

**IMMIGRATION LAWYERS ASSOCIATION OF AUSTRALASIA**

PO Box K1293 Haymarket NSW 1240, Australia |

20 October 2003

Ms Louise Gell
Secretary
Senate Legal and Constitutional Committee
Suite S1.61
Parliament House
Canberra ACT 2600

AND BY EMAIL: legcon.sen@aph.gov.au

Dear Ms Gell

**Submission of the Immigration Lawyers Association of Australasia (ILAA) and the Law
Institute of Victoria (LIV)
Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003 ("the Bill")**

Enclosed is the above Submission which strongly opposes the proposals contained in the Bill on the basis that the Bill is misconceived and its measures will not achieve the stated aims.

The Bill fails to distinguish agents with legal qualifications and practising certificates and others. As such, it will have serious unintended consequences particularly for legal practitioners who are migration agents providing bona fide and professional legal advice in a complex area of law, and often in highly complex cases.

It's cornerstone proposal of defining "vexatious conduct" by virtue of an arbitrary, simplistic and mechanical formula of "visa success rate" is fundamentally flawed particularly when one takes into account the extremely complex and ever changing nature of this area of law.

To the extent that the Bill contains provisions relating to notifying the Department of Immigration, Multicultural & Indigenous Affairs (DIMIA) in respect of their provisions of "advice" (including to any potential applicant) and in the calculation of refusal rates, the Bill seeks to remove the right to confidential legal advice and will adversely impact on legal professional privilege.

Through its conferral of excessive power and discretion to the Executive to suspend an agent on the basis of allegedly "vexatious conduct" based on arbitrary notions of "visa success rate" with review only being available after the event to the Administrative Appeals Tribunal it is potentially punitive and draconian in its consequences.

It impinges on the separation of powers and undermines the rule of law.

In its failure to make the fundamental distinction between agents who have legal qualifications and practising certificates, it inappropriately and even arguably unconstitutionally seeks to regulate legal practice and the provision of legal services.

If the aim is to protect the interests of the client group that is perceived to be vulnerable and to improve competence through sound entry-level knowledge, and hence professional standards and professional integrity, it is misconceived and will not achieve its aims.

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It fails to recognise the inherent tension of allowing non-legally qualified persons to become registered as migration agents after completing a four day course, in an area of law which is codified, exceedingly complex and subject to frequent, ongoing and substantial change.

If there is a real commitment to consumer protection and awareness, then it is of note that the Bill seeks to make no distinction in respect of agents who have legal qualifications and current practising certificates who are in any event subject to two tiers of control namely their State Law Society and the Migration Agents Registration Authority (MARA) and others.

Of concern also is that it fails to address the recommendations of the Review of Statutory Self-Regulation of the Migration Advice Industry (2001-02) ("the Review") which amongst other things recommended that there be higher entry level requirements for those persons who do not have legal qualifications, followed by a period of supervised practice, that there be compulsory Professional Indemnity Insurance at a specified minimum level to better protect clients from professional negligence and that agents be required to satisfy the "fit and proper person and person of integrity tests".

Whilst the Review acknowledged there was an ongoing need to continue to raise professional standards across the board and appropriately address the activities of the unscrupulous few, the mechanisms proposed in the Bill fail to achieve this purpose.

Further, whilst the Review at Recommendation 16 proposed that a means be developed for sanctioning agents who lodge high numbers of vexatious, unfounded or incomplete applications, the arbitrary, simplistic, and mechanical application of the formula of assessing "visa success rates" will potentially have broad ranging applications. Notifications of the provision of advice to the DIMIA coupled with data in respect of "visa success rates" will lead to the creation of a data base of personal information about potential visa applicants and migration advisers which may subsequently be used in various ways not intended by the Bill.

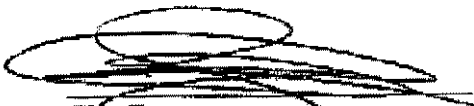
The cornerstone of Australia's Administrative Law system and the rule of law and the rights of individuals, recognises the importance of legal professional privilege and confidential advice. To purport to remove these basic maxims is to undermine the rule of law. Further, the conferral of excessive power and discretion to the Executive can only further impinge upon the separation of powers and cause further tensions well beyond the measures that it seeks to address.

Any regulatory scheme must make an appropriate distinction between agents who are legally qualified and have current practising certificates and those are not.

We would welcome an opportunity to address the Committee on these issues.

We thank you for the opportunity to contribute to the development of strategies to improve the operation of this industry.

Yours sincerely



Glen Ferguson
President of ILAA