Law Council
OF AUSTRALIA

Federal Litigation and Dispute Resolution Section

Creating a world class migration advice industry

Department of Home Affairs

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2020 Executive as at 1 January 2020 are:

- Ms Pauline Wright, President
- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Federal Litigation and Dispute Resolution Section is made up of lawyers who have litigation and dispute resolution practices in Federal Courts and tribunals. But it is also much more than that. Its real areas of activity may be seen from an outline of its committee structure. This is where all the work is done and all the action takes place.

The main activities of the Section may be categorised as follows:

- maintaining professional contact between practitioners in all parts of the country within the areas of interest covered by the Section;
- conducting seminars, conferences and other information sessions on the latest developments; and
- advising the Law Council on matters of law and procedure, both to assist in the development of policy and as background (and often foreground!) for the Council's liaison and lobbying functions.

Members of the Section Executive are:

- Mr John Emmerig, Chair
- Mr Peter Woulfe, Deputy Chair
- Ms Heidi Schweikert, Treasurer
- Mr Ian Bloemendal
- Mr Simon Daley
- Mr David Gaszner
- Mr Robert Johnston
- Ms Bronwyn Lincoln
- Ms Georgina Costello SC
- Mr Ingmar Taylor SC
- Mr Tom McDonald

Executive Summary

1. The Migration Law Committee (**the Committee**) of the Law Council of Australia's Federal Litigation and Dispute Resolution Section welcomes the opportunity to provide a submission to the Commonwealth Government's Migration Advice Industry Reform Discussion Paper 'Creating a world class migration advice industry'.[1]
2. Australia is an economically and culturally diverse nation which has, since the end of World War II, encouraged and supported a large migration program. This is reflected in the range of permanent migration opportunities presently available within the broad migration policy categories of skilled, family, special eligibility migration and humanitarian migration.
3. In addition to permanent migration, Australia also provides significant opportunities for temporary entry to Australia under many specific visa categories, in broad areas such as: studying and training; family and spousal; and working and skilled visa programs.
4. 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.
5. 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.
6. The Committee therefore supports strong and effective regulation of the migration advice sector to maintain the integrity of the migration system and to protect the interests of users of migration agent services.
7. Lawyers practising in the area of immigration law are subject to independent and rigorous regulation and entry to practice requirements to protect consumers. However, it is timely to consider what reforms are needed to the regulation of migration agents in order to protect consumers and maintain the integrity of Australia's immigration system.
8. The Committee proposes a strengthened regulatory regime to protect consumers of migration services and to promote the integrity of the migration services sector. This approach would complement the following initiatives implemented by the Commonwealth Government:
    - the recent passage of the *Migration Amendment (Regulation of Migration Agents) Act 2020* (Cth) (**Regulation of Migration Agents Act**) 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;

[1] 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>.

- 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.

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, the Committee recommends a stronger system for the regulation of Australian migration agents.

10. The Committee submits 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.

11. The framework proposed by the Committee incorporates the following elements:

    - an independent statutory authority to regulate registered migration agents (**RMAs**) and education agents in order to combat misconduct by registered agents and unlawful providers, and thereby protect consumers and build confidence in the industry;
    - enhanced qualification requirements and the maintenance of testing upon entry;
    - a tiered registration system that will 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 to facilitate regulation.

12. Details of the proposed framework are set out in the Committee's 26 recommendations.

Recommendations

Recommendation 1

- That the Australian Government create, by statute, an independent statutory authority empowered to regulate and govern RMAs and education agents. The mandate of the new regulatory body should include: protection of the public by maintaining high ethical standards, so as to preserve the integrity of the system; and, protection of applicants from exploitation by maintaining high standards of competence and encouraging reasonable fees for services rendered. In line with recommendation 3 of the recent Joint Standing Committee on Migration's *Report of the inquiry into efficacy of current regulation of Australian migration and education agents*, the new regulator be properly resourced and empowered to:
    - resolve complaints about immigration services;
    - detect, deter, disrupt, investigate and prosecute unregistered practice;
    - impose sanctions or fines and/or ordering the payment of costs, payment of refund or compensation;

- publish RMA performance data;
- educate people and immigration businesses and agents about best practice complaints handling and resolution; and
- provide information to the Minister in relation to any of the regulator's functions, if requested.

Recommendation 2

- That persons seeking to become a RMA demonstrate to the regulator, prior to undertaking a prescribed exam for entry into the industry, that they meet the English language proficiency requirement having achieved an overall band score of at least 7.5 in the Academic Module of the IELTS (scoring at least 6.5 on each of the four testing components – Listening, Speaking, Reading, Writing).

Recommendation 3

- That the Occupational Competency Standards for RMAs be revised to include detailed guidance in relation to the different types of skills, including communication skills, required for competent practice in each of the three tiers of practice in the proposed tiered registration system.

Recommendation 4

- That the regulator be empowered to suspend a RMA from practice or restrict their scope of practice where it is satisfied that the RMA does not possess the ability to deliver competent service as articulated in the Occupational Competency Standards for Registered Migration Agents. This restriction may be removed by the regulator once it is satisfied that the person possesses the requisite skills required to resume practice.

Recommendation 5

- That a competency-based assessment, such as the Migration Agents Capstone Assessment, continue to be used as a prescribed exam for entry to the industry. Upon the introduction of the proposed tiered registration system, all persons seeking to obtain provisional RMA status must pass such an assessment and the assessment should be recalibrated towards an examination of the level of knowledge, skills and aptitudes required to competently practise in Tier 1 on a supervised basis.

Recommendation 6

- That government assess the efficacy and suitability of the prescribed courses in terms of preparing students to undertake the competency-based assessment and enter the migration advice industry.

Recommendation 7

- That the professional indemnity insurance 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 eg, 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).

Recommendation 8

- That the legislative provisions relating to fitness, propriety and integrity be strengthened by:
    - enabling the regulator to take into account a person's knowledge of migration law, policy and procedure (rather than mere knowledge of migration procedure);
    - broadening the scope of the matters that the regulator may take into account, particularly concerning a person's relationships, current or previous, with individuals who are not persons of integrity (particularly individuals who have been sanctioned by the regulator and/or penalised for an offence involving the unlawful provision of immigration assistance); and
    - specifying additional assessment criteria including, but not limited to, academic misconduct or plagiarism (particularly in connection with a prescribed course, prescribed exam or other competency assessment specified by the regulator).

Recommendation 9

- That the regulator be empowered to impose conditions upon a person's registration where it has been satisfied on reasonable grounds of non-compliance or misconduct. These conditions may be used in conjunction with a power to restrict the RMA's scope of practice until such time as competency has been demonstrated to the regulator's satisfaction.

Recommendation 10

- That all provisionally registered migration agents be required to complete a 12 month period of supervised practice to acquire, develop and consolidate the knowledge, skills and experience thought necessary for future unrestricted work as a Tier 1 RMA. The supervised practice scheme should be developed by the regulator, drawing upon elements of existing requirements for supervised practical experience for entry into the Australian legal profession, with a preference towards an articled clerkship style arrangement, and the supervised practice scheme administered by the Immigration Advisers Authority in New Zealand.

Recommendation 11

- That government prioritise the development and introduction of a system of tiered registration in relation to the categories of services individual RMAs are permitted to provide, the higher tiers restricted to those members of the industry with sufficient competency to conduct cases before the AAT (Migration and Refugee Division), the Immigration Assessment Authority and requests for Ministerial intervention under sections 195A, 197AB, 197AD, 351 or 417 of the Act. The regulator should develop, in conjunction with the relevant review authorities and the Department's Ministerial Intervention Unit, specific competency assessments to be administered by the regulator to enable RMAs to undertake to facilitate their transition into a higher tier. The regulator should not permit industry any role in determining which RMAs qualify to move into a higher tier.

Recommendation 12

- That the definition of immigration assistance be redefined in accordance with the proposed tiered registration system whereby the categories of services

individual RMAs are permitted to provide are clearly specified in accordance with each Tier. To avoid ambiguity and the risk of RMAs engaging in unauthorised work, that may give rise to the imposition of sanctions and penalties, the legislation should specifically prohibit representation or other involvement by RMAs in court-related and judicial review matters, Administrative Appeals (General Division) matters and citizenship matters.

Recommendation 13

- That the Continuing Professional Development (**CPD**) framework be revised in accordance with the proposed tiered registration system to facilitate the provision of more targeted CPD to RMAs, some of which must be undertaken with the regulator. Those RMAs in higher tiers should be permitted greater freedom when selecting from the range of activities offered by approved CPD providers.

Recommendation 14

- That the Occupational Competency Standards for RMAs dated September 2016 be revised in order to reflect the proposed tiered registration system as well as further articulate the scope of permitted practice to be provided by, and the standard of competence practice expected of, RMAs in each Tier. The United Kingdom Office of the Immigration Services Commissioner's Guidance on Competence could be used as a suitable to model to inform revisions to the Australian competency standards.

Recommendation 15

- That the scope of the regulatory scheme be broadened such that organisations offering immigration assistance to consumers must also be registered.

Recommendation 16

- That an Industry Fidelity Fund is established to help provide financial reimbursement to persons who suffer pecuniary loss through the criminal or fraudulent actions of a RMA or their employees in the course of providing immigration assistance.

Recommendation 17

- That the regulator collect information from RMAs in relation to the professional fees charged for various services and, with appropriate qualification and guidance addressed to the consumer, publish (and annually update) average fee information on its website.

Recommendation 18

- That the legislation be amended to increase the penalty for unlawful providers of immigration assistance and provide for a wider range of enforcement powers to enable the regulator and other agencies to coordinate appropriate responses when combatting misconduct and unlawful activity. The Commonwealth should prioritise activities to address the problem of unregistered practice and dedicate sufficient resources to achieve this goal.

Recommendation 19

- That the legislation be amended to adequately empower the regulator, and the Australian Border Force where necessary, to fulfil their duties of monitoring and investigating misconduct by RMAs and unlawful operators. Should an independent regulator be established, it is recommended that the enabling legislation authorise the disclosure of information collected by the Department

to the regulator where necessary and subject to appropriate safeguards, and that the regulator's requests for information are prioritised by the Department.

Recommendation 20

- That the regulator be appropriately resourced and guided in order to ensure that its activities are better understood by consumers, RMAs and other stakeholders.

Recommendation 21

- That the regulator be empowered with the authority to order a Departmental delegate to prioritise the making of a decision on a complainant's visa application/matter within a prescribed period if that will facilitate early resolution of the complaint and secure a just outcome.

Recommendation 22

- That where the regulator has been satisfied on reasonable grounds of a RMA's non-compliance or misconduct, and that this has caused an immigration problem for the client, the regulator be empowered with the authority to refer a complainant's immigration issue to the Minister in order for him or her to consider personally intervening where such intervention could ameliorate or resolve the immigration problem.

Recommendation 23

- That education agents be brought 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.

Recommendation 24

- That when the Department suspects that an application has been prepared by someone other than the applicant, who has been paid for their services and who is neither an Australian legal practitioner nor a RMA, the Department should continue to process the application, and engage the regulator to advise the applicant of the Department's suspicion, and inform the applicant how to find a properly authorised representative. If the applicant responds to this approach by the regulator, the Department should then also allow the applicant the opportunity to review the information provided by the unregistered operator and, if in good faith, the applicant or someone on the applicant's behalf has submitted an application which contains any error or misrepresentation not authorised or previously known to the applicant, the applicant should be permitted to correct the errors or misrepresentations made by the unregistered operator.

Recommendation 25

- That the Department provide to all potential newcomers at the beginning of their application process the rules governing representation by Australian legal practitioners and RMAs in the languages most used by prospective immigrants and that this information be on the Department's website and as part of its application forms. Further, that the Department direct applicants to the regulator's public list of sanctioned RMAs (current and former), explain the risks in using the services of an unregistered operator, and notify applicants of the assistance available from the regulator and those bodies regulating the services of Australian legal practitioners.

Recommendation 26

- That the Department work in consultation and collaboration with overseas posts and other stakeholders to develop education campaigns in foreign markets with a prevalence of unregistered operators who target immigrants to Australia, and with local media for a range of multicultural audiences to educate on registered practice, the immigration process, and to counter misleading and inaccurate information.

History and the need for bold reform

13. Regulation of the migration advice sector commenced in 1948.[2] Over the past 28 years, sector regulation has been the subject of eight different reviews including the present review. A summary of the sector's history and key features of those reviews over the past 28 years is set out below.

Pre-September 1992: Departmental registration scheme

14. Prior to September 1992, anyone wanting to practise as a migration agent was required to inform the then Department of Immigration, Local Government and Ethnic Affairs in writing of their intention to do so. Acknowledgement by the Department constituted accreditation. Under this model, there was no monitoring of the migration advice sector.

15. Issues of concern raised about this scheme were:

- there was evidence of unscrupulous conduct and incompetent advice being given by persons holding themselves out as experts in migration;
- culturally and linguistically vulnerable consumers were being exploited and asked to pay enormous costs for services that were inappropriate;
- there was a perceived imbalance of power between the adviser and the client; and
- many clients whose primary language was not English were unaware of avenues of redress when poor or unethical services were rendered to them.

September 1992 - 1998: MARS

16. In September 1992, the Migration Agents Registration Scheme (**the MARS**) was established. Its principal objective was to protect consumers of immigration advice against professional misconduct and to ensure that consumers had access to affordable and quality advice.

17. The MARS also created the Migration Agents' Registration Board (**the MARB**), charged with regulating the migration advice sector. The MARB comprised five persons:

- the Department Secretary or delegate;

[2] For a summary of the statutory scheme and arrangements governing migration agents between 1948 and 1992, see paragraphs 2.70 – 2.90 of JSCM, Parliament of Australia, *Protecting the Vulnerable? The Migration Agents Registration Scheme* (Final Report, May 1995).

- the Principal Member or a Senior Member of the Immigration Review Tribunal; and
- three others appointed by the Minister.

18. The MARB was administered by the then Department of Immigration, Local Government and Ethnic Affairs.

19. The Joint Standing Committee on Migration (**the JSCM**) investigated the operation and effectiveness of the MARS during 1994 and 1995. In its Inquiry Report that was published in May 1995, 49 recommendations were made to improve the MARS, including that:

    - advice, representation and assistance given in relation to criminal deportations before the Administrative Appeals Tribunal (**the AAT**) should remain outside the scope of the MARS;
    - lawyers remain exempt from the requirement to register as migration agents when undertaking preparation or representation in relation to visa refusals or cancellations before the AAT;
    - broader powers to impose sanctions against migration agents be conferred on the MARB, including powers to impose fines and range of orders against agents including for the refund of fees, to pay compensation to a client, to return a client's documents, to undertake further education, and in relation to an agent's management and employment practices;
    - subject to the appropriate expansion of the MARB's functions and powers, decisions of the MARB be appealable only to the Federal Court of Australia on a question of law; and
    - the MARB produce its own annual report to be presented to the Minister of Immigration and Ethnic Affairs and tabled in Parliament.

March 1998 to June 2009: MARA and the Hodges Review

20. On 23 March 1998, following a review of the MARS that was handed down in March 1997, the then Minister for Immigration appointed the Migration Institute of Australia (**the MIA**) to assume the role of the Migration Agents Registration Authority (**the MARA**) as a statutory, self-regulating body. The Government had proposed that the migration advice industry move to voluntary self-regulation through a period of statutory self-regulation. This decision was based on recommendations of the 1996 Review of the MARS.[3] Voluntary self-regulation is generally understood to mean that there is no legislative framework for the industry, apart from consumer protection mechanisms such as small claims tribunals and the potential for clients to take legal action against agents under the *Trade Practices Act 1974* (Cth) and/or civil action for damages.

21. The aim of the MARA was to 'reduce the red tape burden on small business while maintaining consumer protection for people in the community vulnerable to exploitation.' Key issues that led to the establishment of the MARA included:

    - support from the sector to move towards self-regulation;

[3] Department of Immigration and Multicultural Affairs, *Review of the Migration Agents Registration Scheme* (Report, March 1997) recommendations 7, 8 and 9.

- general agreement that sector members needed to meet competency and ethical standards as set by a regulatory body; and
- the need for the regulatory body to be able to discipline members who breached the Code of Conduct for RMAs (**the Code**).

22. The MIA was appointed as the MARA to administer the relevant provisions of the *Migration Agents Regulations 1998* (Cth) (**the Regulations**) and to undertake the role of regulator. Amongst other things, the Regulations included the Code.

23. Two reviews of the Statutory Self-Regulation of the Migration Advice Industry were conducted and reported in August 1999[4] and September 2002.[5]

24. Key findings from the 1999 and 2002 reviews included that:

- the regulatory arrangements were yet to reach their full potential in terms of consumer protection and professionalism within the industry;
- the profession was not ready to move to full self-regulation and that the period of statutory self-regulation be extended; and
- the Department and the regulatory body work together to increase the level of consumer confidence and to decrease the number of complaints.

25. A third Review of Statutory Self-Regulation of the Migration Advice Profession (**the Hodges Review**) was commenced in 2007 and reported to the government in May 2008. The Hodges Review spanned a period of 14 months. It was conducted by the Department of Immigration under the guidance of an External Reference Group (**the ERG**). The ERG was chaired by the Hon. John Hodges, with the assistance of three others: Mr Glenn Ferguson, Ms Helen Friedman and Mr Len Holt.

26. As part of the inquiry process for the Hodges Review, a Discussion Paper was released in September 2007 inviting stakeholders to make submissions on the profession's readiness to move from statutory self-regulation and other issues in relation to the migration advice profession.

27. Overall, the Hodges Review found that:

- there was overwhelming opposition to the profession moving to self-regulation;
- the arrangement whereby the MIA operated as the MARA had created perceived and potential conflicts of interest resulting in a lack of consumer confidence, such that the government should consider establishing a regulatory body separate to the MIA;
- there was dissatisfaction amongst stakeholders regarding the handling of complaints against migration agents. The Review found that the regulatory body needed additional powers and needed to work in closer co-operation with the Department and other bodies such as the Law Council of Australia and the Australian Competition and Consumer Commission in order to address these issues;
- there needed to be significant changes made to the entry requirements in order to improve professional standards. Recommended changes included the Graduate Certificate be replaced by a Graduate Diploma as soon as

[4] Australian Department of Immigration and Multicultural Affairs, 'Review of statutory self-regulation of the migration advice industry' (August 1999).
[5] Department of Immigration and Multicultural and Indigenous Affairs, 'Review of statutory self-regulation of the migration advice industry' (September 2002).

practicable; the English language requirements be increased and newly qualified migration agents be required to undertake a year of supervised practice;

- Part 3 of the *Migration Act 1958* (Cth) (**the Act**) be simplified with details moved to regulations where appropriate. In simplifying this legislation, where practicable, previously agreed changes should be effected;
- the definition of 'immigration assistance' in the Act should be amended to:
    - remove references to court related work and ensure that the definition does not lead to migration agents engaging in the practice of law when not qualified to do so;
    - ensure that it applies to immigration assistance provided to all clients, not just visa applicants or cancellation review applicants;
    - clarify the distinction between immigration assistance and migration advice; and
    - define the context in which the client/advisor relationship arises;
- to help address the issue of unregistered agents acting as authorised recipients, strategies be developed to increase the availability of non-commercial migration agents in the community sector;
- the Continuing Professional Development (**CPD**) requirements needed to be simplified and streamlined – especially for experienced migration agents with good track records; and
- priority processing should be provided to decision ready applications – whether they be submitted by a migration agent or an applicant directly.[6]

28. The Hodges Review made 57 recommendations. Importantly, the Review recommended that an independent statutory body with greater powers to protect consumers be established to regulate the profession. It was also recommended that the regulatory framework be strengthened and clarified and that entry requirements be raised.[7]

July 2009 to September 2014: OMARA and the Kendall Review

29. Due to the failure of industry self-regulation and a choice made by government not to establish a regulatory body that was fully independent from the Department, the Office of the Migration Agents Registration Authority (**OMARA**) was then established to operate as a discrete office attached to the then Department of Immigration and Border Protection. This office and its structure arose in response to the recommendations of the 2007-08 Hodges Review. Arrangements governing the appropriate disclosure and use of information between the OMARA and the Department were set out in a Memorandum of Understanding dated 16 June 2010.
30. The OMARA was led by two SES Band 1 officers; a Chief Executive Officer (**CEO**) with primary responsibility for external stakeholder relationships and leading the

[6] The Hon. John Hodges, *Review of the Statutory Self-Regulation of the Migration Advice Profession* (Final Report, May 2008).
[7] Dr Christopher Kendall, *Independent Review of the Office of the Migration Agents Registration Authority* (Final Report, September 2014) 4-6.

reform agenda and a Deputy CEO with a primary focus on the internal governance and practice. In July 2009 the then Minister appointed an Advisory Board to the OMARA to provide advice and guidance to the CEO. The Board met four times a year to discuss and to advise on pertinent regulatory matters.

