Migration Agents Instruments Review

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Executive Summary

1. In my capacity as a member of the Migration Advice Industry Advisory Group (**Advisory Group**),[1] I welcome the opportunity to comment upon the Department of Home Affairs consultation report of the Migration Agents Instruments Review (May 2021) (**Review Consultation Report**).[2]

2. I note that the Migration Agents Instruments Review is founded on the Australian Government's commitment to create a world class migration advice industry. Options for reform provided for feedback in the Review Consultation Report have been informed by the Department's consideration of advice received through the Advisory Group and public submissions on the Commonwealth Government's Migration Advice Industry Reform Discussion Paper 'Creating a world class migration advice industry' released in June 2020 (**Discussion Paper**).[3]

3. The size, diversity, and economic and social objectives of Australia's migration program are underpinned by a necessarily detailed legal and administrative framework. By its very nature, immigration predominantly involves people with a limited knowledge of Australian law, and of administrative and legal procedure, (often) limited financial resources and (often) limited proficiency in the English language.

4. There is a very high degree of information asymmetry in migration matters between the Australian Government and migrants. Because of this, while recognising that many in the industry act with due care and diligence, users of immigration assistance services have high vulnerability to the adverse consequences of those services which fall short of these standards. This vulnerability is heightened when those seeking immigration assistance engage with unlawful providers onshore and unregistered offshore providers.

5. I therefore support strong and effective regulation of the migration advice sector to maintain the integrity of Australia's immigration system and to protect the interests of consumers as well as support the industry in its quest towards becoming recognised as a profession.

6. I propose a strengthened regulatory regime to protect consumers of migration services and to maintain the integrity of the migration services sector. In achieving that goal, consideration has been given to the Australian Government's deregulation agenda to ensure the proposed regime is not unduly burdensome for industry participants or unwieldy for the regulator to administer.

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[1] For information relating to the Advisory Group's establishment, purpose and membership, see https://www.homeaffairs.gov.au/help-and-support/how-to-engage-us/committees-and-fora/migration-advice-industry-advisory-group.

[2] Department of Home Affairs, *Migration Agents Instruments Review*, Report to the Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP (May 2021) https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/migrations-agents-instruments-review-report.

[3] Department of Home Affairs, *Creating a world class migration advice industry* (25 June 2020) <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/migration-advice-industry>.

7. The proposed regime would complement a number of recent initiatives implemented by the Commonwealth Government.[4]

8. I have carefully considered the range of initiatives already underway, along with reform proposals outlined in the Review Consultation Report, in the provision of this feedback.

9. Reflecting on the limitations of past and current regulatory approaches implemented in Australia, and the benefits of the regulatory frameworks that govern migration advisers in the United Kingdom, Canada and New Zealand, I maintain that a new independent statutory regulator is required. Past reviews and inquiries have demonstrated that self-regulation and hybrid/Department-based approaches have been inadequate for achieving consumer protection and sector integrity, and problems within the sector persist.

10. I have proposed a framework incorporating the following elements:

    - an independent statutory authority to regulate registered migration agents (**RMAs**) and education agents as well as investigate and prosecute unregulated immigration assistance providers onshore, thereby protecting consumers and building confidence in the industry;
    - enhanced qualification requirements, including the use of appropriate knowledge and skills-based assessments governing entry to and career progression within the industry;
    - a tiering system that will foster professionalisation and ensure that RMAs possess the requisite skills and knowledge to competently perform distinct categories of work that may be undertaken within the industry;
    - augmented enforcement of standards and prosecution of misconduct and breaches; and
    - adequate resources and suitable powers to facilitate effective regulation.

11. Throughout this submission, I have adapted the substance of these elements to the existing OMARA-regulated framework, in the event that my primary recommendation in relation to the introduction of an independent regulator is not accepted.

[4] Examples include: the recent passage of the *Migration Amendment (Regulation of Migration Agents) Act 2020* (Cth) which gives effect to the removal of lawyers from the immigration assistance regulatory scheme and leaves migration legal services providers regulated by the robust framework of lawyers' own regulatory bodies; the introduction of entrance tests for migration agents seeking registration, tests that seek to ensure that those entering the industry have the requisite knowledge, skills and attributes to provide competent and ethical immigration assistance; and the removal of references to unregistered offshore agents on forms that appoint migration agents.

Format of the submission

12. I have structured my submission by reference to Table 1 at pages 6-9 of the Review Consultation Report.

13. Specifically, I have broken the submission into:

    - each of the three themes in that table; then
    - each component within each theme.

14. At the start of the discussion of each component, I have included a table which contains the content from the ‘Summary of reform options’ column in that table and then the ‘Matters for public feedback’ which are detailed in the substantive discussion of the Review Consultation Report.

Theme 1: A qualified industry

1.1 Qualifications

Summary of reform options	Matters for public feedback
A review of migration advice industry entry qualifications to commence no sooner than 2023, supported by ongoing monitoring and evaluation. This timeframe reflects the relatively recent introduction of the current requirements and other significant events likely to impact the outcomes.	Review knowledge requirements in 2023 for registration as a migration agent.

Summary view on reform option

15. I note the bases put for this proposal in the Review Consultation Report:

    - that the upgrade to the knowledge requirements in 2018 represents significant change for persons applying to the OMARA to register as a migration agent;
    - the first cohort of RMAs subject to the higher knowledge requirements are in their first year of practice and as such there is little available evidence as to whether further changes to the entry requirements for RMAs are justified;
    - the Department, at the time the Review Consultation Report was published, was in the process of selecting a new Capstone provider.

16. However, I **do not support** the proposal to delay the commencement of a review of the migration advice industry entry qualifications framework until some point after 2023.

17. I consider that the qualification requirement is significantly connected to the tiering system proposed by the Department.

18. With this in mind, I **recommend**:

    - that the Capstone continue to be used as the prescribed exam for entry to the industry but that its content and delivery be closely monitored to ensure that it adequately tests entrants to ensure that those who pass are capable of engaging in competent practice without supervision by offering all types of immigration assistance currently prescribed within section 276 of the *Migration Act 1958* (**Migration Act**);
    - that upon the introduction of the proposed tiering system, all persons seeking to:
        - enter the industry must pass the Capstone and the assessment should be recalibrated towards an examination of the level of knowledge, skills and aptitudes required to competently practice in Tier 1 on a supervised basis;
        - obtain Tier 3 status must pass a Tier 3 entrance examination[5] unless they are a legacy RMA and have been exempted by the OMARA from having

[5] In the UK's tiering system, testing for entrance to all three levels of practice is a key element of the UK adviser registration process and in deciding whether a person is fit and competent to practice. In 2019/20, competency assessments were provided for Level 1, Level 2 and Level 3 candidates. In total 438 applicants

to do so. Further information in this regard is detailed later in this submission;

- that, consistent with previous submissions made by the Law Council of Australia (**LCA**),[6] there be an assessment of the efficacy and suitability of the prescribed course (the Graduate Diploma in Australian Migration Law and Practice) in terms of preparing students to undertake the Capstone and enter the migration advice industry.

Reasons I do not support delay to the review of entry qualifications framework

The prescribed course

19. The relevant instrument governing the prescribed courses and exams, *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018* is set for repeal on 2 April 2024.[7]

20. The need, and basis upon which, to review the fitness for purpose of the prescribed courses and prescribed exam requires some reconsideration of the OMARA's authority to audit the content of the prescribed course and the Minister's power to no longer prescribe course providers where necessary.

Capstone assessments

21. Since the current prescribed courses and the Capstone were introduced in January 2018, there have been consistently low Capstone pass rates, as the Review Consultation Report acknowledges. The Review Consultation Report encapsulates the perceptions and concerns of various submitters in relation to the Capstone offered between 2018 and 2020. However, it does not present a detailed analysis – whether own-motion or as provided by submitters,[8] the ad hoc group of industry experts that met with the Minister and Department on 23 July 2020 and the Advisory Group – as to why the Capstone pass rates have been consistently low to date.

Principles underpinning a review of the entry qualifications framework

22. I **agree** that there is a need for a comprehensive review of the design and implementation of the entry-level qualification framework for the migration advice industry which focusses on its effectiveness in terms of enhancing consumer protection and achieving a world class, professional and sustainable migration advice industry.

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undertook Level 1 assessment with a pass rate of 54%, 131 applicants for Level 2 with a 30% pass rate and 73 applicants for Level 3 with 37% pass rate. For further information, see UK Office of the Immigration Services Commissioner, Annual Report and Accounts 2019/20, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/901108/OISC_Annual_Report_and_Accounts_2019-20_PRINT.pdf

[6] See Recommendation 5 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf.

[7] Legislation (Migration Agents Instruments) Sunset-altering Declaration 2019

[8] For example, see comments raised in Ms Roz Germov's Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (24 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-roz-germov.pdf

Principles informing a review

23. I **recommend** that the review be informed by the following principles and considerations, which were not addressed in the Review Consultation Report:

- in the absence of a tiering system and supervised practice scheme, an appropriate assessment standard must be set in the Capstone due to the reality that successful candidates could immediately enter the industry and provide immigration assistance without supervision;
- the breadth of subject matter to be assessed by the Capstone should reflect the currently broad definition of immigration assistance prescribed by section 276 of the Migration Act;
- the consistently low-calibre performance of Capstone candidates to date be addressed, particularly in relation to demonstrating suitable English language communication skills required for practice, and competency in matters pertaining to Administrative Appeals Tribunal Migration and Refugee Division (**AAT MRD**) representation and Ministerial intervention requests;
- the need to examine whether, and if so what, further information pertaining to the Capstone (e.g. pass rate data for each intake – overall, by gender, by prescribed course provider etc.) should be made publicly available;
- the need to examine the extent to which quality assurance mechanisms maintained by prescribed course providers contributed to the low Capstone pass rates to date, with particular reference to:
    - course entrance requirements, particularly minimum English language proficiency and entry-qualification requirements and the basis upon which exemptions (if any) were made for potential students of each prescribed course provider;
    - the standard a student must meet in order to pass and, more generally, the overall quality of each prescribed course programme offered.

24. In addition, I note the following proposals were provided to the Department by the LCA in July 2020[9] in relation to preserving the integrity and reputation of the entry-level qualification framework, which were not addressed in the Review Consultation Report:

- assessing the efficacy of the prescribed exam in terms of raising professional standards within the industry by comparing the competency and professional conduct of the RMAs who passed the Capstone with that displayed by RMAs who entered the industry without having to pass the Capstone;
- publishing further information about the Capstone on the OMARA website, including:
    - more detailed pass rate data, particularly in relation to pass rates for the graduates of each of the prescribed course providers, thereby enabling

[9] See paragraph 60 of Law Council of Australia's Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf.

potential students aspiring to become a RMA to make a more informed choice when selecting their course provider; and

- tips from successful Capstone candidates;[10]

- rewarding the pursuit of excellence among Capstone candidates by offering a suitable award to the three highest performing candidates in each Capstone intake/delivery round and, with their consent, publish information about their strategies for success and career aspirations in order to promote excellence among those seeking to enter the industry;
- examining the quality assurance mechanisms of each prescribed course provider with particular reference to course entrance requirements (especially the minimum English language proficiency and the qualification needed before enrolment in the prescribed course);
- investigating the withdrawal/pass/fail rates for the students who enrol in each of the prescribed courses along with the standard a student must meet in order to pass each course;
- assessing the efficacy and suitability of each of the prescribed courses in terms of preparing students to undertake the Capstone and enter the migration advice industry; and
- rationalising the entry-level education system by authorising and equipping the OMARA as either:
  - the only prescribed course provider, thereby dispensing with the need to require a prescribed exam; or
  - one of the prescribed course providers, thereby retaining the prescribed exam for use only in connection with graduates of other prescribed course providers.[11]

Capstone provider integrity

25. I note that The College of Law Ltd was appointed to administer and deliver the Capstone between 1 January 2018 and 31 December 2020 (**first Capstone**). I also note the OMARA's recent announcement on 4 June 2021 that Legal Training Australia Pty Ltd, an OMARA-approved CPD provider connected with the migration agent industry representative body Migration Alliance, is now the second Capstone (**second Capstone**) provider.[12]

26. I understand that the OMARA will monitor the performance of the second Capstone provider and **recommend** that, as was the case for the first Capstone provider, the

[10] For example, in the UK context see the OISC, 'Tips from previous level 1 candidates' <https://www.gov.uk/government/publications/oisc-competence-assessment-tips/tips-from-previous-level-1-candidates>.

[11] See paragraphs 60 and 65 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

[12] OMARA website https://www.mara.gov.au//news-media/archive/article?itemId=619

OMARA publish on its website the pass rates for each intake/delivery round conducted by the second Capstone provider.

RMA cohort analysis

27. In undertaking that review, I **recommend** that the OMARA and the Department immediately commence the collation of comprehensive data relating to the following three cohorts of RMAs (who are not Australian legal practitioners):

    - those RMAs first admitted to the industry between 2016 and 2018 having completed a prescribed course (i.e. Graduate Certificate in Migration Law and Practice) and passed the prescribed exam (i.e. common assessment items required for registration);
    - those RMAs first admitted to the industry between 2018 and 2020 having successfully passed a prescribed course (i.e. Graduate Certificate or Diploma in Migration Law and Practice) and passed the prescribed exam (i.e. the Capstone offered by the first Capstone provider);
    - those RMAs first admitted to the industry between 2021 and June 2022 having successfully passed a prescribed course (i.e. Graduate Certificate or Diploma in Migration Law and Practice) and passed the prescribed exam (i.e. the Capstone offered by the second Capstone provider).

