legal profession

The migration agents' regulatory scheme dates from around 1992. The objective of the scheme when first introduced was "to improve standards of professional conduct and quality of service". The inclusion of legal practitioners in the scheme was based upon concerns about "fragmentation" of self-regulatory mechanisms, but commitments were made to evaluate the registration arrangements in light of "progress made by the legal profession in strengthening its self-regulatory mechanisms."²

Regulation of the legal profession and the provision of legal services is primarily a State and Territory responsibility. Since 1992 substantial reforms have been implemented to strengthen, harmonise and unify the fundamental aspects of legal profession regulation. It is generally recognised that the legal profession is now the most comprehensively regulated profession in Australia.

The first period of regulatory reform (from 2002-2008) resulted in all States and Territories (apart from South Australia) enacting a *Legal Profession Act* based on a comprehensive model legal profession law developed under the policy guidance of the Standing Committee of Attorneys-General. (South Australia enacted many of these model provisions, in 2012).

A second period of reform, between 2009 and 2015, began with a National Legal Profession Reform Taskforce being established by COAG, and culminated in New South Wales and Victoria (which account for around three-quarters of the legal profession) implementing a Legal Profession Uniform Law and a uniform legal profession regulatory framework across those States from 1 July 2015.

Legal profession regulation is now generally consistent across all States and Territories in key areas such as, for example:

- admission to the legal profession is uniformly based upon a tertiary academic qualification (generally requiring at least five years of university education) involving at least the equivalent of three-years' full time of law; completing an approved program of practical legal training covering core areas of legal practice skills, values and competencies; and satisfying the Supreme Court that the person is a fit and proper person to be admitted to the legal profession;
- a mandatory 18-month to 2-year period of supervised legal practice (followed by, in some jurisdictions by practical examinations) before permitting a legal practitioner

² House of Representatives Debates, *Migration Amendment Bill (No. 3) 1992*, 27 May 1992 [Hansard 2937-2940].

to practise unsupervised (i.e. to establish their own law practice or act as a principal in a law practice);

- ongoing personal suitability requirements to hold or renew a practising certificate, supported by the ability of regulators to immediately cancel, suspend or vary practising certificates or conditions in response to instances of misconduct, bankruptcy or commission of certain offences;
- mandatory professional indemnity insurance and continuing professional development;
- complaint mechanisms for consumer and disciplinary matters, including a range of consumer remedies;
- comprehensive trust money and trust account regulation, including annual independent external trust account and trust records examinations, and mandatory fidelity fund contributions;
- rules of professional conduct for solicitors, which have been uniformly adopted across five States and Territories, including New South Wales, Victoria and Queensland; and
- legal practitioners remain at all times officers of the court and are thereby subject at all times to the inherent supervision and disciplinary powers of the courts.

Law Council submits that regulation of the legal profession and the provision of legal services is primarily a matter for the States and Territories, which have developed and implemented robust and effective legal profession regulatory frameworks, and that the concerns that drove the Commonwealth in 1992 to include legal practitioners in the migration agents' regulatory system no longer exist.

Consumer protections and remedies

The reforms to legal profession legislation have substantially strengthened protections and remedies for consumers of legal services. Key measures are summarised below and are based on the *Legal Profession Uniform Law* which applies in New South Wales and Victoria.

Professional indemnity insurance

Professional indemnity insurance policies for legal practitioners must meet prescribed minimum standards. For law practices except barristers, the minimum standards include:

- coverage for any civil liability, including professional negligence, incurred in connection with the legal services provided by the law practice;
- a minimum level of coverage of \$2 million for each and every claim under the insurance, inclusive of the claimant's costs and defence costs;
- coverage for all current and former principals or employees engaged in the legal practice of the law practice;
- indemnity for run-off liabilities for a minimum of 7 years from the date (during the period of insurance) that the law practice ceases to practise, or the date of expiry of the period of insurance, if the law practice is not covered from the relevant date by a further complying policy.

The Law Council considers professional indemnity insurance for legal practitioners provides a comprehensive level of protection to clients of law practices, including clients who are provided legal services in migration law matters.

Trust money and trust accounts

A law practice must not receive trust money unless a principal, or the law practice, has been authorised by the regulatory authority to receive trust money. All applicants for admission to the legal profession must have completed a prescribed program of practical legal training which includes training in trust and office accounting. In addition, some states and territories require that a practice management course also be completed before a practising restriction on receiving trust money is removed.

Legal practitioners are required to maintain general trust accounts at an authorised deposit-taking institution (ADI), to maintain proper accounting records and have their trust records externally examined at least once in each financial year by a qualified external examiner. External examiner's reports are lodged with the regulatory authority.

In addition to independent external examinations, legal profession laws provide for external investigations, and for external intervention in the affairs of a law practice in the form of supervisors of trust money, law practice managers and receivers.

