Migration Alliance
Australia's No.1 immigration site

The Joint Standing Committee on Migration

By email: migration@aph.gov.au

Attn: Pauline Cullen, Committee Secretary.

Dear Madam Secretary,

INQUIRY INTO THE REGULATION OF MIGRATION AGENTS

I am writing in my capacity as Counsel for Migration Alliance Inc.

The purpose of this submission is to assist the Committee with respect to its "…inquiry into the efficacy of current regulation of Migration Agents."

To assist the Committee, I intend to use the "bullet points" as paragraph headings to ensure, insofar as it is possible, that the inquiry is well informed.

Examining the registration and regulation of migration agents in Australia including: education, English Proficiency, payment, fee-scheduling as well as the suitability and stringency of the accreditation process and evidence of deficiencies.

Education

On 1 January 2018 the tertiary qualification for entry into the migration advice profession rose from a Graduate Certificate to a Graduate Diploma in Australian Migration Law and Practice.

Note: Some universities have slightly different names for their Graduate Diploma course.

The recognised Graduate Diploma courses are offered by the following universities:

- Australian Catholic University
- Griffith University
- Murdoch University
- University of Technology Sydney
- Victoria University
- Western Sydney University

Griffith University will also offer a Master's program which will allow entry to the migration agent profession for those who also pass the Capstone assessment.

Master of Australian Migration Law and Practice.

The above mentioned educational requirements are broadly in line with the recommendations made by the "Kendall" Review in 2014. https://www.homeaffairs.gov.au/about/reports-publications/reviews-inquiries/office-of-the-migration-agents-registration-authority.

It is simply too early to assess the efficacy of the introduction of the requirement for a Graduate Diploma as opposed to the 'old' regime of a Graduate Certificate.

English proficiency

The current English language requirement for initial registrants is as follows:

English language proficiency

All first time applicants for registration as a migration agent must demonstrate they meet the English language requirement. The Minister has specified four ways to satisfy this requirement in Legislative Instrument IMMI 18/003. **There are no exemptions to this requirement.**

Under legislation, you must demonstrate you meet the prescribed English language requirement at the time you lodge your application for registration as a migration agent. If you have not met the requirement prior to lodgement, a decision may be made to refuse your application. If a decision is made to refuse your registration application, under legislation you will not be able to lodge another application within 12 months of the date of the refusal decision.

If you do not clearly meet Education Option 1 or 2 or do not hold a current Australian legal practising certificate, please consider sitting an English language exam (number 3 below) prior to enrolling in the prescribed course (Graduate Diploma from 1 January 2018). There have been a number of instances of applicants having paid for, and completed the prescribed course who have been unable to achieve the minimum specified scores in the English language tests.

1. Education Option 1

You have successfully completed:

- secondary school studies to the equivalent of Australian Year 12, with a **minimum of four years'** study at secondary school or equivalent; **and**
- a Bachelor degree or higher degree, with a minimum of three years' equivalent full-time study; **where**
  - your secondary school and degree studies were completed at educational institutions in Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and/or the United States; **and**
  - English was the language of instruction at these educational institutions; **and**
  - your study was undertaken while you were living in the country where your degree was awarded and your schooling was completed.

2. Education Option 2

You have successfully completed:

- secondary school studies either to the equivalent of Australian Year 10 or Year 12; **and**
- at least **10 years** of primary and/or secondary schooling; **where**

  - English was the language of instruction at your school or schools; **and**
  - your schooling was undertaken and completed in Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and/or the United States; **and**
  - you were living in either Australia, Canada, Ireland, New Zealand, South Africa, the United Kingdom and/or the United States throughout your period of schooling.

3. IELTS (Academic) or TOEFL IBT

You have achieved, no more than two years before making your application:

a. A minimum overall test score of 7 in the International English Language Testing System (IELTS) in the **Academic module**, with a minimum score of 6.5 in each subtest (speaking, listening, reading, writing); **or**
b. A minimum overall test score of 94 in the Internet Based Test of English as a Foreign Language (TOEFL) (IBT), with a minimum score of:
   - 20 in speaking
   - 20 in listening
   - 19 in reading
   - 24 in writing

Note: *IELTS and TOEFL are currently the only specified tests of English proficiency.*

4. Legal Practising Certificate

You are the holder of a current Australian legal practising certificate.

Source:

https://www.mara.gov.au/becoming-an-agent/registration-requirements/english-language/

Repeat Registration Applicants:

Currently, registered RMAs do not have to evidence English language capacity.

These arrangements reflected a "grandfathering" of RMAs who were already registered before the implementation of the current scheme with respect to new registrants.

Migration Alliance is wholly supportive of the current regime with respect to the capacity of RMAs to effectively communicate with The Department of Home Affairs and their clients, many of whom do not come from an English speaking background. The diversity of language skills with the Profession is an important tool in effective communication and the protection of consumers.

