ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS — BUSINESS AND CONSUMER SERVICES

Productivity Commission

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Introduction

1. The Law Council of Australia is the peak representative body for the legal profession in Australia. The Law Council speaks for the profession on a range of national and international issues, including regulation of the profession. A profile of the Law Council is included at **Attachment A**.

2. The legal profession is the most heavily regulated profession in the country and Australian lawyers are amongst the most comprehensively regulated in the world. Accordingly, initiatives to reduce the regulatory burden on lawyers should form an essential aspect of any review of regulatory burdens on business. As businesses increasingly transcend state/territory and national boundaries, the need for a strong, effective and independent national legal profession has become increasingly important.

3. The growth of national legal services markets has seen efforts in the last 10-15 years to harmonise legal profession regulation. Whilst the harmonisation process has yielded mixed results, in terms of the regulatory burden for lawyers, in many jurisdictions regulatory complexity has increased substantially, as well as the cost of compliance.

4. In early 2009, the Federal Government announced that the Council of Australian Governments (COAG) would steer a new harmonisation process for legal services regulation, with the objective of achieving national uniformity. The Law Council is presently closely involved in the process of developing a new model Legal Profession Bill, together with its constituent bodies and other stakeholders.

5. While this process is underway, it is inappropriate for the Law Council to discuss any concerns with respect to the consultation and reform process. It is also impossible at this time to comment on the ultimate form of the regulation or burden that will be created, as no legislation has yet been introduced or released for comment (a draft Bill is expected to be released in May 2010).

6. Besides legal profession regulatory reform, which the Law Council cannot address in this context of this Productivity Commission's review, a key concern for the Law Council is "dual-regulation". Whilst all lawyers are subject to legal profession regulation under state/territory laws, a small proportion of lawyers practising in the area of immigration law are subject to an additional and unnecessary regulatory scheme imposed on migration agents under the *Migration Act 1958* (Cth).

7. The Law Council raises this issue as indicative of a broader public policy concern with respect to overlapping and conflicting regulation, often perpetuated by a blurring of State and Federal responsibilities. Whilst pragmatism often wins, for example in the context of tax agents' regulation and conveyancing, insistence on dual regulation in the context of immigration practice is an issue that continues to frustrate practitioners in this area.

8. This submission therefore outlines the Law Council's concerns with respect to dual regulation of lawyers who are migration agents and highlights the damaging impact of dual regulation generally.

9. Please note that these comments have been read and endorsed by the Law Institute of Victoria, which maintains a strong network of immigration lawyers in that jurisdiction.

Dual regulation of immigration lawyers

Background to migration agents' regulation

10. In 1992, in response to a growing number of unregulated migration agents in Australia and an increasingly complex administrative and legal environment in this area, the Federal Government implemented a Migration Agents Registration Scheme (the MARS).

11. The MARS was originally administered by the Department of Immigration, until a review in 1997 recommended that the Scheme be devolved into a system of statutory self-regulation, administered by the Migration Institute of Australia (the MIA). The MIA established the Migration Agents Registration Authority (the MARA), which was funded by the Commonwealth on under a Deed of Arrangement (reviewed periodically) to administer the registration scheme and to handle complaints and disciplinary matters in respect of migration agents.

12. The MARA was subject to extensive criticism on the basis that the MIA and MARA were effectively non-distinguishable, complaints-handling procedures were non-transparent and the scheme was damaging to the public perception of the migration assistance industry.

13. Eventually, in response to those concerns (and after considering the potentially disastrous prospect of introducing full industry self-regulation), the Department of Immigration and Citizenship (DIAC) recommended in the 2007/08 Review of Statutory Self-Regulation of the Migration Advice Industry (the 2007/08 Review) that the Federal Government should end statutory self-regulation and replace the scheme with a statutory, independent regulator.

14. The Minister for Immigration and Citizenship responded in January 2009, announcing that the Federal Government would unilaterally terminate the Deed of Arrangement and devolve regulation of migration agents to a discrete office within DIAC. Subsequently, DIAC established the Office of the Migration Agents Registration Authority (OMARA) as a new section of the Department, which assumed regulatory responsibility from 1 July 2009.

Background to dual regulation of migration lawyers

15. When the MARS was established in 1992, the decision was taken by the government not to exclude practising lawyers from the scheme. To this day, Australia is the only country which requires migration lawyers to be regulated as migration agents in order to practice in this area.

16. Following the establishment of the MARS in 1992, the Law Council and other interested parties challenged the constitutional validity of the MARS insofar as it regulates legal professionals.[1] The High Court found by majority of 5:2 that regulation of lawyers within the migration agents registration scheme was within the Commonwealth's constitutional legislative power.

17. The inclusion of lawyers in the scheme has had a number of direct consequences:

[1] See *Cunliffe v the Commonwealth* (1994) 124 ALR 120

(a) Lawyers have been required to compete with non-lawyers to provide professional services in an increasingly complex legal and administrative environment. This has occurred in circumstance where lawyers are disadvantaged, because:

(i) immigration lawyers must satisfy two different regulatory schemes, while non-lawyer migration agents must satisfy only one;

(ii) immigration lawyers are subject to the burden of both practising certificate fees and migration agent registration fees;

(iii) immigration lawyers may be subject to two separate complaints handling processes in relation to the same conduct;

(iv) lawyers are required to complete 5 years of tertiary legal training followed by 6-12 months of post-graduate practical legal training (including training in professional ethics and accounts management) and a period of supervised practice under a legal practitioner with an unrestricted practising certificate;

(v) by comparison, agents have only recently been required to complete a 12-month postgraduate course in migration practice, with no other requirements other than English language proficiency – requirements that do not apply to agents registered pre-2006.

(b) The scheme has enabled non-lawyers, with no legal qualifications, to effectively pass themselves off as trained to give legal advice. This is because the scheme expressly permits non-lawyer agents to appear before tribunals and courts on behalf of their clients in review applications, but prohibits lawyers who are not registered migration agents from giving basic administrative assistance (such as advice and assistance in filling out visa application forms). The *Migration Act 1958* also fails to prohibit misleading advertising by non-lawyer migration agents in contravention of state/territory legal profession laws, nor any requirement for migration agents to disclose that they are not legally trained,

(c) Dual-regulation therefore places consumers at greater risk while unnecessarily increasing the regulatory burden for immigration lawyers. Consumers of such services are, by-and-large, particularly vulnerable and may have limited English language skills, may have little or no knowledge of their legal circumstances and may be under significant financial or emotional pressure. The lack of any information about agents' qualifications and the potential for clients to be misled about their migration agent's qualifications generates significant potential for exploitation.

18. It is also noted that there have been substantial changes in the regulation of legal professionals in Australia since the migration agents registration scheme was introduced. The "national legal profession project", which commenced in the late 1990's, resulted in generally consistent regulatory standards for lawyers across all jurisdictions by around 2006. However in 2008, the Federal Government announced that uniform legal profession regulation would form a key component of COAG's microeconomic reform agenda. It is expected that a uniform Legal Profession Bill, with a single national legal services complaints mechanism, will be presented for uniform introduction across all jurisdictions within the next 12 months.

Basis for dual regulation?

19. The Law Council considers that dual regulation can rarely, if ever, be justified. Where regulation is applied in any circumstance there should be reasonable and rational grounds for the regulation, and the regulatory response should be proportionate and appropriate to the risks identified.

Consumer protection

20. It is noted that dual regulation of immigration lawyers sends the message that the there are particularly strong risks for consumers seeking assistance from legal professionals in this area. As migration lawyers are subject to two layers of regulation and non-lawyer migration agents are subject to only one level of regulation (as well as being authorised to engage in activities and practices which non-lawyers are otherwise prohibited from engaging in), one would expect some logical basis to exist for dual regulation, e.g. evidence of more serious risks posed by immigration lawyers.

21. In fact, the Law Council is not aware of any reasonable basis for dual regulation of migration lawyers. According to data referred to by DIAC in its discussion paper for the 2007/08 Review, around 18% of all sanction decisions against migration agents since 1998 related to activities of migration agents who held a legal practising certificate. Given lawyers comprise around 29% of all migration agents in Australia it would seem that lawyers are in fact less likely to breach immigration regulations than non-lawyers.

Clarity for consumers

22. In its Final Report into the 2007/08 Review, DIAC once again recommended to the Minister that lawyers continue to be regulated under the scheme. The basis for that recommendation was that "the inclusion of lawyers provided clarity to consumers".[2]

23. The Law Council strongly disagrees with this statement. Under dual regulation, consumers are prone to be confused about a number of matters, including:

    (a) Whether their agent is legally qualified and competent to give legal advice and assistance in immigration and related matters. This is because there is no differentiation between lawyers and non-lawyer agents in publications or information produced by the OMARA or DIAC. In addition, the regulatory scheme permits non-lawyers to hold themselves out as competent to give legal advice, through the use of misleading business names and titles, and to appear in tribunals and courts – despite prohibitions against non-lawyers appearing in court on behalf of clients in any other area of the law;

    (b) Whether to complain about their agent's conduct to the OMARA or the legal services commissioner (the answer to which depends on whether the conduct is interpreted as falling within the definition of "immigration assistance" or "immigration legal assistance" under ss 276 and 277 of the *Migration Act 1958*);

[2] DIAC, *Report into the 2007/08 Review of Statutory Self-Regulation in the Migration Advice Industry*, May 2008, Commonwealth of Australia, page 76.

