Law Council
OF AUSTRALIA

Migration Amendment (Regulation of Migration Agents) Bill 2019

Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019

Senate Legal and Constitutional Affairs Legislation Committee

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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 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

Acknowledgement

The Law Council is grateful to the Law Institute of Victoria, the Law Society of New South Wales, the Law Society of South Australia and the Migration Law Committee of the Law Council's Federal Litigation and Dispute Resolution Section for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in respect of its inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2019 (**the Regulation Bill**) and Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019 (**the Rates of Charge Bill**).

2. The Regulation Bill and the Rates of Charge Bill (together referred to as **the Bills**) seek to amend the scheme which regulates Australian registered migration agents (**RMAs**). The majority of this submission focuses on the Regulation Bill, particularly Schedule 1.

3. Schedule 1 of the Regulation Bill seeks to give substantial effect to Recommendation 1 of the 2014 Independent Review of the Office of the Migration Agents Registration Authority,[1] (the **Independent Review**) that lawyers who hold practising certificates be removed from regulation by the Office of the Migration Agents Registration Authority (**OMARA**), so that they are regulated entirely by their relevant state and territory legal profession body when practising migration law.

4. The Law Council strongly supports the passage of the Bills and the discontinuation of the dual regulation of legal practitioners who provide immigration assistance. The Law Council has consistently advocated against dual regulation of the legal profession as an unnecessary, inefficient and costly regulatory burden for legal practitioners, and a source of confusion and uncertainty for their clients.

5. The Law Council considers that dual regulation is unnecessary because Australian legal practitioners must already possess requisite knowledge and qualifications, demonstrate their fitness to practise and maintain professional standards in order to hold a practising certificate. They must also be covered by professional indemnity insurance and a fidelity fund, which protects clients. The provision of immigration assistance is the only area of legal practice in Australia where a second tier of regulation is imposed upon Australian legal practitioners.

6. Dual regulation is costly and inefficient in that it unnecessarily duplicates administrative processes and subjects Australian legal practitioners to two sets of professional conduct obligations, and potentially three separate complaints handling processes regarding the same conduct. This causes uncertainty, delay and additional costs, which are often ultimately borne by the consumer.

7. Further, dual regulation is a source of confusion for consumers who may be uncertain about the differences between immigration lawyers and RMAs. This may extend to areas of practice and whether certain professional obligations exist, including client legal privilege, trust accounting, coverage by fidelity funds and professional indemnity insurance, not to mention the level of skill and competence that might be expected of those with legal or non-legal qualifications to provide immigration assistance and services.

8. Discontinuation of dual regulation will reduce costs to consumers and improve access to justice by allowing a wider range of Australian legal practitioners to provide immigration assistance, including on a *pro bono* basis. It may also benefit immigration program management by permitting a broader range of Australian legal practitioners

[1] Dr Christopher Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority*, (Final Report, September 2014), https://www.homeaffairs.gov.au/reports-and-pubs/files/omara-review.pdf.

with relevant skills and experience to contribute towards the meeting of program objectives in a lawful and efficient manner.[2]

Prior consideration of dual regulation

9. The Australian legal profession, through the Law Council as its representative peak national body, has supported the removal of dual regulation from Australian legal practitioners providing immigration assistance for more than two decades.

10. Law Council positions are formed in consultation with the state and territory law societies and bar associations and Law Firms Australia, as well as with the Law Council's Sections, advisory committees and directors. Each submission is grounded on a consultation with the legal profession addressing the issues specific to the given inquiry. The Law Council's position on dual regulation is long-established and reflects the views of the legal profession nationally.

