Migration Institute of Australia

Migration Amendment (Regulation of Migration Agents) Bill 2017

Prepared for Senate Legal and Constitutional Affairs Committee Inquiry

Migration Institute of Australia
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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Migration Amendment (Regulation of Migration Agents) Bill 2017 and Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017

The Migration Institute of Australia ("MIA") welcomes this opportunity to comment on the Migration Amendment (Regulation of Migration Agents) Bill 2017.

The MIA is well-recognised as the peak professional body for Registered Migration Agents (RMA). Currently around one third of Registered Migration Agents are lawyers holding legal practising certificates and the MIA's membership reflects this, with around one third of its membership made up of these lawyers.

MIA members represent the majority of the large migration advice companies in this unique marketplace and committed practitioners within the profession. These MIA members therefore, provide a representative sample of the wider migration advice profession.

As the professional peak body for Registered Migration Agents, the MIA has extensive experience in the registration of migration agents. It is in the unique position of having been the regulating authority, in its capacity as the Migration Agents Registration Authority (the MARA) from 1998 to 2009.

This submission reflects the collective opinions of MIA members. These opinions have been obtained from member surveys, member meetings and individual members' feedback. The content of this submission documents and reports their experiences under the current regulatory environment and their well-considered thoughts about the removal of lawyers from this system.

Please feel free to contact the MIA on 9249 9000 if further assistance is required by the Committee in relation to this matter.

Angela Julian-Armitage LLB GAICD FMIA
National President & State President(Qld/NT)
Migration Institute of Australia

1 September 2017

The Final Report of the 2014 Independent Review of the Office of the Migration Agents Registration Authority ("the Kendall Review") recommended that lawyers be removed from the regulatory scheme that governs migration agents. Currently, it is illegal to provide immigration advice without being registered as a migration agent.[1] The Report argued that dual registration was an unnecessary burden on both the legal profession and the regulatory authorities. Central to these arguments was the notion that lawyers already held superior professional qualifications and had professional bodies to regulate their conduct, and as such, the current high level of consumer protection could be maintained if they were removed from the regulatory system. The MIA does not accept this premise.

Migrants, particularly those seeking protection under Australia's UNHCR obligations, are extremely vulnerable. They may be from non-English speaking backgrounds, have poor education and communication difficulties; they may have a history of trauma, have a well-founded fear of authority or have been in detention. Many will have no knowledge of their legal rights in Australia or avenues for consumer redress. Similarly, many will not know how to find a competent migration advisor or how to evaluate the reputation or quality of those offering immigration assistance.

Consumer protection measures are vital for these people. The removal of lawyers from the MARA regulatory system will also remove the protections afforded these most vulnerable people under the current regulatory system. Poor or incorrect migration advice can and does result in disastrous consequences for migrant applicants including financial ruin and bans on settling in Australia.

Provision of competent advice

The regulation of the migration advice profession began in 1992 to address poor advice and unscrupulous practice. The inclusion of lawyers in the regulatory system even weathered a High Court challenge: *Cunliffe v The Commonwealth (1994)* 124 Alr 120. Various enquiries into the regulation of the profession since that time have concluded that lawyers should remain in the regulatory system.[2]

The current entry level qualification for Registered Migration Agents who do not hold a legal practicing certificate is the Graduate Certificate in Australian Migration Law and Practice.[3] Students study four post graduate migration law subjects during this course. In contrast, most law degrees do not include any study of migration law, yet lawyers are able to become registered as RMA with the MARA, purely because they hold a legal practicing certificate. As a consequence, an RMA who has successfully completed the post graduate Certificate is better equipped to advise on migration law than many

[1] There are some exemptions for family members and members of parliament
[2] 1995 Joint Standing Committee on Migration Protecting the Vulnerable;
1999 Review of the Statutory Self-Regulation of the Migration Advice Industry;
2002 Review of Statutory Self-Regulation of the Migration Advice Industry;
2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession
[3] From 1 January 2018 this will be upgraded to a post Graduate Diploma of Australian Migration law and Practice and the number of subjects doubled.

lawyers. Registration of lawyers by the OMARA at least ensures lawyers comply with the MARA Code of Conduct, which requires migration practitioners to maintain sound and up to date knowledge of migration law and processes.

