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Department of Home Affairs
Canberra, Australia

BY INTERNET

Dear Sir/ Madam

RE: SUBMISSION - Comments on the May 2021 Consultation Report titled "*Migration Agents Instruments Review.*"

This submission seeks to establish and advocate for the position that the Migrations Agents Instruments Review published by the Australian Government's Department of Home Affairs (the "Review") is unduly discriminatory towards those working as non-solicitor Registered Migration Agents ("RMAs") within the migration advice profession. Primarily, the Review fails to adequately acknowledge the weaknesses inherent in the practice that preferences the multitude of solicitors and solicitor agents that occupy this field.

The submission will make the following points:

1. On average, the levels of training and qualifications held by many working as solicitor RMAs is much lower, less comprehensive, and less uniform compared to the training undergone by non-solicitor RMAs. This is true whether the license held by the solicitor is restricted or unrestricted, and in either case, they should be held to the same standards and be required to meet the same criteria as non-solicitor RMAs.
2. As it stands, regulations in the space are overwhelmingly directed towards non-solicitor RMAs. The current regulatory regime for non-solicitor RMAs is so overwhelming in fact that it will eventually become prohibitive to the continued practice of the profession. Further, it

will likely devolve into what, for many, will be an effective bar to the profession and deter a sizable portion of new entrants.

3. Little to no regard is paid to the vital skill of being competent in multiple languages.
4. Due to pressure and lobbying from the Law Council of Australia ("LCA"), there will eventually be a marked decrease in supervision and oversight of many working as solicitor RMAs.
5. Such a decrease in oversight will prove to be detrimental to the interests of clients, the public, and the migration advice profession at large.
6. The Review, as it stands, will not further the shared aims of both the Australian Government and the migration advice profession of delivering world class service and assistance.
7. Currently, it appears the Government fails to recognise that the Migration Advice Profession is, indeed, a profession. This outlook must be promptly addressed and altered.
8. Therefore, the Government must recognize our work as a profession and treat it accordingly, or else risk the further deterioration of standards and service throughout.

The themes for this submission include consumer protection, safe working practices, the scope of practice within the provision of immigration assistance by both non-solicitors working in the field and solicitors who have entered the field, the associated high standards of professionalism, and the Government's duty of care to both professionals and consumers within the realm of the migration advice profession.

Second Language Skills and a Diverse and Inclusive Workforce

Fluency in a second language is immensely beneficial in orchestrating clear and effective communication with stakeholders. Because it is such a highly sought-after skill, public servants – particularly those in senior leadership roles – should be highly encouraged, if not required, to speak at least one additional language in order to promote effective communication.[1] Thus, the same should apply to both solicitors and non-solicitors working in the migration advice profession.

Generally, second language skills exist among people who do not hold English as their first language, although they eventually achieve fluency in it. Accordingly, it makes sense that the Australian Government should seek to employ a diverse and inclusive workforce with this perspective. Shared language proficiency is a critical component to both effective team-building and fostering client relationships alike.

[1] Felicity Nelson, 'Bilingual Lawyers have Competitive Edge,' *Lawyers Weekly AU* (online at 9 July 2015) https://www.lawyersweekly.com.au/careers/16804-bilingual-lawyers-have-competitive-edge.

As such, prioritizing diversity in language aids communication, encourages the development of global citizenship and improves stakeholder relationships in the community.[2]

However, the strict regulatory requirements proposed at present are proving to be a strong barrier for entry to certain groups seeking to enter the profession. Whilst the meeting of regulatory requirements may have had the initial intention of protecting consumers, in their current form, they are instead acting as a deterrent to those whose first language is one other than English. This effect is detrimental to businesses and the community and hurts the profession's overarching aim of incentivizing and bringing highly skilled individuals to reside in Australia.[3]

Non-solicitor RMAs are the most likely group from the migrant advisory profession to hold a second language. Anecdotal evidence suggests that migrants are more likely to seek advice from people who are competent in their own first language.[4] Migration is always a stressful experience, and potential migrants – irrespective of their particular motivation in seeking migration – respond significantly better to the comfort and clarity of communicating with a competent professional who shares their native tongue. Whilst we might understand the immigration process fully, migrants do not, and as such need advice to be communicated to them in the clearest and most comprehensive manner possible.