11. Dual regulation was a central issue considered in 2014 by the Independent Review. In its submission, the Law Council echoed the Productivity Commission's 2010 finding that 'no compelling case has been made by the Department for the ongoing dual regulation and dual registration of immigration lawyers'.[3] It observed that '[t]he present legislative and regulatory regime has produced a number of complexities, uncertainties, duplications, costs and undesirable outcomes'[4] and recommended that dual regulation should cease.[5] The final report of the Independent Review aligned with that position, recommending that 'lawyers be removed from the regulatory scheme that governs migration agents'.[6]

12. On 21 June 2017, the Migration Amendment (Regulation of Migration Agents) Bill 2017[7] (**the 2017 Regulation Bill**) was introduced into Parliament to give effect to that and related recommendations. The 2017 Regulation Bill, along with the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017 (**the 2017 Rates of Charge Bill**, together referred to as **the 2017 Bills**) were referred in August 2017 to the Committee for consideration.

13. The Law Council maintained its position in its submission to the Committee in respect of the 2017 Bills.[8]

14. The Committee received 26 submissions, all of which were concerned primarily with the changes to Part 3 of the *Migration Act 1958* (Cth) (**the Act**) proposed by Schedule

[2] For instance, an experienced criminal lawyer may be well placed to contribute to the thorough and lawful consideration of complex character issues in a particular case as they arise under s 501 of the *Migration Act 1958* (Cth).
[3] Law Council of Australia, *Independent review of the Office of the Migration Agents Registration Authority (OMARA)*, (Submission, 1 August 2014), [20], https://www.lawcouncil.asn.au/docs/e8cf17af-fa18-e711-80d2-005056be66b1/140801-Submission-2869-Independent-Review-Office-Migration-Agents-Registration-Authority.pdf.
[4] Ibid [22].
[5] Ibid [20].
[6] Dr Christopher Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority*, (Final Report, September 2014), 28, Recommendation 1.
[7] Introduced to the House of Representatives on 21 June 2017 but later cited as the Migration Amendment (Regulation of Migration Agents) Bill 2018.
[8] Law Council of Australia, *Migration Amendment (Regulation of Migration Agents) Bill 2017*, (Submission No. 12, 5 September 2017), https://www.lawcouncil.asn.au/docs/ab0f3a89-79a9-e711-93fb-005056be13b5/3335%20-%20Migration%20Amendment%20Removal%20of%20Dual%20Regulation%20Bill.pdf.

1 of the 2017 Regulation Bill. In its report, tabled 16 October 2017,[9] the Committee therefore limited its concluding observations to those issues,[10] and made two recommendations. The first recommended that the government consider implementing a formal transition period from the commencement of the 2017 Regulation Bill, to allow RMAs currently holding restricted practising certificates to complete their period of supervised training and obtain an unrestricted certificate prior to ceasing to be registered as a RMA.[11] The Committee's conclusion in that regard aligned with a recommendation made by the Law Council in its 2017 submission.[12]

15. The second and final recommendation of the Committee's 2017 report was that the 2017 Bills be passed.[13]

16. In line with the Committee's recommendation, amendments to the 2017 Regulation Bill were proposed in order to provide for a transitional period. Those amendments were agreed by the House of Representatives on 27 March 2018 and the 2017 Regulation Bill was thereafter cited as the Migration Amendment (Regulation of Migration Agents) Bill 2018. It was introduced into the Senate on 8 March 2018 and a second reading debate took place on 3 December 2018.

17. Despite having bipartisan support, the Senate did not vote on the 2017 Bills before Parliament was dissolved on 11 April 2019.

18. The substance of the 2017 Bills is now largely reproduced by the introduction of the Bills on 27 November 2019.

19. The majority of the Law Council's 2017 submission to the Committee remains relevant in light of the similarities between the 2017 and current versions of the Regulation Bill. Accordingly, this submission restates a substantial proportion of the Law Council's earlier submission to the Committee.

Overview of the proposed changes

20. The Bills seek to amend the existing scheme which regulates RMAs.

21. Currently, the Act distinguishes between 'immigration legal assistance' per section 277, which includes, *inter alia*, preparation for and appearances in court; and 'immigration assistance' per section 276, which includes, *inter alia*, assistance with visa applications or visa cancellation review applications, and assistance with proceedings before a review authority.

