



Committee Secretary

Joint Standing Committee on Migration
PO Box 6100 Parliament House
Canberra ACT 2600

27 April 2018

Dear Committee Secretary,

RE: Submission on the Inquiry into the Efficacy of Current Regulation of Australian migration agents

We welcome the opportunity to participate in this Inquiry into the efficacy of current regulation of Australian migration agents. We support the conduct of this Inquiry and its two-fold methodology of seeking submissions from relevant stakeholder organisations and surveying both agents and people who have with previously engaged a migration agent, in order to examine the issues from a range of different vantage points.

The ASRC provides free legal assistance to people at all stages of the refugee determination process. Our legal practice specialises in refugee law, thus has quite a narrow focus on providing assistance for protection visa applications through primary, merits review and judicial review stages. We also provide assistance with requests to the Minister and applications for associated visas, such as bridging visas. We see a high volume of protection visa cases through the regular clinics that we hold, as well as through our in-house legal representation services. All of our legal staff are lawyers holding both practicing certificates as well as migration agent registration. We also have a large number of volunteer migration agents and lawyers who provide pro bono services to our clients, and volunteers who provide paralegal services under supervision.

Due to the heavy demand for free legal assistance for people seeking asylum, we can only assist those who are unable to afford private legal services. However we do still see many clients who have previously engaged private migration agents, and thus we are often privy to the work of migration agents. In our busy practice, we see people of many different nationalities from all over Victoria. We also provide legal assistance to people in immigration detention, both in Victoria and by telephone to people who are detained in other states and unable to access local assistance. Our comments below are based on our observations and experience as outlined above.

We would like to bring the following concerns and issues to the Committee's attention:

1. It is important to note that migration law is one of the most complex and fast changing areas of law. The level of technical difficulty in advising on such voluminous and complicated laws makes the job of migration agents and lawyers alike, inherently very difficult. Even though we focus mainly on one area of migration law, we find it challenging enough to keep up with the constantly shifting laws, regulations, policies and court judgments that are relevant to our work. Simplification of migration law would help reduce the scope for error by migration agents and lawyers alike. It would also make the laws more comprehensible and accessible to members of the public, and most importantly, to applicants, thus making them less dependent on migration agents, better able to make informed decisions about the conduct of their matters, and more empowered to participate in visa application processes.
2. Many of our clients are not only impecunious, but also very vulnerable. Many suffer from trauma and related mental health issues both as a consequence of their treatment in their home countries,

and also due to the impact of their experiences seeking asylum in Australia. Many lack English language skills and are unable to independently confirm the accuracy of the details put into their applications by their registered or unregistered agents. Most have very limited legal literacy or knowledge of the application process. Due to the combination of these experiences and factors, many people seeking asylum are very mistrustful and wary of government authorities and legal processes. Lack of trust in the system makes people seeking asylum especially vulnerable to exploitation and highly exposed to the risk of receiving misleading, wrong or incomplete advice or assistance.

3. Most people seeking asylum naturally look to the people they know and the community around them for advice and help. Sometimes the people in communities who play these informal navigation and general advisory roles are extremely helpful and a critical source of support. They can help facilitate a vulnerable client's access to competent advice and provide ongoing assurance that their best interests lie in placing trust in their lawyer or agent to enable them to put forward the best prepared and strongest case possible.
4. In other instances, non-registered 'advisors' play unhelpful roles by obstructing people's access to competent assistance, referring people to disreputable agents or directly providing illegal immigration assistance themselves. All of these situations can easily result in wrong or bad advice being provided to a person, which can have extremely serious consequences, especially for people seeking asylum.
5. We see many people who have lost their rights to appeal or review adverse decisions because their agent failed to meet the deadline for lodging an application for review of a decision. This can have far reaching and often incurable negative consequences for the applicant. Where a deadline for lodgment to the AAT has been missed, there is no process by which the AAT can accept an application lodged out of time, no matter how valid or understandable the reason for the late lodgment. In such cases, the only possible appeal available is under the original jurisdiction of the High Court, which is a very inaccessible, complex and expensive process. While it is possible to make an application to the Federal Circuit Court or Federal Court out of time, the Court's acceptance of a case filed out of time requires a decision of a judge who must be satisfied there are good reasons for the late lodgment and convinced that the case has some merit. Thus, missing lodgment deadlines can have catastrophic consequences for applicants, especially for people seeking asylum, for whom a wrong decision can result in them being returned to a country where they may face persecution or even death.
6. Aside from the risk that poor advice can result in loss of rights of review, there can also be other serious consequences for a person who receives wrong or incomplete advice in relation to their visa status. If a person becomes 'unlawful' due to the lapse of their substantive or bridging visa, they are prevented from lodging applications for most visa categories and become subject to immigration detention,¹ and then, removal, from Australia 'as soon as practicable'.² It is not uncommon for us to see people who are not aware that their visa has lapsed and that they have become unlawful, because they had been assured that their migration agent would arrange for a visa extension.
7. The most common problem we see with the involvement of unregistered advisors, is that clients' claims for protection are rarely fully articulated or properly detailed in the initial application. As

¹ *Migration Act 1958 (Cth)* s 189.