Unfortunately, the current policy is acting as a deterrent to non-native English speakers. We need to make sure that they are not marginalized, outcast and made vulnerable. In order to reflect the multicultural nature of Australian society more accurately, the Government should seek either to abolish the English assessment or reduce the required score to encourage more diverse applicants to apply for registration. These steps would greatly facilitate the robust participation of more non-native English speakers in the profession, our community and Australia's economy and bringing profound benefits to all.

Inequality Between Solicitor and Non-Solicitor Migration Advice Professionals

There are different requirements that must be met in order to practise as either a non-solicitor professional or solicitors in the profession, along with those operating as education agent professionals. This must change.

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[2] Federation of Ethnic Communities Council of Australia (FECCA), 'Australia's Growing Linguistic Diversity: An opportunity for a strategic approach to language services policy and practice,' (online at 4 July 2020) https://www.refugeecouncil.org.au/australias-growing-linguistic-diversity/.

[3] Murray Hunter, 'Thousands of registered migration agents to lose accreditation with new legislation,' *Independent Australia* (online at 18 September 2020) https://independentaustralia.net/politics/politics-display/thousands-of-registered-migration-agents-to-lose-accreditation-with-new-legislation,14322.

[4] Rosie Driffill, 'We need to be careful about demanding migrants speak English,' *The Guardian AU* (online at 9 September 2016) https://www.theguardian.com/media/mind-your-language/2016/sep/09/we-need-to-be-careful-about-demanding-migrants-speak-english.

Currently, solicitor and education agent professionals do not have to meet the same level of qualification or training as non-solicitor RMAs. Those with general legal qualifications (solicitor RMAs) are left largely unchecked and unregulated by the Australian Government, which has contributed to the devolving of professional standards, the creation of unsafe working practices and has ultimately resulted in an adverse impact on the reputation of migration advice professionals.

The Australian Government should prioritise ensuring the consistency of regulatory requirements across all groups who work in the migration advice profession. At present, there are no checks in place on solicitors to ensure that they have the appropriate knowledge, qualifications, training and experience to operate as effective migration advice professionals. Solicitors' training tends to be focused purely on the judicial elements of the migration process, whereas those working as migration advice professionals operate within a much wider scope and routinely engage more fully with the community.

We non-solicitor RMAs tend to come from a much more diverse background and are therefore better suited to offer a much broader range of perspective on the unique issues faced by migration clients. We often have broad, transferable skills (including second language skills) which makes the advice we offer highly valuable both to our clients and the community. For example, my own background is as a specialist in industrial relations and human resources management, including in the training and development disciplines.

The Australian Government should be supporting non-solicitor RMAs, not acting in a manner which will destroy their profession in order to marginalize and outcast them and hence make them vulnerable within its own profession. There has been a steady decline in our professional numbers since the introduction of the discriminatory entry requirements implemented a couple of years ago.

Further, many solicitors are qualified only at LLB or Juris Doctor level, including some individuals who qualified overseas which may not be totally comparable to the same Australian standard of qualification. Whereas migration advice professionals who are not solicitors require high level postgraduate qualifications specifically in migration law and practice.

The Capstone exam is a high-level and objectively challenging qualification with an approximately 87 percent failure rate over the past three years.[5] Further, it appears that the Capstone Assessment was

[5] Australian Government, Department of Home Affairs, *Migration Capstone Failure Statistics*, https://migrationshow.com/wp-content/uploads/2019/06/Migration-Show-Capstone-Failure-Stats.pdf.

designed to discourage potential non-solicitor RMAs from entering the profession after completing their postgraduate diploma in Migration Law and Practice. This should only be applicable to legal practitioners without the postgraduate qualification in migration law and practice. Substantial reform of the Capstone is required in order to establish a more equitable and transparent method of evaluation that provides a more accurate assessment of the professional competence and capabilities of an applicant.[6]

The Government should legislate so that solicitors' advice is limited to the level of their qualification. This action will ensure the highest standard of service to both migration clients and the public.