Migration law is labyrinthine. The DIBP's online legislative library, Legendcom, runs to some 500,000 pages of migration legislation, regulation, policy and explanation. The associated Australian citizenship legislation adds a further 250,000 pages. This demonstrates the complexity of this constantly changing area of law. The MARA Code of Conduct requires all RMA to maintain a professional library to inform their practice. Most RMAs subscribe to Legendcom or the alternative commercial version. Migration agents who are not lawyers must also complete ten Continuing Professional Development (CPD) points annually to ensure they have sound knowledge of migration legislation and policy.

The cost to migration practitioners of maintaining a professional library and undertaking compulsory CPD each year is not insignificant. Without the discipline of the MARA regulatory system and Code of Conduct, lawyers searching for new sources of income may be choose to bypass these important practice aspects and as a consequence offer sub-standard legal advice to the unsuspecting public, if removed from the regulatory system.

Identifying competent practitioners

One of the major benefits of OMARA regulation is that competent, approved (registered) practitioners can be easily identified in one place: the OMARA Register of Agents. This provides information to consumers about an agent's years of experience and if they hold a legal practicing certificate. It also lists sanctioned and barred agents, giving the consumer vital information in their selection of a practitioner to represent them.

The OMARA website also informs the consumer on broader issues such as their rights, how to make complaints against incompetent, unethical or fraudulent practice, and disciplinary measures when those rights have been breached. The OMARA has worked for many years to educate those requiring immigration assistance to only seek advice or assistance from a practitioner who is registered with the OMARA. This message has finally gained significant traction within the marketplace.

To remove lawyers from the regulatory system would destroy this consolidated source of information for consumers and dissipate these protections.

Consumer protection - sanctioned Registered Migration Agents who hold legal practicing certificates

Those who oppose dual regulation claim that the legal profession has sufficient complaint and disciplinary mechanisms to deal with professional incompetence or malfeasance. However, some law societies do not appear to have the same regard for migrant consumer protection as the OMARA. Lawyers have been allowed to continue

practicing by their law societies, even after being banned by the OMARA for providing fraudulent migration advice or breaches of fiduciary duties. A notable case is that of Mr Issam (Sam) Issa. Mr Issa was sanctioned and barred from practicing as a migration agent for his flagrant attempts to rort the asylum seeker migration program. Although the OMARA barred Mr Issa in 2014, he continues to hold his legal practicing certificate in NSW and is permitted to practice law.[4]

Impact on consumers and lawyers not working in legal practices

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. Often these non-legal migration practices deal with the most difficult of humanitarian, asylum seeker and domestic violence cases. These cases require much more than just basic legal skills from practitioners. These types of clients may have been subjected to violence, torture and/or have mental health issues, which require a much higher level of support than a general visa applicant. Practitioners in this area are often required to provide a combination of counselling and personal advice, as well as legal support.

These humanitarian and domestic violence cases often take upwards of twelve months and even two years to be finalised and the client builds a close and dependent relationship over this time with their migration advisor. To force them to relinquish this trusted advisor 'mid-stream' in their case, will only magnify their personal distress and disadvantage.

The removal of lawyers from the regulatory system will result in disastrous, unintended consequences for this sector. It is crucially important that it be protected for both consumers and the large numbers of altruistic lawyers working in this sector. If removed from the OMARA regulatory system these lawyers:

- will be barred from registering as migration agents and then be unable to provide migration advice and assistance within these non-legal practices, and
- will need to leave these organisations to seek employment in legal practices if they wish to practice as lawyers.