22. A legal practitioner may give immigration legal assistance without being a RMA but must be a RMA in order to provide immigration assistance. Accordingly, legal practitioners working across the full spectrum of immigration law and practice must be registered both as a migration agent and a legal practitioner. They are therefore subject to the regulatory processes associated with each regime.

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[9] Senate Legal and Constitutional Affairs Legislation Committee, 'Migration Amendment (Regulation of Migration Agents) Bill 2017 [Provisions], Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017 [Provisions]', (Report, 16 October 2017).
[10] Ibid [2.49].
[11] Ibid [2.56].
[12] Law Council of Australia, *Migration Amendment (Regulation of Migration Agents) Bill 2017*, (Submission No. 12, 5 September 2017), 14, Recommendation 1.
[13] Senate Legal and Constitutional Affairs Legislation Committee, 'Migration Amendment (Regulation of Migration Agents) Bill 2017 [Provisions], Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017 [Provisions]', (Report, 16 October 2017), [2.57].

23. The Regulation Bill proposes amendments to Part 3 of the Act, to remove certain legal practitioners from the regulatory scheme governing RMAs. Those provisions will commence by proclamation no later than nine months after the Regulation Bill receives Royal Assent. Upon their commencement, all RMAs who are legal practitioners and who hold an unrestricted practising certificate will cease to be RMAs and will be regulated solely by their relevant state or territory legal professional body.

24. Eligible legal practitioners who hold a restricted practising certificate may continue to be a RMA and a restricted legal practitioner for a maximum period of up to four years, so as to be able to continue to provide immigration assistance whilst completing their period of supervised legal practice. Upon obtaining an unrestricted practising certificate, they will also be removed from the regulatory scheme governing RMAs and thereafter be solely regulated by their relevant state or territory legal professional body.

25. Any restricted legal practitioner who in future wishes to provide migration law advice (including advice that would otherwise be regarded as immigration assistance) as part of legal practice may do so under supervision within the terms of their restricted practising certificate, and in accordance with the broader terms of their supervised engagement in legal practice.

26. By contrast, a restricted legal practitioner who in future wishes to provide immigration assistance unsupervised before completing their period of supervised legal practice may apply to register as a RMA and must meet the same requirements as for RMAs generally, including the successful completion of a Graduate Diploma in Australian Migration Law and Practice and passing a Capstone assessment.

27. Separately from the dual regulation issue, the Regulation Bill also provides for the OMARA to refuse applications for registration as a migration agent where the applicant has not provided required information, and it permits time periods regarding registration applications to be managed through delegated legislation rather than by the Act. The Regulation Bill updates the meanings of 'immigration assistance' and 'immigration representations', requires RMAs to notify the OMARA if they paid a non-commercial application charge but change from operating on a non-commercial basis, and clarifies that powers under Part 3 of the Act may be exercisable by the Minister.

28. The Rates of Charge Bill proposes amendments to the *Migration Agents Registration Application Charge Act 1997* (Cth) to require any RMA who paid a non-commercial application charge associated with their registration but operates on a commercial basis to pay an adjusted charge. This complements the associated notification requirement proposed by the Regulation Bill.

Overall support for the Bills

29. Although the focus of this submission rests on dual regulation, the Law Council expresses its support for the measures contained in the Bills overall.

30. In particular, the Law Council recognises the importance of measures to uphold the integrity of the migration advice industry, including authorising the OMARA to refuse registration applications where applicants have not provided all necessary information, and ensuring that RMAs who operate commercially but paid the reduced charge associated with non-commercial practice are liable to an adjusted charge.

The problems with dual regulation

31. Since 1992, legal practitioners practising migration law have been regulated as RMAs under the Act when providing immigration assistance, in addition to being regulated as legal practitioners under the state and territory legal profession laws.