31. In 2012, the OMARA consolidated to one CEO who reported directly to the Secretary of the Department.

32. In June 2014, the then Assistant Minister announced a further independent review of the OMARA and appointed Dr Christopher Kendall as the independent reviewer with support by a secretariat of the Department (**the Kendall Review**). In September 2014, Dr Kendall made 24 recommendations, some of which were not accepted by the then Australian Government. For example, the OMARA advised the LCA that recommendation 15 'that a system of registration be implemented involving a year of supervised practice' was not accepted by the Government.

33. Notably, recommendation 23 'the inquiry recommends that the OMARA's position within the Department be fully consolidated so that it is entirely and unequivocally part of the Department' was accepted by Government and in 2015 the OMARA consolidated into the NSW Regional Office reporting to the Regional Director NSW/ACT.

34. It is important to note that the Kendall Review and Hodges Review received submissions expressing a preference for the creation of an independent statutory body to regulate migration agents. In relation to this issue, the Hodges Review noted that:

> *As per the models that have been adopted by the legal profession, an independent statutory body may be appropriate. However, as an independent statutory body for the migration advice profession would be regulating a relatively small profession, models may need to be identified whereby such a body could be supported by another body, noting that very small organisations have economy of scale issues that can make them unsustainable*.[8]

35. At the time this finding was made by the Hodges Review, there were 3,755 migration agents registered with the MARA.[9] Following the commencement of Schedule 1 to the *Regulation of Migration Agents Act*, it is anticipated that there will be between 5,000 – 5,500 migration agents registered with the OMARA.

36. It is apposite to consider the findings which supported recommendation 23 in the Kendall Review:

> *Given the relatively small size of the migration advice profession, the creation of an independent statutory body to perform the role of the OMARA would be unsustainable.*
>
> *Importantly, the Inquiry finds that the economy of scale issues identified in the Hodges Review in 2008 are all the more acute today. The Inquiry notes, in particular, the recommendations made in this Report - specifically, the recommendations to significantly decrease the size of the sector (removing lawyers from the scheme will reduce its size by around one third) and limit the*

[8] The Hon. John Hodges, *Review of Statutory Self-Regulation of the Migration Advice Profession* (Final Report, May 2008) 25.
[9] Ibid 17.

scope of the activities currently being regulated by the OMARA (for instance, CPD and current entry qualifications).

The Inquiry does not accept calls made by some stakeholders for the creation of an independent statutory body. The Inquiry is of the opinion, however, that the current hybrid model does need to be amended. This is because the operation of the OMARA as a discrete office attached to, but not fully operating as a normal business unit of, the Department has:

a. only partially resolved the economy of scale issues discussed above; and

b. maintained certain operational barriers that purport to uphold the OMARA's independence but that, in effect, inhibit the development of more robust consumer protection measures. "

Taking these points in turn, the hybrid model has given rise both to duplication of effort for the OMARA for some administrative functions (ie., governance measures including probity reporting, FOI, Privacy provisions) and an inability for the OMARA to capitalise on potential administrative efficiencies by using or leveraging Departmental resources and capacities (such as its IT systems and resources). As a small office, it is inefficient for the OMARA to provide these services by itself.

Equally problematic is the fact that OMARA operates under restrictions the rationales for which is difficult to understand or justify.

Whether considered from the point of view of consumer protection or maintaining public confidence in the integrity of Australia's migration programme, there is a regulatory continuum across the migration advice arena.

The risks faced by consumers in this field need to be identified and mitigated as part of an integrated regulatory strategy. Under the current hybrid model, the division of responsibilities between the OMARA and the Department fragments the approach taken and, in the Inquiry's opinion, risks inhibiting the development and implementation of an integrated strategy.

The Inquiry is aware of cases, for example, where the OMARA has sanctioned a registered migration agent, with the effect of preventing that person from practicing, only to have allegations surface that the same person has continued practicing as an unregistered agent.

This interconnection of risk was acknowledged by the Hodges Report:

> *the Department currently has responsibility for addressing unregistered practice and criminal conduct by registered migration agents which are often intertwined with complaints investigated by the MARA [which was at that time performed by the MIA] … there would be value in facilitating greater information exchange and cooperation between the MARA and the Department …*

It is essential for consumer protection outcomes that there be timely and effective cooperation between the OMARA and the different areas of the Department responsible for the investigation of alleged unregistered practice or criminal conduct by registered agents.

The Inquiry finds, however, that the location of the OMARA as a discrete office attached to the Department, and operating under various information sharing restrictions, inhibits or makes it more difficult to develop a strategically-integrated approach to regulating the intertwined risks present within the migration advice sector.

The Inquiry finds that the current hybrid model, which was a compromise framework created to alleviate the concerns of some stakeholders about

independence, has given rise to a less than, rather than the most, optimal situation by:

- *engendering a lack of clarity for clients, stakeholders and members of the public concerning the roles, responsibilities and functions of the OMARA and the Department;*
- *preventing the OMARA from fully realising the administrative efficiencies and benefits that should flow from operating as part of a large Department; and*
- *acting as a dampener on information sharing and the leveraging of capabilities and assets that can be directed at reducing risks in the sector and on its fringes.*

A review of all of the submissions received by the Inquiry reveals that when discussing "independence" or "where the OMARA should be located" those querying the effectiveness of the current model seem, primarily, to be concerned with:

- *the Department's role in disciplining migration agents;*
- *what many perceive as too great a role by the OMARA in relation to issues best left to other entities; and*
- *whether the Department would play too great a role in the industry were the OMARA more fully integrated into the Department.*

The Inquiry has noted in Chapter Seven of this Report that concerns in relation to serious disciplinary matters are valid. Perception does matter and it is less than ideal to have the OMARA both investigating and ultimately hearing and making determinations about serious disciplinary breaches that might ultimately result in an agent being denied the right to practice. The Inquiry has recommended that this issue be addressed by allowing the Administrative Appeals Tribunal to adjudicate serious disciplinary matters after an initial information gathering stage and investigation by the OMARA.

The Inquiry has also accepted that the OMARA plays too great a role in relation to the regulation of CPD and in relation to the regulation of the educational entry qualifications for migration agents. In that regard, the Inquiry has recommended that the OMARA's role be significantly reduced.

The Inquiry has also recommended that lawyer agents be removed from the current regulatory scheme, such that they now be regulated solely by the relevant legal service regulators throughout Australia.

The Inquiry is of the view that, should these recommendations be implemented, the end result will be a more stream-lined OMARA that can, quite comfortably, sit within the Department. The benefits of such a system can be summarised as follows:

- *a centralised system for the sharing of information and expertise;*
- *an educational structure that allows those persons and entities who are best equipped to provide high quality educational training to do so without unnecessary interference from a government body that was never designed to have expertise in this area; and*
- *costs savings of the sort that result from a more stream-lined administrative structure, with said costs savings potentially able to be passed on to migration agents via reduced registration fees.*

In these circumstances, the Inquiry does not accept that there is need for the adoption of a separate Independent Immigration Commission of the sort adopted in the United Kingdom. This would add a further layer of regulation to an industry that, based on the submissions received by the Inquiry, seems keen to avoid regulation and multiple layers of bureaucracy.

Accordingly, the Inquiry rejects the current hybrid model as either appropriate or efficient and recommends … that the OMARA's position within the Department be fully consolidated so that it is entirely and unequivocally part of the Department.[10]

October 2014 to the present: OMARA and the JSCM Inquiry

37. Since October 2014, the OMARA has implemented a range of recommendations arising out of the Kendall Review. Of note, the OMARA commenced consultations with industry in 2016 for the purpose of introducing a revised Code. Extensive stakeholder consultations concluded in December 2019 and the OMARA is progressing work on a revised version for consideration by the Government.

38. On 14 March 2018 the Hon. Alex Hawke MP, the then Assistant Minister for Home Affairs, asked the JSCM to inquire into and report on the efficacy of current regulation of Australian migration agents. In its Report that was tabled in Parliament on 21 February 2019, the Committee made 10 recommendations. In order to improve consumer protection, the JSCM recommended:

- amending the Act to establish an Immigration Assistance Complaints Commissioner (**the IACC**) with the power to:
    - resolve complaints about immigration services;
    - detect, deter, disrupt, investigate and prosecute unregistered practice;
    - impose sanctions or fines and/or ordering the payment of costs, payment of refund or compensation;
    - publish RMA performance data;
    - educate people and immigration businesses and agents about best practice complaints handling and resolution; and
    - provide information to the Minister in relation to any of the IACC's functions, if requested;
- that the Australian Government establish an education agent register and introduce a demerit point system for education agents as part of the *Education Services for Overseas Students Act 2000* (Cth) (**the ESOS Act**) and National Code of Practice for Providers of Education and Training to Overseas Students; and
- that the Australian Government publish a register containing performance data on migration and education agents.[11]

[10] Dr Christopher Kendall, *Independent Review of the Office of the Migration Agents Registration Authority* (Final Report, September 2014) 155-157.
[11] JSCM, Parliament of Australia, *Inquiry into efficacy of current regulation of Australian migration and education agents* (Final Report, February 2019) ix-xvii.

39. The JSCM also made a number of additional recommendations aimed at ensuring that Australia's RMAs and education agents are truly 'world class' providers of immigration assistance including:

    - a review of the current registration requirements for migration agents, having regard to:
        - the effectiveness of the current registration requirements;
        - technical proficiency through education;
        - English proficiency;
        - peer assessment;
        - issuing of a practising certificate;
        - regulation by legal bodies; and
        - changing migration agent nomenclature;
    - all new migration agents be required to complete a period of supervised practice;
    - that registered providers ensure that education agents have the appropriate education and training prior to entering into a written agreement; and
    - that registered training organisations review written agreements with their education agents annually to ensure that they complete an appropriate number of professional development activities each year.[12]

40. Following the enactment of the Regulation of Migration Agents Act, which received Royal Assent on 22 June 2020, the Government is now examining how legislation can support a highly qualified and professional industry and ensure Government can effectively combat misconduct and unlawful operators. To that end, on 26 June 2020, the Department released its Discussion Paper 'Creating a world class migration advice industry'. Legislation within the review's scope includes:

    - the Act – Part 3 only;
    - *Migration Agents Registration Application Charge Act 1997* (Cth)*;*
    - The Regulations*;*
    - *Migration Agents Registration Application Charge Regulations 1998* (Cth)*;*
    - *Migration Agents (IMMI 17/047: CPD Activities, Approval of CPD Providers and CPD Provider Standards) Instrument 2017;* and
    - *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018.*

41. Specifically outside the review's scope is:

    - the legislation that is currently before Parliament and directly relates to the migration advice industry; and
    - the Code.

[12] Ibid.

The need for bold reform

42. Despite successive reviews and regulatory models, the current regulatory framework and governance arrangements are not fit for purpose. The existing framework is unable to suitably protect vulnerable consumers and promote excellence within the migration advice industry. 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. The Committee calls 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.

Recommendation 1

- **That the Australian Government create, by statute, an independent statutory authority empowered to regulate and govern RMAs and education agents. The mandate of the new regulatory body should include: protection of the public by maintaining high ethical standards, so as to preserve the integrity of the system; and, protection of applicants from exploitation by maintaining high standards of competence and encouraging reasonable fees for services rendered. In line with recommendation 3 of the recent Joint Standing Committee on Migration's *Report of the inquiry into efficacy of current regulation of Australian migration and education agents*, the new regulator be properly resourced and empowered to:**
  - **resolve complaints about immigration services;**
  - **detect, deter, disrupt, investigate and prosecute unregistered practice;**
  - **impose sanctions or fines and/or ordering the payment of costs, payment of refund or compensation;**
  - **publish RMA performance data;**
  - **educate people and immigration businesses and agents about best practice complaints handling and resolution; and**
  - **provide information to the Minister in relation to any of the regulator's functions, if requested.**

Theme 1: A qualified industry

Suitability of existing entry requirements to become a RMA

English language proficiency

43. The current requirement for migration agents under the International English Language Proficiency Test (**IELTS**) is a score of at least 6.5 in each Band, and an overall Band Score of 7.0. An overall Band Score of 7.0 denotes a *good user* of the English language, but still having 'occasional inaccuracies, inappropriate usage and misunderstanding in some situations.' The current requirements mean a person who

could not achieve 7.0 within each Band, would commonly experience inaccuracies, inappropriate usage and misunderstandings in their use and interpretation of English language.

44. The Committee reiterates its position that the work undertaken by RMAs can be linguistically demanding. RMAs work within a very complex area of law and administrative policy and practice, with potentially significant adverse consequences for clients if errors are made when interpreting, explaining and applying law and policy. Although communicating with clients from non-English speaking backgrounds may form a proportion of a RMA's workload, it is very important that every RMA has sufficient English language proficiency to:

    - understand and interpret complex legislation;
    - explain documentation or correspondence that is in English;
    - draft documents in English, including completing forms and statements; and
    - speak, listen, read, write and otherwise communicate effectively with the Department of Home Affairs and other relevant authorities.

45. The Committee's view is that an RMA should be required to demonstrate the same level of English language proficiency as that required to enter the legal profession. This would require an RMA to achieve an English language proficiency Band Score at an average of 7.5 under the Academic version of the IELTS, which denotes an *acceptable*, rather than *probably acceptable* level of English language proficiency. The Committee notes, by way of additional context, that foreign lawyers seeking admission to the Australian legal profession are required to achieve minimum IELTS scores of 8.0 for writing, 7.5 for speaking and 7.0 for reading and listening.

46. The Committee notes the following guidance on the OMARA's website addressed to persons intending to become a RMA who must undertake the entrance test that is currently offered by The College of Law (**COL**):

    > *The OMARA has received some feedback from the College of Law that a lack of English language proficiency may have had an adverse impact on candidates' performance in the Capstone. Individuals intending to register as a migration agent should be aware that the English proficiency required for registration as a migration agent is an overall score of IELTS 7 or TOEFL [Test of English as a Foreign Language] 94, with minimum acceptable scores in each subtest – see the information on this website for full details of the English language requirement.*
    >
    > *The English language requirement applies to all initial applicants for registration (other than lawyers), including those who have completed the Graduate Diploma and passed the Capstone.*
    >
    > *Individuals considering a career as a migration agent may wish to undertake an English language test prior to enrolling in the Graduate Diploma to ensure they have the requisite language skills to ultimately register as a migration agent. The English language test results are valid for two years for registration purposes. Those who cannot achieve the required score may benefit from undertaking English language studies to improve their proficiency before committing to the*

significant financial outlay required for completion of the Graduate Diploma and Capstone assessment.[13]

47. The Committee recommends that persons seeking to undertake the relevant entrance test be required to provide a valid IELTS test certificate (Overall Band Score of at least 7.5 under the Academic version of IELTS test, scoring no less that 6.5 on each of the four testing components – Reading, Writing, Listening and Speaking) to the COL as part of the enrolment process. Subject to passing the entrance test, this same certificate should be used for initial RMA registration application purposes, at which point the OMARA can, if required, assess its authenticity.

Canada

48. The Immigration Consultants of Canada Regulatory Council (**the ICCRC**) regulates Canadian immigration and citizenship consultants and Canadian international student advisors. Currently, all persons seeking to become an immigration consultant in Canada must pass the Regulated Canadian Immigration Consultant Entry-to-Practice Exam (**EPE**) after completing a prescribed entry-level qualification. In order to register for the EPE, persons must provide evidence of having achieved at least the minimum required score on an approved language proficiency test no more than 2 years before the intended EPE date and have their marks included with the application form.[14]

49. Since 1 July 2019, a person must demonstrate having met Canadian Language Benchmark Level 9 which is equivalent to the following minimum scores on each component of the IELTS Academic Test:

    - Listening 8.0
    - Speaking 7.0
    - Reading 7.0
    - Writing 7.0

New Zealand

50. In terms of English language proficiency testing, advisers must undertake and IELTS Academic test and must achieve an overall band score of at least 7 and at least the following scores on each component:

    - Listening 6.5
    - Speaking 6.5
    - Reading 6.5
    - Writing 7.0

51. However, unlike Australia, advisers must also be able to demonstrate:

    - the ability to complete written documentation in English to a professional standard including: forms; letters; emails; client file notes; written agreements; and detailed and well- structured written submissions, arguments or presentations; and

[13] See OMARA, 'Capstone assessment – English proficiency' <https://www.mara.gov.au/becoming-an-agent/registration-requirements/knowledge-requirements/capstone-frequently-asked-questions/ >.
[14] ICCRC, 'Registration Guide' (2018) <https://registration.iccrc-crcic.ca/admin/contentEngine/contentImages/File/Registration_Guide_2018001_Regular_FINAL_ENG.pdf>.

- the ability to communicate orally in English to a professional standard including: conducting telephone and face-to-face interviews; active listening; dealing with conflict; and delivering detailed and well-structured oral presentations, submissions or arguments.[15]

52. Registered advisers may have their licence limited or cancelled by the New Zealand Immigration Advisers Authority (**the NZIAA**) where these competencies are not demonstrated in practice.

United Kingdom

53. In terms of English language proficiency testing, the Office of the Immigration Services Commissioner (**the OISC**) considers that it is essential for an adviser to be able to communicate clearly and accurately in English in order to be able to represent their client effectively when dealing with the Home Office, the Tribunals Service and other relevant third parties.

54. The OISC's Guidance on Competence[16] contains detailed guidance on the communication and comprehension skills expected of advisers applying at the three different levels of practice as follows:

- Level 1 – Straightforward advice and assistance
    - The ability to draft letters and complete application forms clearly and accurately in English, particularly when corresponding with United Kingdom Visas and Immigration and other bodies, using the correct terminology and enclosing the appropriate evidence or a clear explanation as to why it has not been provided.
    - Sufficient verbal communication and interpersonal skills to identify to whom an enquiry relates; establish their wishes and intentions and the relevant facts of the case; communicate advice clearly to a client, giving reasons and explaining all options; inform the client of what steps they and the adviser need to take, including any urgent action.
- Level 2 – More complex applications
    - Sufficient verbal, interpersonal and written communication skills to be able to ask relevant questions, take detailed instructions, deal sensitively with vulnerable and traumatised clients, give clear and detailed advice based on law and policy, explain complex law and policy in simple and clear language, make effective and pertinent oral and written representations, produce documents in English that are comprehensive and readily comprehensible.
- Level 3 – Appeal work advocacy and representation
    - The ability to explain clearly to a client in plain language the progress of their case, including any appeal, the outcome of a hearing, the implications for the client and the options open to them.
    - The ability to draft in clear, pertinent and effective English (making use of

[15] NZIAA, 'Competency standard 5: Communicating in English' <https://www.iaa.govt.nz/for-advisers/competency-standards/ >.
[16] OISC, 'Guidance on Competence' (2017) <https://www.gov.uk/government/publications/oisc-guidance-on-competence-2017>.

case law and human rights legislation, where appropriate) complex applications as well as instructions to a solicitor or barrister.

- The ability to make clear, cogent oral and written representations in the course of Tribunal proceedings; identify when it is appropriate to apply for an adjournment of a hearing and argue effectively for it; identify the salient points in an argument and respond to them effectively in the course of a hearing, where necessary; re-evaluate evidence in the light of responses or other information from the Department or a change in country conditions or new case law; anticipate and respond effectively to the citing of precedents by the Department in the course of a hearing, where necessary; challenge existing case law, if appropriate; make effective and appropriate representations in Tribunal proceedings using applicable treaties and human rights instruments.

55. The OISC assesses communication skills during the application process by taking into account:
    - the quality of the application and supporting documents;
    - the applicant's performance in any oral or written assessments; and
    - the way the applicant communicates with the OISC generally.
56. Persons who fail to show that they are able to communicate clearly and accurately in English may have their applications refused.

