Response to Migration Agents Review Consultation Review

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Introduction

We note the commitment of the Department of Home Affairs to supporting the profession of migration agents and the acknowledgement of the crucial role registered migration agents play in facilitating migration to Australia.

We recognise that this stakeholder engagement arose from the Joint Standing Committee on Migration (JSCOM) recommendation that "the Australian Government in consultation with relevant migration agent peak bodies undertake a review of the current registration requirements for migration agents ....". It is important to note the migration advice profession does not have a consensus on the relevant or legitimate stakeholder body that may represent practitioners. Therefore, we are grateful that the discussion paper *Creating a World Class Migration Advice Industry,* and this Review have gone out to the broader membership of the profession. We also acknowledge the broad membership of the Advisory Group as one that may represent the many facets of the profession.

Setting the benchmark for a world class industry

The aim of assisting the migration advice profession to be world class is one that is shared and welcomed. Dr Dickie has referred to the profession as one that is emerging[1]. This term is not intended to convey that the profession does not meet or deserve the acknowledgment of its status. This term is in common use for new professions such as mediators; emerging from areas of law, that have a defined professional skill and knowledge. It also refers to the relative youth of the migration agent profession which began formally in 1992 when legislation was introduced to require formal registration.

However. Dr Dickie does contend that the profession has been fractured due to three factors:

1. The constantly changing educational requirements for registration.
2. The issue of dual regulation.
3. The lack of one defining professional body.

[1] Dr van Galen Dickie the Protégé Effect, in Home Affairs Report, 2020, p.11.

Dr Dickie maintains that these three factors have hampered the development of the profession in ways that prevent migration agents developing a coherent professional identity:

1. Due to the constant changes in entry requirements agents have not been able to define their professional identity with a common educational background.
2. The issue of dual regulation presented a challenge in identifying as an agent between RMA's with a practicing certificate, those with law degrees and those without.
3. The initial appointment of the Migration Institute of Australia (MIA) as the MARA led to a perceived conflict of interest because the regulator was also the professional representative body. Since the establishment of the OMARA, multiple professional bodies that represent migration agents have been in regular conflict with each other. This conflict has done little to advance the concept of a coherent professional identity.

Dr Dickie has asserted that the end of dual regulation has presented a unique opportunity for the profession to coalesce under the one professional identity of registered migration agent (RMA)[2]. Therefore, it is important to understand that the Department's assessment that migration advisors are not professionals but are industry workers or non-professionals, has been one that has caused great concern to the broader community of migration agents.

Migration agents meet the Australian Council of Professions generic definition of a professional. This definition encompasses traits and knowledge applicable across a range of occupations:

> *A disciplined group of individuals who adhere to high ethical standards and uphold themselves to, and are accepted by, the public as possessing special knowledge and skills in a widely recognised, organised body of*

[2] Van Galen Dickie, M (2020) The Protégé Effect, Doctor of Professional Studies University of Southern Queensland..

> *learning derived from education and training at a high level, and who are prepared to exercise this knowledge and these skills in the interests of others. (Australian Council of Professions, 2003).*[3]

Importantly the Professional Standards Council also uses the Australian Council of Professions definition of a professional.[4] Whereas an industry is defined in the Cambridge Dictionary as:

> *Noun (Production) The companies and activities involved in the process of producing good for sale, especially in a factory or special area.*
> *Noun (Type of work) The people and activities involved in one type of business such as the gas/electric industry, manufacturing industries,*
> *Noun (Quality) The quality of working hard.*

Migration agents undergo a post graduate degree AQF level 8 which provides them with the knowledge and skills to practice within a discrete professional area.[5] They complete a minimum of 10 CPD points annually. All of these CPD focus on practice and many of these CPD surpass those completed by similar professionals in the time, depth and content they cover. Their work is not industry based. It is client based, this in itself puts their work description into one of a professional.

Migration agents also abide by a legislatively prescribed ethical Code of Conduct. They are obliged to undertake annual CPD in ethics. Indeed, it has long been considered that the standard of work expected of a migration agent is the same standard expected of lawyers.

> *An issue that did emerge in these proceedings was whether the duties and responsibilities owed by migration agents to their clients were any different*

[3] Van Galen Dickie, M (2020) The Protégé Effect, Doctor of Professional Studies University of Southern Queensland, pp 81-84.
[4] Professional Standards Council (n.d) *What is a profession?* [online document],accessed 23 June 2021
[5] Australian Government, Australian Qualifications Framework https://www.aqf.edu.au/

> *to the duties and responsibilities owed by lawyers. We think not. We have concluded having regard to the objectives of the Act, the intention of the Parliament as evident by the Minister's speech upon introduction of the Act, the numerous decisions of superior courts referring to the vulnerability of migration applicants and the duty generally of a professional seeking reward and – not insignificantly- the prescription of a Code of Conduct applicable to migration agents… that the standard of conduct of migration agents is no less than the standard of conduct owed by lawyers.*
> *(Administrative Appeals Tribunal, 2004, para. 359)*[6]

It would seem that for the Department to adopt the view that migration agents are not professionals and/or do not belong to a profession is to move the expectation of standard back to one that is not as high as that expected from a practicing lawyer. This would unfortunately be a retrograde step in the development of the profession.

