

Senate submission

Committee Secretary  
Joint Standing Committee on Migration  
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Canberra ACT 2600

Thank you for the opportunity to submit to this Senate Inquiry. I would like focus on the education of agents and in particular the ability of early career agents to gain practice knowledge which may be perceived as a deficiency in the education and accreditation process. The opinions and reflections present here are my own, I hope the few insights I can provide from my work with migration agents are useful to the committee.

I registered to practice as a migration agent in 2002 whilst working for the Australian Democrats. My registration at that point was not legally required, however the ability of parliamentary staff to provide migration assistance and advice to constituents without registration is a privilege that comes with great responsibility. I could not do that role without understanding the way the legislation impacted on the people we were tasked to assist.

In late 2007, I took up the role of Assistant Convenor of new Graduate Certificate in Australian Migration Law and Practice (the Graduate Certificate) at the ANU College of Law, eventually holding the positions of Sub-Dean and Director of the Migration Law Program until 2015. As Director of the Program, I was a member of the Migration Agents Registration and Education Advisory Committee from 2007 – 2015. In 2016 and 2017 I designed and convened the migration stream of the LLM at ANU.

In 2007, I established a pro-bono clinic in the ACT that operated until 2015. I continue to work as a migration agent with ACT Legal Aid.

I am a Visiting Fellow at ANU College of Law and a doctoral student at University of Southern Queensland.

I am currently employed assisting Senator Andrew Bartlett with constituent inquiries relating to migration. This submission will not refer extensively to the work I do in that

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capacity as it is outside of the work of a migration agent and the review of the committee however, I will make a short comment on that work and I would like to thank the parliamentary liaison team in the Department of Home Affairs in their role assisting parliamentarians with constituent inquiries.

### INTRODUCTION

I would like to voice my disappointment in yet another inquiry that includes the education and regulation of agents. This is the latest in a series of reviews and it comes at a time when many of the new educational and registration requirements recommended in the Kendall Review have yet to be implemented. Others such as English proficiency have been addressed previously within the legislation and the thresholds for post graduate entry into university. The new regime exempting lawyers from registration is expected to begin in November this year. The efficacy and impact of these changes will not be able to be assessed for at least two years. Therefore, an examination of the educational threshold for registration as a migration agent appears to be pre-emptive.

Stakeholder concern regarding the adequacy of qualifications for accreditation of agents has been consistent over the past twenty years. It has been fuelled both by the increasingly adversarial attitude the Department<sup>1</sup> has towards agents and the long-term anxiety of the legal profession towards dual regulation. Public discussion of unethical practices of migration agents often ignores the distinction between registered migration agents, education agents, RMA/lawyers and unregistered agents. This conflation of a range of people who may be operating within the migration advice space results in an inability to focus coherently on the profession of migration agents. The common response from government and review bodies to anecdotal and actual accounts of unethical practice has been to recommend an increase in the length of study required to be registered as an agent.

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<sup>1</sup> The Department of Home Affairs and its previous iterations

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## THE EDUCATION OF MIGRATION AGENTS.

### THE REGIME 2007 - 2018

Despite the introduction of the Graduate Diploma, evidence before this committee from those contributing will reflect upon agents who have undertaken the previous qualification. I therefore think a background on that qualification may help the committee.

In 2006 the qualification Graduate Certificate in Australian Migration Law and Practice was established. The qualification and the providers of that qualification were embedded within the *Migration Act 1956 (Cth)* and the *Migration Agent Regulations 1998 (Cth)*. The Four providers were all university law schools with expertise in teaching practical legal training.

The MIA as the MARA (MARA) had oversight of the qualification until 2009 when it was transferred to the OMARA. The oversight of the course by the MARA was a period of great tension between the MARA and the providers. This appears to have been driven by mistrust in the educational expertise of the universities by the regulator which held a dual role as the professional body. Providers were subjected to the imposition of educational arrangements not seen in any other profession. University policies surrounding, the employment of academics, English language requirements for students, disability access, changes to content, grading and exam regimes had to be constantly negotiated to meet the needs of the MARA. This reflected a manifest ignorance towards the requirements of universities, curriculum design and andragogy. The result was a decrease in the ability of universities to adapt quickly to the changing educational and legal environment for the teaching of practice in Australian migration law.