Recommendation 2

- **That persons seeking to become a RMA demonstrate to the regulator, prior to undertaking a prescribed exam for entry into the industry, that they meet the English language proficiency requirement having achieved an overall band score of at least 7.5 in the Academic Module of the IELTS (scoring at least 6.5 on each of the four testing components – Listening, Speaking, Reading, Writing).**

Recommendation 3

- **That the Occupational Competency Standards for RMAs be revised to include detailed guidance in relation to the different types of skills, including communication skills, required for competent practice in each of the three tiers of practice in the proposed tiered registration system.**

Recommendation 4

- **That the regulator be empowered to suspend a RMA from practice or restrict their scope of practice where it is satisfied that the RMA does not possess the ability to deliver competent service as articulated in the Occupational Competency Standards for Registered Migration Agents. This restriction may be removed by the regulator once it is satisfied that the person possesses the requisite skills required to resume practice.**

Knowledge

57. The Committee reiterates the support expressed in the Law Council's submission dated 5 September 2017 to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Amendment (Regulation of Migration Agents) Bill 2017[17] of the requirement that an RMA must hold an academic qualification in migration law and practice, as an important means for demonstrating competence in migration matters where the person has not undertaken the more extensive academic studies and practical training required for admission to the legal profession.

58. The Committee notes the Graduate Certificate in Migration Law and Practice has been replaced, with effect from 1 January 2018, by the Graduate Diploma in Australian Migration Law and Practice as the mandatory educational prerequisite for initial registration as a migration agent. Also, since 1 July 2018, the Capstone test has been employed as a mandatory competency assessment prerequisite for entry to the industry as a RMA. These developments provide a stronger basis for the acquisition and assessment of whether person has a body of knowledge, practical skills and values necessary for effective and ethical practice as an entry-level RMA.

59. While it is understood that comprehensive consultation in relation to revising the Code is outside the scope of this review, the Committee looks forward to the introduction of a revised version of the Code as soon as possible.

60. The Committee supports the entrance test initiative and notes that it has been the subject of considerable interest within the industry, with some stakeholders having expressed dissatisfaction with the low pass rates. In order to support integrity and preserve its reputation within the sector, the Committee suggests the OMARA:

    - assess the efficacy of the entrance test in terms of raising professional standards within the industry by comparing the competency and professional conduct of the RMAs who passed the entrance test with that displayed by RMAs who entered the industry without having passed an entrance test;
    - publish further information about the entrance test on its website, including:
        - more detailed pass rate data, particularly in relation to pass rates for the graduates of each of the six prescribed course providers, thereby enabling potential students aspiring to become an RMA to make a more informed choice when selecting their course provider; and
        - tips from successful exam candidates;[18]
    - reward the pursuit of excellence among test candidates by offering a suitable award to the three highest performing candidates in each testing period 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;

[17] See Law Council, Submission to the Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Migration Amendment (Regulation of Migration Agents) Bill 2017 (5 September 2017) <https://www.lawcouncil.asn.au/resources/submissions/migration-amendment-regulation-of-migration-agents-bill-2017>.

[18] 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>.

- examine the quality assurance mechanisms of each of the prescribed course providers with particular reference to course entrance requirements (especially the minimum English language proficiency and the qualification needed before enrolment in the prescribed course);
- investigate 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; and
- assess the efficacy and suitability of each of the prescribed courses in terms of preparing students to undertake the entrance test and enter the migration advice industry.

61. Until these suggested measures have been taken and their results have been assessed, and at least until an effective supervised practice framework is in place, it is recommended that the passing of an entrance test remains in place as a mandatory prerequisite before any form of RMA status (provisional or unrestricted) is conferred by the OMARA.

New Zealand

62. In New Zealand, one education provider has been authorised by government to offer the prescribed course for entry into the immigration advice industry. Since February 2016, the Toi Ohomai Institute of Technology's Graduate Diploma in New Zealand Immigration Advice has been the only qualification offered to persons seeking to become a New Zealand licensed immigration adviser.[19] Furthermore, a supervised practice framework operates in the New Zealand context and an adviser is not registered to practice on a provisional basis unless the regulator is satisfied that they have an approved supervision arrangement in place.

Canada

63. Prompted by the recommendations of a recent government review of the industry in Canada,[20] the ICCRC overhauled its entry level education framework and elected to move towards a rationalised entry-level education model focussing on higher standards for entry to the industry.[21] Currently, there are ten education providers in Canada[22] accredited to offer the entry-level qualification to students who register before 1 August 2020. It is expected that these qualifications will be entirely phased out by 31 December 2022.

64. From January 2021, Queen's University Faculty of Law will be the sole accredited English-language provider of a new graduate diploma program to train prospective immigration consultants. The program is to be delivered over 66 weeks and entry to this new program will require an undergraduate degree (or equivalent) and a high level of English language proficiency. The program will also be available in French, developed by the Université de Sherbrooke to be launched later in 2021. Queen's Law

[19] Immigration Advisers Authority, 'Qualify' (Webpage) <https://www.iaa.govt.nz/become-a-licensed-adviser/qualify/>.
[20] Standing Committee on Citizenship and Immigration, Canadian House of Commons, *Starting Again: Improving Government Oversight of Immigration Consultants* (June 2017).
[21] ICCRC, 'IPP Accreditation' <https://iccrc-crcic.ca/education/ipp-accreditation/>.
[22] ICCRC, 'Accredited IPPs' <https://iccrc-crcic.ca/education/ipp-accreditation/accredited-ipps/>.

will work closely in collaboration with the Université de Sherbrooke in the development of the program.[23]

65. It is open to the government to determine whether to similarly rationalise the entry-level education system. Options include the regulator becoming:

    - the only prescribed course provider and thereby having the option to dispense with, or revise, the entrance test; and
    - one of a number of prescribed course providers and retain the entrance test for use in connection with graduates of other prescribed course providers.

Recommendation 5

- **That a stand-alone competency-based assessment, such as the Migration Agents Capstone Assessment, continue to be used as a prescribed exam for entry to the industry. Upon the introduction of the proposed tiered registration system, all persons seeking to obtain provisional RMA status must pass the entrance test and the assessment should be recalibrated towards an examination of the level of knowledge, skills and aptitudes required by a provisional RMA to competently practice in Tier 1 on a supervised basis.**

Recommendation 6

- **That government assess the efficacy and suitability of the prescribed courses in terms of preparing students to undertake the entrance test and enter the migration advice industry.**

Professional indemnity insurance

66. In line with previous submissions to the OMARA, the Committee maintains that adequate safeguards are put in place to protect consumers from significant financial loss arising out of negligent advice provision. The Committee recommends strengthening professional indemnity insurance arrangements 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 and ensuring that amount excludes legal costs payable in relation to any dispute or claim. The current level is $250,000.[24] This amount is inadequate, and further consideration must be given to this issue to ensure that the requirement under section 292B of the Act (that is, that the OMARA will only register a person as an RMA if they hold appropriate professional indemnity insurance) is met.[25]

[23] Queen's University, 'Queen's Law launches Graduate Diploma in Immigration and Citizenship Law' (1 May 2019) <https://www.queensu.ca/gazette/stories/queen-s-law-launches-graduate-diploma-immigration-and-citizenship-law>.
[24] The Regulations sub-reg 6B(1).
[25] Law Council, Submission to the Department of Home Affairs, *Code of Conduct for Registered Migration Agents* (30 July 2019) [19].

67. The Committee notes that regulation 6B in Part 3 of the Regulations specifies the minimum level of prescribed professional indemnity insurance ($250,000). This amount has not increased since the regulatory requirement was first introduced on 1 July 2005. By way of contrast, the minimum level of insurance cover provided to legal practitioners in NSW by LawCover is indemnity of up to $2.0 million for each claim, including defence costs and claimant's costs (excluding the applicable excess).[26] The same level of cover is available in Victoria, Queensland, Australian Capital Territory, Northern Territory and Tasmania, with cover of $1.5 million per claim in South Australia and $1.75 million per claim in Western Australia.

68. Given the risks associated with the provision of immigration assistance and the loss that may be suffered by a client, the minimum level of prescribed professional indemnity insurance should be substantially increased. Based upon risk settings maintained by regulators of the legal profession and the costs that may be incurred as a result of a client relying upon incorrect or negligent immigration advice, the Committee recommends that the minimum prescribed level of professional indemnity insurance cover be lifted to at least $1 million per claim event.

Recommendation 7

- **That the professional indemnity insurance 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 eg, 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).**

Effectiveness of current registration requirements, including the suitability of the factors which OMARA considers when assessing an applicant is 'fit and proper' or a 'person of integrity' to be registered

69. Currently, the OMARA cannot register anyone applying to become a migration agent who is not:

- an Australian citizen;
- an Australian permanent resident who holds an Australian permanent visa; or
- a New Zealand citizen who holds a special category visa (and physically in Australia when the OMARA is considering the application).

In addition, applicants cannot:

- be under 18 years of age;
- have been refused registration within 12 months of applying;

[26] For an overview of the cover provided by LawCover see <https://www.lawcover.com.au/insurance/>.

- have had a previous registration cancelled within five years of applying;
- have previously been barred from registering unless the barred period has expired; or
- have had a previous registration suspended unless the suspension has expired.

70. The above requirements are appropriate and should not be altered.

71. Sub-section 290(1) of the Act provides that OMARA must not register an applicant if it is satisfied that:

    (a) the applicant is not a fit and proper person to give immigration assistance; or

    (b) the applicant is not a person of integrity; or

    (c) the applicant is related by employment to an individual who is not a person of integrity and the applicant should not be registered because of that relationship.

72. Sub-section 290(2) of the Act provides that in relation to assessing whether an applicant for registration is not a fit and proper person to give immigration assistance or a person of integrity, the OMARA must take into account:

    (a) the extent of the applicant's knowledge of migration procedure; and

    (b) [repealed][27]

    (c) any conviction of the applicant of a criminal offence relevant to the question whether the applicant is not:

        (i) a fit and proper person to give immigration assistance; or

        (ii) a person of integrity;

        (except a conviction that is spent under Part VIIC of the *Crimes Act 1914*); and

    (d) any criminal proceedings that the applicant is the subject of and that the Authority considers relevant to the application; and

    (e) any inquiry or investigation that the applicant is or has been the subject of and that the Authority considers relevant to the application; and

    (f) any disciplinary action that, is being taken, or has been taken, against the applicant that the Authority considers relevant to the application; and

    (g) any bankruptcy (present or past) of the applicant; and

    (h) any other matter relevant to the applicant's fitness to give immigration assistance.

73. Sub-section 290(3) of the Act provides that in considering whether it is satisfied that an individual to whom the applicant is related by employment is not a person of integrity, the OMARA must take into account each of the following matters, so far as the

[27] Sub-section 290(2)(b) read: "whether the applicant has a qualification prescribed by the regulations or a knowledge of migration procedure that the Authority considers to be sound; and"

OMARA considers it relevant to the question whether the individual is not a person of integrity:

(a) any conviction of the individual of a criminal offence (except a conviction that is spent under Part VIIC of the *Crimes Act 1914*);

(b) any criminal proceedings that the individual is the subject of;

(c) any inquiry or investigation that the individual is or has been the subject of;

(d) any disciplinary action that, is being taken, or has been taken, against the individual;

(e) any bankruptcy (present or past) of the individual.

74. The meaning of the expression 'fit and proper person' was discussed in *Hughes and Vale Pty Ltd v State of New South Wales (No. 2)* where Dixon CJ, McTiernan and Webb JJ said:

> *The expression 'fit and proper person' is of course familiar enough as traditional words when used with reference to offices and perhaps vocations. But their very purpose is to give the widest scope for judgment and indeed for rejection. 'Fit' (or 'idoneus') with respect to an office is said to involve three things, honesty knowledge and ability: honesty to execute it truly, without malice affection or partiality; knowledge to know what he ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it –Coke*.[28]

75. In *Australian Broadcasting Tribunal v Bond and Ors*, Toohey and Gaudron JJ said in effect, that the expression 'fit and proper person' takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities.[29]

76. In the context of section 290 of the Act, the expression applies in the context of a person seeking or retaining registration as a migration agent pursuant to the Act. The object of the Act is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens',[30] a matter of vital concern to the Australian community.

77. Parliament has recognised the important role played by RMAs in the giving of immigration assistance. This is apparent not only from the provisions of the Act requiring the registration of migration agents, but also from the restrictions imposed upon RMAs by Division 2 of Part 3 of the Act, and the further provisions for deregistration, disciplinary action and notification obligations. Further, the Code has been prescribed by regulations made pursuant to sub-section 314(1) of the Act, and the first aim of the Code, according to clause 1.10(a), is to establish a proper standard for the conduct of a RMA.

78. It is recommended that sub-section 290(2)(a) be broadened, such that the relevant factor for consideration is 'the extent of the applicant's knowledge of migration law, policy and procedure'. The current reference to knowledge of migration procedure alone is insufficient.

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[28] [1955] HCA 28; (1955) 93 CLR 127, 156.
[29] [1990] HCA 33; (1990) 170 CLR 321, 380.
[30] The Act s4(1).

79. A consideration of whether a person is fit and proper person to give immigration assistance or a person of integrity should at least include the following:

    - the person's past conduct which can be an indicator of the likelihood of the improper conduct occurring in the future;
    - the person's honesty and competency towards clients, the Department, the OMARA, the AAT, the IAA, the Minister and other government agencies and organisations including any skills assessing authority, English language proficiency assessment body, prescribed course provider, prescribed exam provider;
    - a consideration of the context in which the RMA works or will work ie, the provision of immigration assistance to migration clients;
    - the person's knowledge and competency in migration law and practice;
    - the reputation of the person as a result of their conduct and the public perception of that conduct; and
    - the perception of the conduct by the person's professional colleagues of good repute and competency.

80. With regard to past conduct, the regulator should have regard to whether the person has engaged in any improper conduct in order to gain entry to the industry or maintain their registration. Instances of such conduct would include academic misconduct when undertaking the prescribed course, the prescribed exam or any other assessment prescribed by the regulator for the purposes of entering the industry or otherwise maintaining or elevating their registration status.

81. It is recommended that the regulator establish a panel of reputable and competent RMAs and Australian legal practitioners who practise in the industry to, upon the regulator's request, offer advice as to whether they perceive a given person's behaviour or misconduct falls short of the professional standards that must be upheld in order to protect the public and the reputation of the industry as a whole.[31]

82. It is recommended that consideration be given to broadening the scope of the legislation[32] to enable the regulator to consider an applicant's relationships, current or previous, with individuals who are not persons of integrity. In particular, the provisions should allow the regulator to investigate and assess an applicant's current and previous relationships over the preceding 10 years with:

    - RMAs who have been sanctioned by the regulator; and
    - persons who have committed a prescribed offence, including the provision of immigration assistance without being registered.

83. It is recommended that consideration be given to strengthening the tests of fitness, propriety and integrity with reference to the higher standards and broader assessment criteria prescribed in comparable jurisdictions.

United Kingdom

84. The OISC provides extensive guidance in relation to what the Commissioner takes into account when assessing the fitness of those who will be providing immigration

[31] *Allinson v General Council of Medical Education and Registration* [1894] 1 KB 75.
[32] The Act ss 278 and 290(3) and the Regulations reg 3U.

advice.[33] It is recommended that the factors relating to the assessment of fitness to practise in these documents be considered when drafting any legislative change in this area and that appropriate guidance made available on the OMARA's website so that consumers, existing and aspiring RMAs understand this fundamental requirement.

Canada

85. Persons seeking to attain or maintain status as a registered immigration consultant or international student advisor must demonstrate that they are of good character and good conduct. Unlike the Australian context, this assessment is first undertaken before the person sits the prescribed exam for entry to the profession. It is recommended that a similar approach be taken in the Australian context to ensure that the prescribed exam provider is not required to engage with persons who will ultimately be refused registration by the regulator. Such an approach would also reduce the regulatory burden imposed upon the prescribed exam provider given the decreased likelihood of academic misconduct and plagiarism.

86. The following elements are considered as part of the good character and good conduct assessment:

    (a) fairness and open-mindedness;

    (b) honesty and truthfulness;

    (c) integrity and trustworthiness;

    (d) moral or ethical strength;

    (e) respect for and consideration of others;

    (f) respect for the rule of law and legitimate authority; and

    (g) responsibility and accountability.[34]

87. Evidence that may put the character of a person into question includes whether the person:

    (a) is currently the subject of any criminal proceeding or has criminal charges filed against him/her for which the final disposition or judgment has not yet occurred;

    (b) is currently subject to any outstanding arrest warrant in any province/territory or internationally;

    (c) has been notified by any professional organization that he/she is the subject of a complaint that remains open;

    (d) has ever pleaded guilty to, or been found guilty or convicted of, any criminal or other statutory offence in any jurisdiction (other than parking and non-criminal

[33] See 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>.

[34] *Good Character and Conduct Regulation,* 2016, reg 5.3.

traffic offences) for which a Pardon has not been granted, which in the opinion of the Registrar reflects adversely on their honesty, trustworthiness or fitness to practise

(e) has ever been found guilty in a civil proceeding involving fraud, dishonesty or theft;

(f) has ever disobeyed an order of any court in any jurisdiction;

(g) has ever been the subject of a human rights finding, or been suspended, disqualified, censured, expelled or otherwise disciplined (other than for non-payment of dues and fees, or for failing to maintain CPD requirements) by any court, tribunal, licensing or regulatory body, or professional organization, in Canada or internationally, for any offence that constituted misconduct or professional misconduct (regardless of how defined), or for any offence that affected members of the public, or for any offence that was deemed to bring that profession into public disrepute;

(h) has ever been refused admission as an applicant, or had a membership in a licensing or other professional organization revoked for reasons relating to a lack of good character;

(i) has ever been penalized or sanctioned in any way (other than minor reduction in a nonfinal grade) for misconduct or plagiarism while enrolled in any educational institution;

(j) is currently insolvent, or subject to a petition or assignment in bankruptcy, or have made a proposal to creditors under the *Bankruptcy and Insolvency Act* (Canada), or equivalent legislation of any other jurisdiction, or are the subject to a wage or income garnishment;

(k) has ever violated the *Immigration and Refugee Protection Act* (Canada) by representing immigration clients for a fee before the Minister without authorization under that Act or Regulations; or

(l) has ever had a claim paid out under an errors and omissions insurance program for work in which he/she was involved.[35]

New Zealand

88. Persons are prohibited from being a licensed immigration adviser if they:

- are an undischarged bankrupt;
- are prohibited or disqualified under any of the provisions of sections 382, 383, or 385 of the *Companies Act 1993* from managing a company;
- have been convicted of an offence against the *Immigration Act 2009*, the *Immigration Act 1987*, or the *Immigration Act 1964*;
- have been removed or deported from New Zealand under the *Immigration Act 2009*, the *Immigration Act 1987*, or the *Immigration Act 1964*; or
- have been unlawfully in New Zealand.[36]

89. Further restrictions upon licensing exist in relation to a person who:

[35] Ibid reg 7.
[36] *Immigration Advisers Licensing Act 2007* (NZ) s 15.

- has been convicted, whether in New Zealand or in another country, of a crime involving dishonesty, an offence resulting in a term of imprisonment, or an offence against the *Fair Trading Act 1986* (or any equivalent law of another country);
- under the law of another country:
    - is an undischarged bankrupt; or
    - has been prohibited or disqualified from managing a company; or
    - has been convicted of an immigration offence; or
    - has been removed or deported from the country.[37]

90. In determining a person's fitness to be licensed, the Registrar may take into account:

- any conviction, whether in New Zealand or in another country, for any offence;
- any disciplinary proceedings, whether in New Zealand or in another country, and whether in relation to the provision of immigration advice or in relation to the conduct of any other occupation or profession, taken or being taken against the person (including any past cancellation or suspension of a licence under this Act, or any non-compliance with any other sanction imposed under this Act); and
- whether or not the person is related by employment or association to a person to whom a licence would be refused.[38]

Recommendation 8

- **That the legislative provisions relating to fitness, propriety and integrity be strengthened by:**
    - **enabling the regulator to take into account a person's knowledge of migration law, policy and procedure (rather than mere knowledge of migration procedure);**
    - **broadening the scope of the matters that the regulator may take into account, particularly concerning a person's relationships, current or previous, with individuals who are not persons of integrity (particularly individuals who have been sanctioned by the regulator and/or penalised for an offence involving the unlawful provision of immigration assistance); and**
    - **specifying additional assessment criteria including, but not limited to, academic misconduct or plagiarism (particularly in connection with a prescribed course, prescribed exam or other competency assessment specified by the regulator).**

[37] Ibid s 16.
[38] Ibid s 17.

