The 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]

October 2017

ISBN 978-1-76010-660-7

This document was produced by the Senate Legal and Constitutional Affairs Committee secretariat and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

Members of the committee

Members

Senator the Hon Ian Macdonald (LNP, QLD) (Chair to 12 October 2017)

Senator David Fawcett (LP, SA) (Chair from 12 October 2017)

Senator Louise Pratt (ALP, WA) (Deputy Chair)

Senator Jane Hume (LP, VIC)

Senator Nick McKim (AG, TAS)

Senator Murray Watt (ALP, QLD)

Substitute members

Senator Barry O'Sullivan (LNP, QLD) to replace Senator Ian Macdonald from 12 October 2017

Secretariat

Mr Tim Watling, Committee Secretary

Mr Nicholas Craft, A/g Principal Research Officer

Ms Charlotte Fletcher, Senior Research Officer

Ms Ros Hewett, Senior Research Officer

Ms Alexandria Moore, Administrative Officer

Suite S1.61 Telephone: (02) 6277 3560

Parliament House Fax: (02) 6277 5794

CANBERRA ACT 2600 Email: legcon.sen@aph.gov.au

Table of contents

Recommendations

Recommendation 1

2.56 The committee recommends that the Government consider implementing a formal transition period of two years from the commencement of the bill for registered migration agents currently holding restricted practising certificates, who wish to complete their supervised training and obtain an unrestricted practising certificate.

Recommendation 2

2.57 The committee recommends that the bills be passed.

Chapter 1

Introduction

1.1 On 10 August 2017, the Senate referred the Migration Amendment (Regulation of Migration Agents) Bill 2017 (RMA bill) and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017 (MARACA bill) to the Legal and Constitutional Affairs Legislation Committee (committee) for inquiry and report by 16 October 2017.[1]

1.2 The Selection of Bills Committee referred the bills to the committee because the amendments would see:

> Lawyers who hold practising certificates removed from regulation by the Migration Agents Registration Authority.…
>
> There are concerns that if lawyers were removed from the current system of registration through OMARA [the Office of Migration Agents Registration Authority], 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 undertake specialist studies in migration law.
>
> Under the proposed amendments it would be possible for someone with a legal practicing certificate to be registered as a migration agent without demonstrating any knowledge of Australia's complex migration law and policy.[2]

1.3 The committee has decided to consider these bills together in a single report, because they both amend aspects of the *Migration Act 1958* (Migration Act) or other relevant legislation.

Background and overview of the bills

Migration Amendment (Regulation of Migration Agents) Bill

1.4 The RMA bill consists of a package of amendments to the Migration Act that aims to deregulate the migration service industry.[3]

1.5 A number of these proposed amendments are a response to recommendations from the 2014 Independent Review of the Office of the Migration Agents Registration Authority (the OMARA Review), undertaken by Dr Christopher N. Kendall for the

---

1 *Journals of the Senate, No. 51*, 10 August 2017, p. 1657.

2 *Selection of Bills Committee Report*, No. 8 of 2017, p. 3 and appendix 3.

3 RMA Explanatory Memorandum, p. 44.

Department of Immigration and Border Protection (the Department).[4] The OMARA Review examined and reported 'on the most appropriate organisational structure for regulating the immigration advice sector in order to protect consumers'.[5]

1.6 The set of legislative changes proposed in Schedule 1 of the RMA bill address Recommendation 1 of the OMARA Review, which proposes that 'lawyers be removed from the regulatory scheme that governs migration agents such that lawyers cannot register as migration agents; and are entirely regulated by their own professional bodies'.[6]

1.7 In the second reading speech introducing the bill, the Hon Alex Hawke MP, Assistant Minister for Immigration and Border Protection, stated that:

> The relevant legal professional bodies and statutory schemes underpinning them have a broader range of powers [than the Migration Agents Registration Authority] to resolve consumer-related issues than the scheme governing migration agents. This includes penalties outside of the OMARA's existing jurisdiction, including financial penalties for improper conduct, and recommending compensation for affected clients.[7]

1.8 The legislative changes that would be made by Schedule 2 address the concerns raised in the OMARA Review regarding the current level of training and registration requirements for RMAs.