28. To enable a comprehensive and comparative assessment against various key performance indicators that measure professionalism,[13] for each of these three cohorts, the OMARA should perform a comparative analysis of the following (based on de-identified data):

    - the percentage of RMAs within the cohort who entered and then left the industry and how long they remained registered since first being admitted;
    - the RMA's employment history and tertiary-level qualifications (i.e. level, discipline and institution, e.g. Bachelor degree in Arts from awarded by The University of Sydney) held prior to entering the industry and how long they have been registered;
    - the RMA's business type and registration status (e.g. employee, sole practitioner, commercial or non-commercial etc.);
    - the scope and nature of migration work provided by the RMA including number of cases relating to:
        - skilled, family and humanitarian visa application matters before the Department;
        - sponsorship compliance matters before the Department;
        - visa cancellation matters before the Department;

[13] The suggested KPIs align with and substantially arise out of those detailed in the Review Consultation Report: see *Table 2 Proposed KPIs for Australian migration advice industry*, Review Consultation Report, page 10 https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/migrations-agents-instruments-review-report.

    - AAT MRD matters (sponsorship refusal, nomination refusal, visa refusal by subclass, sponsorship cancellation/bar, visa cancellation);
    - Immigration Assessment Authority (**IAA**) matters;
    - Ministerial intervention requests under each of sections 195A, 197AB, 197AD, 351 or 417 of the Migration Act;
- the number, nature and severity of any referrals to the OMARA from the Minister, the AAT MRD, the IAA, Departmental units including the Ministerial Intervention Unit, parliamentarians and others;
- quantitative and qualitative feedback received by the OMARA from the Minister, the AAT MRD, the IAA and relevant Departmental units including the Ministerial Intervention Unit;
- the number and nature of severity of any client complaints made to the OMARA;
- the number and nature of the OMARA's disciplinary decisions, and other measures, such as warning letters, related to incompetence per period;
- the number and nature of investigations and outcomes relating to RMA's fitness and propriety including any evidence of migration fraud or other criminal behaviour.

29. It may also be instructive for the OMARA to directly engage with a range of RMAs within each cohort, by way of audit, interview, online survey and/or longitudinal study embedded in the repeat registration process, for the purposes of assessing professionalism and gauging RMA perceptions in relation to how well the entry-level qualifications framework has equipped them for practice.

30. Comparative analysis of the data relating to each cohort should reveal which entry-level qualification framework was most effective in terms of enhancing consumer protection and achieving industry professionalisation in order to thereby properly inform any further reform initiatives.

Timing

31. Taking into account the fundamental importance of the qualification requirement in terms of setting the standard for competent and ethical practice by industry entrants, I maintain that this review should not be significantly delayed and **recommend** that it commence as soon as possible and conclude by July 2022. This would allow sufficient time for data to be collected on the basis described above, particularly in relation to the first two cohorts, and then analysed by government for the purpose of implementing any administrative, governance, commercial or legislative changes required to ensure that the qualification requirement is fit-for-purpose well before the sunsetting date of 2 April 2024.

1.2 English Language

Summary of reform options	Matters for public feedback
Update the Occupational Competency Standards for RMAs (**OCS**) to include English language expectations/requirements and create an associated practice guide, detailing RMA obligations.	Update the OCS to include English language guidelines and create an associated practice guide that details RMA obligations.

Summary view on reform option

32. I **generally support** this proposed reform option and, consistent with previous LCA submissions,[14] specifically **recommend** that:

- the OCS be revised to include an additional standard that provides detailed guidance in relation to the skills, including English language communication skills, required for competent practice in each of the three tiers of the tiering system proposed in the Review Consultation Report;
- an associated Practice Guide be prepared by the OMARA and published on its website which clearly articulates:
    - the English language communication skills required for competent practice by RMAs in each of the three tiers;
    - each RMA's obligation to meet those standards in practice and the consequences for non-compliance which may include:
        - cancellation and barring of registration;
        - suspending a RMA from practice or restricting their scope of practice (including tier demotion) until such time as the OMARA is satisfied that the person possesses the requisite skills to resume practice.

Summary of reform options	Matters for public feedback
Increase the level of English required for registration as an RMA from IELTS 7 (minimum score of IELTS 6.5 in all four components of speaking, listening, reading and writing) to 'proficient' English, which equates to IELTS 7 in all four components or the equivalent under accepted tests.	Increase the level of English required for registration purposes to the equivalent of 'proficient English' as defined in Regulation 1.15D of the Migration Regulations.

[14] Paragraphs 43-56 and Recommendations 2-4 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

Summary view on reform option

33. I **generally support** this proposal, but consider that it is inappropriate to link or compare the minimum English language proficiency standard for admission to the migration advice industry with legislative criteria addressing suitability for a non-citizen to potentially qualify for a skilled visa.

34. The setting of these standards are driven by different policy objectives. The minimum standard should not be linked to the skilled visa program. Instead, the minimum standard should be specified in a legislative instrument created pursuant to Part 3 of the Migration Act and in line with the statutory purposes set out therein.

35. Noting that I support a tiering system for registration, in order for the industry to be regarded as truly world-class, I **recommend** that for the English language proficiency requirement to be fit-for-purpose, persons seeking to:

    - enter the industry at Tier 1 be required to demonstrate to the OMARA that they have completed an IELTS Academic test in the preceding two years and have achieved at least an overall band score of 7.0 (with a minimum of 7.5 in writing, 7.0 in speaking, listening and reading)
    - obtain Tier 3 status be required to demonstrate to the OMARA that they have completed an IELTS Academic test in the preceding two years and have achieved at least an overall band score of 7.0 (with a minimum of 8.0 in writing, 7.5 in speaking and 7.0 listening and reading) (**Tier 3 English language proficiency requirement**), unless they are exempted by the OMARA from having to do so. Taking into account the significant concerns raised by the AAT and the linguistically demanding nature of Tier 3 immigration assistance, any exemption criteria should be narrowly defined.

Further comments on this reform option

36. I wish to address the following comments in the Review Consultation Report:

> *Imposing a requirement for Academic level 7 across all components of the IELTS (or equivalent in other tests) would assist in addressing the issues raised by the AAT concerning English deficiency representation by some RMAs. It would also align the requirement with standards required of legal practitioners in Australia, and assist RMAs to most effectively advise clients, interpret case law and advocate matters at the AAT and within their practice generally.*[15]

37. The industry comparison data in part 1.2.4 of the Review Consultation Report demonstrates that NSW lawyers are held to a higher minimum standard in relation to writing and speaking skills (at least IELTS Academic test overall band score of 7.0 with a minimum score of 8.0 in writing, 7.5 in speaking and 7.0 in listening and reading) than those that the Department has proposed for RMAs.

38. Apart from NSW lawyers, the other occupations detailed in part 1.2.4 of the Review Consultation Report do not require persons within those occupations to competently research, interpret and apply complex legislation, case law and policy and thereby advise clients, many of whom are from culturally and linguistically diverse (**CALD**) backgrounds and unfamiliar with Australia's legal system, in relation to that law and

[15] Review Consultation Report, page 27

policy as well as effectively advocate on behalf of such clients in legal fora as part of their usual daily duties.

39. Furthermore, I note that the standard proposed by the Department is lower than that which currently operates for registered immigration consultants in Canada (IELTS Academic test with a minimum score of 7.0 in writing, 7.0 in speaking, 8.0 in listening and 7.0 reading), where listening skills are emphasised.

40. I also acknowledge the significant and alarming concerns that the AAT has raised with the Department about the quality of RMA representation, including the capacity of RMAs to provide appropriate evidence and submissions.[16] Furthermore, since the announcement of the second Capstone provider, I am concerned that the Capstone no longer requires candidates to demonstrate their ability to draft accurate, reasoned and persuasive letters of advice or submissions to the Department and the AAT MRD,[17] thereby making it necessary to ensure that the practical writing skills of industry entrants are suitably tested elsewhere. I am also concerned that the assessment tasks embedded within the second Capstone appear to be less rigorous than the first Capstone in terms of assessing the "profession-specific language skills"[18] required for practice. Consumer protection dictates the need for a higher English language proficiency standard for RMAs who engage with the AAT MRD or undertake any other form of Tier 3 immigration assistance.

41. Finally, given that the minimum qualification for entry is now at graduate diploma level and that Capstone candidates are required to possess sufficient ability to pass that assessment, I **recommend** removing Education Option 2[19] as a basis upon which industry entrants may meet the English language requirement as it is no longer fit-for-purpose. The completion of secondary studies in English either to the equivalent of Australian Year 10 or 12 does not align with the course entrance standards required for an Australian graduate diploma nor the proposed minimum IELTS standard required for entry to the industry.

Summary of reform options	**Matters for public feedback**
Expand the number of English language test providers that the OMARA accepts for registration purposes.	Expanding the number of test providers that the OMARA accepts for registration purposes.

Summary view on reform option

42. In light of the English language requirement recommendations proposed above and for the reasons specified in the Review Consultation Report, I **support** the proposal

[16] AAT Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-administrative-appeals-tribunal.pdf page 3

[17] See Legal Training Australia Capstone Information Guide for assessment structure and content at https://legaltrainingaustralia.com/media/Capstone-InformationGuide.pdf and sample Capstone Assessment https://legaltrainingaustralia.com/media/Capstone-SampleAssessment.pdf

[18] See commentary in relation to English language standards testing for occupational purposes in part 6 of Dr Laura Smith-Khan's Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (24 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-laura-smith-khan.pdf

[19] See Review Consultation Report, page 29

to expand the number of English language test providers that the OMARA accepts for RMA registration purposes.

43. Should this proposal be implemented, I **recommend** that any expansion should include a regular integrity review mechanism by the OMARA of each English language proficiency test provider's ongoing suitability to maintain their status as an accepted provider for this purpose.

1.3 Supervised practice

Summary of reform options	Matters for public feedback
The introduction of a mandatory 12-month provisional licence for newly registered migration agents. Provisional licensees will operate under the supervision of a fully licensed RMA and provide immigration assistance only with applications to the Department and related matters.	The introduction of a mandatory 12-month provisional licence for newly registered migration agents. Provisional licensees would operate under the supervision of a fully licensed RMA and provide immigration assistance only with applications to the Department and related matters.

Summary view on reform option

44. I **support** this proposal.

Further views about the establishment of a supervised practice scheme

45. Further to previous submissions made by the LCA,[20] I make the following suggestions in relation to the principles and requirements that should govern the supervised practice scheme.

Supervision required only at career commencement

46. I consider that supervision should only apply to Tier 1 RMAs.

47. The scheme should not require Tier 2 or 3 RMAs to be supervised. In relation to Tier 3 RMAs, given the level of competence and professionalism to be demonstrated by passing the Tier 3 entrance examination and meeting the Tier 3 English language proficiency requirement (unless exempt), such persons should be trusted to undertake practice without the need for supervision. Any further intrusion by the OMARA in that regard would amount to over-regulation and be unduly burdensome upon industry participants.

48. Should Tier 2 or 3 RMAs require support or assistance from an experienced colleague, I expect that they may access that support through industry associations and other professional networks. Where a form of supervision is required as a condition of registration due to RMA misconduct, this should be considered separately

[20] See Recommendation 10 and paragraphs 100-125 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

from a scheme that should be designed to promote professionalism among new RMAs.

12 months' full-time duration of supervision

49. I suggest that:

- OMARA could approve the initial registration period of a Tier 1 RMA for 2 years with the condition that they may apply for Tier 2 registration once they have completed 12 months of supervised practice within that 2-year period. This would allow sufficient flexibility for part-time workers and RMAs who shift between supervisors to complete their period of supervised practice within the initial period of registration.
- consideration be given towards allowing a further 12-month period upon application (total maximum period of 3 years Tier 1 RMA registration possible) where it is reasonable to do so.

Capstone placement

50. I maintain that the Capstone should be passed prior to a person becoming a Tier 1 RMA and not shifted as a hurdle to jump after the completion of supervised practice in order to enter Tier 2. Retaining the requirement to pass the Capstone before initial registration will provide an incentive to experienced RMAs and Australian legal practitioners to act as supervisors because they will be assured that the potential supervisees have demonstrated to the OMARA's satisfaction that they are sufficiently competent to commence practising on a supervised basis.

Acceptable supervision models

51. Of the various models presented in the Review Consultation Report, I suggest the scheme be modelled akin to that which applies for Australian legal practitioners and that the virtual communities of practice (**VCoP**) model not be pursued. The VCoP model described does not allow sufficient engagement between supervisor and supervisee in order to equip the Tier 1 RMA to successfully transition to Tier 2.