In contrast to the conclusion reached in this review we believe the model (5Es) proposed by the Professional Standards Council [7]and adopted by the Department demonstrates the professionalism of migration agents and the need to refer to a migration agent profession.

We would like to draw attention to the Education and Examination statements made in Table 4 page 19 of the review. It is important to document that the Graduate Diploma and its predecessor the Graduate Certificate are both AQF level 8 and as such all-migration agents have completed undergraduate studies level 7 or equivalent, before entry into that course. Students begin their studies in Australian Migration Law from diverse backgrounds. While the majority hold a Bachelor degree, many also hold post graduate qualifications in other areas. They also have a background working in diverse areas such as science, law, politics and public service. This increases their capabilities as graduates. The providers of

[6] Woods (No.1) and Migration Agents Registration Authority [004] AATA 457 (11 May 2994).
[7] https://www.psc.gov.au/what-is-a-profession/academic-view accessed 27 Jun 2021

both the Graduate Certificate and the Graduate Diploma were selected by the OMARA through a tender process which required a comprehensive documentation of course work aligned to the Occupational Competency Standards including the need to teach all aspects of migration law, migration practice, ethics and business.

The Exam section of Table 4 discusses only the Capstone exam. In doing so it ignores the assessments undertaken during the Graduate Diploma (GDAMLP) which once again are designed to meet the learning outcomes approved by the OMARA in selection of the education providers, and subject to rigorous standards of the University sector.

Finally, despite the claim that as the industry regulator the OMARA meets the entity requirements, the Professional Standards Council has determined that a profession must be self-regulated. [8] This is an issue that has plagued the migration agent profession since the introduction of regulation. The appointment of the MIA as the MARA was intended to be a pathway to self-regulation. Government has successively stood in the way of that progression. This has led to the third factor which has contributed to a fractured profession.

[8] Professional Standards Council (n.d) *What is a profession? The academic view.* [online document], accessed 23 June 2021

Theme One: A qualified industry

Review of mandatory qualifications

Options for reform: Conduct a review of migration advice industry qualifications to commence no sooner than 2023 supported by ongoing monitoring and evaluation. This timeframe reflects the relative recent introduction of the current requirements and other significant events likely to impact on the outcomes

Any timeframe for review of the qualifications needs to be done in consultation with the providers of the Graduate Diploma (GDAMLP). There has been a great deal of work, planning and preparation in the development and implementation of the new GDAMLP. To make any changes at this stage would be premature and create too much uncertainty for students and potential migration agents.

We accept that we must ensure that those who are entering the profession have sufficient competencies. Universities are governed by quality processes within the Higher Education sector. Each course outline, course content, and assessment must meet the standards set by the University in accordance with Tertiary Education Quality Standards Agency and the Higher Education Standards Framework (Threshold Standards 2021) Similarly teaching staff must meet the academic standards set by the University.

The low pass rates for the previously administered Capstone examination are a matter of concern. There is a significant disconnect between the courses and the exam. The factors identified for the failure rate on page 24 accord with our experience.

It is our view that there needs to be regular feedback and discussions between the Capstone provider and the universities in order to better align the Capstone exam.

The high failure rate of the Capstone, delays in appointing a new provider continue to create a great deal of uncertainty for students in the Graduate Diploma and for those who have recently completed the degree but who have not yet completed the exam. This has had a significant impact on the number of people entering the profession.

RECOMMENDATION 1:

The OMARA work closely with the providers to review the GDAMLP. Any review should be held with the university providers only using a system that is verifiable. Graduate student outcomes are measured regularly by all Universities. The matrix used to do so includes employment rates, student satisfaction and engagement with those who have employed graduates (not those who have an opinion on graduates).

English language requirements

Options for reform:
Update the Occupational Competency Standards for RMA'S (OCS) to include English language expectations and requirements and create an associated practice guide detailing RMA obligation.
Increase the level of English required for registration as an RMA from IELTS 7 to proficient English.
Expand the number of English language tests providers that the OMARA accepts for registration purposes.

The authors of this submission held varying opinions on the introduction of an IELTS 7 proficient English. Though the majority understood the need for agents to have proficient English concerns were raised. The expansion of the English language test providers to include OET was noted as this organisation only tests Health professionals. While we all believed an English Language Test specifically designed for migration agents may be beneficial, we did not believe that was the intent of the option proposed.

Associate Professor Mary Anne Kenny has had the opportunity to read the submission of Laura Smith Khan from University of Technology Sydney to the review 'Creating a world class migration advice industry' and is in agreement with her recommendations and analysis on this topic.

Introducing a provisional license with supervision requirement

Options for reform:
The introduction of a mandatory 12-month provisional license for newly registered migration agents.
Provisional licensees will operate under supervision of a fully licensed RMA and provide immigration assistance only with applications to the Department and related matters.

Supervised practice has been a contentious issue for many years. The authors agree that supervision of some kind is preferable for all new agents and is in fact something that the majority of agents want. However, it is vitally important that consideration be given to the models of supervision that are able to be implemented by the profession.