² *Migration Act 1958 (Cth)* s 198.

clients' claims are always subject to intense scrutiny by the Department or the relevant review body to detect any inconsistencies, a failure to comprehensively articulate all claims at the earliest possible time, can be fatal to an application as it is often impossible to correct later on in the process. Aside from the problem of incomplete claims, in some instances, unscrupulous non-registered advisors (and sometimes, registered agents), advise clients to alter or falsify their claims, ostensibly to improve their chances of securing a visa. The significant power imbalance between the client and their advisor can make it difficult for a client to challenge this advice. In other instances, the client is not even aware that the advisor has included falsified claims and is unable to read the documents to discover this for themselves, due to limited English language skills. When the inclusion of any false claims later emerges, as it often does, it is our experience that it is very difficult for an application to still succeed. The Department rarely accepts an applicant's explanation that they were exploited, pressured or unaware that inaccurate information had been submitted on their behalf. This is even when the decision maker accepts that the client was not aware that false claims had been made on their behalf and when the client's 'true' claims are strong.

8. In our experience, the majority of actors who mislead clients, fail to meet lodgment deadlines or provide incorrect advice, are not registered migration agents. This highlights the biggest gap and flaw in the migration assistance regulatory system: it does not effectively hold to account people who provide immigration assistance but who are not migration agents.
9. We note that there are already quite heavy 'strict liability' criminal offences and penalties in place for unregistered agents who provide 'immigration assistance'.³ A person found to be providing immigration assistance unlawfully (ie without being a registered agent) can be fined up to \$6600.⁴ Where an unregistered agent receives a fee for providing immigration assistance, they can be imprisoned for up to ten years.⁵ If a person falsely holds themselves out to be a migration agent, they can be imprisoned for up to two years.⁶ Thus, the penalties for providing unlawful immigration assistance are already quite stiff.
10. We submit that a key reason why these already strong provisions lack effectiveness is that many victims of unregistered advisors are afraid to complain. This is especially because the complaints mechanism is via the Department of Home Affairs and victims are fearful that lodging a complaint could negatively impact on their visa application. While information on the Department's website assures potential complainants that their visa applications will not be affected by making a complaint and that complaints are confidential,⁷ we can understand why potential complainants may find it difficult to accept and trust this assurance.
11. In our experience, Departmental delegates deciding protection visa applications often do not accept applicants' explanations that their migration agent was responsible for including incorrect information in their application. This is in keeping with the overall culture and approach of the Department to impugn the credibility of applicants wherever possible, and often unreasonably so. Decisions makers often make adverse credibility findings against individuals in this situation, and such findings do greatly increase the likelihood of an application being rejected. Given the information sharing arrangements between sections within the Department of Home Affairs (as well

³ *Migration Act 1958 (Cth)* s 279.

⁴ *Migration Act 1958 (Cth)* s 280(1).

⁵ *Migration Act 1958 (Cth)* s281(1).

⁶ *Migration Act 1958 (Cth)* s 285(1).

⁷ See <https://www.homeaffairs.gov.au/trav/visa/usin/reporting-problems-with-migration-agents>.

as between the Department and other agencies falling under the Home Affairs Portfolio) and the enormous effort invested by the Department in uncovering any possible inconsistencies in protection visa applications, we find it difficult to assure clients that they can safely lodge complaints against unregistered agents without risk of it potentially having negative repercussions for their case. Unfortunately, it is our experience that applicants really do need to exercise a great deal of caution regarding any information they provide, or interactions they have, with the Department.