52. By way of example, the COVID-19 pandemic has forced many trainee and junior lawyers to work remotely and it has been reported that this has compromised their well-being, skills acquisition and career development.[21]

OMARA's role

53. The OMARA's role should be clearly defined, particularly in relation to:

- the assessment and approval of supervisors: supervisors should be Tier 3 RMAs and unrestricted legal practitioners with at least 5 years' experience in migration

[21] Pandemic jeapordises young lawyers well-being and learning opportunities, *International Bar Association News*, 15 March 2021 https://www.ibanet.org/article/8AED773E-A492-4B7B-AEA6-4B5D15F31B2E ; Great expectations and deflated outcomes: the reality for law graduates during COVID-19, *Law Society of New South Wales Journal*, 10 March 2021 https://lsj.com.au/articles/great-expectations-deflated-outcomes-the-reality-for-law-graduates-during-covid-19/ ; Law firms set work from home limits, *The Australian*, 3 December 2020 https://www.afr.com/companies/professional-services/lawyers-to-be-in-the-office-more-often-than-not-20201130-p56izz

law advice provision, subject to meeting other supervision criteria specified by the OMARA (unless an exemption applies where a Tier 2 RMA with suitable experience, aptitude and capacity is only available to supervise e.g. in some regional areas);

- the assessment and approval of supervision agreements/plans: any such plan should ideally involve, subject to COVID-19 related restrictions, a minimum amount of at least 8 months of full-time daily face to face contact between the supervisor and supervisee by way of physical co-location at the same premises, such that the remaining 4 months may be undertaken through suitable remote working arrangements that allow the supervisee access to their supervisor as needed by telephone, email, Zoom/Skype etc;
- monitoring compliance, particularly in relation to ensuring that Tier 1 RMAs only offer immigration assistance in relation to Departmental matters on a supervised basis;
- the powers available to the OMARA in order to facilitate quality supervision and limit exploitation.

Role of peak industry bodies

54. Industry bodies should focus on connecting supervisors with supervisees only. In discharging that role, these bodies should ensure that suitable senior RMAs and legal practitioners within their membership are encouraged to become OMARA-approved supervisors and supported in doing so. Supervised practice is not continuing professional development (**CPD**) and the scheme should not be leveraged as a revenue-raising opportunity for industry bodies. Accordingly, industry bodies should not be approved to offer “alternative” supervised practice schemes, including by way of reviving a Practice Ready Program or revised version thereof. That said, such bodies may wish to offer CPD tailored to Tier 1 RMAs but the supervised practice scheme should be designed to ensure that it enables Tier 1 RMAs to obtain supervision in a real workplace setting where migration practice is undertaken with real clients rather than a “simulated” practice experience in a classroom or online learning setting.

Theme 2: A professional industry

2.1 Registration requirement

Summary of reform options	Matters for public feedback
Strengthen Fit and Proper Person requirements to include bankruptcy checks, spouse and associate details, and checks in departmental systems as part of the initial registration application.	There is potential to: • strengthen Fit and Proper Person requirements for registration as an RMA to include bankruptcy checks, spouse and associate details, and checks in the Department's systems as part of the initial registration application. • enhance the criteria for being 'fit and proper' in Part 3 of the Act as a requirement assessed at time of registration and subsequent renewal of registration, modelled after the character test in section 501(6), and tailored to the migration advice industry.

Summary view on reform option

55. I **support** this proposal.

Further views about the fit and proper person requirement

56. Further to the LCA's previous submissions,[22] the following comments and suggestions are provided to assist with the drafting of legislation that would strengthen the Fit and Proper Person (**FPP**) requirements.

Bankruptcy checks

57. Bankruptcy checks should be undertaken as part of the initial and repeat registration process. The provisions could be modelled upon those which apply in connection with the registration of Canadian immigration consultants,[23] New Zealand immigration advisers[24] and UK immigration advisers.[25]

[22] See Recommendation 8 and paragraphs 69-90 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

[23] *Good Character and Conduct Regulation 2016* (Ca), reg 7

[24] *Immigration Advisers Licensing Act 2007* (NZ) ss 15,16

[25] *Immigration and Asylum Act 1999* (UK) s 83 (5); see also UK Government, OISC, 'Fitness of immigration services: assessing advisers' (Webpage, 1 April 2016) <https://www.gov.uk/government/publications/fitness-of-immigration-services-assessing-advisers>; OISC, 'Guidance on Fitness (Advisers)' (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510309/fitness_2016.pdf> and OISC, 'Guidance on Fitness (Owners)' (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510307/owners_2016.pdf>.

Spouse and associate details

58. Spouse (as well as de facto partner) and associate details checks should also be undertaken as part of the initial and repeat registration process and so authorised by the legislation.

59. The degree of association required should be clearly defined in the legislation. To assist with drafting, consideration could be given towards replicating all or part of the meaning of ‘’associated with” provided for in regulation 1.13B of the *Migration Regulations 1994* (Cth) (**Migration Regulations**).

Character test modelling

60. Character-related assessment should be undertaken as part of the initial and repeat registration process and so authorised by the legislation.

61. I acknowledge the Department’s view that the character test in section 501 of the Migration Act “is a useful standard to base the FPP criteria required by the OMARA”[26] but that this test should be appropriately “tailored to the migration advice industry”.[27]

62. I note that the LCA has previously submitted that the expanded cancellation powers raised significant concerns given their breadth, as well as the low cancellation thresholds and insufficient safeguards involved.[28] I suggest that these concerns and other previous LCA submissions relating to the character test be taken into account.[29]

63. To assist with drafting, consideration could be given towards adapting the character test by way of importing aspects of various provisions which apply in connection with the registration of Canadian immigration consultants,[30] New Zealand immigration advisers[31] and UK immigration advisers.[32]

Summary of reform options	**Matters for public feedback**
Amend the Act to allow the OMARA to refuse registration in circumstances relating to integrity or criminal conduct.	There is potential to amend Part 3 of the Act to allow the OMARA to refuse an applicant’s registration as an RMA, or to cancel an agent's registration in the event the OMARA becomes aware of an active and substantive criminal investigation into the agent’s conduct.

[26] Review Consultation Report, page 52
[27] Review Consultation Report, page 51
[28] Law Council of Australia, *Submission No 82 to the Joint Standing Committee on Migration, Inquiry into Migrant Settlement Outcomes*, 17 February 2017, pages 5-6
[29] See also, Law Council of Australia, *Migration Amendment (Strengthening the Character Test) Bill 2019* (Submission to the Senate Legal and Constitutional Affairs Committee), 14 August 2019.
[30] *Good Character and Conduct Regulation 2016* (Ca), reg 7
[31] *Immigration Advisers Licensing Act 2007* (NZ) ss 15,16
[32] *Immigration and Asylum Act 1999* (UK) s 83 (5); see also UK Government, OISC, ‘Fitness of immigration services: assessing advisers’ (Webpage, 1 April 2016) <https://www.gov.uk/government/publications/fitness-of-immigration-services-assessing-advisers>; OISC, ‘Guidance on Fitness (Advisers)’ (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510309/fitness_2016.pdf> and OISC, ‘Guidance on Fitness (Owners)’ (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510307/owners_2016.pdf>.

Summary view on reform option

64. I **generally support** this proposal.

Further views about refusing registration the basis of integrity and criminal conduct concerns

65. Further to the LCA's previous submissions,[33] I make the following comments and suggestions to assist with the drafting of legislation.

Integrity

66. I support any amendments to the law that clarify and expand upon what is meant by a "person of integrity" under section 290 of the Migration Act.

67. The legislation could specify principles or expectations that underpin such an integrity assessment, including:

- fairness and open-mindedness;
- honesty and truthfulness;
- integrity and trustworthiness;
- moral or ethical strength;
- respect for and consideration of others;
- respect for the rule of law and legitimate authority; and
- responsibility and accountability.[34]

Criminal conduct

68. I generally support changes to the law that would allow the OMARA to refuse or cancel a person's registration where a person has pleaded guilty to, or been found guilty or convicted of a criminal offence for which a pardon has not been granted, where the criminal conduct involved reflects adversely on the person's honesty, trustworthiness or fitness to practice.

69. However, care must be taken when drafting provisions that allow for the OMARA to suspend or cancel an RMA's registration, or refuse to register a person as an RMA, where there is an ongoing criminal investigation in relation to their conduct but no such finding of guilt.

70. I acknowledge the risk involved when allowing persons to continue to practice while criminal investigations and proceedings are afoot and suggest that the legislation specify a requirement for the OMARA to promptly audit the practices of such persons to assess that risk and what urgent action may need to be taken. If the RMA's practice is to be curtailed, the OMARA's response should be necessary and proportionate in the circumstances. Consideration must also be given to what restitution could or should be made available to an RMA whose registration is suspended or cancelled

[33] See Recommendation 8 and paragraphs 69-90 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

[34] See for example *Good Character and Conduct Regulation 2016* (Ca), reg 5.3.

by the OMARA due to ongoing criminal investigations or proceedings and they are later found to be innocent.

Summary of reform options	Matters for public feedback
Reduce regulatory burden by removing the 30-day publishing requirement for first time registrations.	Amend Part 3 of the Act, and the Regulations, to remove the 30 day publishing requirement.

Summary view on reform option

71. I **support** this proposal for the reasons outlined in the Review Consultation Report.

Summary of reform options	Matters for public feedback
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 for the five-year period immediately before their registration application is assessed.	Amend Part 3 of the Act to 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 during the five-year period immediately before their registration application is assessed.

Summary view on reform option

72. I **partially support** this proposal.

Further views

73. I acknowledge the streamlining and workload reduction benefits of this proposal but maintain that it should only take effect in conjunction with the introduction of the tiering system and should take into account the need for OMARA to continue to annually monitor RMA performance through the registration process as RMAs progress during their careers through that system.

74. As such, I consider that this change should only apply to Tier 2 RMAs and that the regular scrutiny of Tier 3 RMAs continue through the registration process to a higher degree, given the comparably complex, sensitive and high-stakes nature of Tier 3 immigration assistance.

75. I **do not support** any proposal that awards an extended registration period to a RMA if they agree to the imposition of a condition requiring them to supervise a new RMA for one year.[35] Such a proposal may attract unsuitable supervisors. The supervision framework should be designed to encourage supervisors that have the aptitude and

[35] Review Consultation Report, page 54

capacity to provide quality supervision and not those who may be motivated by the prospect of receiving a registration concession.

76. I suggest that further clarity is needed in terms of when a referral or complaint will be regarded as "substantive" and the degree of procedural fairness to be afforded to RMAs during this assessment process.

77. Assuming that clarity is provided and any assessment process is procedurally fair, I **recommend** amending Part 3 of the Migration Act, with effect on and from the introduction of tiering system, to increase the period of registration from 12 months to 36 months for:

- Tier 2 RMAs who have not had any substantive complaints or referrals made against them during the five-year period immediately before their registration application is assessed;
- Tier 3 RMAs who are:
    - legacy RMAs and have not had any substantive complaints or referrals made against them during the five-year period immediately before their registration application is assessed;
    - not legacy RMAs but have held Tier 3 status for the five-year period immediately before their registration application is assessed and have not had any substantive complaints or referrals made against them during that five-year period.

Summary of reform options	**Matters for public feedback**
The OMARA updates its process of character checks for registration applicants to include a coordinated identity verification process and criminal history check for all applicants at the time of initial and subsequent registration.	The OMARA update its process of character checks for applicants to include a coordinated identity verification process and criminal history check for all applicants at the time of initial and subsequent registration.

Summary view on reform option

78. I **support** this proposal for the reasons outlined in the Review Consultation Report.

2.2 Publishing information on pricing arrangements

Summary of reform options	Matters for public feedback
That the Department publish aggregated information on pricing arrangements on its website.	That an individual who applies for repeat registration be required to submit an approved form identifying the range of fees charged by the individual across all visa classes, for the preceding 12 months of practice, for the purpose of the OMARA publishing aggregated information on its website.

Summary view on reform option

79. I **support** the proposal to publish information on pricing arrangements.

Further views

80. I note the challenge in designing the approved form and data collection process such that information collected from RMAs is accurate and comparable for the services being provided.[36] To that end, I **recommend**:

- introducing a legislative basis for the mandatory collection of this data as part of the repeat registration process;[37]
- including a statement in the RMA repeat registration statement declaration that the pricing information provided as part of the repeat registration process is accurate.

81. In support of the implementation of this proposal, I **recommend**:

- that the OMARA make very clear to RMAs exactly what information is being sought in relation to each migration service that is being surveyed. RMAs should be guided to:
    - specify fee ranges for commonly provided services, including:
        - visa applications by subclass
        - sponsorship applications
        - nominations
        - visa cancellation matters (character cancellation, general visa cancellation)
        - AAT MRD review applications (sponsorship refusal, nomination refusal, visa refusal by subclass, sponsorship cancellation/bar, general visa cancellation)
        - IAA matters

[36] See Recommendation 17 and paragraphs 232-247 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

[37] This legislative provision could be modelled upon regulation 3XA of the *Migration Agents Regulations 1998* (Cth) that was repealed in April 2017.

        - Ministerial intervention requests under each of sections 195A, 197AB, 197AD, 351 or 417 of the Act;
    - specify fee ranges such that the lower range of their fee is what they would charge for a standard[38] matter, while the upper range of the fee bracket reflects what they charge for a more complex matter;
    - specify if they are commissioned by recruitment agencies, education networks, overseas and local businesses and the like to provide immigration assistance, whereby their pricing may be structured in a subsidised form on a retainer basis, so the OMARA would be on notice that these fees are largely subsidised and "outliers" when used to determine the mean or average fees;
- that the OMARA publish on its website the data collection methodology along with the basis upon which the published pricing information has been calculated so consumers can then make an informed assessment as to the veracity and reliability of the published pricing information. Qualifications, guidance and assumptions should also be clearly disclosed on the OMARA website e.g. some RMAs charge higher fees due to the urgency of a matter etc.;
- that if a tiering system is implemented, more accurate and meaningful pricing information could be provided to consumers based upon the services provided by RMAs in each tier;
- that the OMARA annually update this information on its website.

2.3 Developing a fidelity fund or other compensation mechanisms

Summary of reform options	Matters for public feedback
Do *not* introduce a fidelity fund, noting the current fiscal and operational environment, industry size, and adequacy of existing consumer protections.	Do not establish a fidelity fund for the migration advice industry.