The Kendall review recommended a period of 12 months mandatory supervision with an already registered migration agent following completion of the course (recommendation 14 and 15). The Government has not adopted this particular recommendation to date.

There a number of practical problems with requiring supervised practice. As at the end of 2020 there were 6888 registered migration agents.[9] The majority have less than 5 years' experience as a registered migration agent. Meaning there is a dearth of experienced practitioners available to supervise RMAs.

According to the latest Migration Agent Activity Report around 38% operate as sole traders. Now that legal practitioners are no longer allowed to register, it is likely that the percentage of sole traders will increase.

These statistics raise a number of challenges for requiring RMAs to have 12 months supervised practice. One significant issue would need to be addressed as to who would be deemed suitable to supervise? As an example, for legal practitioners this person has at least a Bachelor 's degree and hold an unrestricted practice certificate.

One would assume a supervising RMA would themselves need to have more than one year of unrestricted practice, the Kendall report was silent on this issue.

Consideration needs to be given to factors such as:

- The model of supervision: For example: the number of hours required to be supervised. Whether it is an employment model or an apprenticeship model. Should those who are being supervised be paid? Should supervisors be paid or recompensed for their time?

[9] See https://www.mara.gov.au/notices-reports-subsite/Files/maar-jan-jun-2019.pdf 2126 were identified as Legal Professionals

- It may be best to implement a form of mentoring. Some firms may come to an arrangement where they occasionally share a client file with a senior agent supervising the work. It could be a form of Work Integrated Learning or Clinical practice that is partially done through the Graduate Diploma or it could be a form of peer supervision where work could be undertaken with the assistance of peers and more knowledgeable agents that are willing to assist new agents.
- The qualifications/experience and qualities of supervisors/mentors: Should the supervisor/mentor/peer be a person who has a specified number of years in practice or a specified expertise in an area of practice. Academic studies have shown that professionals learn from peers more than from their supervisors (Eraut, 2007). This is because they may be more prepared to reveal to a peer who is only slightly more experienced that they need assistance, or it may be that they watch and learn tacit knowledge from the way a slightly more experienced professional approaches their work. This means the supervisor need not be an agent with a long registration period, instead they must be a competent agent.

Despite the impediments to supervised practice; there are multiple ways of satisfying this proposal and the authors would welcome the opportunity to work with the Department on determining methods of supervision that would assist all agents no matter their location.

RECOMMENDATION 2:

The OMARA consult the profession on the models of supervised practice that can be implemented for newly registered agents. That several models of supervised practice be introduced. That the Capstone exam be held after a period of supervised practice in accordance with Kendall's recommendations.

Theme Two: A professional Industry

The end of dual regulation offers an opportunity for the migration agent profession and the Department of Home Affairs (the Department) to build a new and coherent identity for migration agents. This should result in a profession that is recognised and appreciated by the Department and by those who benefit from the work of migration agents.

The approach taken in this section of the review paper is, however, incredibly disappointing. Instead of acknowledging the work migration agents do and demonstrating an awareness of their role, this section displays that the Department has a lack of understanding and a deep mistrust of migration agents.

The introductory remarks in 2.1. 3.3 and 2.1.2.4 of the Review paper raise immediate concern. These sections explain that the *majority of submissions* to the JSCOM "held the view that the registration requirements were appropriate and should not be amended" (p.46). However, it goes on to explain that six out of the forty-one submissions to the JSCOM suggested additional requirements, and that four out of fifty-five submissions to the Department's discussion paper favored "an overhaul of current standards and addition of new requirements..." (p.46). It is concerning then that the recommendations of such a small minority of stakeholders have been given such a high profile and consideration by the Department.

It is also concerning that a profession which is client centered has been compared to Depot/Warehouse operators, custom brokers, aviation, maritime security, or ASIC applicants for credit licenses. While these occupations and entities all need licensing or manage licenses, they relate to a broad range of activities that are not comparable to the work of a migration agent. The only legitimate comparisons used in this section can be that of a tax practitioner, legal practitioner or migration agent overseas.

The matters for public feedback will be addressed individually within this submission. Nevertheless, we are deeply concerned at the claims that there is a growing threat to the migration program from unethical agents. These claims are used to justify the changes that are recommended. The review at 2.1.6.1 outlines that a "small number of current and former RMA's are involved in facilitating serious misconduct ..." (p51). Similarly, we are also told that there are a "small number of RMA'S under criminal investigation but who are not subjects of an immigration assistance complaint" (p.51). These claims are not

backed up by data to demonstrate how many of the 6888 currently registered migration agents (RMAs) are represented in these 'small numbers' and/or if these concerns relate to agents registered before the end of dual regulation.

Such far reaching changes to the regulation of the profession deserves an evidence-based approach to demonstrate that change is needed. The reliance on a small number of submissions to various inquiries and statements that relate to an unspecified cohort of practitioners as justification for regulatory change is of great concern.

