Appendix 4.

Our Ref: MM1204118
(Please quote our reference on all correspondence)
Direct Line: 9926 0310

10 September 2003

The Hon. Amanda Vanstone, M.P.
Minister for Immigration and Multicultural and Indigenous Affairs
Parliament House,
Canberra ACT 2600

Dear Minister,

Re: Migration Legislation Amendment (Migration Agents Integrity Measures) Bill

I take this opportunity to congratulate you on your appointment as Minister for Immigration and Multicultural and Indigenous Affairs. The Law Society is aware you have assumed a challenging role in a dynamic and diverse area of the law.

The Law Society of New South Wales notes the introduction into Parliament of the *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill* on 17 September 2003 and has concerns about the legislation as currently drafted. Whilst the Law Society supports tightened controls on the migration advice industry the referral process mandated by the legislation is mechanical and could victimise bona fide agents acting in good faith unless it is addressed. In short, the Society considers the aims of the legislation require clarification. We attach a submission on the Bill for your consideration.

Thank you for your consideration of this submission. Any queries should be directed in the first instance to Simon Arcus on (02) 9926-0310 or by electronic mail at swa@lawsocnsw.asn.au. We look forward to your response.

Yours sincerely,

Robert Benjamin
President

Our Ref: MM1204118
(Please quote our reference on all correspondence)
Direct Line: 9926 0310

10 September 2003

The Hon Gary Hardgrave MP
Minister for Citizenship and Multicultural Affairs
Parliament House
Canberra ACT 2600

Dear Minister,

Re: Migration Legislation Amendment (Migration Agents Integrity Measures) Bill

The Law Society of New South Wales notes the recent introduction into Parliament of the *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill* on 17 September 2003 and has concerns about the legislation as currently drafted. Whilst the Law Society supports tightened controls on the migration advice industry the referral process mandated by the legislation is mechanical and could victimise bona fide agents acting in good faith unless it is addressed. In short, the Society considers the aims of the legislation require clarification. We attach a submission on the Bill for your consideration.

Thank you for your consideration of this submission. Any queries should be directed in the first instance to Simon Arcus on (02) 9926-0310 or by electronic mail at swa@lawsocnsw.asn.au. We look forward to your response.

Yours sincerely,

Robert Benjamin
President

Our Ref: MM1204118
(Please quote our reference on all correspondence)
Direct Line: 9926 0310

10 September 2003

Ms. Nicola Roxon, MP
Shadow Minister for Immigration
Parliament House
Canberra ACT 2600

Dear Shadow Minister,

Re: Migration Legislation Amendment (Migration Agents Integrity Measures) Bill

The Law Society of New South Wales notes the recent introduction into Parliament of the *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill* on 17 September 2003 and has concerns about the legislation as currently drafted. Whilst the Law Society supports tightened controls on the migration advice industry the referral process mandated by the legislation is mechanical and could victimise bona fide agents acting in good faith unless it is addressed. In short, the Society considers the aims of the legislation require clarification. We attach a submission on the Bill for your consideration.

Thank you for your consideration of this submission. Any queries should be directed in the first instance to Simon Arcus on (02) 9926-0310 or by electronic mail at swa@lawsocnsw.asn.au. We look forward to your response.

Yours sincerely,

Robert Benjamin
President

The Law Society
of New South Wales

Migration Legislation Amendment (Migration Agents Integrity Measures) Bill

Submission to :

Federal Minister for Immigration and Multicultural and Indigenous Affairs
Federal Minister for Citizenship and Multicultural Affairs
Shadow Federal Minister for Population and Immigration

October 2003

The Law Society of New South Wales
ACN 000 000 699
170 Phillip Street
Sydney NSW 2000
DX 362 Sydney
Phone (02) 9926 0333
Fax (02) 9231 5809
www.lawsociety.com.au

Law Society submission on the Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003

October 2003

In preparing this submission, the Law Society is particularly grateful for the assistance provided by Mr. Ron Kessles, Solicitor.

Background

The *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003* ("the Bill") seeks to introduce measures designed to discipline migration agents for so-called "vexatious activities." Under the proposed scheme, the Minister will have the power to direct the Migration Agent's Registration Authority ('MARA') to take disciplinary action against agents who have a high visa refusal rate in relation to visas of a particular class. An agent's refusal rate is to be calculated by reference to the total number of applications that have been finally refused and in relation to which that agent has given "immigration assistance."