32. As at 30 June 2019 there were 7,252 RMAs, of whom 2,192 (30.2%) held a practising certificate.[14]

33. As discussed above, the Act attempts a distinction (as a basis for regulatory delineation) between 'immigration assistance' (where registration by a legal practitioner as a RMA is currently required) and 'immigration legal assistance' (where registration by an Australian legal practitioner as a RMA is not required). However, the Law Council observes that Australian 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 an Australian legal practitioner.

34. The Law Council has previously noted that under the present scheme it is practically impossible for an Australian 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 which is subject to two separate regulatory regimes.

35. Dual regulation has adverse consequences for both consumers and Australian legal practitioners. For consumers, the adverse consequences of dual regulation include:

    (a) uncertainty about whether immigration assistance is being provided as a legal service;

    (b) uncertainty about whether the provider is a legal practitioner properly authorised to engage in legal practice, or a RMA solely authorised to provide immigration assistance;

    (c) 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, and where a given matter may potentially give rise to administrative or judicial review;

    (d) uncertainty about whether communications for advice in connection with immigration law matters attracts client legal privilege;

    (e) uncertainty about where complaints are to be made and how they will be resolved when immigration assistance is provided by a legal practitioner;

    (f) uncertainty about the consumer protections and remedies available, including whether the consumer has access to fidelity fund compensation; and

    (g) lack of access to a greater number and wider range of Australian legal practitioners for migration law matters because of the costs, compliance

[14] *Migration Agent Activity Report: 1 Jan to 30 June 2019*, Office of the Migration Agents Registration Authority, Department of Home Affairs (online, accessed 21 Jan 2020), https://www.mara.gov.au/media/665948/MAAR_Jan_Jun_2019_Web.pdf.

burdens and restrictions imposed by the current regime requiring registration as a migration agent.

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

    (a) 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;

    (b) 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

    (c) being subject to two practice and conduct regimes – a statutory code of conduct for migration agents under the Act, as well as the ethical rules and other professional obligations of legal practitioners.

37. The amendments proposed by the Regulation Bill would 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.

38. The amendments would also resolve uncertainty about exactly which professional obligations are in place, by addressing the current situation of dual, and potentially inconsistent, competing sets of professional obligations.

Regulation of the legal profession

39. 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'.[15] 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'.[16]

40. 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.

41. 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).

42. A second period of reform, between 2009 and 2015, began with a National Legal Profession Reform Taskforce being established by the Council of Australian Governments (**COAG**), and culminated in New South Wales and Victoria (which account for around three-quarters of the legal profession) implementing a *Legal*

[15] House of Representatives Debates, Migration Amendment Bill (No. 3) 1992, 27 May 1992 [Hansard 2937].
[16] Ibid [Hansard 2940].

Profession Uniform Law and a uniform legal profession regulatory framework across those states from 1 July 2015. Also, Western Australia has announced its intention to join uniform legal profession regulatory framework from 1 July 2020.

43. Legal profession regulation is now generally consistent across all states and territories in key areas such as, for example:

    (a) admission to the legal profession is uniformly based upon a person:

        (i) completing a tertiary academic qualification (generally requiring at least five years of university education) involving at least the equivalent of three-years' full time study of law;

        (ii) completing an approved program of practical legal training covering core areas of legal practice skills, values and competencies; and

        (iii) satisfying the Supreme Court, in the relevant state or territory jurisdiction, that they are a fit and proper person to be admitted to the legal profession;

    (b) a mandatory 18-month to 2-year period of supervised legal practice (followed, in some jurisdictions, by practical examinations) before permitting a legal practitioner to practise unsupervised (i.e. to establish their own law practice or act as a principal in a law practice);

    (c) 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 impose conditions in response to instances of misconduct, bankruptcy or commission of certain offences;

    (d) mandatory professional indemnity insurance and continuing professional development;

    (e) complaint mechanisms for consumer and disciplinary matters, including a range of consumer remedies;

    (f) comprehensive trust money and trust account regulation, including annual independent external trust account and trust records examinations, and mandatory fidelity fund contributions;

    (g) rules of professional conduct for solicitors, which have been uniformly adopted across five states and territories, including New South Wales, Victoria, Queensland and South Australia; and

    (h) legal practitioners remain at all times officers or the court and are thereby subject at all times to the inherent supervision and disciplinary powers of the courts.