Yet despite the higher level of qualification held by non-solicitor RMAs, the latest government review on the profession focuses almost entirely on those working specifically as migration advice professionals, while leaving solicitors branching into this field largely unmonitored due to the fact that they no longer need to operate under the auspices of the Office of the Migration Agents Registration Authority ("OMARA").

This discrepancy not only threatens the quality of services provided to clients, but directly results in unfair practice since solicitors no longer have to register with, pay for, or operate within the confines of OMARA: something all other migration advice professionals must do.

As for the LCA, it states that it 'exists to…promote the administration of justice (and) access to justice.'[7] However, the restrictions it is seeking to impose on non-solicitor RMAs is in direct contravention with its very own mission statement. The restrictions essentially deny individuals seeking to migrate to Australia access to justice, *since there can be no access to justice without the existence of non-solicitor RMAs.*

Despite recognition of the excellent work done by non-solicitor RMAs, the Australian Government seems happy to tolerate this injustice against the profession and is doing next to nothing to revive or support the now struggling profession. Even prior to the amendment which removes the requirement for solicitors to be a part of OMARA, the Government was prepared to allow those with general legal qualifications to operate in the field with far less supervision or regulation than the highly qualified specialists who work as migration advice professionals. This approach must be revisited and rectified.

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[6] Marianne Dickie & Emma Robinson, When the guardian locks the gate, *Journal of University Teaching & Learning Practice*, 18(1), 2021 file:///C:/Users/16467/Downloads/When%20the%20guardian%20locks%20the%20gate.pdf.
[7] Law Council of Australia. Submission 18 to the Joint Standing Committee on Migration, Parliament of Australia, *Efficacy of current regulation of Australian migration agents*, 11 May 2018, 3.

The problem seems to centre on a foundational misunderstanding of the nature of immigration assistance. The sort of purely legislative approach adopted by other legal services and some other professions is inadequate and maladjusted when it comes to the complex, unique aims of supporting and advising people seeking to migrate to Australia. The role is, and should be, much wider with regard to what it entails on a daily basis. Certainly, knowledge of legislative requirements is one part of this process, but to offer the best service to the public and provide the greatest support, a much more holistic approach must be employed. Solicitors without further post graduate training often lack the requisite knowledge, skills and experience to provide this more holistic approach.

The Role of the LCA in the Review

The LCA is seeking to dictate future Australian Government policy towards non-solicitor RMAs, and this endeavor will prove detrimental to the survival of the migration advice profession. Their behaviour is exploitative and will serve to irrevocably damage the migration advice profession. The Government must focus its attention on legal practitioners who are exempting themselves from meeting the entry requirements faced by other RMAs. Further, it must adequately address those unregistered agents who are regularly engaged in unlawful and unethical conduct.

The LCA consistently fails to recognise the high calibre qualities of non-solicitors, and indeed there are questions about the level of competence of those pushing for the reforms highlighted in the Review. Instead, the Government appears to be prepared to allow the legal profession to exploit loopholes to practise when they often lack the necessary qualifications and knowledge, as well as exert immense undue influence over their decision making. This represents a clear conflict of interest and the move towards over-regulation will destroy the role of non-solicitor RMAs, much to the detriment of those in need of our services.

As for the Review itself, it lacks tangible evidence to support the conclusions within it, almost all of which lack any qualitative or quantitative evidentiary backing.

Reform is welcomed, but the influence of the LCA on the current Review means that it fails to ensure that non-solicitor RMAs are not disadvantaged. As it stands, implementation of the proposed reforms will make the future of the profession unsustainable for non-solicitor practitioners because of the marked increase in regulation and financial burden it creates.

The Review appears to confirm a deep lack of engagement with non-solicitor RMAs which begins as early on in the consultation process. This fact brings into question the integrity of the Australian Government's primary decision makers. It suggests a clear lack of respect for non-solicitor RMAs and their experience, expertise and the work they do on a daily basis. Non-solicitor RMAs have been

practising for decades and have been instrumental in attracting highly skilled migrants from all over the world, all to the benefit of Australian wealth and society. Individuals with such skills will inevitably be in even higher demand once the pandemic has passed, which will render the work of non-solicitor RMAs more important than ever before.

The Australian Government should not be acting to disassemble the migration advice profession, and instead should take the primary responsibility for safeguarding it for the benefit of Australia's national interests. This includes, at a minimum, taking all reasonable steps to maintain the reputation and integrity of the migration advice profession. If the Australian Government continues to pursue its current direction, the regulatory and financial burden placed on non-solicitor RMAs will destroy the profession in the medium to long term. The current global pandemic has only added further burdens on the migration advice profession, much of which is dominated by sole practitioners who have received little to no financial support from the government during this unprecedented time.

One method by which the government can support the migration advice profession is by updating the Code of Conduct for Registered Migration Agents (the "Code"), particularly those provisions which relate to the course of dealing with unlawful non-citizens. The Code must be written in plain English. This will help the public reduce their risk when using the services of RMAs and would increase compliance with the Code. This leads to protecting the consumer and the reputation of the migration advice profession. Further, enforcement would ensure the Code does not exist to act as a hazard during the provision of immigration assistance to clients, particularly with respect to maintaining client confidentiality and privilege.

With respect to the LCA, its efforts would be much better employed by addressing the serious misconduct of some of its own legal practitioners. For one, holding them to a higher standard would vastly improve their reputation, as well as improve their general professionalism and protection of the public.[8] As rampant shortcomings and unethical behavior within the legal profession abound, the LCA turns a blind eye to its watchdog role and leaves the public vulnerable as a result.[9] Essentially, all of the above would be a more productive use of the LCA's resources, rather than attempting to create an effective monopoly on migration advice solely for the benefit of its own members.

It must be recognised by the Australian Government that the migration advice profession is small and has no overarching body to represent and advocate for its interests. In contrast to the LCA, it is

[8] Australia Associated Press, Melbourne gangland Lawyer Joe Acquaro gave police information on former client, *The Guardian AU* (online at 19 January 2021) https://www.theguardian.com/australia-news/2021/jan/19/melbourne-gangland-lawyer-joe-acquaro-gave-police-information-on-former-client.
[9] Ibid.

immensely difficult to make its voice heard and exert its influence over the conversations and policies that impact it most. However, the Government has failed to recognise this stark disparity, and has routinely allowed the skilled lobbying of the LCA to unduly influence its decision making not only to the detriment of non-solicitor RMAs, but also to those in need of the migration profession's services.

The Review

The Review fails to adequately address the issues pertaining to those in the legal profession who provide immigration assistance. This failure is not only detrimental to the reputation and practice of non-solicitor RMAs, but also risks endangering the public at large.

Many solicitor migration advice providers are not trained to represent clients at the tribunal stage. Additionally, many lack the necessary fluency and familiarity with relevant legislation, such as contemporary immigration and citizenship law, to adequately anticipate and serve the complex, varying needs of migrants. These are serious flaws within the system and must be appropriately addressed by the relevant authorities. This exemplifies why it is essential that all individuals working within the migration advice profession have completed a formal post-graduate qualification in migration law and practice, irrespective as to whether they hold a general qualification as a solicitor.

The Review will only be effective if it properly recognises the importance of protecting the vital role of non-solicitor RMAs in the migration advice profession. This may be accomplished by shifting the focus of the Review onto those who are inadequately qualified in migration law and practice, thereby posing a serious risk to the profession. Similarly, the amendment of the relevant legislation which removes the requirement for solicitors working in the field to be registered with OMARA should be removed in its entirety.

Only by undertaking these priorities and recalibrating the Review's main focus away from limiting the prospects of non-solicitor RMAs and instead onto inadequately qualified solicitors will the Review actually achieve its aim of helping to protect the public, improving the quality of advice to clients, protecting the profession, and heightening its professionalism.

As a means of clarification, we are not outwardly opposed to a tiering system as such, especially if membership of OMARA is no longer a requirement for lesser qualified solicitor practitioners. An optimal tiering system would provide a tool for effective oversight and supervision of such practitioners, as well as provide for ongoing support mechanisms as needed. However, the tiering system as proposed merely adds additional layers of red tape. This is inappropriate in a digital age, and clearly discriminates against the average sole practitioner and smaller non-solicitor RMA firms. These firms do not have the resources or infrastructure to deal with this red tape, whereas larger legal

firms do. As it stands, the proposed tiering system is merely a 'back door' method of discriminating against smaller non-solicitor RMA firms.

The ideal tiering system will identify the weakest links in the profession – those practitioners who do not hold high level, appropriate, post-graduate qualifications – and ensure that these advisors receive the appropriate guidance and supervision to ensure that they can deliver a comparable service to a highly qualified non-solicitor RMAs. One factor of this support will be to ensure that such practitioners routinely acquire appropriate levels of qualification.

It must be remembered that non-solicitor RMAs have continued to meet the rigorous requirements put in place by the Government. The suggested tiering will only discriminate against them further and give an unfair and unreasonable advantage to solicitor advisors. This imbalance will only lead to a poorer and substandard service since, as has been stated, non-solicitor RMAs are, by requirement, more qualified and better suited to provide a higher calibre of service than their solicitor counterparts.

Creating and Maintaining a World Class Migration Advice Profession

Satisfying the criteria to become a world class advice profession must surely be the goal of all stakeholders, to the benefit not only of potential migrants and those working in the profession, but to Australian society as a whole.[10] High quality immigrants generate wealth and enhance the culture of the country.[11] It appears that the decision to remove the OMARA registration requirement on solicitors is more about making life easier for this group by removing administrative burdens,[12] rather than actually enhancing the standards of service.

By further contributing to the imbalance in opportunity by increasing red tape for non-solicitor RMAs, creation of a world class profession becomes an even more remote prospect. In order to achieve a world class profession, it is essential that the profession becomes more agile and flexible. It must be capable of adapting to the changing requirements of those seeking migration advice, whilst consistently being an adequate reflection of the views of the community.

A further requirement is that the profession becomes more transparent. Currently it is not. One important move will be to ensure strict enforcement of the APS Code of Conduct. This will increase public confidence in the transparency of the process by deterring senior government officials from

[10] Oxfam Australia, 'Economic and social impact of increasing Australia's humanitarian intake,' *Deloitte Access Economics*, (Online) August 2019, https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-social-impact-increasing-australias-humanitarian-intake-280819.pdf.
[11] Ibid.
[12] Australian Government Department of Home Affairs, 'Independent Review of the Office of the Migration Agents Registration Authority,' https://www.homeaffairs.gov.au/reports-and-publications/reviews-and-inquiries/departmental-reviews/review-of-mara.

engaging in any form of misconduct. In the event of a complaint of such being made by a member of the public, increased enforcement would mandate that the matter be thoroughly investigated by an independent statutory body free of any improper outside influence or bias.

Actions

It is still possible to address and rectify the inequalities in the Review. To achieve this, it is my proposition that the Australian Government should:

1. Ensure that Government representatives and decision makers hold appropriate post-graduate qualification in migration law and practice.
2. Impose a limit on the influence of the LCA on government-level decision making regarding the migration advice profession. This includes limiting the activities of the sort of lobbying organisations such as the LCA, which have the wealth and size to yield massive and often undue influence.
3. Regularly consult with and seek the opinions of non-solicitor RMAs. This must be a top priority. The Australian Government should have the willingness to reimburse the costs (for example, travel, accommodation etc.) associated with seeking advice and opinions from valued migration advice practitioners. This alone has the potential to vastly improve the breadth of knowledge, experience and competence of guidance and advice they source in formulating their plans and further reviews.
4. Ensure that both solicitors and non-solicitors working in the migration advice profession hold a comparable level of qualification and training in migration law and practice.
5. Ensure that all practitioners have transferable skills to benefit their clients. For example, a second language should be at least a strong recommendation, if not an actual requirement.
6. Abandon the proposed tiering system which will seriously compromise the prospects of non-solicitor RMAs, especially those working as sole practitioners or in small practices. The tiering system offers no additional benefits to clients and indeed will only be to their detriment since it will lead to a reduction in choice, professional standards and levels of qualification.
7. Any regulatory body must be properly inclusive with representatives of all stake holders. This will improve both the overall competency and professionalism of the body. Decision makers should be fluent in English and at least one other language to achieve this inclusivity.
8. The regulatory body's Director must be properly qualified to include a postgraduate qualification in migration law. There must also be effective supervision of training.
9. OMARA (or a similar, independent statutory regulatory body) must be capable of delivering a duty of care to all stakeholders.
10. Tribunal members must always be reflective of Australia's multi-cultural community. A requirement for competence in at least one additional language to English would be a

reasonable starting point (The Airline profession, for example, recognises the importance of this as an essential aid to communication). While English might be the dominant language in Australia, there are a significant number of Australians who hold another language as their mother tongue. These include those who speak Australian indigenous languages, as well as Asian, European and African languages.

11. The government must be conscious that it is currently discriminating, through its unfair legislative requirements aimed solely at non-solicitor RMAs, against practitioners of colour or those who use English as their non-primary language. Such an approach is in direct contravention to the sort of criteria a world class migration advice profession requires.
12. In order to achieve a world class migration advice service, the Government should improve its online infrastructure to enhance the process of receiving online applications from Registered Migration Agents on behalf of their clients. For example, clients are frequently confused as to why their acknowledgement letter is sent directly to them rather than to their nominated agent, especially given that they have completed the required form and/or statutory declaration which provides the non-solicitor RMA with authorisation to act on their behalf. By reviewing its internal infrastructures as a priority, and thus improving its service to practitioners working in the migration advice profession, it will enable professionals to offer the highest standards of professionalism in dealing with the public, bringing about the world class system we all wish to see.

Conclusion

The Australian Government is unfairly listening to powerful groups with a heightened-self interest in conducting this Review. It now needs to change course and accept that it must listen to all voices, however small, to achieve its aim of substantively improving the migration profession. This includes the vastly experienced and knowledgeable voices of individual migration advice practitioners who are unique people working in a unique profession. Decisions made by the Government are removing extra layers of protection from the public against receiving advice from legal practitioners who do not possess the training or qualifications to offer such advice effectively.

At the same time, those making decisions on behalf of the Australian Government do not truly reflect the community about which they are making these decisions. The wider Australian community demands equal representation at both the decision-making level and beyond. This can only be addressed by ensuring the recruitment and employment of multi-lingual leaders at the Department of Home Affairs, OMARA and other Australian federal government agencies.

The latest Review is self-serving towards the professionals represented by the LCA, and openly discriminatory against non-solicitor RMAs. Such an approach is detrimental to that very group,

despite its high level of qualification and experience. It is similarly detrimental to migrants, as it outwardly denies them the sort of advice and expertise they seek, and the ability to communicate in their own language. Finally, it is profoundly detrimental to Australia as a nation. The Review, in its current form, will ultimately deter the migration of highly qualified people who would serve to enhance the wealth and diversity of our society.

The Government must act to address this problem with immediate effect. Various actions have been identified in this submission, but I will emphasize the following:

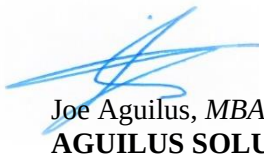
1. Provide a level playing field between non-solicitor and solicitor RMAs while raising the standards of entry requirement for the latter group.
2. Ensure that any supervisory body, be it OMARA or another, applies to ALL practitioners.
3. Enhance the provision of a culturally diverse and reflective membership of all aspects of the migrant profession, with a particular focus on the need for a second language.
4. Recognize the influence of powerful lobbying group in policy making, and act to consciously widen the lines of communication with all interested and expert parties.

This is not my first submission to your office on these matters and I would like to finish by quoting from a previous submission, which summarises my position clearly:

'There can be no justice without the existence of non-solicitor RMAs.'

If you have any question, please do not hesitate to contact me via email.

Yours faithfully



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