This will result in an enormous loss of legal expertise to both consumers and those providing services to them. Many of these are non-legal migration practices provide services on a subsidised basis under government fee for service contracts. These lawyer/RMAs assist asylum seekers process their claims and some travel to remote locations and detention centres to represent these people. These government contracts and the services provided to these asylum seekers will be severely impacted by removal of lawyers from the system. If these service provider non-legal migration practices are unable to continue to employ lawyers to undertake this work,

[4] Further details of this case appear in Appendix A

there will be significant cost implications for the funding of these services. Those clients previously represented by these lawyers, will need to be assigned new representatives. These case are usually extremely complex and the cost to the government of briefing new advisers will be substantial. These contracts will potentially need to be renegotiated by the service providers, at a time when this government funding is already under pressure. The cost to service providers of recruiting and training new migration staff to service these contracts could also be ruinous to their businesses.

Other financial and business impacts on these non-legal migration practices will be significant. These companies cannot easily convert to become legal practices. Legal practices must have a lawyer as a director. If these companies wish to continue to provide services to these disadvantaged clients and to employ the lawyers they have invested so much in training, they will be forced to merge with a legal practice or be forced out of business.

These non-legal migration practices, by virtue of their very unusual caseloads and requisite skills sets, also provide training to graduate lawyers who wish to work in this very specialised and historically restricted area of international and humanitarian law. These organisations collectively employ large numbers of lawyers. However, as Australian legal practitioners can only give immigration assistance in connection with legal practice, many of the lawyers employed in these non-legal migration practices, provide advice under the OMARA regulatory system as registered migration agents. [5]

The training provided by these non-legal migration practices is fundamentally different to that provided in the corporate sector to RMAs and law graduates. To prohibit lawyers from working within these practices will severely limit both career options for these lawyers if they are forced to leave this employment and penalise the companies that have spent significant amounts of time and money training these lawyers to effectively represent their disadvantaged clients.

Those non-legal migration practices that choose not to become legal practices will most likely have to make staff redundant, as they will be unable to provide immigration assistance. This opens these companies up to actions taken by these redundant employees in the Fair Work Commission. This will be at substantial cost to the employer and a burden on the Commission's resources.

There is currently an oversupply of new legal graduates and a severe shortage of supervised practice positions. The removal of lawyers from the OMARA regulatory system will put further strain on this job market. Many lawyers working within the migration sector hold restricted legal practicing certificates and operate under their registration as migration agents. If these lawyers are forced to give up their work as migration agents, they will also be looking for supervised practice positions, in competition with new law graduates. To change the regulatory system at this time will flood the legal employment marletplace.

[5] Legal practice is defined as the provision of legal services regulated by a law of a State or Territory.

It is not only at the lower levels of the legal profession where these impacts will be felt. Barristers may also face restrictions if they wish to advise migration clients directly. Barristers work within Chambers. A Chambers practice is also not a law practice under the various legal professions acts.[6] In Queensland, for example, a legal practice must have a Solicitor with a Principal Practicing Certificate.

It is also not unusual for registered migration agents to come to the law later in their careers, completing law degrees as an adjunct to their migration work and practice. For many this is a hard won qualification, requiring long hours of study and sacrifice, payment of expensive course fees and often all while holding down full time employment. They undertake these degrees to increase their knowledge and to provide extra services to their clients.[7] Few would hold unrestricted legal practicing certificates. If lawyers are removed from the regulatory system, these practitioners will be forced to choose between giving up their legal practicing certificate or giving up their livelihood as a registered migration agent. In some cases these practitioners have large caseloads and many years of experience in the migration advice sector. If these practitioners make the difficult choice of remaining a lawyer and become unable to practice as an RMA, what becomes of their caseloads?