Summary view on reform option

82. I **do not support** the Department's proposal and **recommend** the government establish a fidelity fund (or other compensation mechanism) for the migration advice industry.

Further explanation of this view and accompanying recommendations

83. I maintain that, in order to create a world class migration advice industry, there is a need to establish a fidelity fund and/or other compensation mechanism to strengthen consumer protection by way of recompensing clients of RMAs who have suffered pecuniary loss through the criminal or fraudulent actions of an RMA or their employees in the course of providing immigration assistance.

[38] By way of guidance, a standard visa application matter could be defined as one that does not involve any complex health, character or other complex PIC-related issues.

84. I note that the previous regulator, the Migration Institute of Australia (in its capacity as the Migration Agents Registration Authority), has previously recommended the establishment of a fidelity fund.[39]

85. It is noted that the Department has recommended against establishing a fidelity fund due to burdens relating to:

- the costs (in time and money) required to establish and manage the fund on an ongoing basis;
- the lack of evidence that a fund is warranted given the size and risk profile of the migration advice industry;
- the need for significant legislative and administrative change.[40]

86. I also note that the Department considers that a fidelity fund is unnecessary given the desire to implement other reform initiatives that aim to improve consumer protection including:

- improved transparency by publishing information on the pricing arrangements of migration agents;
- introducing a period of supervised practice for migration agents;
- use of the CPD framework to deliver targeted education offerings;
- continued duty in the Code of Conduct that a migration agent must have professional indemnity insurance of a kind prescribed by regulation 6B of the *Migration Agents Regulations 1998* (Cth).[41]

87. In relation to these views, I:

- acknowledge the burdens involved but maintains that these, individually or collectively, are far outweighed by the benefits that arise by way of:
    - protecting consumers from the most egregious types of RMA misconduct; and
    - elevating the industry to a profession that offers recompense to the victims of that egregious behaviour;
- maintain that the other reform initiatives proposed by the Department neither mitigate against unlawful RMA activity nor recompense victims of that activity. While publishing pricing information may assist with alerting consumers to the prospects of being overcharged by a fraudulent RMA, supervised practice and CPD attendance will have little impact upon a RMA's propensity to engage in fraudulent or criminal conduct. Furthermore, professional indemnity insurance only reimburses loss suffered as a result of negligence.

[39] Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, Canberra, 19 February 2008, 8 (Mr Bernie Waters, Chief Executive Officer, Migration Institute of Australia; and Chief Executive Officer, Migration Agents Registration Authority).
[40] Review Consultation Report, page 74
[41] Ibid.

88. Although it is noted by the Department that clients have access to the OMARA complaints mechanism for any alleged breaches of the Code, the OMARA's powers do not extend to requiring a RMA to refund fees or pay compensation.

89. To create a world class migration advice industry, powers to handle costs disputes should be extended to the OMARA. By way of suggestion, the introduction of such powers could enable a process whereby a consumer could apply for a costs assessment, and the OMARA could carry out that assessment for the purposes of making a binding determination in relation to:

- the reasonable costs for the work performed; and
- any amount payable by way of refund.

90. I further note the Department's view that consumers can seek compensation or a refund of money paid to an RMA through consumer protection law. Presently if a consumer has a dispute concerning costs of a RMA, they must seek redress through other consumer protection agencies; a process which can be both daunting, costly and time-consuming for clients, many of whom are vulnerable and unfamiliar with the Australian legal system.

91. Furthermore, Australian Consumer Law is subject to range of limitations that may limit recovery and is largely unsuitable as a means by which to seek recovery where criminal activity or migration fraud has occurred. The reality is that many clients of fraudulent RMAs face considerable barriers towards accessing justice and are often left without recourse where the RMA has "disappeared" and has left Australia's jurisdiction.[42]

92. Furthermore, a RMA may have staff or partner with third party agencies that engage in fraudulent or dishonest actions which result in financial loss to consumers. Further consideration should be given to ensuring that consumers are recompensed in such cases.

93. In terms of the quantum of funds held by RMAs and the associated risks to consumers where such funds are misappropriated, fees paid by consumers to certain RMAs for preparing a subclass 188 visa[43] application often exceed $100,000 (including Departmental visa application charges and other third party agency fees). Furthermore, in a range of parent visa application matters,[44] visa application charges alone often exceed $100,000. While the average amount of money held in a clients' account may be low compared with industries that hold funds to manage a sale of a house or property management, the amounts are still significant given the volume of clients an RMA may assist at any given time. Furthermore, these amounts are substantial for many consumers who have saved considerable funds in order to realise their migration goal.

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[42] This is highlighted in a disgraceful case involving a RMA and a Departmental case officer, trading under the business name of "S & S Migration" leaving many victims of their fraud with no recourse and no visa: see 'Victim of agent's fraud': Indian migrant's 7-year long battle for visa, *SBS Punjabi*, 15 January 2020 https://www.sbs.com.au/language/english/victim-of-agent-s-fraud-indian-migrant-s-7-year-long-battle-for-visa

[43] Business Skills (Provisional)(Class EB), Business Innovation and Investment (Provisional) subclass 188 visa

[44] For example, see subclass 143 Contributory parent visa application charges in Item 1130 in Schedule 1 to the *Migration Regulations 1994* (Cth).

94. Currently, the legislative framework offers no consumer protection by way of safeguarding funds held in a RMA's clients' account. In stark contrast, the conveyancing and property industry have strict controls over the transfer of funds required for property transactions, especially through the use of secure property exchange platforms, such as Property Exchange Australia Ltd. Authentication is required throughout each stage of a property transaction before any funds can be transferred. There are no safeguards in place before funds can be transferred into or out of a RMA's clients' account.

95. Finally, I note the Department's reference to professional indemnity insurance and maintain that, as previously submitted by the LCA, existing arrangements are inadequate.[45] I **recommend** these arrangements be strengthened by:

- ensuring that the Agreement for Services and Fees of each RMA specifies the insurance coverage available in the event of a claim (specifically the maximum coverage available and any limitations and/or exclusions e.g., offshore jurisdictions); and
- increasing the current minimum prescribed level of insurance to $1 million per claim event (excluding legal costs payable in relation to any dispute or claim).

2.4 Introducing a tiering system

Summary of reform options	Matters for public feedback
Introduce a three-tier system of registration for all RMAs that provides a graduated approach to RMAs' career progression and the provision of immigration assistance before the Minister and the AAT.	Implement a tiering system to provide better protection for consumers and a supportive framework for professionalisation of the migration advice industry.

Summary view on reform option

96. I **support** this proposal and **generally agree** with the Department's proposed tiering system model outlined in part 2.4.5.1.1 of the Review Consultation Report subject to the framework including the requirements and concessions detailed below.

Further explanation of view

97. My support for a tiering system is subject to it containing the following features.

Progression to Tier 3

98. I consider that completion of CPD should not be used as a basis upon which to progress to Tier 3.

99. Instead, all RMAs must pass an examination to obtain Tier 3 status, unless the RMA is a legacy RMA who has otherwise been assessed by the OMARA as suitable to enter Tier 3 because they can demonstrate from prior experience that they have

[45] See Recommendation 17 and paragraphs 66-68 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

professionally represented clients with AAT MRD, IAA and Ministerial intervention request matters. When determining whether a legacy RMA is sufficiently competent to enter Tier 3 practice without having to undertake all or part[46] of the Tier 3 entrance examination, information that the OMARA should take into account should include:

- the information provided by the legacy RMA to the OMARA in support of their request to be exempt from having to sit all or part of the Tier 3 entrance examination;
- the legacy RMA's complaints history including any previous disciplinary action taken by the OMARA;
- advice received from:
    - the Department in relation to the legacy RMA's level of competence demonstrated in relation to Departmental matters;
    - the AAT MRD in relation to the legacy RMA's level of competence demonstrated before the AAT MRD;
    - the IAA in relation to the legacy RMA's level of competence demonstrated before the IAA;
    - the Department's Ministerial Intervention Unit in relation to the legacy RMA's level of competence demonstrated in relation to Ministerial intervention matters.

100. A separate Tier 3 entrance examination is necessary for admission to practice at Tier 3; the Capstone and/or completion of specific types or levels CPD is insufficient for this task. The examination must comprehensively assess the skills and knowledge required for competent and ethical practice in relation to AAT MRD, IAA and Ministerial intervention request matters.

101. I recommend that the OMARA:

- develop the examination in conjunction with the AAT MRD, the IAA and the Department's Ministerial Intervention Unit; and
- solely administer the examination.

102. I consider that there should be no requirement for a RMA to have completed a minimum period of practice at Tier 2 before entering Tier 3 – if the RMA can pass the Tier 3 entrance examination then they should simply be permitted to enter Tier 3 if they also meet the Tier 3 English language proficiency requirement described above.

Conditions on Tier 3 RMAs

103. I consider that the OMARA should impose a mandatory condition upon Tier 3 RMA registration requiring the holder to only provide immigration assistance to a person in relation to a Ministerial intervention request matter where that person has provided written confirmation they have received legal advice in relation to their judicial review

[46] The Tier 3 examination could be divided into three parts that assess the three areas of Tier 3 practice: AAT MRD work, IAA work and Ministerial intervention request work. Some legacy RMAs may be able to demonstrate from prior practice that they are competent in some areas (e.g. AAT MRD work and Ministerial intervention requests), but have no experience in IAA work and will therefore only need to undertake that part of the Tier 3 entrance examination.

options (if any) from an Australian legal practitioner. This is necessary to protect consumers so they can understand their judicial review prospects, and have access to lodging a judicial review application within prescribed time limits, before deciding upon how and when (and indeed whether) to pursue a Ministerial intervention request.

Employment of Tier 1 RMAs

104. I suggest that the 12-month period of supervised practice for industry entrants should ideally be in the form of paid employment (unless all or part of that period of supervised practice is undertaken at a community legal centre) where Tier 1 RMAs are paid at industry level so as to mitigate against exploitative arrangements.

Terminology used to describe Tier 3 RMAs

105. I suggest that the Code, or at least an OMARA Guidance Note, specify that promotion of tier status should not be misleading or confuse the consumer. This suggestion is made with particular reference in the Review Consultation Report to Tier 3 RMAs as 'specialists'.[47] A number of State and Territory law societies formally recognise Accredited Specialist legal practitioners in immigration law, and the distinction between accredited specialist lawyers and Tier 3 RMAs should remain clear to a consumer.

Comment on other models

106. I **agree** with the Department's assessment in relation to not pursuing other models as set out in part 2.4.5.1.2 of the Review Consultation Report.

Components under further consideration

107. In relation to the components specified in part 2.4.5.1.3 of the Review Consultation Report, by way of further clarification, I make the following comments in relation to the elements specified for the Department's consideration.

Legacy RMAs

108. The nominal allocation process is unclear. A simple process to enable transition into the tiering system could be to ensure that no later than 6 months (and no more than 12 months) before the tiering system takes effect, the OMARA:

- commences offering the Tier 3 entrance examination;
- invites all legacy RMAs who wish to be immediately allocated to Tier 3 when the tiering system is introduced to either sit the Tier 3 entrance examination or request an exemption from having to sit all or part of that examination (otherwise they will be allocated to Tier 2 once the system takes effect);
- assesses all examination exemption requests[48] and conducts at least 2 examination intakes/delivery rounds so as to allow a reasonable opportunity for

[47] Review Consultation Report, page 75

[48] Information that the OMARA should consider when assessing Tier 3 entrance examination exemption requests from legacy RMAs could include information provided by the RMA which addresses their capacity to meet a revised OCS for Tier 3 practice, the RMA's referral/complaints history including any previous disciplinary action as well as advice/information received from the AAT MRD, the IAA and the Ministerial Intervention Unit relating to the RMA's competence and professionalism. Further information relating to how

legacy RMAs to transition into Tier 3 before the tiering system takes effect. All legacy RMAs who did not make a successful examination exemption request or pass the Tier 3 entrance examination would be allocated to Tier 2 once the system takes effect.

109. Once the tiering system is in effect, all Tier 2 RMAs seeking to obtain Tier 3 status must:

- pass the Tier 3 entrance examination (examination exemptions should no longer apply); and
- meet the Tier 3 English language proficiency requirement unless exempted by the OMARA from having to do so.

110. Again, there should be no requirement for minimum time to be served in Tier 2 before entering Tier 3.

Non-commercial RMAs (Tiers 1 and 2)

111. I consider it important to ensure that if any concessions are given to non-commercial RMAs that this not give rise to the emergence of a differing standard/quality of immigration assistance being offered by commercial and non-commercial/non-profit RMA organisations.

Part-time RMAs

112. It is unclear what particular accommodation of part-time RMAs and other specified cohorts is required, especially if there would be no requirement for RMAs to complete a minimum amount of time served in Tier 2 before seeking to enter Tier 3.

Sanctioned RMAs

113. I generally agree with the proposals outlined by the Department in relation to altering tier status and the imposition of practice-related conditions to enable the ongoing registration of sanctioned RMAs.[49]

Publishing/promotion of a tier allocation

114. I agree with the rationale to update the Register to specify each RMA's tier and the introduction of requirement that all RMAs publish their assigned tier and what immigration assistance it permits them to provide when promoting their services.