Whether OMARA should have the power to impose conditions on an individual's registration if it has concerns with the applicant's competency levels

91. The Kendall Review supported OMARA's call for additional regulatory tools in order to take a more nuanced and cost-effective approach towards addressing concerns about RMA competence and conduct. The Kendall Review summarised the issue in the following terms:

> *The Inquiry received evidence that in the case of complaints or disciplinary action, the most effective regulatory tool would be a flexible power to impose conditions or requirements that were not dependent on a disciplinary decision such as a caution or suspension. Investigations leading to disciplinary decisions can often be protracted and resource intensive and do not necessarily result in altering behaviour, but are aimed at keeping unfit agents out of the profession.*
>
> *The Inquiry was advised that for registration a possible model for consideration would be:*
>
> - *in the case of non-compliance with objective requirements identified through either monitoring or complaints handling activities, to impose an enforceable condition upon the current registration. The condition would require that this deficiency be rectified within a defined period or prior to a subsequent application for re-registration. Should there be no rectification, the next application for re-registration would not be approved on the grounds that the enforceable condition had not been met;*
> - *in the case of serious non-compliance, a condition could be imposed such as requiring supervision by an experienced agent for a defined period, with an obligation to provide a report from the supervisor at the next registration anniversary. At the next registration date the report would help determine whether to continue the supervisory condition, should the agent be re-registered; and*
> - *in the case of repeated and continuing infringements, the cumulative nature of enforceable conditions could trigger a sanction decision in advance of a re-registration consideration.*
>
> *The Inquiry agrees that changes of the sort proposed above would be beneficial. The power to impose conditions would have the effect of reducing the regulatory burden on the OMARA and on agents by shifting more focus to proactive prevention, rather than reaction to complaints. Such a power would bolster and support monitoring activity by the OMARA. It is expected that over time the use of such powers would limit and reduce the expansion of the complaints/disciplinary caseload and thereby reduce the burden on agents to respond to complaints. It would also raise professional standards and allow the OMARA to respond more promptly and appropriately to consumer concerns.*[39]

92. The Committee agrees with these findings and supports proposals for legislative reform in this area.

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[39] Dr Christopher Kendall, *Independent Review of the Office of the Migration Agents Registration Authority* (Final Report, September 2014), 24

93. Where reasonably held concerns exist in relation to a RMA's competence that are not so egregious as to warrant the suspension, cancellation or barring of registration, the regulator should have power to impose an enforceable condition upon the RMA's current registration. Examples of such conditions include the requirement to:

    - demonstrate competency to the regulator's satisfaction by passing a specific competency assessment;
    - be supervised by an experienced RMA or suitable Australian legal practitioner for a defined period;
    - rectify a clients' account defalcation;
    - rectify any failure to maintain a subscription to a professional library;
    - complete mandatory training specified by the regulator and conducted either by the regulator or a person approved by the regulator; and
    - complete CPD on a specific topic with a specific CPD Provider.

94. An RMA's failure to comply with such a condition within a specified period may then enable the regulator to restrict the scope of immigration assistance the RMA is authorised to perform or proceed to sanction the RMA.

95. A tiered registration system would enable the regulator to take a nuanced approach towards restricting RMA registration where incompetence has been demonstrated in a specific area of practice eg, merits review applications and Ministerial intervention requests. Further information in relation to the proposed tiered registration system is detailed later in this submission. For present purposes, the regulator may be satisfied in relation to an RMA's level of competency by requiring them to pass the entrance test, an assessment of competency to assist clients with review application matters and/or an assessment of competency to assist clients with Ministerial intervention requests.

96. The regulator should take care when imposing a condition so as to ensure that the RMA's compliance would appropriately address the area of incompetence and not be punitive or unduly burdensome. For example, an RMA with extensive experience appearing before the AAT who missed a review application lodgment deadline on one occasion due to poor diary management should not be required to undertake the entrance test. The condition should instead seek to remedy the knowledge or skill deficiency and not be imposed by way of a disproportionate response to the given situation. In many instances, a mandatory training program to be delivered by the regulator, at the RMA's expense, would be appropriate.

Canada

97. It is worth noting that in Canada, the regulator may impose a condition or restriction upon an immigration consultant's licence.[40]

New Zealand

98. Similarly, in New Zealand, the Registrar may grant a limited licence that authorises a person to provide immigration advice only in relation to specified matters, if satisfied that the applicant has competence only in relation to those matters.[41]

[40] *College of Immigration and Citizenship Consultants Act,* SC 2019, c 29, s 69(3)(a).
[41] *Immigration Advisers Licensing Act 2007* (NZ) s 19(4).

United Kingdom

99. Furthermore, in the United Kingdom, the regulator is empowered to make an order directing that a person subject to its jurisdiction is to be subject to such restrictions on the provision of immigration advice or immigration services as the body considers appropriate.[42]

Recommendation 9

- **That the regulator be empowered to impose conditions upon a person's registration where it has been satisfied on reasonable grounds of non-compliance or misconduct. These conditions may be used in conjunction with a power to restrict the RMA's scope of practice until such time as competency has been demonstrated to the regulator's satisfaction.**

Other suggestions for reform, such as the introduction of supervised practice, and associated standards and requirements

Supervised practice and provisional registration

100. There is presently no mandatory requirement that newly qualified RMAs participate in any form of supervision following their initial registration.

101. The Committee notes that supervised practice is an ordinary and accepted element of learning and development in professions such as the legal profession.

102. A mandatory period of supervised practice would enhance consumer protection by providing a structured setting in which an entry-level migration agent can acquire, develop and consolidate the knowledge, skills and experience necessary for future unrestricted work as a RMA.

103. The Committee maintains its position that the Australian Government and the OMARA should take immediate steps to introduce a mandatory period of supervised practice for all persons seeking to become an RMA.[43] The Kendall Review recommended non-lawyer RMAs be required to undertake a period of one year mandatory supervision with an already RMA following completion of the prescribed course.[44] The need for supervised practice was expressed in the following terms:

> *In addition to calls for reform in relation to the type of entry course required, numerous submissions called for the addition of a period of restricted practice/mandatory supervision for non-lawyer migration agents after they have completed their university entry requirements.*
>
> *The Inquiry again accepts the findings of the 2007-08 Hodges Report that a period of mandatory supervision will do much to raise the standards of new migration agents.*
>
> *The Inquiry accepts that the industry will need to take steps to ensure that students are, as much as possible, able to find practitioners who are willing to supervise them and that appropriate safeguards are taken to ensure that these*

[42] *Immigration and Asylum Act 1999* (UK) s 90(1).
[43] Law Council, Submission to the Department of Home Affairs, *Code of Conduct for Registered Migration Agents* (30 July 2019) [20].
[44] Dr Christopher Kendall, *Independent Review of the Office of the Migration Agents Registration Authority* (Final Report, September 2014) 30.

students are not in any way exploited. The Inquiry notes that a similar system exists in relation to legal practitioners.[45]

104. The Committee understands that this recommendation was not initially accepted by government.

105. More recently, in its *Report of the inquiry into efficacy of current regulation of Australian migration and education agents,*[46] the JSCM made the following comment:

> *The United Kingdom, New Zealand and Canadian migration agent systems all contain a requirement that an immigration advisor or consultant undergo a period of supervised practice prior to being granted a certificate to practice unrestricted.*[47]

106. JSCM recommended that all new RMAs be required to complete a period of supervised practice prior to being granted an unrestricted practice certificate.[48] While the Committee accepts the thrust of this recommendation, it notes that the usage of the term 'practice certificate' is likely to create confusion within the market and strongly recommends that a different term be employed for RMAs, such as 'registration certificate'.

Proposed framework

107. The Committee believes that all new migration agents be registered on a provisional basis and be required to complete period of supervised practice before being permitted to practise on their own.

108. Persons undertaking the prescribed course and preparing to undertake the entrance test may of course undertake work (paid, voluntary or otherwise) in contexts where they are exposed to the practice of RMAs providing immigration assistance or Australian legal practitioners providing migration law advice in connection with legal practice. Graduate diploma providers, industry associations, community legal centres and the regulator should collaborate to provide information to aspiring RMAs undertaking the prescribed course about entry-level work opportunities in the sector eg, volunteer positions and placements at community legal centres, administrative assistant positions in law firms or migration agencies etc. Acting as a single source of truth, the OMARA website could specify up-to-date information about entry-level work opportunities in the sector.

109. Upon passing the prescribed course and the entrance test, as well as meeting other initial registration requirements, the Committee considers that a person should only be granted a provisional registration certificate by the regulator if they can demonstrate that they have an approved supervision arrangement in place. This is akin to the initial registration and supervised practice system that has been in effect in New Zealand for licensed immigration advisers since 26 November 2015.[49]

110. A condition of the provisional registration certificate will require the holder to only provide Tier 1 immigration assistance under the direct supervision of an approved

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[45] Ibid 22.
[46] JSCM, Parliament of Australia, *Inquiry into efficacy of current regulation of Australian migration and education agents* (Final Report, February 2019).
[47] Ibid 36 [3.110].
[48] Ibid [3.114] recommendation 2.
[49] Immigration Advisers Authority, 'Qualify' (Webpage) <https://www.iaa.govt.nz/become-a-licensed-adviser/qualify/>.

person for a minimum period in accordance with the approved supervision arrangement.

111. Upon completing a period of supervised practice, which should be no less than twelve months (full-time), the person may then apply to the OMARA for the conferral of a Tier 1 registration certificate. If conferred, the person may only then provide Tier 1 immigration assistance on an unsupervised basis. At this point, the person may be authorised to establish and operate an organisation that offers Tier 1 immigration assistance.

112. During the supervision period, the person would be authorised to provide Tier 1 immigration assistance under the guidance of an approved person (supervisor) who is:

    - a RMA with at least 5 years' experience in the provision of immigration assistance; or
    - an Australian legal practitioner holding an unrestricted legal practising certificate with at least 5 years' experience in migration law advice provision in connection with legal practice.

113. All supervisors would be pre-approved by the OMARA in accordance with other relevant criteria relating to the supervisor's good-standing within the profession and ability to train the person in the field of migration law and practice, with 'ability' being determined both on legal and practical ability to provide substantive supervision to a person seeking to enter the industry. Supervisor competency standards should be developed and used to assess applications from persons seeking approval as a supervisor. When designing the supervised practice scheme, lessons may be taken from the experience of the NZIAA to ensure that the new scheme fosters supportive and mutually beneficial relationships between supervisors and their trainees.[50]

114. Acting as a single source of truth, the regulator's website should specify a list of approved supervisors willing to accept applications from persons seeking supervision. Consideration should be given to the maximum number of supervisees a supervisor may have at any one time.

115. Supervision terms should be agreed between the parties and lodged with the regulator. The regulator should develop a standard supervised practice agreement and toolkit that can be downloaded from its website.[51] The supervisor should be required to complete a statutory declaration confirming the supervision and detailing evidence of completed work during the period of supervision (such as details of the types of visa applications worked on).

116. Inadequate and/or improper supervision should give rise to adverse consequences for the supervisor, including restriction, suspension or bar upon holding supervisor status as well as potential professional disciplinary action.

117. A supervisee's failure to complete an agreed period of supervised practice should be reported to the regulator by the supervisor along with reason(s) for that failure. The reason(s) may be taken into account by the regulator if and when the supervisee

[50] See Immigration Advisers Authority, 'Reference group minutes of 24 June 2020' <https://www.iaa.govt.nz/about-us/news/reference-group-minutes-24-june-2020/>

[51] The supervised practice agreement template and toolkit may be modelled upon those used by the Immigration Advisers Authority in the New Zealand context; see https://www.iaa.govt.nz/for-advisers/adviser-tools/supervision-toolkit/.

makes an application to become an RMA. For example, if the reason was that the supervisee engaged in unlawful activities such as giving unauthorised immigration assistance during their period of supervision, this information would be relevant to the regulator's assessment of whether the supervisee is a 'person of integrity' or 'fit and proper' to give immigration assistance.[52]

118. The Committee has serious concerns that, unless approached with significant rigour, the concept of 'supervision' could easily be reduced to a matter of pretence rather than ensuring genuine supervision of the conduct of the provisionally RMA. Of particular concern will be circumstances where the provisionally RMA and their supervisor are not physically co-located in the same premises, let alone in the same country. In instances where remote supervision is the only option (eg, due to physical distancing restrictions arising out of COVID-19, lack of approved supervisors in regional or remote areas etc.), the regulator should only approve the arrangement where specific guidelines are met.[53]

119. The NZIAA Code of Conduct[54] (**the NZIAA Code**) includes clauses relating to the supervision agreement between a full and provisional licence holder,[55] the roles and responsibilities of the supervisor[56] and the roles and responsibilities of the provisional licence holder[57] in the New Zealand context. Aspects of the New Zealand model could be replicated in the Australian context. The Committee refers to its recent submission to the OMARA relating to Code reform[58] and reiterates its suggestion to ensure the Code prescribes obligations that will enable and support the proposed supervised practice system. Clauses 10-13 of the NZIAA Code may be relied upon as a basis for drafting such clauses.[59]

Feasibility and sustainability

120. Ideally, the provisionally RMA will be employed by the supervisor as a trainee or intern to assist the supervisor with their client matters before the Department. During the ordinary course of business, the supervisee will be exposed to proper delivery of immigration assistance. This is akin to the existing requirements for supervised practical experience and corresponding arrangements used in the Australian legal profession.

121. It is acknowledged that due to the current composition of the industry (many sole practitioners and small businesses operating from homes etc.), there could be insufficient supervisor opportunities, causing a bottleneck at the industry entry-point. This may lead to delayed career commencement, high rates of graduate

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[52] See the Act s 290.
[53] The remote supervision guidelines may be modelled upon those that exist in the legal profession, e.g. Victoria see https://lsbc.vic.gov.au/lawyers/new-lawyers/supervised-legal-practice; New South Wales see https://www.lawsociety.com.au/news-and-publications/news-media-releases/impact-covid-19-legal-profession/remote-supervision.
[54] Immigration Advisers Authority, *Licensed Immigration Advisers Code of Conduct* (2014), <https://www.iaa.govt.nz/assets/subsite-iaa/documents/tools/code-conduct-2014.pdf>.
[55] Ibid [11].
[56] Ibid [12].
[57] Ibid [13].
[58] Law Council, Submission to the Department of Home Affairs, *Code of Conduct for Registered Migration Agents – Third Round Consultation Response* (13 December 2019) <https://www.lawcouncil.asn.au/docs/9f6eae23-a03c-ea11-9403-005056be13b5/3723%20-%20Code%20of%20Conduct%20for%20RMAs.pdf>.
[59] Immigration Advisers Authority, *Licensed Immigration Advisers Code of Conduct* (2014), 2-3.

unemployment, a decline in popularity of the Graduate Diploma in Australian Migration Law and Practice and heighten the risks associated with exploitation of graduates who will be desperate to get a placement. Even in the not-for-profit sector, it may be challenging to help supervise multiple placements.

122. However, for supervised practice to be meaningful for the newly qualified RMA, as well as attractive to and commercially viable for the supervisor, the period of supervised practice should only commence after the person has successfully completed the entry-level qualification and passed the entrance test. Retaining the requirement to pass an entrance test 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 regulator's satisfaction that they are sufficiently competent to commence practising on a supervised basis.

123. To support the establishment of the scheme, consideration should also be given to the regulator facilitating access to existing Australian Government incentives for supervisees and supervisors.[60]

124. It is important to avoid substitutions for supervised practice, such as CPD or mentoring arrangements, that involve the supervisee paying a fee to a course provider or mentor. Previously, in the absence of a supervised practice framework, OMARA-approved CPD Providers ran 'Practice Ready Programs' for RMAs intending to lodge their first repeat registration application. The Committee maintains that such programs should be regarded as beginner level CPD rather than a substitute for a supervised practice arrangement.

125. Since the introduction on 1 January 2018 of higher technical proficiency requirements to register as a RMA, the OMARA has reported a continued decline in the number of RMAs.[61] It is estimated that over the past year approximately 100 newly registered migration agents without an Australian legal practising certificate have entered the industry. Following the removal of legal practitioners from the scheme, approximately 5,000-5,500 RMAs will likely remain, many of who will have at least five years' experience. It is therefore more than feasible for the OMARA and viable for the industry to collaborate to ensure that a supervised practice scheme will offer enough supervisor opportunities for provisional registration applicants on an ongoing basis.

Recommendation 10

- **That all provisionally registered migration agents be required to complete a 12 month period of supervised practice to acquire, develop and consolidate the knowledge, skills and experience thought necessary for future unrestricted work as a Tier 1 RMA. The supervised practice scheme should be developed by the regulator, drawing upon elements of existing requirements for supervised practical experience for entry into the Australian legal profession, with a preference towards an articled**

[60] The Australian government provides a range of incentives to eligible apprentices/trainees and their employers. For further detail see <https://www.australianapprenticeships.gov.au/financial-programs>.
[61] OMARA, 'Half-yearly report on the provision of immigration assistance in Australia' (Migration Agent Activity Report, 1 July – 31 December 2019) <https://www.mara.gov.au/media/682329/MAAR_Jul_Dec_2019_Web.pdf>

clerkship style arrangement, and the supervised practice scheme administered by the Immigration Advisers Authority in New Zealand.

Theme 2: A professional industry

Introduction of a tiered registration system

126. The Committee welcomes the government's consideration of a tiered registration system as a consumer protection measure and the basis upon which to strengthen the integrity and reputation of the migration advice industry.

127. In the absence of such a system, a large pool of RMAs have entered the migration advice industry without having to pass an independent competency assessment such as the Migration Agents Capstone Assessment (**MACA**). Of concern, many RMAs continue to undertake work on behalf of a client without appropriately ensuring that they have the requisite competency to perform that work to the required standard. Furthermore, there is no reliable basis upon which consumers can distinguish whether an RMA possesses the requisite skills and knowledge to competently perform distinct categories of work that may be undertaken within the industry.

128. Members of the Committee report that there have been situations where RMAs have taken on specific matters which they do not have experience or capacity to undertake. Poor handling of those matters has resulted in any or all of the following adverse consequences for the client:

- delayed or lost migration opportunity;
- unlawful status, detention, removal and/or blemished migration record;
- unnecessary stress and heightened vulnerability; and
- undue professional fees and other costs.

129. Furthermore, incompetent representation frustrates and delays the decision-making process, thereby contributing to inefficiencies and the growing backlog in the Department, review tribunals and ultimately the courts.

130. The Committee observes that this is an issue which frequently appears in the OMARA's sanction decisions. Where an RMA was well-intentioned but acting beyond their competency or experience, serious adverse consequences for the client have often resulted. The need for a tiered registration framework is underscored by the fact that many clients of RMAs are especially vulnerable and rely upon the regulator to properly assess the professional standards and capability of an RMA before permitting them to practise, particularly in connection with more complex, high-risk or sensitive client matters.

131. The Committee's view is that a new tiered registration system should govern the types of immigration assistance an RMA will be authorised to provide during their career and thereby inform:

- the occupational competency standards framework;
- the registration process; and
- the CPD framework for CPD providers and CPD obligations of each RMA.

132. Arrangements should be put in place to ensure that a tiered system properly reflects the escalating complexity and risk involved when providing immigration assistance as well as the competency and practice capability of each RMA as they progress during their career. RMAs would then progressively qualify to assist and represent clients with:

- matters before the Department;
- matters before the Administrative Appeals Tribunal (Migration and Refugee Division) (**AAT MRD**) and the Immigration Assessment Authority (**IAA**); and
- requests for Ministerial intervention.

133. The definition of immigration assistance in Part 3 of the Act should be amended to clearly articulate the work that may be performed by RMAs based upon their tier status in the new system.

Tier 1: Immigration assistance in connection with matters before the Department (Tier 1)

134. After completing a period of supervised practice, a provisional RMA certificate holder may apply to the regulator to become registered as a Tier 1 RMA. If their application is approved, they should only be authorised to give immigration assistance to a person (natural or otherwise), where they use, or purport to use, knowledge of, or experience in, migration law, policy and procedure with a Departmental matter, by:

- preparing, or helping to prepare, a sponsorship, nomination or visa application;
- advising about a sponsorship, nomination or visa application;
- advising in connection with visa cancellation or sponsorship compliance matter;
- preparing, or helping to prepare, a document in connection with any of the above; and
- representing a person before the Department in connection with any of the above.