(c) Whether their communications with their adviser are confidential and subject to client legal privilege (which they are entitled to expect when seeking legal advice or assistance);

(d) Whether they are covered by the law societies' fidelity fund. For example, in NSW, the Law Society of NSW adopts the view that clients are not covered by the fidelity fund for conduct falling within the definition of "immigration assistance", whereas all other jurisdictions do not adopt this approach. This is because of recent decisions of the NSW Administrative Decisions Tribunal and NSW Supreme Court, which distinguishes conduct falling within the definition of "immigration assistance" from the definition of "legal assistance" for the purposes of determining whether a claim against the fidelity fund exists. This is despite that conduct, such as filling in forms and preparing review applications, are common to every other area of administrative legal practice and would be covered by the fidelity fund in all areas except "immigration assistance"; and

(e) Whether they are covered by their lawyer's professional indemnity insurance policy. For example, the NSW Office of the Legal Services Commissioner stated in a submission to the 2007/08 review 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.'*[3]

24. The Law Council notes the above consequences of dual regulation have serious consumer protection implications. Clients who thought their communications were protected by client legal privilege may subsequently discover that no confidentiality was attached to information or advice given or received during consultations with their agent, who they assumed was their lawyer. In addition, clients of legal professionals in NSW are directly impacted in relation to any claim they might otherwise have had on the fidelity fund or their lawyer's professional indemnity insurance policy (this is discussed in further detail below).

25. By contrast, if immigration lawyers were regulated in the same manner as all other legal professionals, there would be no confusion. Complaints against lawyers would be directed to the Legal Services Commissioners, whilst complaints against agents would be dealt with by the OMARA. Consumers could direct their complaints according to whether they had retained the services of an agent or a lawyer (a relatively simple distinction), rather than on the basis of whether their agent or lawyer was providing "immigration assistance" or "immigration legal assistance" within the meaning of s 267 and 277 of the *Migration Act 1958*.

26. It is further noted that the COAG reform process will create a uniform national regulatory scheme for legal professionals within 12 months, with a single body to receive and monitor complaints handling, which should assuage DIAC's concerns about different legal services regulators in each jurisdiction.

Consistent standards

27. It is further noted that DIAC has in the past expressed a preference for 'consistent standards' across the migration advice industry.

[3] Ibid, page 56.

28. Unfortunately, unless immigration lawyers allow their practising certificate to lapse and remove themselves from the Roll of Legal Practitioners, such that they are no longer subject to the legal profession laws or conduct rules or the supervision of the Court, legal professionals will always be subject to different standards of regulation and professional conduct to agents.

29. However, dual regulation of immigration lawyers has the frustrating effect of applying different standards among legal practitioners. Whereas all other legal practitioners are subject to a standard set of legal profession laws and rules of conduct (which will shortly be uniform across the country), immigration lawyers who are required to register as migration agents are subject to two separate standards arising under State/Territory and Federal regulation.

International comparison

30. Australia is the only country which includes lawyers in its migration agents' regulatory scheme. Other countries either prohibit such work by non-lawyers or exclude lawyers from the regulatory framework on the basis that they are already sufficiently regulated (see Annexure B in **Attachment B** for a summary of the approaches taken in other jurisdictions, including the United Kingdom, Unite States, Canada, New Zealand and South Africa). Most recently, the Parliament of New Zealand enacted the *Immigration Advisers Licensing Bill 2007* (NZ), which excluded lawyers from their immigration advisers regulatory scheme on the same basis as all other countries (except Australia) – that lawyers are already subject to sufficient and appropriate regulation and dual regulation is oppressive and unnecessary.

31. In a submission to the 2007/08 review, the NZ Ministry of Labour explained the decision to exclude lawyers from the migration advisers regulatory framework, was made on the basis that

    (a) the legal profession regulatory scheme would provide appropriate protection for clients using lawyers;

    (b) that inclusion in the scheme would involve unnecessary compliance costs; and

    (c) that including lawyers would cause confusion and dissatisfaction amongst consumers arising from having two avenues of complaint.[4]

Other adverse consequences of dual regulation

32. Besides the fact that dual-regulation diminishes consumer protection; promotes inconsistent standards of regulation within the legal profession; and is at odds with the consensus of the international community, there are a number of other specific consequences of dual regulation, including:

    (a) Facilitation and tolerance of misleading and deceptive conduct by agents;

    (b) Disqualification of clients from the protection of the Law Societies' fidelity fund and professional indemnity insurance coverage; and

[4] As noted in DIAC's *Report into the 2007/08 Review of Statutory Self-Regulation in the Migration Advice Industry*, May 2008, Commonwealth of Australia, page 74.

(c) 'double jeopardy' and regulatory mishaps resulting from two regulators investigating or addressing the same conduct.

Who addresses misleading and deceptive conduct?

33. As noted above, dual-regulation effectively enables some agents to hold themselves out as competent to provide legal advice. Such conduct contravenes state/territory *Legal Profession Acts* and would ordinarily be investigated and prosecuted by the state/territory legal services regulators. This includes, for example, the sorts of business titles and advertisements which lead consumers to believe the agent is a 'migration law specialist' or 'immigration specialist' (where "specialist" is an accreditation given to legal professionals who attain the highest level of specialisation in their field of practice – for which there is no equivalent accreditation for non-lawyers).

34. However, despite the difficulty legal regulators face in addressing this conduct, given the OMARA does not observe a general practice of referring complaints to legal services regulators, the Law Council considers there is a reasonable expectation that the OMARA will take steps to address the unethical conduct of agents who misrepresent themselves in this way. Unfortunately, when the Law Council has raised these matters with the MARA and DIAC in the past, the response has been that it is the legal services regulators who must address the conduct, regardless of the fact that the problem is facilitated by Commonwealth regulation and is exacerbated by the lack of any information for consumers on the migration agents register, or otherwise produced by DIAC or the OMARA, about whether an agent holds a legal practising certificate.

35. There is also doubt over whether the legal services regulators can actually address conduct which may be impliedly authorised by the *Migration Act 1958*. For more detailed discussion on this point, please refer to paragraphs 118-124 of **Attachment B.**

Diminished protection for clients

Access to fidelity fund

36. Under all State and Territory *Legal Profession Acts*, legal professionals are required to contribute to a fidelity fund by way of a compulsory levy included in the practising certificate fee. Legal professionals are also required to hold a very high level of professional indemnity insurance (PII) cover, of up to $2 million (compared with only $250,000 for migration agents). These are things which benefit clients in the following ways:

    (a) In the event of a defalcation of trust monies by the lawyer, a client is entitled to indemnity from the fidelity fund, while the Law Society will pursue the practitioner for reimbursement along with any other sanctions for misconduct.

    (b) In the event of a finding of negligence against a law practice in the provision of legal advice or assistance, any subsequent award of damages to the client will be paid by the law practice's PII insurer.

37. As noted above, following findings by the NSW Administrative Decisions Tribunal[5] and NSW Supreme Court, "immigration assistance" as defined in the *Migration Act 1958* has been interpreted as falling outside the definition of legal assistance. Therefore clients of immigration lawyers in NSW are not covered by the fidelity fund in many circumstances.

38. Law Societies in other jurisdictions continue to regard a lawyer's activities falling within the definition of "immigration assistance" as covered under their fidelity fund. This serves to highlight the confusion which has resulted from dual regulation.

39. In addition, it is considered that "immigration assistance" may fall outside activities covered by most PII policies offered to legal professionals[6]; while non-lawyer agents' PII cover may not extend to any court related work which is nonetheless authorised by s 267 of the *Migration Act 1958*.[7]

40. As a further consequence of this, the Law Council is advised NSW barristers are required to obtain separate insurance cover if they choose to register as a migration agent, creating a major disincentive for NSW barristers to accept briefs in immigration matters. As noted in the Law Council's earlier submissions to DIAC, there are extremely few barristers or solicitors who practice migration law without registering, due to the additional cost and tedium involved with continually having to interface with registered agents. The result is a strain on the workloads of barristers who work in this area and a corresponding drain on the capacity of non-profit migration and refugee resource centres to find suitable representation or assistance in court proceedings.

Double jeopardy and regulatory gaps

41. The Law Council submits that, as a result of applying two regulatory schemes, immigration lawyers can be subject to "double jeopardy" or may altogether avoid disciplinary action necessary to preserve the integrity of the legal profession due to blurred lines of regulatory responsibility.

42. "Double jeopardy" refers to the legal principle that protects a person from trial or punishment twice for the same offence, on the same facts and evidence. "Double jeopardy" is used in this context to refer to the potential for investigation and disciplining of an immigration lawyer, concurrently or consecutively, by two regulatory authorities for the same conduct.