With the current under resourcing of the DIBP, many migration applications can take in excess of one, if not two or more years to be decided. The professional relationship between migration clients and their representatives may last many years. Will the RMA who chooses to practice law then need to abandon or sell their business, or offer their client caseload up in return for a supervised practice position? Will these lawyers be targeted by opportunistic law firms looking to increase their client base? What is to stop these law firms offering a position to these RMA/lawyers and having acquired their clients, then dispose of the former RMAs employment? How does this serve to protect consumers? It is unjust and grossly unfair to force lawyer/RMAs to make such decisions. The logistical and financial implications alone are frightening. Interestingly, there is much discussion amongst the migration advice profession as to whether the strong support for removing lawyers from the OMARA system emanates from those large legal entities that will benefit hugely from the restructuring of these non-legal migration businesses.

Arguments against the dual registration of lawyers.

The MIA is not convinced by the arguments put forward by the law societies in support of the de-regulation of the migration advice profession.

[6] For example, in NSW a Chambers Practice is not a law practice under the Legal Profession Act 2004. In Queensland the same rule applies; a legal practice or Law firm requires a Solicitor with a Principal Practising certificate (Legal Profession Act 2007). In Victoria, the same rules apply as they do in NSW under the Uniform Law.

[7] Only lawyers can represent migration clients in courts of law. RMAs are restricted to tribunal level representation and below.

Many of the arguments against the dual regulation of lawyers provided in submissions to the Kendall Review are, at best, unsubstantiated assertions, with little evidence or reasoning provided in support, for example: that dual registration diminishes the independence of the legal profession and compromises a lawyer's ability to advise without fear or favour; that non-lawyer agents may masquerade as migration lawyers; and that Australia is the only western country to have dual regulation of lawyers.

Much of the emphasis in support of removing lawyers from the regulatory system relies on concerns harboured by the impacts on lawyers, with apparent disregard for the impact on consumers.

The Kendall Review provided some examples of the 'administrative' burden of dual registration for lawyers: dealing with differing dates for renewal of practicing certificates and MARA registration dates; the financial burden of the OMARA registration fee; and the theoretical overlap of MARA Code of Conduct and legal professional obligations. None of these have reference to consumer protection.

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 agents are registered by the ATO.[8] Financial planners are regulated by ASIC and must hold an Australian Financial Services License or be covered by an exemption. They have to meet training and ongoing competency standards.[9] Similarly, auditors are also regulated by ASIC.[10]

Similarly, the assertion by Dr Kendall that, Canada and the United Kingdom have comparable registration schemes for migration agents and neither require lawyers to be registered to provide immigration assistance and advice, is misleading.[11] The Canadian and the British regulatory systems both allow lawyers to 'opt in' to their registration systems. The Bill currently before the Australian Senate, in contrast, specifically 'prohibits' lawyers from being registered to give migration advice and assistance in Australia.

The MIA position on removal of lawyers from the regulatory system

For the reasons discussed above, the MIA strongly objects to the removal and prohibition of persons who hold a legal practicing certificate from the regulatory scheme. The MIA believes that this is in the best interest of vulnerable consumers and of the migration advice profession as a whole.

[8] https://www.tpb.gov.au/register-tax-agent

[9] https://www.cpaaustralia.com.au/professional-resources/financial-planning/how-to-become-a-financial-planner

[10] http://www.asic.gov.au/auditregistration

[11] The Kendall Review, 2014, 41.

Requiring lawyers to register as migration agents with the OMARA, would ensure that:

- consumer protection and confidence is maintained through the provisions and requirements of the migration specific OMARA Code of Conduct,
- information for those seeking immigration assistance will be found in one place,
- the many lawyers working in non-legal migration practices will be able to continue to provide immigration assistance.

The MIA believes that it is in the best interest of vulnerable consumers, and of the migration advice profession as a whole, that the Government reconsiders the *Migration Amendment (Regulation of Migration Agents) Bill 2017*.