Fee Scheduling

Absent any elucidation by the Committee in its' terms of reference, Migration Alliance will approach this factor on the basis that the Committee wishes to inform itself about the range of fees charged by Migration Agents for the provision of "immigration assistance".

As the Committee is no doubt aware, at each registration cycle for an RMA, the RMA is obliged to indicate the range of fees likely to be charged by them in the context of the provision of immigration assistance.

A search of the "Disciplinary decisions" of the OMARA using the key word "overcharging" yielded zero results.

There is no evidence that RMAs overcharge for the provision of immigration assistance contrary to the Code of Conduct.

It is conceded however, that there may be a disparity between RMAs and the fees they charge but there has not been any wholesale analysis of the fees charged by RMAs for the provision of their professional services in this complex and demanding statutory environment.

Suitability and stringency of the accreditation process and evidence of deficiencies

It is submitted that the current process of accreditation may inform the Committee as to the adequacy of the accreditation process. That process appears to set high standards and the relevant qualification are, in the main, provided by leading tertiary educational institutions.

In addition the requirements for RMAs to undertake continuing professional development (CPD) acts to ensure that practitioners are kept well informed in this very complex and dynamic statutory environment.

The evidence before the Committee as to the overall efficacy of the entry requirements may be drawn from the available evidence of sanctions imposed by the regulator since 2008. The evidence is that a total of 79 RMAs have been sanctioned (Disciplinary decisions: https://www.mara.gov.au/news-and-publications/public-notices/disciplinary-decisions/) with 17 RMAs being sanctioned since 1 January 2017.

Migration Alliance submits that although there are legitimate concerns arising in each case, the overwhelming evidence is that the very vast majority of RMAs are not engaging in fraud, professional misconduct or other behaviours capable of enlivening the imposition of a sanction.

Rigorous entry requirements, ongoing professional development and professional support for RMAs all operate to regulate the conduct of members of the profession.

The nature and prevalence of fraud, professional misconduct and other breaches by registered migration agents, the current review mechanisms for migration agents and the adequacy of penalties.

Nature and Prevalence of fraud.

Although there have been some spectacular instances of fraudulent conduct engaged in by RMAs concerning the provision of bogus documents and false statements (The S&S Migration case) the majority of cases involving serious fraud are in the main, relatively rare.

It is conceded that the risk of fraud is potentially high and the risk of detection relatively low, but the occasional entry in the Immigration assistance space by criminal entrepreneurs who are not RMAs has seen, in some cases, seen the wholesale devastation of various vulnerable consumers and their communities.

The case of Abel Prasad
https://www.google.com.au/search?q=abel+kalpinand+prasad&oq=Abel+Prasad&aqs=chrome.5.69i57j0l5.6928j0j7&sourceid=chrome&ie=UTF-8

The case of Eddie Kang

https://migrationalliance.com.au/immigration-daily-news/entry/2017-12-eddie-kang-reports-of-scams-and-dibp-response.html.

[redacted]

Relevantly, it was Migration Alliance acting as a "listening post" that brought these 2 individuals to the attention of the relevant authorities.

Regrettably, there are also spectacular examples of criminal misconduct by Departmental Officers.

https://www.smh.com.au/politics/federal/visa-fraud-suspects-fled-after-wiring-1m-overseas-20140807-3dbmu.html

By reason of a lack of precision by the Minister's advisors, the more spectacular examples of fraud in the Immigration space are often mistakenly sheeted home to "migration agents" thus creating the perception that RMAs are under regulated and inclined to fraudulent conduct.

https://www.sbs.com.au/yourlanguage/hindi/en/article/2016/07/15/migration-agent-who-faked-visa-indian-citizen-jailed-australia and https://www.sbs.com.au/yourlanguage/punjabi/en/article/2017/09/20/international-students-lose-thousands-dollars-alleged-visa-fraud.

Professional misconduct and other breaches by registered migration agents.

The evidence before the Committee as to the overall efficacy of the entry requirements may be drawn from the available evidence of sanctions imposed by the regulator since 2008. The evidence is that a total of 79 RMAs have been sanctioned (Disciplinary decisions: https://www.mara.gov.au/news-and-publications/public-notices/disciplinary-decisions/) with 17 RMAs being sanctioned since 1 January 2017.

Migration Alliance submits that although there are legitimate concerns arising in each case, the overwhelming evidence is that the very vast majority of RMAs are not engaging in fraud, professional misconduct or other behaviours capable of enlivening the imposition of a sanction.

This submission is made in the context of an active and efficient regulator (OMARA) who is zealous in its investigation of complaints from consumers, Tribunals and the Department.

The current review mechanisms for migration agents and the adequacy of penalties.