43. Immigration lawyers are subject to two codes of conduct, being the Legal Profession Conduct Rules in each jurisdiction[8] and the Migration Agents Code of Conduct.[9] Accordingly, immigration lawyers may be subject to two separate investigations into the same conduct, two separate disciplinary proceedings and two punishments. For example, if a client complains to the Law Society or Legal Services Commissioner about certain conduct by an immigration lawyer, which is duly investigated and dealt with under legal profession regulation, the client may also lodge a complaint with the OMARA (or the OMARA may acquire knowledge

[5] *Portale v Law Society of NSW (No.1) (LSD)* [2003] NSWADTAP 56
[6] As noted by the NSW Office of the Legal Services Commissioner in Ibid, page 56
[7] Ibid, page 56, per a submission by KGA Lawyers-MPE.
[8] See for example the Law Society of NSW *Professional Conduct and Practice Rules 1995* at http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ruleslegislation/SolicitorsRules/index.htm; or the Law Institute of Victoria *Professional Conduct and Practice Rules 2005* at http://www.liv.asn.au/PDF/Practicing/Professional-Standards/Acts/2005ConductRules.aspx
[9] See https://www.mara.gov.au/default.aspx?ArticleID=630

of the investigation in some other way), prompting a secondary OMARA investigation into the same conduct.

44. Alternatively, an immigration lawyer may engage in conduct which affects his or her professional standing and fitness to hold a practising certificate, but which was committed in circumstances where the lawyer was deemed to have been providing so-called "immigration assistance". On this basis the OMARA might commence an investigation into the conduct and de-register the agent or apply some other penalty. However because the legal services regulator has not been advised, the immigration lawyer is able to continue operating a law practice until such time as the matter is brought to the legal services regulator's attention. At this point in order to discharge its statutory functions, the legal services regulator will investigate the conduct and take appropriate action, notwithstanding the fact that disciplinary action has already been taken, because the previous sanction has had no impact on the lawyer's right to practice law – thereby prosecuting the same conduct twice.

45. Further, to the extent that some differences exist in the regulatory environment for the legal profession or migration agents, immigration lawyers have the capacity to argue that their conduct fell under whichever scheme is likely to be more favourable in the circumstances. The lawyer might argue that they were providing "immigration assistance" rather than "immigration legal assistance" because the OMARA will investigate the conduct and may not refer the matter to the legal services regulator if it is deemed to relate to "immigration assistance".

46. In such circumstances, the most serious consequence of the OMARA's disciplinary action might be de-registration as a migration agent. However, the loss of a legal practicing certificate has significantly greater professional consequences for a lawyer than de-registration as a migration agent. This is because a lawyer who is only deregistered as a migration agent can continue to practice law in other fields (or even continue to carry on a limited immigration law practice). However a lawyer-agent who has his/her legal practising certificate cancelled will be unable to practice either as a lawyer or an agent because registration as a migration agent is contingent upon either holding a legal practising certificate or satisfying other requirements.[10]

47. This highlights a fundamental problem with dual regulation: those subject to two schemes of regulation covering the same conduct can be investigated and punished twice for the same 'offence', or might avoid professional consequences altogether.

48. If immigration lawyers were removed from dual regulation, the complaints and investigation procedures would be simple and straight-forward. Complaints against legal professionals would be referred to the legal services regulator, whilst complaints against agents would be referred to the OMARA. Both lawyers and agents would be subject to a single set of professional conduct rules appropriate to their profession. Importantly, any conduct egregious enough to result in suspension or revocation of the lawyer's practising certificate would also disqualify the lawyer from operating as a migration agent. Similarly, double

[10] In order to become (or remain) registered as an agent, persons who do not hold a current legal practising certificate must, in the 12 months prior to registration, have completed a Graduate Diploma In Migration Practice and passed the relevant common assessment items for the course: see https://www.mara.gov.au/Becoming-an-Agent/Registration-Requirements/Knowledge-Requirements/Knowledge-Requirements/default.aspx

jeopardy would not arise because the OMARA would relinquish jurisdiction over investigation of lawyers, precluding a second investigation into the same conduct.

Other comments

Excessive regulation

49. The Law Council supports a number of the recommendations of the Regulation Taskforce report, *Rethinking Regulation* (January 2006). In particular, the Law Council notes the leading observations on page (ii) of that report, that:

> *In responding to [the pressure of eliminating risks], governments themselves are often attracted to regulatory solutions both as a tangible demonstration of government concern and because the costs are typically 'off-budget', diffuse and hard to measure. Moreover, each regulatory solution tends to be devised within individual government agencies. Within such policy 'silos', the cumulative impact of regulation across government is poorly understood and rarely taken into account.*[11]

50. This statement can be readily applied to describe the manner in which dual regulation of immigration lawyers has been allowed to persist. In 1992 a decision was taken by the government of the day to include legal professionals within the migration agents' regulatory scheme, with little regard to the broader regulatory environment lawyers already operated within. Subsequent changes to legal profession regulation over time have harmonised many aspects of state/territory legal profession regulation. It is expected that within 12 months the ultimate objective of achieving a truly 'national' legal profession will be ultimately achieved, with uniform regulation across all jurisdictions and a central complaints handling agency.

51. If allowed to continue, dual regulation will continue to disrupt this national regulatory framework and set immigration lawyers apart (despite that the risk to their clients and to the broader community is no different to any other lawyer).

52. Whilst dual regulation of immigration lawyers is not the subject of any recommendation by the Regulation Taskforce, it clearly falls within the broad categories identified by the Regulation Taskforce as "priority reforms to existing regulation",[12] being:

- *Overlapping and inconsistent regulatory requirements* – dual regulation arises from an attempt by the Commonwealth Government to regulate legal professionals who are already subject to comprehensive State/Territory regulation.

- *Regulation that is redundant or not justified by policy intent* – dual regulation has perverse outcomes, including confusing consumers, lawyers, agents and regulatory agencies, allowing consumers to be misled, generating excessive costs for lawyers in isolation from non-lawyers (despite no evidence that a heavier regulatory burden is justified), 'double jeopardy' and potential to evade regulation altogether.

[11] Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing the Regulatory Burdens on* Business, Report to the Prime Minister and Treasurer, Canberra, page ii.
[12] Ibid, page iii.

- *Variations in definitions and reporting requirements* – ad hoc attempts to define "immigration assistance" and "immigration legal assistance" to accommodate lawyers in the scheme has resulted in unnecessary confusion, facilitated legal practice by non-lawyers and impacted upon state and territory PII schemes and fidelity fund coverage.

DIAC's arguments in support of dual regulation

53. DIAC has consistently opposed removal of lawyers from dual-regulation. The Law Council has made numerous submissions, held meetings and generally engaged with the Department on this issue over many years, without any progress. There is a sense of frustrating inertia about the issue that is compounded by what the Law Council regards as disingenuous attempts by DIAC to identify a principled basis for continuing dual regulation.

54. The following describes some of the arguments used by DIAC to support its position, and the Law Council's responses:

Dual regulation supports a unified migration advice profession that will better benefit consumer awareness and protection through consistent standards of professional conduct and quality of service across the profession

As outlined above, this argument is patently flawed and untrue. There continue to exist two avenues of complaint for consumers, a situation which confuses consumers, lawyers, agents and regulators alike. In this regard, see also the Law Council's detailed comments at paragraphs 162-167 of **Attachment B**.

Practising lawyers are not necessarily experienced or knowledgeable in migration law and policy, which are very complex and change frequently. This lack of knowledge is demonstrated by the considerable number of lawyer agents who contact DIAC seeking advice, which, as practising agents, they would be expected to know.

This argument was raised, without any supporting information, in the Discussion Paper released for the 2007/08 Review. In fact, no information has ever been released by the MARA, the OMARA or DIAC to support or explain the statement.

The Law Council investigated the statement in preparing its submission to the 2007/08 Review. **Attachment B,** at paragraphs 168-178, outlines the nature of that investigation and the unsatisfactory conclusion that no empirical basis for this statement by DIAC could be found. As noted, it would appear that DIAC does not record the nature of inquiries it receives or identity/background of agents who contact the Department. DIAC has not yet explained the empirical basis for its claims and did not address the Law Council's strong contradiction of this argument in its Final Report into the 2007/08 Review.

The Law Council queries how regulation can possibly be based on such unfounded, anecdotal claims, when analysed in the context of the Productivity Commission's 'Principles for Good Regulatory Process'.[13]

Since 1998 over 18 per cent of MARAs sanction decisions have been against lawyer agents with a legal practising certificate. It has been found that state and territory law societies may not always action complaints

[13] Ibid, recommendation 7.1.

about lawyer agents in a timely manner, thus demonstrating the need for this additional consumer protection.

The Law Council refers again to its response in **Attachment B** at paragraphs 179-184. DIAC omits from this argument that migration lawyers make up around 29% of all registered migration agents, demonstrating that legal practitioners are in fact less likely to engage in misconduct. It suffices to say that this does not support a case for applying an excessive second layer of regulation to lawyers and just one layer of regulation to non-lawyer agents.

In addition, the Law Council rejects entirely DIAC's unsupported claim that 'law societies' may not always action complaints. The Law Council also points out that the argument (quoted directly from DIAC's discussion paper) demonstrates misunderstanding of legal professional regulation.

Most jurisdictions have statutory, independent Legal Services Commissioners to receive, investigate and sanction misconduct, or to supervise the legal professional bodies in this role. Despite requests to the Department, the Law Council has not been provided with a single example of a complaint referred to legal services regulators, which was not duly investigated or other appropriate action taken.