Appendix A

The Case of Mr Issam (Sam) Issa – Barred migration agent and currently practicing solicitor

Mr Issa was first registered as a migration agent on 9 February 1995 and renewed his registration annually until 2014. Mr Issa is also legally qualified and holds a current unrestricted Australian legal practicing certificate, issued by the Law Society of NSW.

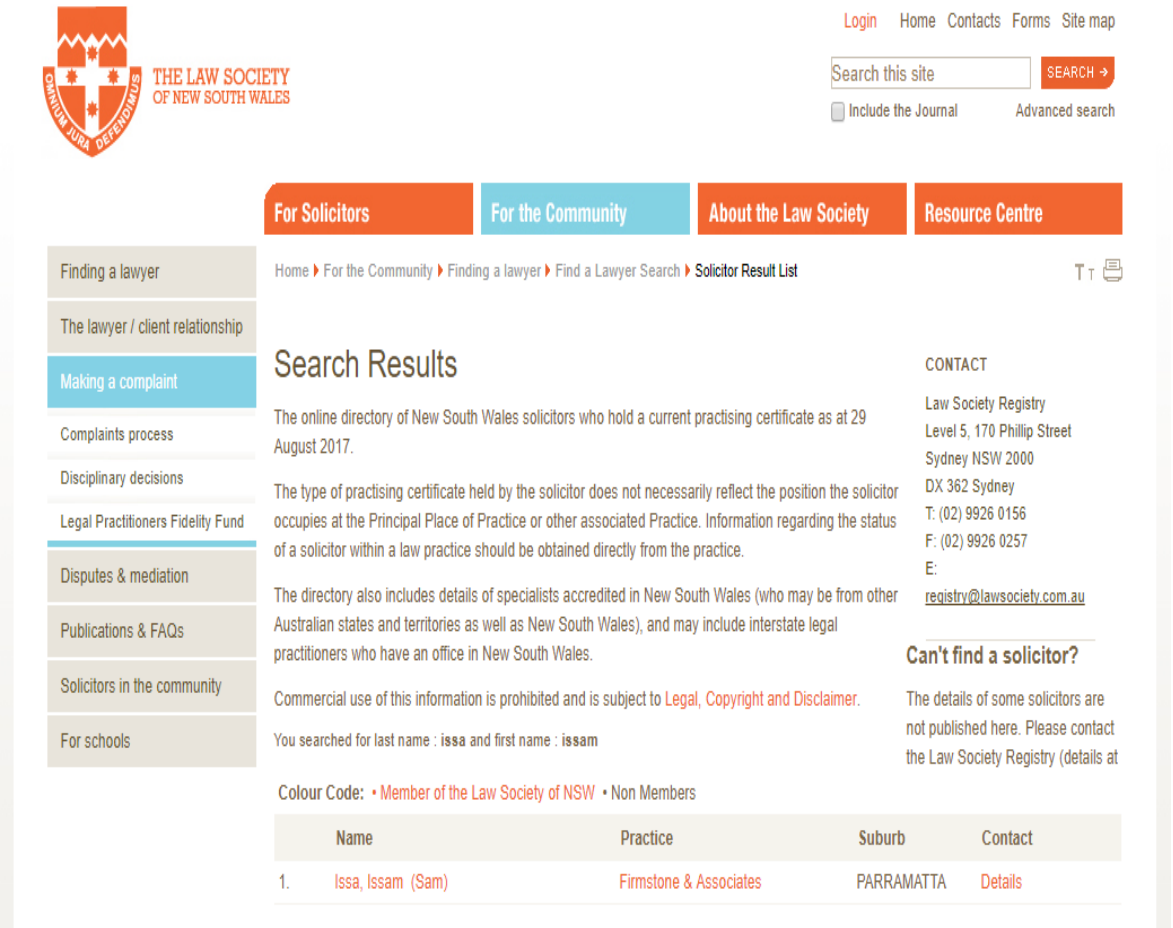
The Office of the MARA bar

The Office of the MARA received 8 complaints about the Mr Issa's conduct and the immigration assistance he provided to Protection visa applicants. These complaints were from individual clients, the Department of Immigration and Border Protection, the Refugee Review Tribunal and the NSW Legal Services Commissioner. The complaints alleged that the agent encouraged and assisted his clients to lodge applications for Protection visas with claims that were fabricated. The agent's migration practice was predominantly in relation to preparation and lodgement of Protection visa applications. In its investigation, the Office of the MARA considered the agent's practice more broadly and analysed samples of the agent's client files, departmental files and Tribunal files. This analysis revealed that the agent had an established pattern of poor practices which breached the Code of Conduct. The Office of the MARA found that the agent prepared and submitted applications containing generalised information not supported by instructions from his clients; he included misleading and inaccurate statements to enhance the prospects of success of the visa applications; and failed to provide frank and candid advice to his clients about the prospects of success of their visa applications. The agent also failed to maintain proper records of material communications with his clients. As a result of the investigation the Office of the MARA was satisfied that the agent had breached multiple provisions of the Code of Conduct and was not a person of integrity, and not a fit and proper person to give immigration assistance. The agent's registration has been cancelled for 5 years. The agent has applied for a review of this decision to the Administrative Appeals Tribunal.

Appeals to the Administrative Appeals Tribunal

Mr Issa appealed the Office of the MARA's bar on him to the Administrative Appeals Tribunal and after several attempts by Mr Issa to stay the proceedings, that tribunal upheld the Office of the MARA's decision in July 2017.

The Law Society of New South Wales allows Mr Issa to continue to practice as a lawyer.



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1.	Issa, Issam (Sam)	Firmstone & Associates	PARRAMATTA	Details