From an educational perspective, the change from the MARA to the OMARA benefited the profession. Universities were encouraged to work together to improve outcomes for their students and to innovate within their own programs. In 2012 the four providers redesigned the curriculum to meet Australian Qualification Framework (AQF) requirements. The changes allowed for more flexibility between providers, the provision of formative assessment and an increase in practice based coursework. The ability to make these curriculum changes, reflected an understanding by the OMARA of the

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educational expertise within the universities and a respect for the processes universities had to adhere to. However, the gains made by the providers and the commitment they had to a continual improvement of educational outcomes were ignored by the 2014 Kendall Review, which then went on to recommend significant changes to the education and registration requirements of agents.

The Kendall Review also failed to take into account the fact that a move from a Graduate Certificate to a Graduate Diploma would not raise the AQF level.<sup>2</sup> It merely increases the length and cost of the course. Imposing a requirement for a Master's level degree as entry to the profession would have resulted in the same length of time and cost for students as a Graduate Diploma but would have ensured students gained a higher level of education, skills and knowledge. The additional requirement to sit a practice exam post registration was not adequately explained or justified by the review.

Those who had chosen to study the Graduate Certificate in Australian Migration Law and Practice were usually over 35 years of age, held an undergraduate degree and were seeking a career change and work that fitted their lifestyle. Students who held law degrees undertook the course to ensure they understood the complexity of the legal field they were entering. Very few students had a strong business or marketing background however the majority still intended to work in sole practice. Those with a background in humanities appeared to cope with the course work better than those who came to the program with technical or IT qualifications.

The course work at ANU was written and taught by practitioner academics. The curriculum design was problem based learning and students were exposed to elements of practice that included working in small 'firms', with client files where students worked in small groups of 10 to 18. The classes were predominantly held online with access to master classes in Sydney.

From a pedagogical perspective, the requirement imposed by the legislation, for all students regardless of their provider, to sit a 'common exam' continued to hinder educational outcomes for students.

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<sup>2</sup> Both the Graduate Certificate and Graduate Diploma are a level 8 AQF qualification.

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### RESEARCH INTO NEW MIGRATION AGENTS, EMPLOYABILITY AND PRACTICE

There has been limited academic research that has focused on migration agents.<sup>3</sup> Since 2007 I have worked on three research projects examining aspects of the education of migration agents.

My research has found the main reason given by students for becoming a migration agent is that they wanted to ‘*help people*’. The overwhelming majority of students had a migrant background, either arriving as migrants, in a relationship with migrants or were the child of migrants. All felt that their migrant experience would assist them to understand the experience of their clients, and ensure they were best placed to help people navigate the complex task of migrating. This finding coincides with academic research focusing on the backgrounds of US immigration lawyers.<sup>4</sup>

### 2010 Graduate Outcomes

In 2010, a study we conducted into the skills employers sought when employing graduates of the Migration Law Program, found employers were seeking a range of generic graduate attributes. These included:

- personal qualities such as motivation, self-awareness and compassion
- technical knowledge and skills and
- the ability to apply their technical knowledge and skills in different contexts.

It is important to note that there was a consensus amongst those interviewed for this study that these generic attributes were also essential qualities of agents they described as ‘more experienced’, ‘successful’ or ‘good agents’.<sup>5</sup>

### Peer Supervised Practice Project

In 2016, a joint research project with the MIA aimed at designing a ‘post entry qualification’ short course,<sup>6</sup> that could provide peer supervised practice was conducted.

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<sup>3</sup> See the work of Marina Khan (2017, May). Master of Research. *Contested Ground: Migration Intermediaries' Experience of Network Governance in the Australian Migration Industry*, 1- 84. Sydney , NSW, Australia: UNSW.

<sup>4</sup> Leslie Levin, ‘Guardians at the gate: The backgrounds career paths and professional development of private US immigration lawyers’ (2009) *Law and Social Inquiry* 34 (2).

<sup>5</sup> Andrew Bartlett, Marianne Dickie ‘Employer Expectations of the Graduate Certificate in Australian Migration Law and Practice’ (2013) 3 *Migration Australia* 79.

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This project began with a survey of registered migration agents. The survey aimed to gauge the attitudes registered agents had towards the mentoring of new agents.<sup>7</sup> The survey also sought opinions and advice on pathways for new agents to gain essential experience in their first years of practice. Agents across a broad spectrum of experience in time and practice participated in the survey.