In order to ensure that agents notify the Department of all applications in relation to which they have given "immigration assistance" two new criminal offences will be created[1]. Under the new provisions, an agent who provides "immigration assistance" to a visa applicant or person who has made an application for review will be legally required to notify the Department or review authority of this fact. Failure to notify will be a strict liability offence, punishable by 60 penalty units. The new offences are designed to ensure that registered agents cannot avoid the new "refusal rate" scheme by acting for clients "off the record" by not advising the Department of Immigration or relevant review authority of their involvement in the case.

While the Law Society supports tightening controls on the migration advice industry the referral process mandated by the legislation is mechanical and likely to victimise bona fide agents acting in good faith unless it is addressed. The aims of the legislation require clarification.

Currently, the proposed sections require all agents to notify the Department of Immigration or relevant review authority in all cases where they provide **any** "immigration assistance" to an existing visa applicant or review applicant, even where that assistance is only in the form of genuine "advice[2]." This include situations where there are no ongoing instructions to act further for the client.

The requirements of the legislation appear to have two very serious consequences:

1. They will completely remove the right of visa and review applicants to receive advice from a registered agent in confidence.
2. They will unfairly affect the calculation of the refusal rate of agents and so will discourage registered agents from advising applicants who have already lodged applications.

---

[1] See proposed sections 312A and 312B attached

[2] This is because sections 276(1)(b) and (2)(b) clearly include "advice" in the definition of immigration assistance.

Removal of the right to confidential advice

Access to competent confidential advice about a client's rights and obligations is central to the operation of any legal system, and the just administration of any Government scheme such as the visa system. The *Migration Act* 1958 establishes a complex visa system and imposes strict liabilities on persons misusing that system including the possibility of visa refusal, cancellation and various criminal punishments. The Law Society considers visa applicants, holders and sponsors have a right to access independent, confidential and competent advice as to their rights and liabilities under that system.

The proposed sections 312A and 312B will remove the right of visa applicants and review applicants to obtain advice in confidence from a registered agent, including a lawyer registered as an agent. It is likely that the legislation will cause a rise in the numbers of visa applicants and sponsors choosing not to seek independent advice about their matters. This is contrary to the proper administration of the Act. It would particularly affect people seeking advice in the following situations:

- Where a person only wishes to consult an agent on select aspects of an existing application (either primary or review) without engaging the agent on an ongoing basis to assist in the preparation, lodgment or processing and would prefer to see the agent in confidence.
- Where a person has already engaged a migration agent but is seeking an independent opinion from another agent about their application. They may not wish the first agent to become aware they have sought further advice. The first agent could become aware of this because the notification of the second agent will presumably appear on the applicant's file.
- Where an applicant is in breach of visa conditions and wants advice from an agent in confidence without fear that the Department will be aware of the fact that he or she has sought advice. The Law Society considers it is in the public interest for applicants in breach to seek legal advice and guidance on the legitimate options available to them.

The removal of the right to advice in confidence is extremely serious. The Law Society is of the view there is no need or reason to remove this right in order to give effect to the legislative intent. The Law Society submits the Bill should be amended to exclude the requirement to notify of advice in such circumstances.

Legal Professional privilege

Legal professional privilege was upheld (see especially parts below in bold) in the case of *Joel v Migration Agents Registration Authority* [2000] FCA 1919 where MARA asked the migration agent/solicitor for (amongst other things) advice that was given to clients in a class action. Judicial statements in the *Joel* case included the following:

".....the ambit of the question "What advice was given to the applicants in relation to their position in the class action", particularly in the light of the other contextual matters to which I have referred, was too compelling to avoid the implication of infringement of the privilege. In any event, I do not think that the statutory contrast between "immigration assistance" and "immigration legal assistance" produces the consequence that advice by a lawyer on matters within the former category are necessarily outside the scope of legal professional privilege. **Advice upon matters within the former category by a lawyer, such as the Applicant who specialises in migration law and who also carries on practice as a registered migration agent, may well constitute legal advice within the scope of legal professional privilege, irrespective of the statutory distinction drawn for the purpose of marking out the limits of**

permissible conduct for migration agents who are not also qualified lawyers. The privilege can of course be abrogated by statute although statues having such an operation are rare, and the courts will not lightly infer a legislative intention so to do. Statutory clarity would certainly be warranted on the subject. As appears from the judgment of Deane J in *Baker v Campbell*, supra at 116:

"It is a settled rule of construction that general provisions of a statute should only be read as abrogating common law principles or rights to the extent made necessary by express words or necessary intendment."