Additional Tier 3 elements – CPD

115. I consider that the following persons should only be approved to provide CPD training to Tier 3 RMAs:

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the OCS should be revised to support the tiering system, see Recommendation 14 and paragraphs 208-211 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

[49] For further information, see paragraphs 91-99 and Recommendation 9 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

- Tier 3 RMAs with at least 5 years' experience in offering Tier 3 immigration assistance;
- unrestricted legal practitioners with at least 5 years' experience in providing migration law advice in relation to AAT MRD, IAA and Ministerial intervention request matters.

Additional Tier 3 elements – supervision

116. I consider that only Tier 3 RMAs, and unrestricted legal practitioners with at least 5 years' experience in providing migration law advice in connection with legal practice, should be permitted to supervise Tier 1 RMAs.

117. Exemptions should be made available, on application and in reasonable circumstances – e.g. Tier 2 RMAs who agree to tailored arrangements to ensure appropriate supervision. This exemption should only be enlivened once the intending supervisee has demonstrated an inability to successfully secure supervision from a Tier 3 RMA or an unrestricted legal practitioner – e.g. they reside in a regional area where there are limited supervisors available.

Arrangements for former RMAs returning to the industry

118. I suggest that, subject to other industry re-entry requirements that may exist, if a former RMA was registered in the tiering system at Tier 2 or 3 and their industry break is:
    - less than 3 years, they should be required to complete, within the 6-month period prior to applying for registration:
        - at least 30 CPD points at Tier 2 level in order to resume practice at Tier 2;
        - at least 15 CPD points at Tier 2 level and 15 CPD points at Tier 3 level in order resume practice at Tier 3;
    - more than 3 years, they would need to re-qualify for entry into the industry at:
        - Tier 2 by passing the Capstone;
        - Tier 3 by passing the Capstone and the Tier 3 entrance examination.

Identifying RMAs practising outside their tier

119. I support the proposal to introduce a mechanism for identifying RMAs practising outside their tier and recommend the automatic commencement of OMARA disciplinary proceedings and/or Australian Border Force (**ABF**) investigations where non-compliance has been detected.

2.5 Review of Continuing Professional Development (CPD) arrangements

Summary of reform options	Matters for public feedback
Use the CPD system to deliver the required training for a tiering system (should a tiering system occur).	Use the CPD system to deliver the required training for any tiering system: • *Option A – repurpose the Practice Ready Program for a tiering system* • *Option B – prescribed requirements for moving to a higher tier* • *Option C – allowing RMAs to take any CPD activities from a higher tier as a prerequisite to moving to that tier.*

Summary view on reform option

120. While I support a proposal to introduce a tiering system, I do **not support** this proposal or any of the options suggested.

Explanation of my position

121. In line with previous submissions made by the LCA,[50] I believe the CPD system requiring OMARA regulation should:

- only be designed to enable RMAs to maintain and improve their knowledge in an existing tier of practice by way of acquiring sufficient CPD points to enable ongoing RMA registration; and
- not be designed to cater to RMAs seeking career progression to a higher tier of practice.

122. Allowing persons to attend an activity suited to RMAs in a higher tier will undermine the learning experience of the RMAs in that higher tier and for whom the activity was designed. It will also compromise a CPD provider's ability to properly design and deliver that activity within the timeframe allowed.

123. Assuming the tiering system proposed by the Department is implemented, I believe that RMA career progression can and should be enabled outside the OMARA-regulated CPD system e.g. completion of supervised practice by Tier 1 RMAs, introduction of the Tier 3 entrance exam that will give rise to RMA uptake of other forms of education including Tier 3 examination preparation courses, non-OMARA approved education and professional development offerings, work experience placements, mentorship programs, volunteer activities etc.

124. This approach will encourage and facilitate RMAs to advance in their careers by undertaking self-improvement and professional education in addition to CPD designed for the purposes of maintaining registration.

[50] See paragraphs 91-99 and Recommendation 9 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

125. I consider that in order to enable CPD providers to target their offerings at the appropriate level, the system should be designed to require:

- approved CPD providers to offer CPD activities suitably targeted to RMAs in a specific tier (e.g. a Tier 2 activity on sponsorship refusal would contain different content to a Tier 3 activity on the same subject, the latter activity going into greater depth and sufficiently covering matters pertaining to sponsorship refusal in the merits review context);
- RMAs to only complete CPD relevant to their tier.

126. The OMARA should have the authority to assess and approve a provider's capacity to deliver CPD to Tier 1 RMAs, Tier 2 RMAs and/or Tier 3 RMAs.

127. In order to further safeguard consumers by ensuring that RMAs also learn from relevant authorities, rather than just from industry-based peers, I recommend that only the OMARA be empowered and resourced to offer the following types of mandatory learning activities which must be completed by Tier 1 and 3 RMAs:

- Tier 1 mandatory activity – an education activity/information session covering a range of matters that may include:
    - a Departmental briefing/information session relevant to immigration assistance offered in connection with Departmental matters e.g. Skilled visa changes roadshows etc.;
    - an OMARA education activity/information session covering a range of matters including the application of the Code in practice, regulator interpretations of the Code, updates on regulator Practice Guides, trends in recent regulator disciplinary decisions, best practice updates for RMAs e.g., clients' account management, contingency planning, file management, managing conflicts of interest etc.
- Tier 3 mandatory activity – an education activity/information session covering a range of matters that may include:
    - AAT MRD procedure and practice, recent legal developments affecting the operations of the AAT MRD and the manner in which its decisions are made, ethical representation and advocacy before the AAT MRD, AAT MRD caseload and processing updates etc.;[51]
    - IAA procedure and practice, recent legal developments affecting the operations of the IAA and the manner in which its decisions are made, ethical representation and advocacy before the IAA, IAA caseload and processing updates etc.;
    - the administration and application of Ministerial intervention guidelines, the Minister's expectations of RMAs authorised to make intervention requests, the AAT MRD's discretion to refer a case to the Minister for intervention consideration, recent legal developments and other key issues/matters governing the Minister's powers to intervene.

[51] I note the AAT information sessions outlined in part 3.5.5.4 of the Review Consultation Report and suggest that these be regarded as a form of mandatory Tier 3 CPD offered by the OMARA.

128. In offering such mandatory activities, I envisage that the OMARA will, to the extent required, work in conjunction with:

- relevant Departmental units to design, develop and deliver mandatory Tier 1 CPD;
- the AAT MRD, the IAA and the Department's Ministerial intervention unit to design, develop and deliver mandatory Tier 3 CPD.

129. The table below specifies the minimum CPD requirements that I consider need to be completed by Tier 1 RMAs before progressing to Tier 2 as well as the annual minimum CPD obligations for each of Tier 2 and 3 RMAs to maintain ongoing registration within their respective tiers:

	CPD offered by OMARA-approved CPD providers			**Mandatory CPD offered by OMARA**		**Total CPD points**
	Tier 1 CPD points	**Tier 2 CPD points**	**Tier 3 CPD points**	**Tier 1 mandatory CPD points**	**Tier 3 mandatory CPD points**	
Tier 1 RMA	15[52]	0	0	5[53]	0	20
Tier 2 RMA	0	10	0	0	0	10
Tier 3 RMA	0	7		0	3[54]	10

Summary of reform options	**Matters for public feedback**
Strengthen oversight of CPD, including new quality controls for CPD activities.	Introduce quality controls for CPD activities to address issues identified in CPD audits conducted by the OMARA since the introduction of the new system in 2018 and the issues raised by stakeholders.

Summary view on reform option

130. I **support** the proposal to introduce quality controls outlined in part 2.5.7.2 of the Review Consultation Report.

[52] In relation to Option A in part 2.5.7.1.1 of the Review Consultation Report, I acknowledge the possibility that the Practice Ready Program could be repurposed and offered to Tier 1 RMAs in order to complement what they learn while completing supervised practice. If that option is pursued, I suggest that 15 hours would be sufficient assuming all Tier 3 related material is removed from the former Practice Ready Program course and it is adapted on account of the fact that all Tier 1 RMAs will be undertaking supervised practice.
[53] I envisage that these mandatory activities could include face to face workshops and conferences, online webinars or self-study modules (such as *Ethics Bytes* https://www.mara.gov.au/tools-for-registered-agents/ethics-in-your-work) or pre-recorded information sessions in audio or video format available for download by RMAs through the OMARA website.
[54] The AAT information/educational sessions outlined in part 3.5.5.4 of the Review Consultation Report could be recognised as a form of mandatory CPD for Tier 3 RMAs.

Further views relevant to this reform option

131. I consider the OMARA should take a more active role in mandatory CPD provision for Tier 1 and 3 RMAs as outlined above to ensure it remains of a high standard and fit-for-purpose.

132. I note that prior to 2018, all CPD activities needed to be approved by the OMARA before the CPD activity could be delivered to RMAs. The approval process required a fee to be paid, and submission of the presentation materials, key learning outcomes defined and a sample session plan, amongst other information.

133. I also note that since the 2018 changes, the approval of CPD activities is no longer required and a CPD provider is able to apply for a CPD activity number without having to provide any further information about the activity apart from the CPD Title, duration, CPD points it attracts and whether the CPD activity is considered mandatory or non-mandatory. Further, since the upgrade of the OMARA system in March 2021, the allocation of the CPD activity number is automated. There is a heightened risk under existing arrangements whereby a CPD provider can expand their activity offerings to a wide range of topics that do not necessarily address the OCS or assist RMAs maintain current working knowledge of migration law and meet their ethical obligations.

Summary of reform options	Matters for public feedback
Clarifying CPD provider standards.	Clarify the CPD provider standards, including the meaning of 'interactive' and 'workshop' and other potential ambiguities.

Summary view on reform option

134. I **support** the proposal to clarify the CPD provider standards as outlined in part 2.5.7.4 of the Review Consultation Report, particularly by way of clarifying the degree of interactivity required during CPD workshops.

Summary of reform options	Matters for public feedback
Increase the number of compliance audits of CPD providers and make the results publicly available.	Increase the number of CPD provider compliance audits conducted by the OMARA and make the audit results publicly available, ensuring that the publication is compliant with the *Privacy Act 1988* and the *Australian Border Force Act 2015.*

Summary view on reform option

135. I **support** this proposal but **recommend** that monitoring and audit resources are focussed on:

- targeting recently approved providers and those providers who have a history of non-compliance;
- ensuring monitoring activities are appropriately focussed on identifying non-compliance in relation to substantive issues (e.g. failing to deliver quality CPD with up-to-date knowledge and ethical practice information suited to the practice area and expectations of RMAs within the relevant tier) rather than minor issues (e.g. failing to provide sufficient ventilation at a CPD venue).

Theme 3: Combatting misconduct and unlawful activity

3.1 The definition of immigration assistance

Summary of reform options	Matters for public feedback
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.	Reframe the 'clerical work' exception to require supervision and replace 'clerical work' with 'administrative assistance'. Make the clerical work exception apply only to persons that are supervised by an RMA or a legal practitioner (with exceptions). Introduce a definition of 'clerical work', including listing particular acts. Replace the term 'clerical work' with 'administrative assistance'. Limit the number of clerical workers that an RMA can supervise.

Summary view on reform option

136. I **generally support** the proposal to reframe the "clerical work" exception in section 276(3) of the Migration Act, subject to the caveats and recommendations below.

More detailed analysis on reform option

137. I **suggest** replacing the term "clerical work" with "administrative support" rather than "administrative assistance". Using the word "support" will further clarify the framework by way of further reducing the prospect of consumers confusing immigration *assistance* with administrative *assistance*.

138. I **agree** with the proposal to introduce a provision requiring all persons providing "administrative support" to be supervised by a RMA or legal practitioner. However, given the recent discontinuation of dual regulation of legal practitioners[55] and the existence of extensive professional obligations governing lawyers in the supervision of their delivery of legal services,[56] care must be taken to ensure that any such requirement not involve the re-introduction of a form of dual regulation for Australian legal practitioners providing immigration assistance in connection with legal practice.

139. I consider that any exceptions to this supervision requirement, such as allowing the Department's offshore Service Delivery Partners to continue supporting visa applicants without supervision from a RMA or legal practitioner, should be clearly

[55] See *Migration Amendment (Regulation of Migration Agents) Act 2020*.
[56] For example, rule 37 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* states: '[a] solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.'

specified in the legislation. For example, Part 3 of the Migration Act could empower the Minister to specify by way of legislative instrument the persons and organisations that are exempt from providing administrative support under the supervision of a RMA or legal practitioner. This would allow sufficient flexibility for the Minister to specify any exceptions from time to time whilst also providing clarity to consumers and industry participants.

140. I **agree** with the proposal to introduce a provision that defines the term "administrative support" and recommend that it specifies an exhaustive list of activities that fall within that definition including a final catch-all provision e.g. "any other activity of an administrative nature which does not contribute in substance to the production of an application or document".

141. Part 3.1.2.1.2 of the Review Consultation Report details various possible approaches and I suggest the following activities be specified:

- operating a telephone switchboard;
- receiving phone calls or answering phone calls;
- recording, organising, storing, or retrieving of information;
- computing or data entry;
- recording information on any form, application or request as directed by another person;
- typing, photocopying or collating documents;
- calculating, invoicing, billing, charging or cash handling; and
- any other activity of an administrative nature which does not contribute in substance to the production of an application or document.

142. I acknowledge the risk that may exist where a RMA hires a large number of administrators and then is unable to properly supervise them to ensure they do not provide immigration assistance.

143. The case study example provided in part 3.1.2.4 of the Review Consultation Report indicates that the issue relates to a failure by the supervisor to clearly direct their staff in relation to the scope of their permissible duties and the requirement that they not provide immigration assistance in the course of those duties.

