



Australian Government

Department of Home Affairs

Submission to the Inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2019 and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019

Senate Legal and Constitutional Affairs Legislation
Committee

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Overview

The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2019 (the Agents Bill) and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019 (the Charge Bill).

1. History of the Bills

The Agents Bill was first introduced into the House of Representatives on 21 June 2017. It was referred to the Committee on 10 August 2017 and a report presented on 16 October 2017. The Bill was amended and then passed by the House of Representatives on 28 March 2018. The Bill was introduced into the Senate on 8 May 2018 and lapsed on 1 July 2019, immediately before the commencement of the 46th Parliament.

The Charge Bill was first introduced into the House of Representatives on 21 June 2017. It was referred to the Committee on 10 August 2017 and a report presented on 16 October 2017. The Bill was passed by the House of Representatives on 28 March 2018 and introduced into the Senate on the same day. The Bill lapsed on 1 July 2019, immediately before the commencement of the 46th Parliament.

The Bills were amended and reintroduced into the House of Representatives on 27 November 2019.

The Bills were referred to the Committee by the Senate Selection of Bills Committee in its Report No. 9 of 2019, on 28 November 2019. The reason for referral is to determine whether the Parliament of Australia should vote in favour of this Bill Package in its current form (or in an amended form), having regard to the views of industry and other key stakeholders.

1. Migration Amendment (Regulation of Migration Agents) Bill 2019

1.1. Introduction

This Bill amends the *Migration Act 1958* (the Migration Act) to improve the effectiveness of the scheme that regulates migration agents. The key measure of the Bill is outlined in Schedule 1 to the Bill, which is the removal of certain legal practitioners from regulation by the Migration Agents Registration Authority (MARA).

As at 30 June 2019, there were 7252 registered migration agents with the MARA, of which 2192 (30.2 per cent) were Australian legal practitioners.

The Bill will facilitate amendments to academic and vocational requirements for migration agents, as well as to the time periods for repeat registration as a migration agent.

The Bill also includes amendments to allow the MARA the power to refuse an application for registration when the applicant has been required to, but fails to, respond to requests for further information. The Bill will also complement amendments to fees and charges in the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019 and make other minor amendments.

1.2. Amendments on Reintroduction

On reintroduction, minor technical changes have been made to the Bill that include:

- making the commencement date on the measures within Schedules 1 and 2 to be fixed by proclamation, or if not proclaimed, to commence nine months after Royal Assent
- simplifying the transitional arrangements for Australian legal practitioners
- updating the academic and vocational requirements for applicants to be registered with the MARA to be the completion of the Graduate Diploma and Capstone Assessment
- clarifying the situation in which the MARA may refuse an application for registration as a migration agent where the applicant has been required to, but has failed to, provide further information.

1.3. Schedule 1 amendments

Since regulatory schemes governing immigration assistance were first introduced in 1992, legal practitioners have argued for their removal from such schemes. At various times, other bodies have recommended the removal of legal practitioners when considering the migration agent industry. Significantly, in 2010, the Australian Productivity Commission recommended that legal practitioners be exempted from registration as migration agents and that a review of the performance of legal practitioners be conducted three years after the exemption becomes effective.

The effect of the amendments made by Schedule 1 will be to reduce the regulatory and financial burden on lawyers working in the migration advice industry. These amendments will also benefit some restricted legal practitioners that may otherwise be disadvantaged by the supervisory restrictions on their practising certificates.

1.3.1. The 2014 OMARA Review

The 2014 Independent Review of the Office of the MARA (the OMARA Review) canvassed the views of all stakeholders across the migration advice industry.

After consideration of their views, the OMARA Review made a number of recommendations, the first of which was that lawyers be removed from the regulatory scheme that governs migration agents such that lawyers:

- cannot register as migration agents
- are entirely regulated by their own professional bodies.

International comparisons revealed that Canada, the United Kingdom and New Zealand, which have comparable registration schemes for migration agents, do not require that lawyers be registered in order to provide immigration advice.

The OMARA Review found that despite concerns expressed that lawyers should continue to be registered as migration agents due to the complexity of migration law, it was noted that lawyers operate in many highly complex areas, such as intellectual property, taxation law and finance law, 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.

1.3.2. Existing Regulatory Scheme

Under the current legislation, lawyers who wish to hold a practising certificate are required to register and pay their fees to the relevant state or territory legal professional body and are subject to regulation by that body. However, lawyers who provide immigration assistance are also required to register as migration agents and pay registration fees to the MARA, which imposes an additional financial and regulatory burden.