1.9 The OMARA Review suggested the requirement that applicants apply for registration within a year of completing the Prescribed Course was 'unnecessarily restrictive', and recommended that 'the time period for registration after completing the Prescribed Course be extended from one year to five years'.[8]

1.10 In response, the amendments put forward in Schedule 2, according to the RMA bill's Explanatory Memorandum, propose removing 'the 12-month time limit within which a person must apply for registration following the completion of a prescribed course'.[9] The amendments further mean:

> …that there will be a longer window within which applicants may be considered applicants for repeat registration, and will therefore be exempt from certain entry qualification requirements. This contrasts with the

---

4 RMA Explanatory Memorandum, pp. 5, 46.

5 See Terms of Reference in Dr Christopher N. Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report*, September 2014, p. 13.

6 Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority*, p. 28.

7 The Hon. Alex Hawke MP, Assistant Minister for Immigration and Border Protection, *House of Representatives Hansard*, 21 June 2017, p. 7203.

8 Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority*, pp. 21, 30.

9 RMA Explanatory Memorandum, p. 2.

> current provisions of the Migration Act, which only exempt from those requirements applicants who apply within 12 months of the end of their last registration period.[10]

1.11 The RMA bill's Explanatory Memorandum stated that the new 'prescribed period will be prescribed in a legislative instrument made under the *Migration Agents Regulations 1998*'.[11]

1.12 In the second reading speech, the Assistant Minister outlined that these changes were intended to strengthen the registration requirements of the migration industry and would 'complement the introduction of a Graduate Diploma in Migration Law and Practice to replace the current Graduate Certificate'.[12]

1.13 Schedule 3 proposes amendments to, or the repeal of, redundant provisions of the Migration Act.[13]

1.14 The legislative changes contained in Schedule 4 aim to close an existing loophole, in which incomplete applications remain in limbo if the applicant does not respond to requests for further information.[14]

1.15 The amendments proposed by Schedule 5 would mean that a migration agent who has been registered on a non-commercial basis must inform the OMARA if they have begun to provide immigration assistance on a commercial basis.[15]

1.16 Schedule 6 proposes amending the definitions of 'immigration assistance' and 'immigration representations', with the aim of ensuring that a person must be an RMA (or exempt from the legal requirements to be an RMA) to provide this assistance.[16]

Migration Agents Registration Application Charge Amendment Bill

1.17 The MARACA bill sets out amendments to the *Migration Agents Registration Application Charge Act 1997*. These amendments would complement the changes outlined in the RMA bill to the Migration Act, and further proposed changes to be made to the Migration Agents Registration Application Charge Regulations 1998.[17]

---

10 RMA Explanatory Memorandum, p. 23.

11 RMA Explanatory Memorandum, p. 23.

12 The Hon. Alex Hawke MP, Assistant Minister for Immigration and Border Protection, *House of Representatives Hansard*, 21 June 2017, p. 7203.

13 RMA Explanatory Memorandum, p. 26.

14 RMA Explanatory Memorandum, p. 47.

15 RMA Explanatory Memorandum, p. 48.

16 RMA Explanatory Memorandum, p. 41.

17 MARACA Explanatory Memorandum, p. 3.

1.18 The MARACA bill would make the commercial registration charge the default charge, unless applicants can prove they meet criteria allowing them to pay the non-commercial charge.[18]

1.19 The Explanatory Memorandum for the bill explains the proposed amendments as follows:

> Regulation 5 of the Charge Regulations allows a person to pay a lower registration application charge (the non-commercial charge) where that person meets two criteria. These criteria are if the person acts solely on a non-commercial or non-profit basis, and if the person acts as a member of or a person associated with an organisation that operates in Australia solely on a non-commercial or non-profit basis.[19]

Financial implications

1.20 The Explanatory Memoranda included financial impact statements noting the bills would have low financial impact on Commonwealth Government departments and agencies.[20]

Compatibility with human rights

1.21 The Explanatory Memoranda state that both bills are compatible with Australia's human rights obligations.[21]

Conduct of the inquiry

1.22 Details of the inquiry were advertised on the committee's website, including a call for submissions by 1 September 2017.[22]

1.23 The committee received 24 submissions, which are listed at appendix 1 of this report. These submissions are available in full on the committee's website.