Legal practitioners (essentially solicitors in private legal practice) are required to make an annual contribution to a fidelity fund, which provides compensation to persons who have suffered a financial loss as a result of a defalcation by a law practice involving trust money or trust property. Fidelity Fund protection is not provided for under the *Migration Act 1958* for client monies held by a migration agent.

The Law Council considers that the trust money and trust accounting regulatory requirements of the legal profession laws provide a comprehensive level of protection to clients of law practices, including clients who are provided legal services in migration law matters.

Complaints handling

All States and Territories have implemented comprehensive complaints and discipline mechanisms. By way of example, the key aspects of the complaints and disciplinary framework that operates in New South Wales and Victoria under the *Legal Profession Uniform Law* are as follows.

General approach

- the complaints-handling authority is statutorily independent from legal professional bodies (although legal professional bodies may assist the regulatory authority in investigating a complaint);
- complaints can be about a consumer matter (complaints relating to matters such as for example the quality, timeliness and costs of legal services), a disciplinary matter (complaints about professional conduct), or both;
- a practising certificate can be immediately suspended following lodgement of a complaint if warranted in the public interest because of the seriousness of the complaint; and

- in investigating a complaint, the regulatory authority can extend the investigation to other matters.

Consumer matters

- before the regulatory authority attempts to resolve a consumer complaint, it must be satisfied there has been a reasonable attempt by at least one of the parties to resolve the dispute (unless it would be unreasonable to expect that to occur);
- the regulatory authority must attempt informal resolution of a consumer complaint;
- the regulatory authority may order the parties to a consumer complaint to attend mediation;
- a settlement agreement can be made between the parties to settle a consumer complaint, which can then be filed in a court;
- the regulatory authority may make a Determination to settle a consumer matter by:
 - issuing a caution or requiring an apology;
 - requiring the work to be redone at no cost or a reduced cost;
 - requiring the respondent to undertake training, education, counselling or be supervised;
 - making a compensation order; and
 - determining the amount to be payable in a dispute about legal costs (subject to the amount involved and other avenues of formal costs assessment).

Conduct matters

In relation to a complaint involving a professional conduct matter, the regulatory authority may find that there has been unsatisfactory professional conduct and make orders in a Determination for:

- a caution, reprimand or requirement for an apology;
- the work to be redone at no cost or a reduced cost;
- the respondent being required to undertake training, education, counselling, or be supervised;
- payment of a fine up to \$25,000;
- imposing conditions on a practising certificate; and/or
- a compensation order.

The regulatory authority may refer a conduct matter involving unsatisfactory professional conduct, and must refer a matter involving professional misconduct, to a disciplinary Tribunal, which can make additional orders that:

- the lawyer does, or refrain from doing, certain things in connection with the practice of law;
- the law practice be managed;
- the law practice be subject to periodic inspection;
- the lawyer seeks management advice from a specified person;
- recommend to the Supreme Court that the lawyer's name be removed from the roll;
- impose conditions of the lawyer's practising certificate

- suspend the practising certificate;
- specify a period of time in which a practising certificate cannot be applied for, granted or renewed;
- a compensation order be made;
- the lawyer pays a fine of up to \$100,000;
- the lawyer pays expenses.

The Law Council considers that the complaints and discipline-handling arrangements provide a comprehensive approach to resolving complaints, with a range of protections for the general public, as well as remedies for clients of law practices, including clients who are provided legal services in migration law matters.

Knowledge of migration law and procedure

The Law Council notes the concern raised that if lawyers were to be removed from the migration agents' registration system, consumers and other stakeholders could not rely upon receiving a consistent quality of service from those lawyers who have not been required to either demonstrate that they have sound knowledge of migration practice and procedure or have undertaken specialist studies in migration law.

Section 289A of the *Migration Act 1958* (inserted in 2004) provides that an applicant for initial registration (or re-registration after a period of 12 months unregistered) as a migration agent must either:

- have completed a prescribed course and passed a prescribed examination; or
- hold prescribed qualifications.

Under s 289A, the current "prescribed course" is specified through Regulations as the Graduate Certificate in Australian Migration Law and Practice. The "prescribed qualifications" are specified through Regulations as a current legal practising certificate issued by an Australian body authorised by law to issue that practising certificate.

To be admitted as a legal practitioner, a person must have completed tertiary academic studies that include the equivalent of at least three years' full-time study of law. Within this, it is compulsory to undertake studies across 11 prescribed areas of legal knowledge, including federal and state constitutional law, administrative law, civil procedure (litigation and dispute management), criminal law and procedure, evidence, and ethics and professional responsibility. A person studying law then has a range of choices as to other areas of law that might be studied, so as to either diversify their academic legal knowledge, or to specialise in certain areas.