MATTER FOR PUBLIC FEEDBACK

2.1 Review of registration requirements

Options for reform:
Strengthen fit and proper person requirements to include bankruptcy checks, spouse and associate details and checks in departmental systems as part of initial registration application.
Amend the Act to allow the OMARA to refuse registration in circumstances relating to integrity or criminal conduct
Reduce regulatory burden by removing the 30-day publishing requirement for first time registration
Increase the period of registration from 12 months to 36 months for agents who have not had any substantive complaints or referrals made against them in the five-year period immediately before their registration application is assessed.
The OMARA updates its process of character checks for registration applications to include a coordinated identity verification process and criminal history check for all applicants at the time of initial and subsequent registration.

2.1.6.1 Modelling the character test

The concept of a fit and proper person is used regularly by professions and bodies dealing with licenses within and outside of Australia. [10]

Appendix B (p.159) of the Review details the comprehensive questions the OMARA can currently ask new applicants as part of the registration process. These questions already require applicants to provide information about their past or present criminal conduct, disciplinary proceedings or any investigation they may face, and other issues of integrity.

[10] The relevant case law includes *Australian Broadcasting Tribunal v Bond* (1990) 64 ALJR 462; *New Zealand Law Society v John Llewellyn Stanley* [2020] NZSC 37 (17 August 2020)

It therefore is offensive that the Department would consider using the character provisions for the registration of migration agents. The character test within s501 is a blunt instrument that has resulted in a need for migration agents and lawyers to spend countless hours arguing for revocation of mandatory decisions. As it stands, a person fails s501(6)(a) regardless of when they were sentenced. Their crimes could accumulate over separate incidents across many years to eventually meet the 12-month benchmark. Applying such a test would risk reducing consideration of registration to the individuals past history, not their present behaviour or qualifications.[11]

The imposition of the character test would require a natural justice provision which would increase the evidentiary burden upon both the individual seeking registration and the OMARA. Without evidence that there is a need for the imposition of a regime such as this, it would seem that the increase in administrative burden upon the OMARA would outweigh the limited benefits that may result.

RECOMMENDATION 3:

The need to improve the fit and proper person provisions has not been argued effectively within the discussion paper.

1. An evidence-based approach would ensure that the need to change these provisions were based in verifiable facts. We recommend research into the numbers of migration agents breaching fit and proper provisions, and the impact of any factors such as past criminal records, bankruptcy and associates conduct on their practice capability performance, integrity and honesty.

2. Investigate and adapt the provisions used by the legal profession in imposing "fit and proper" person requirement upon their practitioners.

3. Additional provisions could be included within the Code of Conduct to require a person to inform the OMARA within 7 days if an agent has been charged or convicted of a serious offence, bankruptcy has occurred, or the agent is subject to disciplinary proceedings of another profession. The option to suspend registration is more appropriate for those who are under criminal or professional investigation. Registration could then be renewed or cancelled or refused following resolution of investigation.

[11] See: *New Zealand Law Society v John Llewellyn Stanley* [2020] NZSC 37 (17 August 2020)

2.1.6.1.3 Relationships of concern

FPP criteria established under case law includes the requirement to be a person of honesty and integrity. The increase in OMARA powers to investigate a registering agents' relationships (either spousal, associate or business) is far reaching and intrusive. Once again, the claims for such an increase in power has not been backed up with data that demonstrates an overwhelming need.

RECOMMENDATION 4:

That data be collected and presented to the migration agent profession to demonstrate the need to increase OMARA powers to investigate relationships of concern.

2.1.6.2 Remove the 30-day publishing requirement

It is noteworthy that this recommendation is accompanied by data showing the 30-day publication resulted in four valid objections between 2015 and 2020. We have no objection to this recommendation.

2.1.6.3 Amend Part 3 of the Act to increase the period of registration from 12 months to 36 months ...

This recommendation specifies that it is designed to relieve the administrative burden on OMARA and agents. However, it would not necessarily be applied uniformly. Instead, only agents who agreed to the OMARA "auditing their conduct at any time during the extended registration period" and "varying the conditions of their registration, imposing a shorter registration period or otherwise sanctioning the RMA if the OMARA receives information that they are not a fit and proper person" (p.54) would be allowed to register every three years. In addition, there is a proposal to tie the extended registration to conditions related to supervision etc.

It appears that designing and managing such a scheme with varying levels of commitment, lengths of registration and complexity would substantially increase the

administrative burden on the OMARA. Far from achieving the recommendation of Kendall to ensure agents of good standing have longer periods of registration accompanied by self-declaration this level of complexity and intrusion would drive many agents back into the scheme they have been using for over 15 years.

RECOMMENDATION 5:

Define and implement a standardised period of registration without the auditing or supervisory requirement. Consideration of 2 – 3-year maximum period is recommended.

2.2 Publishing information and pricing arrangements

Options for reform: that the Department publish aggregated information on pricing arrangements on its website

We disagree with this option. We support the findings of the Hodges Review. Publishing of fees should be a matter for an individual migration practice and should not be attached to re-registration criteria. Migration agents run professional businesses and should not be subject to disclosure of their fees in this way. Consumers can and do check on fees before choosing an agent. In addition, the statement of services/cost agreement provided to consumers before work is done ensures that they are aware of the costs they will face should they engage that agent.