Structure of this report

1.24 This report consists of two chapters:

- This chapter provides a brief background and overview of the bills, as well as the administrative details of the inquiry.

---

18 MARACA Explanatory Memorandum, p. 3.

19 MARACA Explanatory Memorandum, p. 3.

20 RMA Explanatory Memorandum, p. 2; MARACA Explanatory Memorandum, p. 2.

21 RMA Explanatory Memorandum, p. 44; MARACA Explanatory Memorandum, p. 8.

22 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs

- Chapter 2 sets out the issues raised by submitters to the inquiry. It also outlines the committee's views and recommendations

Acknowledgements

1.25 The committee thanks all organisations and individuals who made submissions to this inquiry.

Chapter 2

Key concerns

2.1 This chapter discusses the main concerns raised by submitters to this inquiry about the RMA bill, and outlines the committee view and recommendation.

2.2 Please note this chapter focuses on areas of concern discussed in submissions regarding Schedule 1 of the RMA bill. No concerns were directly raised in relation to other Schedules in the bill. The committee did not receive submissions expressing concerns about the MARACA bill.

General support for the RMA bill

2.3 A number of submitters highlighted the benefits that the proposed amendments would bring for the legal profession. These included reduced costs for lawyers, who would no longer be required to register as migration agents, and the stringent disciplinary measures that lawyers would be subject to within their own field instead of the OMARA's disciplinary measures.[1]

2.4 The Law Council of Australia, for example, submitted that it:

> …strongly supports removing dual regulation of lawyers when practising migration law. The Law Council has consistently advocated against dual regulation of the legal profession as an unnecessary and costly regulatory burden for legal practitioners, and a source of confusion and uncertainty for their clients.[2]

2.5 The Refugee Council of Australia also welcomed the bill, offering the opinion that the removal of lawyers from the OMARA regulatory scheme, including its associated costs and the time required to register, would 'allow more legal practitioners to provide vital legal advice for refugees and asylum [seekers]' who often rely on pro bono legal advice.[3]

Key concerns raised by submitters

2.6 Most submissions that the committee received were from registered migration agents (RMAs) who also held legal qualifications and, in many instances, restricted practising certificates.

2.7 These submitters focused on the amendments in Schedule 1 concerning the removal of lawyers from the OMARA regulatory scheme. The effect of this removal would mean that migration agents with practising certificates would have to choose to practice either as lawyers, regulated by their respective state or territory legal bodies, or as migration agents, regulated by the OMARA.

---

1 Refugee Council of Australia, *Submission 8*, p. 1; Department of Immigration and Border Protection, *Submission 9*, p. 3.

2 Law Council of Australia, *Submission 12*, p. 5.

3 Refugee Council of Australia, *Submission 8*, p. 1.

2.8 These proposed amendments would impact a significant number of migration agents: as at 15 August 2017, a third of RMAs with the OMARA were also Australian legal practitioners.[4]

2.9 The concerns that these submitters raised about Schedule 1 of the RMA bill included:

- Limited prior consultation;
- Dual regulation existing in other fields and countries;
- Impact on small businesses and potential unemployment;
- Loss of expertise;
- Migration agents being 'punished' for upgrading their skills;
- Confusion for clients; and
- Lawyers formerly sanctioned by the OMARA potentially being able to provide migration advice.

Limited prior consultation

2.10 Concerns were raised in evidence regarding the level of consultation that the Government engaged in prior to introducing the final version of the RMA bill. For example, one submitter suggested that the consultation was 'limited' and involved 'only a few handpicked people at the LCA [Law Council of Australia] and the MIA [Migration Institute of Australia] sworn to secrecy about the process'.[5]

2.11 However, the Department in its submission emphasised that:

> Prior to final drafting of this bill, the Government extensively consulted, including by circulating an Exposure Draft to key stakeholders in the migration advice industry. The feedback provided in response to the Exposure Draft was taken on board to ensure an orderly transition of lawyers from the OMARA regulatory scheme.[6]

2.12 In the second reading speech introducing the RMA bill, the Assistant Minister for Immigration and Border Protection stated that the Government had 'consulted broadly' on Schedule 1 of the RMA bill by taking 'the relatively uncommon step of circulating an exposure draft of schedule 1 to key stakeholders'. These stakeholders included the Law Council of Australia, the Migration Institute of Australia, and state and territory legal and professional bodies.