44. The 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 scheme no longer exist.

Consumer protections and remedies

45. 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 has applied in New South Wales and Victoria since 1 July 2015.

Professional indemnity insurance

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

    (a) coverage for any civil liability, including professional negligence, incurred in connection with the legal services provided by the law practice;

    (b) 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;

    (c) coverage for all current and former principals or employees engaged in the legal practice of the law practice; and

    (d) 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.

47. 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 connection with migration law matters.

Trust money and accounts

48. 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.

49. Legal practitioners are required to maintain general trust accounts at an authorised deposit-taking institution, 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 examiners' reports are lodged with the regulatory authority.

50. 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.

51. 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* (Cth) for client monies held by a RMA.

52. 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.

Supervised practice

53. In all Australian jurisdictions, legal practitioners are required to practise under supervision for a period following the grant of their first practising certificate.[17] The rationale for this requirement is to provide guidance and assistance to early career legal practitioners, and to provide assurance to clients that the work has been properly carried out.

54. The supervision period is commonly either 18 months or two years full-time, or its equivalent if completed on a part-time basis. This is a statutory requirement which follows the completion of the practical legal training necessary to qualify for admission as a legal practitioner and is implemented in the form of a restricting condition placed upon the individual's practising certificate. Accordingly, a legal practitioner who remains subject to the supervision requirement is the holder of a 'restricted' practising certificate.

55. A restricted legal practitioner is entitled to engage in legal practice under the guidance of a qualified, unrestricted supervisor. 'Legal practice' in this context has been interpreted by the Victorian Legal Services Board to include giving legal advice, interpreting and applying legislation or case law for the use of a client, and/or drafting legal documents.[18]

56. At present, there is no equivalent mandatory period of supervised practice for RMAs, despite the fact that work undertaken by RMAs touches on highly complex areas of law and practice and can have profound implications for the lives and circumstances of clients.

57. The Law Council's established position is that a period of supervised practice should be a requirement for all persons seeking to become a RMA.[19] Such a requirement would be consistent with the requirement to which legal practitioners are subject, and provide similar assurance regarding the quality and accuracy of work undertaken by early career RMAs. It would also be consistent with the recommendations of the Independent Review[20] and of the Parliamentary Joint Standing Committee on Migration's *Inquiry into efficacy of current regulation of Australian migration and education agents*.[21]

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[17] See, for example, the *Legal Profession Uniform Law* which governs legal practice in New South Wales and Victoria, s 49(1).
[18] Victorian Legal Services Board, 'Supervised legal practice' (Online, accessed 21 January 2020), https://lsbc.vic.gov.au/?page_id=214.
[19] See, most recently: Law Council of Australia, *Code of Conduct for Registered Migration Agents – Third round consultation response*, (13 December 2019), [14]-[23], https://www.lawcouncil.asn.au/resources/submissions/code-of-conduct-for-registered-migration-agents-third-round-consultation-response.
[20] Christopher Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority*, (Final Report, September 2014), 30, Recommendation 14.
[21] Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into efficacy of current regulation of Australian migration and education agents*, (Report, February 2019), [3.114], Recommendation 2.

Complaints handling

58. All states and territories have implemented comprehensive complaints handling frameworks and professional disciplinary regimes relating to legal practitioners. 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

59. In relation to the general approach:

(a) the complaints handling authority is statutorily independent from legal professional bodies (although legal professional bodies may assist the regulatory authority in investigating a complaint);

(b) 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;

(c) 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

(d) in investigating a complaint, the regulatory authority can extend the investigation to other matters.