However, the Law Council notes that this argument may be put simply because DIAC does not trust that its complaints about lawyers will be properly addressed if referred to a State regulatory body over which it has no influence. DIAC is the most frequent complainant against migration agents and has a vested interest in ensuring agents not only comply with the law, but also support the Federal Government's immigration policy.

The MARA is able to address complaints against lawyer agents that legal services regulators might not consider sufficient to warrant disciplinary action

The Law Council here refers back to its response to this argument set out in paragraphs 185-194 of **Attachment B**.

In addition, it is noted that DIAC is most likely referring certain aspects of the MARA Code of Conduct, which set out more prescriptive requirements for migration agents in lodging visa applications on behalf of clients. These include sponsoring or lodging vexatious visa applications and timely provision of supporting information and documents in a certain form.

All other professional duties contained in the MARA Code of Conduct have equivalent duties under Legal Profession Conduct and Practice Rules, including with respect to misleading and deceptive conduct, conduct likely to diminish public confidence in the profession, etc, which are designed to protect consumers. Complaints with respect to those matters are regularly investigated and sanctioned by legal services regulators to the extent of their powers.

Therefore DIAC must be concerned that legal services regulators will not enforce rules which are designed to protect the administration of Australia's immigration programs. It is unclear what consequences might ordinarily flow from a breach of those clauses by an agent. The potential 'harm' is relatively small, involving only a minor administrative cost to the Department for each breach that occurs (although it is accepted that such costs may 'cascade' if left unchecked). However, by contrast, the cost to migration agents of dual regulation is

comparatively large, borne by small businesses or sole traders with a limited capacity to absorb excessive compliance costs.

It is considered that there are certainly a number of other means by which DIAC could ensure the administration of Australia's immigration program is protected, including through agreements and undertakings, or other means which do not involve excessive, disproportionate, costly and unnecessary dual regulation. The Law Council considers exploration of alternatives to dual regulation is consistent with the 6 recommended Principles of Good Regulatory Process set out under recommendation 7.1 of the 'Rethinking Regulation' report.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

Attachment B

Law Council
OF AUSTRALIA

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

The Hon Ms Teresa Gambaro MP

Parliamentary Secretary to the Minister for Immigration and Citizenship

12 November 2007

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Executive Summary

This submission responds to the Department of Immigration and Citizenship's (DIAC's) discussion paper entitled "2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession".

The Law Council Of Australia is pleased to provide these submissions and notes that the matters under Review are of considerable importance to the Law Council and its members.

The Law Councils submissions in relation to dual regulation can be summarised as follows:

1. Dual-regulation of migration lawyers with legal practising certificates is oppressive, unnecessary and should be ended as soon as possible.

    - Lawyers with legal practising certificates should not be required to register as migration agents.

    - All complaints against lawyers with legal practising certificates should be referred by Migration Agents Registration Authority (MARA) or DIAC to the relevant Legal Services Commissioner or Board, or to the relevant Law Society or Bar Association, for investigation and sanction, where appropriate.

2. In the unfortunate event that, following this review, the government decides that dual-regulation will continue, the Law Council strongly submits that:

    - The regulator should be independent of all stakeholders but have representatives of the stakeholders on an Advisory Board (akin to the UK model – outlined in **Attachment 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;

    - 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;

    - 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 specialist accreditation from a Law Society; and

    - 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.

In addition, the Law Council makes the following submissions with respect to other matters raised in the discussion paper:

- The definition of 'immigration assistance' should be changed to clarify that nothing in the *Migration Act 1958* permits the practice of law by non-lawyers.

- The Law Council does not support any proposal to move from statutory self-regulation to industry self-regulation.

- MARA/MIA must cease to be the both provider and regulator of CPD courses and activities.

- MARA should be wound up as industry regulator and replaced with a statutorily independent body, similar to the United Kingdom's Office of the Immigration Services Commissioner, to deal with concerns about the MIA and MARA's conflict of interest as regulator and industry representative body. The Law Council does not support any move from statutory self-regulation to industry self-regulation.

- There should be no scheme for priority processing of applications submitted by agents or anybody else.

The Law Council would be pleased to provide further information in support of these submissions or respond to any queries that may arise.

1 – Introduction

1. This submission is provided in response to the Discussion Paper released by the Department of Immigration and Citizenship (DIAC) in September 2007, entitled *2007-2008 Review of Statutory Self-Regulation of the Migration Advice Profession* (the discussion paper).

2. The Law Council has been unable to respond to all aspects of the discussion paper in the time provided. Focus has been given to matters of specific concern to the Law Council under each chapter of the discussion paper. The Law Council's submission addresses the discussion paper under each chapter heading and includes additional sub-headings where appropriate.

3. As will be evident, the majority of discussion in this submission is directed toward the Law Council's concerns about dual regulation of practising lawyers who provide legal services relating to migration law. The Law Council notes that many of the concerns outlined in this submission are already well known to DIAC, particularly to those of its officers within its Migration Agents Section. Accordingly, this submission summarises the Law Council's views about dual regulation and other aspects of the MARA's regulatory role and then addresses the issues and questions raised in the discussion paper.

4. The Law Council speaks on behalf of around 50,000 Australian lawyers through the Law Societies and Bar Associations of the States and Territories and the Large Law Firm Group (the 'constituent bodies' of the Law Council). The Law Council notes that these matters are not simply of concern to lawyers currently practising migration law. The matters raised in this submission, particularly in relation to dual regulation, affect all lawyers, including those who would otherwise offer their legal expertise to assist a highly vulnerable section of the community

2 – Consumer protection under the current scheme

5. MARA's regulatory role and the structure of the scheme to protect consumers of migration agents' services is a matter of significant interest to the Law Council. The Law Council supports the objectives of the Commonwealth Government and DIMA, in seeking to ensure standards of conduct in the migration advice industry. Consumers of immigration advice services are highly vulnerable to unscrupulous behaviour and may suffer terrible consequences as a result of negligent or reckless advice from persons inappropriately holding themselves out as experts in their field, or who seek to unconscionably take advantage of them.

6. Consumers of migration services are among the most vulnerable in the community. In many cases, migrants or aspiring migrants will:

   - have poor English language skills and little or no knowledge of the regulatory environment in which migration agents operate;

   - be unlikely to understand the difference between a migration lawyer and a 'migration specialist' with no legal training

- have very limited financial resources, but a great willingness to guarantee or pay whatever they can for a visa; and

- have little or no understanding of the complex laws that apply to them.

7. The Law Council considers that there are several ways in which consumer protection is undermined by the present regulatory scheme, which are outlined in detail below, but can be summarised as follows:

   (1) There is no clear delineation between legal services and immigration assistance under the *Migration Act 1958*, which appears to sanction legal practise by non-lawyers;

   (2) Dual regulation facilitates misleading and deceptive conduct by non-lawyer migration agents, who are not prevented by MARA or DIC from holding themselves out as legally trained or qualified;

   (3) Dual regulation provides a disincentive to lawyers to practice or specialise in migration law, limiting the extent and quality of legal services available to migrants; and

   (4) The current regulator has an irreconcilable conflict of interest, carrying on the two conflicting roles of industry regulator and industry representative body.

3 – The Regulatory Framework

8. The Law Council believes that the current definitions of 'immigration assistance' and 'immigration legal assistance' lack clarity and may effectively sanction legal practise by non-lawyers. The Law Council believes that the current definition of 'immigration assistance' should be clarified to make it clear that the *Migration Act 1958* (Cth) does not permit non-lawyers to provide immigration legal advice.

9. The *Migration Act* provides that only registered migration agents may provide immigration assistance.[14] The definition of 'immigration assistance' extends to 'preparing proceedings before a court or review authority' and 'representing an applicant in proceedings before a court or review authority.'[15] The implication of this is that migration agents (non-lawyers) are permitted to accept a fee to represent an applicant before a court and to prepare documents for those proceedings. This is discordant with the various States' legal profession Acts which make it an offence for a person to engage in legal practice unless they are a lawyer and hold a current practicing certificate.[16]

[14] *Migration Act* 1956 (Cth) Section 280.

[15] See *Migration Act* 1956 (Cth) ss 276(1)(c), (1)(d) and (2)(c).

[16] See for example section 14 *Legal Profession Act* 2004 (NSW). Equivalent provisions exist in all Australian States and Territories.

Supremacy of Commonwealth Laws

10. Where Commonwealth and State laws are inconsistent, Commonwealth law will override State law to the extent of any inconsistency.[17] Section 109 of the Constitution *"gives supremacy, not to any particular class of Commonwealth Acts but to every Commonwealth Act, over not merely State Acts passed under concurrent powers but all State Acts, though passed under an exclusive power, if any provisions of the two conflict."*[18]

11. Accordingly, if the *Migration Act 1958* (Cth) effectively permits a non-lawyer to engage in legal practice in immigration matters it will override all State and Territory *Legal Profession Acts* to the extent that they are inconsistent.