4 Department of Immigration and Border Protection, *Submission 9*, p. 4.

5 Mr Mark Northam, *Submission 21*, p. 2.

6 Department of Immigration and Border Protection, *Submission 9*, p. 3.

2.13 The Assistant Minister declared that the feedback received from these organisations would be used to 'assist in ensuring the transition of lawyers with practising certificates from the OMARA regulatory scheme is as smooth as possible'.[7]

Dual regulation in other fields and countries

2.14 A number of submitters objected to the bill on the grounds that dual regulation is permitted in a number of other fields of employment. For example, the Migration Institute of Australia stated that:

> Dual regulation is not uncommon in other professions in Australia. Accountants are required to have separate registration to work in auditing, financial planning and taxation. Tax practitioners and BAS [Business Activity Statement] agents are registered by the ATO [Australian Taxation Office]. Financial planners are regulated by ASIC [Australian Securities and Investments Commission] and must hold an Australian Financial Services License or be covered by an exemption…Similarly, auditors are also regulated by ASIC.[8]

2.15 Other submitters argued that other countries do not disallow lawyers from registering as migration agents. These submitters noted that the proposed amendments are based on the recommendation from the OMARA Review that 'lawyers be removed from the regulatory scheme that governs migration agents such that lawyers cannot register as migration agents'.[9] The OMARA Review argued that unlike Australia, Canada, the United Kingdom and New Zealand do not 'require lawyers to be registered in order to provide immigration advice or assistance'.[10]

2.16 One submitter contended that:

> …while it is true that Canada and the United Kingdom do not *require* 'lawyers to be registered in order to provide immigration advice or assistance', those countries do not *prohibit* them from so registering. It is one thing not to require dual registration. But to prohibit it is very different and [will] bring disastrous consequences...[11]

2.17 In its submission, the Law Council of Australia stated that migration law was the only area of legal practice subject to two different regulatory regimes. The consequences of dual regulation included 'the uncertainties and compliance burdens of two separate legislative regimes' that amounted to 'differences in law, regulatory

---

7 The Hon. Alex Hawke MP, Assistant Minister for Immigration and Border Protection, *House of Representatives Hansard*, 21 June 2017, p. 7203.

8 Migration Institute of Australia, *Submission 10*, p. 8. See also Mr Ron Dick, *Submission 15*, p. 2.

9 Dr Christopher N. Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report*, September 2014, p. 28.

10 Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority*, p. 41.

11 Mr Sergio Zanotti Stagliorio, *Submission 14*, p. 10, italics in original. See also Migration Institute of Australia, *Submission 10*, p. 8.

policies, practices and procedures…applying to the same area of legal practice'.[12] The Law Council also highlighted uncertainty caused by dual regulation for consumers about the type of immigration assistance provided by lawyers, where to lodge complaints and what consumer protections and remedies were available.[13]

Impact on small businesses and potential unemployment

2.18 Many submitters highlighted that the proposed amendments will most affect migration agents who will soon graduate or have recently graduated from a law degree and currently hold a restricted practising certificate requiring them to be supervised until they have completed a specified level of supervised legal practice. For example, one RMA with a restricted practising certificate informed the committee:

> If the Bill is passed in its current form…existing registered migration agents who hold a practising certificate will need to choose: give up the practising certificate to remain as an RMA, or de-register as a migration agent to continue holding a practising certificate. This choice is not problematic for the majority of lawyers…[but] is not so problem-free for lawyers who:
>
> 1) are RMAs and have been RMAs for a long time, building up their RMA business from ground up; and
>
> 2) hold a restricted practising certificate, and [are] otherwise practising law (not necessarily migration law) elsewhere; and
>
> 3) would have to give up their main source of income (RMA activities) should they de-register as an RMA…[14]

2.19 Some submissions included personal accounts indicating that the proposed bill would affect submitters' businesses and livelihood. The submitter above wrote:

> Personally, I am looking at the choice between giving up my entire business just to retain my practising certificate, or to give up my practising certificate (something that took years of hard work and personal sacrifice to obtain) just so that I can continue to rely on my migration advice business which is the main source of income for my family unit.[15]