Consumer matters

60. In relation to consumer matters:

(a) 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);

(b) the regulatory authority must attempt informal resolution of a consumer complaint;

(c) the regulatory authority may order the parties to a consumer complaint to attend mediation;

(d) a settlement agreement can be made between the parties to settle a consumer complaint, which can then be filed in a court;

(e) the regulatory authority may make a Determination to settle a consumer matter by:

(i) issuing a caution or requiring an apology;

(ii) requiring the work to be redone at no cost or a reduced cost;

(iii) requiring the respondent to undertake training, education, counselling or be supervised;

(iv) making a compensation order; and

(v) 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

61. 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) a caution, reprimand or requirement for an apology;

    (b) the work to be redone at no cost or a reduced cost;

    (c) the respondent being required to undertake training, education, counselling, or be supervised;

    (d) payment of a fine up to $25,000;

    (e) imposing conditions on a practising certificate; and/or

    (f) a compensation order.

62. 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:

    (a) the lawyer does, or refrains from doing, certain things in connection with the practice of law;

    (b) the law practice be managed;

    (c) the law practice be subject to periodic inspection;

    (d) the lawyer seeks management advice from a specified person;

    (e) recommend to the Supreme Court that the lawyer's name be removed from the roll;

    (f) impose conditions on the lawyer's practising certificate;

    (g) suspend the practising certificate;

    (h) specify a period of time in which a practising certificate cannot be applied for, granted or renewed;

    (i) a compensation order be made;

    (j) the lawyer pays a fine of up to $100,000; and/or

    (k) the lawyer pays expenses.

63. The Law Council considers that the complaints handling and professional discipline arrangements that apply to legal practitioners in connection with legal practice provide a comprehensive approach to resolving complaints, protecting consumers and maintaining the reputation of the legal profession. In particular, the Law Council notes the wide range of protections available to 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

64. A concern may arise 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.

65. Section 289A of the Act provides that an applicant for initial registration (or re-registration after a period of 12 months unregistered) as a migration agent must either:

    (a) have completed a prescribed course and passed a prescribed examination; or

    (b) hold prescribed qualifications.

66. Under section 289A, the current 'prescribed course' is specified through regulations as the Graduate Diploma in Australian Migration Law and Practice and the current 'prescribed examination' is the Capstone assessment. 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.

67. 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.

68. 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 practise in a particular area of law. In its view, legal practitioners who choose to practise in a particular area of law will:

    (a) through their academic legal education, have a proven legal knowledge base and skills to acquire new legal knowledge;

    (b) through their academic legal education, have undertaken elective subjects as part of their tertiary studies, in areas of law of particular interest to them;

    (c) through their practical legal training, have demonstrated the skills, competencies and values considered essential to legal practice;

    (d) 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;

    (e) 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

(f) 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.

69. The Law Council is not aware of any evidence of demonstrated deficiencies in legal knowledge or practice competencies among legal practitioners practising migration law 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. The Law Council also notes that under the present regulations[22] 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 including representation in migration law matters before Australian courts.

70. The Law Council supports the requirement for the Graduate Diploma in Australian Migration Law and Practice and Capstone assessments as an important means to demonstrate 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.

Benefits of ending dual regulation

71. As noted, the Law Council believes that the dual regulation of legal practitioners who provide immigration assistance is unnecessary, inefficient and costly to practitioners, and a source of confusion and uncertainty for clients. Its discontinuation will therefore be inherently beneficial. In addition, the Law Council considers that specific benefits will also result from ending dual regulation.

72. The Law Council considers that the enactment of the Regulation Bill will increase access to justice for vulnerable people requiring legal advice, including in refugee and asylum matters. The removal of dual regulation will allow more lawyers to provide assistance, including on a *pro bono* basis. The Law Council understands from its constituent bodies that many lawyers wishing to provide such assistance have been unable to do so due to the requirement to obtain registration as a RMA. Further, ending dual regulation will mean that community legal centres are better able to assist migrants, as this will not be limited only to those Australian legal practitioners who are also RMAs. It will also enable more Australian legal practices, particularly larger law firms, to undertake work on a *pro bono* basis in this field.