Sanctions for professional misconduct, which may include fraudulent behaviour, include the OMARA sanctions of Suspension, Cancellation and Barring of RMAs, There are however significant sanctions under the Migration Act 1958 and the Criminal Code relating to the making of false statements and imposition upon the Commonwealth.

It is submitted that the range of criminal penalties arising in respect of serious criminal misconduct are more than adequate in the context of punishment and general deterrence.

It is submitted that the problem here is not the sanction but the dilatory nature of the investigations undertaken by the relevant authorities. For example, the cases of Eddie Kang and Abel Prasad, notwithstanding early reports of behaviour of concern, it took years to bring the malefactors to justice. The delay in interviewing the offenders and their victims allowed the perpetrators carte blanche for a number of years to the detriment of their victims and the integrity of the migration programme.

Migration Alliance and its members are well placed to inform the Department of various visa scams and other criminal behaviour as they are often the first port of call for the victims seeking redress. The absence of any actual or perceived protective function under the Migration Act 1958 often impacts adversely on the gathering of criminal intelligence and ultimately the timely prosecution of offenders. The criminal justice visa system is, in the estimation of Migration Alliance, in disarray. The reliance upon prosecutors acting in concert with defence attorneys to apply for a criminal justice stay visa can lead to anomalies where an important prosecution witness' (also a victim) may be removed from the jurisdiction and thus prejudice the likelihood of a successful prosecution.

Also alleged offenders may be held in detention at an Immigration detention centre and be removed when charged but before final hearing of the matter, thus prejudicing the administration of criminal justice.

These concerns are of particular interest to Migration Alliance.

Deficiencies and barriers to relevant authorities' investigation of fraudulent behaviour by registered migration agents in visa applications, including the adequacy of information and evidence sharing between such authorities.

Deficiencies and barriers.

RMAs are denied the privilege against self- incrimination and may be asked any relevant question by OMARA at any time concerning any allegation of misconduct by a client or on an "own motion" by OMARA. On occasion RMAs and Solicitors have been required to attend and be examined by an Examiner of the Australian Crime Commission. In those contexts they have been denied the privilege against self- incrimination. This cohort of Australian citizens and Permanent residents have, by reason of their registration as a Migration Agent, abrogated fundamental civil and political rights in exchange for the "privilege" of being able to provide immigration assistance.

Regrettably, resort to these unprecedented coercive powers may prejudice the investigation of criminal conduct but there are already no barriers to the relevant authorities which would undermine their capacity to investigate alleged criminal misconduct arising in the context of migration applications and other interactions with Australian government authorities.

The widely held view of members of Migration Alliance is that the response of the Commonwealth in such matters is often "too little too late" with a focus on the victims rather than the offenders. This is of course the easy path and if the Commonwealth is serious about immigration fraud then it needs to cast its net wider to include the conduct of criminal entrepreneurs, Education agents (who are completely unregulated) and in some cases Departmental officers.

It is the view of Migration Alliance that one of the significant barriers to the elimination or mitigation of fraud is the continued and inexplicable failure of the Department to regulate Education Agents and the failure to acknowledge that they inevitably provide "Immigration assistance".

The continuing disregard for representations made by membership organisations calling upon the Government to adopt a system similar to the New Zealand and Canadian authorities with respect to their dealings offshore with Education and Migration Agents; the issuing of "offshore agents numbers" by the Department, all serve to undermine the integrity of the migration programme.

The oft resorted to explanation that the Migration Act,1958 cannot have extraterritorial effect, is in a legal sense correct but has not acted as an impediment in other statutory schemes encompassing people smuggling, sexual tourism, slavery etc.

Further, the alleged difficulties do not appear to have troubled the New Zealand and Canadian authorities in dealing with offshore applicants and their "representatives".

The failure to act creates a culture of impunity amongst those who treat out Migration programme with contempt.

The adequacy of information and evidence sharing between such authorities.

There are no barriers between Commonwealth agencies with respect to the collection and dissemination of information and evidence. The problem here is the willingness of those in authority and with responsibility for the gathering of that information and the responsibility for its dissemination, to inform themselves and others of the relevant investigative inferences that can be drawn from the raw intelligence.

The twin mantras of "integrity" and intelligence can sometimes create a hostile environment for the examination and the acting upon "live" intelligence.

The belief that a system can be created to gather, examine and disseminate useful intelligence, absent analysis and enforcement, is a triumph of form over substance.

Criminals are not concerned about intelligence, they are concerned about being targeted and being subject to investigation.

The criminal justice system provides heavy sanctions but the rewards are also very high and the risks slight. A proactive approach by law enforcement acts as a deterrence. Intelligence gathered, but not acted on, is a vice to which some in the "intelligence" community are addicted.

The integrity of the migration programme is also undermined by laziness, stupidity and a failure to act in the presence of a threat which can be mitigated if acted upon at the first available opportunity.