12. We also note that the online complaint form provided by the Department is not presented in very accessible user-friendly language or format⁸ and this may contribute to victims' reluctance or inability to make complaints. The entry point to the form is headed 'Border Watch- report something suspicious'. The complainant then needs to select the tab titled 'report suspicious immigration activity' and provide details of the 'offence' allegedly committed from a long drop-down table of other offences. Notably, the form is also only available in English. These all present significant access issues, especially for vulnerable complainants.
13. We recommend that the responsibility for receiving and investigating complaints against unregistered advisors should be transferred to an independent body. We further recommend that where such a body finds that a complaint against an unregistered agent is made out and the agent has caused incorrect information to be submitted in an application, then the Department should be prevented from making adverse credibility findings against applicants on this basis. Vesting an independent body with the power to handle such complaints and ensuring that victims of non-registered agents are not penalised in their visa applications for having made a complaint, would likely increase victims' confidence to put forward their complaints and help to end the impunity enjoyed by many unscrupulous non-registered agents. Given the vulnerability of many victims, it may further embolden and encourage victims to lodge complaints if free assistance were made available to help them do so.
14. Even where complainants do sum up the courage to make a complaint against an unregistered advisor to the Department, the feedback we have received from clients who have made complaints (and based on our own experience), is that the Department's complaints mechanism is not very responsive and does not reliably follow through to investigate and act on the complaints received. Thus, from the perspective of a victim, the current arrangements for making complaints against non-registered advisors may carry considerable risks, for very uncertain gains.
15. In addition to fearing that lodging a complaint may have negative consequences for their visa applications, some victims also fear retaliatory actions from the agent who is the subject of the complaint. Some of these actors have a lot of influence and power within particular communities and can easily deter victims from lodging complaints. It is recommended that 'whistleblower' protections be established within the complaints mechanisms to assure victims that they can safely lodge complaints and will also be protected throughout any investigation and enforcement processes.
16. While there are many very professional and competent migration agents who provide careful and diligent services that add tremendous value to their clients' cases, we would also like to share some of the problems that some of our clients have disclosed to us in relation to their former migration agents, including situations where their migration agents:

⁸ <https://www.homeaffairs.gov.au/Forms/Pages/Border-Watch.aspx?offenceType=immigration>.

- Take money to provide a service and then fail to complete the work.
- Fail to meet deadlines including for lodgment of applications or lodgment of supporting information or submissions.
- Retain clients' original identity or other documentation as a guarantee.
- Do not have sufficient English language skills to complete the work to a professional standard.
- Do not know the law well enough and provide incorrect advice.
- Fail to keep their clients adequately updated as to the progress of their matter.
- Receive funds on behalf of the client (eg. the return of a bond posted to secure release from detention) and then abscond with the money.

In our experience many clients that have experienced such difficulties or been dissatisfied with their migration agents, are not motivated to lodge complaints with the Office of the Migration Agent Registration Authority ('OMARA'). This is especially when they become aware that OMARA does not have power to order a migration agent to refund fees paid by a client or to order damages for the harm done or lost opportunity caused by the misconduct. These are the remedies most sought after by many victims, especially those who are impecunious. The available remedies, being the issuance of a caution, suspension or cancellation of registration for a period, or up to a five year bar on registration, are generally less relevant to many victims. While they may help prevent further misconduct by an agent, they do not in any practical sense, address the harm already done to the victim. Potential complainants may be further deterred when they become aware that the resolution of complaints against migration agents can take a long time (stated on OMARA's website as being between 6-12 months).⁹ There may also be issues in relation to access to the complaints process, especially for vulnerable people. While the OMARA website provides the Consumer Guide and 'Tips for using a registered migration agent' in several languages, the online complaints form and explanation of the process and remedies available, are only available in English, likely limiting access to the process for many potential complainants.

Recommendations

Recommendation 1

Simplify migration law to reduce the scope for error by migration agents and to make migration law and processes comprehensible to the public and to applicants.

Recommendation 2

Transfer responsibility for receiving and investigating complaints against unregistered advisors to an independent body equipped with capacity to reliably conduct swift and thorough investigations, and follow up enforcement actions.

Recommendation 3

Create a mechanism whereby if it is found that an unregistered or registered agent has caused incorrect information to be submitted in an application, binding the Department not to make adverse credibility findings against applicants on this basis.

Recommendation 4

Ensure that all online complaints forms regarding the conduct of unregistered and registered agents be framed in simple, non-threatening layperson's language and be available in a range of commonly used languages.

⁹ <https://www.mara.gov.au/using-an-agent/resolving-disputes-with-your-agent/make-a-complaint-about-an-agent/>.

Recommendation 5

Provide free assistance to people who wish to make complaints against unregistered or registered agents.

Recommendation 6

Establish robust 'whistleblower' protections within complaints mechanisms against both unregistered and registered agents, to protect complainants from threats or other interference throughout the complaints processes, including during any investigation and enforcement processes.

Recommendation 7

Empower OMARA to make and enforce orders for the refund of fees paid to migration agents where complaints against migration agents are sustained.

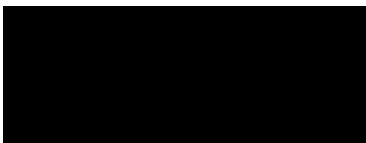
Recommendation 8

Create an accessible mechanism for clients to seek compensation where it is found that the misconduct of migration agents have caused them harm.

Recommendation 9

Provide sufficient resources for OMARA to resolve complaints more swiftly, ideally within a three month period.

Yours faithfully,

A black rectangular box redacting the signature of Kon Karapanagiotidis.

Kon Karapanagiotidis

OAM, Chief Executive and Founder