2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession

Final Report

May 2008

Published by the National Communications Branch of the Department of Immigration and Citizenship
6 Chan Street Belconnen ACT 2617

ISBN 978-1-921446-73-3

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Letter to the Minister

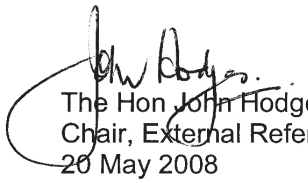
Senator the Hon Chris Evans
Minister for Immigration and Citizenship
Parliament House
CANBERRA ACT 2600

Dear Senator

I am pleased to present you with the Report on the 2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession.

The Reference Group members wish to thank you for the opportunity to contribute to the Government's commitment to the development of this industry.

Yours sincerely



The Hon John Hodges
Chair, External Reference Group
20 May 2008

Abbreviations

AAT	Administrative Appeals Tribunal
ACCC	Australian Competition and Consumer Commission
CALD	Culturally and Linguistically Diverse
CLE	Continuing Legal Education
COAG	Council of Australian Governments
CPD	Continuing Professional Development
DEWR	Department of Employment and Workplace Relations
DIAC	Department of Immigration and Citizenship
DITR	Department of Industry, Tourism, and Resources
ERG	External Reference Group
IARC	Immigration Advice and Rights Centre
IELTS	International English Language Testing System
IAAAS	Immigration Advice and Application Assistance Scheme
ICAC	Independent Commission Against Corruption
ILAA	Immigration Lawyers Association of Australasia
IRMAP	Information about the Regulation of Migration Advice Profession
JSCM	Joint Standing Committee on Migration
LCA	Law Council of Australia
MAPKEE	Migration Advice Professional Knowledge Entrance Examination
MARA	Migration Agents Registration Authority
MARS	Migration Agents Registration Scheme
MCIMA	Ministerial Council on Immigration and Multicultural Affairs
MIA	Migration Institute of Australia
MRC	Migrant Resource Centre
OLSC	Office of the Legal Services Commissioner
PSRC	Professional Standards and Registration Committee
RMA	Registered Migration Agent
SCIMA	Standing Committee on Immigration and Multicultural Affairs
UNHCR	United Nations High Commissioner for Refugees
VAC	Visa Application Charge

1 Executive summary

1.1 Background and purpose of the Review

The migration advice profession has been the subject of three previous reviews, the last of which was conducted in 2001–02. The *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession* has been undertaken to assist the government assess the effectiveness of the regulatory scheme, the state of the profession and its readiness for a move from statutory self-regulation to self-regulation.

In particular, the Review examined:

- the legislative framework within which the Migration Institute of Australia Limited (MIA) acts as the Migration Agents Registration Authority (MARA)
- consumer confidence and protection
- the capacity of the MARA to deal with complaints.

1.2 Terms of Reference

At the outset of this Review, Terms of Reference were formulated. The Review was tasked to:

- evaluate the capacity of the migration advice profession to move to full self-regulation
- evaluate the role of the MIA as the industry regulator in a deregulated environment
- examine the effectiveness of the legislation and other relevant documentation in delivering the policy objectives under review. This included Part 3 of the *Migration Act 1958* (the Act), the Migration Agents Regulations 1998 (the Regulations) and the Deed of Agreement between the Commonwealth and the MIA (the Deed)
- evaluate the costs and benefits of the scheme to consumers and the community, and to fee charging and non-fee charging agents
- evaluate the dual regulation of lawyer migration agents
- examine the success of the Continuing Professional Development (CPD) scheme as well as its relevance and accessibility to agents
- examine the options for priority processing of applications submitted to the Department of Immigration and Citizenship (the department) by registered migration agents
- report on the effectiveness of, and possible improvements to, the current statutory framework in regulating the migration advice profession.

This Review was conducted in accordance with the Commonwealth's best practice processes for regulatory review and reform as outlined in the *Best Practice Regulation Handbook*, available at http://www.obpr.gov.au/bestpractice/.

1.3 Previous Reviews

Prior to the 1990s, migration advice in Australia was unregulated. In September 1992, the migration advice profession was brought under full government regulation through the Migration Agents Registration Scheme, which was administered by the then Department of Immigration, Local Government and Ethnic Affairs.

Following a review of the MARS in March 1997, statutory self-regulation of the profession commenced in March 1998 when the MIA was appointed as the MARA to administer the relevant provisions (Regulations) of the *Migration Act 1958* and to undertake the role of regulator. Among other things, the Regulations included a Migration Agents Code of Conduct.

An initial review of this transitional period of statutory self-regulation was undertaken in August 1999 to assess the effectiveness of the framework and the capacity of the migration advice profession to move to full self-regulation. Although the review found that statutory self-regulation had achieved its objectives of improving consumer protection, competence and ethical standards, the profession was not ready to move to full self-regulation and recommended that the period of statutory self-regulation be extended.

A third review of the profession was undertaken in 2001–02. At this time it was agreed that a further review of statutory self-regulation of the profession should be undertaken by June 2008.

1.4 Key findings

After thorough analysis of submissions and discussion with the ERG, the Review found that:

- there was overwhelming opposition to the profession moving to self-regulation.
- the current arrangement whereby the MIA operates the MARA has created perceived and potential conflicts of interest resulting in a lack of consumer confidence, and the government should consider establishing a regulatory body separate from the MIA.
- there is dissatisfaction amongst stakeholders regarding the handling of complaints against migration agents. The Review has found that the regulatory body needs additional powers and needs to work in closer cooperation with the department and other bodies such as the Law Council of Australia (LCA) and the Australian Competition and Consumer Commission (ACCC) in order to address these issues.
- there needs to be significant changes made to the entry requirements in order to improve professional standards. Recommended changes include: the Graduate Certificate be replaced by a Graduate Diploma; the English language requirements be increased and newly qualified migration agents be required to undertake a year of supervised practice.
- legislation relating to migration agents needs to be substantially revised to remove confusion.
- to minimise consumer confusion, lawyer agents should continue to be included in the regulatory scheme, although revisions to the regulatory scheme would provide further concessions to lawyer agents.

- the Continuing Professional Development (CPD) requirements need to be simplified and streamlined – especially for experienced migration agents with good track records.
- priority processing should be provided to decision ready applications – whether they are submitted by a migration agent or an applicant directly.

1.5 Recommendations

The following list of recommendations is taken from the discussion sections of each chapter in this Report.

Chapter 4 – Role of the MIA as industry regulator

1. That the Professional Standards and Registration Committee (PSRC) or any future body charged with decision making regarding professional standards, registration and the sanctioning of migration agents comprise representation across a range of interests including the MIA, LCA, community representation and the Commonwealth.
2. That the Board of the new regulatory body should be appointed by the Minister and consist of no more than seven members. The Board should comprise a diverse range of representatives including:
    - a consumer advocate
    - a community representative
    - a nominee from the LCA
    - a nominee from the MIA.
3. That the government consider addressing any remaining concerns regarding potential or perceived conflicts of interest by establishing the new Board in an independent regulatory body separate from the MIA.

Chapter 5 – The MARA's performance as the industry regulator

4. That criteria on which the regulatory body will decide to investigate complaints be made publicly available.
5. That all relevant complainants be provided with explanations of why the regulatory body decides not to formally investigate their complaint when a decision of 'No further action' is made.
6. That the regulatory body disclose relevant details of complaints which are being investigated or being considered for investigation to the migration agent in question, as long as such disclosure does not compromise the investigative process.
7. That quality assurance procedures be implemented to ensure consistency in the complaints handling processes of the regulatory body.

8. That an easily identifiable channel for making a complaint against the way the regulatory body handles investigations be developed.
9. That migration agents be made aware of relevant aspects of relevant complaints against them that are not further investigated at that time and requested to take appropriate action to avoid future complaints for similar issues.
10. That options be developed to facilitate the better integration and coordination of the regulatory body and departmental complaints handling functions.
11. That the regulatory body work in partnership with relevant bodies such as the Office of the Legal Services Commissioner (OLSC) and the Australian Competition and Consumer Commission (ACCC) in order to progress the investigation of complaints and to ensure that the results of complaints are known by relevant regulators and that these organisations also take appropriate action.
12. That the regulator review and appropriately revise any existing training program for complaints handling staff or if such a program is not in existence, that it develop a new, appropriately robust training program for these staff.
13. That as soon as practicable, the Graduate Certificate as the knowledge requirement for entry to the profession be replaced with a Graduate Diploma level course.
14. That the regulatory body be empowered to require migration agents who are subject to repeated complaints about their knowledge and those sanctioned for a lack of sound knowledge to undertake some or all of the units that make up the prescribed course prior to sanctions being lifted or being re-registered.
15. That a system of registration be implemented involving a year of supervised practice for newly qualified migration agents.
16. That new and re-registering migration agents be required to prove that they have English language proficiency of at least International English Language Testing System (IELTS) 7.
17. That in order to be eligible for repeat registration, migration agents be required to prove that they meet conditions as determined by the regulatory body.
18. That the regulatory body be able to impose further conditions on migration agents applying for repeat registration after being sanctioned. Such conditions could include that the agent:
    - operates under the supervision of another migration agent
    - is restricted to a particular type of work
    - undertakes specific training.

19. That an independent review of the MARA's communications activities be undertaken and that a comprehensive communications strategy be developed and published electronically. A separate and distinct budget should be allocated for the implementation of the strategy and the expenditure of this budget should be similarly reported separately.
20. That a fidelity fund not be established.
21. That if practicable, migration agents ensure that clients pay Visa Application Charges (VACs) directly to the department.
22. That if it is not practicable for VACs to be paid by clients directly to the department, that migration agents hold funds in trust accounts that are managed according to trust accounting standards.
23. That the regulatory body be granted additional emergency powers including, but not limited to, the power to:
    - suspend a migration agent
    - retrieve client files
    - appoint an administrator
    - seek a court order to appoint a receiver.
24. That in developing protocols for the use of emergency powers, the following should be considered to ensure there are suitable 'checks and balances on such powers:
    - the tribunals and courts should be consulted
    - the regulatory body to be indemnified in case tribunals later determine powers should not have been exercised
    - an appropriate governance framework be developed to ensure that the decision making process regarding the invoking of emergency powers is impartial and transparent.
25. That the regulatory body be more responsible for legal matters pertaining to its operations.

Chapter 6 – The regulatory framework

26. That Part 3 of the Act be simplified with details moved to Regulations where appropriate. In simplifying this legislation, where practicable, previously agreed changes should be effected.
27. That the definition of immigration assistance be amended to remove references to court related work and to ensure that the definition does not lead to the practising of law by migration agents who are not qualified to do so.

28. That the definition of immigration assistance be amended to:
    - ensure that it applies to immigration assistance provided to all clients, not just visa applicants or cancellation review applicants
    - clarify the difference between immigration assistance and migration advice
    - define the context in which the client/advisor relationship arises.
29. That consideration be given to enable certain bodies to provide immigration assistance without this assistance being provided by registered migration agents. Decisions on exemptions to be made at ministerial level based on exceptional circumstances.
30. That 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.
31. That the department's Form 956 Appointment of a migration agent or exempt agent or other authorised recipient be revised to clearly distinguish between the appointment of a migration agent and an authorised recipient, to be more client friendly and to include both client and departmental obligations.
32. That with significant input from the profession, the Code should be re-written in simple English, strengthened, and ethical issues dealt with separately. The Code should remain in Regulations.
33. That in revising the Code, consideration be given to including:
    - clarification of the role of supervising migration agents
    - the adoption of trust accounting regulations in relation to the management of client accounts and referral to a comprehensive inspection scheme
    - acknowledgement of the role of Regional Certifying Bodies
    - clear conflict of interest guidelines regarding conflicts that may arise from a migration agent's connection with a recruitment or training organisation
    - a comprehensive definitions and interpretation section
    - provisions for migration agents working within different business structures
    - a set of rules that must be satisfied before a change can be made and a procedure for changing the Code.
34. That the penalty provisions under section 306 be changed to exempt inactive migration agents from the penalty when non-compliance is beyond the agent's control, for example when the agent is incapacitated.
35. That consideration be given to the deletion of Division 5 from the Act except for providing for the need for a registered migration agent to conduct himself or herself in accordance with the Code of Conduct. Details previously provided in Division 5 could then be covered in Regulations.

36. That the definition of 'client' in Regulations be amended to specify the context in which immigration assistance is provided including defining that an individual officially becomes a 'client' when a contract for services is signed.

37. That further guidance be provided on the definition of 'fit and proper person' in section 290.

38. That amendments be made to ensure that provisions apply to all businesses (not just individuals) that are involved in the provision of immigration assistance.

39. That legislation be revised mindful of relevant standards established in ILO Conventions 181 (Private Employment Agencies) and 143 (Migrant Workers – Supplementary provisions) that are consistent with government policy.

Chapter 7 – Costs and benefits of the scheme

40. That the department and the regulatory body continue to make information available to industry associations, labour hire organisations and employers (including small businesses) on the regulatory framework, service charters, fees, and the complaints mechanism.

41. That providers of the Graduate Certificate of Migration Law and Practice, and the MIA as the industry association, investigate the possibility of providing a number of scholarships to students who make a commitment to practice in the non-commercial sector.

42. That the providers of CPD activities be encouraged to offer migration agents operating in the non-commercial sector greater discounts on CPD activity fees.

43. That the department consider providing non-commercial migration agents with further discounts on access to LEGENDcom.

44. That consideration be given to amending the CPD scheme to provide additional incentives for experienced migration agents to provide pro-bono services.

45. That the department consider extending the Immigration Advice and Application Assistance Scheme (IAAAS) to provide funding for advice and application assistance both for onshore and offshore visa applications, including to proposers of offshore humanitarian visas.

Chapter 8 – Inclusion of lawyer agents in the regulatory scheme

46. That lawyer agents continue to be included in a revised regulatory scheme.[1]

47. That complaints about lawyer agents be referred to relevant Legal Services Commission/ Ombudsman for investigation. Resulting decisions from investigations to be subject to review by the migration advice regulator. As the requirement of the migration advice regulator to allocate resources to address complaints about lawyer agents would decrease, that registration fees payable by lawyer agents be decreased as appropriate.

[1] Glenn Ferguson, ERG member, dissented from this recommendation.

48. That the public register of migration agents provide for all migration agents to have relevant qualifications listed.

Chapter 9 – Continuing Professional Development (CPD)

49. That the CPD system be modified to provide more flexibility regarding the activities undertaken.

50. That the process of approving CPD activities be revised to ensure that more flexibility is provided in the CPD activities that can be undertaken and to address concerns about the onerous nature of the current approval process.

51. That migration agents with over three years experience, who have good track records (as determined by the regulator) be able to undertake CPD on an honour basis.

52. That CPD activities be developed that involve greater interaction between departmental staff and migration agents; for example, the provision of presentations by departmental staff to migration agents and vice versa.

Chapter 10 – Priority processing

53. That a priority processing scheme be implemented that awards priority to complete, decision-ready applications, regardless of who lodges them.

54. That consideration be given to the establishment of a stakeholder committee to identify strategies to further streamline procedures by which departmental offices receive applications and documents from migration agents and provide services to them.

55. Pending consideration of more cost effective options to encourage high quality decision-ready applications, that a rating scheme not be implemented.

Chapter 11 – Capacity of the profession to move to self regulation

56. That the migration advice profession not move to self-regulation.

57. That statutory self-regulation be discontinued.

2 Conduct of Review

2.1 External Reference Group

Like the previous three reviews into the regulatory framework, the current Review was conducted by the department under the guidance of an External Reference Group (ERG).

The ERG was chaired by the Hon John Hodges. Mr Hodges has had a long association with immigration issues in his capacity as a former Federal Minister for Immigration and Ethnic Affairs. He is a founding member of the MIA, a former registered migration agent, a member of reference groups for both the *1997 Review of the Migration Agents Registration Scheme* and the *1999 Review of Statutory Self-Regulation of the Migration Advice Industry* and is the current Chair of the Immigration Detention Advisory Group (IDAG).

Other members of the ERG were:

- Mr Glenn Ferguson, a Queensland solicitor and registered migration agent, who is a member of the executive of the Law Council of Australia (LCA), current President of the Immigration Lawyers Association of Australasia (ILAA) and a former President of the Queensland Law Society
- Ms Helen Friedmann, a registered migration agent with her own consultancy and a former departmental officer
- Mr Len Holt, a registered migration agent, former Queensland State President of the MIA and the Immediate Past President of the MIA.

The ERG met with the department's review team several times during the course of the Review and provided guidance on this report.

2.2 Discussion Paper

A Discussion Paper was released in September 2007 inviting stakeholders to make submissions on the profession's readiness to move from statutory self-regulation to self-regulation and other issues in relation to the migration advice profession.

In addition to the Discussion Paper being posted on the websites of the department and the MIA, it was mailed out to:

- members of the Ministerial Council on Immigration and Multicultural Affairs (MCIMA)
- members of the Standing Committee on Immigration and Multicultural Affairs (SCIMA)
- all federal senators and members, including shadow ministers
- education bodies (including universities that provide the Graduate Certificate in Australian Migration Law and Practice)

- Migrant Resource Centres (MRC)
- industry bodies and chambers of commerce
- unions, community organisations, legal and ethnic community councils.

2.3 Submissions received

A total of 37 submissions were received in response to the Discussion Paper. These have all been carefully considered and used, in conjunction with ERG discussions, to develop this report and recommendations. A list of organisations and individuals who made submissions to the Review is at Attachment A.

3 Overview of the profession

In Australia, in order to legally provide immigration assistance for a fee or reward, individuals must be registered with the MARA, unless they belong to certain exempted groups. An individual must meet several requirements in order to be registered. Amongst other requirements, these include that they:

- meet specific knowledge requirements
- are an Australian citizen, permanent resident or a New Zealand citizen holding a special category visa
- are a person of integrity/are of good character
- are over 18 years of age
- hold professional indemnity insurance of at least $250 000.

Complaints about migration agents are managed and investigated by the MARA and the department. The MARA is responsible for addressing complaints about a migration agents' adherence to the Migration Agents Code of Conduct. The department is responsible for addressing complaints about unregistered practice as well as criminal conduct by registered migration agents.

As at 31 March 2008 there were 3755 migration agents registered with the MARA. Almost one third or 1073 of these held legal practising certificates and 234 operated in not-for-profit or non-commercial organisations such as legal aid centres. At the time of the last Review in 2001-02, there were 2429 migration agents. Around 50 per cent of registered migration agents are members of the MIA.

The Immigration Lawyers Association of Australasia (ILAA), which is a part of the LCA, represents the interests of some lawyers who are also migration agents. Some migration agents are members of both the MIA and ILAA, while a significant number of migration agents appear to be members of neither organisation.

The majority of registered migration agents have only been registered for a short period of time. Almost 49 per cent of all currently registered migration agents became registered in the past three years. The percentage of currently registered migration agents who have been registered for over 10 years is around 14 per cent.

The number of cases handled by individual registered migration agents varies greatly. Some migration agents only handle one or two cases per year, while some of the larger practices handle over a thousand. Some migration agents specialise in certain visas, while others work across a wide range of visa classes. Attachment B shows the percentage of visa applicants who used a migration agent for selected visa classes in January-March 2008.

4 Role of the MIA as industry regulator

4.1 Background

The MIA was appointed to operate the MARA in 1998. Inter alia, Division 6 of Part 3 of the *Migration Act 1958* provides for:

- the appointment of the MIA
- functions of the MARA
- MARA powers
- referral of lawyers' conduct to other authorities
- delegation of MARA powers to committees, officers or employees of the MIA
- the department to disclose personal information (for example, about the applications a migration agent has submitted) to the MIA to enable it to perform the functions of the MARA.

The MIA was originally appointed to operate the MARA in order to increase consumer protection and provide a basis for future voluntary self-regulation of the profession. At the time of its appointment, the MIA's objective of promoting and representing the interests of members of the profession was considered consistent with the regulatory function: as the MIA was interested in ensuring the future of the profession, it was in its best interests to undertake the regulatory function so that the profession developed appropriately and that individuals whose actions reflected badly on the profession were effectively sanctioned or removed from the profession.

The basic terms and conditions under which the MIA is expected to carry out the statutory functions of the MARA are set out in a Deed of Agreement between the Commonwealth and the MIA. The current Deed commenced in June 2003 and is due to expire in March 2009. The Deed can be terminated at any time by either party for any reason. A copy of the Deed is publicly available on the MARA website at http://www.themara.com.au/ArticleDocuments/2003%20Deed.pdf.

Concerns about the appropriateness of the MIA operating the MARA have been raised by stakeholders in the past. In particular, concerns have been raised that the arrangement may involve a conflict of interest that in particular affects MARA decision making on complaints it receives about migration agents. This concern stems from the MIA Board acting as the MARA Board, and from the MARA Professional Standards and Registration Committee (PSRC), which makes decisions on disciplinary actions, comprising officers delegated by the MARA/MIA Board. Under the PSRC, there is also a Professional Standards Committee. This committee comprises migration agents, lawyers and consumer representatives. As consultants to the MARA, the committee assists in the conduct of investigations by conducting interviews, undertaking research and providing advice.

Recommendations have been made in the past that the PSRC should include independent representation. This requires a change to section 319A of the Act which enables the MIA to delegate

MARA powers to a committee of the MIA, an officer of the MIA or an employee of the MIA. To date, while this legislative change has been proposed, it has not received priority in the legislative change program.

Specific questions about the role of the MIA as the industry regulator asked in the Discussion Paper to the Review were:

- Is there a real or perceived conflict of interest from the MIA acting as the MARA?
- Should there be a requirement for some or all members of the MARA Board to be independent of the MIA and the migration advice profession?
- What other models could be used in regulating the migration advice profession?

4.2 Comments received from submissions

A real or perceived conflict of interest in the MIA acting as the MARA

In response to the Discussion Paper, 11 submissions indicated concerns regarding a potential conflict of interest or perceptions of conflicts of interest inherent in the MIA operating the MARA.

One submission, from the MIA, disagreed that there was a conflict of interest, noting that while a perception of a conflict of interest existed, it was not a reality, but based on a misunderstanding of the arrangements:

> *'There is an enormous lack of understanding about this issue. At the moment some RMAs perceive conflict of interest. What the MIA needs is to better educate RMAs.'*

The MIA notes that measures have been put in place to address potential conflicts of interest:

> *'Conflicts of interest have not arisen because potential conflicts are managed through a system of controls that separate decision making in every instance where a conflict of interest may arise. This includes requiring Board members to absent themselves from discussions where they might have (or be perceived to have) a conflict of interest.'*

The MIA notes that it is desirable that disciplinary decisions be made by a committee comprising migration advice professionals and independent representatives. This committee is currently the MARA PSRC. However, the MIA does not support a requirement that some or all MARA Board members be independent of the MIA and the migration advice profession.

Of the 11 submissions that note concerns about a conflict of interest, several indicate that they have very significant concerns. The LCA notes that it:

> *'…has very serious concerns about the MIA operating as MARA and believes, unequivocally, that this creates an irreconcilable conflict of interest for the MIA/MARA.'*

The submission from the Immigration Advice and Rights Centre (IARC) notes:

> *'It is our strong view that conflicts of interest exist within the regulatory structure which significantly undermine the actual and perceived integrity of the profession. The conflicts of interest are actual, perceived and potential.'*

The submission from Christopher Levingston and Associates submits that:

> *'…on the available evidence that there is an actual conflict of interest or at a minimum the perception of a conflict of interest between both the MIA and the MARA and DIAC…it is clear that apart from the administrative business of the MARA that it is controlled, directed and strongly influenced by an industry association, the MIA.'*

A number of submissions note that whether or not an actual conflict of interest actually exists, there is a widespread perception that there is a conflict of interest inherent in the arrangement, and that this perception is problematic as it undermines public confidence in the scheme. The Ombudsman's submission notes:

> *'Although we are cognisant of the measures the MARA has in place to identify and manage conflict of interest situations, and we are not to be taken to be expressing the view that actual conflict of interest of bias is inherent in the MARA's decisions and processes, it would appear from the complaints received by my office that there remains a perception that such issues exist. The standing of the MARA as an impartial and effective regulatory body is dependent upon it assiduously ensuring that its procedures continue to minimise the rise of both actual and perceived conflict of interest or bias.'*

Conflict of interest and Continuing Professional Development (CPD)

One of the main areas that a conflict of interest is at least perceived to exist is in the area of CPD administration. This issue is also discussed in Chapter 9 – Continuing Professional Development.

Concerns are raised in submissions that the conflict of interest is particularly notable in respect to the MARA's role in assessing and approving CPD activities as the MIA is a major provider of these activities. The LCA notes:

> *'MIA provides CPD services for migration agents and is also empowered to issue CPD licences to other CPD providers in its capacity as the MARA which creates an untenable conflict of interest for the MARA as the industry representative, regulator and as a CPD service provider.'*

The Commonwealth Ombudsman's submission notes that during its own motion investigation into MARA complaints handling, complainants expressed concern that the business interests of the MIA and individual MIA Board members represented conflicts of interest when decisions were being made to appoint individuals or entities as CPD course providers.

The IARC expressed particular concern that a conflict of interest – not just a perception of a conflict of interest – actually exists regarding CPD provision. The IARC notes significant commercial implications in decisions pertaining to CPD, noting that if 3500 migration agents are required to complete 10 CPD points at a cost of approximately $650 each, this involves a CPD 'industry' of around $2 million per year. The IARC subsequently recommends that:

> *'Urgent steps must be taken to manage the actual conflict of interest identified above. The steps taken must necessarily involve the removal of education regulation and education service provision from the hands of what, by virtue of its identical board members, is essentially the same organisation with different names. At the very least, independent and differently constituted boards are recommended for each organisation. We suggest that consultation with a body such as the ICAC or similar body may assist in putting in place procedures or identify models to remedy the conflict.'*

The submission from KGA Lawyers-MPE also expresses concern about the conflict of interest involved in the MIA providing CPD activities while at the same time as the MARA approving these activities. The submission notes:

> *'The MIA has a vested interest in approving and promoting its own CPD activities above all others. There is no way it can avoid the conflict between that interest and its duty, as the MARA, to administer the CPD scheme.'*

To address the conflict, the submission recommends that unless there is an independent CPD approval body other than the MARA, then the MIA should have no connection to the provision or approval of CPD. If the MIA wishes to continue to provide CPD activities, it should have no role in their approval.

Conflict of interest and decision making about individual migration agents

The submission from KGA Lawyers-MPE notes concerns expressed about the MARA's decision making processes by migration agents who have been the subject of investigation by the MARA. As individuals conducting the investigation and those making disciplinary decisions are registered migration agents, who may be direct competitors to the agent being investigated, they may have vested interests in the decisions to sanction the agent. The submission notes that while the MARA asserts that it has measures in place to address these potential conflicts of interest, there are perceptions that influence is exerted 'behind the scenes.'

The Ombudsman's submission notes that concerns have been raised with it about the way in which the MARA deals with complaints about former and current MIA/MARA Board members.

Chapter 5 - MARA's Performance as the industry regulator, provides more detail regarding concerns about conflicts of interest and the MARA's complaints handling process.

Other conflicts of interest

Submissions also point to other examples where they believe conflicts of interest have been apparent. The IARC expressed concern about an example where the MIA delayed informing MIA members of the results of the Commonwealth Ombudsman's review of MARA complaint handling procedures. The Commonwealth Ombudsman also refers to the consideration of the move from the Migration Advice Professional Knowledge Entrance Examination (MAPKEE) to the Graduate Certificate in Migration Law and Practice by the MARA/MIA Board as an issue that could also have involved a potential conflict of interest.

Models that could be used in regulating the migration advice profession

Regarding the measures that the MIA have put in place (such as Board members absenting themselves from discussions that might involve a conflict of interest) which it claims address conflict of interest issues, submissions indicate concern that these measures are insufficient. The Office of the Legal Services Commissioner (OLSC) writes:

> *'While the OLSC acknowledges the various administrative arrangements that have been put into place to separate functions between the MARA staff and the MARA Board, for example, it is not of the view that this goes sufficiently far to satisfy the requirement of justice being seen to be done in this regard…'*

Similarly, the submission from the Law Institute of Victoria argues that such measures are insufficient.

> *'The imposition of so-called "safeguards" to ensure that conflicts of interest do not arise cannot avoid real conflicts.'*

Submissions note measures that have been put in place by other professions to address such conflicts of interest. The LCA notes that statutorily independent legal services commissioners and boards have been put in place to work with Law Societies and Bar Associations to investigate and prosecute complaints against practitioners. The LCA recommends that:

> *'the MARA should be wound up and replaced with a statutorily independent body, similar to the Office of the Immigration Services Commissioner in the United Kingdom.'*

The Australian Council of Trade Unions (ACTU) submission recommends that in order to address ongoing public confidence issues, that the MARA Board comprise representation beyond the MIA:

> *'Whilst membership of the Board should not be determined by government, the requirement for the Board of the regulatory body to have a certain number of community representatives on it would be of value and assist in the maintenance of confidence and reduce the risk of perceived conflicts between the MARA and MIA.'*

The Law Institute of Victoria's submission recommends that a separate body with an independent board regulate the profession.

> *'As is the case for the Victorian legal profession, the roles of regulator and representative of registered migration agents should be divided between two separate and independent organisations to ensure that the regulatory function is carried out without bias.'*

Amongst other recommendations, the submission from Christopher Levingston and Associates recommends that the MARA be formally constituted as a quasi-autonomous non-government organisation, independent of both the MIA and the department with its own Act and that it be self-funding, subject to the oversight of the Commonwealth. Further it is recommended that the Board of the MARA be elected from registered migration agents in each state and territory with representation proportional to the numbers of migration agents in each jurisdiction, and that the PSRC include independent persons.

4.3 Discussion

All submissions that expressed a view on the conflict of interest issue, including the MIA's submission, noted that at least a perception of a conflict of interest exists in the MIA operating the MARA. A number of submissions indicated concerns that actual conflicts of interest existed and had influenced MARA decisions and activities. The Review concluded that these views are of considerable concern and have the potential to, or already have, significantly undermined public confidence in the current arrangement.

Suggestions made to address the issue range from including independent representation on the PSRC, to appointing an independent MARA Board, to the establishment of a separate entity.

The suggestion regarding the inclusion of independent representation on the PSRC, put forward by the MIA, predates this Review. As the PSRC makes decisions pertaining to the disciplining of migration agents, independent representation would be expected to help address concerns that decisions regarding individual agents should be more transparent and unbiased. It was considered, however, that the inclusion of independent representation on a still largely unrepresentative body was not sufficient and that the PSRC or its replacement should be a fully representative body.

Further, it was noted that as 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, that there would be value in facilitating greater information exchange and cooperation between the MARA and the department by including a departmental representative on the disciplinary body.

Recommendation

That the Professional Standards Registration Committee or any future body charged with decision making regarding professional standards, registration and the sanctioning of migration agents comprise representation across a range of interests including the MIA, LCA, community representation and the Commonwealth.

However, as it is the MARA Board and not the PSRC that makes other decisions including those relating to CPD, an independent PSRC would not address other concerns about conflicts of interest in other areas identified by submissions.

The appointment of an independent MARA Board was suggested by a number of submissions. As only 50 per cent of the profession are MIA members, the MIA Board, acting as the MARA Board, is not truly representative of the profession. Non-MIA members and lawyers in the profession should be represented on the Board. Further, as the function of the MARA is to provide for consumer protection, it would also seem logical that it include consumer or community representatives. In addition, to ensure that the Board's composition was appropriately representative and that appointments to the Board were transparent, the Review concluded that there would be value in a process whereby the Minister would appoint the Board. It was also noted that the current MIA/MARA Board could comprise up to 17 members. This number was considered to be too large and worked against effective decision making.

Recommendation

That the Board of the new regulatory body should be appointed by the Minister and consist of no more than seven members. The Board should comprise a diverse range of representatives including:

- a consumer advocate
- a community representative
- a nominee from the LCA
- a nominee from the MIA.

While a truly representative and independent Board and disciplinary committees will go a long way in addressing perceived if not real conflicts of interest in the MIA operating the MARA, there is a danger that such changes may not be sufficient to restore consumer confidence – and that the perception that there is a conflict of interest will continue to exist. The Review noted that given the strength of the concerns expressed, further changes such as the establishment of a body separate to the MIA may be warranted. In addition, while the establishment of an independent board to govern the MARA under the MIA would appear simple, it could face operational and governance issues that would make it difficult to be effective.

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.

Recommendation

That the government consider addressing any remaining concerns regarding potential or perceived conflicts of interest by establishing the new Board in an independent regulatory body separate from the MIA.

5 The MARA's performance as the industry regulator

5.1 Background

The responsibilities of the MARA are set out in Part 3 of the *Migration Act 1958* and in the Deed of Agreement between the Commonwealth of Australia and the MIA.

Section 316 of the *Migration Act 1958* (The Act), provides that:

(1) The functions of the Migration Agents Registration Authority are:

(a) to deal with registration applications in accordance with this Part

(b) to monitor the conduct of registered migration agents in their provision of immigration assistance and of lawyers in their provision of immigration legal assistance

(c) to investigate complaints in relation to the provision of immigration assistance by registered migration agents

(d) to take appropriate disciplinary action against registered migration agents or former registered migration agents

(e) to investigate complaints about lawyers in relation to their provision of immigration legal assistance, for the purpose of referring appropriate cases to professional associations for possible disciplinary action

(f) to inform the appropriate prosecuting authorities about apparent offences against this Part or Part 4

(g) to monitor the adequacy of any Code of Conduct

(h) such other functions as are conferred on the Authority by this Part.

In addition, Division 4 of the Act sets out certain powers and procedures relating to the MARA's role in investigations and decision making including disciplinary action.

Schedule 2 of the Deed of Agreement articulates responsibilities authorised under section 316 subsection (h) (above). These are that the MARA is also responsible for:

- improving standards within the profession by setting educational standards for
  - entry to the profession
    the MARA must take into account the applicant's knowledge of migration procedure as stated in section 290(2) of the Act
  - continuing professional development
    the MARA is responsible for the assessment of CPD activities for approval (section 290A and Regulation 6 and 6A of the Migration Agents Regulations 1998) and publishing the approved activities as of 1 July 2003.
- obtaining copies of client documents from Inactive Agents or from the legal personal representatives of Deceased Agents; and giving copies to the clients concerned, under the MARA's powers in Division 3A.

Part 2 of Schedule 2 of the Deed of Agreement sets out MARA performance targets for functions such as complaints handling, monitoring migration agents' conduct, processing registration applications, setting and improving registration standards, consumer information provision, customer satisfaction and other activities.

Migration agents sanctioned by the MARA may appeal sanction decisions through the Administrative Appeals Tribunal (AAT) and the courts. Under the Deed of Agreement, the Commonwealth is responsible for 'the preparation, referral (where appropriate), carriage and prosecution or defence of any litigation in relation to the exercise by the Institute of its functions and powers as the MARA'[2]. This has given rise to questions as to whether this level of support is appropriate and whether the MARA should be responsible for the cost of the legal defence of their decisions.

The questions raised in the Discussion Paper regarding MARA's performance were:

- Has the MARA adequately met its responsibilities in relation to consumer awareness, registration, complaints handling and dispute resolution? If not, what other measures or activities could the MARA undertake to improve its performance in these areas, in addition to those measures already agreed to by the MARA in the Commonwealth Ombudsman's report?
- Are the MARA's complaints handling procedures effective? If not, how might consumer complaints be better addressed?
- Should consideration be given to setting a schedule of fees that may be charged by registered migration agents?
- How else might consumers be protected to prevent complaints regarding registered migration agents?

[2] For this and other services provided by the Commonwealth to the MARA, the MARA is required to pay the Commonwealth $150 000 each year.

- How might litigation be undertaken and funded by the MARA if the profession moves to full self-regulation, or if it is otherwise decided that the profession, and not DIAC, should meet these costs?
- How might the level of litigation be reduced?
- How might legislation be strengthened to further discourage registered migration agents from committing offences?
- Is there a need for a fidelity fund for registered migration agents? If so, what issues need to be considered and which model(s) would be appropriate? If a fidelity fund is not appropriate, how might consumers' monies be otherwise protected?
- Is there a need for the MARA to have 'emergency' sanctioning powers?

5.2 Comments received from submissions

Complaints handling and dispute resolution

Ten submissions to the Review made comments regarding the complaints handling process of the MARA. The majority of these agreed that while several recent changes had been made, further improvement is still desirable.

The Commonwealth Ombudsman's submission refers to its own motion report in 2007 on its investigation of the MARA's complaint handling process, noting that the investigation was undertaken because of a:

> *'series of complaints about the way in which the MARA conducted its investigations into the actions of registered migration agents. Many of these complaints involved delay during an investigation, dissatisfaction with the quality of an investigation or concerns about the MARA's decision making at the conclusion of an investigation.'*

As a result of the Ombudsman's report, a series of recommendations were made that were agreed to by the MARA. The Ombudsman's submission notes, however, that an ongoing issue regarding complaints to its office about MARA complaints handling appears to relate to concerns regarding potential or perceived conflicts of interest inherent in current arrangements where the MIA acts as the MARA.

The submission from KGA Lawyers-MPE also identifies a number of problems with the complaints handling processes that result from the MIA acting as the MARA.

> *'The weaknesses in the investigation and disciplinary process stem from a legislative scheme which appoints members of the profession and industry body representatives as detective, prosecutor, judge and jury…the absence of any external checks and balances in the systems compromises the integrity of the complaints process. This lack of independence may well account for the steady increase in the number of appeals against MARA's decisions as noted in the Discussion Paper. The implementation of a complaints process which is fair and transparent to both consumers and practitioners is an essential characteristic of a mature profession.'*

This issue of the apparent conflict of interest in the MIA's appointment to operate the MARA is discussed more fully in Chapter 4 – Role of the MIA as industry regulator.

The department's submission expressed concerns about the MARA's complaint handling process, in particular that:

> *'The MARA does not accept, take complaints seriously, or investigate them unless evidence against the agent is insurmountable.'*

The submission from KGA Lawyers-MPE suggests that in order to help address this concern, further transparency regarding the MARA's complaints handling process is required and suggests that:

> *'…publicly available criteria should be developed to ensure that MARA staff can confidently and expeditiously determine which complaints warrant further investigation and which should be summarily dismissed.'*

The submission from Ms Juliette Vrakas similarly expresses concern about the MARA's complaint handling activities and the need for greater transparency of processes. In particular, she identifies cases where a complaint about a registered migration agent from another agent was dismissed without apparent reason, cases where the MARA apparently 'over exerts' pressure on agents to respond to communications about complaints, and where the MARA does not inform the agent of the content of the complaint against them. Her submission identifies possible improvements, including:

- a system to monitor MARA's complaints handling processes
- an easily identifiable channel for making a complaint against the way MARA handles investigations
- the MARA to disclose copies of complaints which are being investigated or being considered for investigation to the migration agent in question.

The department's submission further expressed concern about the division of responsibility for complaints handling between the department and the MARA. While the MARA are responsible for investigating complaints against migration agents breaching the Code of Conduct, the department is responsible for investigation of criminal activity by migration agents and unregistered practice:

> *'This division of responsibility between the MARA and the department has proven to be problematic where there are difficulties in determining whether an agent's activity falls within the governance of the MARA or the department. While the department aims to work closely with the MARA regarding inappropriate behaviour by agents, the unclear demarcation of roles provides the potential for inappropriate behaviour by an agent to "fall between the cracks". At the very least, the division of responsibilities is administratively inefficient.'*

In comments to the department on its submission, the MIA disputed the department's concerns, claiming that:

> *'…responsibilities are clear and the problem has been insufficient resources and priority for DIAC to properly investigate and prosecute unregistered practice in Australia and criminal conduct by registered migration agents.'*

Submissions from the OLSC and the LCA note that there appears to be room for the MARA to collaborate further with relevant legal bodies regarding complaints against lawyer agents. The OLSC notes:

> *'…an apparent reluctance (by the MARA) to communicate with this office regarding complaints made against migration agents who also hold legal practising certificates.'*

The LCA's submission notes:

> *'In 2004–05 the MARA referred just 16 complaints regarding lawyers to legal professional associations out of a total of 113 complaints against legal practitioners which resulted in a sanction decision.*
>
> *The Law Council submits that any complaint against a legal practitioner whether meritorious or not should be referred to and investigated by an appropriate legal professional body, not the MARA. It is not appropriate for the MARA as a non-legal professional body to determine whether or not a complaint against a legal practitioner should be investigated by a legal professional body.'*

The submission from KGA Lawyers-MPE discusses the problem of addressing migration agent firms, as opposed to individual migration agents, within firms, who may be acting inappropriately:

> *'The current legislative and regulatory scheme only applies to natural persons and not to corporations, trusts or businesses run by persons who are not registered migration agents… if a complaint is made against the business, the migration agent handling the client's matter will be the sole target for investigation and possible sanction rather than the business.*
>
> *The MARA does not appear to have referred the conduct of such businesses to the Australian Competition and Consumer Commission (the ACCC) or State and Territory Fair Trading authorities for investigation and possible sanction.'*

This issue of complaints against corporations/business entities is also discussed in Chapter 6 – The regulatory framework.

The submission from the Northern Territory Government notes that for the complaint handling function to be effective, resourcing and training of staff is essential:

> *'Those who are handling or investigating complaints must be formally trained and equipped to handle even the most serious breaches. Officers who are responsible for preparing an investigation report must have a range of skills including knowledge of information gathering processes, statutory requirements to meet legal standards and the need for confidentiality.'*

The submission from the IARC supports this need for training suggesting that:

> *'…the MARA's performance would be significantly enhanced if its key staff members obtained comprehensive training to enhance their understanding of the Migration Act, the Migration Regulations and the Migration Agents Regulations. We note that key staff members in other industry regulators such as the NSW Law Society are trained professionals in their respective industries.'*

Entry standards

Increasing the knowledge standards of practitioners is seen as one way of managing or avoiding complaints. Several submissions made comments welcoming the introduction of the Graduate Certificate in Migration Law and Practice in 2006 as the knowledge requirement for initial registration. Other comments were made regarding the Graduate Certificate in regards to the CPD points that can be obtained by completing Graduate Certificate units. See Chapter 9 – Continuing Professional Development, for further discussion of CPD issues.

The MIA submission notes that the next steps should be that the Graduate Certificate (one semester full time or equivalent course) is replaced by a Graduate Diploma (two semesters full time or equivalent course) and then a Bachelor of Law (Migration) Degree (three or four years full time or equivalent).[3]

While submissions acknowledge that the Graduate Certificate may not have been in existence long enough to determine whether it has improved the profession, some submissions indicate that it is not sufficiently rigorous. An anonymous migration agent submitted:

> *'I think the entry level standards into the profession are ludicrous.*
>
> *Only very recently did the MIA/MARA go a small step by introducing minimum tertiary entry standards via the Graduate Certificate.*
>
> *I believe this does not go far enough. The qualification is an AQF level well below a Bachelor Degree qualification.*
>
> *I believe the minimum entry standards should be a Bachelor of Laws Degree. Again we are operating in an area of law.'*

Some submissions also commented on the English language requirement for registration (currently International English Language Testing System (IELTS) 6). The submission from the department noted concerns that some migration agents demonstrate very poor levels of English, and the anonymous migration agent claimed that:

> *'…many Registered Migration Agents would fail to achieve even Functional English Language ability scores on an IELTS test.'*

The MIA submission acknowledges concerns about English language proficiency noting however that the successful completion of the Graduate Certificate should require English language proficiency. To improve the standards of those entering the profession, the MIA recommends that the standard be increased to IELTS 7.

Some of the submissions discuss whether changes to entry requirements should be applied retrospectively – for example, whether existing registered migration agents who entered the profession prior to the Graduate Certificate should be required to complete it in order to be eligible for continued registration. The anonymous migration agent submitted:

> *'…further, I believe that such a measure should be introduced retrospectively so that it applies to all current and intending registered migration agents. This will help weed out the older registered migration agents who have managed to avoid meeting any standards.'*

[3] The Review notes that commencing in 2009, the Australian National University will be offering a Graduate Diploma and a Masters Degree in Migration Law and Practice.

The LCA submitted that all current migration agents should be required to complete the Graduate Certificate in order to be fully qualified for ongoing registration. This view is supported by the United Nations High Commissioner for Refugees (UNHCR) submission claiming that it will improve the knowledge base of the industry. The MIA submission disagrees claiming that there would be little value in making it mandatory as the majority of currently registered migration agents have the knowledge required. Graduate Certificate units currently attract CPD points and this issue is discussed further in Chapter 9 – Continuing Professional Development.

A number of submissions support the idea of a registration system where new migration agents should be subject to at least 12 months supervision. This would help to address issues that can arise when newly qualified, inexperienced agents establish their own businesses and then practice in relative isolation with little support. The submission from New Zealand's Department of Labour describes the conditions that they are implementing within their regulatory scheme for their migration agent equivalent, immigration advisers:

> *'New Zealand's Immigration Advisers Licensing Act also has provision for a supervisory system for immigration advisers based on the competency of the immigration adviser to provide advice in all areas of immigration. Section 16(2) allows for the Registrar to grant:*
>
> - *a full licence, or*
> - *a limited licence, or*
> - *a provisional licence.*
>
> *A provisional licence requires that the immigration adviser work under the direct supervision of a fully licensed immigration adviser for up to 12 months.'*

The UNHCR submission also calls for supervision, especially in the field of refugee law:

> *'In UNHCR's global experience, migration agents often do not have sufficient skills in the highly specialised field of refugee law. Therefore continued, targeted professional development and training, and a supervisory mechanism of migration agents are essential.'*

The Northern Territory Government also support the idea, comparing the migration advice industry to other professions in Australia:

> *'consideration needs to be given to having newly registered agents complete a professional year under the supervision of an experienced migration professional similar to that undertaken by graduates in the accountancy and legal professions. This approach would result in graduate migration agents acquiring a working knowledge before they commence practising as an agent in their own right.'*

Registration

There did not appear to be any adverse comments in submissions specifically regarding the MARA's handling of the agent registration process.

The MIA submission discusses the MARA's plans to implement a new method of repeat registration including a monitoring program. The MARA is also seeking to improve their audit processes. The MARA feel that:

> *'better monitoring of all RMAs adherence to the requirements for operating clients' accounts and the keeping of professional libraries could best be achieved through the repeat registration process.'*

The MIA submit that the repeat registration process will provide a means for auditing all migration agents and this process will become substantially more electronic, improving the efficiency of application processing.

The submission from KGA Lawyers-MPE suggests that the regulatory body should be able to place conditions on the repeat registration of agents that have been sanctioned. They suggest that such agents' registration be subject to a variety of conditions including: a requirement to be supervised; a restriction be placed on the type of work they can do; and a requirement that they undertake specific training.

Consumer awareness

The MIA submission notes that a range of publicity and consumer awareness initiatives have been implemented. These include the publication of the *Information on the Regulation of the Migration Advice Profession* leaflet in several languages, a multilingual newspaper and television advertising campaign, posters, brochures, and the MARA website. The MIA submission notes that it is continually seeking ways to improve the information available to consumers and a range of new activities are underway.

Some submissions indicate that the MARA could be doing more to improve consumer awareness. The submission from the then Department of Industry Tourism, and Resources (DITR) notes:

> *'According to key industry representatives the current regulatory framework, including the role of the MARA, is very confusing for employers. They do not understand how the system operates or the basis for the fees charged by migration agents.'*

Similarly to the DITR submission, the department suggests that further measures are required to assist the clients of migration agents:

> *'The clients of migration agents are often unfamiliar with the process, may not be comfortable with English and likely to find the process somewhat stressful. These circumstances may result in misunderstandings and conflicts. Therefore the department believes that there is value in the development of a Consumers Guide on the use of migration agents, or other strategies as appropriate.*
>
> *A Consumers Guide could help to improve client/agent relationships, which may result in a decrease in complaints about migration agents and the negative perceptions that such complaints generate.'*

Schedule of fees

In order to help address complaints about fees charged by migration agents, the Discussion Paper asked whether a schedule of fees should be set. While the MARA already publishes a list of average fee ranges, there is no obligation for migration agents to charge within these ranges.

Two submissions supported the setting of a schedule of fees and four submissions opposed such a move. The Migrant Resource Centre North West Region claimed a schedule of fees would provide clients with a:

> *'clearer view of the financial commitment involved and the level of complexity of their case, prior to their engaging an agent.'*

The Northern Territory Government supported the publication of upper and lower ranges to better inform clients of the quality of service they were engaging.

The submissions opposing the introduction of a schedule of fees stated it would only reduce protection for clients. The submissions from Christopher Levingston and Associates, Mr John Findley, KGA Lawyers-MPE and the MIA argue that establishing scheduled fees would create a situation where all migration agents' fees would drift towards the higher end of the scale, regardless of the experience of the migration agent or the quality of service provided. Clients would then not be able to use price as a possible indicator of the quality of the service they would receive. They claim that providing a schedule of fees would also reduce the incentive for migration agents to seek to provide a better service or strive for expertise in a specific area.

Some submissions suggested that as complaints about fees are still one of the smaller categories of complaints received, there is insufficient justification for setting a schedule of fees. They indicate that the MARA publication of average fees provides sufficient information to the consumer. KGA Lawyers-MPE submits:

> *'The MARA already publishes on its website a range of fees that are charged by migration agents for different types of matters. This is sufficient for consumer information purposes and goes beyond consumer protection measures in relation to professional fees regulation adopted in other industries and professions. Moreover, in a free market economy where adequate information is made available to consumers in order to enable them to make informed choices market forces should be given proper scope for determining fee levels.'*

Safeguarding of clients' monies

As a mechanism that could be used to compensate clients who suffer a financial loss as a result of a migration agents' criminal actions, seven submissions supported the concept of a fidelity fund, and two submissions opposed the establishment of a fidelity fund.

The submissions supporting the concept of a fidelity fund included: Christopher Levingston and Associates; the MIA; the IARC; FCG Legal; the department; the LCA; and Restaurant and Catering Australia. They reasoned that it would increase consumer protection and clients would have more confidence in dealing with migration agents. These supporting submissions provided several recommendations for its operation, including that it should:

- be established by placing a levy on registrants
- be topped up by interest generated through investment of money held in the fund and through any operating surplus from the regulatory body
- exempt lawyers (as they already contribute to a fidelity fund) and migration agents acting solely on a not-for-profit basis from contributing to the fund.

Submissions recommend that limits on payments from the fund would need to be established and that payments would be subject to funds availability. Furthermore, as a result of a claim being paid from the fidelity fund it should be ensured that:

- the regulatory body has the power to obtain records from a migration agent to verify claims
- any criminal act results in a sanction against the offending migration agent
- claimants cooperate with any investigation of the matter and provide evidence in any court action taken against the offending migration agent.

While some submissions recommended that any fidelity fund be administered by the regulatory body, the department's submission recommended that due to potential conflicts of interest, any fidelity fund should be administered separately from the regulatory body.

The submission from Mr John Findley opposed the establishment of a fidelity fund arguing that the migration advice profession is different to other professions that require fidelity funds, as migration agents do not hold funds in escrow. KGA Lawyers-MPE indicated that they did not see a need for a fidelity fund either:

> *'…given that migration agents must have professional indemnity insurance, the need for such a fund is not immediately apparent. Migration agents deal with a much more limited range of issues than lawyers or accountants and those issues are not always readily capable of being quantified in terms of economic loss.'*

Some submissions suggested other measures to provide greater protection of client funds. The submission from the Office of the Legal Services Commissioner notes that while the client accounts that registered migration agents are required to maintain resemble trust accounts, the reporting and management requirements of these accounts are not as rigorous as those for trust accounts. Further, the submission raises concerns that the client accounts are not subject to the same level of inspection by the MARA as trust accounts are by the LCA for example. For lawyer agents, they recommend that funds from clients be deposited into trust accounts (and not client accounts) whether the practitioner intends to provide immigration legal assistance or immigration assistance. Further, the submission recommends:

> *'the adoption of the trust accounting regulations into the Code of Conduct as well as the development of a comprehensive inspection regime.'*

The submission from FCG Legal similarly raises the issue of client accounts and the need for them to be subject to stricter audit, although noting that this could involve considerable costs. The submission notes that migration agents may hold Visa Application Charges (VACs) which could reach $100 000.

Emergency powers

Seven submissions supported the need for the regulatory body to have emergency sanctioning powers and two submissions were in opposition. Several submissions, including the MIA and the Northern Territory Government, agreed that the regulatory body needed to be able to react decisively and quickly when necessary and that existing powers were not sufficient to properly protect the consumer.

The MIA's submission recommended that the MARA be given the powers to:

- seek a court order to enter a property and seize client files to return them to clients
- immediately suspend a migration agent until an investigation has been conducted or the risk to the client has been ameliorated. It notes that this would allow the MARA to return documents to clients (if the power above was granted). It notes however 'that this power should not be open ended and should be reviewable by the AAT with the opportunity for the decision to be stayed by the AAT'.
- seek an order from a court to appoint a MARA approved and qualified receiver. It notes that the MIA 'would need indemnification and protection from consequential loss and damage as a result of any action taken'.

The submission from KGA Lawyers-MPE suggests a number of powers that could be given to the regulatory body including:

> *'…the power to appoint an administrator to run the practice of a migration agent who is deceased, bankrupt or barred from being a migration agent where no arrangements have been put in place to deal with such events. It should also have power to appoint an administrator and suspend a migration agent from practice if there are serious grounds for believing that the agent is acting in a manner that would amount to professional misconduct and/or put their clients at risk of financial loss. This power should be subject to the proviso that the MARA would be liable to compensate the agent for any loss caused it if turns out that it did not have a reasonable basis for taking such strong action. Cases involving the exercise of such power would need to be finalised within strict time limits.'*

Although there was strong support for the implementation of emergency sanctioning powers, submissions indicated that a level of caution was required to ensure that relevant checks and balances were in place. In particular, submissions suggested that there should be protections in place for migration agents that are suspended, including the right to an appeals process.

The IARC submission supports the implementation of emergency powers but warns that the regulatory body's powers should not be enhanced unless careful consideration is given to the potential consequences of granting such powers. In particular, it notes that the power to appoint a receiver, if exercised, could have a significant impact on the migration agent's business and reputation.

Litigation

The submission from Christopher Levingston and Associates states that 'MARA needs to conduct its own litigation and to monitor the outcome of that litigation' in order to help address concerns about a lack of independence, and further:

> *'…that the MARA seeks tenders for the provision of legal advice and representation in ongoing litigation but excludes from tender firms on contract to DIAC with the exception of the Australian Government Solicitor.'*

The MIA submission acknowledges a transfer of litigation costs to the MARA will need to occur if the profession was to move to self-regulation. The MIA submits that the cost of litigation could be reduced as:

> *'…the Commonwealth uses a panel of top end legal firms in all of its litigation. We agree that the MARA should be a model litigant but we believe that given the small specialist nature of the litigation load, which is primarily focussed on the AAT, a single or small firm that specialises in the area could yield a better result at a lower cost.'*

5.3 Discussion

Complaints handling and dispute resolution

Submissions noted that the perceived or real conflict of interest inherent in the MIA operating the MARA has and continues to undermine public confidence in the MARA's complaints handling processes. The issue of the MIA operating the MARA is discussed in more detail in Chapter 4 – Role of the MIA as industry regulator.

Concerns are also raised in submissions regarding the MARA's decisions on whether to investigate a complaint or not, suggesting that greater transparency regarding these decisions is required. The Review supported these views noting that while some complaints about migration agents may have resulted from misunderstandings between the client and the migration agent, refer to relatively minor issues, or indeed be scurrilous, it was still necessary that decisions on these complaints be transparent, auditable, and the regulatory body be accountable for decisions.

Recommendation

That criteria on which the regulatory body will decide to investigate complaints be made publicly available.

Recommendation

That all relevant complainants be provided with explanations of why the regulatory body decides not to formally investigate their complaint when a decision of 'No further action' is made.

Recommendation

That the regulatory body disclose relevant details of complaints which are being investigated or being considered for investigation to the migration agent in question, as long as such disclosure does not compromise the investigative process.

Recommendation

That quality assurance procedures be implemented to ensure consistency in the complaints handling processes of the regulatory body.

Recommendation

That an easily identifiable channel for making a complaint against the way the regulatory body handles investigations be developed.

It was further noted that migration agents should be informed of all complaints, including minor issues, and be requested to address these issues. Such feedback could help the agent to avoid future complaints for similar issues or more serious complaints if an agent's practices are allowed to deteriorate.

Recommendation

That migration agents be made aware of relevant aspects of relevant complaints against them that are not further investigated at that time and requested to take appropriate action to avoid future complaints for similar issues.

It was noted by the Review that the MARA is currently responsible for investigation of complaints about migration agents' adherence to the Code of Conduct, and the department is responsible for investigating complaints about criminal activities and unregistered practice. There is a need, therefore, for the two to work together closely to ensure that complaints do not 'fall between the cracks' or that the division of responsibilities does not result in 'blame shifting.' The Review further noted the role that the department has in providing information to the MARA under section 321 of the Act in support of its complaint handling functions, and in supporting litigation. Accordingly, the Review concluded that there was a need for the two organisations to work together in a more streamlined and holistic manner.

Recommendation

That options be developed to facilitate the better integration and coordination of the regulatory body and departmental complaints handling functions.

The issue of complaints against migration agents with legal practising certificates has been largely addressed in Chapter 8 – Inclusion of lawyer agents in the regulatory scheme. However, in respect to the manner in which the industry regulator has handled complaints from lawyer agents, many lawyers, supported by the LCA, expressed the view that complaints against legal practitioners received by the MARA should be referred to the relevant legal professional body.

The Review had concerns that handing over complaints to other bodies may result in complaints being handled inconsistently, consumer confusion regarding roles of the regulatory body and increased dangers that complaints could fall between additional 'cracks'. However, it noted that if a migration agent who is also a legal practitioner is sanctioned, it may be appropriate for the relevant legal body to take appropriate action. Similarly, if the owner of a migration agency is sanctioned, corporate regulators may need to take action. Information sharing between relevant regulatory bodies is desirable in the interests of consumer protection, and should be encouraged.

Recommendation

That the regulatory body work in partnership with relevant bodies such as the Office of the Legal Services Commissioner (OLSC) and the Australian Competition and Consumer Commission (ACCC) in order to progress the investigation of complaints and to ensure that the results of complaints are known by relevant regulators and that these organisations also take appropriate action.

The Review noted concerns expressed that in order for complaints handling to be effective there was a need for complaints handling staff to be well trained. Due to the critical nature of this function and the importance of ensuring that it was handled well, the Review concluded that there would be value in further consideration of training strategies for these staff.

Recommendation

That the regulator review and appropriately revise any existing training program for complaints handling staff or if such a program is not in existence, that it develop a new, appropriately robust training program for these staff.

Entry standards

The Review noted that according to the Deed, the MARA is required to manage the registration process to ensure that 'individuals will have an acceptable standard of knowledge, demonstrated by a pass in a common examination operated by MARA to help individuals seeking to enter the profession without a prescribed qualification'. In 2003 the MARA implemented the MAPKEE as the common examination. This was replaced in 2006 by the Graduate Certificate in Migration Law and Practice, a pass in which is considered the current requirement for entry to the profession.

A key theme emerging from submissions is that the introduction of the Graduate Certificate was a positive step towards improving the professional standards of the migration advice profession. The MIA acknowledges that it is committed to making further improvements in time, with a bachelor degree the ultimate goal. The Review agreed that the Gradate Certificate appeared to be a positive step, but noted concerns that a Graduate Certificate is not a sufficiently robust knowledge requirement for an increasingly complex area. The Review also noted concerns in some submissions regarding an apparently high attrition rate amongst new migration agents, and more rigorous entry standards may both prevent individuals from entering the profession if they are not committed to it, as well as better preparing them for its challenges. To address these concerns, it would appear that increased entry requirements are warranted.

The Review noted that the Australian National University will be offering a Graduate Diploma and a Masters Degree in Migration Law and Practice from 2009.

Recommendation

That as soon as practicable, the Graduate Certificate as the knowledge requirement for entry to the profession be replaced with a Graduate Diploma level course.

Some submissions indicated that in order to ensure that all migration agents met certain standards, currently registered migration agents, including those who entered the profession before the Graduate Certificate, should be required to complete it. The Review felt that a blanket requirement for all migration agents to complete the Graduate Certificate would not be appropriate, as many experienced agents had knowledge beyond that taught as part of the course. However, it noted that through the current arrangements by which existing agents could accrue CPD points by the completion of Graduate Certificate units, an incentive for some to participate in the course was provided.

It was noted, however, that there were continuing concerns about the knowledge standards displayed by some migration agents. Such lack of sound knowledge could represent a breach of the Code of Conduct and result in a sanction if pursued by the regulator. As result of a sanction and as a condition of the sanction being lifted, the Review felt that there would be value in requiring some migration agents, as appropriate, to complete course units. Indeed, in some circumstances, it could be appropriate for a poorly performing migration agent to be required to complete the course as a condition of repeat registration or lifting of a sanction if he or she had not previously completed the course or relevant units.

Recommendation

That the regulatory body be empowered to require migration agents who are subject to repeated complaints about their knowledge and those sanctioned for a lack of sound knowledge to undertake some or all of the units that make up the prescribed course prior to sanctions being lifted or being re-registered.

A registration system was discussed in a couple of submissions whereby newly qualified migration agents practice under the supervision of an experienced agent for a period of time. This is understood to work well in the legal profession where lawyers are required to complete at least 12 months of supervised practice after completing all their qualifications. This period of supervision enables new lawyers to develop expertise in controlled situations. Such a system would be consistent with a move to harmonise the regulation of Australian and New Zealand agents where under the New Zealand Immigration Advisers Licensing Act, holders of a provisional licence will be required to work under the supervision of a more experienced agent.

Recommendation

That a system of registration be implemented involving a year of supervised practice for newly qualified migration agents.

Levels of English language proficiency were also discussed in submissions. The Review noted the MIA's recommendation that the standard for entry to the profession be increased from IELTS 6 to 7, and supported this recommendation. However, some existing migration agents have an apparent lack of English language proficiency, which impacts significantly on the levels of service they appear able to provide their clients. Accordingly, it would appear that agents applying for repeat registration as well as existing migration agents should be required to prove their English language proficiency.

Recommendation

That new and re-registering migration agents be required to prove that they have English language proficiency of at least IELTS 7.

The Review noted the MARA's plans to introduce a monitoring and auditing program through the repeat registration process that would audit migration agents on their client account keeping practices and their professional libraries. The Review felt that this was a welcome initiative but questioned whether these criteria were sufficiently robust. It noted that rigorous, comprehensive audit processes would require significant resources and may not be practicable. Alternatively an approach whereby the agent seeking repeat registration is required to prove their suitability for repeat registration could be explored. This would involve the onus being put on the agent to prove that they are suitable for repeat registration and not the regulatory body to prove that the agent is not suitable.

Recommendation

That in order to be eligible for repeat registration, migration agents be required to prove that they meet conditions as determined by the regulatory body.

The Review also considered that there was merit in KGA Lawyers-MPE recommendation that conditions be put on migration agents applying for repeat registration after the agent had been sanctioned. This would be in addition to any conditions placed on the agent related directly to the specific sanction.

Recommendation

That the regulatory body be able to impose further conditions on migration agents applying for repeat registration after being sanctioned. Such conditions could include that the migration agent:

- operates under the supervision of another migration agent
- is restricted to a particular type of work
- undertakes specific training.

Consumer awareness

The Review noted that while the MARA appeared to be undertaking several activities to improve consumer awareness, there still seemed to be significant gaps in understanding by key groups. The Review also expressed concern that while the MARA had apparently undertaken a TV and radio campaign, records of these had not been kept. The Review felt that there would be value in an independent review of MARA communications activities and the development of a comprehensive communications strategy. To ensure transparency and accountability, the strategy should be provided on the MARA website and reported on quarterly. A separate and distinct budget should be allocated for the implementation of the strategy and the expenditure of this budget should be similarly reported separately.

Recommendation

That an independent review of the MARA's communications activities be undertaken and that a comprehensive communications strategy be developed and published electronically. A separate and distinct budget should be allocated for the implementation of the strategy and the expenditure of this budget should be similarly reported separately.

Schedule of fees

The Review noted that in the interests of consumer protection and to encourage competition, the MARA publishes a list of average fees charged by registered migration agents. This list displays fee ranges and states that the reason for the difference between the upper end and lower end of the range is due to the experience of the migration agent, the complexity of the case, the quality of service provided and other overhead costs associated with running a business.

The Review acknowledged that the provision of migration assistance operates in a market environment and that fees should not be subject to unnecessary regulation. The Review felt that consumers should be free to choose an appropriate migration agent based on their own analysis of fees charged and services offered. The list displayed on the MARA website should be sufficient to satisfy the need for consumer protection regarding the level of fees charged.

Safeguarding of clients' monies

While the introduction of a fidelity fund was supported by a number of submissions, the Review expressed serious concerns that the implementation and administration of such a scheme for a relatively small profession would not be justified. It was noted that fidelity funds operated by other professions required significant governance and administrative investment to ensure that they operated effectively, and that there may be better ways to safeguard clients' monies.

Recommendation

That a fidelity fund not be established.

The Review noted that the client monies of concern were the sometimes substantial VACs payable to the department. It was noted that in a number of cases, migration agents should not need to take these funds from the clients – funds can be paid by clients directly to the department. For example, clients could provide migration agents with cheques payable to the department for the migration agent to lodge with applications. Where this was not practicable, better funds management such as managing funds according to trust account provisions should be used.

Recommendation

That if practicable, migration agents ensure that clients pay Visa Application Charges (VACs) directly to the department.

The Review considered that the establishment of trust accounts with separate ledgers for each client would be a significant first step to improving consumer protection in this context.

Recommendation

That if it is not practicable for VACs to be paid by clients directly to the department, that migration agents hold funds in trust accounts that are managed according to trust accounting standards.

Emergency powers

The Review noted that there have been several situations where the MARA has not had the necessary authority to protect consumers in a short timeframe. These included situations where migration agents may abandon their offices and client files and documentation from these offices can not be taken quickly and acted upon. Clients were then disadvantaged as their cases could not be progressed.

The Review agreed that in order to protect consumers, the regulatory body needed to have emergency powers. It was noted that the LCA had emergency powers that could provide a useful model.

Recommendation

That the regulatory body be granted additional emergency powers including, but not limited to, the power to:

- suspend a migration agent
- retrieve client files
- appoint an administrator
- seek a court order to appoint a receiver.

However, to provide confidence to migration agents that these powers would not be abused, appropriate checks and balances needed to be incorporated. The Review considered that consultation with the tribunals and courts should occur. The regulatory body would need to be indemnified, however, in case tribunals later determine powers should not have been exercised. Furthermore, there would need to be an appropriate governance framework to make decisions about the invoking of emergency powers.

Recommendation

That in developing protocols for the use of emergency powers, the following should be considered to ensure there are suitable 'checks and balances on such powers:

- the tribunals and courts should be consulted
- the regulatory body to be indemnified in case tribunals later determine powers should not have been exercised
- an appropriate governance framework be developed to ensure that the decision making process regarding the invoking of emergency powers is impartial and transparent.

Litigation

The Review noted the current situation, whereby the regulatory body is not responsible for the full costs of defending its sanction decisions in the courts or tribunals. The Review considered that ideally the regulatory body should be responsible for these functions and costs to enhance its accountability for decisions and actions and further develop internal expertise.

Recommendation

That the regulatory body be more responsible for legal matters pertaining to its operations.

6 The regulatory framework

6.1 Background

The current regulatory framework comprises:

- Part 3 of the *Migration Act 1958*, Migration agents and immigration assistance
- Section 494D of the *Migration Act 1958*, Authorised recipient
- Migration Agents Regulations 1998
- *Migration Agents Registration Application Charge Act 1997*
- Migration Agents Registration Application Charge Regulations 1998
- Deed of Agreement between the Commonwealth of Australia and the Migration Institute of Australia Limited.

Part 3 of the *Migration Act 1958*, Migration agents and immigration assistance, provides for:

- the definition of immigration assistance
- who can provide immigration assistance
- the registration of migration agents
- the disciplining of registered migration agents for engaging in vexatious activity
- documents relating to clients of inactive migration agents and deceased migration agents
- investigations and decision making by the MARA
- disciplining former registered migration agents
- obligations of registered migration agents
- the MARA including the appointment of the MIA to operate the MARA
- registration application fees and repeat registration status charges.

Section 494D of the *Migration Act 1958* (the Act), Authorised recipient, enables clients to appoint authorised recipients to receive documents in connection with matters arising under the Act. Clients may choose to appoint an authorised recipient to receive documents from the department if, for example, they are located in remote areas or travelling. Clients often also appoint their migration agent as their authorised recipient, so that the migration agent receives communications about the application directly from the department. While the department can discuss the details of a client's application with an appointed migration agent, it can not with the authorised recipient.

The Migration Agents Regulations 1998 provides for:

- immigration assistance given by persons not registered such as employers to employees, sponsors, and other persons such as close family members
- infringement notices relating to the provision of immigration assistance
- rules surrounding registration, prescribed qualifications, Continuing Professional Development (CPD), and the Code of Conduct.

The *Migration Agents Registration Application Charge Act 1997* provides for:

- the imposition of a charge on registration applications
- the imposition of a charge in respect of the status of a migration agent's registration.

The Migration Agents Registration Application Charge Regulations 1998 provides for registration charges payable for commercial or non-commercial assistance.

The Deed of Agreement between the Commonwealth of Australia and the MIA sets the basic terms and conditions under which the MIA will carry out the statutory functions of the MARA in regulating the migration advice profession.

The Deed sets out:

- the manner in which the MIA should manage services including financial management
- departmental and MARA functions
- performance targets
- milestones.

Specific questions about the regulatory framework asked in the Discussion Paper to the Review were:

- Is there too much detail in Part 3 of the Act and are there matters that should be simplified? For example, should the definition of immigration assistance be simplified?
- Are there details within the Act that might better be placed in the Regulations? For example, should the information that is included on the Register be included in the Regulations and removed from the Act?
- Should further limitations be placed on who can represent visa applicants? For example, should DIAC limit communications to visa applicants, registered migration agents or those exempt from the need to be registered in section 280 of the Act?
- Are there changes that might be made that would strengthen the Code of Conduct?
- Are there other legislative changes that could be made to improve the regulatory framework?

6.2 Comments received from submissions

Part 3 of the Act

The IARC submitted that Part 3 of the Act is unnecessarily complex and cumbersome and requires restructuring and redrafting. It recommended that Part 3 be simplified to only include: the need to register in order to provide immigration assistance; penal provisions; and the appointment of MARA, its functions and powers. Details of registration requirements, notification requirements and the obligations of registered migration agents should be covered in Regulations or the Code of Conduct.

The submission from the MIA agreed that Part 3 is too complex, and noted that many of the details in the Act could be transferred to regulations. For example, registration application requirements could move to Regulations. The submission also recommends that details in the Act (such as section 278 – Relation by employment) that match provisions in Regulations (Regulation 3U – Relation by employment) could be moved into revised Regulations.

The MIA submission notes that changes to legislation relating to migration advice have not always received priority in the extensive program of legislative change before Parliament and that legislative changes that have been agreed have not been tabled in Parliament. These changes include:

- the appointment of persons independent of the profession to the MARA's PSRC
- ensuring that the fit and proper person and person of integrity factors considered in disciplining a migration agent (section 303) match those used to refuse an application for registration (section 290)
- the factors used for disciplining an agent and those used for barring of an agent
- defining 'client' in the Act as a person to whom immigration assistance is given, which will mean that when an agent gives advice to a sponsoring/nominating company, and a visa applicant, the migration agent will have professional obligations to both under the Code of Conduct
- enabling the MARA to publish decisions not to register an agent, where the agent has failed to meet integrity requirements
- providing the discretion not to publish on the Register the business addresses of certain agents in rare cases where this information is sensitive (for example where the agent works at a women's refuge)
- ensuring that the AAT does not issue a stay of a decision by the MARA to cancel or suspend an agent unless it is satisfied that the prescribed supervisory requirements are in place.

In addition, the MIA recommends that the following changes be made:

- in addition to current sanctions in response to non-compliance by migration agents (including encouragement, direction, suspension, cancellation and barring), that there should be provision for: the ability to restrict the practice of the agent; require a period of supervised practice; or require an agent to attend compulsory training on specific topics
- removal of suspended agents from the Register of Agents for the duration of their suspension
- enable clients of agents to recover monies from an agent as a debt under section 313 in an expanded number of circumstances, such as before a decision has been made by the Minister
- making it explicit in legislation that agents can not avoid their responsibilities by operating their business through a corporate structure (ie not hide behind a 'corporate veil')
- redefine 'review authority' in section 275 to include the Administrative Appeals Tribunal (AAT) to remove uncertainty as to whether non-legal practitioners who are not agents can appear in the AAT on character cases and business visa cancellations.

The submission from Mr John Findley, disagreed that details contained in the Act should be moved to Regulations, expressing concern that this would make it too easy to make changes. He submitted that:

> *'by leaving the Act as it is we are confident that only significant changes of genuine need are made, as opposed to small time interfering.'*

Immigration legal assistance as opposed to immigration assistance

In its submission, the LCA noted that it believes that the current definitions of immigration assistance and immigration legal assistance in sections 276 and 277 of the Act lack clarity and may effectively sanction legal practice by non-lawyers. In particular, it takes issue with the definition of immigration assistance, which includes *'preparing proceedings before a court or review authority'* and *'representing an applicant in proceedings before a court or review authority.'* The LCA recommends that the definition of immigration assistance be changed to clarify that nothing in the Act permits the practice of law by non-lawyers. It suggests that this could be achieved by inserting a provision in section 276 which contains words to the effect of 'Nothing in this definition shall be construed as in any way permitting a person other than a lawyer to provide legal advice or services'. The submission from the IARC shares the concerns that the current definition of immigration assistance could lead to the practising of law by migration agents who are not qualified to do so. It recommends that section 276 of the Act be amended to exclude references to court proceedings.

The submission from KGA Lawyers-MPE also expresses concerns about references to court related work in the definition of immigration assistance and recommends that the definition be amended to remove references to any form of court related work or advice concerning possible litigation. It further notes that the Professional Indemnity Insurance that migration agents are required to have may not cover them for court related work:

> *'The indemnity insurance that applies to migration agents who are not legal practitioners often excludes coverage for any purported "legal" work done by such agents who are not admitted as legal practitioners in the State or Territory in which they operate.'*

As well as expressing concern regarding the definition of immigration legal assistance, the OLSC notes that lawyer agents are not required to take out additional Professional Indemnity Insurance other than that they already carry to cover them for the provision of legal assistance. The OLSC understands that this means that lawyer agents' insurance will not cover them for their provision of immigration assistance. The OLSC believes that:

> *'LawCover will reject any claim in relation to a legal practitioner providing migration assistance, as current legislative definitions dictate that this does not constitute "legal work" and thus could potentially represent a grave lacuna in that practitioner's insurance coverage.'*

Immigration assistance

The submission from the IARC expressed concerns that the current definition of immigration assistance in the Act suggests that it is only provided if there is a 'visa applicant' or a 'cancellation review applicant'. It notes situations where immigration assistance may be provided in other circumstances, and recommends that the definition should apply to any immigration assistance, regardless of whether it relates to a visa applicant or a cancellation review applicant. This concern was also reflected in the submission from KGA Lawyers-MPE.

The submission from the Migrant Resource Centre North West Region requested that the nature of 'migration assistance' and 'migration advice' be further clarified. It noted that:

> *'...often the terms are interchangeable and can result in inconsistency of support, resulting in a range of expectations on what can in fact be provided by a migration agent.'*

The submission from the New Zealand Department of Labour notes the reference in the Discussion Paper to the definition of immigration advice in the New Zealand legislation that is all inclusive unless something is specifically excluded. The New Zealand Department of Labour indicates its willingness to work with Australia to reset the definition of immigration assistance along similar lines. The submission from KGA Lawyers-MPE notes that while the definition of immigration advice in the New Zealand legislation is simpler and clearer, it does not properly define the context in which the client/advisor relationship arises. The submission claims that as the definition used in the New Zealand legislation is so broad, it would create unduly high compliance burdens and should not be adopted.

Who can give migration advice

Restaurant and Catering Australia submitted that the Act should be amended to exclude associations from the prohibition on the provision of migration advice to their members. It suggested that this would mean that small businesses could turn to their associations for migration advice, which would reduce the cost to them of recruiting skills from offshore and in turn reduce current skills shortages.

The submission from L'Amer-Aussies Multinational Refugees Foundation also suggested that some community non-government organisations could be permitted to provide immigration assistance. In particular, the submission recommended that organisations such as those who assist asylum seekers be permitted to provide immigration assistance to their members without employing or engaging registered migration agents. It also recommended that a special scheme be established to include 'meritorious community leaders' nominated by non-government organisations to act on behalf of asylum seekers. It notes that this would assist the Commonwealth to meet its obligations under the Convention Relating to the Status of Refugees.

Authorised recipients

The submission from the Legal Services Commission of South Australia noted that:

> *'...the restriction on who can "represent" visa applicants should remain confined to registered migration agents and exempt agents. However, authorised recipients should not be abolished... so long as an authorised recipient's role is confined to the receipt of correspondence only (and not the provision of immigration assistance), it is a useful concept.'*

This view was also reflected in the submission from National Legal Aid.

The submission from the Northern Territory Government also supported the concept of authorised recipients (referred to as 'Authorised contacts' in their submission). They noted, however, that they were aware of circumstances where such contacts had been questionable.

Ms Judith Burgess noted in her submission the importance of authorised recipients such as community workers to 'disadvantaged applicants and sponsors who do not have the English skills, cultural familiarity or internet access required to make enquiries regarding applications made by overseas relatives'. Ms Burgess notes that 'any further tightening of the authorised recipient requirements would create obstacles for disadvantaged applicants in communicating with the department regarding progress of applications'. To address the issue of unregistered agents acting as authorised recipients, Ms Burgess recommends that measures be put in place to ensure that there are adequate non-commercial migration agents available in the community sector.

The submission from the Commonwealth Ombudsman noted the level of confusion surrounding authorised recipients and migration agents, and noted the potential for visa applicants to be disadvantaged if their migration agent was de-registered or suspended by the MARA but the department continued to treat the migration agent as the applicant's authorised recipient.

The submission from the MIA expressed concern that the current departmental *Form 956 Appointment of a Migration Agent or Exempt Agent or other Authorised Recipient* was confusing to clients and was possibly contributing to clients being misled by unregistered agents. The MIA recommends that the Form 956 be replaced by two separate forms; one for appointing a migration agent and one for appointing an authorised recipient. The form for appointing a migration agent should be easy for the client to complete and take into account migration firms that may employ multiple migration agents, several of whom may handle matters on behalf of the visa applicant. In addition, the MIA recommends that forms should include reminders regarding the deemed receipt provisions under the *Migration Act 1958* that deem that documents have been received at the end of the day upon which they were transmitted. The MIA warns that this is different from the *Electronic Transaction Act 1999* which prescribes the time of receipt of an email as when it enters the information system or comes to the attention of the addressee.

Code of Conduct

The submission from the MIA notes that 'frequent changes to the Code… have made it confusing for consumers and migration agents. While the MIA has requested changes to the Code, it now believes that it should be entirely rewritten to provide a clear structure with a focus on principles illustrated by examples'. The MIA believes that the profession should be given control of the Code through the MARA, and any new Code could be developed with the input from stakeholders and approved by the Minister. The MIA believes that the Code needs to clarify the role of supervising migration agents and address concerns regarding unscrupulous exploitation of loopholes in legislation.

The OLSC expressed the view that the 'Code does not go far enough to guarantee a satisfactory level of consumer protection, particularly in an area where professional services are offered to some of the most vulnerable members in the community'. The OLSC is particularly concerned about the 'client account' provisions in the Code. It notes that while in some ways, client accounts are similar to the trust accounts managed by lawyers, the reporting and management requirements are not as rigorous as those for trust accounts. The OLSC recommends the adoption of the trust accounting regulations into the Code of Conduct as well as the development of a comprehensive inspection regime. The adoption of trust accounts is discussed further in Chapter 5 – MARA's performance as the industry regulator.

The Northern Territory Government supported strengthening of the Code, noting that the relationship between Regional Certifying Bodies and migration agents should be specifically acknowledged in the Code.[4]

[4] Regional Certifying Bodies (RCBs) are a source of assistance for employers seeking to sponsor permanent or temporary skilled workers. Through knowledge of the local labour market, RCBs certify nominations under some permanent and temporary entry skilled programs before they are submitted to the department for approval.

The Northern Territory Government believes that the Code should cover the potential conflict of interest that may arise when a migration agent offers both recruitment and migration advice. The Northern Territory believes that there is a considerable risk of conflict of interest given that the migration agent has a vested interest in the success of the visa application for the recruit. The submission from the Australian Nursing Federation supported this view, noting that clear conflict of interest guidelines need to be put in place to address issues such as when migration agents are working with employment or training agencies. The Federation notes:

> *'…it is imperative that migration agents are, and are seen to be at arms length from training and/or employment agencies and are working only in the interests of the person concerned.'*

This concern was shared by the submission from the ACTU and the then Department of Employment and Workplace Relations (DEWR).

The submission from the Australian Council for Private Education and Training (ACPET) also expressed concern about conflicts of interest, noting that there are unethical migration agents operating within and around the international education industry:

> *'It appears that there may be practices occurring that could pervert the education system through migration agents having a direct vested interest or ownership of RTOs. ACPET believes that migration agents should not have a direct interest in the operation of any Registered Training Organisation (RTO).'*

The submission from DEWR noted that the Code states that migration agents must act lawfully and in the legitimate interest of their clients, but it does not require migration agents to operate within the policy intentions and the satisfaction of the government. It notes that recent reviews of the Temporary Business Long Stay visa (subclass 457) by the Joint Standing Committee on Migration (JSCM) and the Council of Australian Governments (COAG) identified the need for consistency in the application of Migration Regulations and threshold criteria to enhance the integrity of the visa class and achieve the policy intentions of the government. In this context it noted that 'there may be merit to extending the Code to include a requirement for migration agents to operate within the policy objectives of the government and for appropriate sanctions to apply to migration agents not satisfying this standard.'

Other submissions disagreed that the Code should be amended to require migration agents to act within the policy intentions of the government. The submission from the IARC notes in one of its recommendations that they:

> *'…strongly oppose the suggestion that the Code should direct agents to operate within the policy intentions and to the satisfaction of government. The Code should aim to be a tool for consumer protection, enhancing the industry's professionalism, integrity and independence. It should not seek to make the profession an avenue for enforcing government policy.'*

The submission from KGA Lawyers-MPE recommended that the Code be amended to include a comprehensive definitions and interpretation section and to make adequate provision for different business structures.

The submission from Mr John Findley suggested that to ensure changes to the Code were practical and well considered, the Code should include a set of rules that must be satisfied before a change can be made, as well as a procedure for changing the Code.

Other legislative changes that could be made to improve the regulatory framework

Penalties for inactive migration agents

The submission from the Migrant Resource Centre North West Region notes that under section 206D of the Act, the MARA is empowered to obtain copies of client documents from inactive migration agents, and under section 306, the migration agent is liable for a criminal penalty if he/she does not respond to a compliance notice issued by the MARA within the required timeframe. The submission notes that this may be harsh if the migration agent has become inactive due to physical or mental incapacity and therefore can not respond to the notice. It recommends changes be made to exempt inactive migration agents from the section 306 penalty when the non-compliance is beyond the migration agent's control. As an alternative, it recommends that client protection measures in such cases be dealt with under emergency powers.

Division 5

Part 3 of the Act contains Division 5 – Obligations of Registered Migration Agents. The submission from the Migrant Resource Centre North West Region suggests that this is unnecessarily prescriptive and would be more appropriately contained in the Code of Conduct. The Centre recommends that Division 5 'be deleted save that a registered migration agent must conduct himself or herself in accordance with the Code of Conduct which is to be made in consultation with the MARA and administered by it'.

Section 332E Protection from civil proceedings

In his submission, Mr Ron Dick, a registered migration agent, notes that under section 332E, anyone making a complaint against a registered migration agent in good faith is protected from civil proceedings for damages. Mr Dick notes that:

> *'This immunity means complainants need not find it necessary to consider the full consequences of a complaint on the registered migration agent. Complainants are able to ignore the possibility of harming the registered migration agent by their complaint.'*

Mr Dick requests that this provision in the Act be repealed, noting that the courts have their own rules regarding vexatious litigants.

Definitions of other terms

The submission from KGA Lawyers-MPE recommends that the definition of 'client' in the Migration Agent Regulations be amended to specify the context in which immigration assistance is provided; when the client-migration agent relationship officially starts and when it ceases. The submission queries whether a person becomes a 'client' when they have formally engaged a migration agent's services or whether they can be considered a 'client' when a migration agent gives casual 'off the cuff' advice or comment. It notes that there has been confusion in the past about when the migration agent is formally engaged and when the migration agent is then obliged to provide the client with their terms of engagement and a copy of the publication *Information about the Regulation of the Migration Advice Profession* (IRMAP). KGA Lawyers-MPE recommend that the client/advisor relationship should be confined to one where the advice is sought in the migration agent's professional capacity and that the obligation to provide a fee agreement and a copy of the IRMAP only arises once the client formally engages the services of the migration agent.

Under section 290 of the Act, the MARA must not register a person if it is satisfied that the person is not a person of integrity or fit and proper to give immigration assistance or if the applicant for registration is related by employment to such a person. The submission from KGA Lawyers-MPE goes on to recommend that legislation be amended to provide further guidance on the definition of 'fit and proper person'. It notes that:

> *'...this could be achieved by ensuring that the definition provide some guidance in relation to the factors to be taken into account when assessing a person's fitness, propriety and or integrity in the migration agent professional context. These factors should not be exhaustive so as to ensure that there is some capacity to retain flexibility in assessing various relevant matters as they arise in the circumstances of any given case.'*

Corporations and other business entities

The submission from KGA Lawyers-MPE notes that the current legislative and regulatory scheme only applies to natural persons and not to corporations, trusts or businesses run by persons who are not registered migration agents. While clients of these businesses enter contracts with the business, if complaints are made, the migration agent handling the client's matter will be the target for investigation and sanction rather than the business. The submission notes that:

> *'...the current scheme places an unrealistic burden on employee agents and curtails the ability of the MARA to properly protect members of the community who use the services of businesses run by persons who are not registered migration agents.'*

The submission recommends that legislation be amended to apply to all businesses that are involved in the provision of immigration assistance or that the MARA should be required to refer the conduct of businesses to relevant agencies such as the Australian Competition and Consumer Commission (ACCC) or State and Territory Fair Trading authorities for investigation and possible sanction. This issue is also discussed in Chapter 8 – Inclusion of lawyer agents in the regulatory scheme.

International standards

The ACTU noted that any regulation of migration agents should be based on upholding standards established in two International Labour Organisation (ILO) conventions: Private Employment Agencies Convention (No 181); and Migrant Workers (Supplementary Provisions) Convention (No 143).

6.3 Discussion

Part 3 of the Act

Submissions indicate that there is support for a revision of Part 3 of the Act to simplify it and to move some of the details to Regulations, noting that Regulations are legally enforceable.

Regulations are generally more readily amended than Acts, which must go through the Parliament. Changes to Regulations may be made with the approval of the responsible minister as long as the changes do not impact upon other portfolios. Changes to Regulations are scrutinised by Parliament and can be disallowed. These processes help to ensure that while Regulations are able to be changed more readily than Acts, any changes made are necessary and well considered.

The *Legislation Handbook*[5] notes that 'while it is not possible or desirable to provide a prescriptive list of matters that should be included in primary legislation and matters that should be included in subordinate legislation, it is possible to provide some guidance'. The Handbook notes that *inter alia*, the following should be implemented through Acts of Parliament:

- provisions imposing obligations on citizens or organisations to undertake certain activities (for example to provide information noting that the detail of the information required should be included in subordinate legislation) or desist from activities (for example to prohibit an activity and impose penalties or sanctions for engaging in an activity)
- provisions creating offences which impose significant criminal penalties or those imposing administrative penalties for regulatory offences
- provisions imposing significant fees and charges
- provisions creating statutory authorities (noting that some details of the operation of a statutory authority would be appropriately dealt with in subordinate legislation).

[5] *Legislation Handbook*, Department of Prime Minister and Cabinet, 1999, http://www.pmc.gov.au/guidelines/docs/legislation_handbook.rtf

It would appear then that while a range of provisions in the current Act should stay, there is scope to move a significant portion of the detail to Regulations which would allow more timely responses to emerging issues.

Recommendation

That Part 3 of the Act be simplified with details moved to Regulations where appropriate. In simplifying this legislation, where practicable, previously agreed changes should be effected.

The definitions of immigration assistance and immigration legal assistance are causing concern amongst stakeholders. The definition of immigration assistance includes reference to court and review authorities, possibly leading to work akin to the practising of law by migration agents. The definition also means that a lawyer undertaking work relating to court and migration review authorities could be determined to be undertaking immigration assistance when in effect they were providing immigration legal assistance. The implication of this being that firstly, they could be considered to be engaging in unregistered practice and thus acting illegally, and secondly that their professional indemnity insurance and/or fidelity fund may not cover this work and thus leave the consumer unprotected.

Recommendation

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

Stakeholders indicated that the definition of immigration assistance could be further clarified, in particular to make it clear that it applies to all categories of clients, as well as when an individual is considered to officially become a client. As there also seems to be confusion between immigration assistance (the overarching activity) and migration advice (an element of immigration assistance), this should be clarified. It was noted that while the New Zealand legislation had taken a different, broad approach to the definition of immigration assistance, the Review considered that the existing Australian definition should be further clarified, and that definitions be clearly communicated to stakeholders.

Recommendation

That the definition of immigration assistance be amended to:

- ensure that it applies to immigration assistance provided to all clients, not just visa applicants or cancellation review applicants
- clarify the difference between immigration assistance and migration advice
- define the context in which the client/advisor relationship arises.

Who can give immigration assistance

To reduce the costs of recruiting skills from offshore and to provide greater access to immigration assistance to disadvantaged visa applicants such as asylum seekers, some submissions suggested that certain associations and individuals be exempted from registration requirements.

Not-for-profit providers of immigration assistance are currently provided with concessions including reduced registration and CPD course fees and access to LEGENDcom (a database of legislation and policy documentation relating to migration).

Other organisations may have legitimate reasons for seeking exemption from registration requirements that could be considered on a case by case basis. In making a decision on whether to grant any exemption, issues such as whether the accepted standard of immigration assistance provided will be maintained, consumer protection and any resulting general consumer confusion about who can provide immigration assistance and who can not will need to be considered. In considering this issue, the Review noted that exempting some organisations may contribute to consumer confusion regarding who can legitimately provide immigration assistance. As such it was felt that if such exemptions were to be made, decisions should be made at a high level based on exceptional circumstances.

Recommendation

That consideration be given to enable certain bodies to provide immigration assistance without this assistance being provided by registered migration agents. Decisions on exemptions to be made at ministerial level based on exceptional circumstances.

Authorised recipients

Submissions generally agreed that the concept of the authorised recipient was useful – especially for disadvantaged applicants or those applicants who were travelling and did not have stable addresses. The challenge is, however, ensuring that authorised recipients contain their activities and do not provide

untrained and unregistered immigration assistance and that unscrupulous unregistered migration agents do not use their appointment as an authorised recipient as a mechanism to enable them to practice illegally. Greater availability of non-commercial migration agents was seen as a key strategy which could help prevent authorised recipients from illegally providing immigration assistance and discourage applicants from seeking out such services.

As discussed above, not-for-profit providers of immigration assistance are provided with concessions including reduced registration and CPD course fees and access to LEGENDcom. However, additional strategies could be put in place to increase the availability of non-commercial migration agents.

Recommendation

To help address the issue of unregistered migration agents acting as authorised recipients, strategies be developed to increase the availability of non-commercial migration agents in the community sector.

Submissions noted confusion about the roles of registered migration agents and authorised recipients. These distinct roles need to be clarified in departmental documentation and communications products. The Review noted that the department had issued clear guidance to staff regarding these roles including protocols for seeking directions from applicants using migration agents that become deregistered and are still officially appointed as authorised recipients, but could further clarify the roles by revising Form 956.

Recommendation

That the department's Form 956 Appointment of a migration agent or exempt agent or other authorised recipient be revised to clearly distinguish between the appointment of a migration agent and an authorised recipient, to be more client friendly and to include both client and departmental obligations.

Code of Conduct

A range of submissions agreed that the Code should be improved. The current Code comprises Schedule 2 of the Migration Agents Regulations 1998, and as such, adherence to the Code is legally enforceable. Migration agents are required to display a copy of the Code, provide a copy if requested by a client, reference the Code in contracts with clients and provide a link to the Code if they have a website.

Submissions noted that the Code had become confusing, should be simplified and should be strengthened in several areas. The Review noted that the Code had grown to include ethical issues that perhaps were best dealt with through education and awareness strategies. The Review concluded that the Code should be substantially revised with input from the profession but that it should remain in Regulations.

Recommendation

That with significant input from the profession, the Code should be re-written in simple English, strengthened, and ethical issues dealt with separately. The Code should remain in Regulations.

Recommendation

That in revising the Code, consideration be given to including:

- clarification of the role of supervising migration agents
- the adoption of trust accounting regulations in relation to the management of client accounts and referral to a comprehensive inspection scheme
- acknowledgement of the role of Regional Certifying Bodies
- clear guidelines regarding conflicts of interest that may arise such as from a migration agent's connection with a recruitment or training organisation
- a comprehensive definitions and interpretation section
- provisions for migration agents working within different business structures.

Other legislative changes

Penalties for inactive migration agents

The Review noted that in order to protect clients it was important that the regulatory body, in a timely manner, could obtain copies of client documents from migration agents that have become inactive. It noted that current arrangements could be harsh where migration agents who are incapacitated and can not respond to the regulators' requests, may be subject to penalties.

Recommendation

That the penalty provisions under section 306 be changed to exempt inactive migration agents from the penalty when non-compliance is beyond the migration agent's control, for example when the agent is incapacitated.

Division 5

The Review noted that Division 5 of Part 3 of the *Migration Act 1958* was prescriptive and covered details that might more appropriately be covered in Regulations.

Recommendation

That consideration be given to the deletion of Division 5 from the Act except for providing for the need for a registered migration agent to conduct himself or herself in accordance with the Code of Conduct. Details previously provided in Division 5 could then be covered in Regulations.

Section 332E Protection from civil proceedings

The Review noted that other legislation contained similar provisions, and provided assurance for individuals wishing to speak out against the practices of some migration agents. The Review further noted that while the section may appear to provide protection to vexatious complainants, in reality, the courts have robust processes in place to deal appropriately with these cases. In conclusion, the Review felt that the section should remain in the Act.

Definitions of other terms

The Review noted that 'client' should be further defined to clarify when a person officially becomes a migration agent's client, and thus when the migration agent is responsible for the advice given. The Review determined that an individual should officially become a client once a contract is officially entered into.

Recommendation

That the definition of 'client' in Regulations be amended to specify the context in which immigration assistance is provided including defining that an individual officially becomes a 'client' when a contract for services is signed.

The Review noted that it was fundamental to the profession's long term viability that individuals who are not 'fit and proper' are denied access to the profession. As such, relevant areas of the Act should be strengthened.

Recommendation

That further guidance be provided on the definition of 'fit and proper person' in section 290.

Corporations and other business entities

The Review noted that while a very significant portion of migration agent businesses were operated by sole practitioners, a number of businesses operated under different structures and involved the employment of registered migration agents by other agents or other individuals. In order to ensure that the clients of all businesses were protected, relevant legislation, practices and policies should apply to all business structures.

Recommendation

That amendments be made to ensure that provisions apply to all businesses (not just individuals) that are involved in the provision of immigration assistance.

International standards

The Review noted that international standards such as ILO Conventions 181 (Private Employment Agencies) and 143 (Migrant Workers – Supplementary provisions) provided useful guidance, and in accordance with government policy, should be incorporated into changes to legislation, policies and procedures as appropriate.

Recommendation

That legislation be revised mindful of relevant standards established in ILO Conventions 181 (Private Employment Agencies) and 143 (Migrant Workers – Supplementary provisions) that are consistent with government policy.

7 Costs and benefits of the scheme

7.1 Background

While the regulation of an industry imposes costs, regulation should produce benefits that outweigh the costs involved. Higher levels of regulation will generally increase direct costs – it will cost more to manage higher levels of regulation, and it will cost more for industry participants to comply with such regulatory schemes. While benefits may concurrently increase to a certain point, it is likely that costs will eventually outweigh benefits. In analysing costs and benefits of any regulatory scheme, difficulties arise in identifying and quantifying intangible costs and benefits and in determining the appropriate balance between these costs and benefits.

For consumers of the services of migration agents, direct costs of the scheme include the fees charged by migration agents for services as well as any costs they may incur if the regulatory scheme fails to protect their interests and they subsequently suffer a loss. There is currently no set schedule of fees chargeable by migration agents, although as previously discussed in Chapter 5 – The MARA's performance as the industry regulator, the MARA publishes on its website a list of average fees for migration agents' services. Fees for services charged in a regulated environment would be expected to be higher than in an unregulated environment because the costs of compliance with the scheme borne by migration agents are passed onto clients. In addition, regulation provides 'barriers to entry' to a profession, decreasing the number of service providers. Fewer providers can then theoretically charge more for services. Benefits of the regulatory scheme for consumers would be expected to include better quality services provided by migration agents that are required to operate to certain standards.

For the community as a whole, the costs of the scheme include the direct costs of regulation plus the indirect costs if the scheme fails to provide required levels of consumer protection. The activities of the MARA, including the registering, monitoring and disciplining of migration agents are funded largely from the registration fees paid by migration agents. Costs borne by the community are incurred by the department in monitoring the regulatory scheme, addressing unregistered practice and criminal activity by migration agents, providing legal advice, and information to the MARA in support of its functions. Benefits of the scheme to the community include higher levels of consumer protection and thus presumably fewer detrimental effects on any consumers of substandard services that the community may then indirectly pay for.

For migration agents, costs of the scheme include costs of complying with the regulatory scheme. These include costs associated with obtaining the required qualification, registering, undertaking CPD, holding professional indemnity insurance and other costs of compliance such as those involved with adhering to the Migration Agents Code of Conduct, including maintaining a professional library.

The benefits of regulation for migration agents should include a better industry that is well regarded in the community and by consumers. In turn, the industry should be more sustainable and possibly be held in higher regard by the community.

Major direct costs for commercial and non-commercial migration agents are outlined in the table below.

Table 7.1: Major direct costs

	Commercial/for profit migration agent	Non-commercial/not-for-profit migration agent
Graduate Certificate course costs	$5520 - $8400	$5520 - $8400
Initial Registration	$1760	$160
Repeat Registration	$1595	$105
LEGENDcom – 1 person license*	$1340	$640
CPD Courses – 10 units per year	Approx. $550 - $1000	Approx $0 - $300**
Professional Indemnity Insurance***	Approx. $360 - $1280	Approx. $360

* LEGENDcom may comprise the majority of a migration agent's professional library. Lawyer agents may already have access to a professional library through their legal practices.

** The cost of CPD courses for non-commercial agents varies. If they complete CPD courses with the not-for-profit agency they volunteer for, or are employed by, then the courses are often provided free of charge. If they attend CPD courses run by the MIA they receive a 50 per cent discount on the MIA members' rate (which is around $55 per session).

*** Professional Indemnity Insurance of at least $250 000 is required under regulation 6B. The costs of insurance vary according to the income generated by the agent. As migration agents operating in the non-commercial sector do not generate income from the activity (excluding wages if they are employees) it is assumed that Professional Indemnity Insurance for these agents would be towards the bottom of the scale indicated.

7.2 Comments received from submissions

The costs and benefits of various elements of the regulatory scheme are discussed throughout this report. This section includes comments on cost/benefit issues that are not covered elsewhere in the report.

Consumers and the community

The submission from DITR claimed that despite awareness activities undertaken by the department and the MARA, there remains a lack of understanding by employers about the migration requirements relating to overseas labour. This means that employers do not have a good understanding of the time and costs associated with the compilation of visa applications and subsequently the fees charged by migration agents. Due to the lack of understanding of the process, many employers engage migration agents despite concerns about the size of the fees and charges.

Fee charging and non-fee charging migration agents

The submission from the LCA argues that as inclusion in the regulatory scheme leads to a disincentive for lawyers to practice in immigration matters, there is a resulting shortage of migration agents with court experience. In turn, this impacts on the operation of the tribunals and the courts:

'…the shortage of practitioner agents with court experience affects the operation of the tribunals and the courts by increasing the length and cost of proceedings. The shortage of practitioner agents increases the likelihood of poor or unfounded applications being made on behalf of applicants because of the significant pressure placed on practitioner agents to act on short notice.'

Submissions indicate concern that the current scheme does not provide sufficient incentives to migration agents operating in the not-for-profit sector. The submission from the LCA argues that dual regulation has had a detrimental impact on the number of lawyer agents providing pro bono services or those working in Community Legal Centres (CLCs).

'The Law Council is advised that dual regulation of migration lawyers has had substantial negative effects on both the number and quality/experience of legal counsel available to CLCs.'

The submission from Ms Judith Burgess expresses concern that the rising costs of entry to the profession and registration and the limited availability of paid positions for registered migration agents in the community sector has resulted in a marked decline in the availability of non-commercial migration agents. Ms Burgess claims that in 2002, 11 per cent of registered migration agents were non-commercial agents, while currently only 7 per cent are non-commercial agents. To address this issue Ms Burgess recommends the following measures:

- *'require education providers of entry-level courses to provide a number of scholarships to students who make a commitment to practice as a non-commercial agent*
- *provide free access to Legend for non-commercial agents*
- *Department of Immigration and Citizenship to extend the IAAAS scheme to provide funding for advice and application assistance both for onshore and offshore visa application, including to proposers of offshore humanitarian visas.'*

7.3 Discussion

In considering the costs and benefits of the scheme, the Review determined that as long as the costs of regulation were producing commensurate benefits, then the costs were acceptable. It noted that as there were still considerable concerns about the integrity and professionalism of some sectors of the industry, further measures were required to address these sectors, and such measures could result in cost increases.

The Review noted that some elements of the current regulatory scheme, such as the CPD framework required substantial overhaul, and did not appear to be producing benefits commensurate with the costs involved. CPD issues are discussed in further detail in Chapter 9 – Continuing Professional Development.

The DITR submission discussed the continued lack of understanding amongst stakeholders of the regulatory scheme and costs. To address these concerns the Review concluded that there would be value in further information provision regarding the regulatory scheme.

Recommendation

That the department and the regulatory body continue to make information available to industry associations, labour hire organisations and employers (including small businesses) on the regulatory framework, service charters, fees, and the complaints mechanism.

The Review noted the concerns raised by some submissions that the current scheme did not provide sufficient incentives for migration agents operating in the not-for-profit/community sector. The Review considered it important, for access and equity reasons, that quality services were accessible to clients who could not afford to pay commercial rates for immigration assistance. In considering recommendations pertaining to this issue, the Review considered it important that measures encouraged skilled and experienced agents to provide high quality non-commercial services and that the provision of non-commercial services was not just seen as a training ground for less skilled, inexperienced agents. To achieve this end, the Review considered that a range of measures would be appropriate.

Recommendation

That providers of the Graduate Certificate of Migration Law and Practice, and the MIA as the industry association, investigate the possibility of providing a number of scholarships to students who make a commitment to practice in the non-commercial sector.

Recommendation

That the providers of CPD activities be encouraged to offer migration agents operating in the non-commercial sector greater discounts on CPD activity fees.

Recommendation

That the department consider providing non-commercial migration agents with further discounts on access to LEGENDcom.

Recommendation

That consideration be given to amending the CPD scheme to provide additional incentives for experienced migration agents to provide pro-bono services.

Recommendation

That the department consider extending the Immigration Advice and Application Assistance Scheme (IAAAS) to provide funding for advice and application assistance both for onshore and offshore visa applications, including to proposers of offshore humanitarian visas.

8 Inclusion of lawyer agents in the regulatory scheme

8.1 Background

Under section 280 of the *Migration Act 1958*, apart from some limited exemptions, only registered migration agents can provide immigration assistance. This does not prevent lawyers from providing immigration legal assistance – which they can do without being registered. However, as discussed in Chapter 6 – The regulatory framework, the definitions of immigration assistance and immigration legal assistance in the Act appear to be confusing, and in practice it is often difficult to determine whether the assistance being provided is immigration assistance or immigration legal assistance.

Since the introduction of statutory regulation in 1992, lawyers (individuals with legal practising certificates – not individuals with law degrees) have been required to register with the MARA if they wish to provide immigration assistance. The objective of their inclusion was to achieve consistent standards of professional conduct and quality of service within the migration advice profession. In recognition of lawyers' legal training and qualifications, the regulatory scheme has fewer requirements for lawyer agents. For example:

- lawyers do not need to complete the Graduate Certificate
- there is no requirement for lawyer agents to take out additional Professional Indemnity Insurance in addition to that required as part of their legal practice
- some Continuing Legal Education (CLE) activities that are done by lawyers as part of their legal practising requirements may be counted as CPD activities for repeat registration.

As at 31 March 2008, there were 1073 migration agents (28.5 per cent) with legal practising certificates. In comparison, as at 30 June 2003, there were 739 migration agents (24 per cent) with legal practising certificates.

Ever since lawyers have been included in the regulatory scheme, there has been strong opposition from lawyers and their various representative bodies. In 1994, lawyer agents, with the support of the LCA, unsuccessfully challenged the validity of Part 2A of the *Migration Act 1958* that provided for the inclusion of lawyer agents in the regulatory scheme. Since then the LCA, as the national organisation for the legal profession in Australia, has been one of the strongest opponents of this inclusion.

The term 'dual regulation' is often used in discussions regarding the inclusion of lawyer agents in the regulatory scheme. It is claimed that as lawyers are regulated by their own profession in regards to the provision of legal assistance, they should not be required to be registered by the migration advice profession for the provision of immigration assistance. As they are required to be registered by both, it often referred to as 'dual regulation'.

The Discussion Paper to the Review asked:

- Should lawyer agents continue to be required to be registered with the MARA in order to act as migration agents? If not, why not? If so, are there some requirements currently placed on lawyer agents by the MARA that could be changed or removed?

8.2 Comments received from submissions

Of the 37 submissions received, eight agreed that lawyer agents should continue to be registered with the MARA in order to act as migration agents whereas seven submissions were in opposition. Another two submissions supported the continuation of their inclusion but advocated that further concessions be afforded to lawyer agents.

Views against the inclusion of lawyer agents in the regulatory scheme

The submission from the LCA strongly opposed the inclusion of lawyer agents in the regulatory scheme. They claim that this inclusion:

- *'is unnecessary, given the comprehensive regulatory scheme currently applicable to the legal profession*
- *conflicts with the Australian Government's policy of reducing the regulatory burden on business and removing unnecessary red tape…*
- *conflicts with the objectives of the National Profession Project…*
- *results in confusion among consumers, lawyers, agents representative bodies and even DIAC about which body is the most appropriate to address misconduct, where it occurs*
- *facilitates misleading and deceptive conduct by non-lawyer migration agents*
- *creates conflicting and unnecessarily onerous CPD requirements for lawyers*
- *creates a major disincentive for lawyers to practise migration law, which seriously limits the number of qualified counsel to assist in migration legal work at all levels, including pro bono and legal aid…'*

The LCA's submission recommends that if it is decided that lawyer agents should continue to be included in the scheme, then:

'(a) The regulator should be independent of all stakeholders, but have representatives of the stakeholders on an Advisory Board

(b) Lawyers with legal practising certificates should not be required to pay a registration fee in addition to their practising certificate fees, professional indemnity insurance premiums and fidelity fund contributions

(c) All complaints regarding lawyer agents should be referred by MARA or DIAC or the relevant body to the state or territory legal services board, law society or bar association for investigation and, if necessary punishment

(d) Lawyers with legal practising certificates should not be required to meet MARA's continuing professional development (CPD) requirements in addition to their CPD load as lawyers; and

(e) MARA or the relevant industry regulator must be required to provide information on its public register of migration agents, indicating whether a registered lawyer agent holds a legal practising certificate and/or specialist accreditation from a Law Society.'

In a supplementary submission to the Review, dated 11 January 2008, the LCA notes that the Law Society of NSW has advised that the clients of lawyer agents would only be covered by the Law Society's Fidelity Fund if the lawyer in question was providing legal advice; clients would not be covered if the lawyer was providing immigration assistance. They note that different jurisdictions have different approaches, but assert that the current arrangements provide clients with less protection than they would have if lawyer agents were not included in the regulatory scheme.

In its submission, the Legal Services Commission of South Australia indicates its support for the LCA's arguments why lawyer agents should not be included in the regulatory scheme, as contained in section 7.3.1 of the Discussion Paper. In addition to the objections outlined above, this section includes the following arguments:

- *'the regulation of lawyer agents conflicts with legal practitioners' duties to their clients and as officers of the court, and includes limiting the duty to provide comprehensive legal advice and the threat of sanctions by a non-legal body, without respect for a lawyers' duty to protect client legal privilege*
- *dual regulation restricts the capacity of community legal advice centres to provide legal advice because they have difficulty attracting experienced lawyers, and those who do practise in these centres are often inexperienced and must be closely supervised*
- *as a key professional body for registered migration agents. There is a conflict of interest in the MIA acting as the MARA, in exercising its regulatory functions*
- *there is no distinction made between lawyer agents and non-lawyer agents and some non-lawyer agents hold themselves out to clients as lawyers*
- *Australia is the only western country that subjects lawyer agents to dual regulation.'*

In response to the reason above regarding the capacity of community legal centres to attract experienced staff, the IARC's submission clarifies that while community legal centres have difficulty obtaining pro-bono assistance from lawyers who are also experienced migration lawyers, their legal practitioners are experienced.

The submission from National Legal Aid supported the LCA's submission, noting in particular that the costs of registration, CPD and subscription to LEGENDcom are burdensome for lawyer agents in the community/not-for-profit sector. The submission notes:

> *'If lawyer agents are to continue to be required to be registered with MARA, it is submitted that the costs of initial registration, re-registration and subscription to Legend ought to be reduced for lawyer agents working in not-for-profit and non-commercial organisations. Reduced fees coupled with a more flexible approach to the CPD requirements….would go some way to ameliorating the impact on the not-for-profit/ community sector.'*

The submission from the OLSC expresses the view that the existing scheme to regulate the legal profession offers higher levels of protection to consumers than the migration advice regulatory scheme, and that there is a need for greater involvement of legal regulators in the discipline of lawyer agents.

The submission from Mr Mark Tarrant claims that the inclusion of lawyer agents in the scheme does not protect consumers as it protects 'rogue' lawyers. The submission notes that while the MARA may de-register a 'rogue' lawyer for his/her provision of immigration assistance, these individuals can continue to practice as lawyers as they do not face sanction by the relevant Law Society or Legal Services Commissioner.

The Law Institute of Victoria similarly argues that legal practitioners should be regulated only by the relevant legal profession regulatory body, noting that:

> *'Additional regulation by another body is unwarranted, time-consuming, expensive and may in fact work contrary to the best interests of the migration advice industry as a whole by discouraging lawyers from practising in the area.'*

The submission from the New Zealand Department of Labour explains why they decided to exclude lawyer agents from their recently established scheme. These reasons were: that legal profession regulatory scheme would provide appropriate protection for clients using lawyers; that inclusion in the scheme would involve unnecessary compliance costs; and that it could cause confusion and dissatisfaction amongst consumers arising from having two avenues of complaint.

Views for the inclusion of lawyer agents in the regulatory scheme

Of submissions that supported the continued inclusion of lawyer agents in the regulatory scheme, the Northern Territory Government saw it as important to help ensure that lawyer agents maintain relevant knowledge stating that 'in recent years Immigration legislation has changed regularly and it is important for both agents and their clients these changes are understood...'.

A similar view was held by the Migrant Resource Centre North West Region, which noted that migration law was specific and that law graduates may not study it as part of their courses. To ensure that such individuals were competent to operate in the area, they should therefore be required to be included in

the scheme and registered. The submission from the UNHCR concurred, noting '…dual regulation of lawyer agents will ensure the necessary level of understanding of Australian migration law, and promote consistency and quality in standards of practice'.

The MIA's submission notes that in the past, there were two main reasons for its position that lawyers should be required to be registered. Firstly, they claim that in the past, lawyer agents were over-represented amongst agents sanctioned, while they are now under-represented. Secondly, they express concerns that removing lawyers from the regulatory scheme would encourage lawyers with little experience in the area to offer services to clients, decreasing the quality of services provided. The MIA submission suggests that the legal profession could manage their own registration process for migration purposes, but indicates that the legal profession may not wish to become active in this area given the relatively small proportion of lawyer agents.

The submission from FCG Legal suggested that the inclusion of lawyer agents in the scheme should continue, but in a more limited manner. In particular, complaints about lawyer agents should be referred to relevant legal bodies for action. To facilitate this, special procedures should be developed for MARA initiated referrals to legal regulators. These procedures:

> *'Should address the manner in which complaints are referred and the minimum content of such referrals in order to ensure that all allegations that may give rise to disciplinary action as a result of possible misconduct are properly brought to the attention of the relevant State or Territory law society.' As a result of the transfer of the responsibility to investigate and action complaints about lawyer agents to legal bodies, the submission recommends that lawyer agents could then be permitted to pay a discounted registration fee to the migration advice regulator.'*

FCG Legal also suggest that in order to ensure that legal practitioners maintain their knowledge of the area, they should continue to undertake relevant CPD units:

> *'This would ensure that lawyers maintain an adequate knowledge of updates in this specialised area of practice, thereby minimising the prospect of further complaints about lawyers based upon misconduct claims arising out of an inadequate knowledge of migration law and procedure. This concern is particularly well founded in certain cases where lawyers may engage in a multi-disciplinary practice and who may, as indicated in the Discussion Paper, be relying heavily upon DIAC for basic information about migration practices that they should already know.'*

On the issue of obtaining or maintaining an adequate knowledge of the subject area, the submission from Ms Juliette Vrakas goes further than the CPD suggestion above, suggesting that lawyer agents should be required to complete the Graduate Certificate or equivalent.

The submission from FCG Legal similarly supports the continuation of the inclusion of lawyer agents in the scheme, but in a diluted form. The submission recommends that:

'1. The costs of dual regulation are not properly recognised/acknowledged and there should be an amendment to the legislation that will significantly reduce the registration fees and repeat registration fees of for profit agents who hold a current practising certificate.

- *This may have the effect of increasing the number of lawyer agents overall, and increasing the revenue pool but hopefully will allow greater dispersal and thereby lead to wider array of immigration assistance…*

2. CPD Requirements for Lawyers holding a Practising Certificate from States and Territories where there is a mandatory CPD requirement be simplified.

3. The MARA register note the distinction between agents who are lawyers as well as migration agents. This may well already (be) within MARA's powers as MARA has a power in section 316 (1) (b) to monitor lawyers providing immigration legal assistance.'

8.3 Discussion

The inclusion of lawyer agents in the regulatory scheme has proven to be one of the most contentious issues of the Review. After initial discussions with the ERG, it was determined that further consultation was needed with key stakeholders. A meeting was subsequently held with representatives from the LCA and the MIA to further analyse the arguments for and against the inclusion of lawyer agents in the regulatory scheme and obtain further information on key issues.

In its consideration of this issue, the Review concluded that while many of the arguments for and against the continued inclusion of lawyer agents could be the subject of ongoing dispute, it was clear that the inclusion of lawyer agents provided clarity to consumers.

Recommendation

That lawyer agents continue to be included in a revised regulatory scheme[6].

The Review noted the recommendation in Chapter 5 – The MARA's performance as the industry regulator – regarding greater cooperation between the MARA and other regulators such as the Legal Services Commissioner. It concluded that complaints about lawyer agents could be referred to relevant Legal Services Commission/Ombudsman for investigation and the migration advice regulator could have a right of review of decisions made. The Review noted that this would be likely to result

[6] Glenn Ferguson, ERG member, dissented from this recommendation.

in a decrease in the requirement for the migration advice regulator to allocate resources to address complaints against lawyer agents, and a reduction in registration fees payable by lawyer agents would thus be appropriate.

Recommendation

That complaints about lawyer agents be referred to relevant Legal Services Commission/ Ombudsman for investigation. Resulting decisions from investigations to be subject to review by the migration advice regulator. As the requirement of the migration advice regulator to allocate resources to address complaints about lawyer agents would decrease, that registration fees payable by lawyer agents be decreased as appropriate.

Regarding the suggestion by the LCA that the industry regulator provide information on its public register of migration agents indicating whether a registered lawyer agent holds a legal practising certificate and/or specialist accreditation from a Law Society, the Review considered that the provision of this information would be of benefit to consumers. However, it also considered that the qualifications of other agents may provide consumers with useful information on which to choose an agent, and that the register should provide for all agents – not just lawyer agents – to have relevant qualifications listed.

Recommendation

That the public register of migration agents provide for all agents to have relevant qualifications listed.

9 Continuing Professional Development (CPD)

9.1 Background

Compulsory CPD in the migration advice profession was introduced in 1998. Section 290A of the *Migration Act 1958* provides that all migration agents wishing to renew their registration must meet CPD requirements. If a migration agent fails to meet the requirements, their application for repeat registration can not be approved, and the agent will be excluded from practising for a period of 12 months.

Schedule 1 of the Migration Agents Regulations 1998 sets out the requirements for CPD. In summary, these are:

- Migration agents must complete approved CPD activities with a value of at least 10 points per year, with at least six of the points relating to the completion of core activities
- Core activities must relate specifically to the Act, Regulations, other legislation relating to migration procedure, portfolio policies and procedures, or the application of these to the agent's practice. Core activities may involve passing an examination.
- Elective activities are those that relate to a topic of a legal or business nature relevant to the migration agent's practice. Elective activities can include providing immigration assistance for a voluntary, not-for-profit organisation
- The MARA approves CPD activities and publishes a list of approved activities on its website
- Approved activities can include: certain programs of education; private study; attendance at certain lectures, seminars, conferences, etc; authorship and publication of articles; preparation or presentation of relevant materials; and authorship, shared authorship or editorship of a book
- Activities can be approved if they meet requirements for registration in other professions. For example, mandatory Continuing Legal Education (CLE) activities and CPD activities for accountants can be approved
- The MARA may declare that certain activities are mandatory for certain migration agents in particular years or for all agents. The MARA can also declare that an agent must undertake assessable activities up to the value of seven points.
- When applying for repeat registration, migration agents must provide the authority with a written statement that they have met CPD requirements and a list of the activities they undertook. They must keep records of the activities they undertook.

Under Part 3 of the Migration Agents Regulations, the MARA can charge a fee of $99 to assess an activity to decide whether to specify it as an approved activity.

The way in which points are allocated to approved activities is explained on MARA's website:

- 'Level one activities are worth one CPD point for 1.5 hours of learning time. These activities are typically delivered to larger audiences and there is generally lower participation by attending agents. There is no included assessment.
- Level two activities are worth two CPD points for 1.75 hours of learning time. These activities are designed to give a deep and substantial understanding of migration matters. An assessment is also included.
- Level three activities are worth three CPD points for two hours of learning time. These activities are designed to give a deep and critical understanding of particular aspects of giving immigration assistance. An assessment is also included[7]'.

In 2006, the Graduate Certificate in Migration Law and Practice was introduced as the knowledge requirement for initial registration for individuals without a legal practising certificate. Migration agents registered before the introduction of the Graduate Certificate as the knowledge requirement are not required to complete the course, although an agent can receive five CPD points for successful completion of each unit.

Since the last review in 2001–02, the MARA engaged the University of Western Sydney to conduct a review of CPD. The report, Linking Continuing Professional Development to Standards in CPD Review (the Horsley Report),[8] was released in early 2007. One of the key recommendations that has been implemented is that newly qualified migration agents are to undertake four mandatory CPD courses in their first year. These courses are: Accounts Management; Business Management; Ethics and Professional Practice; and File Management.

Another key recommendation of the Horsley Report is a change to the current CPD points structure. The Report's recommendation 3d states 'Each CPD point will generally equate to 1.5 hours of activity requiring 15 hours of CPD annually[9]'. This recommendation would abolish the structure described above where more complex (Level three) CPD activities are worth more points.

The requirements for lawyer agents have also changed as a result of the Horsley Report's recommendations. The report noted that many lawyer agents are required to complete CLE activities annually as part of their obligations as legal professionals. In recognition of these CLE activities, the

[7] http://www.themara.com.au/Online/Default.asp?DeptID=178&ArticleID=174

[8] *Linking Continuing Professional Development to Standards in CPD Review*. Initial Report 23/3/07 Associate Professor Mike Horsley and Dr Debra Costley.

[9] *Linking Continuing Professional Development to Standards in CPD Review*. Initial Report 23/3/07 Associate Professor Mike Horsley and Dr Debra Costley. Recommendation 3d, p7

Horsley Report recommended that lawyer agents be credited with four elective points if their jurisdiction requires CLE to be undertaken. In result, in addition to their CLE activities, most lawyer agents now only have to complete six points of core CPD to continue to meet requirements as a migration agent.

The Horsley Report recommendations are due to be fully implemented by May 2009.

To help address the issue of migration agents maintaining a good knowledge of complex areas, jurisdictions such as the United Kingdom's Office of the Immigration Services Commissioner (OISC) have relied on a tiered registration system whereby immigration advice and services are divided into three levels of activity depending on the complexity of the work. The three levels of possible registration are:

- Level 1 – Initial advice
- Level 2 – Casework
- Level 3 – Advocacy and representation.

The questions raised in the Discussion Paper regarding CPD in the profession were:

- Are there ways in which the regulation of the CPD scheme and its provision could be improved?
- Are there issues associated with the MIA being both the regulator and the main provider of CPD activities? If so, how might these be addressed?
- To what extent do CPD activities contribute to improved professionalism of registered migration agents?
- Should the Graduate Certificate or parts of it be either compulsory CPD or a requirement for continuing registration for migration agents who were registered prior to it being a requirement of registration? If so, over what time frame?
- Would a tiered system, such as that which operates in the United Kingdom resolve issues relating to the level of knowledge and professionalism of registered migration agents? If so, how might such a system operate within the Australian regulatory framework?

9.2 Comments received from submissions

The MIA submission claims that the introduction of CPD in 1998 has led to greater professionalism in the industry and this is supported by KGA Lawyers-MPE, who claim 'the main way in which migration agents can obtain information and openly discuss the scope of their professional obligations has been, to date, in the context of CPD activities and through the development of relationships with colleagues at those activities'. Although submissions highlight the importance of CPD they also acknowledge that there is room for improvement. Sixteen submissions, including from the MIA, supported further changes to the CPD system.

MIA as regulator and main provider of CPD activities

Submissions highlight the strong feelings amongst many stakeholders that a conflict of interest exists within the MIA/MARA concerning the provision and administration of CPD activities. The LCA submission raises concerns that a conflict of interest exists because the MIA is a major provider of CPD and the MARA regulates CPD activities. They recommend that this arrangement should cease. They argue that the MIA/MARA:

> *'has the power to appoint CPD service providers and approve CPD courses. However, the MIA/MARA also competes with other CPD service providers in providing approved CPD courses to migration agents.'*

The submission from KGA Lawyers-MPE agrees that a conflict of interest exists as the MIA has an unfair advantage by being able to approve their own CPD activities:

> *'The MIA provides CPD activities for migration agents and lawyers while at the same time being responsible as the MARA for approving the CPD activities offered by it and other competitor CPD providers. The MIA has a vested interest in approving and promoting its own CPD activities above all others. There is no way it can avoid the conflict between that interest and its duty, as the MARA, to administer the CPD scheme. This conflict can only be properly removed if the MIA has no connection whatsoever with CPD activity approval or provision.'*

The LCA submits that in order to rectify this situation, the 'MARA/MIA must cease to be both the provider and regulator of CPD courses and activities'. The issue of a conflict of interest existing within the MIA/MARA is discussed in greater depth in Chapter 4 – Role of the MIA as industry regulator.

Approval of CPD activities

Similarly to the concerns about a perceived or potential conflict of interest, submissions also expressed concerns about the process whereby the MARA assesses and approves CPD activities, claiming that it is too difficult. The LCA submission claims the approval process is far too onerous as providers of CPD aimed at lawyers are forced to seek accreditation from the MARA:

> *'Law Societies are the responsible bodies for designing, approving and ultimately providing CPD courses to the entire legal profession. It is illogical, under the current scheme, that professional legal bodies are required to seek accreditation from a non-lawyer industry body to run CPD courses in professional legal practice for lawyers.'*

National Legal Aid also have concerns with the approval process for CPD activities, claiming it to be often too complex to negotiate:

> *'Legal Aid NSW did provide… CPD to its legal practitioners and to CLC staff doing immigration work, but no longer provides this service because the MARA approval process proved far too time consuming and cumbersome. The CPD provided by Legal Aid NSW was targeted to cover topics often not covered by other providers but which were particularly relevant to the areas of immigration work typically carried out by the not-for-profit/community sector…the complicated approval process also makes it very difficult to develop and run one-off CPD courses on topics of current interest, such as the effect of new case law and amendments to legislation and on topics which combine aspects of migration law, family law and criminal law, relevant to many migration clients who often have interconnected legal problems.'*

The National Legal Aid submission claims that problems with the approval process have led to a shortage of relevant activities. It notes that while changes have been made to the CPD system, there has not been enough time to determine how effective these changes have been.

Nature of CPD activities

Some submissions expressed concerns about the relevance of CPD activities. The LCA claims that 'the CPD provided to migration agents is generally not designed to meet the needs of legal professionals'. A similar argument is put forward in the National Legal Aid submission suggesting that the courses provided are often not aimed at migration agents working in the not-for-profit sector:

> *'We are concerned that often the topics covered by commercial CPD providers are not relevant to the not-for-profit/community sector which typically does not act for applicants applying for skilled, student or business visas. Topics covered are often quite generic and the information, while useful, is basic.'*

Outcomes of the Horsley Report

KGA Lawyers-MPE are CPD providers and whilst they agree with the majority of recommendations from the Horsley Report, they disagree with the recommended change that all migration agents need to complete 15 hours CPD annually. They express their opposition stating:

> *'It is of concern that this new system increases the CPD obligations for all agents (except for practising lawyers and accountants) to at least 15 hours per year. The reintroduction of a flat system decreases the ability of providers to conduct targeted CPD that meets the various competency levels of migration agents and generally increases costs to individual agents.'*

Under the existing system experienced migration agents were 'able to complete their CPD obligations in less time than an inexperienced agent and had fewer obligations in completing mandatory activities'.

They express their opposition to this further in a letter to the MARA which states:

> *'We strongly take the view that the more experienced a practitioner is, the less CPD they require.'*

The KGA Lawyers-MPE submission further argues that the recommended changes will have detrimental effects on the standards of CPD activities provided:

> *'This "flattening" of the CPD points structure will also remove any incentive for the offering of higher quality/points value CPD products by providers and their uptake by agents. As a result there will be less variety in CPD products and it will be likely that product standardisation will result in the CPD needs of more experienced agents not being met.'*

They also claim that the change to the existing CPD points structure will affect the format of intensive CPD programs. While the Horsley Report recommends against intensive programs that allow a migration agent to undertake their entire annual CPD requirement in one day, they argue that intensive CPD programs are far more productive and conducive to creating networks amongst agents:

> *'it has been our experience that 10 Point Blitz style programs are much more likely to create a community of practice and ongoing contact amongst agents than short bursts of CPD activity. Agents are together the entire day and use the sessions and breaks to network amongst themselves and with the CPD providers… It is our view that a desired community of practice among agents is more likely to develop such an environment as opposed to sporadic short CPD attendances throughout the year where the presentation format and agent audiences varies on each occasion.'*

Further changes to the CPD structure

The MIA submission discusses the new CPD framework that they are implementing, based on the Horsley Report recommendations. Their submission suggests a number of possible improvements including:

> *'the responsibility for approving CPD activities should be given to CPD providers and that the MARA be responsible for accrediting the providers and ongoing quality assurance. This recommendation requires amendments to the Migration Agents Regulations 1998, which currently require the MARA to approve activities.*
>
> *With amendments being made, it is an opportune time to consider passing control and regulation of CPD to the profession to a greater degree than ever before. Allowing MARA to determine the requirements relating to CPD would simplify the Regulations and give flexibility to vary requirements as the profession matures.'*

Tiered systems

A few submissions provided input regarding the possible introduction of a tiered registration system. The IARC does not support the introduction to the profession of registration for separate levels of activity. Their submission states:

> *'The tiered registration system adopted by the UK government is not an appropriate option in Australia so long as the dual registration (for lawyers) continues to exist. In practice the Australian migration advice industry operated in a de facto tiered system. It is seldom that a migration agent will practice in all areas and levels of work (family, economic and humanitarian streams and temporary and permanent visas for primary application, merits and judicial review), however, there are some concerns that some migration agents take on work in areas, particularly in review application at the AAT and the Court level), when they are not competent to do so.'*

National Legal Aid submits that a tiered system will probably not work as the CPD would not be relevant to the not-for-profit sector as:

> *'agents, often working in small offices, are required to provide advice and representation in a wide range of complex immigration matters from the commencement of their work with clients and where the three levels of initial advice, casework and advocacy and representation must be undertaken immediately.'*

The LCA could only support the tiered system in the event that dual regulation continues. Their submission states:

> *'If the unfortunate decision is made that lawyers will continue to be subject to dual regulation, the Law Council would only support a model based on the United Kingdom's tiered registration system.'*

Graduate Certificate as CPD

The LCA submit that all current migration agents should be required to complete the Graduate Certificate in order to be fully qualified for ongoing registration, but they do not agree that it should count as CPD. They feel that the Graduate Certificate is an entry level requirement and therefore should not be recognised as continuing development. The MIA submission disagrees claiming that there would be little value in making it mandatory as the majority of currently registered migration agents have the knowledge and professionalism required. They do, however, feel that currently registered migration agents should be encouraged to complete it and should be able to continue to obtain CPD points as they successfully complete units. The Graduate Certificate is discussed in more detail in Chapter 5 – The MARA's performance as the industry regulator.

CPD requirements for lawyer agents

The LCA's submission expressed ongoing concern that despite recent changes to CPD requirements for lawyer agents, these agents have a higher total CPD/CLE burden; Lawyer agents are required to complete 10 CPD points of Continuing Legal Education (CLE) annually in the legal profession and six points CPD annually in the migration advice profession. They argue that 'migration lawyers who engage in other areas of practice must undertake more CPD each year than non-lawyer migration agents, significantly increasing their annual CPD expenditure and opportunity costs, in terms of lost billable hours'.

9.3 Discussion

MIA as regulator and main provider of CPD activities

Several submissions expressed concerns regarding the MIA operating the MARA and one main area of concern regarding perceived or potential conflicts of interest was in the provision of and administration of CPD activities. The submissions argue that there needs to be a severing of the current arrangements to ensure that the same organisation is unable to provide and regulate CPD concurrently.

Chapter 4 – Role of the MIA as industry regulator, provides a recommendation that addresses this concern.

Nature of CPD activities

The Review noted that there should be allowance for more flexibility in the types of activities that could be counted as part of CPD, especially for more experienced migration agents, including experienced lawyer agents.

Members of the ERG expressed particular concerns that under current arrangements, many CPD activities were irrelevant to the needs of experienced migration agents. As a result, experienced agents feel that they are forced to attend inappropriate CPD activities in order to meet their annual CPD obligations.

The Review noted an example of monthly information sessions held in Melbourne. The sessions are organised free of charge for registered migration agents as a means of networking and discussing topics of interest and relevance to the migration advice profession. CPD points are not awarded despite the fact that this sort of session is extremely useful and contributes to maintaining a migration agent's knowledge.

Recommendation

That the CPD system be modified to provide more flexibility regarding the activities undertaken.

In order to provide even more flexibility in the CPD activities undertaken by migration agents, the Review considered that the approval process should be revised. Revisions should also be undertaken to address concerns about the onerous nature of the current approval process.

Recommendation

That the process of approving CPD activities be revised to ensure that more flexibility is provided in the CPD activities that can be undertaken and to address concerns about the onerous nature of the current approval process.

To further address the needs of experienced migration agents with good track records, the Review concluded that there would be value in offering such agents further concessions in regards to the CPD activities they undertake and the way in which they are required to report to the MARA on the activities they complete.

The Review noted reported arrangements in the legal profession whereby more experienced lawyers are allowed to undertake CPD on an honour basis. In order to qualify for repeat registration, an experienced agent with a good track record could provide the MARA with a statutory declaration that they have undertaken appropriate approved and non-approved CPD activities rather than providing the MARA with a list of the specifically approved activities undertaken.

The Review noted that such a change would be balanced by other recommendations in this report, that migration agents of concern/sanctioned agents would be required to undertake additional CPD.

Recommendation

That migration agents with over three years experience, who have good track records (as determined by the regulator) be able to undertake CPD on an honour basis.

The Review noted the Horsley report's recommendation that newly qualified migration agents be required to undertake four mandatory CPD courses in their first year, including Accounts Management; Business Management; Ethics and Professional Practice; and File Management. The Review supported this recommendation.

ERG members noted that there would be value in developing further CPD activities that involved greater interaction between departmental staff and migration agents. For example, departmental staff could provide presentations to migration agents, and vice versa.

Recommendation

That CPD activities be developed that involve greater interaction between departmental staff and migration agents; for example, the provision of presentations by departmental staff to migration agents and vice versa.

In respect to a tiered registration system whereby for example migration agents might be registered to only provide a certain type of immigration assistance, the Review noted that there was little support for such a system. The Review also noted that such a system would involve administrative overheads and compliance issues, the costs of which would possibly be beyond the benefits that would accrue. However, the Review noted concerns that newly qualified migration agents required considerable support in order for them to be effective and avoid pitfalls in their early days. Such support would provide benefits to the newly qualified migration agents, the department and the profession as a whole. Broadly in line with the legal profession where newly qualified practitioners work under the supervision of experienced lawyers, the Review considered that there would be considerable value in implementing a year of supervised practice for newly qualified agents. A recommendation on a year of supervised practice for newly qualified agents is included in Chapter 5 – The MARA's performance as the industry regulator.

10 Priority processing

10.1 Background

In 2007 migration agents were used for approximately 45 per cent of Temporary 457 Business (Long Stay) visa applications and more than 50 per cent of applications lodged in several other visa classes. Migration Agents also lodged sponsorship, nomination and review applications on behalf of their clients. Attachment B provides more information regarding the percentage of visa applications lodged by migration agents.

Through experience, migration agents may become proficient in lodging 'decision-ready' applications in some visa subclasses. A decision-ready application is one that has been filled out completely, correctly and lodged with all the supporting documentation. When an application is submitted without all the required details and documentation, time is wasted by departmental staff contacting agents for missing details. When complete applications are submitted, the processing time within the department is minimised as departmental staff do not need to chase missing information.

The MIA has suggested developing a priority processing scheme whereby experienced migration agents are able to gain an 'accreditation' allowing them priority processing privileges. This priority status could mean that the applications lodged by these agents will receive priority from departmental staff over other applications.

In addition to seeking comments on whether a priority processing scheme should be developed, the Discussion Paper sought views on what such a scheme should involve if it were implemented.

As an adjunct to a priority processing scheme, the Discussion Paper canvassed the idea of a migration agents rating scheme to provide further incentives to agents to provide high quality service and improve information available to clients about the standard of services provided by these agents. It was suggested in the Discussion Paper that a rating scheme could involve the allocation of three, four or five star ratings to experienced agents with reputations for excellence.

The issues raised in the Discussion Paper were:

- Should priority processing for applications lodged by registered migration agents be introduced?
- If it were introduced, what criteria could be used to decide which migration agent would receive priority processing privileges, for example volume of applications, approval rates or some other criteria?
- Which visa subclasses or other services could be included or excluded from a priority processing scheme?
- Should migration agents be able to state which of their applications they recommend receive priority processing, thus allowing non priority processing of any 'borderline' applications they may wish to lodge?

- Should migration agents be able to advertise or market that they may be able to secure priority processing of applications for their clients?
- How could the sanctions regime be changed, if at all, to cater to a priority processing environment, including the criteria to be applied to determine when a sanction should apply?
- Should a rating scheme be developed to recognise excellence in the profession and provide clients with further information about the quality of the migration services they are purchasing?

10.2 Comments received from submissions

Nine submissions indicated support for a scheme that would afford priority processing privileges to migration agents while 14 indicated that they did not support such a scheme.

A range of submissions indicated that they supported a scheme that awarded priority to complete, decision-ready applications, regardless of whether that application was lodged by a migration agent or not.

Submissions indicating support for priority processing privileges for migration agents

The submission from the MIA suggested that providing 'priority processing' status to quality migration agents will improve the efficiency of the application process. The submission claims that it would also provide incentives for agents to improve the applications they submit and thus be 'awarded' this status. Such agents would then be able to advertise their status and gain a commercial benefit.

The MIA submission also claims that providing a 'priority status' to quality migration agents will benefit clients in two ways:

- *' Individual consumers who use a RMA having access to priority processing will receive quick outcomes.*
- *Consumers generally will benefit because the commercial advantage that RMAs able to access priority processing will have over RMAs who do not, will force an improvement in standards. In effect the bar set for access to priority processing will establish an aspirational standard that will quickly be achieved because financial imperatives will drive that outcome. The result will be an overall raising of standards within the profession.'*

The MIA claims that such a scheme would also reduce processing times for departmental staff as more decision-ready applications would be submitted. They acknowledge that criteria for inclusion would need to be developed and they propose that any such scheme should be balanced by increased sanctions against any migration agent who acts unethically while part of the scheme.

The submission from the Tourist and Transport Forum discusses priority processing as a possible mechanism to speed up processing times. They indicate that they:

> *'...have experienced lengthy delays of up to 12 weeks, or more, for processing of the Long Stay Temporary Business (subclass 457) visa for their employees. These delays are of great concern and impact on the business operations of our Members, which include leading Australian organisations across the tourism and transport sectors.'*

They support the introduction of priority processing as they feel it will improve the efficiency of application processing within the department. Their submission states that they support:

> *'...the need for visa processing times and efficiency to be improved by introducing "employers of choice" and "migration agents of choice". A fair, robust and effective migration scheme that processes people wanting to come to Australia to work and live as efficiently as possible will ensure that industry has a sufficient workforce to be able to continue to contribute to the success of the Australian economy. Professional migration agents will increasingly play a key role in this.'*

The Australian Nursing and Midwifery Council (ANMC) also supports the introduction of a priority processing scheme for experienced migration agents:

> *'The ANMC in its role of assessing authority for nurses/midwives would be pleased to see the introduction of priority processing if this leads to faster processing of nurses/midwives into the health system.'*

Other comments on how priority processing could work

Most submissions provided comments on whether or not priority processing should be introduced. Apart from comments above regarding priority processing of decision-ready applications from any applicant – rather than priority processing applications from migration agents per se, there were few comments on the optimal configuration of a priority processing scheme.

The MIA submission suggests that:

> *'Selection of RMAs for participation should have regard to factors such as their experience, professionalism, not having previously been sanctioned, caseload size, preparedness to lodge applications electronically where this would not disadvantage clients, commitment to lodge complete applications, preparedness to undertake training and preparedness to abide by conditions.'*

They also suggest that all visa subclasses should be included; agents be able to flag certain cases as priority and be able to advertise their participation in the rating scheme. The submission also indicates there would be a need for deterrents to guard against misuse of the scheme.

Submissions indicating opposition to priority processing privileges for migration agents

The submission from the Australian Computer Society provides a range of reasons in opposition to providing migration agents with priority processing privileges:

- *'it disadvantages the individuals who competently present their own applications*
- *it assumes that registered migration agents are competent and many are not*
- *it will drive all applicants to use migration agents which will negate the promised priority status*
- *it will require more staff not less to ensure that those without priority status have their applications processed in the standard timeframe*
- *it will provide an excuse for agents to increase their fees.'*

The submission from the Filipino Women's Working Party went as far as to say it would be:

> *'…oppressive and unfair. It will give rise to corruption of the system prioritising the more moneyed-applicants.'*

Several of the submissions opposing the introduction of priority processing highlight that it is not only discriminatory against those who choose not to use a migration agent but it is discriminatory to those who can not afford to use an agent. The submission from Ms Doris Bertollo, states that a priority processing scheme 'will give an unfair advantage to those persons engaging a Migration Agent over those who cannot afford the high fees'. This view is echoed in the submission of the IARC which claims that an application decision 'should be based on the circumstances of the case itself, not on whether an applicant can afford the services of an "experienced" agent'.

The submission from the Ethnic Communities Council of Victoria is in agreement with these submissions stating:

> *'such a model would disadvantage persons who do not use migration agents, including those who cannot afford to pay a migration agent. Such a model would also increase the perception that applications submitted by registered migration agents are more successful than those that are not.'*

The Legal Services Commission of South Australia is also opposed to the idea stating it:

> *'...discriminates against the many applicants and sponsors who cannot afford the fees of a migration agent or who cannot access a migration agent…'*

and this view is further supported in the National Legal Aid submission claiming that

> *'...it is particularly inappropriate for agents operating in the not-for-profit/community sector.'*

Submissions indicating support for prioritising complete applications

The department's submission indicated that a priority processing scheme may discriminate against clients who choose not to or can not afford to use a migration agent, which would be against its stated policy that applicants are not required to use a migration agent for any dealings with it. As the department states on its website:

> *'You do not need to use a migration agent to lodge any kind of visa application or asylum claim. Your application will not be decided any sooner if you use a migration agent and they cannot influence the outcome of your application.*
>
> *However, if you do not feel confident in lodging an application, or if your case is complex, you may wish to use a migration agent to help you.'*[10]

In summary, the department suggests in its submission that it may be more appropriate to afford priority processing status to decision-ready applications, regardless of whether such applications are submitted by a migration agent or an applicant directly.

The submission from the ACT Government stated 'based on our experience, the ACT Government would strongly support the implementation of priority processing of complete and high quality applications lodged by registered migration agents and individuals'.

This view is shared by the Northern Territory Government submission which suggests 'What may be more beneficial for migration agents in relation to expeditious processing is the submission of complete, high quality applications. When such applications are submitted, the assessing authority is better placed to make a prompt decision'.

The DITR submission also recommends that 'Priority processing of applications should be based on an appropriate assessment and should not be confined to the migration agent profession'.

The submission from Restaurant and Catering Australia suggests that:

> *'Whilst the intent of providing a "Fast Track" process for applications from Migration Agents is understood, it needs to be considered that such an initiative should not slow applications from others. If the basis for "Fast Tracking" is that applications from Migration Agents are more complete, resources might just as well be diverted to assisting others to make complete applications.'*

[10] www.immi.gov.au/students/migration_agents/

Rating schemes

The submission from Tourism and Transport Forum Australia (TTF) supports the implementation of a 'rating scheme that recognises excellence in the migration agents' profession and is able to provide clients with information about the quality of the migration services they are purchasing'. The submission provides several recommendations on how such a rating scheme could work:

> *'TTF would suggest that a "gold" status be considered for migration agents, which would require agents to fulfil certain criteria on an on-going basis. The key elements would be:*
>
> - *a statutory self-regulation scheme which could provide a "rating" system for agents, where the agent's rating (built upon competence) would be used as a prioritisation tool for the government in considering applications*
> - *an imperative that Migration Agents not set priorities for visa classes or applications. Government would retain the priority of visa processing on the basis of criteria it sets e.g. skills in demand*
> - *in utilising a "gold/star rating" system the government could give priority to those applications received from the highest rating agents. This should involve fewer resources and therefore a higher volume of processed applications in a shorter time period.'*

The submission also suggests that all visa subclasses, other than protection visas, be included and that 'migration agents who obtain and retain "gold" status should be able to market and advertise that they can secure priority processing for clients'.

The MIA is supportive of an idea suggesting introduction of an 'accreditation system to recognise RMAs who demonstrate high levels of competence and experience'.

The submission from the then Department of Employment and Workplace Relations suggests a couple of rating systems that could be used as a reference:

> *'Should priority processing for applications lodged by migration agents be introduced, there may be merit in considering the feasibility of a star rating scheme similar to that used to measure the performance of Job Network Members. The voluntary excellence criteria recently developed for the Australian Quality Training Framework (AQTF) 2007 may also provide a useful reference point.'*

The MRCNW submission suggests in regards to a rating scheme that 'although it could assist individuals in choosing a migration agent, it also has the consequence of seeming to justify higher fees, if no schedule is in place'.

The submission from Mr John Findley strongly opposes the introduction of a rating scheme. He notes that several other professions do not have ratings systems, that such measures would represent excessive consumer protection, and would not be warranted:

> *'The suggestion is both outrageous and naive.*
>
> *The suggestion embodies an assumption that somehow migration clients are a privileged part of the community and that they should have some body deciding who is good bad or indifferent. That is outrageous.*
>
> *…The whole concept of tiers and ratings smacks of elitism, it's an anathema to sole traders doing good work for their clients but without the time or resources to play in the MIA.*
>
> *Plumbers, electricians and motor vehicle repairers are all vital services, delivered only by licensed trades persons, but government would never attempt to develop a rating system for those occupations.*
>
> *…A rating system if introduced must be strictly neutral (in respect of company size, and or volume of transactions) in how it affects the rights and livelihood of any RMA, be that RMA a sole trader or a member or partner of a corporation.'*

The submission from the Australian Computer Society does not support the concept of a rating system as they state:

> *'…in many cases the competencies of individuals within agencies varies considerably and so you would need to rate individuals as well as the agencies themselves.'*

The submission from Ms Juliette Vrakas also opposes the idea claiming it to be 'unfair and unjust'.

The KGA Lawyers-MPE submission suggests that a rating system is not necessary for the migration advice profession due to the nature of the work involved and the danger of creating false expectations:

> *'A competency rating system could be perceived as a form of guarantee or warranty to consumers that the agent will always conduct themselves appropriately, perform their work competently and obtain the desired outcome. This could result in complacency on the part of the agents involved and unrealistically high expectations amongst consumers.*
>
> *…having a "specialist" accreditation scheme for migration agents is unnecessary given that migration practice is already a very specialised field of professional advice work.'*

10.3 Discussion

There was widespread concern expressed in the submissions that providing priority processing privileges to migration agents would be unfair to applicants who choose not to use a migration agent or could not afford to use a migration agent. As the department states there is no requirement for a

visa applicant to use a migration agent for any visa application, any scheme that shows preference to migration agents could be considered to be unfair.

Submissions that supported giving priority processing privileges to particular agents argued that it would speed up processing time for applications, which in turn benefits the client. These submissions also acknowledge the potential benefits to migration agents who could be awarded priority processing privileges.

Submissions indicated that if a priority processing scheme was introduced then migration agents' fees could increase with priority status and clients could feel pressure to use a priority agent due to a perception that their application would have a greater chance of success.

It appears that greater benefits would be achieved by promoting a strategy of decision-ready applications that can be processed expeditiously. Complete applications that are submitted, regardless of whether they are submitted by a client or a migration agent, would naturally be processed quicker than applications missing information. This provides a means of priority processing and such a scheme is overwhelmingly supported by submissions.

Recommendation

That a priority processing scheme be implemented that awards priority to complete, decision-ready applications, regardless of who lodges them.

The Review noted however that as migration agents lodge a significant number of visa applications on behalf of clients, there could be value in further investigation of streamlining ways in which departmental offices receive applications and documents from migration agents and provide services to them. In particular, members of the ERG noted that some offices had 'drop boxes' that enabled agents to deposit applications and other paperwork instead of waiting in lines. The ERG also noted that there would be value in further consideration of strategies such as specific queues for migration agents and times allocated at which agents could more readily discuss cases with decision makers.

Recommendation

That consideration be given to the establishment of a stakeholder committee to identify strategies to further streamline procedures by which departmental offices receive applications and documents from migration agents and provide services to them.

The majority of submissions did not support a rating scheme. Although a few submissions reasoned that such a scheme would reward competence and excellence in service, several submissions reasoned that it would cause an increase in fees without necessarily guaranteeing better service. Such a scheme would also involve administrative overheads that could result in costs being passed on to the migration agents and subsequently applicants. The Review considered that these costs should be avoided.

Recommendation

Pending consideration of more cost effective options to encourage high quality decision-ready applications, that a rating scheme not be implemented.

11 Capacity of the profession to move to self-regulation

11.1 Background

Prior to the 1990s, migration advice in Australia was largely unregulated. In September 1992, migration advice was brought under full government regulation through the Migration Agents Registration Scheme (MARS), which was administered by the department.

After a review of the MARS in 1997, the government decided that the migration advice profession should move towards voluntary self-regulation after a transitional two year period of statutory self-regulation. Following amendments to Part 3 of the *Migration Act 1958*, and subject to a sunset clause, statutory self-regulation commenced on 21 March 1998, with the appointment of the MIA as the MARA to administer the relevant provisions of the Act and to undertake the role of industry regulator. On 1 April 1998, the Regulations came into effect. Amongst other things, the Regulations included a Migration Agents Code of Conduct.

In 2000, subsequent to a second review, the government agreed with the findings that the profession was not ready to move to self-regulation and decided to extend the period of statutory self-regulation for a further three years, until 21 March 2003, stipulating that a further review be conducted prior to that date.

The third review, which reported in 2002, found that while the MIA/MARA had improved its performance, it needed more time to achieve key goals and the profession was not yet ready to move to full self-regulation. The fourth review, this Review, again has been undertaken to determine whether the profession is ready to move to full self-regulation.

Regulatory schemes

Regulatory schemes cover the spectrum from full government control to full self-regulation. A range of resources such as the *Office of Best Practice Regulation's Handbook*[11] explains the main features of regulatory schemes.

Self-regulation

Self-regulation is generally characterised by industry formulating rules and codes of conduct, with industry solely responsible for enforcement. Within schemes that are categorised as self-regulating, a range of approaches may be in place from the existence of a simple code of ethics to codes that are drafted with legislative precision together with sophisticated customer dispute mechanisms.

[11] Office of Best Practice Regulation www.obpr.gov.au/bestpractice.html

The Handbook advises that self-regulation should be considered where:

- there is no strong public interest concern
- the problem is a low risk event of low impact/significance
- the problem can be fixed by the market itself. For example, there is incentive for individuals and groups to develop and comply with self-regulatory arrangements.

Self-regulation is likely to be successful where there is:

- adequate coverage of the industry concerned
- a viable industry association
- a cohesive industry with like minded/motivated participants committed to achieve goals of the profession
- evidence that voluntary participation can work – effective sanction and incentives can be applied, with low scope for the benefits being shared by non-participants
- a cost advantage from tailor made solutions and less formal mechanisms, such as access to quick complaints handling and redress mechanisms.

Statutory self-regulation generally refers to schemes that are underpinned by legislation but administered by the industry concerned.

Quasi-regulation

In these schemes, the government influences businesses to comply, but rules, instruments and standards do not comprise explicit government regulation. Examples include government endorsed industry codes of practice or standards, government issued guidance notes, industry-government agreements and national accreditation schemes.

The Handbook advises that quasi-regulation should be considered where:

- there is public interest in some government involvement in addressing a community concern and the issue is unlikely to be addressed by self-regulation
- there is a need for an urgent interim response to a problem in the short term, while a long term regulatory solution is being developed
- government is not convinced of the need to develop or mandate a code for the whole industry
- there are cost advantages from flexible, less formal mechanisms
- there are advantages in the government engaging in a collaborative approach, with industry having substantial ownership of the scheme. For this to be successful, there needs to be:
    - a specific industry solution rather than regulation of general application
    - a cohesive industry with like-minded participants, motivated to achieve goals

- a viable industry association with the resources necessary to develop and/or enforce the scheme
- effective sanctions or incentives to achieve the required level of compliance, with low scope for benefits being shared by non-participants
- effective external pressure from industry itself (survival factors), or threat of consumer or government action.

- as in the case of self-regulation, proposed approaches should not restrict competition.

Co-regulation

These schemes involve situations where industries develop and administer their own arrangements, but government provides legislative backing to enable the arrangements to be enforced.

Explicit government regulation

This is the most common form of regulation and comprises primary or subordinate legislation. Advantages include certainty and effectiveness because of the availability of legal sanctions. Disadvantages may be that arrangements may be standardised and inflexible, take significant time to make or amend legislation, not be suitable for influencing the quality of complex services, be perceived to be difficult to understand, have higher government budgetary costs and compliance costs, and provide poor access for those without means to pursue their legal rights.

The Handbook advises that explicit government regulation should be considered where:

- the problem is high risk: of high impact/significance
- the community requires the certainty provided by legal sanctions
- universal application is required (or at least where the coverage of an entire industry sector or more than one industry sector is judged as necessary)
- there is a systematic compliance problem with a history of intractable disputes and repeated or flagrant breaches of fair trading principles and no possibility of effective sanctions being applied
- existing industry bodies lack adequate coverage of industry participants, are inadequately resourced or do not have a strong regulatory commitment.

Issues raised in the discussion paper included:

- Is self-regulation a desired outcome for the migration advice profession?
- Has the migration advice profession demonstrated a level of professionalism indicative of an industry ready to self-regulate?
- If the migration advice profession is not yet ready for self-regulation, or if self-regulation is not the desired outcome for the profession, are there alternative regulatory models that might be more appropriate?

11.2 Comments received from submissions

Of the 37 submissions received, 12 explicitly did not support a move to self-regulation, 23 did not offer a direct opinion on the issue and two indicated some support for such a move.

The submission from the Australian Nursing and Midwifery Council did not offer a strong argument for a move to self-regulation, but noted that self-regulation works well for nurses and midwives, as in many other professions, and may well be appropriate for the migration advice profession.

The MIA indicated support for a move to self-regulation although this was qualified by the view that the profession was not yet ready for such a move. In its submission, the MIA noted that full self-regulation is desirable but is a long term objective that should be achieved progressively. It expressed the view that in preparation for a move to self-regulation, it should have control of CPD, entry-level standards and the Code of Conduct. The MIA undertook as a matter of priority to review the Code with the input of stakeholders. The MIA's view was that investigative and sanction powers must remain within the regulatory framework in the short to medium term, given levels of litigation.

Of the 12 submissions that expressly did not support a move to self-regulation, reasons given included: concerns about the integrity and professionalism of some migration agents; the vulnerability of some clients of migration agents and the need for strong measures to protect them from unscrupulous practice; the MIA's role as the industry regulator; entry level standards; costs; and the need for an overhaul of the regulatory framework.

A range of respondents expressed concerns that the integrity and professionalism of migration agents is still an issue for the profession. The Northern Territory Government noted that:

> *'In its role as the Northern Territory's Regional Certifying Body (RCB) and signatory for state specific General Skilled Migration Schemes, the department regularly interacts with Australian registered migration agents...Through this contact it is apparent that there are differing levels of professionalism and standards of service offered by migration agents, ranging from highly competent and professional to significantly less than competent.'*

Further to concerns about the integrity of some migration agents, the ACTU submission noted concerns that migration agents associated with recruitment agencies may be subject to conflicts of interest: operating in the interests of placing migrants in work, and not necessarily in the best interests of migrants and their move to Australia.

The Department of Employment and Workplace Relations noted that any move to self-regulation may not be consistent with the findings of the Joint Standing Committee on Migration (JSCM) and the Council of Australian Governments (COAG). These have identified a need for greater integrity and monitoring of the Temporary Business Long Stay (subclass 457) arrangement.

Respondents noted the vulnerable nature of some clients and the need for appropriate protection. The Ethnic Communities Council of Victoria noted that as some clients such as refugees, asylum seekers and Culturally and Linguistically Diverse (CALD) communities are particularly vulnerable, there is a need for government oversight to ensure high quality services. In addition they note that cultural and language barriers faced by clients may result in under-reporting of complaints against migration agents. Further, the Council expressed concern that a move to a:

> *'...self-regulated industry will swing the balance of power too far to migration agents and lawyers, rather than the consumers of migration advice. Further policies and strategies are required to ensure that people seeking migration advice in Australia are able to readily access affordable and correct migration advice.'*

Respondents such as the OLSC did not support a move to self-regulation noting that the complaints history against migration agents is of particular concern considering the economic, social and legal status of many of those who seek migration advice:

> *'The combination of these factors makes such clients acutely vulnerable to unscrupulous migration agents who may target them as a source of profit for the provision of inadequate migration assistance'.*

The OLSC goes on to note that as migration advice is a complex domain that can have a profound impact on peoples' lives, all practitioners need to be held to the highest ethical and professional standards, and that it does not believe that this is being achieved under the MARA. As an alternative, the OLSC suggests that an 'independent statutory regulator such as that established under the LPA for example, is the preferable regulatory model'.

Further concerns were raised in submissions regarding the MIA's suitability to regulate the industry. The KGA Lawyers-MPE submission observed that 'A self-regulatory scheme for the migration advice industry would only be feasible if the governing body has the respect and confidence of all of its members'.

Other respondents expressed concern that the MIA operating the MARA would not be the appropriate body to administer self-regulation due to perceived or real conflicts of interest. These are discussed in Chapter 4 – Role of the MIA as industry regulator.

The LCA's submission noted that in order to address concerns regarding the perceived independence of the legal profession's regulatory framework, the majority of jurisdictions appointed an independent statutory legal services regulator. These regulators work with the Law Societies and Bar Associations to ensure complaints are appropriately investigated and appropriate action taken. This view was reflected in submissions that noted that other professions that are self-regulating are subject to significant independent controls involving, for example, statutory boards or Ombudsman.

The Department of Industry, Tourism and Resources submission indicated that the tourism and hospitality industry would welcome involvement in any monitoring arrangements.

Entry level standards were discussed as a reason why the profession was not ready for self-regulation. The United National High Commissioner for Refugees noted that a move to self-regulation was not appropriate at this time and that the 'relatively low entry costs compared to other professions, attainment of qualifications and relevant work experience, sets it apart from self-regulating professions such as legal practice, medical practice and accounting'.

The Filipino Women's Working Party expressed concern that self-regulation will result in increases in the costs of migration. Their submission argues that while currently the department provides the MARA with legal advice, in a self-regulatory model, the regulatory body would be solely responsible for funding the provision of advice and litigation. The regulatory body would subsequently need to increase charges on migration agents to cover these costs. Migration agents would subsequently raise the fees they charge clients.

KGA Lawyers-MPE argued in their submission that the profession can not move to self-regulation without a substantial overhaul of the current legislative scheme for regulating the profession. Limitations to the current scheme are outlined and include: conflict of interest and lack of independent controls through a statutory board; complaints handling; need for emergency powers; application of the current scheme to entities apart from natural persons; and better definitions of key terminology.

11.3 Discussion

Submissions indicated widespread opposition to a move to self-regulation. In its purest form, such a move could involve the removal of provisions relating to the regulation of migration agents from the *Migration Act 1958* and Regulations and relying on the industry to formulate and enforce rules and Codes of Conduct. Submissions clearly indicate concerns that the environment is not suitable for self-regulation: there is strong public interest concern; the problem is not low risk/significance; and the market does not appear to be able to fix the problem itself.

Recommendation

That the migration advice profession not move to self-regulation.

Further to the conclusion that the profession is not ready for a move to self-regulation, concerns raised in submissions regarding the current statutory self-regulation arrangement would appear to indicate that it may not be appropriate either. Submissions indicate that there are significant concerns, especially regarding:

- the integrity and professionalism of some migration agents: while some migration agents provide excellent professional services, unfortunately some do not, and the impact that this can have on clients' lives can be catastrophic
- the vulnerable nature of some clients, especially those from culturally and linguistically diverse societies: the more vulnerable the clients, the greater the need for strong and effective regulatory schemes
- the role of the MIA in operating the MARA and claims that this has resulted in a conflict of interest that has compromised the MARA's effectiveness. As outlined in Chapter 4 – Role of the MIA as industry regulator, this is a very significant concern that may be best addressed through the appointment of a new, independent regulatory body.

Given concerns raised by stakeholders in their opposition to a move to self-regulation, including the role of the MIA operating the MARA, it would appear that conditions exist that could make a move away from statutory self-regulation, (where the profession administers the legislation relating to the registering and disciplining of migration agents) appropriate.

Recommendation

That statutory self-regulation be discontinued.

Attachment A – List of organisations and individuals who made submissions to the Review

	Name of individual/organisation
1	Anonymous (Registered Migration Agent)
2	Australian Nursing and Midwifery Council (ANMC)
3	Ms Doris Bertollo (Electorate Officer)
4	Christopher Levingston and Associates Solicitors
5	Mr John Findley (Registered Migration Agent)
6	Australian Computer Society Inc
7	Ms Juliette Vrakas (private citizen)
8	Australian Council for Private Education and Training (ACPET)
9	The Filipino Women's Working Party (including comments from Solicitor Chona Davidson)
10	KGA Lawyers-MPE (Migration specialists)
11	The Migration Institute of Australia (MIA – including comments on behalf of the MARA)
12	Mr Ron Dick, Hallmark Immigration (Registered Migration Agent)
13	Ms Judy Burgess (Registered Migration Agent)
14	Immigration Advice and Rights Centre (IARC)
15	L'Amer-Aussies Multinational Refugees Foundation Inc
16	Tourism and Transport Forum (TTF) Australia Ltd
17	Mr B B Charania (Overseas Migration Agent)
18	Law Institute of Victoria
19	Department of Employment and Workplace Relations (DEWR)
20	Australian Council of Trade Unions (ACTU)
21	United Nations High Commissioner for Refugees (UNHCR)
22	John Hargreaves, MLA (ACT), Minister for Multicultural Affairs
23	Prof John McMillan, Commonwealth and Immigration Ombudsman
24	Department of Labour, New Zealand
25	Australian Nursing Federation

	Name of individual/organisation
26	Migrant Resource Centre North West Region Inc. (MRCNW)
27	Northern Territory Government
28	Ethnic Communities Council of Victoria
29	Mr Andrew Cope, FCG Legal
30	Department of Immigration and Citizenship (DIAC)
31	Mr Mark Tarrant, Principal Lawyer, Mark Tarrant Lawyers
32	Legal Services Commission of South Australia
33	Department of Industry, Tourism and Resources (DITR)
34	Law Council of Australia (LCA)
35	Mr John Hart, CEO, Restaurant and Catering Australia
36	The NSW Office of the Legal Services Commissioner (OLSC)
37	Mr Hamish Gilmore, Chairperson, National Legal Aid

Attachment B – Percentage of visa applications lodged by migration agents (January – March 2008)

Visa subclass	Total applications	Migration agent used	Percentage who used a migration agent
Family			
100 Spouse	254	19	7%
143 Contributory Parent (Migrant)	170	45	26%
309 Spouse (Provisional)	5	0	0%
801 Spouse	5164	1048	20%
802 Child	105	29	28%
804 Aged Parent	243	69	28%
808 Confirmatory (Residence)	5	2	40%
814 Interdependency	122	32	26%
835 Remaining Relative	120	30	25%
836 Carer	69	15	22%
838 Aged Dependent Relative	29	11	38%
864 Contributory Aged Parent (Residence)	141	63	45%
884 Contributory Aged Parent (Temporary)	21	8	38%
Employer sponsored			
119 Regional Sponsored Migration Scheme	280	144	51%
121 Employer Nomination	419	177	42%
124 Distinguished Talent	20	13	65%
457 Business (Long Stay)	27934	15601	56%
496 Skilled – Designated Area Sponsored (Provisional)	4	0	0%
855 Labour Agreement	192	30	16%
856 Employer Nomination Scheme	3618	2047	57%
857 Regional Sponsored Migration Scheme	1003	416	41%
858 Distinguished Talent	32	10	31%

Visa subclass	Total applications	Migration agent used	Percentage who used a migration agent
General skilled			
175 Skilled – Independent	9408	2853	30%
176 Skilled – Sponsored	2758	1244	45%
461 New Zealand Citizen Family Relationship (Temporary)	174	14	8%
475 Skilled – Regional Sponsored	1146	584	51%
476 Skilled – Graduate	69	7	10%
485 Skilled – Graduate	8714	4526	52%
487 Skilled – Regional Sponsored	138	97	70%
495 Skilled Independent Regional (Provisional)	46	13	28%
885 Skilled – Independent	2927	1070	37%
886 Skilled – Sponsored	1584	927	59%
887 Skilled – Regional	606	79	13%
Business skills			
845 Established Business in Australia	36	27	75%
890 Business Owner	46	30	65%
892 State/Territory Sponsored Business Owner	281	208	74%
893 State/Territory Sponsored Business Investor	13	8	62%
Student			
570 Independent ELICOS Sector	7349	269	4%
571 Schools Sector	4807	860	18%
572 Vocational Education and Training Sector	25329	3315	13%
573 Higher Education Sector	57968	2868	5%
574 Masters and Doctorate Sector	2612	18	1%
575 Non-award Foundation/Other Sector	5763	81	1%
576 AusAID or Defence Sponsored	930	5	1%
580 Student Guardian	720	107	15%

Visa subclass	Total applications	Migration agent used	Percentage who used a migration agent
Visitor			
459 Sponsored Business Visitor (Short Stay)	108	37	34%
675 Medical Treatment (Short Stay)	59	7	12%
676 Tourist (Short Stay)	21741	280	1%
679 Sponsored Family Visitor (Short Stay)	5905	675	11%
685 Medical Treatment (Long Stay)	250	20	8%
Temporary/other			
050 Bridging (General)	8898	1113	13%
155 Five Year Resident Return	14525	327	2%
157 Three Month Resident Return	42	6	14%
405 Investor Retirement	31	25	81%
410 Retirement	399	50	13%
416 Special Program	564	98	17%
419 Visiting Academic	116	6	5%
420 Entertainment	4615	169	4%
421 Sport	66	5	8%
422 Medical Practitioner	310	38	12%
428 Religious Worker	292	82	28%
442 Occupational Trainee	579	69	12%
785 Temporary Protection	131	22	17%
866 Protection	978	454	46%

Notes: 1. These figures do not include applications lodged by unregistered offshore migration, travel or education agents.

2. The source of this data is Integrated Client Service Environment (ICSE) and it does not include data from the Immigration Records Information System (IRIS).

3. This data relates only to certain visa applications, and does not include data about sponsorships and nominations. Visa subclasses that have not registered lodgement by a migration agent in the past 12 months are not included.