Implications for Legal Profession Regulation

12. Legal profession regulatory bodies (such as the States' Legal Services Commissions, the Law Societies and Bar Associations) have the power in certain circumstances to prosecute non-lawyers who breach the *Legal Profession Act*. The clear intention of the various States' legal profession Acts is to give such authority to a single competent professional body, primarily to set standards so as to protect the public from unscrupulous, careless or incompetent legal representation. The practise of law by non-lawyers would therefore remove certainty in legal disciplinary proceedings because non-lawyers cannot be sanctioned if they engage in illegitimate and actionable conduct under legal profession legislation.

13. Where a client has suffered due to misconduct or negligence by a lawyer, legal profession disciplinary bodies may order that compensation be paid to the client. Serious matters may be escalated to Disciplinary Tribunals or to the Supreme Court and an adverse finding against a lawyer can include fines and imprisonment. By contrast, the Migration Agents Regulatory authority has no power to award damages, determine compensation, to penalise or to fine an agent found guilty of misconduct or professional negligence.

Abolition of Judicial Discretion

14. While there are no legal barriers to individuals representing themselves before a court, there are barriers to litigants being represented otherwise than by a lawyer. Non-legal advocates require leave from a court to appear on behalf of a litigant.[19] By expressly permitting non-lawyers to represent an applicant before a court, the *Migration Act* appears to abolish judicial discretion to refuse or accept a request by a non-lawyer to represent a litigant. The Law Council notes that this appears to be an unwarranted intrusion into the powers of the Court.

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[17] Under section 109 of the Constitution. See *Amalgamated Society of Engineers v The Adelaide Steamship Co* (the Engineers Case) (1920) 28 CLR 129.

[18] The Engineers Case at 155.

[19] Australian courts generally have been disinclined to permit non-lawyer representatives to give 'quiet assistance' as with a 'McKenzie friend' *R v EJ Smith* 2 NSWLR 608, 614 (NSW Court of Appeal); *R v Burke* (1993) 1 Qd R 166 (Queensland Court of Appeal).

Recommendations

15. The Law Council recommends that the definition of 'migration assistance' be amended to make it clear that the *Migration Act* 1956 (Cth) does not permit non-lawyers to provide immigration legal advice. 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"

4 – MARA's performance as industry regulator

16. The Law Council does not have any comment about MARA's performance as industry regulator, other than to note that MARA is not the appropriate body to regulate migration lawyers (a matter discussed in detail in response to Chapter 7, below).

Fidelity funds

17. The Law Council notes this section considers whether it is appropriate that a fidelity fund be established for registered migration agents. The Law Council notes that this would be a positive development in terms of consumer protection.

18. Currently, state and territory law societies and bar associations manage fidelity funds on behalf of their members, which are financed by compulsory member contributions. Accordingly, the Law Council would not support any requirement that migration lawyers be required to pay into a second fund.

19. However, the Law Council notes that there is some confusion at present about whether the clients of registered migration lawyers can claim from the Law Societies' fidelity fund, a further problem created by dual regulation. This is discussed in detail, in response to Chapter 7 (see paragraphs 128-130, below).

5 – Continuing professional development

20. The Law Council has significant concerns about the overlapping continuing professional development (CPD) schemes, which are administered by the MARA and Law Societies. The effect of this overlap is that

- migration lawyers must undertake more CPD each year than any other legal professional;
- 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;
- the CPD provided to migration agents is generally not designed to meet the needs of legal professionals;

- Law Societies generally do not provide CPD services in this area because they have to compete with the MIA/MARA, which provides CPD at a lower cost than the Law Societies are able.

CPD burden more onerous for migration lawyers

21. Lawyers are required to complete 10 hours or more of CPD each year in relation to their various areas of practise[20] as a condition of renewal of their practising certificate. In some jurisdictions it is mandatory for lawyers to complete a certain number of hours in ethics, trust accounting, and equal opportunity. A lawyer who fails to meet CPD requirements will lose the right to practise.

22. MARA requires that migration agents, including migration lawyers, undertake 10 hours of CPD either with MIA or another MARA appointed provider. This adds to the overall CPD burden on lawyers, who are also required to undertake CPD in other areas of practise.

23. For example, a lawyer whose practice involves 70 per cent civil litigation, 20 per cent criminal law and 10 per cent migration advice may appropriately apportion 10 hours of CPD according to those values. The additional burden imposed by the MARA requires that lawyer to spend an extra 9 hours on CPD, such that lawyers who choose to practise as migration lawyers may have to complete up to 19 hours of CPD.

24. The Law Council notes that the MARA has introduced mandatory CPD activities such as Accounts Management, Ethics and Professional Practice. Such requirements appear to be closely modelled on legal profession regulatory requirements. This, along with other mimicry of legal profession regulation by MARA, such as insurance requirements, and the extensive complaint and review powers of the MARA demonstrate the regard held for legal profession regulation. However, this also emphasises the redundancy of dual-regulatory mechanisms for migration lawyers, who are already subject to the highest standards of professional regulation.

25. As previously mentioned, the skills required to practise migration law are not substantially different from the skills required to practise in any other area of law. The burden of additional CPD both financially (CPD course costs range from $100 - $300 per hour) and in terms of time lost in billable hours is a major disincentive for lawyers to practise migration law.

Graduate Certificate in Migration Law and Practice

26. The Law Council notes the recent decision of the MARA to allocate 5 CPD points for successful completion of each unit of the Graduate Certificate in Australian Migration Law and Practice (Graduate Certificate).[21] It appears that the MARA intends to allocate 5 CPD points per 'course', or 'module' of the Graduate Certificate (the Graduate Certificate offered by the Australian National University currently comprises four six-unit courses totalling twenty-four units). The CPD offer by the MARA appears to be based upon encouraging existing agents to

[20] The requirements vary, though in most jurisdictions the minimum CPD requirement for non-accredited specialists is 10 hours of learning or teaching a course of study in the areas of their practice.
[21] Email from MARA to all registered migration agents, 'Message from Migration Agents Registration Authority, 29 September 2006.

complete the Graduate Certificate rather than the genuine professional development of existing agents.

27. The Law Council does not regard completion of an entry level education requirement as 'continuing professional development' for experienced migration agents. This would appear equivalent to awarding lawyers half their annual CPD points for completing a law unit in the core competencies of a university degree (known as the 'Priestly XI'), without which the lawyer could not be admitted to practice in the first place.

28. It is submitted that migration agents should be required to meet these minimum standards as a condition of their ongoing registration. DIAC may wish to consider whether a 'grace' period is appropriate, to encourage all registered agents to obtain the qualification promptly and to avoid unnecessary hardship for agents who would otherwise be deregistered on the basis of a new requirement being applied retrospectively. However, the Law Council does not believe completion of the Graduate Certificate should attract CPD points.

Academic independence must be respected

29. The Law Council notes that if there is to be any respect for the quality or relevance of the Graduate Certificate, DIAC and MARA must cease attempting to exert inappropriate control over the manner in which the course is conducted.

30. The Law Council refers to the following comment arising from notes taken at a meeting between DIAC and the MIA on 2 November 2007:

> **"Concerns that some presenters may misrepresent the way DIAC operates to Graduate Certificate Students**
>
> DIAC advised that they were extremely dissatisfied about reports from some students associated with DIAC that some presenters had misrepresented that way that DIAC operates during their presentations to Graduate Certificate students. DIAC will formally write to MARA about this and expect that MARA will hold discussions with the universities involved to ensure that there is no recurrence. DIAC expects that recurrence should be considered strongly in renegotiation of contracts with the universities."

31. The Law Council regards this as an utterly inappropriate incursion into the independence of the academia and is considering writing to the academic standards committees of the Universities involved in running these courses to advise them of this statement.

32. These courses are ostensibly run out of the Law Schools of the relevant universities (being ANU, Griffith, Murdoch and Victoria Universities). Universities have a duty to provide the highest standards of education possible to those enrolled in their courses. This includes providing facts, information, resources, views and opinions about laws, policies and public administration. It would be unthinkable if the Australian Government sought to stifle debate about contentious public policies and laws in academic discussion. Such an action would attack the very heart of academic freedom. There is no place for this kind of censorship and interference by government in liberal democracies where free speech is encouraged.

33. The Law Council strongly condemns any proposal by DIAC to make funding for the Graduate Certificate contingent on academics 'stepping into line'. If DIAC

has concerns that some students are being misinformed, or that certain tutors or lecturers misunderstand DIAC's operating procedures, DIAC should write to the relevant course conveners to provide the information DIAC believes to be correct.

34. The Law Council will vigorously defend against any incursion into academic freedom and would most certainly oppose the action DIAC is proposing to take in relation to the conduct of the Graduate Certificate.

Law Society concerns over CPD

35. The MIA/MARA has a conflict of interest arising from its role as both a provider and regulator of CPD services. 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.

36. State Law Societies have voiced strong concerns over the administrative burden imposed by the MARA accreditation process for CPD seminars and courses. 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 practise for lawyers.

37. The Law Council submits that it is highly unsatisfactory for migration lawyers to undertake CPD with a non-lawyer provider. The majority of courses offered by the MARA appointed CPD providers are not pitched at legal professionals or migration law specialists; they are aimed at non-lawyers, with little or no advanced knowledge of the broader legal framework affecting migration law advice.

