Migration Institute of Australia

SUBMISSION

Migration Amendment (Regulation of Migration Agents) Bill 2019
Legal and Constitutional Affairs Legislation Committee Inquiry

Migration Institute of Australia
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Migration Institute of Australia

The Migration Institute of Australia (MIA) was established in 1992 as the professional association for Registered Migration Agents. Through its public profile the Institute advocates the value of migration, thereby supporting the wider migration advice profession, migrants and prospective migrants to Australia. The Institute represents its members through regular government liaison, advocacy, public speaking and media engagements. The Institute supports its members through its separate but interlinked sections: professional support; education; membership; communications; media; business development and marketing.

The Institute operates as a company limited by guarantee and complies with all Australian Securities and Investments Commission (ASIC) requirements. Under its constitution it is not empowered to pay any dividends. The MIA and its elected office bearers are guided by the legal framework set out in the Corporations Act 2001, the MIA Constitution and Rules, the Corporate Governance Statement and Board Charter.

MIA Members hold a further responsibility to their clients and the Australian community to abide by ethical professional conduct and to act in a manner which at all times enhances the integrity of the migration advice profession and the Institute. MIA Members are bound by both the MIA Members' Code of Ethics and Practice, which sets the profession's standards of behaviour, and the statutory Code of Conduct of the Office of the Migration Agents Registration Authority (MARA).

The Migration Institute of Australia (MIA) welcomes this opportunity to comment on the Migration Amendment (Regulation of Migration Agents) Bill 2019.

The MIA is the peak professional body for Registered Migration Agents. Currently around one third of all Registered Migration Agents hold legal practicing certificates and the MIA's membership reflects this, with around one third of its membership made up of 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.

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 reports their well-considered thoughts on the removal of lawyers from the current regulatory system.

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

John Hourigan FMIA
National President
Migration Institute of Australia
29 January 2020

Recommendation

The MIA is strongly opposed to the removal of the lawyers from Office of the Migration Agents Registration Authority regulatory system and proposes an alternative strategy to that of the *Migration Amendment (Regulation of Migration Agents) Bill 2019*.

The MIA recommends that those practitioners who hold Australian legal practicing certificates and who wish to provide immigration assistance should:

- ***be registered with the OMARA for a nominal fee***
- ***not be subject to the OMARA disciplinary system, but to their relevant state or territory legal services commission, and***
- ***be required to undertake at least six Continuing Professional Development (CPD) points in the area of Australian migration law and policy each year.***

This proposal would ensure that:

- consumer protection and confidence is maintained as all those approved to provide immigration assistance will have some knowledge of Australian migration law
- information about anyone approved to provide immigration assistance can be found in one place
- the many lawyers working in migration practices that are not also legal practices could continue to provide immigration assistance
- lawyers will be only be regulated under one disciplinary system, and
- there would still be significant savings to the Department of Home Affairs as it will only be registering lawyers and checking annual CPD compliance.

Migration Amendment (Regulation of Migration Agents) Bill 2019

The Migration Institute of Australia (MIA) welcomes the opportunity to provide input into this current Legal and Constitutional Affairs Legislation Committee Inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2019 and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019.

The MIA notes that no specific terms of reference have been provided by the Committee for this Inquiry, although the Hansard of 28 November 2019 in Appendix 3 provides the reasons for referral/principal issues for consideration as:

> *To determine whether the Parliament of Australia should vote in favour of this bill in its current form (or in an amended form), having regard to the views of industry and other key stakeholders.*

The MIA also notes that this is the third review or inquiry into the removal of Australian lawyers from the Office of the Migration Agents Registration Authority's (OMARA) regulatory system in the last five years. The removal of lawyers from OMARA regulation has been considered by:

- The Independent Review of the Office of the Migration Agents Registration Authority – Dr Christopher Kendall – September 2014[1]

- The Migration Amendment Regulation of Migration Agents Inquiry – Legal and Constitutional Affairs Committee – Final report presented 16 October 2017

- Current Inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2019 and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019 by the Legal and Constitutional Affairs Legislation Committee – to report March 2020.

The Kendall Review 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.

[1] Also referred to as the 'Kendall Review' – recommended the removal of lawyers from the OMARA regulatory system pp 39-72

Consumer protection

Since its inception in September 1992, the primary intent of the migration agent registration and regulation of those providing migration advice and assistance has been to provide consumer protection.

The Hon. Jason Woods MP in introducing this legislation to the parliament acknowledged in his second reading speech that:

> *The government further recognises that deregulation of the migration advice industry should not be prioritised over the maintenance of important consumer protections.*[2]

The final report of the 2014 Independent Review of the Office of the Migration Agents Registration Authority 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.[3] This includes lawyers and barristers.

