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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email to legcon.sen@aph.gov.au and by upload

Dear Committee Secretary

Submission to the Senate Committee on the Migration Amendment (Regulation of Migration Agents) Bill 2019 and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019

1. Estrin Saul Lawyers (**Estrin Saul**) welcomes the opportunity to provide a submission to the Senate Committee in relation to the Migration Amendment (Regulation of Migration Agents) Bill 2019 (**Bill**).
2. Estrin Saul is Western Australia's largest specialist immigration law firm, comprising Australian legal practitioners (currently dually regulated) as well as migration agents who are not lawyers, most of whom are also members of the Migration Institute of Australia (**MIA**). In 2019, Estrin Saul won the title "Boutique Law Firm of the Year" at the Australian Law Awards.
3. Australian legal practitioners are currently prohibited from providing "immigration assistance" by section 280 of the *Migration Act 1958* (Cth) (**Act**) without first applying for registration with the Office of the Migration Agents Regulation Authority (**OMARA**). The Bill seeks to remove these unnecessary administrative burdens, leaving the consumer with certainty of representation, capacity and avenues for redress for breaches of professional rules and obligations.
4. Estrin Saul strongly supports the proposed changes contained in Schedule 1 of the Bill.

Burdens of dual regulation and consumer protection

5. As at 30 June 2019, dual regulation affected 30.2% of registered migration agents or 2,192 Australian legal practitioners.¹ Dual regulation not only impacts legal practitioners negatively, but also detrimentally impacts the consumer – often extremely vulnerable individuals from Culturally and Linguistically Diverse (**CALD**) backgrounds. The 2014 Independent Review of the Office of the Migration Agents Registration Authority (commonly referred to as the “Kendall Review”) highlighted the adverse effects of dual regulation. Since the report, these effects have been extensively debated.²
6. The Kendall Review recommended an overhaul of the current regulatory scheme,³ which is an unnecessary burden on lawyers also a potentially the source of confusion for those seeking migration assistance.
7. For a firm the size of Estrin Saul Lawyers (nine lawyers and three registered migration agents), dual registrations, fees and double re-registration creates an unnecessary administrative burden and additional overheads which affect the end consumer.
8. The amendments to the Act proposed in Schedule 1 of the Bill will help alleviate these adverse effects of dual regulation and be beneficial to both legal practitioners working in the migration advice industry and the consumers we serve.

Protecting the consumer

9. The Government recognises that the current scheme poses unnecessary administrative burdens on legal practitioners but acknowledges that removing this burden should not be prioritised at the consumer’s expense.⁴ Estrin Saul submits that removing dual regulations will only improve consumer confidence and reduce confusion.
10. With the Act requiring any person providing “immigration assistance” to be a registered migration agent (with limited exceptions), the consumer is often left uncertain whether the advice being given is legal or otherwise. The consumer can also be confused as to which authority is best to deal with any complaints, how they will be resolved, which remedies are available and most importantly, which professional obligations exist (eg client legal privilege).

¹ *Migration Agent Activity Report: 1 Jan – 30 Jun 2019*, Office of the Migration Agents Registration Authority, Department of Home Affairs, <https://www.mara.gov.au/media/665948/MAAR_Jan_Jun_2019_Web.pdf>.

² *2014 Independent Review of the Office of the Migration Agents Registration Authority: Final Report September 2014*, Dr Christopher N Kendall, <<https://www.homeaffairs.gov.au/reports-and-pubs/files/omara-review.pdf>>.

³ *Ibid*, p 67.

⁴ Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 27 November 2019, 5984 (Jason Wood, MP), <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2Fa7ce6cc1-21ba-4cac-bf80-f84a4f8caf08%2F0030%22>>.

11. At present, dual regulation adds no additional protections for the consumer. In some instances, the legal regulatory body may even be more efficient for immediate action. For instance, the Legal Practice Board of Western Australia (**LPBWA**) has a “Rapid Resolutions Team” whose goal is to “resolve complaints by conciliation and to identify possible conduct issues”.⁵ In the context of visas, “rapid resolution” is more preferable than the OMARA complaints process, which, while effective, often yields an outcome which does not assist the aggrieved consumer in the short term. The Rapid Resolutions team, which addresses matters within two working days of receipt, can often conciliate the concern raised and mitigate any conduct *before* taking it further to the Legal Professional Complaints Committee.⁶
12. As an example, on 15 November 2018, OMARA made a decision to cancel the registration of agent 0960330. While the decision was comprehensive, it dealt with some complaints which had been received 18 months prior to the decision.⁷ Had a complaint been raised under the “rapid resolutions” process of the LPBWA, a more immediate outcome may have been achieved, perhaps even one with a short term visa solution as well as disciplinary action.

Case example

Visa Applicant C had tried to contact her lawyer/registered migration agent to ask about the status of a visa application. The lawyer/agent had received a visa refusal decision from the Department of Home Affairs but had neglected to inform the applicant for 17 days. Visa Applicant C complained to the OMARA, who acknowledged the complaint and began investigating the lawyer/agent. By the time any action was taken, Visa Applicant C’s 21 day period in which to apply to the Administrative Appeals Tribunal for review of the refusal decision had expired, with no right to seek an extension of time. She became unlawful and was subject to a three-year exclusion period upon leaving Australia.

Had Visa Applicant C applied to the Rapid Resolutions Team of the Legal Professional Complaints Committee, the complaints legal officer may have actioned the matter within a timeframe that would **not** have had the disastrous consequences outlined above.