144. I note that many large and reputable law firms and migration agencies engage the services of large teams of administrators/support staff whose duties may include the data population of forms and the collection and collation of documents to be lodged in support of migration-related applications and requests.

145. Accordingly, I do **not support** the proposal to limit the number of administrators that can be supervised and **suggest** that the issue raised in the case study is better addressed by way of education to RMAs regarding managing an office environment in a way to mitigate this risk, and in appropriate cases, disciplinary action taken against the RMA and, prosecution of the unregistered administrator for providing immigration assistance when they have not been authorised by law to do so.[57] In

[57] *Migration Act 1958* s280(1)

addition, the OMARA could collect information as part of the registration application process for individual RMAs about the number of administrators they employ and assess whether they are capable of providing adequate supervision before approving/re-approving their registration. A similar approach could be taken in relation to applications made by businesses that engage in the provision of immigration services, a proposal which is addressed below.

Summary of reform options	Matters for public feedback
Address the use of business structures to avoid responsibility for misconduct, including amending the Act to apply to all businesses, and not just individuals, which provide immigration assistance.	Address the use of business structures to avoid responsibility for misconduct.

Summary view on reform option

146. I **support** this proposal and agree with the two-step implementation mechanism to enable this necessary change as outlined in part 3.1.3.1.2 of the Review Consultation Report.

Recommended approach to give effect to this change

147. To facilitate this change, I suggest amending Part 3 of the Migration Act to:

- prescribe the types of business structures (e.g. sole trader, partnership, corporation etc.) that an RMA can enter into for the purpose of providing immigration assistance (**prescribed business structure**);
- give new powers to the OMARA enabling it to regulate businesses and introduce new Code provisions that relate to businesses;
- prohibit persons (other than unrestricted legal practitioners) from advertising immigration assistance services unless they are operating under a prescribed business structure.[58]

Summary of reform options	Matters for public feedback
Release a factsheet explaining the distinction between general advice and legal advice on the matters under the *Australian Citizenship Act 2007* (Cth).	Clarify the law by preparing a factsheet explaining the distinction between general advice and legal advice on the matters under the *Australian Citizenship Act 2007* (Cth).

[58] Consideration will need to be given towards amending section 284 of the *Migration Act 1958.*

Summary view on reform option

148. I **do not support** this proposal.

Explanation of position

149. I **recommend** that RMAs be prohibited[59] from providing any type of general advice in relation to citizenship matters because:

- this is not immigration assistance and therefore their conduct is unregulated;
- they have not undertaken any formal study or been tested in relation to citizenship matters for the purposes of qualifying as a RMA and are under no obligation to maintain a sound working knowledge of citizenship law;
- providing such advice may expose consumers to an unacceptable level of risk (RMA professional indemnity insurance coverage does not extend to this type of advice provision) and potentially give rise to RMAs facing penalties for engaging in unqualified legal practice.[60]

150. This recommendation is in harmony with the existing state of affairs that do not permit RMAs to assist with the merits review of citizenship-related matters.

151. In support of my recommendation, I refer to the following submissions made in response to the Discussion Paper by Ms Roz Germov of the Victorian Bar:

> *Non-legally qualified agents should be prohibited from acting in the General Division of the AAT or to advise on Australian Citizenship. General Division matters are adversarial and involve complex character related matters, business visa cancellations and citizenship refusals. The Department is always represented by a solicitor or barrister. General Division reviews require advocacy skills and involve examination in chief and cross examination. Non-legally trained migration agents do not have the skills or training for this sort of representation.*
>
> *The [Migration] Act and the migration agent regulatory scheme do not encompass Australian Citizenship. Australian Citizenship law is also complex and has been through many iterations over the past 100 years so that different legislative provisions continue to apply to certain applicants depending on when and how they arrived in Australia. Ascertaining which version of the legislation applies to particular applicants for Citizenship is not a straightforward process. Non-legally qualified migration agents do not have the academic training to competently advise and represent clients in this jurisdiction.*[61]

152. If the Department intends to progress with this reform option, I suggest that it undertake further consultation with the LCA and the relevant State and Territory legal services regulators before finalising its approach.

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[59] RMAs have never been authorised to assist in relation to AAT General Division matters, including review of citizenship-related matters; see definition of "review authority" in *Migration Act 1958* s275.

[60] See *Legal Profession Uniform Law* s 10. In New South Wales and Victoria, the maximum penalty for engaging in unqualified legal practice is a fine of 250 penalty units or imprisonment for 2 years or both. The maximum penalty for an entity that holds itself out as entitled to engage in legal practice is 250 penalty units.

[61] Ms Roz Germov's Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (24 July 2020), page 5 https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-roz-germov.pdf

153. Should the Department see fit to proceed with developing and issuing a fact sheet, I recommend that the Department prepare that fact sheet in consultation with the LCA and the relevant State and Territory legal services regulators before it is published on its website and/or otherwise disseminated to consumers. Careful consideration will need to be given towards addressing specific matters in the fact sheet including:

- the types of general advice on citizenship law that can be provided by a person who is not an Australian legal practitioner;
- the extent to which the consumer may rely upon that general advice;
- the fees a consumer can reasonably expect to pay for that general advice;
- the recourse available to the consumer if they rely upon poor/negligent general advice to their detriment, including the risk of no recourse through a service provider's professional indemnity insurance as well as potential adverse consequences that may include citizenship revocation/cessation, citizenship application refusal and/or unnecessary citizenship application processing delays.

Summary of reform options	Matters for public feedback
Remove and clarify certain exemptions for provision of immigration assistance in the relevant sections of the Migration Act.	Clarify the law by: • not removing references to 'court' in the definition of 'immigration assistance' • making changes and clarifications to the exemptions for provision of immigration assistance.

Summary view on reform option – references to 'court' in the definition of 'immigration assistance'

154. I **do not support** the proposal to retain a definition of immigration assistance that permits a RMA (unless they are a restricted legal practitioner) to offer immigration assistance in connection with:

- preparing for proceedings before a court in relation to a visa application or cancellation review application;[62]
- representing the visa applicant or cancellation review applicant in proceedings before a court in relation to the visa application or cancellation review application;[63]
- representing a person in proceedings before a court that relate to the visa for which the person was nominating or sponsoring a visa applicant (or seeking to nominate or sponsor a visa applicant) for the purposes of the regulations.[64]

[62] *Migration Act 1958* s 276(1)(c)
[63] *Migration Act 1958* s 276(1)(d)
[64] *Migration Act 1958* s 276(2)(c)

Explanation of this position and associated recommendations

155. I note that the Hodges Review recommended that:

> *the definition of immigration assistance be amended to remove references to court related work and to ensure that the definition does not lead to the practising of law by migration agents who are not qualified to do so.*[65]

156. It is apposite to consider the submissions made to the Hodges Review which supported this recommendation:

> *In its submission, the LCA noted that it believes that the current definitions of immigration assistance and immigration legal assistance in sections 276 and 277 of the Act lack clarity and may effectively sanction legal practice by non-lawyers. In particular, it takes issue with the definition of immigration assistance, which includes 'preparing proceedings before a court or review authority' and 'representing an applicant in proceedings before a court or review authority.' The LCA recommends that the definition of immigration assistance be changed to clarify that nothing in the Act permits the practice of law by non-lawyers. It suggests that this could be achieved by inserting a provision in section 276 which contains words to the effect of 'Nothing in this definition shall be construed as in any way permitting a person other than a lawyer to provide legal advice or services'. The submission from the IARC shares the concerns that the current definition of immigration assistance could lead to the practising of law by migration agents who are not qualified to do so. It recommends that section 276 of the Act be amended to exclude references to court proceedings.*
>
> *The submission from KGA Lawyers-MPE also expresses concerns about references to court related work in the definition of immigration assistance and recommends that the definition be amended to remove references to any form of court related work or advice concerning possible litigation. It further notes that the Professional Indemnity Insurance that migration agents are required to have may not cover them for court related work:*
>
> > *'The indemnity insurance that applies to migration agents who are not legal practitioners often excludes coverage for any purported "legal" work done by such agents who are not admitted as legal practitioners in the State or Territory in which they operate.'*
>
> *As well as expressing concern regarding the definition of immigration legal assistance, the OLSC notes that lawyer agents are not required to take out additional Professional Indemnity Insurance other than that they already carry to cover them for the provision of legal assistance. The OLSC understands that this means that lawyer agents' insurance will not cover them for their provision of immigration assistance. The OLSC believes that:*
>
> > *'LawCover will reject any claim in relation to a legal practitioner providing migration assistance, as current legislative definitions dictate that this does not constitute "legal work" and thus could potentially represent a grave lacuna in that practitioner's insurance coverage.'*[66]

157. Recent amendments to the Migration Act that took effect in March 2021 included the repeal of the term "immigration legal assistance",[67] however the framework still requires clarification to ensure consumers only receive services from RMAs which they are qualified to perform. Further to the submissions to the Hodges Review

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[65] Hodges, J (2008:11) *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* [online document], Commonwealth of Australia, accessed 21 June 2020 https://www.ombudsman.gov.au/__data/assets/pdf_file/0019/33616/2007-08_review_of_statutory_self-regulation_of_the_migration_advice_profession.pdf

[66] Ibid. pages 52-53

[67] Item 6 of Schedule 1 to the *Migration Amendment (Regulation of Migration Agents) Act 2020*

summarised in the extract above, I maintain that RMAs (apart from those who are restricted legal practitioners) should be prohibited from providing any type of advice in relation to migration-related court matters because:

- they have not undertaken any formal study or been tested in relation to matters pertaining to preparation and carriage of migration litigation for the purposes of qualifying as a RMA;
- providing such advice may expose consumers to an unacceptable level of risk and potentially give rise to RMAs facing penalties for engaging in unqualified legal practice;[68]
- there is a risk that RMAs may be involved in the lodgement of unmeritorious cases,[69] thereby adding to the migration case backlog in the courts and facilitating the ongoing residence of non-citizens in Australia who have no lawful basis to remain onshore.[70]

158. I also seek to address the following comments in the Review Consultation Report:

> *… RMAs may still have a legitimate supporting role in preparing for court proceedings, including collating documents, interviewing or advising clients. An RMA could potentially assist in the review of and advice on the visa decision, or provide referrals to accredited migration legal practitioners. An RMA may also provide assistance to a client that chooses to lodge their court application as a self-represented litigant (or obtain legal representation or legal aid assistance).*[71]

159. For the reasons set out above, I maintain that RMAs (unless they are restricted legal practitioners) have no legitimate role (supporting or otherwise) in:

- interviewing or advising clients about migration litigation given their lack of qualifications in this complex area of law;
- collating documents as this is a critical part of preparing for court proceedings and the failure to properly collate relevant material can be fatal to a judicial review applicant's case or at least result in unnecessary costs being incurred;
- providing any form of assistance to a person who chooses to lodge their application as a self-represented litigant, especially given the risks involved with shadow representation.[72]

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[68] See *Legal Profession Uniform Law* s 10. In New South Wales and Victoria, the maximum penalty for engaging in unqualified legal practice is a fine of 250 penalty units or imprisonment for 2 years or both. The maximum penalty for an entity that holds itself out as entitled to engage in legal practice is 250 penalty units.

[69] Only lawyers are required to provide the court with written certification that there are reasonable prospects of success as part of lodging migration-related judicial review applications.

[70] See paragraphs 176-181 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

[71] Review Consultation Report, page 99

[72] Shadow representation undermines the integrity of Australia's immigration and legal systems. For an explanation of integrity issues arising out of shadow representation in the judicial review context, see paragraphs 177-180 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf For an explanation of integrity issues arising out of shadow representation in the merits review context, see paragraphs 22-27 of the AAT Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (July 2020)

160. In relation to the Department's contention that RMAs could "potentially assist in the review and advice on the visa decision", I do not see this as court-related work as this is already covered by other parts of the definition of immigration assistance.[73]

161. Finally, in relation to RMAs referring persons to "accredited migration legal practitioners" in order to "obtain legal representation or legal aid assistance", I also do not see this as "court-related work" but a proper recognition of the fact that court-related work is indeed beyond the capacity and expertise of RMAs (unless they are restricted legal practitioners) and should solely be handled by lawyers.

162. Accordingly, I **recommend** amending Part 3 of the Migration Act by:

- removing references to "court" proceedings and representations in the definition of "immigration assistance"; and
- inserting a provision that prohibits RMAs (other than restricted legal practitioners) from assisting persons with any court-related work, other than to refer such persons to an Australian legal practitioner for legal advice.

Summary view on reform option – changes to exemptions in the definition of 'immigration assistance'

163. Furthermore, I **generally support** the Department's proposals in part 3.1.4.3 of the Review Consultation Report.

164. I **recommend** that:

- the class of unqualified persons who are permitted to provide immigration assistance be restricted to close family members only, thereby removing employers, prospective employers and parliamentarians from the category of exempt persons;
- redundant provisions be removed from the regulations as specified in Table 25 of Appendix E in the Review Consultation Report.

Summary view on reform option – changes to references to terminology

165. I **generally support** the Department's proposals in part 3.1.4.4 of the Review Consultation Report but **recommend** that care be taken when amending Part 3 of the Migration Act to ensure that the "person" giving immigration assistance is clearly distinguished from the "person" receiving immigration assistance.

https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-administrative-appeals-tribunal.pdf

[73] *Migration Act 1958* ss 276(1)(a) and (b), (2)(a) and (b)

3.2 Offshore unregistered migration agents

Summary of reform options	Matters for public feedback
Increase consumer awareness of the risks associated with the use of unregistered offshore and unlawful onshore providers of immigration assistance, and encourage the use of the OMARA's Register of migration agents to find and contact an RMA.	N/A.