I do not consider that the operation of s 308(1)(a) avoids the application of such a stringent test, in so far as legal advice in respect of immigration assistance may be given by a lawyer. Why the High Court in *Corporate Affairs Commission of NSW v Yuill* (1990-1) 172 CLR 319 took a different path, in relation to the explicit legislative scheme of exclusion contained in the Companies (NSW) Code 1991 concerning the obligation to produce documents, was explained by Brennan CJ at 322 as follows:

Baker v Campbell should not be regarded as prescribing an alteration in the rules of statutory construction, but rather as declaring legal professional privilege to be a common law right or privilege available (unless excluded) not only in judicial and quasi-judicial proceedings but whenever the exercise of a statutory power would trespass upon the confidentiality of the communications which the privilege protects. We are therefore not so much concerned with a change in the rules of statutory constructions, as with an application of the presumption that the legislature does not intend to abrogate a common law right or privilege unless a contrary intention is clearly expressed or implied in the statute. That presumption is a means by which to discover the true intention of the legislature... We are thus concerned with an application of that presumption in a legal matrix which has changed since the Code was enacted. The alteration of the law which Baker v Campbell prescribed evokes an application of the rule contemporanea expositio est optima et fortissimo in lege - the best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up: Broom's Legal Maxims, 10th ed. (1939), p.463. And so, the answer to our first question is that the Code came into force - that is, the law as it stood before Baker v Campbell was decided - unless there be something in the Code which is inconsistent with the operation that would thus be attributed to the Code."

35 I therefore conclude that to the extent that the Respondent's notice of 3 August 2000 required the Applicant to answer the question **"What advice was given to the applicants in relation to their position in the class action", the Applicant was entitled to decline to answer the same on the ground of infringement of the legal professional privileges of the plaintiffs to the class action affected thereby, and accordingly the notice has no legal operation or effect to the extent of such question.** I further conclude that to the extent that the third notice of the Respondent directed to the Applicant and bearing date 14 September 2000 purports to rely for its operation upon the applicant's absence of response to the question **"What advice was given to the applicants in relation to their position in the class action" contained in the second notice of the Respondent directed to the Applicant and bearing date 3 August 2000, the same has no force or effect as a requirement for the purposes of s 308(1) or s 309(2) of the Act."**

The Law Society remains of the view that the judicial reasoning in the *Joel* decision with regard to legal professional privilege was sound. Legitimate legal professional privilege is a long standing principle of the legal system and the Law Society is concerned the legislation as currently drafted may have the effect of undermining that privilege.

Unfair calculation of an agent's "refusal rate."

The Law Society considers there is potential for manifest unfairness where the fact that the agent gave the person advice will be used in the calculation of the agent's refusal rate regardless of whether the agent acted for the person in any ongoing capacity after giving the advice, and regardless of what the advice was. The system is unfair and likely to be impractical to administer.

Given the complexity involved in migration and or legal matters the Law Society has serious concerns that a mathematical calculation of the number of refusals against an agent is an imprecise assessment of true performance and too simplistic to correctly establish whether that agent is complying with the spirit or the letter of the immigration law or Code of Conduct.

It is of great concern to the Law Society the Bill does not appear to distinguish between so called "meritless" applications and applications which are not without merit but not strong. While the Law Society considers it is essential to strongly discourage applications without merit, a lawyer or agent may give proper and ethical advice in a matter that has a less than certain chance of success. In such a case the client would be entitled to proceed despite the possibility of adverse outcome. The Society does not believe such an application can be said to be without merit. Nor that an indication can be imputed the lawyer or agent acted improperly. Despite this, under the proposed calculation of refusal rates a refusal in such a case would have an adverse affect on the lawyer or agent.