The last major review prior to the Kendall Review, the Hodges Review undertaken in 2007-8, noted:

> *In its consideration of this issue, the Review concluded that while many of the arguments for and against the continued inclusion of lawyer agents could be the subject of ongoing dispute, it was clear that the inclusion of lawyer agents provided clarity to consumers.*[4]

Nevertheless, the Kendall Review recommended that lawyers be removed from the regulatory scheme that governs migration agents such that lawyers:

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

Should this Bill be passed in its current form, it will reduce the level of protection and quality assurance for consumers of immigration advice.

Migrants are extremely vulnerable consumers of immigration advice. 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.

[2] Hansard - House of Representatives - 27 Nov 2019, p 5985

[3] There are some exceptions for certain government officials and family members

[4] 2014 Independent Review of the Office of the Migration Agents Registration Authority, p 42

Consumer protection measures are vital for these people. The removal of lawyers from the OMARA system will also remove the protections afforded these most vulnerable people under this 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.

MIA Member comment …

I have worked in various organisations since becoming registered initially in 2005, including law firms. I have worked with talented and dedicated lawyers and registered migration agents and do not believe lawyers should be removed from OMARA oversight. I have also provided training to law graduates in the lead up to their registration as agents.

Given my experiences, I believe we need to maintain a level playing field with one body helping consumers who may receive assistance from an unscrupulous provider - whether that provider is a registered agent only or a registered agent who also holds a legal practising certificate.

We can't kid ourselves that this won't happen, but having a centralized body for consumers to go to, and a centralized body to maintain oversight of the standards for the migration professional is essential.

Provision of competent advice

Arguments for the deregulation of lawyers by the legal profession lack plausibility and disregard consumer protection. Deregulation may satisfy professional pride, but it does not ensure consumer protection for particularly vulnerable people. Deregulation should not be pursued for its own sake. It must be considered in terms of consumer protection.

Migration law is labyrinthine. The Department of Home Affairs' (Home Affairs) 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 official policies of Home Affairs are as complex as the legislation itself.

Lawyers in Australia generally do not study immigration law as a core subject in their undergraduate degrees. Perusing the requirements for a particular visa type does not provide insight the underlying complex legislation which is vital to understanding the making of valid visa applications, advising clients of their migration options or what to do when the existing legislation changes, as it does frequently. There are no refunds for incorrect applications and for some applicants their migration outcomes may mean the difference between life and death.

The OMARA Code of Conduct requires all RMA to maintain a professional library to inform their practice. Most registered migration agents 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 OMARA regulatory system and Code of Conduct, lawyers searching for new sources of income may choose to bypass these important practice aspects and as a consequence offer sub-standard legal advice to the unsuspecting public.

If lawyers are removed from the regulatory system, the migration advice profession will be opened up to lawyers who:

- are currently sanctioned or barred by the OMARA, but who continue to be allowed to practice by their relevant law societies
- have no knowledge of Australia's complex migration legislation and policy.
- have no compulsion to maintain currency of knowledge and professional resources pertaining to this area of law, as required by OMARA registration
- choose to provide immigration assistance to supplement their struggling legal practices.

It has been argued that if lawyers are removed from the regulatory system and provide immigration assistance without having competent knowledge, they will be subject to the complaints and disciplinary mechanisms of the legal profession. This is akin to locking the stable door after the horse has bolted. They may have already caused great damage to peoples' lives.

The inclusion of lawyers in the OMARA regulatory system ensures the integrity of the migration program and the reputation of the migration advice profession.

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.

MIA Member comments …

For consumers, it is much simpler to search one register to verify the registration status of the agent. We may also see non-registered people masquerading as "lawyers" in order to provide immigration assistance. I doubt the law societies in each state/territory have the resources to police this practice, whilst the Department through the ABF has more powers to prosecute people who are masquerading as migration agents when they are not registered.

Unintended consequences of removal of lawyers from dual regulation

The MIA contends that removal of lawyers from the OMARA regulatory system will have unintended and highly damaging consequences for consumers, legal and migration practices, lawyers and registered migration agents. An alarming unforeseen consequence of the proposal to remove lawyers from the regulatory system is that a significant number of lawyer registered migration agents may lose their jobs and/or businesses.

It is common for large migration practices not to be legal practices within the definition of a “qualified entity”. These companies cannot easily convert to become legal practices as legal practices must have a lawyer as a director. Non-legal migration practices providing services to disadvantaged clients and employing lawyers with immense knowledge and experience in this area, will be forced to merge with a legal practice or be forced out of business.