38. Many continuing legal education providers commonly used by lawyers have all but ceased providing migration law seminars and classes, as they are unable to compete with the less expensive courses provided by non-legal CPD providers. It is considered uneconomical for them to offer such courses because of the dwindling proportion of legal practitioners who choose to practise migration law, which in 2004 was less than 2% of practitioners in Australia.

39. The Law Council submits that State Law Societies should not be required to receive accreditation from the MARA to run CPD courses. This matter is of even greater concern in light of what the Law Council understands to be the MIA's intention to lobby for complete industry self-regulation at the next review of the migration agent registration scheme. The Law Council notes that requiring Law Societies to be accredited by an unrelated industry body to provide legal education to lawyers is analogous to requiring the Australian Medical Association to seek accreditation from the Australian Nursing Federation to run CPD seminars for medical practitioners.

Conflict of interest for MARA

40. The Law Council believes that the MARA is being permitted to entertain an irreconcilable conflict of interest as both a regulator and provider of migration CPD services, which can only be addressed either by preventing the MIA/MARA from providing CPD services, or by appointing a statutorily independent industry regulator to regulate CPD education providers.

41. The recent 'Review of Legal Education'[22] by the Victorian Department of Justice found that where "professional associations are effectively the regulators, providers, and auditors of their respective schemes… there is an obvious potential for this arrangement to be anti-competitive, in what is generally a very competitive market."

42. The Department concluded that "continuing professional development schemes should be overseen by an independent body" and noted that "the introduction of independent oversight does not create an additional layer of bureaucracy for either participants or providers." [23]

43. The Law Council recommends that an independent industry regulator be established to regulate migration industry CPD education providers and that appropriate consultation be carried out to ensure that CPD schemes are nationally consistent in both structure and form.

44. The Law Council notes that work is currently being undertaken by the National CPD Taskforce to develop National CPD guidelines, to ensure consistency in the delivery of CPD programs for the legal profession[24].

6 – MIA operating as MARA

45. The Law Council 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.

46. The MIA is a representative body for migration agents and has continued to fulfil that role following its appointment as the industry regulator. 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.

47. The Law Council notes that this matter has been dealt with effectively in the legal profession. Statutorily independent Legal Services Commissioners and Boards have now been established in almost all jurisdictions to carry out regulation of the legal profession and to work with the Law Societies and Bars in investigating and prosecuting complaints against practitioners.

48. The Law Council submits that an independent statutory authority is necessary in the migration advice industry, not only to protect a highly vulnerable sector of the community, but also to ensure transparency in the complaints handling process.

Lack of transparency

49. It is noted that the MARA carries out a role which effectively usurps the powers of the Minister for Immigration, creating a community expectation that MARA's

[22] Victorian Department of Justice, *review of Legal Education Report: Pre-Admission and Continuing Legal Education,* September 2006

[23] Ibid at p 95.

[24] See www.cleaa.asn.au

actions should be subject to the same public scrutiny as the Minister or a delegated government authority. This assertion is compounded when one considers the enhanced regulatory powers granted to the MARA under the MAIM amendments.

50. Decisions made by the MARA are not subject to public scrutiny in the same way as those of any other public sector authority. The MARA has extensive powers at its disposal, powers which are generally available only to Ministers or delegated to public entities, which are subject to *Freedom of Information* legislation, administrative review and appeals processes. However, the MARA claims not to be subject to the *Freedom of Information Act 1982* (Cth)[25] and review of the MARA's decisions is only available in the Administrative Appeals Tribunal after the fact.

51. DIAC has indicated that, whilst the MARA is not an 'agency' for the purposes of the FOI Act, the MARA has agreed to be bound by the Ombudsman Act under the Deed of Agreement between the Commonwealth and the MIA. DIAC also notes that agents can apply to DIMA/MARA for access to documents under the FOI Act.

52. The Law Council submits that it is not satisfactory for an authority with such broad regulatory powers to be exempt from the operation of the FOI Act. It is reasonably clear that documents held by the MARA will not always be held by DIAC and that a substantial amount of information relating to the exercise of administrative power, that would normally be available to the public from a body properly characterised as a government 'agency', can be withheld by MARA.

53. This lack of decision making transparency removes a vital check on administrative authority, which has long been recognised as a requirement of appropriate and effective review of decision making power. More importantly it undermines the confidence of consumers and weakens consumer protection. The fact that such power is held by an industry organisation, without appropriate checks and balances, is of grave concern to the Law Council.

54. The Law Council has previously raised concerns that the MARA and the MIA are able to regularly consult and receive briefings from DIAC. The Law Council has raised these concerns with DIAC in the past and also during the Commonwealth Ombudsman's own-motion review of MARA's complaints handling processes in 2006/07. Following that review, the Ombudsman recommended that

> *MARA and DIAC establish formal consultative arrangements with the peak professional bodies including the MIA and the Law Council of Australia for discussions on policy, legislative and administrative changes relating to migration agent regulation and the industry review.*[26]

55. It is noted that DIAC has commenced formal consultation and briefings with the Law Council of Australia, through the Immigration Lawyers Association of

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[25] MARA has claimed that, as it is not a 'Department', an 'eligible case manager' or a 'prescribed authority' under the *Freedom of Information Act 1982* (the FOI Act), it is not an agency and therefore not subject to the provisions of the FOI Act.

[26] Commonwealth Ombudsman, *Report into the Review of the Migration Agents Registration Authority Complaint-Handling Process*, June 2007, Report 05/2007, Commonwealth of Australia, Recommendation 13.

Australasia (ILAA) in the Council's International Law Section, which is regarded as a positive development.

Independent regulatory body necessary

56. The Law Council believes 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.

57. It is noted that this matter was given very little consideration in the 2001-02 Review of Statutory Self-Regulation of the Migration Advice Industry, which reached the conclusion that the migration advice industry was not ready for complete self-regulation. In the review, the option of an independent statutory authority was barely considered.

58. The Explanatory Memoranda accompanying the *Migration Amendment (Migration Agents Integrity Measures) Bill 2003* noted (at paragraph 7.5) that "the risks to the community are not sufficiently high or widespread to warrant direct government regulation". With respect, the Law Council submits that the risks to the community, outlined in this submission, are more than sufficient to warrant independent regulatory control – a fact that has been recognised in the regulatory responses of most other jurisdictions, as outlined in Attachment B. However, it must also be noted that the relationship between the MIA and MARA is, of itself, inappropriate, non-transparent and damaging to the public perception of the complaints handling process.

7 – Dual Regulation of Migration Lawyers

59. The Law Council submits, in the strongest possible terms, that dual regulation of migration lawyers is oppressive, unnecessary and should be ended as soon as possible. As outlined under 7A, below, the Law Council firmly believes that dual regulation:

- 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, following the Banks review in 2005;[27]
- conflicts with the objectives of the National Profession Project, which has designed and implemented uniform *Legal Profession* legislation across all jurisdictions, and is in the process of reviewing and updating model rules of professional conduct;
- 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;

[27] Productivity Commission, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, January 2006, Commonwealth of Australia

- creates conflicting and unnecessarily onerous CPD requirements for lawyers (as opposed to non-lawyer agents); and
- 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 (or Refugee and Migration Resources Centres).

60. The Law Council rejects the supposed 'advantages' of dual regulation, put forward by DIAC in support of continuing the status quo. As outlined under part 7B, below, the so-called 'advantages' are illusory, unfounded and appear to be entirely unsupported by any empirical or other evidence.

61. If the unfortunate decision is made that dual regulation will continue, the Law Council submits that, at the very least, the following changes must be implemented:

(a) the regulator should be independent of all stakeholders but have representatives of the stakeholders on an Advisory Board (akin to the UK model – outlined in **Attachment B**);

(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.

7A – Dual Regulation: General Comments

Background

62. The Law Council of Australia has long been concerned that Australian lawyers practising migration law are effectively required to register as migration agents. Under the current scheme, it is practically impossible for a lawyer advising on migration issues to provide legal services in this area without being required by law to register as a migration agent. This has the practical effect that lawyers are subject to 2 separate schemes of regulation – the comprehensive legal profession regulatory framework and the migration agents' registration scheme.

63. The Law Council has made submissions regarding these concerns in several contexts, most recently to the Parliamentary Secretary to the Minister for Immigration and Citizenship. Many of the matters raised in that submission are summarised in this submission.

64. The current review of statutory self-regulation of the migration advice profession provides a timely opportunity to re-examine the appropriateness and necessity of subjecting lawyers to oppressive dual-regulation. This review follows a period in which regulation of Australian lawyers has achieved national harmonisation and uniformity, an achievement driven over the last 5-7 years by the Standing Committee of Attorneys-General in conjunction with the Law Council. The legal profession is now subject to the most comprehensive regulatory framework of any profession in Australia. Indeed, it is regarded as more onerous and complete than any other legal profession regulatory framework in the world.

International comparison

65. Australia is the only Western country that subjects legal practitioners to dual regulation in this way. Details concerning migration agents' regulatory schemes in other countries, including the United States, United Kingdom, New Zealand, South Africa and Canada are outlined in **Attachment B**.