Tier 2: Immigration assistance in connection with matters before the Department, the AAT MRD and the IAA (Tier 2)

135. A Tier 1 RMA certificate holder may apply to the regulator to become registered as a Tier 2 RMA. If their application is approved, they should only be authorised to give immigration assistance to a person (natural or otherwise) where they use, or purport to use, knowledge of, or experience in, migration law, policy and procedure with:

- a Departmental matter by:
  - preparing, or helping to prepare, a sponsorship, nomination or visa application;
  - advising about a sponsorship, nomination or visa application;
  - advising in connection with visa cancellation or sponsorship compliance matter;
  - preparing, or helping to prepare, a document in connection with any of the above; and

- representing them in matters before the Department in connection with any of the above.

- a review application matter to be lodged, or being considered by, the AAT MRD or the IAA, by:
  - preparing, or helping to prepare, that review application;
  - advising about that review application;
  - preparing, or helping to prepare, a document in connection with that review application; and
  - representing them in matters before the AAT MRD or the IAA.

Tier 3: Immigration assistance in connection with matters before the Department, the AAT MRD, the IAA and the Minister (Tier 3)

136. A Tier 2 RMA certificate holder may apply to the regulator to become registered as a Tier 3 RMA. If their application is approved, they should only be authorised to give immigration assistance to a person (natural or otherwise) where they use, or purport to use, knowledge of, or experience in, migration law, policy and procedure with:

- a Departmental matter by:
  - preparing, or helping to prepare, a sponsorship, nomination or visa application;
  - advising about a sponsorship, nomination or visa application;
  - advising in connection with visa cancellation or sponsorship compliance matter;
  - preparing, or helping to prepare, a document in connection with any of the above; and
  - representing them in matters before the Department in connection with any of the above.

- a review application matter to be lodged, or being considered by, the AAT MRD or the IAA, by:
  - preparing, or helping to prepare, that review application;
  - advising about that review application;
  - preparing, or helping to prepare, a document in connection with that review application; and
  - representing them in matters before the AAT MRD or the IAA.

- a Ministerial intervention request by:
  - preparing, or helping to prepare, a request to the Minister to exercise his or her power under sections 351 or 417 of the Act;
  - preparing, or helping to prepare, a request to the Minister to exercise his or her power under sections 195A, 197AB or 197AD of the Act; and
  - advising or making representations on behalf of, a person in connection with any of the above.

137. In relation to Ministerial intervention requests, the Tier 3 RMA may only proceed to offer immigration assistance to a person where that person provides written confirmation that they have received advice in relation to their judicial review options (if any) from an Australian legal practitioner. This confirmation is required to ensure persons are fully informed by an Australian legal practitioner of the availability of judicial review as well as their judicial review prospects (if any) before a Ministerial intervention request is made on their behalf by a Tier 3 RMA. This approach is necessary to ensure consumers are properly protected, particularly given the strict time limits involved when seeking judicial review and the difficulties involved in securing an extension of time.[62]

138. This separation into three categories would allow for recognition of existing market segments and expertise within the industry (eg, many RMAs do not undertake merits review application work etc.) and facilitate targeted and more effective regulation of RMAs by the regulator (eg, certain RMAs should not be authorised to provide assistance in connection with merits review applications and/or Ministerial intervention requests).

139. To ensure competency standards are met, passing an entrance exam would suffice for those seeking to practise in Tier 1. Separate assessments should be developed by the regulator, in conjunction with subject matter experts from:

- the AAT MRD and the IAA, for entry into Tier 2; and
- the Ministerial Intervention Unit of the Department, for entry into Tier 3.

140. Special arrangements should apply to accommodate persons holding RMA status when the tiered system is introduced (**legacy RMAs**) so that they appropriately transition into the new system. Further detail in relation to such arrangements for legacy RMAs is provided later in this submission, as well as further detail regarding proposed RMA CPD requirements.

141. The table below illustrates a proposed model for entry to, and graduation within, the industry:

	ENTRY REQUIREMENTS	**RMA OBLIGATIONS**
PRESCRIBED QUALIFICATION	Currently vary according to each course provider and not influenced by the regulator	N/A
PRESCRIBED EXAM	Candidate must hold: • prescribed qualification • IELTS test certificate (Overall Band Score at of at least 7.5; at least 6.5 in each of the four testing components; Academic version) or equivalent	N/A

[62] See *Gill v Minister for Immigration & Border Protection & Anor* [2014] FCCA 1929 at [8]

	• regulator certificate confirming they have passed the fit and proper person and person of integrity test	

PROVISIONAL REGISTRATION
(granted for 2 years)
	Application to regulator for a provisional registration certificate. Applicant must:
	• have passed the entrance test
	• hold IELTS test certificate (Overall Band Score at of at least 7.5; at least 6.5 in each of the four testing components; Academic version) or equivalent
	• have an approved 12 month supervised practice arrangement in place and undertake to complete that arrangement within 2 years of application approval. The supervisor must hold appropriate professional indemnity insurance to cover the activities of the supervisee
	• be a fit and proper person / person of integrity
	• meet other entry requirements relating to age, Australian citizenship/visa status etc.
		If provisional RMA certificate application is approved, regulator must publish holder's details and provisional registration status on the Register. Provisional RMA certificate holder must:
		• complete 12 months of supervised practice within 2 years of application approval
		• only provide Tier 1 immigration assistance under supervision
		• complete at least 20 hours of professional development:
		  • a range of mandatory Tier 1 Ethics and Practice Management training sessions delivered by the regulator (10 hours)
		  • 10 hours of Level 1 CPD to be completed in the 12 month period before lodging their Tier 1 registration application (10 hours)

TIER 1 REGISTRATION **(granted for 1 year)**	Application to the regulator for registration as a Tier 1 certificate holder authorising the provision of immigration assistance in matters before the Department. Applicant must: • have passed the entrance test, unless they are a legacy RMA and exempted by the regulator • have completed 12 months of supervised practice under an approved supervised practice	If Tier 1 RMA certificate application is approved, the regulator must publish holder's details and Tier 1 registration status on the Register. Tier 1 RMA certificate holder must: • only provide Tier 1 immigration assistance • maintain appropriate professional indemnity insurance • complete at least 10 hours of professional development: • Level 1 CPD (8 hours)

	arrangement, unless they are a legacy RMA • hold appropriate professional indemnity insurance • be a fit and proper person / person of integrity • have met their CPD obligation during the previous registration period	• a mandatory Tier 1 training session delivered by the regulator (2 hours)

TIER 2 REGISTRATION
(granted for 1 year)
	Application to the regulator for registration as a Tier 2 certificate holder authorising the provision of immigration assistance in matters before the Department, the AAT MRD and the IAA. Applicant must:
	• have passed the Tier 2 entrance exam, unless they are a legacy RMA and exempted by the regulator
	• hold appropriate professional indemnity insurance
	• be a fit and proper person / person of integrity
	• have met their CPD obligation during the previous registration period
		If Tier 2 RMA certificate application is approved, the regulator must publish holder's details and Tier 2 registration status on the Register. A Tier 2 RMA certificate holder must:
		• only provide Tier 2 immigration assistance
		• maintain appropriate professional indemnity insurance
		• complete at least 10 hours of professional development:
		  • Level 1 and/or 2 CPD (7 hours)
		  • a mandatory Tier 1 training session delivered by the regulator (1 hour)
		  • a mandatory Tier 2 training session delivered by the regulator (2 hours)

TIER 3 REGISTRATION **(granted for 1 year)**	Application to the regulator for registration as a Tier 3 certificate holder authorising the provision of immigration assistance in matters before the Department, the AAT MRD, the IAA and the Minister. Applicant must: • have passed the Tier 3 entrance exam, unless they are a legacy RMA and exempted by the regulator	If Tier 3 RMA certificate application is approved, the regulator must publish holder's details and Tier 3 registration status on the Register. A Tier 3 RMA certificate holder must: • only provide Tier 3 immigration assistance • maintain appropriate professional indemnity insurance • complete at least 10 hours of professional development:

	• hold appropriate professional indemnity insurance • be a fit and proper person / person of integrity • have met their CPD obligation during the previous registration period	• Level 1, 2 and/or 3 (7 hours) • a mandatory Tier 2 training session delivered by the regulator (2 hours) • a mandatory Tier 3 training session delivered by the regulator (1 hour)

Introduction of the tiered registration system – registration application fees and concessions for legacy RMAs

142. The Committee acknowledges that the introduction of a tiered system may be of concern to some legacy RMAs. In recognition of such concerns, the Committee suggests the government consider:

- staggering registration application fees payable to enter each tier; and
- providing concessions to legacy RMAs when lodging their first application to enter the tiered system.

143. By way of example, in relation to registration application fees, the Committee suggests replacing the current commercial registration fee price structure (Initial registration application fee: $1,760; Repeat registration application fee: $1,595) with a staggered application fee structure, for example:

- Provisional registration fee: $1,600 (allows for 2 years of provisional registration);
- Tier 1 registration fee: $1,000 (allows for 1 year of registration);
- Tier 2 registration fee: $1,300 (allows for 1 year of registration); and
- Tier 3 registration fee: $1,500 (allows for 1 year of registration).

144. A staggered price structure will reduce the cost for all RMAs, especially small businesses, when transitioning into the tiered system.

145. Furthermore, it is suggested that government establish arrangements to provide the following exemptions to legacy RMAs seeking to transition into:

- Tier 1: an exemption from having to pass the entrance test if they are assessed by the regulator as competent to practise in this tier;
- Tier 2: an exemption from having to pass the entrance test and/or pass the Tier 2 entrance exam if they are assessed by the regulator as competent to practise in this tier; and
- Tier 3: an exemption from having to pass the entrance test, the Tier 2 entrance exam and/or Tier 3 entrance exam if they are assessed by the regulator as competent to practise in this tier.

146. These exemptions would only apply to legacy RMAs when they make their first registration application after the introduction of the tiered registration system.

147. By way of suggestion, to assist with the management of legacy RMA transition into the tiered system, the regulator should invite all legacy RMAs to lodge an expression of interest (**EOI**) before a prescribed deadline detailing their interest in entering Tier 1, 2

or 3. Those who do not respond to the EOI invitation will be deemed to have expressed interest in seeking to transition into Tier 1.

148. Once the EOI lodgement deadline has passed, the regulator should liaise with the Department and the AAT in order to obtain relevant information in relation to the assessment of each legacy RMA's competence to practice in their chosen tier. When determining whether a legacy RMA is sufficiently competent to transition into their chosen tier and thereby exempt from having to undertake a competency assessment, the factors that may be taken into account by the regulator could include:

    - the information provided in the EOI;
    - the RMA's complaints history including any previous disciplinary action taken by the regulator (relevant to assessing entry into Tier 1, 2 or 3);
    - advice received from the Department in relation to the RMA's level of competence demonstrated in relation to Departmental matters (relevant to assessing entry into Tier 1);
    - advice received from the AAT in relation to the RMA's level of competence demonstrated before the AAT MRD and the IAA (relevant to assessing entry into Tier 2 and Tier 3); and
    - advice received from the Ministerial Intervention Unit of the Department in relation to the RMA's level of competence demonstrated in relation to Ministerial intervention matters (relevant to assessing entry into Tier 3).

149. Upon reaching its decision, the regulator should notify the RMA of the outcome. Where the outcome is:

    - favourable, the RMA should be permitted to transition into their preferred tier; and
    - unfavourable, the regulator should specify which tier has been allocated to the RMA and invite the RMA to undertake and pass a competency assessment(s) within a prescribed period in order to enter their preferred tier should they wish to pursue that option.

150. In addition to the entrance test, Tier 2 and 3 entrance examinations would need to be developed and offered to those legacy RMAs requiring a competency assessment before the tiered system takes effect.

151. The Committee understands that significant resources would need to be dedicated to enabling the transition process but maintains that the return on this investment would be delivered quickly in terms of bolstering consumer protection, improving the reputation of the industry as well as reducing backlogs and delays in decision-making by the Department, the review authorities and the relevant Minister(s).

United Kingdom

152. The OISC, an agency independent from United Kingdom Visas and Immigration, regulates immigration advisers, ensuring they are fit and competent and act in the best interests of their clients.

153. Sub-section 84(1) of the *Immigration and Asylum Act 1999* (UK) prohibits the provision of immigration advice or services other than by a 'qualified person'. A registered person with OISC within the United Kingdom is considered a 'qualified person'.[63]

[63] *Immigration and Asylum Act 1999* (UK) s 85(1).

Barristers and solicitors in the United Kingdom are exempt from registration with OISC.[64]

154. There are three levels of registration with the OISC:[65]

- Level 1: basic immigration advice within the Immigration Rules;[66]
- Level 2: more complex casework, including applications outside the Immigration Rules;[67] and
- Level 3: appeal work.[68]

155. In order to become an OISC-registered adviser, or apply to transition to a higher level, an application to OISC is required demonstrating the applicant is fit, proper and a competent person, as well as demonstrating the ability to manage client files as per the competency requirements for the level of registration they are applying for.[69]

156. As part of the application process for initial registration of a new adviser, or a request to raise the levels of an already authorised adviser, the OISC requires applicant advisers to undertake a formal written competency assessment.

157. In 2018-19, 585 candidates undertook a formal written assessment at Level 1. Of these, 50 per cent were successful. At the higher levels, 125 candidates took an assessment at Level 2 and 75 at Level 3. 31 per cent of candidates were successful at Level 2 and 15 per cent were successful at Level 3.[70] The OISC releases the immigration assessment papers of previous years, which immigration advisers were required to undertake for registration, as well as model answers.

New Zealand

158. While there is no tiered system in New Zealand, a supervised practice framework exists as a mechanism to protect consumers by ensuring that provisional license holders act ethically and provide competent advice.

159. It should be noted that in the absence of a tiered system, the Immigration Advisers and Complaints Disciplinary Tribunal has upheld a broad range of sanction decisions imposed by the NZIAA upon advisers who have fraudulently or negligently handled review applications before New Zealand's Immigration and Protection Review Tribunal. Examples of such cases involve inexperienced immigration advisers:

- failing to inform the client of the unfavourable outcome of the review application;[71]

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[64] Ibid s 86(1).
[65] OISC, 'How to become a regulated immigration adviser' (Webpage, 29 April 2020) <https://www.gov.uk/government/publications/how-to-become-a-regulated-immigration-adviser/how-to-become-a-regulated-immigration-adviser>.
[66] For work permitted at Level 1, including competence requirements, OISC, 'Guidance on Competence' (2017) 10-13 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604807/OISC_GoC_2017.pdf>.
[67] For work permitted at Level 2, Ibid 14-18.
[68] For work permitted at Level 3, Ibid 19-23.
[69] OISC, 'Guidance on Fitness (Advisers)' (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510309/fitness_2016.pdf> .
[70] OISC, *Annual Report* 2018/19 (Report, 11 July 2019) 12 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816154/OISC_-_Annual_Report_2018_PRINT.pdf>.
[71] *Delamere v Jiang* [2017] NZIACDT 1 (17 February 2017) 67.

- lodging a review application that was wholly misguided and devoid of merit;[72]
- failing to lodge a review tribunal appeal within the prescribed timeframe and then dishonestly representing to the client that an appeal had been lodged;[73] and
- misrepresenting their professional qualifications and capacity to clients and the review authority.[74]

Canada

160. Unlike the United Kingdom, Australia and New Zealand, industry self-regulation persists in Canada. In addition to regulating immigration consultants, the ICCRC regulates international student advisors at universities. This is an example of tiering whereby a limited licence is offered for activities related to international students' immigration needs. Immigration, Refugees and Citizenship Canada has recently indicated that the tiered licensing system could be expanded.[75]

161. Currently, all registered immigration consultants can act as a representative before the Immigration and Refugee Board of Canada (**IRB**), Canada's tribunal for review of immigration and refugee decisions. However, due to concerns raised by the IRB and other witnesses at the Canadian House of Commons Standing Committee on Citizenship and Immigration Inquiry 'Starting Again: Improving Government Oversight of Immigration Consultants' in 2017 about the quality of Regulated Canadian Immigration Consultants (**RCICs**) advocacy before the IRB,[76] the regulator commissioned a report on the feasibility of specialisations for RCICs. The following recommendation was made:

> *The Specialization Task Force recommends that the ICCRC implements a specialization for RCICs to represent clients at Tribunals. Only RCICs with this specialization would be allowed to appear before the IRB to represent clients. This specialization would better protect the public, offer RCICs a competitive advantage and further enhancing the reputation of the immigration consulting profession.*
>
> *The requirements would entail completing advance training on representing clients at tribunals. The Council would collaborate with the IRB to determine the education competencies of this specialization. The implementation framework, including detailed guidelines and competencies, would be published within one year of the Council agreeing to implement the specialization designation.*[77]

162. According to the ICCRC 2019 Annual Report, the Specialization Program is currently under development and it is anticipated that the program will consist of an on-line, self-directed component, a three-day intensive component and a mock-trial component. It is anticipated that the Specialization Program will launch by the end of 2019. All

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[72] *Singh v Golian* [2019] NZIACDT 9 (19 February 2019) 10.
[73] *BG v Hakaoro* [2013] NZIACDT 63 (19 September 2013) 21-23.
[74] *Bell v Shadforth* [2018] NZIACDT 1; *Five Complainants v Kumar* [2015] NZIACDT 82 (17 August 2015).
[75] Canadian House of Commons Standing Committee on Citizenship and Immigration, *Starting Again: Improving Government Oversight of Immigration Consultants Inquiry* (Report, June 2017) 25.
[76] Ibid, 26.
[77] ICCRC, *A Report on the Feasibility of Specialisation for RCICs* (Report, 2017) 9-10 < https://iccrccrcic365.sharepoint.com/ICCRC-WEBSITE/Shared%20Documents/Public/English/About%20Us/Publications/Reports/Report_Specialization_FINAL_July2017.pdf?&originalPath=aHR0cHM6Ly9pY2NyY2NyY2ljMzY1LnNoYXJlcG9pbnQuY29tLzpiOi9nL0lDQ1JDLVdFQlNJVEUvRVdhQUZEaWpuZTVDdVZJX2ViUFF0WWNCVV9ZTWNoU1NCaEE4aXdKVDhUd29UUT9ydGltZT1VRVdhTk5RdDJFZw>.

RCICs who wish to appear before the IRB will be required to undertake the specialisation.[78]

163. The Committee does not support the introduction of an equivalent specialisation or accreditation program to be provided by industry or an education provider in the Australian context. Subject to the AAT and the IAA's views, the Committee recommends the introduction of a Tier 2 entrance examination developed by the AAT and the IAA in conjunction with the regulator and then administered by the regulator as the best mechanism to realise consumer protection in this area. Industry may suitably respond by offering preparatory courses and mentoring arrangements to assist RMAs seeking to enter higher registration tiers. Consistent with government's deregulation agenda, these industry offerings should not be regulated by the regulator.

Recommendation 11

- **That government prioritise the development and introduction of a system of tiered registration in relation to the categories of services individual RMAs are permitted to provide, the higher tiers restricted to those members of the industry with sufficient competency to conduct cases before the AAT (Migration and Refugee Division), the Immigration Assessment Authority and requests for Ministerial intervention under sections 195A, 197AB, 197AD, 351 or 417 of the *Act*. The regulator should develop, in conjunction with the relevant review authorities and the Department's Ministerial Intervention Unit, specific competency assessments to be administered by the regulator to enable RMAs to undertake to facilitate their transition into a higher tier. The regulator should not permit industry any role in determining which RMAs qualify to move into a higher tier.**

Redefining the scope of immigration assistance – excluding advocacy work before the AAT (General Division), migration litigation and citizenship matters

Advocacy work before the AAT

164. Section 276 of the Act defines 'immigration assistance' as including:

- preparing for proceedings before a court or review authority in relation to a visa application or cancellation review application; and
- representing a visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the application.

165. Section 275 of the Act provides:

review authority means:

(a) the Tribunal in reviewing a Part 5-reviewable decision; or

(b) the Tribunal in reviewing a Part 7-reviewable decision; or

[78] ICCRC, *Annual Report* (Report, 2019) 12 < https://iccrccrcic365.sharepoint.com/ICCRC-WEBSITE/Shared%20Documents/Forms/undefined>.

(c) the Immigration Assessment Authority.

166. The Committee notes that the current definition of 'immigration assistance' excludes any form of assistance with matters before the General Division of the AAT and maintains that this is appropriate and should not change.

167. The Committee is particularly concerned about ensuring that RMAs meet the professional standards required in order to ethically and competently assist clients with matters before the IAA and the AAT MRD. The risk to be considered is that RMAs who are ill-equipped to handle this work will not be acting in the best interests of their clients and frustrate the proper functioning of these review authorities.