Many of these non-legal migration practices and the lawyers they employ provide pro bono or legal aid funded services to migrants. It is crucially important that this sector be protected from a potentially enormous loss of legal expertise for both consumers and those providing services to them.

Often these non-legal migration practices provide services on a subsidised basis under government fee for service contracts. These lawyer registered migration agents assist asylum seekers and the like to 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, 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 with 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 be ruinous to their businesses.

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 practices collectively employ large numbers of lawyers. However, as Australian legal practitioners can only give immigration assistance in connection with legal practice,[5] many of the lawyers employed in these non-legal migration practices, provide advice under the OMARA regulatory system as registered migration agents.

If removed from the OMARA regulatory system lawyers currently working in these migration practices:

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

Comments from five MIA Members…

I submit that there will be a real and practical discriminatory effect on employers and unrestricted legal practitioners who operate outside of traditional law firms should the Bill be passed in its current form. … This is contrary to the Bill's Explanatory Memorandum which states that there is 'no practical discriminatory effect'.

I had a practicing certificate when this legislation was proposed, I have let it go because it did not suit my business model. But I might want to resume it. This legislation is anti-competitive because it would prevent me from registering as a migration agent. The so called red tape benefits are not persuasive.

My business will fold, I will need to revert to being an employee again and get a job in a law firm, not in an agency where I have worked for the last 10 years, working as a lawyer rather than an RMA. I do not want to do this and resent the government forcing me to fold my successful business with no apparent valid reason behind the decision.

I believe that making [me] choose between being an RMA and being a lawyer and making this selection final and irreversible is completely unconscionable. The government should not be able to force me to give up my practising certificate simply because I choose to run my own business instead of finding an unpaid or low-paid position supervised by a solicitor with an unrestricted practising certificate.

It will impact my business considerably as I would have to co-operate and depend on supervision of a unrestricted practising solicitor. This will cause financial strain on my business. Or I would have to relinquish my legal practicing certificate and undertake the migration agent course, which will take away time and money from my business.

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

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 registered 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 marketplace

It is not only at the lower levels of the legal profession where these impacts will be felt. Barristers may also face restrictions. Barristers work within Chambers. A Chambers practice is also not a law practice under the various legal professions acts. In NSW for example, a Chambers Practice is not a law practice under the Legal Profession Act 2004. In Queensland the same rule applies and a legal practice or Law firm must have 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.

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.[6]

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. It is unjust and grossly unfair to force lawyer registered migration agents to make such decisions. The logistical and financial implications alone are alarming.

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 without conditions attached to their practice, even after being barred by the OMARA for gross misconduct and breaches of fiduciary duties.[7]

[6]Only lawyers can represent migration clients in courts of law. RMAs are restricted to tribunal level representation and below.
[7] The OMARA publishes the identity and disciplinary decision decisions on its website for consumer protection purposes

Notable cases are those of a lawyer who was barred from practicing as a migration agents for flagrant attempts to rort the asylum seeker migration program and another whose registration was cancelled for knowingly lodging large numbers of fraudulent applications.

MIA Member comment…

While it may be well intentioned, the removal of lawyers from the OMARA regulatory system will only see an increase in risk to consumers and an increase in complaints. There is already evidence that lawyers who are registered as migration agents have been found on occasion to not operate in accordance with the code of conduct and some lawyers who have been barred from registration have then continued to take advantage of consumers on the basis of holding a practicing certificate.

Immigration clients can be some of the most vulnerable consumers and without a dedicate regulatory body such as the OMARA to oversee their rights, I would be concerned about how swiftly any complaints would be dealt with, and what if any actions the various law society bodies would take in dealing with complaints.

Arguments against the dual registration of lawyers

Dual regulation is not uncommon in other professions in Australia. Accountants are required to have separate registration to work in taxation, financial planning and auditing. 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 must meet training and ongoing competency standards.[9] Similarly, auditors are also regulated by ASIC.[10]

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

[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

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

The Kendall Review also provided as justification for the removal on the grounds of the 'administrative' burden of dual registration for lawyers, none of which noted any reference to consumer protection:

- dealing with differing dates for renewal of practicing certificates and MARA registration dates
- the financial burden of the OMARA registration fee
- the theoretical overlap of MARA Code of Conduct and legal professional obligations.