In summary, the results found:

- Respondents felt graduates needed to undertake formalised supervised practice before they practiced alone.
- There was strong support for formal training to be included in a period of supervised practice.
- Respondents recognized the benefits of networking, mentoring and interacting with each other and more experienced agents.
- Respondents who had mentored or employed new agents understood, key concepts of training new agents, including the need to identify gaps in knowledge when supervising new agents, and the obligations and responsibility-supervised practice imposed upon the employer organization.
- Very few respondents had ever mentored or *would consider mentoring new* agents.

The survey results pointed to a course curriculum design that contained:

- a means of identifying gaps in knowledge,
- aspects of actual practice, including client interaction,
- opportunities to interact with more experienced agents,
- specific training in specific areas of knowledge (such as visas processes, review, business, marketing,)
- the ability to observe more experienced agents,
- the ability to network with peers.

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<sup>6</sup> A course that may have replaced or supplemented the practice ready program

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Since the 2016 study was undertaken, the feasibility to trial and or implement a practice course for graduates, has been supplanted by the introduction of the regime proposed by the Kendall Review.

### 2018 Doctoral project

My doctoral studies are based on a 2014 online community of practice designed as a supportive workplace.<sup>8</sup> The aim of this research is to see if a purposefully designed online Community of Practice, could enhance the development of a migration agent's professional identity. The project was inspired by studies conducted in 2009 and 2011 focusing on US immigration lawyers working in sole practice.<sup>9</sup> These studies by Leslie Levin looked at the role the professional bar played in US immigration lawyers ethical and practice development. Levin's studies found that despite the significant role the bar played in assisting those in sole practice, the broader professional community the migration lawyers worked within held the greatest influence.<sup>10</sup>

My work also rests upon research by Michael Eraut's professional practice for early career professionals. Eraut's studies into "early career learning" identified work processes that could generate learning as a by-product.<sup>11</sup> Importantly the learning activities located within these work processes included listening, observing, locating resources, reflecting, giving and receiving timely feedback and asking questions. Eraut concluded that a supportive workplace would enhance the development of tacit knowledge required for practice, as well as build competence and confidence in early career professionals.<sup>12</sup> Levin's work confirmed that early career immigration lawyers in sole practice also used these same modes of learning.<sup>13</sup> However, their isolation due to sole practice meant they had to reach out to colleagues who were often strangers in order to access these learning experiences.

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<sup>8</sup> Based upon studies by academic and author Michael Eraut.

<sup>9</sup> Levin, above n 2. Leslie Levin, 'Speciality Bars as a Site of Professionalism' (2011) *University of St. Thomas Law Journal*, 8(2).

<sup>10</sup> Ibid.

<sup>11</sup> Michael Eraut, 'Informal Learning in the Workplace' (2004). *Studies in Continuing Education*, 26(2).  
Michael Eraut, 'Learning from other people in the workplace' (2007) *Oxford Review of Education*, 33(4).

<sup>12</sup> Eraut, above n 7

<sup>13</sup> Levin, above n 2.

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My doctoral studies have revealed that there were several key issues facing the new agents in the study. These were;

- Unpredictability and uncertainty due to constant change in migration law, policy and practice
- Learning how to run a small business
- The overwhelming responsibility of ensuring their client has a positive outcome.

Agents in the beginning of the study showed a high degree of caution when working with clients and an overwhelming anxiety that they may provide incorrect advice. In order to cope with their status as 'new agents', they spent additional time researching visa requirements, and often worked for free or did not account for their research time in their invoicing.

The impact of constant change in policy and law during their first years of practice was profound. The ability to reach out to both peers and experts through a Community of Practice where they could discuss, share and co-create practice knowledge, was a key factor in their success and continued registration as agents.

### THE CURRENT SITUATION FACING THE PROFESSION

The profession is now at a stage where migration agents are finding it is impossible to act with surety in many areas of migration law. The rapid changes to legislation and policy have resulted in an inability to provide long term advice to clients with confidence. Decision making by the delegates within the Department of Home Affairs also appears to be in crisis. Whilst this may be due to a shortage of staff in the Department, decision makers (particularly in offshore locations) are increasingly acting in ways that confound agents and their clients. Low integrity decisions are increasing. Applications can languish for months and years without case officer assigned to assist. Agents who have been working successfully with the Department for twenty years to achieve client outcomes are openly discussing leaving the profession, due to the nature of their interactions with departmental staff.



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### SOLUTIONS

The irony of the concerns surrounding the efficacy of the educational qualification is that despite the current environment they are working in, the profession has been quietly building in new and modern forms of peer supervised practice.