168. Decision-making in migration law (a subset of administrative law) starts at the primary level, goes through to merits review and ends, subject to a jurisdictional breach or error, at judicial review. The review process is overwhelmingly presided over by a legally trained Member bound by case law and judicial precedent. This legal setting is alien to many RMAs, most of whom have no knowledge of rapidly changing case law, binding precedent and related areas of law that impact on the decision at issue.

169. Further, the procedures and processes at the IAA and the AAT, particularly in the General Division, are very complex and require a deeper understanding of the law. Immigration law overlaps with company law, family law, employment and criminal law. Only lawyers are trained in core and elective fields of law. Moreover, the skills required to competently assist a client with a matter before a review authority differ greatly than those needed to assist at the primary level.

170. The competency of the advocate and the submissions made at the merits review stage have a direct bearing on the capacity of the applicant to seek judicial review, as new evidence cannot be adduced at judicial review. There is a significant risk that RMAs who are not Australian legal practitioners will fail to identify an error of law, in particular jurisdictional error, while a matter is before the review authority and therefore fail to consider issues that could have been resolved at the review stage.

171. Preparation, arguments and competency are critical at this stage so as not to close a possible judicial review option. Once the IAA or the AAT MRD makes an unfavourable decision, many review applicants are then unable to seek recourse at the courts, as their issues may be only merits related. The Committee's general concern is that RMAs are not adequately trained in theory and practice for merits review. It is unlikely that the elevation of the prescribed course to a Diploma level, without requiring mandatory training and supervision, would make an RMA more competent at the merits review stage.

172. These concerns are brought into particularly stark relief when matters before the General Division of the AAT are considered, these most commonly being character cases related to section 501 of the Act and citizenship cases pursuant to the *Citizenship Act 2007* (Cth). In these matters the Australian Government is always legally represented by a solicitor, and often also by a barrister. These matters run akin to a Federal Court trial with evidence in chief, cross-examination and re-examination, at times with complex arguments on the admissibility of evidence and contested legal debate.

173. It is apposite to look at the Canadian context where similar concerns have been raised. In evidence before the Canadian House of Commons Standing Committee on Immigration and Citizenship inquiry into the Canadian government's oversight of Canadian immigration consultants, IRB Chairperson Paul Aterman stated that currently all consultants may practise before the tribunal, yet many do not possess the skills required to advocate effectively for their clients. As a result, he told the Committee, IRB members will compensate at a hearing:

> *[B]oard members use a kind of compensatory mechanism in a hearing room. If they're dealing with a consultant who is not able to present the client's case, they get drawn into the arena and they have to start eliciting the evidence. It's not something a lot of members like to do, but sometimes they feel they have to do that in order for the case to go ahead that day and for there not to be a miscarriage of justice*.[79]

174. In a response to a question from the Standing Committee on Immigration and Citizenship, the IRB clarified that:

> *the skills required to advocate on behalf of a client in a hearing are unique. They require counsel to distinguish between argument and evidence, know and apply the proper legal tests, develop an appropriate litigation strategy and cross-examine witnesses. These litigation skills are not engaged in application based processes*.[80]

175. On this basis, the Committee maintains that a tiering system is needed to distinguish the requisite capabilities in relation to matters before the AAT MRD and the IAA and that the definition of 'immigration assistance' should continue to exclude assistance in connection with matters before the General Division of the AAT.

Migration litigation

176. In relation to migration litigation, once the AAT MRD or the IAA makes an unfavourable decision, persons are then unable to seek recourse at the courts, as their issues may be only merits related. The grounds for judicial review are very limited and RMAs who are non-lawyers should not be seeking to advise on judicial review prospects.

177. Part 8B of the Act imposes an obligation on persons not to encourage other persons to commence or continue unmeritorious migration litigation in the courts. It reinforces the powers of courts having jurisdiction in relation to migration litigation to make personal costs orders against persons who encourage unmeritorious migration litigation. Further, only lawyers acting in migration cases are required to certify at the institution of proceedings that the application has merit. The provisions are designed both to deter the initiation or continuation of proceedings that are an abuse of a court's process and which waste court resources and to safeguard litigants so that they are not encouraged to pursue unmeritorious migration litigation. Costs orders may be made against lawyers, migration agents or other persons who have encouraged the prosecution of unmeritorious migration claims by litigants. Courts will be able to make a personal costs order against an adviser promoting litigation behind the scenes if the person has given no proper consideration to the prospects of success or has acted for an ulterior purpose.

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[79] Canadian House of Commons Standing Committee on Citizenship and Immigration, *Starting Again: Improving Government Oversight of Immigration Consultants Inquiry* (Report, June 2017) 26.
[80] Ibid.

178. The problem arising out persons promoting litigation behind the scenes was highlighted by Wilcox J in *Muaby v Minister for Immigration & Multicultural Affairs*:

> *Challenges to decisions of the Refugee Review Tribunal may not be motivated in all cases by a careful consideration of the relevant legal principles and an assessment of the prospects of success. Those challenges, it is suspected, may in some cases be driven more by a determination to remain in Australia for as long as possible, whatever may be the ultimate prospects of success in the courts. And even more disturbing is the potential that some challenges may be pursued by unrepresented litigants who have been given ill-considered advice as to their prospects*.[81]

179. Courts have not had occasion to use these powers against RMAs who are not lawyers as these persons rarely present themselves to the court[82] but may shadow unmeritorious litigation. Members of the Committee have observed that RMAs who are non-lawyers have been providing legal advice to clients on how to prepare and complete an application to the Federal Circuit Court, and that they request that the clients apply to the court as a self-represented litigant. The reason for advising clients to self-represent is that the right to appear before a court as an advocate is only given, pursuant to the inherent power of a court to control its own processes, to legal practitioners. The efficient administration of justice is frustrated where RMAs and other unlawful operators shadow unmeritorious judicial review applications for the primary purpose of extending a person's stay onshore.

180. There is an urgent need to review the policy and legislation relating to the role of RMAs in the litigation process. It would only be appropriate for the legislation to authorise a RMA to refer a person to an Australian legal practitioner for legal advice in relation to judicial review matters. Any broader authorisation involves a significant risk to a client who may be embarking upon or continuing unrepresented litigation.

181. Part 3 of the Act should be amended to ensure there is no ambiguity in relation to the fact that the provision of advice about the commencement or continuation of migration litigation, certification of reasonable prospects of success and representation before the court are matters that should only be undertaken by Australian legal practitioners.

Legal advice on citizenship law

182. The Committee is also concerned about RMAs giving legal advice on citizenship law.

183. The citizenship laws are outside the scope of the Act. Many RMAs are unfamiliar with key issues pertaining to citizenship, such as how and when visas cease, character concerns and Ministerial discretions.

184. Citizenship law, policy and procedure is not taught in the prescribed course and there is no requirement for a RMA to maintain sound working knowledge of citizenship law, policy and procedure. As a result, there is a significant risk for clients that they will receive incorrect and contrary advice from a RMA that is unfamiliar with citizenship laws.

[81] *Muaby v Minister for Immigration & Multicultural Affairs* (Federal Court of Australia, Wilcox J, 20 August 1998).
[82] For example, see *SZFDZ v Minister for Immigration and Multicultural Affairs* [2006] FCA 1366.

185. Furthermore, the OMARA is unable to combat RMA misconduct in relation to citizenship matters. The Committee's view is that legal advice on Australian citizenship law should only be provided by Australian legal practitioners.

Recommendation 12

- **That the definition of immigration assistance be redefined in accordance with the proposed tiered registration system whereby the categories of services individual RMAs are permitted to provide are clearly specified in accordance with each Tier. To avoid ambiguity and the risk of RMAs engaging in unauthorised work, that may give rise to the imposition of sanctions and penalties, the legislation should specifically prohibit representation or other involvement by RMAs in court-related and judicial review matters, Administrative Appeals (General Division) matters and citizenship matters.**

Continuing professional development requirements

186. The Committee acknowledges that CPD ensures the level of professionalism, knowledge and skill required of RMAs is continually improved. This is particularly important because migration legislation is complex and dynamic.

Observations of the RMA CPD market

187. Despite extensive efforts by the OMARA to regulate the RMA CPD market, many experienced RMAs report their dissatisfaction with the proliferation of low-cost online options which has led to fewer quality CPD offerings relevant to more experienced RMAs.[83]

188. Interestingly, Committee members have reported that recent entrants to the industry who have passed the entrance test have also complained about the quality of CPD available in the market.

189. Others have commented that existing CPD providers offered limited value for money and suggested that the regulator could 'look at providing a better service in professional training'.[84]

Suggested changes to the RMA CPD framework

190. RMAs should be required to undertake a minimum amount of CPD in each year of registration.

191. Any changes to the requirements should not unduly burden RMAs but recalibrate their CPD obligations to ensure that they undertake CPD which is relevant to their sphere of practice.

192. A greater role should be played by the regulator in delivering targeted professional development to RMAs.

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[83] These reports were raised in the MIA submission to the JSCM Inquiry. See JSCM, Parliament of Australia, *Inquiry into efficacy of current regulation of Australian migration and education agents* (Final Report, February 2019) 3.74.

[84] Evidence of Ms Angela Chan (private capacity), Consultant, Dispute Resolution Pty Ltd given to the JSCM Inquiry on 16 July 2018. See Ibid 3.76.

193. The RMA CPD framework should be revised to reflect the proposed tiered registration system and require RMAs to complete a minimum amount of levelled and mandatory CPD that is designed for their sphere of practice.

194. The table below specifies the minimum CPD requirements for RMAs:

	Levelled CPD – CPD providers			Mandatory CPD – OMARA				Total CPD hours
	Level 1 CPD hours	Level 2 CPD hours	Level 3 CPD hours	Entry program hours	Tier 1 program hours	Tier 2 program hours	Tier 3 program hours	
Provisional RMA	10	0	0	10	0	0	0	20
Tier 1 RMA	8	0	0	0	2	0	0	10
Tier 2 RMA	7		0	0	1	2	0	10
Tier 3 RMA	7			0	0	2	1	10

Levelled CPD to be offered by approved CPD providers only

195. CPD providers may, subject to meeting requirements set by OMARA, offer CPD activities at Levels 1, 2 and/or 3 that are designed to develop a RMA's understanding of migration law, policy, procedure and practice in order to offer quality immigration assistance in their authorised area of practice.

196. Reflecting the tiered system, the content that must be covered in a levelled CPD activity is explained below:

(a) Level 1 CPD activities solely relate to the provision of immigration assistance in matters before the Department;

(b) Level 2 CPD activities solely relate to the provision of immigration assistance in matters before the AAT MRD or the IAA; and

(c) Level 3 CPD activities solely relate to the provision of immigration assistance in connection with requests to the Minister to exercise his or her power under section 195A, 197AB, 197AD, 351 or 417 of the Act.

197. In recognition of their seniority in the industry, RMAs in Tiers 2 and 3 should be afforded discretion in terms of how they spread their levelled CPD across the levels authorised for their respective tiers.

Mandatory CPD to be provided by OMARA only

198. In addition to levelled CPD, RMAs should undertake a minimum amount of mandatory CPD provided by the regulator. All RMAs would benefit from targeted training to be delivered by the regulator which focusses on the information required for ethical and competent practice in the tier which the government has authorised them to engage in practise. This is a critical function of the regulator. To that end, it should appoint suitably qualified persons to a Mandatory CPD Education and Training Panel whose task would be to develop and deliver the mandatory CPD program for RMAs in each practice tier.

199. The purpose of this education offered by the regulator is to provide RMAs with the appropriate education, tools and resources required for competent practice to ensure consumer protection and boost the public's confidence in the industry. Again, this is a critical function of the regulator and should be carefully managed.

200. All RMAs should be required to complete activities from the mandatory program relevant to their Tier on an annual basis. Details of the proposed content of these activities is set out below:

    (a) Tier 1 mandatory activity – an education activity 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 eg, clients' account management, contingency planning, file management, managing conflicts of interest etc.

    (b) Tier 2 mandatory activity – an education activity covering a range of matters including AAT MRD and IAA procedure and practice, recent legal developments affecting the operations of these review authorities and the manner in which their decisions are made, ethical representation and advocacy before the review authorities, review authority caseload and processing updates etc.

    (c) Tier 3 mandatory activity – an education activity covering 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 governing the Minister's powers to intervene.

201. In Canada, the ICCRC provides mandatory practice education (in person or via real-time remote) to all registered immigration consultants.[85]

202. The Committee maintains that the introduction of a mandatory education system conducted by the regulator, to supplement the education offered by CPD providers, will strengthen consumer protection by ensuring that the expectations of the regulator, the review authorities, the Department and the Minister are understood by RMAs. The system will also enable the regulator to foster productive working relationships with RMAs and personnel from the Department and the review authorities.

The role of CPD and career progression

203. CPD is required in order for RMAs to maintain and improve their knowledge in an existing area of practice. However, the CPD system should not be relied upon as a forum for curing basic skill and knowledge deficiencies that may exist among some RMAs who have entered the industry at time when the entry-level requirements were comparably lower than the standards that are now expected by the Australian community.

204. Furthermore, the CPD system should not be designed to cater to RMAs seeking career progression to Tier 2 or 3. RMAs required to undertake Level 2 and/or 3 activities should have the confidence that those activities are appropriately pitched to

[85] ICCRC, 'Course registration' (Webpage, 9 March 2020) <https://iccrc-crcic.ca/education/practice-management-education-7/course-registration/>.

their needs rather than addressed to an audience that is not authorised to provide immigration assistance of that type.

205. If an RMA wishes to consider extending their area of practice into Tier 2 or 3, they may, among other things, wish to undertake additional Level 2 or 3 CPD. Should they choose to do so, their completion of such activities should not attract CPD points and CPD providers must ensure that they do not make up more than 10 per cent of attendees undertaking any CPD activity offered where Level 2 or 3 RMAs are in attendance.

206. Instead, for those RMAs intending to sit the regulator's Tier 2 or 3 entrance examinations, it is envisaged that a community of practice will, and should, emerge within the industry to facilitate career advancement whereby:

    - persons authorised to provide supervised practice will continue to support the career development of their supervisees through ongoing mentorship arrangements; and
    - industry associations and other CPD providers will offer mentorship programs and preparatory courses for those intending to sit those examinations.

207. It is recommended that the regulator not play a role in regulating this community of practice.

Recommendation 13

- **That the Continuing Professional Development framework be revised in accordance with the proposed tiered registration system to facilitate the provision of more targeted CPD to RMAs, some of which must be undertaken with the regulator. Those RMAs in higher tiers should be permitted greater freedom when selecting from the range of activities offered by approved CPD providers.**

Occupational competency standards required for RMAs

208. The existing Occupational Competency Standards for Registered Migration Agents dated September 2016 (**OCS Framework**)[86] has been embedded in the systems relating to the education of, and entry to, the profession for over five years. The OCS Framework is a recognised and accepted standard for assessing an RMA's competency.

209. In the United Kingdom, where a tiered registration system has been in place for many years, the OISC has developed a comprehensive Guidance on Competence[87] as part of its duty to ensure that those who provide immigration advice or immigration services are fit and competent to do so. The OISC's Guidance on Competence:

    - was first published in 2012 and is currently in its 6th edition;
    - sets out the standards advisers must meet to be considered competent; and

[86] Department of Immigration and Border Protection, 'Occupational Competency Standards for Registered Migration Agents' (September 2016) <https://www.mara.gov.au/media/484225/Competency_Standards_for_Agents_September_2016.pdf>.
[87] See OISC, 'Guidance on Competence' (2017) <https://www.gov.uk/government/publications/oisc-guidance-on-competence-2017> .

- must be read alongside the Commissioner's Code of Standards, which sets out the standards that OISC advisers and their organisations must meet contains lists of the type of advice that can be given at each advice level.[88]

210. By way of contrast, the current OCS Framework has not been revised since it was introduced in 2016. It is recommended that the OCS Framework be revised in order to reflect the tiered system as well as further articulate the scope of permitted practice to be provided by, and the standard of competence practice expected of, RMAs in each tier. To that end, the OISC's Guidance on Competence could be used as a suitable to model to inform revisions to the OCS Framework.

211. A revised OCS Framework will strengthen consumer protection and bolster professional standards through the clearer articulation of the standard of competent practice expected in the industry, thereby better informing:

- consumers, RMAs, organisations that employ RMAs as well as RMA industry associations of the standard expected for competent practice by RMAs in each of Tiers 1, 2 and 3;
- prescribed qualification course providers and their students of the standard expected for admission to the industry to practise in Tier 1 on a supervised basis;
- candidates undertaking the entrance test, and the prescribed exam provider, of the standard expected for admission to the industry to practise in Tier 1 on a supervised basis;
- supervisors of the standard expected for competent practice by RMAs in Tier 1;
- persons developing and delivering the Tier 2 entrance examination of the content and style of that examination, as well as the standard expected in order to pass;
- persons developing and delivering the Tier 3 entrance examination of the content and style of that examination, as well as the standard expected in order to pass;
- approved CPD providers offering levelled CPD to RMAs of the standard expected for competent practice by RMAs in each of Tiers 1, 2 and 3; and
- the OMARA when evaluating the conduct and expected level of performance of RMAs, especially when complaints arise.

Recommendation 14

- **That the Occupational Competency Standards for Registered Migration Agents dated September 2016 be revised in order to reflect the proposed tiered registration system as well as further articulate the scope of permitted practice to be provided by, and the standard of competence practice expected of, RMAs in each Tier. The United Kingdom Office of the Immigration Services Commissioner's Guidance on Competence could be used as a suitable to model to inform revisions to the Australian competency standards.**

[88] See OISC, 'Guidance on Competence 2017- Introduction' (30 March 2017) https://www.gov.uk/government/publications/competence-oisc-guidance-2012/oisc-guidance-on-competence-2017-pt-1.

Other reform suggestions

Expanding regulation to include organisations offering immigration assistance

212. The Kendall Review recommended 'in order to ensure that the clients of all businesses are protected, the relevant legislation, practices and policies that govern migration agents should apply to all business structures'.[89]

213. The Committee remains concerned with the use of business structures that effectively disable the OMARA from investigating allegations of misconduct. This most commonly arises in the following types of situations:

- an Australian company is incorporated without any of the company directors being an RMA. That business advertises migration services and contracts with end-user clients to provide those services. The company then subcontracts that work to an RMA;
- a business based entirely outside of Australia advertises its ability to provide migration services, contracts with a client outside of Australia and distributes the work to a subcontracted RMA; and
- an existing migration agency with RMAs subcontracts work to an external RMA with the visa applications being lodged under the ImmiAccount of the subcontracted RMA.

214. In these and similar situations, in the event of a complaint being made to the OMARA, the RMA who performed the work will commonly have had:

- limited, if any, contact with the client;
- no control over or access to client records such as the client file; and
- no control over or access to accounting records including receipts, clients' account and the like.

215. As such, the RMA is often not in a position to provide any relevant information and/or records to the OMARA apart from their recollection of events.

216. In the first and second business structure scenarios outlined above, the OMARA is potentially unable to access any records in relation to the matter. In the third scenario, a contest can then arise as to which RMA holds an obligation to provide records to the OMARA.

217. At the heart of this problem is the fact the law currently only regulates the conduct of individual RMAs who provide immigration assistance, and not the businesses through which migration services are provided.

218. The Committee recommends that protection of the public interest would be best served by amending Part 3 of the Act to require organisations that offer immigration assistance to consumers, particularly fee-charging organisations, to be regulated by the OMARA. The Committee accepts that such an approach would require significant legislative amendment, and it recommends that the government give consideration to this as a matter of priority.

[89] Dr Christopher Kendall, *Independent Review of the Office of the Migration Agents Registration Authority* (Final Report, September 2014) 29, recommendation 7.

Organisations that offer legal advice in Australia

219. In stark contrast to the legislative framework governing the provision of immigration assistance in Australia, legal services can only be provided in Australia through the following structures:[90]

    - a sole practitioner operating in their own name;
    - in the case of a law firm – a partner in a legal partnership;
    - in the case of a community legal service – the supervising legal practitioner; and
    - in the case of an incorporated or unincorporated legal practice – a legal practitioner who holds an Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice, and is:
        - if the law practice is a company within the meaning of the *Corporations Act 2001* (Cth) – a validly appointed director of the company; or
        - if the law practice is a partnership – a partner in the partnership; or
        - if the law practice is neither – in a relationship with the law practice that is of a kind approved by the Legal Services Council[91] under section 40 of the Legal Profession Uniform Law or specified in the Uniform Rules for the purposes of this definition.