66. Most recently, New Zealand enacted the *Immigration Advisers Licensing Act 2007*, which expressly excludes lawyers from licensing requirements[28]. It is worth noting that the Government of New Zealand gave careful consideration to the question of whether lawyers should be included in the regulatory scheme established for immigration advisers. The New Zealand Government – similar to every other government in the Commonwealth and United States, which regulate the activities of migration agents – reached the conclusion that practising lawyers should be regulated under the scheme applicable to all other lawyers.

67. There is no reasonable argument which can be advanced in support of dual-regulation of immigration lawyers in Australia, which has not been considered and rejected in other countries. The policy objectives of the Australian Government when implementing a statutory self-regulatory scheme for migration agents are no different to the objectives of the governments of New Zealand, United Kingdom, United States or Canada. It is recognised that that there is a need to ensure an appropriate standard of professional conduct among those who assist others to apply for visas. However, it is recognised in those other countries that the complaints handling mechanisms and professional standards required of lawyers under existing regulatory arrangements are more than sufficient to ensure misconduct or unprofessional behaviour is dealt with. The following outlines the existing regulation of the legal profession is Australia, which is generally regarded as the most comprehensive legal professional regulatory scheme in the world.

Legal profession regulation and conflicts caused by dual regulation

68. Australia's legal profession is subject to extensive regulation and oversight under Federal, State and Territory legislation, common law, and by the courts, which retain the inherent jurisdiction to regulate court officers. This regulation is important to the continued trust and confidence of the public in the legal profession and the administration of justice. The consequences of not complying with professional conduct rules and laws depend on the nature and seriousness of the breach and could result in disciplinary action, an order for compensation, suspension from practice and criminal charges leading to convictions.

[28] The New Zealand *Immigration Advisers Licensing Act 2007* received Royal Assent in May 2007

69. Australian state and territory law societies, bar associations and statutorily independent complaints handling bodies (Legal Services Commissioners) are empowered under the Legal Profession legislation of each jurisdiction to regulate the legal profession.

70. Complaints about misconduct by a legal practitioner are provided for under uniform State and Territory Legal Profession legislation and may be directed to the Legal Services Commissioner or to the practitioner's local Law Society or Bar Association. Solicitors are required to comply with professional conduct rules, which are mirrored in each jurisdiction. Practitioners may be struck off the roll or have their practicing certificate suspended if they are found to have engaged in conduct that would amount to grave impropriety affecting their professional character.[29] Practitioners may also be subject to a costs or compensation order if a court finds that a practitioner has acted improperly to the detriment of an individual or entity.

71. State and territory law societies and bar associations have specialized departments with teams of investigators, inspectors and auditors to discharge this function. For instance, the Law Society of NSW has more than 30 staff investigating and overseeing complaints and professional conduct matters pursuant to the *Legal Profession Act 2004* (NSW), which provides for complaints against legal practitioners and investigation of those complaints by the Legal Services Commissioner or Law Society or Bar Association.[30] The Commissioner, Law Society or Bar Association is able to suspend or revoke a lawyer's practising certificate or issue a costs or compensation order on application by a complainant.[31] Particulars of any disciplinary action against a legal practitioner are published in the Register of Disciplinary Action, or in any other manner the Law Society or Commissioner sees fit.[32] Similar provisions exist in other State and Territory Legal Profession legislation.[33]

72. The Law Societies and Bar Associations will apply to the court to have a practitioner's name struck from the Roll of Legal Practitioners if an investigation reveals the practitioner has engaged in inappropriate conduct. These regulatory authorities are highly vigilant in this respect, to ensure the reputation and image of the legal profession is not besmirched by the unconscionable behaviour[34] of a few.

73. For example, the NSW Bar Association has around 75 members in four Professional Conduct Committees which, on behalf of the Bar Council, carry out investigations regarding the conduct of barristers. The work of the committees is

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[29] *Kennedy v Council of the Incorporated Law Institute of New South Wales* (1939) 13 ALJ 563

[30] *Legal Profession Act 2004* (NSW), Chapter 4.

[31] Ibid, Part 4.9.

[32] Ibid, Part 4.10.

[33] *Legal Profession Act 2004* (Vic), Part 4.4; *Legal Practitioners Act 1970* (ACT), Part VIII; *Legal Practitioners Act 1974* (NT), Part VI; *Queensland Law Society Act 1952* (QLD), Parts 2, 2A and 2B; *Legal Profession Act 2004* (QLD), Chapter 3; *Legal Practitioners Act 1981* (SA), Part 6; *Legal Profession Act 1993* (TAS), Part 8; and *Legal Practitioners Act 1893* (WA), Part IV.

[34] See, for example, *Law Society of Tasmania v Avery* Unreported, Supreme Court of Tasmania, 16 May 2006.

supported and facilitated by the Professional Conduct Department of the Bar Association.

74. The Queensland Law Society has a Professional Standards Department comprising of more than 40 investigators, auditors and related service and administrative staff.

75. In a smaller jurisdiction such as Northern Territory, the NT Law Society has a Complaints Department with two staff and a Professional Standards Committee comprising legal practitioners and non-lawyers. Spot inspections of solicitors' accounts are also conducted by the Master of the NT Supreme Court. The ACT Law Society has around 25 staff and panel and committee members involved in investigations and prosecutorial action.

76. Following investigations, many prosecution actions have been initiated with respect to professional misconduct and other breaches of standards in connection with the practice of law. For instance, the ACT Law Society has initiated legal action including disciplinary proceedings and prosecution action with respect to about 13 matters in 2004 and 2005. In the past two years, the Law Society of the Northern Territory has successfully prosecuted at least four matters in the Supreme Court and the Legal Practitioners Complaints Committee. The Queensland Law Society has initiated more than 60 prosecutions between 2001 and 2004. Since 2004, the Queensland Legal Services Commission has been responsible for the prosecutorial function.

77. In the past six years, the NSW Law Society has successfully obtained 52 orders in the Supreme Court and 113 orders in the Administrative Decisions Tribunal.

78. The Law Council also notes that existing legislation empowers regulating bodies such as the Law Societies, Bar Associations and Legal Services Commissions to report on legal practitioners in relation to information obtained in the course of trust account examinations, complaint investigations or compliance audits to certain law enforcement bodies including the Attorney General. For instance, section 730A of the *Legal Profession Act* 2004 (NSW) states that the regulating body has a duty to report suspected offences.

79. Law Societies in most jurisdictions work with a statutorily independent complaints handling body, which will investigate complaints or refer its investigatory function to the Law Society as appropriate. For example, the Office of the Legal Services Commissioner presently exists in NSW, Queensland and Victoria. A similar body (the Legal Practitioners Complaints Board) exists in South Australia and Western Australia. Similar bodies will be established in the Northern Territory and Tasmania with the passage of the *Legal Profession Legislation*, expected to occur this year.

Conflicts of interest

80. The Law Council notes that the dual regulatory regime conflicts with certain fundamental duties that must be observed by a lawyer.

81. Under State and Territory legislation, lawyers are ethically and professionally bound to act in their clients' best interests at all times. The relationship has been described in the following terms:

"A lawyer has a duty to exercise skill and care in acting for a client and must act in good faith and with absolute fairness and openness towards the client."[35]

82. Lawyers also have a duty of care to their clients under the common law and are subject to civil liability for negligent conduct, where their behaviour or conduct does not comply with the standard expected among lawyers of good reputation.[36] Further, lawyers may be contractually liable for breach of their retainer if they fail to provide services to the expected standard of skill and care.

83. The duty of care imposed on lawyers is greater in circumstances which give rise to the perception that the client is more vulnerable, due (for example) to age, infirmity and/or poor comprehension of English. Accordingly, the duty of care imposed upon migration lawyers is very high.

84. Lawyers are subject to certain professional duties and obligations to their clients, which do not apply to non-lawyers. These duties are not peculiar to Australian lawyers, but apply to lawyers in the majority of western legal systems for the reason that lawyers, as officers of the court, have an obligation to uphold and serve the administration of justice.

85. A key example of a conflict faced by a lawyer under dual regulation is in the area of client legal privilege.

Client Legal Privilege

86. Client legal privilege protects communications between:

- a client and his or her lawyer, both when advice is sought and where litigation is pending, made for the dominant purpose[37] of giving legal advice; and

- a lawyer and third parties, where those communications relate directly to the furtherance of the client's cause.

87. Client legal privilege is integral to the administration of justice. In order to ensure the integrity of the legal process clients must feel able to communicate frankly and freely with their solicitor concerning their circumstances and the laws which apply to them without fear of those communications being disclosed to third parties.

88. Client legal privilege belongs to the client and has been upheld by the High Court of Australia as both a fundamental human right[38] and an important common law immunity,[39] which can only be waived by express or clearly implied instructions

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[35] *Halsburys Laws of Australia*, Vol.16 [250-535].

[36] *Simmons v Pennington & Son* [1955] 1 WLR 183

[37] *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

[38] *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 192 ALR 561 at 583-584 per Kirby J. See also *Baker v Campbell*.

[39] *Daniels,* ibid, at 565 per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

from the client. Client legal privilege cannot be abrogated, except by clear legislative provisions stating a clear intention to remove the privilege.[40] Accordingly, legislative provisions that do not expressly remove privilege cannot be construed as requiring a lawyer to deliver documents or files that reveal the substance of legal advice, regardless of threats of administrative or criminal sanctions.