Potential unfairness is easy to envisage. For example, a visa applicant may consult three agents. All three agents may advise the application has no merit and should be withdrawn. The applicant may decide to ignore the advice of all three and continue without the assistance of any of the agents. According to the legislation as currently drafted the agents would have to notify of their immigration assistance to the applicant. They would not, however, have to disclose the advice they gave as this would be confidential. If the visa application is eventually refused, all three agents will have the rejection counted against them in their refusal rates.

Such a result would be unfair, and a perverse assessment of the agent's role in the advice process. In such circumstances an agent will be reluctant to give advice to existing applicants out of concern the outcome of the applications might count against the agent. This is regardless of the fact that it had nothing to do with the agent's advice.

If an amended version of sections 312A is enacted without deletion or amendment, it would be fair and reasonable that DIMIA be required by legislation to notify an agent when any other agent has taken over conduct of a file the former agent notified on or indeed if the client has chosen to represent him or herself.

Need to amend the Bill to specifically exclude genuine advice

As noted earlier, the Law Society considers at the very least the Bill should needs to exempt the provision of "advice" from the requirement to notify under sections 312A and 312B and from the calculation of the refusal rate under section 306AC.

However, the potential effect of the proposed provisions is even more concerning if they also apply to the giving of advice by an agent to a *potential*, as opposed to actual, visa or review applicant. If this is the case, agents will be required to notify the Department or a review authority whenever they provide advice to a person about immigration, even where that person decides not to proceed with any application, or to proceed without the further assistance of that agent.

This possibility is created by the loose language of section 276 which does not define the term "visa applicant." As a result, it is unclear whether the provisions of section 276(1)(a) and 276(2)(a) which refer to "preparing" an application or sponsorship and sections 276(1)(b) and 276(2)(b) which refer to "advising" a visa applicant, would encompass the provision of preliminary advice to potential visa applicants or applicants for review.

However, if a registered agent was liable for giving wrong or incompetent advice to potential applicants who never subsequently lodged applications and such advice was not "immigration assistance" under the Migration Act, then it seems the MARA would have no jurisdiction over the matter. This would seem to suggest that Parliament may have intended that advice to potential applicants be covered by section 276.

If this is correct, then the new provisions in the Bill would apply to the giving of such preliminary advice to potential applicants. In this case, the additional effects of section 312A and section 312B may be the following:

(i) Removing the ability of **all** potential and existing visa applicants and sponsors to obtain advice in confidence.

(ii) Substantially undermining the workability of the proposed legislation because registered agents will be at risk whenever they give advice to applicants with *potential* applications because that case could affect the agent's "refusal rate," regardless of the fact that agent did not provide any ongoing assistance to the applicant.

This would impact very adversely on the migration assistance industry as nearly all agents, however diligent and ethical, would be unable to control their refusal rate. Presumably it would also waste significant resources at the Department of Immigration as it attempts to calculate the refusal rates for thousands of agents giving advice to tens of thousands of potential applicants.

(iii) Imposing excessive obligations on registered migration agents because agents would have to notify the Department or review authority of advice to **any** potential applicant, including advice to people overseas, by phone, by e-mail or by facsimile, regardless of whether or not that person in fact goes on to lodge an application or use the agent.

(iv) Leading to the creation of a database of personal information about potential visa applicants which might be used by the Department of Immigration against those persons.

For example, if it was known to the Department that an unlawful non-citizen in Australia had sought advice from a migration agent, then there would be nothing to prevent the Department from using that information to trace the person's whereabouts. This would effectively end the ability of unlawful non-citizens to access confidential, independent advice from a registered migration agent or lawyer. The Law Society considers this is not in the public interest.

Similarly, if a person on a tourist visa sought advice from one or more migration agents, there would be nothing to prevent the Department then questioning that person about their future intentions for the purpose of considering whether to cancel their tourist visa under s116(1)(a). There would also be nothing to prevent the Department using information about contact with registered agents when considering whether to refuse to grant an offshore person a tourist visa on the basis that they might not have a genuine intention only to visit.

The collection of such information about persons who may never actually become applicants for visas or for review would be contrary to basic rights to privacy. Further, such a database could be used by the Department of Immigration, and the review bodies, for purposes other than disciplinary action against agents under the new division 3AA.

The uncertainty about whether advice to potential applicants is "immigration assistance" is further reason to remove or amend the new sections of the Bill so that the giving of genuine advice is clearly excluded from the calculation of the refusal rate and the notification requirements under ss312A and 312B.