The LCA and other community legal advice and refugee centres argue that the requirement to be registered reduces their ability to attract experienced practitioners willing to provide pro bono advice and that there is a … *severe "brain drain" of specialist migration lawyers, who cease practicing due to frustration with the oppressive regulatory scheme.*[11]

The MIA strongly rejects these assertions. These arguments conflate the OMARA registration requirement with the lack of lawyers willing to provide pro bono services. The cost of OMARA registration to non commercial legal practitioners is negligent. By virtue of holding a current legal practising certificate, the lawyer is not required to undertake any additional qualifications, the OMARA recognises a lawyer's CLE points undertaken yearly for their practising certificate, the cost of professional indemnity insurance for migration practice is a fraction of that paid by lawyers to their fidelity funds and the OMARA registration fee for non-commercial registration as a migration agent is $160.00 per year. Hardly an 'oppressive regulatory' scheme.

It is totally illogical to argue that the OMARA registration requirements are the sole barrier to lawyers providing pro bono services in community legal centres. The MIA would contend that it is more likely to be lack of interest in volunteering generally or lack of professional immigration knowledge or experience that prevents the majority of non registered lawyers from advising or representing clients with migration matters in these centres.

MIA Member comment…
I can be a lawyer and a hairdresser or a lawyer and a chef but I will not be able to be a lawyer and a migration agent. Why not?

[11] 2014 Independent Review of the Office of the Migration Agents Registration Authority, p 49

MIA Members' attitudes and opinions to the removal of dual regulation

Approximately one third of the MIA membership is made up of registered migration agent lawyers. The MIA has surveyed its total membership several times on the issue of removal of lawyers from the OMARA regulatory system, initially for the preparation of the MIA's submission to the Kendall Review and most recently in January 2020. These surveys have allowed the MIA to track the attitudes and opinions of its members over time on this issue.

MIA members have been consistent in their attitudes and opinions across all this time, while around one half to two thirds of the MIA's registered migration agent lawyer member respondents to the surveys support the removal of dual regulation, they are not without criticism of the effect of the current Bill and the manner in which the 'deregulation' will occur.

Similarly, MIA registered migration agent members who do hold legal practising certificates are concerned about the unfettered ability of lawyers without migration knowledge or training to provide immigration advice and the lack of consume protection.

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.[12]

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 with the OMARA.

Many MIA registered migration agent lawyer members are opposed to being 'prohibited' from being registered by the OMARA and would prefer an 'opt in' system.

MIA lawyer Member comment …

Every lawyer who is also an RMA should still have an option to maintain dual registration if they so choose. It should be open to such lawyers to continue paying registration fees to both MARA and the relevant Law Society to continue renewing both their RMA registration and their practising certificate, if they like.

In other words, while I would be perfectly OK if MARA registration was no longer mandatory for those with legal practicing certificates, I firmly believe that it should still remain optional for those people from that cohort who wish to maintain dual registration voluntarily.

[12] The Kendall Review, 2014, p41.

Many of these proponents of an opt in system are long standing practitioners as evidenced by their Migration Agents Registration Number (MARN) which is prefixed by the year of their first registration ie 96XXXXX indicates that the agent was first registered in 1996. A MARN is an indication of longevity and experience as a migration practitioner.

> ***MIA lawyer member comment …***
>
> *From the consumer point of view, they would prefer someone who has experience in the field. The benefit of RMA is that MARN indicates the years of experience verified by a third party (MARA) whereas lawyer does not have such advantage unless obtain accredited specialisation in immigration law*

One MIA member had a novel approach to the regulation of lawyers:

> ***MIA Member comment …***
>
> *If an RMA who is also a lawyer (ie holds a practicing certificate) has completed the relevant qualifications for registration as an RMA, I think it should be an option to either rely on that for registration rather than have to maintain registration with the relevant Law Society.*

Alternative proposal to the removal of lawyers from OMARA regulation

For the reasons discussed in this submission the MIA strongly objects to the removal and prohibition of persons who hold a legal practicing certificate from Office of the Migration Agents Registration Authority regulatory system. The MIA does not believes that this is in the best interest of vulnerable consumers and of the migration advice profession as a whole.

The MIA proposes the following alternative strategy to that of the *Migration Amendment (Regulation of Migration Agents) Bill 2019*.

The MIA recommends that those practitioners who hold Australian legal practicing certificates and who wish to provide immigration assistance should:

- *be registered with the OMARA for a nominal fee*
- *not be subject to the OMARA disciplinary system, but to their relevant state or territory legal services commission, and*
- *be required to undertake at least six Continuing Professional Development (CPD) points in the area of Australian migration law and policy each year.*

This proposal would ensure that:

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