2.20 Other submitters noted that the proposed bill could have devastating effects on small migration businesses as well as the industry more generally. One argued that:

> …unless I'm willing to give up my practising certificate and with it any chance of becoming an unrestricted lawyer, I will have to close my business…the successful business I've worked night and day to build for the last 5 years will be forced to close its doors. [The proposed bill] amounts to

12 Law Council of Australia, *Submission 12*, p. 6.

13 Law Council of Australia, *Submission 12*, pp. 6–7.

14 Name Withheld, *Submission 2*, p. 1. See also Australian Migration & Citizenship Services, *Submission 5*, p. 2.

15 Name Withheld, *Submission 2*, p. 2. See also Australian Migration & Citizenship Services, *Submission 5*, p. 2.

> a forced business closure for the RMA simply in order to be able to continue doing [what] they are already legally able to do now.[16]

2.21 The flow-on effects, one submitter suggested, would lead to unemployment for many employees in small migration agencies run by RMAs with restricted practising certificates.[17]

2.22 Submissions indicated that the effect of the amendments would mean that RMAs wishing to retain their restricted practising certificates would be forced to close their established businesses until they held unrestricted practising certificates. The reason for this is the requirement that lawyers not provide legal advice as sole practitioners until they have completed a required period of supervision under a lawyer with a full certificate.

2.23 Several submitters noted that if RMAs did choose to retain their unrestricted practising certificates while maintaining their registration as migration agents, large law firms could benefit to the detriment of smaller businesses.[18] These submitters were concerned that they would have to find a law firm willing to take them and their clients so that they could fulfil the supervision requirements of their restricted practising certificates while continuing to practice in the field of migration advice. This, they argued, would mean not only the end of their livelihoods, but also cause some inconvenience to their clients. One submitter said that this would mean handing over clients to law firms and '[hoping] that that law firm would employ me and not dismiss me shortly after'.[19]

2.24 The Law Council of Australia noted the concerns raised about the impact the bill could have on migration agents who hold a restricted practising certificate, and suggested that 'provision be made for a transitional period, of 2 years, to enable these affected migration agents to complete the steps required by their legal profession regulatory bodies'.[20]

2.25 Other submitters argued that if a transition period is implemented, it should be greater than two years to take into account current law students who do not yet have a restricted practising certificate, as well as the individual circumstances of RMAs that may prevent them from completing the required supervision within two years.[21]

2.26 The Department's submission stated that the proposed amendments would commence on 1 July 2018. In this, it emphasised that '[t]he Department will work closely with the legal profession regulators to ensure that the transition is well managed'.[22] It also underlined the fact that 'a high level of regulation imposes

---

16 Mr Mark Northam, *Submission 21*, pp. 1–2. See also Mr Daniel Taylor, *Submission 1*, p. 2.

17 Mr Sergio Zanotti Stagliorio, *Submission 14*, p. 28.

18 Mr MaCson Queiroz, *Submission 16*, p. 1.

19 Ms Leila Reypour, *Submission 4*, p. 1.

20 Law Council of Australia, *Submission 12*, p. 5.

21 For example, Mr Sergio Zanotti Stagliorio, *Submission 14*, pp. 36-37.

22 Department of Immigration and Border Protection, *Submission 9*, p. 5.

unnecessary costs, damages productivity, deters investment and undermines job growth' more broadly.[23]

Loss of expertise

2.27 A significant number of submissions argued that the proposed amendments could lead to a loss of expertise in migration agencies, the broader migration agent community and the legal profession.