Migration Alliance is very concerned that the "listening post" function of the Alliance is undermined by a failure to act promptly. As a general rule members of Migration alliance will receive intelligence about organised malpractice about 2 to 5 years before law enforcement gears up to act.

The current review mechanisms for migration agents and the adequacy of penalties.

Review mechanisms

The OMARA exercises statutory powers conferred by the Migration Act 1958.

The sanction regime of Caution, Suspension and barring is supplemented by an additional, albeit informal, system of "warnings" which serve to inform and ultimately regulate the conduct of an RMA who is the subject of a complaint.

The formal sanctions are amenable to review at the AAT.

That review process is dominated by the OMARA, the "Authority" who tend to frustrate the attempts of Applicants (the sanctioned RMA) to obtain documents relevant to the examination of the conduct leading to the sanction. Applications for summons are the subject of discretionary powers exercised by the AAT member, but as a general rule an application for a summons to produce background information informing the decision maker and to require the complainant to attend and be cross examined are, in the main, vigorously opposed by the Minister's representatives. This can, in the opinion of Migration Alliance create in the mind of the regulators delegates, a sense of impunity which undermines the expectation of procedural fairness.

It is recommended that the OMARA be required to obtain witness statements from complainants and to make full disclosure of all materials available to the Authority which would include both exculpatory and inculpatory "evidence".

Further, the Minister's representatives should be required, along with the OMARA, to adhere to the Model litigant guidelines to set off the grave imbalance of powers and resources available to the Commonwealth at the expense of the Respondent and subsequent Applicant for review at the AAT.
https://www.ruleoflaw.org.au/priorities/model-litigant-rules/

Adequacy of penalties

Having regard to the current sanction regime the "penalty" of a caution, suspension and barring appear to be adequate. This penalty regime is also supported by the Criminal Code and the penalty regime of the Migration Act 1958 with respect to aiders and abettors of offences.

The need for general deterrence is met by publication of the relevant sanctions, however, it is grossly unfair for the relevant Minister or Assistant Minister to issue a press release which may embellish the facts relied upon by the OMARA to warrant the sanction and in the event that a complaint is dismissed and the matter remitted back to the Authority for re-examination, the destruction of the RMAs professional and personal reputation cannot be undone.

It is recommended that in the case of an appeal being on foot that the most prudent and fairest course of action is to make no public comment at all, unless there is a corresponding obligation imposed on the Minister and the Assistant Minister to do a press release in the event that the AAT rules in favour of the Applicant for review.

Deficiencies and barriers to relevant authorities' investigation of fraudulent behaviour by RMAs in visa applications, including the adequacy of information and evidence sharing between authorities.

The Commonwealth of Australia has vast resources at its disposal to investigate and prosecute offences against laws of the Commonwealth.

There are no relevant deficiencies or barriers to the investigation of fraudulent behaviour by RMAs.

It is relevant to note that RMAs do not enjoy, in the context of an OMARA investigation, the privilege of not being required to answer questions. There is no privilege against self-incrimination.

In addition there is no prohibition on the communication of information obtained through this process to law enforcement or other agencies and by reason of the use/collateral use rule; information obtained under compulsion may lead investigators to related offences and thus avoid the prohibition on the primary information (obtained under compulsion) being used in a criminal prosecution.

Evidence of the volumes and patterns of unregistered migration agents and education agents providing immigration services (Immigration assistance) in Australia.

Migration Alliance has no formal evidence of the nature and extent of the provision of immigration assistance by unregistered agents and Education Agents.

However Migration Alliance is specifically concerned about the current level of exemptions which permit, amongst others, HR managers to provide immigration assistance to employees which can give rise to a conflict of interest as well as concerns about the quality of that advice. Similarly, Members of Parliament and their staff should not provide immigration assistance to constituents. That advice should be provided by RMAs who, through Migration Alliance, are happy to provide pro bono advice to Members of Parliament and their staff to constituents. RMAs are insured and are qualified to provide independent and expert advice. Officers of the Department and the AAT should be encouraged not to provide "immigration assistance" to members of the public.

The Commonwealth already provides funding to a number of NGOs who provide pro bono advice and in some cases, assistance, to members of the public.

Appropriateness of migration agents providing other services to clients.

Migration Alliance is of the view that absent any conflict of interest and appropriate professional indemnity insurance that RMAs with appropriate skills and qualifications should be able to provide "other services' to their clients.

It is noted that the Code of Conduct specifically prohibits marriage celebrants (who are also RMAs) from providing "immigration assistance" to the persons they marry.

Conclusion

Migration Alliance is happy to provide additional oral evidence and to respond to submissions being made by both the regulator (OMARA) and the Department of Home Affairs should it become necessary.

Please let me know if you require any further clarification on any of the matters addressed in this submission.

Yours faithfully,

Christopher Levingston
Counsel for Migration Alliance.