The Daily Telegraph

MIGRATION AGENT BANNED AFTER COACHING CLIENT TO BE GAY AT HOME OF MARDI GRAS

EXCLUSIVE Daniel Meers, The Daily Telegraph
October 20, 2014 11:00pm

A SYDNEY migration agent has been banned for allegedly taking a client to Oxford Street and Kings Cross to learn how to be gay so he could apply for a protection visa.

The Migration Agents Registration Authority (MARA) found lawyer and agent Issam Sam Issa encouraged and assisted clients to fabricate claims for protection visas to improve their chances of staying in Australia.

Mr Issa was found to have told clients to be homosexual or change their religion so they were a better prospect of being granted a visa.

"In his appearance before the Court, Mr E alleged that the agent advised and assisted him to apply for a Protection visa based on fabricated claims of being homosexual,'' the tribunal judgment reads.

"To support the claims for his visa application, Mr E claimed that the Agent took him to Oxford Street, Kings Cross.''

Homosexuals in some countries — particularly in the Middle East — face serious persecution and seek protection.

Mr Issa was banned for five years after MARA found he produced "misleading and inaccurate statements to enhance the prospects of success of the visa applications."

The action continues the federal government's strong approach to border protection.

Assistant immigration minister Michaelia Cash said the decision was a warning for the 5000 registered migration agents working in Australia and overseas.

"This former agent lodged applications with little or no prospect of success and created statements purporting to have originated from his clients,'' Senator Cash said.

"His conduct fell well short of standards set out under the code of conduct for registered migration agents and he posed a serious risk to consumers.

"Fraudulent visa applications attempt to undermine the integrity of Australia's immigration system — fraudsters should understand that under this government they will be pursued and they will be brought to justice.''

The Daily Telegraph phoned Mr Issa's office, but he did not return calls. Mr Issa told hearings that the "only credible, similar fact pattern" was Mr E's "habitual lying''.

He claimed he had no knowledge the statements were wrong and has appealed the decision.

MARA chief executive Steve Ingram said Mr Issa had fabricated groundless applications. "This included complaints from clients that he had advised them to portray themselves as having a different religion to the one they had and in one case there was a complaint against him that he had encouraged a client to pretend he was homosexual," he said.