2.28 The committee received several submissions arguing that the bill could lead to a loss of legal expertise or legal aid funded services in large, non-legal migration agencies because lawyers would seek employment elsewhere. For example, the Migration Institute of Australia stated that:

> It is common for large migration practices to not be legal practices within the definition of a 'qualified entity'. Many of these non-legal migration practices and the lawyers they employ provide pro bono or legal aid funded services to migrants…Many of these non-legal migration practices provide services on a subsidised basis under government fee for service contracts... If these service provider non-legal migration practices are unable to continue to employ lawyers to undertake this work, there will be significant cost implications for the funding of these services… [T]he cost to the government of briefing new advisers will be substantial. These contracts will potentially need to be renegotiated by the service providers…[24]

2.29 A further argument put forward in opposition to the ban on dual registration was that the migration agent community as a whole would suffer from the loss of legal expertise in its forums and activities.[25]

2.30 Other submitters suggested that a law degree would not be sufficient training for lawyers providing immigration assistance, unlike the existing postgraduate training in migration law required for migration agents. For example, one submitter put forward the opinion that:

> this amendment seems to be in direct contradiction to increasing the entry requirements to be a Registered Migration Agent. On the one hand the qualification is being increased from a six (6) month Graduate Certificate to a twelve (12) month Graduate Diploma with a proposed compulsory placement component and restricted practicing period of two (2) years. Then on the other hand this amendment would allow any lawyer with a practicing certificate, who could have no formal training or experience in immigration law and practice, to be able to provide immigration assistance…[A]llowing the holder of a practicing certificate to provide both immigration legal assistance and immigration assistance without any further

23 Department of Immigration and Border Protection, *Submission 9*, p. 4.

24 Migration Institute of Australia, *Submission 10*, pp. 5–6. See also Mr Sergio Zanotti Stagliorio, *Submission 14*, p. 28; *Submission 15*, p. 1.

25 Mr Ian Bosley, *Submission 3*, p. 2.

> training or registration will undermine these changes, and the professions as a whole.[26]

2.31 The Migration Institute of Australia agreed with this observation, arguing that 'an RMA who has successfully completed the postgraduate Certificate is better equipped to advise on migration law than many lawyers'.[27]

2.32 On the other hand, the Law Council of Australia submitted that:

> The Law Council is not aware of any evidence of demonstrated deficiencies in legal knowledge or practice competencies among legal practitioners practising in migration assistance, to suggest that the current requirements for admission to the legal profession and legal practice, and the options for ongoing professional development, should no longer be regarded as sufficient to provide immigration assistance. We note also that under the present [Migration Agents] Regulations 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…Further, it would, in the Law Council's view, be an odd outcome if holding a legal practising certificate were to be regarded as inadequate for providing immigration assistance, but would be adequate for other forms of legal assistance and representation in migration law matters.[28]

2.33 In addition, the Department was of the opinion that:

> …while immigration law is complex, lawyers operate in many highly complex areas with the knowledge that if they are negligent or unprofessional, they will be subject to some of the strictest and harshest disciplinary procedures and professional sanctions in the country…Lawyers with practising certificates intending to practice in the migration advice field will be able to access educational offerings to increase their knowledge.[29]

2.34 The Department also highlighted the suitability requirements for lawyers for admission, granting and renewal of legal practising certificates, and the period of supervised practice and continuing professional development programs that lawyers must complete.[30]

Migration agents 'punished' for upgrading their skills

2.35 Several submitters expressed the opinion that the proposed amendments would have the effect of 'punishing' migration agents who chose to pursue a law degree to increase the knowledge and skills that they offered their clients. For example, one suggested that RMAs who had chosen to 'upgrade' their legal knowledge

---

26 Ms Toniey Munro, *Submission 7*, p. 4.

27 Migration Institute of Australia, *Submission 10*, pp. 3–4.

28 Law Council of Australia, *Submission 12*, p. 12.

29 Department of Immigration and Border Protection, *Submission 9*, pp. 3–4.

30 Department of Immigration and Border Protection, *Submission 9*, p. 4.

and then obtained a restricted practising certificate could end up being 'downgraded' because they could no longer practice law if they wanted to remain RMAs.[31]

Confusion for clients

2.36 The committee received submissions that the proposed amendments would result in confusion for many clients of migration agents.[32] In particular, submitters drew attention to the fact that the OMARA Register of Agents 'provides information about an agent's years of experience and if they hold a legal practicing certificate'.[33]

2.37 A number of submitters considered that the fact that lawyers would no longer hold a Migration Agents Registration Number (MARN) could cause some confusion, as the first two digits of this number allow clients to:

> …easily infer how much experience RMAs have based on their MARN...Clients would no longer be able to easily ascertain how many years of practise in migration law a lawyer has. That is not in the best interests of clients.[34]