In formulating this submission the Law Society is aware the intention of the legislation may not be that agents must notify the Department each time they advise a prospective visa applicant. However, the Law Society has highlighted the pitfalls of the legislation as currently drafted. Given that the sanction is a strict liability criminal offence for non-compliance the Society considers the Government must clarify these issues in drafting.

For any further information, at first instance please contact Simon Arcus, Executive Member, Immigration Law Committee at (02) 9926-0310 or by electronic mail : swa@lawsocnsw.asn.au.

Yours sincerely,

Robert Benjamin
President

The following is a compilation of how the *Migration Act 1958* will read if the *Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003* is passed without amendment.

SECT 276
Immigration assistance

(1) For the purposes of this Part, a person gives *immigration assistance* if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by:

(a) preparing, or helping to prepare, the visa application or cancellation review application; or

(b) advising the visa applicant or cancellation review applicant about the visa application or cancellation review application; or

(c) preparing for proceedings before a court or review authority in relation to the visa application or cancellation review application; or

(d) representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application.

(2) For the purposes of this Part, a person also gives *immigration assistance* if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by:

(a) preparing, or helping to prepare, a document indicating that the other person nominates or sponsors a visa applicant for the purposes of the regulations; or

(b) advising the other person about nominating or sponsoring a visa applicant for the purposes of the regulations; or

(c) representing the other person in proceedings before a court or review authority that relate to the visa for which the other person was nominating or sponsoring a visa applicant (or seeking to nominate or sponsor a visa applicant) for the purposes of the regulations.

(3) Despite subsections (1) and (2), a person does not give immigration assistance if he or she merely:

(a) does clerical work to prepare (or help prepare) an application or other document; or

(b) provides translation or interpretation services to help prepare an application or other document; or

(c) advises another person that the other person must apply for a visa; or

(d) passes on to another person information produced by a third person, without giving substantial comment on or explanation of the information.

(4) A person also does not give immigration assistance in the circumstances prescribed by the regulations.

SECT 312

Notification obligations

(1) A registered migration agent must notify the Migration Agents Registration Authority in writing within 14 days after any of the following events occurs:

(a) he or she becomes bankrupt;

(b) he or she applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;

(c) he or she compounds with his or her creditors;

(d) he or she makes an assignment of remuneration for the benefit of his or her creditors;

(e) he or she is convicted of an offence under a law of the Commonwealth or of a State or Territory;

(ea) if he or she paid, in relation to his or her current period of registration, the charge payable under regulation 5 of the *Migration Agents Registration Application Charge Regulations 1998*—he or she begins to give immigration assistance:

(i)on a commercial, or for-profit, basis; or

(ii)as a member of, or a person associated with, an organisation that operates on a commercial, or for-profit, basis;

(f) he or she becomes an employee, or becomes the employee of a new employer, and will give immigration assistance in that capacity;

(fa) he or she becomes a member of a partnership and will give immigration assistance in that capacity;

(g) if he or she is a member or an employee of a partnership and gives immigration assistance in that capacity—a member of the partnership becomes bankrupt;

(h) if he or she is an executive officer or an employee of a corporation and gives immigration assistance in that capacity:

(i) a receiver of its property or part of its property is appointed;

(ii) it is placed under official management;

(iii) it begins to be wound up.

Penalty: 100 penalty units.

(2) An offence against subsection (1) is an offence of strict liability.

(3)The day on which the event mentioned in paragraph (1)(ea) occurs is to be worked out in accordance with the *Migration Agents Registration Application Charge Regulations 1998*.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

312A Notification of giving of immigration assistance to visa applicants

(1) If a registered migration agent gives immigration assistance to a visa applicant in relation to the visa application, the agent must notify the Department in accordance with the regulations and within the period worked out in accordance with the regulations.

Penalty: 60 penalty units.

(2) An offence against subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

312B Notification of giving of immigration assistance to review applicants

(1) If a registered migration agent gives immigration assistance to a person in respect of a review application made by the person, the agent must notify the review authority concerned in accordance with the regulations and within the period worked out in accordance with the regulations.

Penalty: 60 penalty units.

(2) An offence against subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) In this section:

review application means an application for review by a review authority of a decision to refuse to grant a person a visa.