The Law Council does not agree that legal practitioners, who have already undertaken many years of tertiary legal education in law to qualify for admission to the legal profession should be compelled to undertake further academic studies to practice in a particular area of law. In our view, legal practitioners who choose to practise in a particular area of law will:

- through their academic legal education, have a proven legal knowledge base and skills to acquire new legal knowledge;
- through their academic legal education, have undertaken elective subjects as part of their tertiary studies, in areas of law of particular interest to them;

- through their practical legal training, have demonstrated the skills, competencies and values considered essential to legal practice;
- acquire additional legal knowledge and experience post-admission, through compulsory supervised legal practice, which must be undertaken before becoming entitled to engage in unrestricted legal practice;
- undertake the equivalent of 10 hours of approved, compulsory continuing professional development, annually, in those areas of law and practice relevant to their chosen field; and
- pursue available opportunities to build their knowledge and competence through specialist accreditation programs, additional post-graduate qualifications in their chosen field of legal practice and membership of their professional associations and specialist sections.

The Law Council is not aware of any evidence of demonstrated deficiencies in legal knowledge or practice competencies among legal practitioners practising in migration assistance, to suggest that the current requirements for admission to the legal profession and legal practice, and the options for ongoing professional development, should no longer be regarded as sufficient to provide immigration assistance. We note also that under the present Regulations³ the holder of a legal practising certificate is not required to undertake further migration-related continuing professional development prior to applying for repeat registration as a migration agent – i.e. the continuing professional development/continuing legal education required to retain a legal practising certificate is regarded as sufficient to meet the continuing professional development requirements of a migration agent. Further, it would, in the Law Council's view, be an odd outcome if holding a legal practising certificate were to be regarded as inadequate for providing immigration assistance, but would be adequate for other forms of legal assistance and representation in migration law matters.

The Law Council supports the introduction of the Graduate Certificate in Australian Migration Law and Practice as an important means for demonstrating competence in migration matters for persons who have not undertaken the more extensive academic studies and practical legal training required for admission to the legal profession. While it is likely that many legal practitioners who choose to practice in migration law will regard the Graduate Certificate as an important additional qualification, the Law Council does not consider there is any justification for this post-graduate qualification being compelled.

Transitional issues – holders of restricted legal practising certificates

The Bill intends to eliminate dual regulation from 1 July 2018 by prohibiting the holder of a practising certificate from also being registered as a migration agent. It is claimed that holders of "restricted" practising certificates will be disadvantaged because:

- principals of migration agencies who hold restricted practising certificates will not be able to continue to operate as principals; and
- employees of migration agencies (whether for profit, or not-for-profit) who hold restricted practising certificates will not be able to continue in employment.

The Law Council notes it is the general case that a lawyer newly admitted to the legal profession will be permitted to engage only in supervised legal practice as a condition attached to his or her first practising certificate, and that this condition remains in place until

³ *Migration Agents Regulations 1998*, Regulation 6,

the requirements of supervised legal practice are satisfied. (The relevant state or territory legal profession regulatory authority may also consider it necessary that other conditions be imposed).

The period of required supervision under a “restricted” practising certificate is usually 2-years, but a legal profession regulatory authority may decide to reduce or waive this period. During this period the holder of a restricted practising certificate may only engage in legal practice as an employee of a law practice and under the supervision of an authorised legal practitioner (that is, a legal practitioner who holds an unrestricted legal practising certificate), or if they are otherwise supervised by an authorised legal practitioner. Legal practice outside the terms of a “restricted” practising certificate is a serious contravention of legal profession laws and professional obligations.

One consequence of the current system of dual regulation is that these restrictions have not applied to restricted practising certificate holders, who provide immigration assistance services clients pursuant to their authority to do so as conferred by their registration as migration agents.

For migration agents who hold a restricted practising certificate, prohibiting lawyers from registering as a migration agent (as proposed by the Bill) will require them to make a decision to either remain as a registered migration agent providing immigration assistance services (and to cease holding a restricted legal practising certificate) or regularising their legal profession practising entitlements by undertaking the steps necessary to obtain an unrestricted practising certificate.

The Law Council submits that migration agents who decide to remain as legal practitioners will need to obtain information and guidance about their individual circumstances from their local legal profession regulatory authority, and that they should have sufficient time to act upon that advice and guidance to satisfy the requirements for an ‘unrestricted’ practising certificate if they wish to remain as legal practitioners.

For those migration agents intending to acquire unrestricted practising entitlements, the Bill in its current form would require those steps to be completed before 1 July 2018. The Law Council recommends the Bill be amended to make provision for a transitional period of 2-years from enactment, to enable currently registered migration agents who might be adversely affected by the changes a reasonable period within which to satisfy the requirements for an unrestricted practising certificate.

Recommendations

The Law Council recommends that:

1. a 2-year transitional period be inserted into the *Migration Amendment (Regulation of Migration Agents) Bill 2017* to apply to registered migration agents who hold a “restricted” legal practising certificate at the date of enactment.
2. the Committee recommend that the Bill be passed.