220. The purpose of these provisions is to ensure that at least one principal legal practitioner is always legally and ethically responsible for all aspects of the legal services provided by the 'law firm', however that is structured. As such, the legal body investigating complaints against an Australian legal practitioner will always have access to records and files relating to the matter under investigation, including financial and file records.

Organisations that offer immigration advice in the United Kingdom

221. Sub-section 83(5) of Part V of the *Immigration and Asylum Act 1999* (UK) places a statutory duty on the Immigration Services Commissioner to exercise her functions so as to secure, so far as reasonably practicable, that those who provide immigration advice or immigration services:

    - are 'fit' and 'competent' to do so;
    - act in the best interests of their clients;
    - do not knowingly mislead any court, tribunal or adjudicator in the United Kingdom;
    - do not seek to abuse any procedure operating in the United Kingdom in connection with immigration or asylum (including any appellate or other judicial procedure); and
    - do not advise any person to do something which would amount to such an abuse.

222. Section 83 applies to both individual advisers and advice organisations.

223. Registered advisers are only able to provide advice under organisations that have also been registered with the OISC. As at 31 March 2019, there were:

[90] See: Legal Profession Uniform Law (NSW), s 6 (definitions of 'Law Firm' and 'Principal of a Law Practice').
[91] As established by Ibid Part 8.2.

- 1,050 registered organisations (918 of which were fee charging organisations, and 592 were non-fee charging); and
- 2,733 registered advisers.[92]

224. For organisations (sole traders, partnerships, companies and charities) seeking to be registered, the OISC assesses the fitness and competence of its owners and managers as part of the initial registration application process and monitors compliance on an ongoing basis.

225. Registered organisations are required to apply annually for a continuation of their registration which includes detailing all registered advisers attached to their organisation. Once organisations have gained registration, an ongoing assessment of their fitness and competence is carried out through a programme of premises audits, compliance with CPD requirements and the investigation of any complaints received against registered organisations.[93]

Recommendation 15

- **That the scope of the regulatory scheme be broadened such that organisations offering immigration assistance to consumers must also be registered.**

Industry fidelity fund

226. The Committee notes that a range of OMARA disciplinary decisions reveal that instances involving the inappropriate handling of client funds often arise due to a lack of RMA training in this area, rather than a calculated intent of the RMA to act inappropriately. RMAs, especially provisionally registered RMAs, should be required to undertake mandatory CPD offered by the regulator in relation to client accounts training to improve their ability in managing client funds.

227. Further, the Committee supports the OMARA in its efforts to undertake regular inspection of clients' accounts. It is recommended that all clients' accounts are to be held at an Australian deposit-taking institution. This will enable the OMARA to readily undertake targeted audits of RMA client accounts to ensure compliance.

228. In order to strengthen consumer protection and build confidence in the industry, the Committee recommends that government establish a Fidelity Fund to help provide financial reimbursement to people who suffer pecuniary loss through the criminal or fraudulent actions of a RMA or their employees in the course of providing immigration assistance. Examples of other industry fidelity funds which could inform fund establishment and management arrangements include:

[92] OISC, *Annual Report* 2018/19 (Report, 11 July 2019) 16-17 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816154/OISC_-_Annual_Report_2018_PRINT.pdf>.
[93] OISC, 'Guidance on Fitness (Owners)' (2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/510307/owners_2016.pdf>.

- the Fidelity Guarantee Account[94] established under the *Real Estate and Business Agents Act 1978* (WA) and the *Settlement Agents Act 1981* (WA); and
- the Claim Fund[95] established under the *Property Agents and Motor Dealers Act 2000* (Qld).

229. The Fidelity Fund may be financed through contributions from RMAs, interest on RMA client accounts and interest generated by the fund account. Interest on all clients' accounts could be directly diverted on a monthly basis by the Australian deposit-taking institution to the fund, in a manner similar to the interest from Trust Accounts held by legal practitioners in NSW. As stated above, these funds should be used by the regulator to compensate persons who suffer pecuniary loss due to defaults by RMAs arising from dishonest acts or omissions relating to client funds (where such persons have otherwise been unable to recover against the RMA's professional indemnity insurance provider). These funds should not be used to fund the OMARA's monitoring, investigation and disciplinary activities.

230. If a Fidelity Fund is to be established, it is recommended that the amount of each RMA's Fidelity Fund contribution should change each financial year and be determined by the regulator taking into account the type and number of claims that are made in the preceding financial year. Before being charged to each RMA as part of initial and repeat registration process, the fee set by the regulator should be approved by the Minister.

231. Following the release of a Canadian Parliamentary Inquiry Report in June 2017 which highlighted the need for heightened consumer protection for those using the services of Canadian immigration consultants, the ICCRC is now working with the Canadian government to establish a compensation fund to help the victims of unscrupulous immigration consultants.[96]

Recommendation 16

- **That an Industry Fidelity Fund is established to help provide financial reimbursement to persons who suffer pecuniary loss through the criminal or fraudulent actions of a RMA or their employees in the course of providing immigration assistance.**

Publication of RMA pricing arrangements

232. Prior to 1 July 2017, RMAs were, upon request by the OMARA, required under regulation 3XA of the Regulations to submit with their registration application,

[94] Government of Western Australia, Department of Mines, Industry Regulation and Safety, 'Fidelity guarantee account' (Webpage, 2 January 2020) <https://www.commerce.wa.gov.au/consumer-protection/fidelity-guarantee-account>.
[95] Queensland Government, 'Claim fund for the property, motor and debt collector industry' (30 June 2017) <https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/regulated-industries-and-licensing/regulated-industries-licensing-and-legislation/debt-collecting-and-process-serving-industry-regulation/managing-your-debt-collector-business/claim-fund-for-the-property-motor-debt-collector-industry>.
[96] Canadian House of Commons Standing Committee on Citizenship and Immigration, *Starting Again: Improving Government Oversight of Immigration Consultants Inquiry* (Report, June 2017) 28-29; also see Peter Zimonjic, 'Immigration minister details plans to go after unethical immigration consultants' (6 May 2019) <https://www.cbc.ca/news/politics/ahmed-hussen-college-immigration-consultants-1.5124601>.

information identifying the average fees they charged as a registered agent during the preceding 12 months. This legislative requirement was introduced during the MIA's time operating as the MARA at the request of the then Minister responsible for the MARA. The legislative requirement was intended to provide consumer protection by assisting the understanding of whether fees charged by RMAs were reasonable and comparative.

233. According to the Department and the Australian Border Force (**ABF**), there were a number of issues with the provision and collection of this data including:

- the regulatory burden on RMAs (small business) in compiling and providing this information;
- the quality and usefulness of the information (insufficient granularity to compare like with like services and its unverifiable nature);
- the administrative costs of collecting and presenting the information, and of verifying its accuracy; and
- the Government's broader deregulation agenda of reducing regulatory burden.[97]

234. Regulation 3XA was repealed in April 2017 and the OMARA has not been collecting fee information since 1 July 2017 (when regulation 3XA ceased). Instead, since 1 July 2018, the OMARA has replaced average fee information with the following guidance on its website:

> ***Why fees vary***
>
> *Under the Code of Conduct for Registered Migration Agents, the amount your agent charges (fees) must be fair and reasonable. Your agent will set their fee based on your circumstances.*
>
> *Agent fees vary and depend on:*
>
> - *your visa application type*
> - *the amount of time it will take to prepare your application. Some visa applications take longer to prepare than others*
> - *the level of service you need*
> - *if you need extra help or have complex circumstances. For example your agent might charge more if you have dependants on your application (such as children).*
> - *the experience and qualifications of your agent. If your agent is a lawyer or has many years of experience, their fees might be higher. If your agent's fees seem too high, discuss this with them before signing a contract.*
>
> *To ensure you are charged fairly, it is recommended that you talk to three different agents about their services and fees, before you choose one and sign a written contract with them.*[98]

New Zealand

235. Clause 20 of the NZIAA Code provides that a licensed immigration adviser must:

(a) ensure that any fees charged are fair and reasonable in the circumstances;

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[97] Department of Home Affairs and Australian Border Force, Submission to JSCM, *Inquiry into efficacy of current regulation of Australian migration and education agents*, submission 6, [2.5.1 – 2.5.8].
[98] OMARA, 'Agent fees' (Webpage) <https://www.mara.gov.au/using-an-agent/working-with-your-agent/agent-fees/>

(b) work in a manner that does not unnecessarily increase fees, and

(c) inform the client of any additional fees, or changes to previously agreed fees, and ensure these are recorded and agreed to in writing.

236. The NZIAA's website offer the following guidance to consumers in relation to fees:

> *Licensed advisers vary in expertise, the fees they charge and the level of service they offer. You may wish to speak to several advisers before deciding which one best meets your needs.*
>
> ***Why do fees vary?***
>
> *A licensed adviser when determining a reasonable fee for services to be provided will consider some or all of the following factors:*
>
> - *the adviser's experience and ability*
> - *the degree of complexity of the application*
> - *the urgency of the application, including any time limitations imposed by the client*
> - *the length of time involved in processing the application*
> - *the reasonable costs of running the adviser's business*
> - *whether the application is lodged in New Zealand or offshore*
> - *the location of the adviser lodging the application*
> - *the number of people included in the application*
> - *whether disbursements such as third party costs, couriers, translations, copying etc. are included*
> - *the level of personal service provided*
> - *current market place fee levels for similar services.*[99]

United Kingdom

237. In relation to issues of price and service transparency, the OISC in the United Kingdom does not require registered organisations to publish their fees. Instead, through its Consumer Satisfaction Online Presentation,[100] the OISC encourages registered organisations to be increasingly transparent with clients about both the services offered and the costs involved.[101]

Canada

238. Registered advisers in Canada must charge fees that are 'fair and reasonable'.[102]

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[99] IAA, 'How much should an adviser cost?' (Webpage) <https://www.iaa.govt.nz/for-migrants/cost-of-an-adviser/>.
[100] OISC, 'Consumer satisfaction online presentation' (Webpage, 21 March 2019) <https://www.gov.uk/government/publications/oisc-consumer-satisfaction-online-presentation-text-version>.
[101] OISC , *Annual Report* 2018/19 (Report, 11 July 2019) 22 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816154/OISC_-_Annual_Report_2018_PRINT.pdf>.
[102] Clause 9.2 of Retainer Agreement Regulation 2020-001 made in accordance with By-law 2019-1; see http://registration.iccrc-crcic.ca/admin/contentEngine/contentImages/file/Retainer_Agreement_Regulations_FINAL_14May2012.pdf

239. The ICCRC currently warns consumers about fraudulent fee charging practices and how to spot them.[103]

240. Notably, in order to uphold and protect the public interest through the regulation of the migration advice profession, the ICCRC is taking steps to establish a suggested fee guide for immigration services.[104]

241. The Canadian Government has also committed to ensure that the CICC will provide greater transparency on the fees charged by RCICs and Regulated International Student Immigration Advisors.[105]

Suggestions for reform

242. While recognising that many people in the migration industry act with due diligence and care, the Committee remains concerned about the propensity for persons who do not meet these standards, whether they be RMAs or unlawful operators, to exploit vulnerable migrants by overcharging fees.

243. Consumers should be empowered with average fee guidance when determining whether to engage the services of a RMA. However, such guidance should be reliable and appropriately qualified when published by the regulator. In recognition of the need for transparency and reliability, the regulator should take a targeted approach when determining average fee guidance based upon the type of service being offered and the breadth of experience of the RMA offering that service.

244. With the introduction a tiered registration system, a targeted approach could be employed whereby RMAs in each tier are required to declare to the regulator their range of fees charged for commonly provided services:

- Tier 1 services eg, sponsorship applications, nominations, temporary and permanent visa applications, visa cancellations etc.;
- Tier 2 services eg, advice and representation in relation to common AAT MRD review applications (sponsorship refusal, nomination refusal, visa refusal, sponsorship cancellation/bar etc.) and IAA matters; and
- Tier 3 services eg, Ministerial intervention requests made under each of section, 195A, 197AB, 197AD, 351 or 417 of the Act.

245. The lower end of the range should reflect the fee charged for a standard matter while the upper end of the range should reflect the fee charged for a complex matter (eg, visa applications involving health, character or fraud issues, sponsorships and nominations involving adverse information etc.).

246. After collecting this data during the repeat registration application process, the regulator could then aggregate that data and publish details on its website with the appropriate qualification and guidance to the consumer when interpreting the published data.

247. The suggested initiative will provide the regulator with information needed to fulfil its statutory duty to protect the consumer. Furthermore, the burden upon small business

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[103] ICCRC, 'Top 20 Tips on how to Prevent Immigration Fraud ' (Webpage) <https://iccrc-crcic.ca/fraud-prevention/>.
[104] ICCRC, *Annual Report* (Report, 2019) 12 < https://iccrccrcic365.sharepoint.com/ICCRC-WEBSITE/Shared%20Documents/Forms/undefined>.
[105] Hugo O'Doherty, 'Canada bolsters regulation of immigration consultants' *Moving2Canada* (Webpage, 24 September 2019) https://moving2canada.com/canada-college-immigration-citizenship-consultants/.

would be further reduced if the government sought to regulate organisations (rather than just individuals) offering immigration assistance because employee RMAs would not be required to provide the information sought as part of their repeat registration application. Finally, the argument that RMAs in small business would find the time spent compiling and providing this information to the regulator burdensome is specious given that small business owners readily quote their fees to clients as part of everyday practice.

Recommendation 17

- **That the regulator collect information from RMAs in relation to the professional fees charged for various services and, with appropriate qualification and guidance addressed to the consumer, publish (and annually update) average fee information on its website.**

Theme 3: Combatting misconduct and unlawful activity

Adequacy of penalties for unlawful providers of immigration assistance

248. Persons providing, asking for or receiving a fee or reward for giving, or advertising that they give immigration assistance without holding registration are subject to the operation of criminal offence provisions within the Act. However, the investigation and prosecution of those offences lies outside of OMARA's regulatory authority despite those allegations frequently being made to the OMARA.

Criminal offences

249. The criminal offence regime in Part 3 of the Act is summarised below:

Section[106]	Offence	Penalty
280(1)	Provision of immigration assistance	60 penalty units[107], being $12,600
281(2)	Asking for or receiving any fee or reward for giving immigration assistance	10 years imprisonment
281(2)	Asking for or receiving any fee or reward for giving immigration assistance by another person who is not an RMA	10 years imprisonment
282(1)	Asking for or receiving any fee or reward for making immigration representations[108]	10 years imprisonment

[106] All offences are listed in the Act.
[107] Subsection 4AA(3) of the *Crimes Act 1914* (Cth) currently sets a value of $222 for a penalty unit in respect of Commonwealth offences. This applies to all federal legislation, including the *Criminal Code Act 1995* (Cth), *Customs Act 1901* (Cth) and *Corporations Act 2001* (Cth).
[108] 'Immigration Representations' are defined in subsection 282(4) of the Act (Cth).

282(2)	Asking for or receiving any fee or reward for making immigration representations by another person who is not an RMA	10 years imprisonment
283	A non-RMA person representing themselves as being an RMA (whether directly or indirectly)	2 years imprisonment
284	A non-RMA advertising that they give immigration assistance	2 years imprisonment
285	A non-RMA advertising that another person gives immigration assistance when that other person is not an RMA	2 years imprisonment

250. The Committee maintains that the penalty in section 280 of the Act is too low and does not provide a sufficient deterrent to persons engaging in unauthorised activity. In order to protect vulnerable consumers from receiving advice from unregistered persons, government should increase this penalty.

251. Of greater concern is the absence of evidence of prosecution. The Committee is aware of only one successful prosecution under these provisions[109] and as such it is not possible to provide any meaningful comment on the adequacy or otherwise of the potential penalties involved. A lack of resourcing by the Commonwealth for the investigation of misconduct by non-RMAs may explain the lack of prosecutions.

252. By way of analogous example, it is the common experience of Committee members involved in judicial review proceedings before the Federal Circuit Court and Federal Court that it becomes apparent that those proceedings were commenced and maintained by non-lawyers (whether being RMAs or non-RMAs). However, it is an extremely rare event for the Minister's solicitors to seek a personal costs order against those third parties pursuant to sections 486E and 486F of the Act. At least part of the problem for the failure of prosecutions for the existing offences flows at least in part from the complexity of the fact that the Department undertakes the investigation while any prosecution would be instigated and implemented by the Commonwealth Director of Public Prosecutions (**CDPP**).

253. It has been the anecdotal observation of the Committee that the past few years has seen a significant increase in the number of criminal prosecutions for offences under Division 12 in Part 2 of the Act in relation to offences concerning fraudulent partner relationship claims. The high level of migration knowledge reflected in the Charge Sheets and Statement of Facts demonstrates that at least in relation to partner applications there must be a strong engagement between the Department and the CDPP.

254. The fact that there is growing evidence in one set of criminal offences concerning partner relationships but not with the offences set out in sections 281-285 of the Act strongly indicates that pursuing unregistered immigration assistance has not been a priority for the Commonwealth.

[109] ABF, 'Fake migration agents sentenced' (News release, 20 December 2019).

255. The damage for consumer protection and the protection of the integrity of the Australian migration system demands that this historical approach must change. Only once this has occurred could the adequacy of the current offences and available penalties be properly assessed.

The need for a broader range of penalties

256. The pursuit of criminal offences is resource-intensive and, in many cases, should be reserved for the most egregious offending. Consideration should be given towards the introduction of a wider range of penalties to enable the regulator to more readily take a swift and tailored approach towards those engaging in offending conduct. An escalating sanctions framework with clearly articulated enforcement powers should be legislated, with provision for:

- monitoring and investigations;
- warnings;
- infringement notices;
- enforceable undertakings;
- injunctions; and
- civil penalties.

Regulatory Powers (Standard Provisions) Act 2014 (Cth)

257. The *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**the Regulatory Powers Act**) provides for a standard suite of provisions in relation to monitoring and investigation powers, as well as civil penalties, infringement notices, enforceable undertakings and injunctions. The Regulatory Powers Act commenced on 1 October 2014, but only has effect where Commonwealth Acts are drafted or amended to trigger its provisions.[110]

258. The standard provisions of the Regulatory Powers Act are an accepted baseline of powers required for an effective monitoring, investigation or enforcement regulatory regime, providing adequate safeguards and protecting important common law privileges. New or amending acts that require monitoring, investigation or enforcement powers of the kind available under the Regulatory Powers Act should be drafted to trigger the relevant provisions of that act, unless there are compelling policy reasons to the contrary. A summary of this act is available from the Commonwealth Attorney-General's Department.[111]

259. Consideration should be given to the engagement of the provisions of the Regulatory Powers Act by amending Part 3 of the Act, or drafting any other proposed legislation, to enable the regulator to take action in relation to less serious instances of unregistered conduct.

260. Such an approach would be consistent with the Australian Government's policy desire for the simplification and consistency of government regulation in the sphere of Commonwealth law. This approach will also likely make it easier for the regulator to attract skilled investigators from other jurisdictions which already employ the structure offered by the Regulatory Powers Act.

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[110] By way of example, see Part 7 of the *Industrial Chemicals Act 2019* (Cth).
[111] See Australian Government Attorney-General's Department, 'Regulatory Powers' (Webpage) <https://www.ag.gov.au/legal-system/administrative-law/regulatory-powers>.

The need for a co-ordinated and strategic approach

261. The problem of unregistered practice is significant. Some of the barriers to address this issue include the difficulty collecting information and evidence (given it must often come from complicit witnesses) and the absence of suitable powers in the Act. Perhaps more critical is how this crime is perceived by the courts; despite attempts to explain the often severe consequences on consumers, penalties are often disappointing and provide little deterrence. With so many allegations, the regulator needs to have appropriate powers, strategy and resourcing to tackle the problem.

Recommendation 18

- **That the legislation be amended to increase the penalty for unlawful providers of immigration assistance and provide for a wider range of enforcement powers to enable the regulator and other agencies to coordinate appropriate responses when combatting misconduct and unlawful activity. The Commonwealth should prioritise activities to address the problem of unregistered practice and dedicate sufficient resources to achieve this goal.**

ABF and OMARA's powers relating to monitoring and investigating misconduct by RMAs

Statutory powers for monitoring and investigating

262. Part 8E of the Act does not sufficiently empower the ABF or OMARA to monitor or investigate RMA misconduct. Officials responsible for investigating contraventions of the Act ought to have at their disposal powers adequate to the fulfilment of that duty.

263. Again, consideration should be given towards triggering the standard suite of provisions offered by the Regulatory Powers Act to enable monitoring and investigating RMA misconduct. Should these monitoring and investigative powers not suffice, they may be supplemented by amendment to the Migration Act.

Ensuring the flow of information to the regulator

264. The issue of whether the regulator should be fully independent of the Department warrants consideration in terms of the need to ensure the flow of information to the regulator is not inhibited.

265. Currently, the OMARA relies and benefits heavily on the flow of information between it and the Department. For example, information and allegations via the Department's dob-in lines, information from the Department's processing teams about client experiences and specific feedback as well as the results of the Department's compliance activities can assist the OMARA in the discharge of its functions.

266. Any barriers to the access of information can hamper the OMARA's monitoring and investigations of RMA misconduct as well as other activities eg, understanding and addressing consumer needs, assessing whether an individual is a fit and proper person etc. 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 regulator

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

267. Should an independent regulator be established, it is recommended that the enabling legislation authorise the disclosure of information collected by the Department to the regulator, where necessary and subject to appropriate safeguards,[112] and that the regulator's requests for information are prioritised by the Department.

Strengthening monitoring during the repeat registration application process

268. Many RMAs only interact with the regulator on an annual basis when they apply to renew their registration. The OMARA is to be commended for streamlining this process in recent years.

269. However, the regulator should be enabled to readily monitor an RMA's ongoing fitness to practise at this juncture by undertaking a desk audit of an RMA's competence and adherence to professional standards as part of this process. In particular, this would involve enabling the regulator to request and inspect a copy of a particular client file or set of client files to determine, among other things, whether the RMA has met their professional obligations and indeed whether the RMA's repeat registration should be approved or further education, investigation and/or disciplinary action is warranted.

270. This procedure is used effectively by the NZIAA as a tool for educative purposes along with the complementary power to impose conditions to enable ongoing registration.[113] Adopting a similar procedure in the Australian context would support the maintenance of professionalism within the industry and well as efforts to identify and combat RMA misconduct.

271. In order to avoid creating red tape and unnecessary regulatory burden for RMAs of good standing, the use of such a power should be informed by the regulator's risk-based approach to its monitoring targets and activities.[114]

Recommendation 19

- **That the legislation be amended to adequately empower the regulator, and the Australian Border Force where necessary, to fulfil their duties of monitoring and investigating misconduct by RMAs and unlawful operators. Should an independent regulator be established, it is recommended that the enabling legislation authorise the disclosure of information collected by the Department to the regulator where necessary and subject to appropriate safeguards, and that the regulator's requests for information are prioritised by the Department.**

[112] 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.
[113] IAA, 'Renew your licence' (Webpage) <https://www.iaa.govt.nz/for-advisers/your-licence/renew-your-licence/>.
[114] Department of Home Affairs and Australian Border Force, Submission to JSCM, *Inquiry into efficacy of current regulation of Australian migration and education agents*, Submission 6 [2.6.1 – 2.6.6].

Adequacy of OMARA's disciplinary actions in deterring and addressing misconduct by RMAs

Observations in relation to OMARA disciplinary decisions within the regulatory intervention scheme

272. Deterrence is credible when would-be wrongdoers perceive that the risks of engaging in misconduct outweigh the rewards and when non-compliant attitudes and behaviours are discouraged. Deterrence occurs when persons who are contemplating engaging in misconduct are dissuaded from doing so because they have an expectation of detection and that detection will be rigorously investigated, vigorously prosecuted and punished with robust and proportionate sanctions.

273. In addition to an effective sanctions regime, there are other factors that can deter misconduct in a credible way, including strong and resilient regulatory governance, comprehensive enforcement powers, and good regulatory practices such as timeliness of enforcement intervention and holding individuals and entities accountable. Other factors include the use of new technologies and techniques that bold regulators can employ to deter misconduct.

274. Currently, the OMARA has limited regulatory tools and resources available to it in order to adequately deter and address RMA misconduct. Regulatory interventions are limited, inconsistent, delayed and lack sufficient transparency. It is acknowledged that the legislative framework does not enable the OMARA to have a full range of tools at its disposal, thereby requiring it to rely upon other agencies, such as the Department, the ABF and the CDPP, to adequately provide a co-ordinated response towards addressing non-compliance.

275. Resource limitations may also inhibit the adequacy of OMARA's responses. When OMARA was established in 2009, it was led by two SES Band 1 officers; a CEO with primary responsibility for external stakeholder relationships and leading the reform agenda and a Deputy CEO with a primary focus on the internal governance and practice. It also had three Director level positions - one responsible for Registration and Client Services, one for CPD and Education, and another focused on Integrity and Complaints. The Committee understands that the OMARA is now managed by one Director only whose reporting line has recently changed. The reduction of senior resources has been significant.

276. Based upon a review of the OMARA's website, where disciplinary decisions are published, the Committee suggests the following.

- Need for further transparency and explanation with a consumer focus – The information provided on the website is not clearly addressed to the consumer. While the clarity and relevance of the Decision Summaries has recently improved, the information is not addressed to an audience of consumers whose first language is not English. The summary is a record of events and outcomes. It is suggested that the summaries contain a warning in plain English detailing what the misconduct was by the RMA and how the action taken by the OMARA has adequately averted a risk to future consumers of the RMA's services.
- Inappropriate sanction response to the RMA's misconduct – Some sanction responses have been blunt and do not necessarily address the conduct of concern. For example, in some instances where the RMA has breached the

Code due to a failure to maintain adequate records or meet deadlines, the sanction has included a requirement for the RMA to pass the MACA. The requirement to pass the MACA has also been imposed in cases where the RMA has engaged in dishonesty and other fraudulent conduct. An entrance test is not designed to remedy poor business practices or address fraudulent conduct and it is suggested that a different approach be taken in order to ensure that a sanctioned RMA's misconduct is adequately addressed in order to protect future consumers.

- Delay in responding to the alleged misconduct – A review of recent sanction decisions indicate that the OMARA may take up to 5 years to reach a decision. In a decision published on 22 June 2020 concerning one particular RMA, the OMARA received a complaint from a client about the RMA on 17 November 2016, which was followed by a complaint from the AAT on 5 April 2017 and then another client on 9 October 2019.[115] Such protracted delay is of great concern given that the RMA could potentially cause additional harm to the public, further frustrate and delay decision-making agencies and significantly undermine the industry's reputation while the complaint is being considered. Furthermore, delay undermines the degree to which the sanction may deter other RMAs from engaging in similar misconduct. Potential wrongdoers are more likely to be deterred from engaging in misconduct when they realise that the regulator will hold them accountable for their actions and that they will be resolutely and swiftly investigated, prosecuted, and sanctioned. Timely enforcement interventions prevent misconduct crystallising into consumer detriment and harm to integrity of the immigration system as a whole.
- Inconsistent publication and insufficient messaging – Consumers and RMAs alike would benefit from the making and publication of sanctions decisions on a regular basis. No RMA sanction decisions were made and published between 10 January 2020 and 21 May 2020. Furthermore, the OMARA does not alert industry (eg, by way of email or a newsletter) once any sanction decision is made/published.

Need for improved communications to consumers and deterrence messaging

277. The Committee recommends that the OMARA create and publish on its website consumer information in the form of videos[116] and/or infographics explaining its role, functions and how it can assist consumers who have suffered from the misconduct of RMAs and unlawful operators.

278. The use of infographics and other forms of visual content will ensure that clients with varying levels of literacy and from a range of culturally and linguistically diverse backgrounds will better understand the regulator's powers in addressing misconduct.[117]

279. Simple and clear deterrence messaging is important. Potential wrongdoers may be deterred from engaging in misconduct when they know that the regulator is working with criminal authorities and other agencies to strengthen their detection, investigation,

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[115] OMARA, Decision CMP-47489-1 (22 June 2020) <https://www.mara.gov.au/news-and-publications/public-notices/disciplinary-decisions/>.

[116] For example, see the ICCRC's Fraud Prevention Campaign website video https://iccrc-crcic.ca/ and https://www.youtube.com/embed/FTblEyz7LEM/.

[117] It has been estimated that visual information can be processed 60,000 times faster than text and can be easier to remember. See, for example: Rachel Gillet, 'Why We're More Likely To Remember Content With Images And Video (Infographic)', *Fast Company* (online, 18 September 2014) <https://www.fastcompany.com/3035856/why-were-more-likely-to-remember-content-with-images-and-video-infogr>, citing 3M, *Polishing Your Presentation* (online, 24 July 2019).

prosecution and sanctioning capabilities and when they understand they cannot hide behind borders because cross border regulatory counterparts are working together to ensure violators have no safe haven.

Empowering the regulator to discharge the consumer protection function

280. It is the experience of members of the Committee that a significant percentage of complaints to the OMARA are ultimately motivated by:

- a financial dispute between the parties; or
- an allegation that error or incompetence of the RMA has resulted in a loss of opportunity for the complainant.

281. As far as the OMARA is concerned, its current powers are limited to an administrative sanction of RMAs, with its ultimate sanction being the refusal or cancellation of the RMA's registration.[118] Currently, the OMARA is not empowered to do any of the following:

- offer mediation between the complainant and the RMA such that the dispute may be settled on commercial terms, including the preparation and lodgement of new applications at the RMA's cost;
- order repayment of professional fees and application fees paid; or
- order compensation.

282. Alternative dispute resolution procedures could be facilitated by the regulator to enable settlement of a complaint, which in some instances could involve the signing of a Deed of Release between the parties where they agree the matter is resolved and will not to take further action. While finality is desired, it should remain open to the regulator to pursue disciplinary action taking into account the RMA's willingness to participate in mediation and facilitate early resolution of the complaint.

283. While sanctioning a RMA may serve to protect consumers in the future, in the majority of cases sanctioning of the RMA provides no relief or 'solution' to the complainant. The powers of the regulator should be significantly broadened to include the above matters.

284. A protocol should be developed such that following receipt of a complaint an assessment be undertaken promptly to ascertain whether there may be a solution to the 'underlying problem' faced by the complainant. If that solution can be identified and implemented quickly then the complaints process will be seen as offering real remedies to the public. The Committee suspects that these assessments will require a very high level of expertise and creativity well above that held by the Department and even the OMARA. As such this initiative would either involve the regulator employing appropriate expertise to conduct these assessments 'in house' or contracting third party experts on commercial terms.

285. In many instances, the 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. Options the Australian Government may wish to consider introducing in order to address that deficiency include empowering the regulator with the authority:

[118] See the Act ss 286 – 306AA.

- to order a delegate to prioritise the making of a decision on the complainant's visa application/matter within a prescribed period if that will facilitate early resolution of the complaint; and
- to refer the issue surrounding the complainant's immigration status to the Minister in order for him or her to personally intervene in order to assist. 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 (eg, grant visa, overturn cancellation, release from detention, lift a statutory bar etc.) where a referral has been made by an authorised regulator.

Recommendation 20

- **That the regulator be appropriately resourced and guided in order to ensure that its activities are better understood by consumers, RMAs and other stakeholders.**

Recommendation 21

- **That the regulator be empowered with the authority to order a Departmental delegate to prioritise the making of a decision on a complainant's visa application/matter within a prescribed period if that will facilitate early resolution of the complaint and secure a just outcome.**

Recommendation 22

- **That where the regulator has been satisfied on reasonable grounds of a RMA's non-compliance or misconduct, and that this has caused an immigration problem for the client, the regulator be empowered with the authority to refer a complainant's immigration issue to the Minister in order for him or her to consider personally intervening where such intervention could ameliorate or resolve the immigration problem.**

Adequacy of consumer protections, including in relation to unregulated offshore migration assistance

Unregistered practice – education agents

286. The Committee considers the present self-regulation regime covering education agents should be overhauled to mitigate the risk of education agents engaging in practices which do not meet the requisite standards of due skill and diligence, and the provision of immigration assistance when not registered as a migration agent.

287. Presently, education agents are regulated under the ESOS Act by the registered provider of courses for overseas students.

288. Standard 4 in the *National Code of Practice for Providers of Education and Training to Overseas Students 2018* requires a written agreement between a registered provider of courses and each education agent the provider engages. The agreement must include a requirement that the agent:

- declares in writing and takes reasonable steps to avoid conflicts of interests with its duties as an education agent of the registered provider;

- observes appropriate levels of confidentiality and transparency in their dealings with overseas students or intending overseas students;
- acts honestly and in good faith, and in the best interests of the student; and
- has appropriate knowledge and understanding of the international education system in Australia, including the Australian International Education and Training Agent Code of Ethics.

289. Standard 4 also requires a registered provider to take immediate corrective action where it becomes aware that an education agent has not complied with the agent's responsibilities under the Standard. What that corrective action might be is not set out in the Standard, however the Standard does require a registered provider to:

    - immediately terminate the services of an education agent (or require the agent to terminate its relationship with an employee or subcontractor) where the registered provider becomes aware or has reason to believe that the agent (or an employee or subcontractor of the agent) is engaging in false or misleading recruitment practices; and
    - not accept students from an education agent if the registered provider knows or reasonably suspects the education agent to be, among other things, providing migration advice, unless the agent is authorised to do so under the Act.

290. The ESOS Act contemplates a degree of oversight of registered providers and provides that a breach of the Act or the National Code by a registered provider can lead to the provider's registration being suspended, cancelled or made subject to conditions, one of which is to not deal with a specified education agent in relation to overseas students or intending overseas students.

291. Australian legal practitioners with experience in dealing with migration law, visas and students have reported a range of inappropriate conduct by education agents who are not RMAs, including:

    - advising/promising students that certain courses of study have permanent migration pathways but in fact do not. These courses also tend to be long in duration and financially lucrative for the education agent;
    - advising students to undertake a series of courses when only one course was needed to achieve the student's education goal - for example, Committee members have reported instances where students have been advised to undertake a graduate diploma and then a bachelor's degree (the former qualification not being required to achieve the student's goal), simply because the education agent would receive double the commission from the course provider;
    - advising applicants to apply for student visas with the sole intention of 'buying time' to find a work or family sponsor;
    - advising applicants how to bolster or create stronger Genuine Temporary Entrant claims when, in fact, these claims do not exist or are marginal;
    - failing to advise applicants that more beneficial visas may be available in the circumstances that better suit the student's needs – for example, Work and Holiday or Working Holiday visas; and
    - deliberately advising students who are in genuine and ongoing partner relationships that they do not have enough evidence to prove the relationship, the consequence of which is that each applicant then has to apply for a student visa separately to enable them to travel together to Australia, which, in turn, doubles the commission income for the education agent.

292. The practice of providing immigration assistance when not a RMA is generally undetected, as education agents generally do not directly charge a fee for these services, or do not act as authorised recipients, and the applications are completed as though the student had completed the application themselves, by generating new emails and ImmiAccount logins.

293. In the absence of legislative arrangements that enable the regulation of education agents by the OMARA, it is incumbent upon the Australian Government to investigate and, where necessary, take action against education agents who offer immigration assistance.

294. Furthermore, consideration should be given in relation to requiring education agents to become registered as migration agents and similarly regulated by the OMARA and subject to the same sanction and penalty regime that applies to RMAs.

295. By way of example, the Canadian regulator regulates both immigration consultants and student immigration advisors. Those student immigration advisors, known as Regulated International Student Immigration Advisors, may provide advice only in relation to authorisations to study in Canada and authorisations to enter and remain in Canada as a student and must not assist a person in other immigration or citizenship matters.[119]

296. Australia could replicate this arrangement by creating a new restricted class of migration adviser, the registered education agent (**REA**). Like RMAs, a person seeking REA status would need to register with the regulator. An entrance exam assessing knowledge, skills and aptitude for preparing and lodging student visa applications would need to be passed before entering the registration scheme. Education providers should be required to engage the services of REAs or RMAs where courses are being promoted and sold to international students. The REA would only be permitted to provide immigration assistance in connection with student visa applications before the Department. The introduction of the REA class would be a positive step towards strengthening regulation within the student visa segment of the industry so as to protect some of the most vulnerable users of the migration system.

Recommendation 23

- **That education agents be brought 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.**

Addressing the challenge posed by unregulated operators offshore

297. Many unregistered operators avoid detection by not using their names on applications, but their client's name. While the recent changes to Department's Form 956 are to be commended, this does not address the mischief of unregistered persons acting as an authorised recipient or otherwise being involved in the preparation of applications.

[119] See *College of Immigration and Citizenship Consultants Act 2019,* SC 2019, c 29, subsection 87(4)(b).

298. These unregistered persons are difficult to track because they often operate through oral contracts, accept payment in cash and do not give their names.

Applicant declaration

299. In terms of a solution, applicants should have to attest to whether or not they had received assistance. For example, everyone who submits an application without a representative must make a declaration:

- stating that they have completed the application themselves without any paid advice or assistance from a third party; and
- confirming their understanding of misrepresentation on the statement and of the potential penalty for being untruthful.

300. Otherwise, where the applicant has received assistance from a third party who is neither a RMA nor an Australian legal practitioner, the form should require the applicant to fully disclose details of all persons who may have contributed to the preparation of the application including all persons paid to provide advice or services related to it, including translators, the Visa Application Centre, a notary, recruiter etc. Unregistered operators often hide behind these types of agencies.

Other initiatives for consideration

301. The Department also has a role to play in addressing this challenge. If the Department suspects that an application has been prepared by someone other than the applicant, who has been paid for their services and who is neither an Australian legal practitioner nor an RMA, the Department should continue to process the application, and engage the regulator to advise the applicant of the Department's suspicion, and inform the applicant how to find a properly authorised representative. If the applicant responds to this approach by the regulator, the Department should then also allow the applicant the opportunity to review the information provided by the unregistered operator. If in good faith, the applicant or someone on the applicant's behalf has submitted an application which contains any error or misrepresentation not authorised or previously known to the applicant, the applicant should be permitted to correct the errors or misrepresentations made by the unregistered operator.

302. Resources are also needed to enable extensive public awareness activities, including establishing dedicated community outreach officers in visa offices abroad, to help prevent susceptible people from falling victim to unregistered persons both onshore and offshore. The Canadian Government recently committed to launching extensive public awareness activities, including establishing dedicated community outreach officers in visa offices abroad, to help prevent susceptible people from becoming victims to fraudulent immigration consulting practices.[120] In terms of budgetary commitment, the Canadian 2019 Budget proposed $51.9 million over 5 years, and $10.1 million per year ongoing to improve oversight of immigration and citizenship consultants, to strengthen compliance and enforcement measures, and to support

[120] Hugo Doherty, 'Canada bolsters regulation of immigration consultants' (24 September 2019) <https://moving2canada.com/canada-college-immigration-citizenship-consultants/>.

public awareness activities that will help protect vulnerable newcomers, applicants and ethical and professional consultants against unregistered operators.[121]

Recommendation 24

- **That when the Department suspects that an application has been prepared by someone other than the applicant, who has been paid for their services and who is neither an Australian legal practitioner nor a RMA, the Department should continue to process the application, and engage the regulator to advise the applicant of the Department's suspicion, and inform the applicant how to find a properly authorised representative. If the applicant responds to this approach by the regulator, the Department should then also allow the applicant the opportunity to review the information provided by the unregistered operator and, if in good faith, the applicant or someone on the applicant's behalf has submitted an application which contains any error or misrepresentation not authorised or previously known to the applicant, the applicant should be permitted to correct the errors or misrepresentations made by the unregistered operator.**

Recommendation 25

- **That the Department provide to all potential newcomers at the beginning of their application process the rules governing representation by Australian legal practitioners and RMAs in the languages most used by prospective immigrants and that this information be on the Department's website and as part of its application forms. Further, that the Department direct applicants to the regulator's public list of sanctioned RMAs (current and former), explain the risks in using the services of an unregistered operator, and notify applicants of the assistance available from the regulator and those bodies regulating the services of Australian legal practitioners.**

Recommendation 26

- **That the Department work in consultation and collaboration with overseas posts and other stakeholders to develop education campaigns in foreign markets with a prevalence of unregistered operators who target immigrants to Australia, and with local media for a range of multicultural audiences to educate on registered practice, the immigration process, and to counter misleading and inaccurate information.**

[121] Government of Canada, 'Government changes will strengthen the regulation of immigration and citizenship consultants' (24 May 2019) <https://www.canada.ca/en/immigration-refugees-citizenship/news/2019/05/government-changes-will-strengthen-the-regulation-of-immigration-and-citizenship-consultants.html>.