There are some exemptions for such lawyers under the current legislation:

- completion of the Graduate Diploma in Australian Migration Law and Practice as well as the Capstone Assessment is not required; and
- lawyers are not required to purchase additional professional indemnity insurance if they already have the required insurance on their legal practice.

1.3.3. Arrangements for Legal Practitioners

Under the Bill, the situation for legal practitioners with restricted practising certificates will differ from that of lawyers with unrestricted practising certificates. Lawyers with unrestricted practising certificates will be allowed to give immigration assistance in connection with legal practice unsupervised.

The Bill introduces the following arrangements for legal practitioners:

- legal practitioners with **unrestricted** practising certificates will be removed from the regulatory scheme that governs migration agents on commencement of Schedule 1
- legal practitioners with **restricted** practising certificates at commencement of Schedule 1 can continue to be registered as migration agents for an eligible period of two years, which can be extended to up to four years with the agreement of the MARA
- future legal practitioners with **restricted** practising certificates will still be eligible to be registered as migration agents if they have completed the qualifications to become a migration agent (Schedule 2 to the Bill). They can register as migration agents for two years, which can be extended to up to four years with the agreement of the MARA
- future legal practitioners with **restricted** practising certificates who have not completed these qualifications will be regulated entirely by the relevant State or Territory disciplinary legal body.

If legal practitioners with restricted practising certificates are not granted an unrestricted legal practising certificate by the end of the eligible period, they may continue to be registered as migration agents by giving up their legal practising certificates.

1.3.4. Rationale for Change

A high level of regulation imposes unnecessary costs, damages productivity, deters investment and undermines job growth. As a result, the Government prioritises reducing inefficient regulation where possible.

However, the Government recognises that deregulation should not be prioritised over the maintenance of important consumer protections.

The relevant legal professional and disciplinary bodies and the statutory schemes underpinning them have a broader range of powers to resolve consumer-related issues arising from the provision of advice by legal practitioners, which they are experts in implementing. This includes penalties outside of the MARA's existing jurisdiction, including financial penalties for improper conduct, and recommending compensation for affected clients.

There is also strict regulation of trust accounts, including provisions for external intervention.

In addition to requiring a four-year degree for legal practice, legal practitioners must meet personal suitability requirements for admission, as well as for the granting and renewal of legal practising certificates. Legal practitioners must also complete a period of supervised practice before they can practice on an unsupervised basis. Their relevant legal professional association requires them to complete continuing professional development courses as a condition of their practising certificate.

All legal practitioners in the migration advice field will be able to access opportunities to increase their knowledge to address their client's needs, as they already do with other complex aspects of the law.

1.3.5. Handling of Complaints

If the legislation passes through both houses of Parliament, Schedule 1 is to commence by Proclamation, or if not proclaimed, to commence nine months after Royal Assent.

Following the commencement of Schedule 1, MARA will no longer be able to investigate existing complaints about immigration legal assistance given by Australian legal practitioners, who are not registered migration agents or former registered migration agents. These complaints will need to be re-lodged by the complainant with the State and Territory law societies. The MARA will continue to be responsible for investigating new and existing complaints relating to registered migration agents or former registered migration agents who are not Australian legal practitioners. The MARA will have the power to refer the conduct of registered migration agents or former registered migration agents who are Australian legal practitioners to authorities responsible for disciplining Australian legal practitioners in a State or Territory, if the conduct occurred while the legal practitioner was a registered migration agent.

The Department will work closely with the legal profession regulators to manage the transition.

Relevant State and Territory jurisdictions will be responsible for investigating new complaints relating to legal practitioners who are not eligible to be registered with the MARA.

Suitable arrangements will be put in place, such as information sharing, to assist the jurisdictions to resolve such complaints.

1.4. Schedule 2 amendments

The amendments made by Schedule 2 reflect the improvements to the entry-level standards to the migration advice profession made in *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018* (the Instrument). The *Migration Agents Regulations 1998* and the Instrument allowed individuals to register as migration agents if they either:

- hold a current legal practising certificate or
- complete the Graduate Diploma in Migration Law and Practice as well as pass a Capstone Assessment.

To reflect the intent of the Bill to remove the dual regulation of certain legal practitioners, after commencement there will no longer be an option to register as a migration agent based on a legal practising certificate alone.

Therefore, future legal practitioners who have not completed the Graduate Diploma and the Capstone Assessment will be regulated solely by the relevant State or Territory disciplinary legal body.

Once an individual completes the Graduate Diploma, the qualification will never lapse. The Capstone assessment will lapse after three years.

Other amendments made by Schedule 2 will ensure that the period within which an application will be considered an application for repeat registration as a migration agent is a prescribed period, rather than a 12 month period. The intention is to prescribe a period that is longer than 12 months. Similar amendments to introduce a prescribed period are also made in relation to the consideration of satisfying publishing requirements and continuing professional development requirements of registered migration agents.

1.5. Schedule 3 amendments

Schedule 3 amends or repeals redundant provisions of Part 3 of the Migration Act.

The amendments are mainly reflective of the administrative changes arising from the consolidation of the Office of the MARA into the Department. Due to the consolidation, several of the powers authorising actions or information-sharing between the Office of the MARA and the Department are no longer required.

Other amendments repeal provisions that refer to the Migration Institute of Australia (MIA) as the body that carries out the functions of the MARA. The MIA is no longer the body that carries out the functions of the MARA and it will not be appointed to do so in the future.

1.6. Schedule 4 amendments

Schedule 4 gives the MARA the power to refuse an application for registration when the applicant has been required to, but fails to, respond to requests for further information.

This measure remedies the current situation where an application for registration remains open and unfinalised indefinitely while there is a failure to respond.

The changes made by Schedule 4 provide the process the MARA must follow when an applicant has been asked to provide information in support of an application and has not done so.

1.7. Schedule 5 amendments

The amendments made by this Schedule require a migration agent who has been registered on a non-commercial basis to notify the MARA if there is a change in circumstances that has led to their providing immigration assistance otherwise than on a non-commercial basis. This differs from the current legislation in which an agent must notify the MARA if they registered on a non-commercial basis and subsequently begin to give immigration assistance on a commercial, or for-profit, basis. This change in language will make it clearer as to when migration agents must notify the MARA of a change in their circumstances.

This will complement changes under the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019 that are aimed at making the higher registration application charge the default charge payable, and ensuring that the non-commercial application charge can only be accessed by those applicants who will be genuinely offering services on a non-profit basis and in association with a charitable organisation or for the benefit of the Australian community. The Charge Bill makes amendments to ensure that if a registered migration agent pays the non-commercial application charge and subsequently gives immigration assistance otherwise than on a non-commercial basis, an adjusted charge will be imposed. This differs from the current situation in which an adjusted charge would be imposed if the agent gives immigration assistance on a commercial basis. This change in language will make it clearer as to when an adjusted charge would be imposed.

1.8. Schedule 6 amendments

The amendments made by this Schedule will amend the definitions of ‘immigration assistance’ and ‘makes immigration representations’ to include reference to assisting a person to make representations to the Minister about revocation of a visa cancellation or refusal decision on character grounds.

The purpose of these amendments is to deter those not registered as migration agents from using their real or purported knowledge of migration procedure to assist another person in making representations to the Minister regarding revocation of the cancellation or refusal of a visa on character grounds.

1.9. Compliance with International Human Rights

The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2. Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019

2.1. Introduction

This Bill amends the *Migration Agents Registration Application Charge Act 1997* to ensure that migration agents who paid the non-commercial registration application charge, but give immigration assistance otherwise than on a non-commercial basis, are liable to pay an adjusted charge. This differs from the current situation in which an adjusted charge would be imposed if the agent pays the non-commercial charge but gives immigration assistance on a commercial basis. This change in language will make it clearer as to when an adjusted charge would be imposed.

2.2. Amendment on Reintroduction

On reintroduction, minor technical changes have been made to the Bill to make the adjusted charge applicable to an agent on the new basis only after the next time the agent registers following the Bill's commencement.

2.3. Complementary Legislation

These amendments will complement those made by the Migration Amendment (Regulation of Migration Agents) Bill 2019 in relation to an agent's notification requirements should they register on a non-commercial basis, but begin to give immigration assistance otherwise than on a non-commercial basis during their registration period. This differs from the current legislation in which an agent must notify the MARA if they registered on a non-commercial basis and subsequently begin to give immigration assistance on a commercial, or for-profit, basis. This change in language will make it clearer as to when migration agents must notify the MARA of a change in their circumstances.

2.4. Compliance with International Human Rights

The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.