2.38 Some submitters highlighted that because legal practitioners will no longer have their services listed on the OMARA website, it will be difficult for potential clients to find them, particularly because the agency in the past had emphasised that only the services of migration agents registered with the OMARA should be used.[35] One RMA and solicitor practising as migration agent in Sri Lanka noted that:

> …outside Australia, the significant amount of problems associated with lawyers and professionals who are not registered as migration agents and yet practice migration law has resulted in distrust and suspicion in relation to migration services provided by anyone who is not a registered migration agent.[36]

2.39 However, the Law Council of Australia was of the opinion that the current system of 'dual regulation of the legal profession…[is] a source of confusion and uncertainty' for lawyers' clients.[37]

2.40 The Department provided reassurances in its submission that 'the OMARA…will offer a comprehensive communication strategy so that consumers understand that migration advice can also be obtained from practising lawyers'.[38]

---

31 Name Withheld, *Submission 2*, p. 2. See also Ms Leila Reypour, *Submission 4*, p. 1; and Migration Institute of Australia, *Submission 10*, p. 7.

32 Mr Jose Aniceto Respall, *Submission 6*, p. 3; Mr Sergio Zanotti Stagliorio, *Submission 14*, p. 24.

33 Migration Institute of Australia, *Submission 10*, p. 4.

34 Mr Sergio Zanotti Stagliorio, *Submission 14*, p. 26; Ms Leila Reypour, *Submission 4*, p. 2; and Migration Institute of Australia, *Submission 10*, p. 4.

35 Migration Institute of Australia, *Submission 10*, p. 4; Ms Leila Reypour, *Submission 4*, p. 2; and Australian Migration & Citizenship Services, *Submission 5*, p. 2.

36 Mr Jude Sushendra Fernando, *Submission 22*, p. 2.

37 Law Council of Australia, *Submission 12*, p. 5.

Sanctioned and barred migration agents

2.41 The committee received evidence arguing that the bill would potentially allow some lawyers who have been banned from practising as migration agents by the OMARA to resume offering migration advice.[39]

2.42 The Migration Institute of Australia asserted that 'Lawyers have been allowed to continue practising by their law societies even after being banned by the OMARA for providing fraudulent migration advice or breaches of fiduciary duties'.[40]

2.43 However, the Law Council provided evidence that there have been significant reforms to legal profession legislation that 'have substantially strengthened protections and remedies for consumers of legal services'.[41]

2.44 Additionally, the Department declared that:

> …the Government recognises that deregulation should not be prioritised over the maintenance of important consumer protections. In the implementation of this change, the Government will ensure that appropriate consumer protections are in place, including mechanisms to ensure that vulnerable consumers will continue to be protected from receiving incompetent migration advice.[42]

2.45 The Department also highlighted the 'broader range of powers' of legal professional and disciplinary bodies and the statutory schemes underpinning them that lawyers would be subject to, including 'penalties outside of the OMARA's existing jurisdiction'.[43]

Potential constitutional challenges

2.46 The committee received a supplementary submission containing legal advice, including from a QC, arguing that the proposed amendments affecting RMAs with restricted practising certificates could present constitutional issues:

> While not completely free from doubt, we are of the view that the Bill effectively burdens communication on governmental or political matters…
>
> [A] question arises as to the means being used to achieve the identified objects and whether those means adversely impinge on the functioning of the system of representative government and are therefore incompatible in the relevant sense…
>
> The means being used is deregistration of migration agents who become Australian legal practitioners. The effect of the chosen means is to restrict a class of communications (including communications made to the Minister)

---

38 Department of Immigration and Border Protection, *Submission 9*, p. 4.

39 Ms Toniey Munro, *Submission 7*, p. 3.

40 Migration Institute of Australia, *Submission 10*, pp. 4–5.

41 Law Council of Australia, *Submission 12*, pp. 8–11.

42 Department of Immigration and Border Protection, *Submission 9*, p. 4.

43 Department of Immigration and Border Protection, *Submission 9*, p. 4.

> by those previously registered migration agents, who can no longer provide unsupervised immigration assistance outside the legal practice in which they are employed. Previous clients may also be left without advice and assistance from their former agent in this regard…
>
> [T]he means adopted to achieve [the ends of the RMA bill] may give rise to a risk of incompatibility with the system of representative government that is protected by the implied freedom…
>
> In our view, the Bill may face difficulties in passing the proportionality stage of the analysis.[44]