Practice knowledge in 2018 is now gained through multiple channels. These include informal networking, Podcasts, CPD courses and conferences. All of these can be successful, some are free and all are accessible.<sup>14</sup> But it is social media that provides access to constant contact with peers that has proven to be the most successful means of gaining professional competence and confidence. Social media platforms allow agents to keep abreast of the changes to law, and provides them with a place to share ideas, experiences and questions in a forum where there are trusted and experienced agents to assist.

These platforms demonstrate the ability of a profession to self-regulate their practice knowledge. Platforms are provided by formal bodies such as the Migration Institute of Australia as well as informal groups run by more experienced agents, or communities run by new agents. A key aspect of the platforms is that they are free, and they are managed by peers. The sole aim of agents involved is to improve their individual expertise and raise the professional ability of others.

My experience in watching these platforms has been that overall agents are encouraged to research the correct way, reminded to look to the Code of Conduct and sometime chided when they appear to be suggesting a pathway that is not sanctioned by the community. Through this provision of timely feedback the social forums provide a key aspect of Eraut's recommendation for a supportive workplace.

Importantly for educators these social forums can expose threshold concepts agents did not grasp during their education, were not taught or arise due to new legal requirements. This allows a great insight for educators to ensure their students are kept abreast of current issues they may face in practice.

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<sup>14</sup> See for example the Migration Show < <http://migrationshow.com/> >.

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The most compelling aspect of these social platforms is the regular updating of changes in practice and legislative reform that agents engage with and are assisted with. This is invaluable and allows agents to bring together all aspects of practice they are facing in a supportive environment.

## CONCLUSION

Unlike departmental staff, migration agents are expected to meet the same ethical, knowledge and skill level as lawyers.<sup>15</sup> But the ability to manage the complexity of the law, its surrounding policy and the ethical responsibility of working as an agent cannot rest solely on the entry qualification. Whilst the education level has not risen, the move to a Graduate Diploma will provide additional time and opportunity to integrate more practice based course work into the education of agents. However, no university qualification can possibly teach all aspects of practice.

*‘The length of study cannot be equated with depth or quality of study. Merely increasing the qualification to include more tasks will not guarantee better graduates. The knowledge a person learns in formal education will always be different to the way they learn to use that knowledge in practice, and different again to the knowledge they will learn once they are in practice. The transition from student to competent practitioner and expert occurs in a contextual setting that the university can seek to mimic but cannot fully replicate. Professional knowledge and expertise are gained within specific workplace settings, and professional communities’.*<sup>16</sup>

No one graduates from a degree as a fully formed professional. Whilst the education of agents at a Graduate Diploma level will undoubtedly raise the level of formal knowledge a new graduate has: the course work may not include any training in business, marketing, the vagaries of online applications and computerised decision making and dealing with constant legislative change. The ever-evolving knowledge of practice can only come from the profession.

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<sup>15</sup> Woods and Migration Agents Registration Authority [2004] AATA 457 (11 May 2004).

<sup>16</sup> Bartlett, A, Dickie, M, ‘Employer Expectations of the Graduate Certificate in Australian Migration Law and Practice’ (2013) 3 *Migration Australia* 79.

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### Commentary: [Working from A Parliamentarian's Office](#)

I have heard repeatedly, that politicians working with constituents have encountered multiple cases of unethical or poor work by migration agents. This anecdotal evidence is often presented to me as a reason migration agents need more scrutiny.

Whilst I cannot comment on issues such as the work done by Border Protection in areas uncovering fraud by migration agents, I would like to put on record my experience working in this role. I have found that constituents who reach out to their politician's office, have either come to the end of their visa options or are experiencing such a high level of stress in achieving their goal that they seek intervention.

The decisions we have coming out of our overseas posts often contain legal errors, typos and a lack of information. Errors by the Department or a lack of substantive communication with the Department are compounded by the applicant's inability to understand what is happening to them.

Constituents then may 'shop' around for an outcome with various migration agents, and politicians. They often fail to reveal the entire story to their migration agent or just ignore their agent's advice. In doing so the impression they will then provide to the parliamentarian is that the outcome they are facing is the agents fault.

Whilst I acknowledge that all agents are not perfect, it is my experience that constituents who have sought assistance from their parliamentarians are not the victims of unethical migration agents. Instead they are victims of the complexity of the migration process, poor decision making, lack of communication from the Department and/or their own decisions regarding their options. However, staff without knowledge of migration law and practice may not be able to discern how the problems facing constituents arose. The inability to reach the facts behind the casework may then lead to yet more anecdotal evidence of poor practice by agents.

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