73. The discontinuation of dual regulation may also provide benefits in terms of migration program management and efficiency. In addition to increasing the numbers of legal practitioners permitted to provide immigration assistance, it will also make available a wider range of skills and experience to contribute to immigration matters and support the Department of Home Affairs (**the Department**) in realising the lawful and effective administration of the migration program. By way of one example, complex matters

[22] Migration Agents Regulations 1998 (Cth), reg 6.

relating to character issues[23] often intersect with the criminal justice system or raise related issues. Ending dual regulation would allow experienced criminal lawyers to engage on those matters. By way of another example, an experienced family lawyer may be well placed to contribute to the consideration of sensitive and complex issues involving family violence,[24] inter-country adoption[25] and the like, as they interact with Australian immigration law. Ending dual regulation will enable consumers to access the skills and experience of a broader range of legal practitioners. The Department would also benefit from the increased availability of specialised skills from within the legal profession more broadly.

Possible administrative considerations

74. Administrative adjustments may be required if the Regulation Bill is passed.

75. It is currently possible for members of the public seeking immigration assistance to search OMARA's online Register of Migration Agents in order to, among other things, locate an Australian legal practitioner who also holds RMA status. The Law Council understands that this online facility is also used by the Department in its engagement with representatives who are providing immigration assistance. Once dual regulation ceases, it will no longer be possible to search for Australian legal practitioners providing immigration law services in the same way. Furthermore, the majority of Australian legal practitioners will no longer be able to cite a registration number issued by the OMARA. Consumers may be forced to search for Australian legal practitioners offering migration law advice across a variety of online fora.

76. Furthermore, the Department may need to consider an alternative means by which to identify, and confirm the authorisation of, Australian legal practitioners acting in immigration matters who are ineligible for, or otherwise eligible but do not seek to hold, RMA status. One possible approach would be for the Department to put in place memoranda of understanding with the relevant state and territory law society or regulatory authority by means of which it can confirm at any point in time that a given Australian legal practitioner is in fact the holder of a current practising certificate. An alternative could be to request Australian legal practitioners to declare that they hold a current Australian legal practising certificate when communicating with the Department on behalf of a client.

77. Australian legal practitioners offering immigration advice may perhaps, in future, develop a searchable online database which is accessible to the public, and by means of which prospective clients can search for legal practitioners working in the area.

78. Regardless of whether such a database is developed, however, the Department should review its public messaging regarding RMAs and Australian legal practitioners. This is necessary to provide clear and accurate public information as to the respective role and function of each, the differing levels of qualification, the limitations on types of matters which may be undertaken by RMAs, and the different levels of consumer protection offered by legal practitioners through the use of audited trust accounts, fidelity funds, professional indemnity insurance and the application of legal professional privilege. The Department should, in its messaging, make clear that:

[23] For example, visa refusal and cancellation under section 501 of the *Migration Act 1958* (Cth).
[24] For example, obtaining judicial evidence to support a determination that a visa holder has suffered family violence that would satisfy the requirements under Division 1.5 in Part 1 of the Migration Regulations 1994.
[25] For example, advising clients in relation to inter-country adoption processes that comply with the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* and related family law matters in connection with Australia's adoption visa requirements as specified in migration law.

(a) Australian legal practitioners are no longer required to register with the OMARA in order to offer immigration assistance in connection with legal practice;

(b) as part of a transitional arrangement, some Australian legal practitioners who hold a restricted practising certificate will, subject to meeting RMA registration requirements, be eligible to maintain RMA status for a limited period until such time as they have completed their mandatory period of supervised legal practice and become the holder of an unrestricted practising certificate; and

(c) consumers may therefore obtain immigration assistance either from a RMA or any Australian legal practitioner. However, any legal advice or assistance beyond immigration assistance can only be offered, and provided by, an Australian legal practitioner.

Recommendation

Recommendation:

- **The Law Council recommends that the Bills be passed.**