2.47 The advice concluded that the Bill could be constitutionally invalid:

> We consider that there is at least an appreciable risk that the Bill, if enacted, may be constitutionally invalid as infringing the implied freedom. We consider that the Bill would be less susceptible of challenge if it permitted Australian legal practitioners (or at least those who hold a restricted practising certificate) the option of continuing to be registered as migration agents.[45]

2.48 The committee includes this evidence in its report for the information of the Department.

Committee view

2.49 The committee has limited its comments to the proposed amendments to Schedule 1 of the RMA bill. This approach was taken because submissions did not directly address the other schedules of the RMA bill or the proposed amendments outlined in the MARACA bill.

2.50 The committee notes that the RMA bill in its current form could impact migration agents with restricted practising certificates, and recognises that many submitters put forward suggestions to alleviate this impact. These included that lawyers be allowed to voluntarily register with OMARA as in other countries and fields of employment; lawyers holding restricted practising certificates be allowed to simultaneously register as migration agents until such time as they are granted a full practising certificate; or that a transitional period of two or more years be provided for those RMAs who currently hold restricted practising certificates.

2.51 The committee understands that the Government took the relatively unusual step of circulating an exposure draft of Schedule 1 to key stakeholders for feedback, including the Law Council of Australia, the Migration Institute of Australia, and state and territory legal professional bodies. The Department stated that feedback from this extensive consultation process was used to draft the final version of the bill. The Assistant Minister has also provided assurances that the feedback from these organisations will be used to facilitate a smooth transition of lawyers from the OMARA regulatory scheme.

---

44 Chris Horan and Alexander Solomon-Bridge, *Submission 14.1*, pp. 3, 4, 5.

45 Chris Horan and Alexander Solomon-Bridge, *Submission 14.1*, p. 6.

2.52 The committee also notes the Department's assurances that the Government will implement consumer protection measures to protect clients affected by the proposed amendments, and that the Department will employ a communication strategy to inform clients of the changes.

2.53 Nonetheless, the committee is mindful of the difficulties that the RMA bill would impose on RMAs with restricted practicing certificates who want to work towards obtaining their full unrestricted legal practicing certificates, by effectively forcing them to close their businesses and lose their livelihoods in the short-term.

2.54 Given this, the committee suggests that the Government should consider implementing a formal transition period of two years for this group, so that RMAs who hold a restricted practising certificate are able to meet the requirements to obtain unrestricted practicing certificates while running their current businesses.

2.55 On balance, the committee considers that the bills will satisfy the relevant recommendations of the OMARA Review, contribute considerably to the deregulation of the migration advice industry and reduce the administrative burden of dual regulation on lawyers practising in the field of immigration assistance.

Recommendation 1

2.56 The committee recommends that the Government consider implementing a formal transition period of two years from the commencement of the bill for registered migration agents currently holding restricted practising certificates, who wish to complete their supervised training and obtain an unrestricted practising certificate.

Recommendation 2

2.57 The committee recommends that the bills be passed.

Senator David Fawcett

Chair

Appendix 1
Public Submissions

1	Mr Daniel Taylor
2	Name Withheld
3	Mr Ian Bosley
4	Ms Leila Reypour
5	Australian Migration & Citizenship Services
6	Mr Jose Aniceto Respall
7	Ms Toniey Munro
8	Refugee Council of Australia
9	Department of Immigration and Border Protection
10	Migration Institute of Australia
11	Monil Arora
12	Law Council of Australia
13	Dr Sina Sarkarati
14	Mr Sergio Zanotti Stagliorio
	• Supplementary Submission
15	Mr Ron Dick
16	MaCson Queiroz
17	Mr John Frame
18	Ms Johanna Barnard
19	Mr Sanjayai Kapoor
20	Mr Peter Michalopoulos
21	Mr Mark Northam
22	Jude Sushendra Fernando
23	Mr Trent Pickup
24	Mr Robert Alexander
	• Supplementary Submission
25	Danuzia Pontes
26	Ms Luciana Meroni