2.3 Developing a fidelity fund or other mechanism for recompense

Options for reform: Do not introduce a fidelity fund.

Agree with this conclusion.

2.4 Introducing a tiering scheme

Options for reform: Introduce a three-year tiering system of registration for all RMA's that provides a graduated approach to RMA's career progression and the provision of immigration assistance before the Minister and the AAT.

While we appreciate the intent of this proposal, we strongly oppose it. The introduction of a three-year tiering system imposed on either newly registered agents or legacy agents, who have practiced for many years, is fundamentally flawed. The intent of the proposal is to ensure that all migration agents work within their strengths and ultimately, that the consumer is protected. However, the proposed tiering scheme mistakes and conflates experience with expertise. It does not reflect the level of complexity and risk involved in providing migration assistance.

For example: an agent who has worked for fifteen years predominately on partner, and refugee visas and character cancellations, including many Ministerial intervention[12] applications and appearances before the AAT may find they are allocated to Tier 3.

The consumer would assume that agent is more experienced across all visas than the agent who is on Tier 1 or Tier 2 because they predominately focus on other visas.

Experience is gained by as a migration agent; it relates to time in practice and exposure to different casework. Expertise is gained when an agent finds their niche and understands they do not want or cannot adequately represent clients in areas they have not focused on. Therefore, a highly experienced agent may not move along the Tiers in the way envisaged by the proposal. They will, inevitably face commercial disadvantage due to the perception of Tier 3 identifying a more experienced migration agent. While Ministerial intervention, and representation at the AAT are specific forms of advocacy they are not the only complex advocacy area in migration law. Working competently in these areas is not an accurate reflection of the level of knowledge and experience required to assist clients across the spectrum of visas.

Moving up a Tier through CPD is also flawed as providers are then put into a position of advancing their peers careers.

[12] Under sections195A, 197AB, 197AD, 351 or 417 of the *Migration Act 1958 (Cth)*

It is understandable that the OMARA receives feedback from both the Minister and the AAT which highlights problems with the written and oral advocacy provided for clients by some migration agents and would seek to address any issues that are raised. However, addressing the quality of advocacy through a dynamic and responsive CPD program that targets problem areas would produce a better outcome for the profession, their clients and stakeholders.

2.5 Enhanced proficiency through the Continuing Professional Development

Options for reform: Use CPD system to deliver the required training for a tiering system (should tiering occur). Strengthen oversight of CPD including new quality controls for CPD activities and clarifying CPD provider standards. Increase the number of compliance audits of CPD providers and make the results publicly available.

We strongly oppose a regime of tiering and advocate for a more advanced method of learning through CPD. Currently all agents are required regardless of their experience to undertake mandatory CPD in ethics and file management annually. Extending the mandatory CPD to include CPD's in advocacy could address the flaws currently seen in Ministerial Intervention requests and AAT appearances and submissions. Agents who do represent clients in this way could be required to undertake CPD in areas such as: writing ministerial intervention requests, researching and analysing case law, researching country information, advocating in the AAT. We also submit that agents have the opportunity to attend Immigration interviews and AAT hearings with a peer (and obviously with agreement of the client), as part of their training in advocacy and preparation to take on AAT cases. Attending such hearings could be awarded CPD points.

There is an opportunity for further work to be conducted by OMARA on CPD definitions and clarifying CPD provider standards. Migration agents should be made aware that OMARA are actively involved in the quality control of CPD and welcome constructive feedback on CPD providers. CPD providers should be encouraged to always seek to improve and implement changes if necessary.

The re-introduction of quality controls for CPD activities is supported by the authors. It is imperative that the knowledge and those providing the knowledge transfer, are more than adequately equipped in pedagogy specifically adult education, mastery of the CPD subject and relevant experience. All CPD providers should be required to evidence all these attributes, not just one or two.

Theme Three: Combatting misconduct and unlawful activity

3.1 immigration assistance definition and scope

Options for reform:
Reframe the clerical work exception to require supervision, introduce a definition, rename to administrative assistance and limit the number of supervisees an RMA can supervise.
Address the use of the business structures to avoid responsibility for misconduct, including amending the Act to apply to all businesses and not just individuals which provide immigration assistance
Release the factsheet explaining the distinction between general advice and legal advice on matters under the Citizenship Act 2007.
Remove and clarify certain exemptions for provision of immigration assistance in the relevant sections of the Act.

3.1.2 Reframe 'clerical work' exception to require supervision and replace clerical work with administrative assistance.

We agree with the proposal and suggest research/consultation as whether a maximum number of staff providing clerical work be imposed. Consideration should also be given to how this would be enforced.

3.1.4 Matters for public feedback: Clarify the law

With regard to general and legal advice in relation to immigration assistance under the *Citizenship Act 2007*, it is doubtful that reframing the definition of immigration assistance can address this issue. It is accepted that there currently appears to be no impediment to RMA's providing general advice.

It is notable that all providers of the Graduate Certificate in Australian Migration Law and Practice, are required to include the Citizenship Act 2007 and (the Transitional legislation) in their course curriculum and assessments. This requirement has been imposed by the OMARA in its various iterations. In addition, the Department responds to migration agents providing such advice and requires those who are representing clients in their Citizenship applications, to complete and lodge a Form 956 as verification of their appointment. The implication being that RMA's are expected to be able to provide advice and are accepted as legitimate providers of advice on Citizenship issues.

We believe that all RMAs would be qualified to assess when a visa has ceased, to understand character concerns and Ministerial Directions and that they would have 'academic training to competently advise and represent clients in this jurisdiction' p.99. Migration agents have completed a post graduate degree which is an AQF level 8. This is the same level of academic education practicing lawyers achieve with their Bachelor degree and Graduate Diploma in Legal Practice (or equivalent).

Citizenship is a logical extension of a permanent visa application. We support therefore the comments by Newland Chase that migration agents should 'be allowed to provide citizenship advice' p.98. And those made by Aus Visa Specialists that migration agents fill a low-cost key role in representing clients in relation to citizenship law. Of particular concern are Citizenship applications within the refugee and humanitarian cohort were an intimate knowledge of migration law and regulations is required to adequately assist and advise this cohort. This highly vulnerable group of applicants would not have access to advice if forced to pay law firms for assistance.

However, we welcome consideration of this issue by the Department. Clarifying the legal position of migration agents providing such assistance will enable them to take the relevant protection through their insurance.

RECOMMENDATION 6:

We recommend the Department continue to work with migration agents providing advice and assistance in this area. This would include assisting clients, providing advice and preparing and lodging Citizenship applications. We recommend that the form 956 be amended to reflect that the appointment of an agent is for Citizenship advice.

We also recommend that the OMARA seek consultation with the migration profession if there is to be a distinction between general advice and legal advice on matters under the Citizenship Act 2007, to ascertain the impact restricting work may have on our vulnerable clients.

3.2 Measures to address unlawful and offshore immigration assistance

Options for reform:
Increase consumer awareness of the risks associated with the use of unregistered offshore and unlawful onshore providers.
Do not make the OMARA regulatory framework apply offshore
Do not allow offshore unregistered agents to be listed with the OMARA
Do not introduces categories of persons permitted to be authorised recipients.
Options for further examination by Department.
Make legislative and system changes to allow the Department to accept visa applications only from applicants, RMA's, unrestricted legal practitioners and exempt persons.
Introduce an unregistered immigration assistance PIC that could result in a decision to refuse the grant of the visa
Require visa applicants to attest in a declaration as to whether they have received immigration or other relevant assistance.
Develop risk profiles for individuals, occupations and industries where unregistered immigration assistance is high and conduct audits of high-risk visa applications.

3.2.4 Proposals recommended for further examination

We appreciate and thank the Department for the thoughtful examination of options presented in this section. We agree that the issue of unlawful and offshore agents needs to be addressed and support the options presented by the Department for further consideration.

3.2.4.2 Consider enabling ImmiAccount to allow visa applications to be lodged only by visa applicants, RMAs, legal practitioners or exempt persons.

It is noteworthy that the concerns regarding education agents have been raised within a number of inquiries, reviews and forums. Several options are presented which are aimed at addressing the ability of unregistered migration agents or education agents from lodging applications with an ImmiAccount.

However, caution is needed in implementing these as they stand to disadvantage agents who work with more than one firm and as a consequence have more than one email address or access to more than one ImmiAccount.

3.2.4.4. consider requiring a visa applicant to declare assistance they have received.

We support the intent of this suggestion but caution that many applicants would not understand the scope of the request and migration agents or those assisting who are unregistered, may find they are named by applicants when the assistance or advice they provided does not meet the legislative definition of immigration assistance. For example, visa applicants may have been provided some forms and assisted with an understanding of the meaning of a question, without providing immigration advice or assistance to the visa applicant.

3.2.4.5 Consider developing risk profiles and conducting audits of high-risk visa applications.

We agree with the proposal by the MIA to the JSCOM and reiterate their concerns regarding education agents, recruitment firms, travel agents, investment advisors and others that the prevalence of these occupations providing immigration assistance an all too regular occurrence.

3.3.8 Penalties for unlawful immigration assistance providers

We agree with the MIA proposal as per 3.2.4.5, we remain concerned that despite the continued representations made to various Government committees by migration agents and representative bodies, the Review continues to refer to unregistered migration agents. We emphasise that anyone providing migration advice who is not registered is not a migration agent. We remain concerned at the lack of attention paid to the professionals, workers and industry's that are providing migration advice when they are legally not entitled to do so.

3.4 The powers of the OMARA to address RMA misconduct

Options for reform: Amend sections of Part 3 of the Act to strengthen OMARA's powers clarify their scope and remove redundant provisions.

See our comments on the fit and proper person provisions and any amendments made to the Migration Act to change this criterion. We agree with removing redundant provisions.

3.5 Improving compliance with AAT practice directions

Options for reform: Progress existing initiatives to improve compliance in conjunction with relevant recommendations within this report including the provisional license under supervision and a tiering system.

We raise concern that the AAT practice directions have been implemented with little input from the migration agent profession. We appreciate that initiatives have been introduced to improve the content and provision of submission to the AAT and to enable the AAT to discharge its statutory objectives and undertake its review function with as much expedition as possible.

We note the review does not provide statistical evidence in relation to how many migration agents are not complying with practice directions compared to lawyers not complying, nor are there statistics about which compliance directions are not being complied with.

We question the inclusion of some practice directions including the way in which submissions are required to be formatted. For example, protection visa submission now requires a FULL copy of any references made, not simply a link to the reference. This direction is more far reaching than even required for a University thesis, where one quotes a passage from a source and then references the relevant source. Some of the sources used in refugee submissions are from books or very long human rights reports. Providing the full report is not just onerous for the migration agent and costly for the client, but we submit sets up the Tribunal for Judicial review in that it is then incumbent on the Member to read the FULL document (some are more than 600 pages long) instead of the relevant passage that has been quoted and referenced.

Secondly the practice directions require every document to be numbered sequentially. This again is onerous for the migration agent and costly for the client who is required to pay for the service. We recommend the submission should be numbered and clearly set out with reference to numbered attachments, but that each attachment should not then need to have each page numbered sequentially.

We also raise our concern at anecdotal reports that Members are reprimanding migration agents, about practice directions, in front of clients at hearings. We submit this is unprofessional and inappropriate and that the Member should ask to speak to the migration agent after the hearing, if they have issues about the agent not complying with Practice Directions.

We support the suggestion of extra CPD in this area with Members providing input. We do not agree with Tiering as previously discussed in this submission.

RECOMMENDATION:

We recommend the AAT review its practice directions to ensure that the requirements for agents are not too onerous. For example: special attention should be paid to the way submissions are required to be formatted and cited texts provided (see above example of the need to provide the entire source, not just the reference).

We again recommend CPD be further developed in the area of advocacy of representatives at AAT and in relation to the AAT practice directions and Tribunal Members have input to these CPD.

We further recommend that AAT provide statistical evidence of non-compliance in both the numbers of RMA and lawyers who do not comply with the Directions and also in relation to which directions are most commonly not met.

3.6 Establishing an independent regulator

Options for reform: Do not proceed with an Immigration Assistance Complaints Commissioner. Instead strengthen relevant policies legislation processes and procedures to achieve the intention of the recommendation.

The authors do not agree with the decision not to proceed with the Immigration Assistance Complaints Commissioner. The original intent of the Parliament in establishing

the MARA and appointing the MIA to that role in 1997, was for the migration agent profession to become self-regulating. Indeed, this is one area where the migration agent profession is in stark contrast to other professions within Australia. The steady reversal of this original intent has resulted in the absorption of the OMARA into the Department[13]. This will continue to hinder the development of the profession. It is therefore disappointing that the recommendation of the JSCOM has not been followed. The establishment of an independent Complaints Commissioner that may have become a regulator, may have been a return to the original intent of the parliament and independence for the profession.

[13] Outlined clearly in Attachment A: Chronology of Australian migration advice industry regulation p. 167 of Migration Agents Instrument Review.

RECOMMENDATIONS

RECOMMENDATION 1: The OMARA work closely with the providers to review the Graduate Diploma. Any review should be held with the university providers only using a system that is verifiable. Graduate student outcomes are measured regularly by all Universities. The matrix used to do so includes employment rates, student satisfaction and engagement with those who have employed graduates (not those who have an opinion on graduates).

RECOMMENDATION 2: OMARA consult the profession on the models of supervised practice that can be implemented for newly registered agents. That several models of supervised practice be introduced. That the Capstone exam be held after a period of supervised practice in accordance with Kendall's recommendations.

RECOMMENDATION 3: The need to improve the fit and proper person provisions has not been argued effectively within the discussion paper.

1. An evidence-based approach would ensure that the need to change these provisions were based in verifiable facts. We recommend research into the numbers of migration agents breaching fit and proper provisions, and the impact of any factors such as past criminal records, bankruptcy and associates conduct on their practice capability performance, integrity and honesty.

2. Investigate and adapt the provisions used by the legal profession in imposing "fit and proper" person requirement upon their practitioners.

3. Additional provisions could be included within the Code of Conduct to require a person to inform the OMARA within 7 days if an agent has been charged or convicted of a serious offence, bankruptcy has occurred, or the agent is subject to disciplinary proceedings of another profession. The option to suspend registration is more appropriate for those who are under criminal or professional investigation. Registration could then be renewed or cancelled or refused following resolution of investigation.

RECOMMENDATION 4: That data be collected and presented to the migration agent profession to demonstrate the need to increase OMARA powers to investigate relationships of concern.

RECOMMENDATION 5:

Define and implement a standardised period of registration. Consideration of 2 – 3-year maximum period is recommended.

RECOMMENDATION 6:

We recommend the Department continue to work with migration agents providing advice and assistance in this area. This would include assisting clients, providing advice and preparing and lodging Citizenship applications. We recommend that the form 956 be amended to reflect that the appointment of an agent is for Citizenship advice.