Summary view on reform option

166. I **support** this proposal but make related recommendations.

Recommendations related to reform option

167. I **recommend** that consumers should be proactively encouraged by the Department, Departmental and other officials, community and industry sources to use RMAs *and* Australian legal practitioners.

168. To that end, I **recommend** that the Department:

- increase its efforts to raise consumer awareness of the risks associated with using unregistered offshore and unlawful onshore providers of immigration assistance as outlined in parts 3.2.1 of the Review Consultation Report;
- pursue the measures outlined in part 3.2.3.1 of the Review Consultation Report and ensure that:
    - consumer education and awareness campaigns accurately and fairly promote the benefits of using the services provided by RMAs *and* Australian legal practitioners;
    - communication strategies targeted towards vulnerable consumers clearly:
        - outline the risks involved when using an unregistered provider and/or an authorised recipient who is not an Australian legal practitioner or a RMA;
        - alert consumers that:
            - they should obtain immigration assistance either from a RMA or an Australian legal practitioner; and
            - any legal advice or assistance beyond immigration assistance can only be offered, and provided by, an Australian legal practitioner;
        - direct those consumers in their quest to find RMAs (by directing them to the OMARA Register) *and* Australian legal practitioners (by directing them to the dedicated information page on the LCA's website).

Summary of reform options	Matters for public feedback
Do *not* make the OMARA regulatory framework apply offshore.	Do *not* make the OMARA regulatory framework apply offshore. Enable offshore RMAs to fulfil their OMARA registration requirements.

Summary view on reform option

169. I **support** this proposal and **recommend** that:

- in the absence of having a regulatory framework apply offshore, significant resources be directed towards encouraging consumers to use the services of Australian legal practitioners and RMAs;
- the measures outlined in part 3.2.2.1 of the Review Consultation Report in relation to supporting offshore RMAs are pursued.

Summary of reform options	Matters for public feedback
Do *not* allow offshore unregistered migration agents to be listed with the OMARA.	Do *not* allow and encourage offshore unregistered migration agents to be listed with the OMARA (accreditation of offshore agents).

Summary view on reform option

170. I **support** this proposal and accepts the basis of the Department's rationale outlined in part 3.2.2.2 of the Review Consultation Report.

Summary of reform options	Matters for public feedback
Do *not* introduce categories of persons permitted to be authorised recipients. Instead, ensure departmental delegates have adequate training to identify suspicious authorised recipients, and assess the efficacy of the relevant section of the Act.	Do *not* introduce categories of persons permitted to be authorised recipients.

Summary view on reform option

171. I **support** this proposal and accept the basis of the Department's rationale outlined in part 3.2.2.3 of the Review Consultation Report.

172. That said, I **suggest** that the Department take steps to:

- assess, from a consumer protection perspective, the effectiveness of subsection 494D(5) of the Migration Act in allowing the Department to cease providing information to an authorised recipient if they are suspected of providing registered immigration assistance;
- develop and deliver adequate training programs for Departmental delegates which focus upon the early identification of suspicious authorised recipients, particularly where these persons are located offshore and across application types where there are higher risks of migration fraud;
- strengthen consumer awareness initiatives so that consumers understand the risks involved when authorising another person, who is neither a RMA nor an Australian legal practitioner, to only receive Departmental communications on their behalf.

Summary of reform options	**Matters for public feedback**
Options for further examination by the Department: ○ Make legislative and system changes to allow the Department to accept visa applications only from the applicants, RMAs, unrestricted legal practitioners, or exempt persons. ○ Introduce an unregistered immigration assistance Public Interest Criterion that could result in a decision to refuse to grant a visa where unregistered or unlawful immigration assistance has been received. ○ Require visa applicants to attest in a declaration as to whether they have received immigration assistance or other relevant assistance. ○ Develop risk profiles for individuals, occupations and industries where the risk of unregistered immigration assistance is high, and conduct audits of high risk visa applications.	OMARA and ABF work with the offshore network to improve awareness of Australian legislative framework governing migration agents. Consider introducing a requirement for a valid visa application to be lodged by an RMA, a legal practitioner, an exempt person or the applicant. Consider enabling ImmiAccount to allow visa applications to be lodged only by visa applicants, RMAs, legal practitioners (from March 2021) or exempt persons. Consider introducing an unregistered immigration assistance Public Interest Criterion (PIC). Consider requiring a visa applicant to declare assistance they have received. Consider developing risk profiles and conducting audits of high-risk visa applications. Consider expanding the use of service Delivery Partners (SDPs) and assisted online lodgement services offshore. Consider concessions for visa applicants for using services of RMAs and legal practitioners.

Preliminary comments

173. I note the Department's preliminary comments in relation to these proposals:

> *Primary mechanisms for change for these proposals are not directly within the Review's legislative scope and have a significant level of complexity. These proposals are instead recommended for further examination and progression as appropriate by the Department.*[74]

174. I acknowledge the complexities involved with some of these proposals and offer the following comments below in relation to various proposals and welcome any further opportunity to provide feedback on these proposals should they be progressed.

Summary view on reform option – limit on persons who can validly lodge a visa application

175. In response to part 3.2.4.1 of the Review Consultation Report, I **generally support** the introduction of a requirement for a valid visa application to be lodged by the applicant, an Australian legal practitioner, RMA or exempt persons.

176. However, applying validity criteria to invalidate applications lodged by unregistered providers may adversely impact upon unsuspecting applicants, who may have been waiting several years before their applications are considered for a decision.

177. These instances could be addressed by ensuring validity assessments are done as soon as an application is lodged[75] along with the insertion of a new provision into the Migration Regulations[76] that allows certain applicants an opportunity to cure the invalidity by engaging the services of an Australian legal practitioner or RMA prior to the decision being made. Further consideration should be given to the types of applicants that should be afforded this opportunity and what information (if any) about the unregistered provider must be given by the applicant to the Minister in order to cure the validity defect.

Summary view on reform option – changes to ImmiAccount to limit persons who can lodge visa applications

178. In response to part 3.2.4.2 of the Review Consultation Report, I **generally support**:

- enabling ImmiAccount to only allow lodgment of applications by visa applicants, RMAs, Australian legal practitioners and exempt persons. This approach would complement the validity measure described above;
- allowing an RMA to create no more than one ImmiAccount profile at any point in time, and require them to lodge visa applications for all their clients from that account;
- making it an offence for an RMA to allow another person to access their ImmiAccount, except a person providing administrative support to the RMA;

[74] Review Consultation Report, page 8
[75] The validity assessment could, in most cases, be embedded in the online application process for a range of visas by way of an automated reference to the OMARA's Register of Migration Agents and the Department of Home Affairs' Legal Practitioner Database.
[76] The provision could be modelled upon regulation 2.11 of *Migration Regulations 1994* (Cth).

- introducing an offence for creating an ImmiAccount on behalf of another person, unless an exempt person.

Summary view on reform option – introducing an unregistered immigration assistance PIC

179. In response to part 3.2.4.3 of the Review Consultation Report, I **have reservations** in relation to the introduction and operation of an integrity Public Interest Criterion (**PIC**) enabling visa application refusal where the applicant knowingly received unregistered or unlawful immigration assistance.

180. Care would need to be taken towards ensuring that applicants are sufficiently made aware of such adverse consequences and clarity is needed in relation to whether the state of knowledge must be actual, constructive or imputed.

181. Furthermore, difficulties may be encountered when assessing whether the applicant had the requisite state of knowledge to enliven the PIC.

182. A safeguard mechanism should be included in the PIC such as a waiver that is broad in scope and favours applicants who can demonstrate they took reasonable steps to avoid using an unregistered or unlawful provider.

Summary view on reform option – requiring visa applicant to declare assistance

183. In response to part 3.2.4.4 of the Review Consultation Report, in line with previous LCA submissions,[77] I **support** a requirement for applicants to declare assistance they have received.

Summary view on reform option – risk profiles and audits

184. In response to part 3.2.4.5 of the Review Consultation Report, I **support** the Department developing risk profiles and conducting audits of application cohorts where the risk of unregistered practice is high.

Summary view on reform option – service delivery providers (SDPs)

185. In response to part 3.2.4.6 of the Review Consultation Report, I acknowledge the role of SDPs and **recommend** that where any referral for immigration assistance is required, SDPs appropriately refer consumers to RMAs (by directing them to the OMARA Register) *and* Australian legal practitioners (by directing them to the LCA website).

Summary view on reform option – use of concessions

186. In response to part 3.2.4.7 of the Review Consultation Report, I acknowledge that offering priority processing or reduced application fees as an incentive towards using the services of an RMA or Australian legal practitioner may disadvantage some applicants. Consideration may be given to the design of a pilot program where such an approach could be trialled whereby the comparative advantages and

[77] See paragraphs 299-301 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

disadvantages are assessed. Given the relative financial strength of most Business Skills and Global Talent visa applicants, these visa types may well be suited for such a pilot program.

3.3 Penalties for unlawful immigration assistance providers

Summary of reform options	Matters for public feedback
Increase financial penalties in section 280(1), and consider increasing financial penalties in sections 312A and 312B from 60 penalty units to 250 penalty units.	Increase financial penalties in section 280(1), and considering increasing penalties in sections 312A and 312B from 60 penalty units to 250 penalty units. Consider the potential for an additional Ministerial intervention power to allow a visa application to be re-assessed if the applicant was a victim of unlawful immigration assistance (and therefore had their application cancelled or denied).

Summary view on reform option

187. I **support** the proposal to increase the financial penalties from 60 penalty units to 250 penalty units in section 280(1) and sections 312A and 312B of the Migration Act.

188. In line with previous submissions made by the LCA,[78] I **support** the introduction of an additional Ministerial intervention power to allow a visa application to be re-assessed if the applicant was a victim of unlawful immigration assistance (and therefore had their application cancelled or denied).

Summary of reform options	Matters for public feedback
Apply penalties to businesses, not just individuals.	Apply penalties to businesses, not just individuals

Summary view on reform option

189. I **support** the proposal to apply penalties to businesses, not just individuals, and agree with the Department implementing the range of measures outlined in part 3.3.9.2 of the Review Consultation Report.

[78] See Recommendation 22 and paragraph 285 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

190. I welcome the Department's proposal and **support** the prioritisation of its implementation of this proposal along with the allocation of sufficient resources towards detecting and disrupting unlawful business practices.

191. Industry colleagues have alerted me to instances where a sanctioned RMA (whose registration has been suspended by the OMARA) has continued to operate a migration agency through a company structure, and employ a new RMA to provide immigration assistance. The sanctioned RMA has been removed as a Director or Shareholder of the company to conceal their involvement in the business which continues to provide immigration assistance using the new RMA's Migration Agents Registration Number. The existence and application of penalties in such circumstances would reduce these types of shadow-type advisory arrangements and strengthen consumer protection.

Summary of reform options	Matters for public feedback
Require payment of reparation and commercial gain.	Require the payment of reparation and commercial gain.

Summary view on reform option

192. I **support** the proposal to require the payment of reparation and commercial gain, especially if government does not take steps towards introducing an industry-based fidelity fund and/or other compensation mechanism.

193. In relation to the mechanisms outlined in part 3.3.9.3 of the Review Consultation Report, I **recommend** amending Part 3 of the Migration Act to:

- enable an Australian court to make orders requiring unlawful providers to make payments for reparation and personal gain in line with the legislative scheme that operates in New Zealand[79] and the UK;
- empower the OMARA to facilitate compensation of consumers who have received poor advice from a RMA by way of recommending the RMA refund all or part of client fees. This could be modelled on the scheme that operates in the UK and become a helpful feature in any mediation process as a key step towards resolving a variety of complaints where it is clear that inadequate advice has been given.

Summary of reform options	Matters for public feedback
Remove differentiation between fee-for-service and no fee-for-service.	Remove differentiation between fee-for-service and no fee-for-service.

[79] *Immigration Advisers Licensing Act 2007* (NZ) Parts 71-72

Summary view on reform option

194. I **support** the proposal to remove differentiation between fee-for-service and no fee-for-service for the reasons outlined in part 3.3.9.4 of the Review Consultation Report.

Summary of reform options	Matters for public feedback
Introduce the ability to apply both financial infringements and/or imprisonment for related offences under sections 281(1), 281(2), 282(1), 283(1), 284(1) and 285(1) of the Migration Act.	Introduce the ability to apply both financial infringements and/or imprisonment for related offences under subsections 281(1), 281(2), 282(1), 283(1), 284(1) and 285(1)of the Migration Act.

Summary view on reform option

195. I **support** the proposal to introduce the ability to apply both financial infringements and/or imprisonment for related offences under subsections 281(1), 281(2), 282(1), 283(1), 284(1) and 285(1) of the Migration Act.

Summary of reform options	Matters for public feedback
Introduce provisions to make it a criminal offence to knowingly provide immigration assistance for the purposes of enabling serious and organised crime.	Introduce provisions to make it a criminal offence to knowingly provide immigration assistance for the purposes of enabling serious and organised crime. Do *not* expand Australian criminal offences and/or civil penalties for visa applicants and sponsors using unlawful immigration assistance.