⁵ <https://www.lpbwa.org.au/Complaints>

⁶ <https://www.lpbwa.org.au/Complaints/The-Committee-s-Services>

⁷ <https://www.mara.gov.au/news-and-publications/public-notice/disciplinary-decisions/sanctioned-agent-detail/?id=6a06ab26-a352-e311-9402-005056ab0eca>

Ensuring competency of immigration professionals

13. A Western Australian lawyer wishing to do conveyancing or business settlement work does not need to be additionally registered as a settlement agent or a conveyancer.⁸ Similarly, a lawyer practising employment law in Western Australia does not need registration as an industrial agent.⁹ Migration law should be no exception to the principle that lawyers can do any type of legal work.
14. All Australian lawyers must:
 - a. complete a three-year law degree (including a compulsory unit of Administrative law);
 - b. complete Practical Legal Training, comprising further study of practical legal skills and practice ethics as well as work experience;
 - c. be deemed a fit and proper person to practice law for admission to a Court; and
 - d. complete 18 months to two years supervised “restricted practice”.
15. Throughout a lawyer’s career, State and Territory regulators are able to cancel, suspend or vary a lawyer’s practising certificate where misconduct, bankruptcy or commission of certain offences has taken place. These regulatory bodies provide the consumer with sufficient complaint mechanisms which have a range of remedies. They can also step in to ensure that if a lawyer is unable to continue practising (whether due to misconduct, ill health or for any other reason), their clients are not left without representation. The regulator then assigns the clients to other highly qualified lawyers, ensuring that no consumer is left without access to justice.
16. Lawyers are also legally required to fulfil the continuing professional development requirements of their practising certificates and maintaining professional indemnity insurance. These safeguards afforded to clients of law practices, including clients of lawyers practising in the area of migration, offer comprehensive protection and are sufficient to protect vulnerable consumers.

Access to justice

17. Lawyers have a history of commitment to *pro bono* assistance and should be encouraged to assist with complex matters at short notice without OMARA registration. The current system creates confusion, particularly for those vulnerable clients who need certainty from the legal process.
18. The current system can lead to problematic results, for example:
 - a. competent lawyers wishing to assist in preparing protection visa applications being discouraged by the restrictions and administrative burden of the dual regime;
 - b. non-RMA lawyers who represent clients at the judicial review stage being precluded from assisting at the Administrative Appeals Tribunal (**AAT**) or the Immigration Assessment Authority (**IAA**);

⁸ <https://www.commerce.wa.gov.au/consumer-protection/licensing-settlement-agents>

⁹ See section 112A of the *Industrial Relations Act 1979 (WA)*

- c. criminal defence lawyers being unable to represent their client when it comes to a “cancellation review application” before the AAT; and
- d. lawyers who practice family law not being allowed to advise clients about visa family violence provisions.

Case example

Applicant A was assisted by a large national law firm and senior counsel acting **pro bono publico** at the Federal Circuit Court on a migration matter with complex health assessment issues. The case was successful at Court and the matter was remitted to the AAT. Neither the instructing solicitor nor senior counsel were Registered Migration Agents and were thus unable to lawfully represent Applicant A at the AAT.

The law firm had to hand the matter over to Estrin Saul Lawyers for assistance.

- 19. The above case example demonstrates an absurd outcome of dual regulation which deprive the client of continuity and certainty.

Representation for asylum seekers

- 20. Currently, of the 6,420 legal practitioners in Western Australia¹⁰, only 77 are Registered Migration Agents with the OMARA. This means that only 1.1 per cent of legal practitioners in Western Australia can legally provide immigration assistance to asylum seekers whose protection visa applications are being assessed by the Department of Home Affairs or reviewed by the IAA and the AAT.
- 21. The latest OMARA Migration Agent Activity Report shows that only 38% of Temporary Protection Visa and 15% of permanent protection visa applications are lodged by a Registered Migration Agent, compared to 86% for employer sponsored visas¹¹.

Case example

Jane is a barrister who specialises in administrative law. She is not a Registered Migration Agent but has significant expertise in the area of refugee judicial review applications. Jane wishes to volunteer at a community legal centre (CLC) once a week assisting clients with their protection visa applications and addressing refugee and complementary protection criteria under *Migration Act*.

Jane is told by the CLC that she cannot assist as she is not a Registered Migration Agent.

¹⁰ https://lawalmanac.justice.wa.gov.au/C/certificated_legal_practitioners.aspx?uid=6765-1807-9234-7333

¹¹ *Ibid* at p7



22. Given the complexity of the law and the vulnerability of clients in the asylum seeker community, the low number of professionals representing clients for protection visas is a concern. Allowing legal professionals to assist with this caseload will improve the quality of applications and discourage the lodgement of vexatious or unmeritorious cases.
23. While lawyers can become registered migration agents simply by virtue of holding a legal practising certificate, the OMARA initial registration processing time is eight weeks¹², far too long for any meaningful response to immigration law deadlines. The current system dissuades and administratively blocks access to justice for those who need it the most.

Recommendation

24. Over thirty years ago, the Trade Practices Commission observed that “there are sound public interest reasons for ensuring that lawyers practice according to high professional and ethical standards and contribute to the maintenance of a judicial and legal system of high standing”.¹³ This statement rings true today – lawyers are held to the highest professional standards when practicing in all areas of the law, from housing, finance, personal injury, wills and probate to family law. Migration law is no exception to scrutiny by legal regulatory bodies, without the need for additional regulations.
25. For the reasons above, we support the Bill.
26. Please contact us on _____ or _____ if you require further information about this submission.

Yours sincerely

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Partner | Lawyer and Registered Migration Agent

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¹² <https://www.mara.gov.au/becoming-an-agent/registration-process/>

¹³ Trade Practices Commission, “Regulation of professional markets in Australia: issues for review”
<https://trove.nla.gov.au/work/6721002?q&versionId=7738788>