We also recommend that the OMARA seek consultation with the migration profession if there is to be a distinction between general advice and legal advice on matters under the Citizenship Act 2007, to ascertain the impact restricting work may have on our vulnerable clients.

FINAL COMMENTS Dr Marianne Dickie

Dr Dickie is an experienced academic. She holds a Master's degree in Higher Education, and is a Senior Fellow of the Higher Education Academy. While the Capstone is not under consideration in this Review, it is discussed. She wishes to raise concerns publicly through this submission at the impact the Capstone exam has had on the migration agent profession.

The providers of the Graduate Diploma are governed by quality processes within the Higher Education sector. Each course outline, course content, and assessment must meet the standards set by the University in accordance with Tertiary Education Quality Standards Agency and the Higher Education Standards Framework (Threshold Standards 2021). Similarly teaching staff must meet the academic standards set by the University. However, evaluating the success of the new qualifications appears to be limited to the results graduates achieve in the Capstone exam. She believes that the implementation of the Capstone exam which was not in accordance with the recommendations of Kendall has impacted on the ability of the OMARA, the providers and the broader profession to gain an indication of the efficacy of the change from the Graduate Certificate to the Graduate Diploma. Similarly, the appointment of a new Capstone provider may once again impact poorly on the outcomes for graduates as the provider will not be subjected to the same stringent quality control processes implemented by the University sector. The quality of assessments in this area needs to be rigidly controlled and if the Capstone remains as the last entry requirement for migration agents the implementation must amended.

High- stakes summative assessments[14] particularly those that must be passed in order to enter a specific professional can influence teaching and learning approaches (Dickie and Robinson 2021). Dr Dickie advocates a redesign of the current system to address the current shortcomings of the implementation of the Capstone and to ensure that both students and graduates are adequately prepared for practice.

[14] Summative assessments are designed to sum up knowledge, whereas formative assessments provide students with feedback to allow them to grow their knowledge or learn from their mistakes and achievements.

This is because:

> *The inability for universities to have input into the Capstone raises the question of validity. The effective outsourcing of competency testing results in a system where test design occurs in a vacuum and those responsible for student outcomes are unaware, and in disagreement of the content students need to learn (Smith et al., 2010).*

In addition, Dr Dickie has concerned surrounding the criteria used to assess graduates undertaking the exam:

> *OMARA's website notes that the Capstone provider has indicated that English language, proficiency is a factor in the low pass rate (n.d.). The finding that English proficiency may be hampering candidate success highlights the danger of testing bias present in the current exam design. As English language proficiency is not a component of the OCS, it is impossible to ascertain if this is a factor of consequential validity (Dolin et al., 2018) or a specific criterion that candidates are expected to meet. Communicating hidden criteria such as this to the university providers would provide transparency and ensure that both the Capstone and the Graduate Diploma evolve to improve the quality of training and outcome for migration agents.*
>
> *The tension created between the prescribed course and the prescribed exam is reflected in similar areas of legal education. Curtis describes the need to produce "professional, ethical attorneys who have skills and knowledge and attributes to be competent and responsible members of the profession, with the ability to pass the bar exam"; as a 'no win tug of war'*

between preparing students for practice and memorisation of a doctrinal heavy exam" (2017, p.267). She explains that the reason bar examiners regulate the legal profession is to protect the public (Curtis, 2017). Her solution is one that would go some way to address the repercussions of the OMARA's failure to implement Kendall's recommendations in full. Curtis advocates moving from an exam that tests a student's ability to memorise information, to one that tests minimum competence to practice, through the "leverage of learning outcomes" (2017, p. 268). Leverage would entail the law schools and bar examiners working together to determine common learning outcomes, and importantly identify learning outcomes to be tested in the exam.

The approach of stakeholders who actively work together would present a solution to the current situation facing candidates for the Capstone. If the providers of the Graduate Diploma and the Capstone were able to work together in ways that closed the assessment loop, the outcomes for students would be rendered reliable and valid. In other words, both providers and the regulator would determine what best suits a one-time summative assessment such as the Capstone and what is best for formative assessment within the prescribed course allowing students to adjust their learning approach accordingly. Until this can happen the disconnect between education and entry into the profession will continue. (Dickie and Robinson 2020).[15]

[15] Dickie, M & Robinson, E. (2021) When the guardian locks the gate, *Journal of University Teaching & Learning Practice*18 (1), https://ro.uow.edu.au/jutlp/vol18/iss1/4/

Closing the assessment loop refers to students learning in accordance with learning outcomes that address the relevant level of learning (breadth and depth of skills and knowledge learnt) and their assessment against those learning outcomes. Currently the Capstone is not assessed in accordance with learning outcomes of any of the AQF level GDMLP courses. Instead, it is assessed against the occupational competency standards. While this may seem reasonable to the lay person, it goes against all pedagogical, and andragogical curriculum and assessment design standards.[16]

[16] Pedagogy was originally associated with teaching children it is now in common use across all education. Andragogy refers to teaching adults. Some texts use pedagogy to refer to "teacher centred learning" and andragogy to refer to "learner centred". It is easy then to see why andragogy is often a more reliable means of referring to adult learning