Summary view on reform option – introduction of criminal offence

196. I **support in principle** the proposal to introduce provisions to make it a criminal offence to knowingly provide immigration assistance for the purposes of enabling serious and organised crime. I support the creation of criminal offences where they are warranted e.g. where there is no existing potential for ancillary offences and Crimes Act provisions to apply. It is unclear whether the Department has liaised with the Attorney-General's Department on this issue.

Summary view on reform option – not to expand offences for using unlawful immigration assistance

197. I acknowledge the concerns raised by the Department in part 3.3.9.7 of the Review Consultation Report and **generally support** the proposal to *not* expand Australian criminal offences and/or civil penalties for visa applicants and sponsors using unlawful immigration assistance.

198. However, I share the Department's concern about visa applicants and sponsors knowingly using unlawful providers of immigration assistance for the purposes of securing migration outcomes in cases involving fraud e.g. contrived marriages. Further consideration may need to be given towards refining this proposal in order to address such practices.

3.4 The powers of the OMARA to address RMA misconduct

Summary of reform options	Matters for public feedback
Amend certain sections in Part 3 of the Act to strengthen OMARA's powers, clarify their scope and remove redundant provisions.	Amend Part 3 of the Act to empower the OMARA to compel the provision of documents under threat of penalty and remove redundant subsections. Simplify the information gathering powers and penalties in Part 3 of the Act under one section. Amend Part 3 of the Act to include provisions to bar RMAs based on fitness and propriety, and clarify that the OMARA may bar agents for complaints received during their period of registration as well as after their registration has lapsed. Amend Part 3 of the Act to reference the OMARA only. Do *not* amend Part 3 of the Act to strengthen the OMARA's investigative powers, allowing it to sanction entities that employ RMAs and enter and search premises. Do *not* introduce a system of demerit points to sanction RMAs.

Summary view on reform option

199. I support the LCA's previous submissions on this issue[80] and **recommend** that further consideration be given to empowering an independent regulator through this approach rather than the compromise approach presented in part 3.4 of the Review Consultation Report.

Recommendations regarding additional regulatory powers of the OMARA

200. I note the Department's preference to retain existing arrangements whereby the OMARA continues to administer the scheme that governs RMAs while the ABF continues to target criminal activity. This approach does not take advantage of the benefits that can be realised through the establishment of an independent regulator

[80] See paragraphs 257-260 of the Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

suitably empowered to combat RMA conduct by way of engaging provisions of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**).

201. If the Australian Government elects to pursue the Department's suggested proposals outlined in part 3.4 of the Review Consultation Report, I:

- agree with the amendments proposed in part 3.4.4.1 subject to the OMARA retaining the power to compel RMAs to appear before it as part of the investigations process. I consider that the OMARA should consider making more use of this power in practice. Requiring RMAs to attend interviews with the OMARA is a critical tool to employ when undertaking misconduct investigations, particularly in order to avert the delays that otherwise arise through desk-based information gathering processes that are authorised as a part of the investigations process.
- agree with the amendments proposed in part 3.4.4.2;
- partially agree with proposal outlined in part 3.4.4.5 subject to further consideration being given to conferring OMARA with the suite of powers to enable it to investigate immigration assistance provider businesses once it is able to regulate and approve such businesses as registered providers;
- agree with the amendments proposed in part 3.4.4.6.

202. Finally, I note previous LCA submissions[81] and also **recommend** that the OMARA be empowered to refer instances involving RMA misconduct to the Minister for consideration as to whether to intervene to grant the visa or allow an application to be made.

203. In many instances, a complainant's concerns would be addressed if they could simply achieve the migration outcome they had sought had it not been frustrated by the RMA's misconduct. A deficiency of the existing scheme is that it provides no basis for the OMARA to assist the complainant in that regard.

204. Options the Australian Government may wish to consider introducing in order to address that deficiency include empowering the OMARA with the authority:

- to request a delegate prioritise the making of a decision on the complainant's visa application/matter within a prescribed period, or as soon as reasonably practicable, if (in the OMARA's opinion) that will facilitate early resolution of the complaint and suitably protect the consumer from further/ongoing harm; and
- to refer the issue surrounding the complainant's immigration status to the Ministerial Intervention Unit in order for the Minister to personally intervene. This novel approach to complaints resolution would require the introduction of new Ministerial intervention power to allow the Minister to intervene in order to address/rectify the client's immigration situation caused by the RMA (e.g., grant visa, overturn cancellation, release from detention, lift statutory bar etc.) where a referral has been made by the OMARA.

[81] See Recommendations 20 and 21, Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf

3.5 Improving compliance with AAT practice directions

Summary of reform options	Matters for public feedback
Progress existing initiatives to improve compliance in conjunction with relevant recommendations within this report, including the provisional licence under supervision and a tiering system.	Progress initiatives including: • Raising RMA awareness of and compliance with AAT Practice Directions. • Reviewing the curriculum for the Graduate Diploma and the content of the Capstone to ensure there is sufficient coverage of the types of matters important for providing effective assistance in a merits review process at the AAT. • Developing policy guidelines to be released concurrently with the revised Code. These guidelines will provide examples and explanations about themes discussed in the Code, including representing clients at the AAT and steps RMAs can take to ensure they assist the AAT and its members to fulfil the AAT's statutory objective. • Working with prescribed course providers and CPD providers to ensure RMAs are properly educated about their obligations and are well versed not only in legislation, but also AAT practice and procedure, including the professional etiquette required of them when appearing before the AAT and other review bodies. • Improved liaison between the OMARA and the AAT. • Introducing a tiering system that will only permit experienced RMAs to represent clients at the AAT. • Providing educational sessions to RMAs about AAT practice, procedure and advocacy.

Summary view on reform option

205. I commend the ongoing efforts by the Department, including the OMARA, in collaborating with the AAT to improve, where necessary, the standard of RMA conduct before the Tribunal and combat misconduct and unlawful activity.

206. I **support** the Department's proposal to progress existing initiatives in conjunction with relevant recommendations contained elsewhere within the Review Consultation Report.

Recommendations relevant to reform option

207. Additionally, I **recommend**:

- that, from a quality assurance perspective, the OMARA involve the AAT in the review of the curriculum for the Graduate Diploma and, until such time as the tiering system is introduced, the content of the second Capstone (as was the case with the first Capstone) to ensure there is sufficient coverage of the types of matters important for providing effective assistance in a merits review process at the AAT;
- that the OMARA prioritise AAT referrals pertaining to RMA misconduct and promptly publish all sanction decisions in that regard, particularly cases involving a failure to comply with AAT Practice Directions;
- that the revised Code be introduced as soon as possible[82] along with the release of OMARA policy guidelines detailing examples and explanations about themes discussed in the Code, including best practice representation of clients at the AAT and steps RMAs can take to ensure they assist the AAT and its members to fulfil the Tribunal's statutory objective;
- that the OMARA support the AAT in its development and introduction of the tiering system by way of:
    - developing, with suitable AAT MRD and IAA input, and administering the Tier 3 entrance examination;
    - seeking advice from the AAT in relation to legacy RMAs who appear before the Tribunal and request an exemption from the Tier 3 entrance examination;
- that the OMARA not pursue a form of provisional licensing that permits inexperienced RMAs to assist clients with matters before the AAT MRD (or the IAA) under the supervision of another RMA. The risks to the consumer arising out of the blurred lines of responsibility through this arrangement, along with the additional burden imposed upon the AAT MRD and the IAA in dealing with two representatives, necessitate against such an approach;
- that the OMARA work in conjunction with the AAT MRD and the IAA to develop and deliver targeted educational sessions to RMAs with a view to specifying these as mandatory activities for Tier 3 RMAs under the tiering system;
- that the OMARA audit the activities of CPD providers to currency, accuracy and relevance of activities containing AAT-related content to ensure that RMAs are properly educated in relation to AAT practice, procedure and advocacy (including

[82] Almost 7 years have elapsed since then Dr Christopher Kendall (now Judge Kendall of the Federal Circuit Court of Australia) recommended "that the Department undertake a detailed consultation with interested parties to determine how best to address concerns in relation to the scope and content of the Code of Conduct and, after said consultation, amend the Code as then deemed feasible and appropriate". See Recommendation 17, *Independent Review of the Office of the Migration Agents Registration Authority* (Final Report, September 2014) page 31.

the professional etiquette required of them when appearing before the AAT and other review bodies).

3.6 Establishing an independent regulator

Summary of reform options	Matters for public feedback
Do *not* proceed with an Immigration Assistance Complaints Commissioner. Instead, strengthen relevant policies, legislation, processes and procedures to achieve the intention of the recommendation.	Implement initiatives that will give effect to the regulatory intent of a Complaints Commissioner. Do *not* establish an independent Complaints Commissioner. Do *not* establish a Complaints Commissioner within the Department. Whether to continue initiatives already underway to enhance consumer protection.

Summary view on reform option

208. I **do not support** this reform option**.**

Explanation for position

209. I consider that despite successive reviews and regulatory models, the current regulatory framework and governance arrangements for RMAs have to date proven to be inadequate and not fit-for-purpose.

210. I consider that the existing framework is unable to suitably protect vulnerable consumers and promote excellence within the migration advice industry.

211. I accept that many of the Department's reform proposals under consideration, if implemented and properly resourced, may collectively go some way towards bolstering consumer protection and sector integrity.

212. However, many key problems remain unaddressed, including the:

- specific failure to bring education agents within the purview of the regulatory scheme by way of conferring them with a prescribed agent status authorising them only to provide immigration assistance in connection with the preparation and lodgement of student visa applications;
- ongoing probity concern around the Department being responsible for both making decisions in relation to visa applications and regulating RMAs.

213. I note the Department's position that the establishment of an independent regulator:

- is unjustified in terms of cost, given the industry's size;
- will disrupt the ABF's law enforcement operations;

- be unable to realise from the efficiencies that currently exist in relation to information-sharing between the Department, the OMARA and the ABF.

214. It is worth stepping through each of these concerns in turn.

Budgetary cost

215. In relation to budgetary cost, I respectfully note that the Review Consultation Report does not provide any data or costings in relation to maintaining the existing framework and what an independent regulator model would indeed involve or require in that regard. It is therefore difficult to assess, as part of a thorough cost-benefit analysis, whether that cost is prohibitive or undue in the circumstances.

216. I suggest that government be provided such budgetary costings data in order to assist it in determining whether to persist with the existing framework or invest in a new regulatory model. To that end, I also suggest that any proposed budgetary modelling include an assessment of the impact of bringing education agents within the purview of an independent regulator.

ABF enforcement operations

217. In relation to the ABF's law enforcement operations, the nature and extent to which these may be disrupted has not been articulated in the Review Consultation Report. It is therefore difficult to assess the degree of disruption contemplated by the Department or indeed suggest possible mechanisms to avert or minimise that disruption (apart from those outlined below in relation to information flows).

218. For present purposes, I note the apparent absence of evidence of investigation and prosecution of unregistered practice. I am aware of only two recent successful prosecutions of unregistered conduct.[83] By way of comparison, it is worth noting at this juncture that New Zealand's independent regulator, the New Zealand Immigration Advisers Authority has a longer, and more visible, record of using its investigative powers and prosecuting unlicensed advisers.[84]

Flow of information

219. I acknowledge it would be critical to ensure the flow of information to the regulator is not inhibited. Currently, the OMARA relies and benefits heavily on the flow of information between it and the Department. Any barriers to the access of information can hamper the OMARA's monitoring and investigations as well as other activities. Any level of regulator independence from the Department may disrupt or delay these important information flows. For example, the regulator sending requests to the Department for information and awaiting a response may give rise to an unacceptable delay. Furthermore, disputes between the Department and the

[83] ABF, 'Fake migration agents sentenced' (News release, 20 December 2019) https://newsroom.abf.gov.au/releases/fake-migration-agents-sentenced ; ABF, 'Jail for serial fraudster migration agent' (News Release, 7 February 2021) https://newsroom.abf.gov.au/releases/3ab68c2c-8bd6-41b2-be79-0d86599bb20d

[84] See NZIAA website, Criminal proceedings at https://www.iaa.govt.nz/about-us/judicial-and-tribunal-decisions/ and Media release, 'Company director sentenced to community detention and ordered to pay $74,703 for immigration advice provided without license' (Media Release, 21 June 2021) https://www.iaa.govt.nz/about-us/news/company-director-sentenced-to-community-detention-and-ordered-to-pay-74703-for-immigration-advice-provided-without-license/

regulator may also arise in relation to the responsibility of each agency and the resources allocated to enable information flow.

220. Should an independent regulator be established, important information flows can be maintained by way of appropriate resourcing and ensuring that the enabling legislation authorises the disclosure of information collected by the Department to the regulator, where necessary and subject to appropriate safeguards,[85] and that the regulator's requests for information are prioritised by the Department.

A bold approach

221. I consider that in order to elevate the Australian migration advice industry to one that is truly world class, significant reform is needed. A bold approach is needed in order to build the industry's reputation and ensure a robust regulatory migration advice framework that prevents misconduct and unlawful advice. In line with the LCA's previous recommendation[86], I call upon the Australian Government to establish a suitably empowered and resourced regulatory agency independent of the Department, such as a Commission, to rise to the task.

[85] c.f. *Johns v Australian Securities Commission* (1993) 178 CLR 408; *Katsuno v R* [1999] 199 CLR 40 referred to recently in *Smethurst v Commissioner of Police* [2020] HCA 14.
[86] See Recommendation 1 of Law Council of Australia Submission to the Department of Home Affairs, *Creating a world class migration advice industry* (29 July 2020) https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf