SUBMISSION BY THE NEW SOUTH WALES OFFICE OF THE LEGAL SERVICES COMMISSIONER TO THE 2007-08 REVIEW OF STATUTORY SELF-REGULATION OF THE MIGRATION ADVICE PROFESSION

This Office

The New South Wales Office of the Legal Services Commissioner (**OLSC**) commenced operation on 1 July 1994. It was established by the *Legal Profession Act 1994* which created an independent Legal Services Commissioner in New South Wales. The OLSC receives complaints of professional misconduct and unsatisfactory professional conduct against Australian legal practitioners in New South Wales. This function was previously performed by the New South Wales Law Society and the New South Wales Bar Association, both of which continue to investigate complaints referred to them by this office.

All complaints regarding the conduct of the legal profession in New South Wales are received at the OLSC. Upon receipt, a determination is made as to whether to refer them to the Law Society or Bar Association for investigation, or to investigate them 'in-house'. The OLSC monitors those complaints that are referred and also has the power to review the determination made by the Law Society or Bar Association. Accordingly, the OLSC holds comprehensive statistics as to what matters are referred, the manner in which investigations are undertaken as well as relevant time frames. As such, it comes as some surprise to note the comments made in 7.4.1 of the Discussion Paper indicating that "...state and territory law societies may not always action complaints about lawyer agents in a timely manner, thus demonstrating the need for..." the additional consumer protection offered by dual regulation.

Insofar as New South Wales is concerned, the OLSC holds no statistics which indicate that this is the case. Such an attack is of further concern upon consideration of the recent finding by the Commonwealth Ombudsman's office that the MARA's finalisation rates are failing to meet performance targets and that its targets and actual performance do not achieve 'best practice' when considered against comparable complaints-handling processes.[1]

Submissions

The OLSC provides the following responses to the various issues for discussion raised in the Discussion Paper.

Chapter 3 - The Regulatory Framework

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?

No comment.

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[1] MARA's Complaint Handling Process', Dr Vivienne Thom, June 2007 at para 2.23-24

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?

No comment.

Should the definition of 'immigration legal assistance' be simplified?

Yes.

At paragraph 3.9.2 of the Discussion Paper it is acknowledged that certain parts of the *Migration Act 1958* (**Migration Act**) are 'cumbersome', with specific reference made to the definition of 'immigration assistance' contained in section 276. Closely related to this is the definition of 'immigration legal assistance' contained in section 277 which is, in the OLSC's view, equally unwieldy. It is also possible that such definitions could have a profound financial impact on legal practitioners. As noted in the Discussion Paper at 7.1.3, there are fewer requirements for legal practitioners in achieving registration as a migration agent. A lawyer agent, for example, is not required to take out additional professional indemnity insurance. This is a matter or concern. It is the OLSC's understanding 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.

It is the OLSC's position that, for the purposes of the investigation of complaints against migration agents, the distinction is an unnecessary source of ambiguity, complexity and confusion for those providing migration advice.

The OLSC takes the position that independent state regulators should assume the role of exclusively regulating all legal practitioners within their jurisdiction as well as regulating all people who provide legal services, such as 'migration legal assistance'. All migration advice is provided in the context of a complex legislative scheme. Amendments to the Migration Act are frequent and the complexity and volume of migration regulations has increased at a considerable rate over the past ten years. As such, the OLSC believes there is a prima facie argument that all advice provided in such a context is capable of being regarded as 'legal' advice, though this will often involve a complex analysis on a case-by-case basis.

Are there any changes that might be made that would strengthen the Code of Conduct?

Yes.

Whilst the OLSC acknowledges and supports the provisions of the Code of Conduct as scheduled to the *Migration Regulation 1998* it maintains that this

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.

This office has specific concerns regarding the 'client account' provisions of the Code of Conduct. Under the *Legal Profession Act 2004 (NSW)* (**LPA**), for example, all legal practitioners are required to maintain trust accounts which are subject to regular inspection. Inspections can also be arranged for specific practitioners or firms where this office or the Law Society of New South Wales has concerns as to practitioner's dealings with monies held in trust.

Whilst registered migration agents are required to maintain 'client accounts' which, in some ways, resemble trust accounts, the reporting and management requirements in relation to these accounts are by no means as rigorous as the regime in relation to trust accounts set in place by the LPA, for example. As much appears to be acknowledged in the Discussion Paper at paragraph 4.6.2.

Whilst complaints about practitioner breaches of trust accounting regulations are taken very seriously by this office, we hold serious concerns as to the level of 'client account' inspections undertaken by the MARA. Law Society Trust Account Inspectors, for example, have the power to examine the trust accounts of practitioners practising in New South Wales. They have indicated to this office, however, that upon attempts to inspect the accounting of some firms of solicitors in relation to migration matters, they have been denied access to these accounts on the basis that they have no authority to inspect accounts in relation to work undertaken by migration agents employed by the firm.

It is our position that whenever a costs agreement is entered into between a client and a legal practitioner, any monies received from the client should be held in the practitioner's trust account. Thus, the trust account would be subject to inspection either upon random selection, or information being provided to the Law Society or this office which indicates that such an inspection is warranted. Whilst the OLSC supports the general premise that migration agents keep client accounts to separate monies received from clients from their general accounts, the apparent lack of inspection of these accounts is a matter of serious concern and may even act as a source of temptation for less scrupulous agents. As such, this office recommends the adoption of the trust accounting regulations into the Code of Conduct as well as the development of a comprehensive inspection regime.

At the very minimum, the OLSC is of the view that any money received by an Australian legal practitioner from a client should be deposited into trust regardless of whether that practitioner intends to provide migration assistance or migration legal assistance.

Are there other legislative changes that could be made to improve the regulatory framework?

No comment.

Chapter 4 – The MARA's Performance as the Industry Regulator

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 would 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?

The OLSC has held concerns regarding the efficacy of the MARA's complaints handling systems for some time. Whilst it acknowledges certain advances that have been made by the Migration Agent's Registration Authority (**MARA**) since the 2001-02 review (as detailed at paragraph 4.2 of the Discussion Paper) the OLSC has concerns about the relative success and appropriateness of the MARA in dealing with complaints about migration agents. This is so specifically with regard to delays in complaint handling, effectiveness in decision making, as well as an apparent reluctance to communicate with this office regarding complaints made against migration agents who also hold legal practising certificates. In this regard, the OLSC notes recommendations made in the Commonwealth Ombudsman's report and which observed that:

> In our view, MARA has demonstrated a willingness to develop a more client focused and accountable culture. However, there is much that can still be done to ensure that MARA continues to look at ways to ensure those most vulnerable are protected; are aware of the complaint-handling system and have appropriate access to it; and both complainants and agents can have confidence in the outcomes achieved.[2]

The report, released in June this year, identified a range of areas in which the MARA's complaint handling processes need to be improved; these included concerns regarding accessibility, awareness, fairness, impartiality, transparency and unreasonable delays. Given the existence of such external pressure to improve processes, it is of particular concern that a number of recommendations from the 2002 review of the migration advice profession have not been implemented.[3]

The OLSC supports the MARA's undertaking to improve its processes in accordance with the recommendations made by the Commonwealth Ombudsman and looks forward to seeing evidence of substantive changes in its complaints handling processes in the future.

Are the MARA's complaint handling processes effective? If not, how might consumer complaints be better addressed?

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[2] *MARA's Complaint Handling Process*, Dr Vivienne Thom, June 2007 at p.1.
[3] Being recommendations 6, 7 and 14(c) at Annexure A to the Discussion Paper

As the Commonwealth Ombudsman's report was only released in June 2007, the effectiveness of the MARA's complaints handling processes as augmented by the undertakings given to the Commonwealth Ombudsman, remain to be seen.

Should consideration be given to setting a schedule of fees that may be charged by registered migration agents?

Yes.

How else might consumers be protected to prevent complaints regarding registered migration agents?

No comment.

How might litigation be undertaken and funded by the MARA if the profession moves to full self-regulation, or if it is decided otherwise that the profession, and not DIAC should meet these costs?

The OLSC notes that it is common practice for a regulator to meet the costs of funding any litigation it choses to undertake. The MARA may wish to consider making an application for funding from the Federal equivalent of the New South Wales Public Purpose Fund, or equivalent funds, for the purposes of conducting prosecutions for regulatory breaches. Payments are made into the Public Purpose fund from the interest generated on solicitors' trust accounts. The MARA may wish to consider establishing a similar such fund and assess the viability of funding with the interest generated by migration agents' client accounts.

How might the level of litigation be reduced?

Levels of litigation may be reduced through a rigorous regulatory and disciplinary regime as well as the continuation of an effective professional development programme.

How might legislation be strengthened to further discourage registered migration agents from committing offences?

The previous response is repeated.

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 otherwise be protected?

Yes.

It is uncontroversial that consumer protection must be a key objective of any scheme regulating the conduct of migration agents. As such, the OLSC recommends the adoption of a fidelity fund, funded by the profession, with the

purpose of compensating members of the community who suffer loss attributable to a dishonest failure to account or dishonest default by a migration agent.

The MARA may wish to assess levels of funding which may be obtained by charging an on-going registration fee to all migration agents.

Is there a need for the MARA to have 'emergency' sanctioning powers?

Yes.

The MARA Board has expressed concerns that it "...lacks the power to act swiftly in circumstances they see as warranting such action."[4] Under the LPA, the OLSC can so act in such circumstances to immediately suspend the practising certificate of a legal practitioner where it is in the public interest to do so. We recommend that the MARA explore the relevant avenues to avail itself of such statutory powers.

Chapter 5 – Continuing Professional Development

Are there ways in which the regulation of the CPD scheme and its provision could be improved?

No comment.

Are there issues associated with the MIA being both regulator and the main provider of CPD activities? If so, how might these issues be addressed?

No comment.

To what extent do CPD activities contribute to improved professionalism of registered migration agents?

No comment.

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?

Yes. All migration agents should be able to demonstrate that they hold the requisite knowledge so as to attain the Graduate Certificate. The OLSC recommends a time frame of five years.

Chapter 6 – MIA Operating as the MARA

Is there a real or perceived conflict of interest from the MIA acting as the MARA?

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[4] Discussion Paper at 4.7.1

Yes.

The OLSC holds real concerns that the Migration Institute of Australia Limited (**MIA**), an industry body, is acting as the MARA and performing the function of regulating the migration advice profession in the absence of an independent regulatory body.

As at 30 June 2007 almost half of all registered migration agents were members of the MIA[5]. How such an organisation can then purport to perform the functions of the MARA in such a way as to maintain public confidence in the regulatory scheme and uphold the basic principle that justice, as well as being done, must be seen to be done, is a matter of some concern. By way of analogy, it is useful to examine the circumstances which gave rise to the creation of this office.

In 1993 the New South Wales Law Reform Commission released a report examining arrangements for the investigation of complaints against lawyers.[6] Prior to the creation of this office, complaints made against legal practitioners in New South Wales were handled by the Law Society, whose membership comprised of legal practitioners in the same way that the MIA's membership is comprised of migration agents. Central to its recommendation that an independent statutory office be created to oversee the investigation of complaints against lawyers was a finding that there was a lack of public confidence in the scheme which existed and a general perception that the legal profession were 'looking after their own'.[7] It is difficult to see how similar criticisms could not be levelled against the MIA and the MARA in the current regulatory environment.

The perception of a conflict of interest in "...the major professional organisation for registered migration agents also being the statutory regulator..." is acknowledged in the Discussion Paper.[8] Whilst the OLSC acknowledges the various administrative arrangements that have been put into place to separate functions between the MARA staff and the MARA board[9], 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, nor does it accept that the appeals process to the Administrative Appeals Tribunal sufficiently allays these concerns as such appeals are limited to the refusal to register a particular applicant and has no function in providing independent scrutiny of the MARA's complaints handling processes.

The OLSC also wishes to express its concern that all members of the external reference group are former or current registered migration agents. Whilst it does not suggest that any member of this group will perform their function in

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[5] Discussion Paper at 2.5.2
[6] *Report 70 (1993) - Scrutiny of the Legal Profession: Complaints Against Lawyers*, New South Wales Law Reform Commission, February 1993.
[7] Note 5, 'Executive Summary' at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/R70EXEC
[8] At 6.2.1-2
[9] Discussion Paper at 6.2.2

any other than an ethical and professional way, there is a clear possibility that this could have a detrimental effect on the public perception of the impartiality of this review.

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?

Yes.

What other models could be used in regulating the migration advice profession?

The OLSC is of the view that independent state and territory legal regulators should assume the role of regulation of the migration advice profession to the extent that it undertakes work of a legal nature.

The OLSC also has concerns regarding the cumbersome administrative arrangements concerning the investigation of registered migration agents and those who have not achieved registration. As noted, the MARA deals with investigation of complaints against the former. The investigation of complaints against the latter, however, are referred to the Department of Immigration and Citizenship (**DIAC**). The OLSC sees this as an unnecessary disconnect which could have a detrimental effect on the ease of public access to avenues of redress in circumstances where they held a belief that they were being assisted by a registered migration agent when, in fact, they were not. Under the LPA, the OLSC and the Law Society have the power to investigate the conduct of legal practitioners, as well as those holding themselves out to be in circumstances where they do not hold a practising certificate. Such an arrangement could apply to 'migration agents', registered or not. The provisions of the LPA are also engaged in circumstances where a non-lawyer agent holds themselves out as a lawyer whether or not the agent is registered.

Chapter 7 – Dual Regulation of Lawyer Agents

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 placed on lawyer agents by the MARA that could be changed or removed?

No.

The OLSC is of the view that dual regulation of lawyer agents is unnecessary in light of the broad and detailed legislative regimes administered by independent state legal regimes which already exist. This office believes these state regimes offer greater protection to consumers and establish more exacting standards of professionalism and ethical behaviour such as can be seen in the detailed trust accounting regulations discussed above.

Presented with a choice between two different schemes, it is clear that that requiring adherence to the higher standards of professionalism and ethical

behaviour is to be preferred. Accordingly, we believe that the various state schemes relating to the independent regulation of the legal profession should be engaged to oversee the conduct of all lawyer agents.

In this respect the OLSC notes the submissions made by the Law Council of Australia on the *Regulation of Migration Lawyers, 3 November 2006*[10] as detailed in the Discussion Paper at 7.3.1.

The fact that, since 1998, a proportion of the MARA's sanctions have been against lawyer agents (18%)[11] is no argument for the dual regulation of lawyers (particularly considering that lawyer agents account for approximately one-third of all registered migration agents) but has been presented by the MARA as such.[12] What this figure indicates is the need for increased involvement of independent state legal regulators in the discipline of such practitioners.

Chapter 8 – Priority Processing for Migration Agents

The OLSC has no comment in relation to the issues for discussion raised in this chapter.

Chapter 9 – Self-Regulation and the Migration Advice Profession

Is self-regulation a desired outcome for the migration advice profession?

No.

Has the migration advice profession demonstrated a level of professionalism indicative of an industry ready to self regulate?

The OLSC acknowledges certain advances that have been made, as noted above, but maintains that it still too early to determine whether the migration advice industry is ready for the move to full self-regulation.

As acknowledged in the Discussion Paper, this is not "...a particularly mature industry and although significant improvements have been made in recent years, concerns continue to be raised that 'rogue traders' still operate." The OLSC supports this observation. An examination of the complaints history against migration agents certainly indicates that his may be the case. This becomes a matter of particular concern upon a consideration of the economic, social and legal status of many of those who seek migration advice.

The very nature of migration work means that a high proportion of clients are from non-English speaking backgrounds. A significant number may also have a poor level of education, often coupled with a history of trauma. Some may be overseas and have no face-to-face contact with their agent; some may be in immigration detention.

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[10] Discussion Paper at 7.3.1
[11] Discussion Paper at 7.4.1
[12] See note 11

Unsurprisingly, many individuals who seek the assistance of a registered migration agent are likely to have little knowledge as to their legal rights in Australia, be extremely anxious as to the outcome of their matter and to suffer from communication difficulties. The combination of these factors make such clients acutely vulnerable to unscrupulous migration agents who may target them as a source of profit for the provision of inadequate migration assistance (legal or otherwise) if, indeed, any effective assistance is provided at all.

There is no doubt, then, that professionals coming into contact with such a potentially vulnerable part of the community must be held to the highest ethical and professional standards. Whilst the OLSC acknowledges the migrations agents' Code of Conduct, as scheduled to the Migration Regulation 1998, and supports the provisions it contains, we remain concerned that the Code of Conduct does not go far enough in the protection offered to (often vulnerable) consumers of migration advice, as noted in relation to Chapter 3 above.

Migration advice is a complex, fraught and highly emotionally charged domain and can have a profound impact on peoples' lives. Accordingly, it is the OLSC's position that all practitioners in this field be held to the highest ethical and professional standards possible. We do not believe that this is being achieved under the current scheme as administered by the MARA.

If the migration advice profession is not yet ready for self-regulation, or self-regulation is not the desired outcome for the profession, are there alternative regulatory models that might be more appropriate?

The OLSC believes that independent statutory regulation such as that established under the LPA, for example, is the preferable regulatory model in this regard.

Conclusion

The OLSC believes that, should steps not be taken to align the regulation of the migration industry more closely with the independent regulation of the state legal professions, the current model should be maintained, subject to the strengthening of the Code of Conduct and the MARA demonstrating that substantial progress has been made towards meeting the various undertakings it gave to the Commonwealth Ombudsman in relation to its complaints handling processes.

Steve Mark
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