89. Most recently, the Australian Law Reform Commission was issued a reference by the Commonwealth Attorney-General to review the application of client legal privilege where coercive information gathering powers are exercised by Federal agencies. While the ALRC has yet to release its final report, which is expected in December 2007, the ALRC has confirmed the fundamental importance of client legal privilege and agreed that it should only be abrogated in exceptional circumstances and only by an Act of Parliament.

90. The Law Council notes that section 303C of the Migration Act allows the MARA to request information to which client legal privilege will obviously apply, under threat of heavy fines or administrative penalties for non-compliance. The Law Council has been advised of instances where the MARA has done just this. Such behaviour would demonstrate a clear disregard for the overriding legal obligations lawyers have to their clients and to the court.

91. The Law Council considers that it is grossly inappropriate for any regulatory body to attempt to sanction a lawyer for refusing to disclose privileged information. It is noted that the Federal Court has affirmed the right of a client to claim privilege over communications and documents created by his or her solicitor-agent for the dominant purpose of giving legal advice, even where the lawyer was providing "immigration assistance".[41] A situation should never be allowed to arise which requires a lawyer to chose to uphold obligations owed to another entity over their duty to their client or else risk penalty.

92. The fact that MARA has demonstrated a lack of preparedness to respect the overriding ethical and professional obligations of lawyers to their clients underlines the inappropriateness of including lawyers in the migration agents' regulatory scheme.

<u>Complaints against legal practitioners</u>

93. Available data concerning complaints against legal practitioners provides no basis for arguing dual regulation of lawyers by the MARA is either justified or necessary. As at 30 June 2006 the MARA had received 3547 complaints about migration agents since it was established in 1998. Of those complaints 910 (or 25.6%) were made against agents with legal qualifications. However in 2002-2003, of 3,084 migration agents registered with MARA, 952 (or 30.9 per cent) had legal qualifications. However, it is not known how many of those with legal qualifications all held legal practising certificates and whether the proportion of agents with legal practising certificates changed over the course of the scheme's operation. It also does not account for the fact that lawyers who are registered

[40] Ibid.

[41] *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64

agents may advise in other areas of the law and thus conduct varying degrees of work as an agent.

94. DIAC states in the discussion paper that '18 per cent of MARA's sanction decisions have been against lawyer agents with a legal practising certificate. However, there is no publicly available information to assist in determining the scope of complaints, what sanctions were taken by MARA, or what these complaints in fact related to. Unlike the Legal Service Commissioners, Law Societies or Bar Associations, the MARA does not have the power to issue costs or compensation orders. This emphasises differences between the complaints resolution schemes, in particular the greater degree of consumer protection afforded by existing legal profession regulations.

95. It is noted that under s316(1)(e) of the *Migration Act* one of the functions of the MARA is:

> *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.*

96. 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.[42]

97. 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.

98. The Legal Services Commissioners and State and Territory Law Societies and Bar Associations are empowered to investigate all complaints against practitioners and to determine what, if any, action is appropriate. This is particularly important given the high ethical and professional standards imposed on practitioners by legal profession regulation and the important role of legal professional bodies in upholding the standards of the legal profession[43].

The National Profession

99. Presently, the regulatory standards in each jurisdiction are in the process of harmonisation with the passage of uniform National Profession laws. In 2004, uniform Legal Profession Acts were introduced or amended in NSW, Victoria and Queensland. It is anticipated that Legal Profession Bills based on the National Profession Model Bill will be introduced in Tasmania, Northern Territory, the ACT,

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[42] Migration Agent Regulatory Authority, Annual Report 2004-2005. Average number of sanction decisions calculated using total complaints over total years of operation of scheme. Note that this figure is not representative of the thousands of complaints which have been deemed unmeritorious by the MARA.

[43] An ancillary concern is that currently there is nothing to prevent a lawyer being subject to penalties under both schemes of regulation, despite the fundamental legal principle of double jeopardy. Once a practitioner has been subject to sanctioning for misconduct by the Law Society or Legal Services Commissioner, it seems unconscionable for the MARA to met out further punishment. However, this is currently possible and the Law Council has been advised anecdotally that there have been numerous instances in which this has occurred.

South Australia and Western Australia by the end of 2007. It is hoped that Australia-wide operation of the Model Bill might be in place by mid-2008.

100. The move toward a nationally regulated legal profession highlights the inappropriateness of subjecting lawyers to separate regulation by a private non-lawyer organisation. At a time when Federal, State and Territory Attorneys General are striving to ensure regulation of the legal profession is uniform across all jurisdictions, regulation of legal practitioners by the MARA disrupts this uniformity and runs contrary to the Attorneys' efforts to create a principled and comprehensive scheme of regulation for the legal profession.

101. The Law Council is concerned that migration law is the only area of law in which a trained, qualified and admitted lawyer is restrained from freely practising. The principle behind the regulatory scheme which requires persons who give legal advice to be admitted as lawyers is to ensure that the only people who can legally practise law are those people with the necessary training and ability to understand, interpret, and apply the law in Australia. Certain specialised knowledge is required in every field of legal practise and the Law Council believes it is unnecessary to impose additional regulatory requirements on lawyers practising migration law.

102. The Law Council strongly believes that regulation of the legal profession cannot be truly harmonised while a parallel conflicting regulatory scheme exists.

Reducing the Regulatory Burden on Business

103. Noting the matters outlined above, the Law Council submits that dual regulation also conflicts with the Federal Government's stated policy of removing unnecessary regulation.

104. The Regulation Taskforce (Taskforce) was established in October 2005 to oversee wide-ranging consultation with businesses and government and identify, report and provide recommendations concerning areas of regulation that are unnecessarily burdensome, complex, redundant, or duplicated. The Taskforce released its Report in January 2006. The Taskforce noted that "in many areas…regulation has gone beyond what is sensible".[44]

105. At its meeting in February 2006 the Council of Australian Governments (COAG) agreed to implement reforms which enhance regulatory consistency across jurisdictions. All governments agreed to examine ways of reducing duplication and overlap in regulation and in the roles and operations of regulatory bodies.

106. The Federal Government released its response to the Taskforce's report on 15 August 2006. In its response the Government agreed to recommendations to enhance mechanisms for preventing unnecessary regulation and restated its commitment to reducing existing regulatory red-tape.

107. The recommendations of the Taskforce and the commitment of the Federal, State and Territory Governments to reducing regulatory red-tape go to the heart of the Law Council's concerns over the dual regulation of migration lawyers.

[44] Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January. at p5.

Dual regulation undermines consumer protection

108. The Law Council notes that the dual-regulation scheme has a damaging effect on consumer protection because:

- The scheme effectively facilitates misleading and deceptive conduct, by allowing agents to hold themselves out as qualified to provide migration law advice;
- Clients of lawyers, who are registered as migration agents and provide 'immigration assistance', may not be covered by the Law Societies' fidelity funds or professional standards schemes;
- The dual regulatory scheme creates a major disincentive for lawyers to practice immigration law; and
- Lawyers who are not registered migration agents may be unable to give comprehensive legal advice to clients who seek advice in a number of legal areas including migration law.

<u>Facilitation of misleading and deceptive conduct by agents</u>

109. Generally, consumers rely on available information about agents from whom they are seeking advice to determine whether that individual is skilful or trustworthy in their chosen profession. Consumers are unable to make accurate decisions in their best interests if this information is not available, or inaccurate information is provided.

110. The Law Council notes that the most common form of misleading conduct, in relation to which the registration scheme provides almost no sanctions or guidance, is the use of misleading business titles or advertising. If an agent holds themselves out as a 'migration law specialist', or purports to offer 'legal services' a consumer has little reason to question that person's credentials or even doubt that they are engaging with a legally trained 'expert'.

111. The Law Council notes that it is illegal in all jurisdictions for persons to hold themselves out to be a lawyer unless they are qualified and admitted within the appropriate jurisdiction. This prohibition exists because people who believe they are speaking with a lawyer are entitled to make a number of assumptions, including that:

- client legal privilege (CLP) attaches to any information passing between themselves and the lawyer;
- the person advising them is competent to, and legally obligated to advise them of any other legal issues arising from their situation;
- the lawyer has appropriate professional indemnity insurance and cover under a fidelity fund, which protects the client against defalcation, negligence or other misconduct.

112. For example, person looking for immigration assistance and advice may approach a registered agent who is legally trained (i.e. they have a law degree), is registered as a migration agent, but does not hold a legal practising certificate and has never practised migration law. Whilst that agent is not qualified to give

legal advice, he or she may leave it open for a customer to draw that conclusion by simply framing and hanging their law degree and certificate of registration in their office and claiming that they 'specialise' in migration law.

113. The Law Council notes that a straightforward search of the MIA/MARA's agents database reveals that there are numerous agents without legal qualifications or a current practising certificate operating under a business title using terms such as "legal migration services", "migration law services", "migration law expert" and "migration law specialist". Use of such terms in this context implies that a person has special legal qualifications or expertise and represents a clear breach of legal profession legislation.

114. These examples have been drawn from a simple comparison of MARA-listed migration agents with the names of current holders of legal practising certificates held by State and Territory Law Societies and Bar Associations.

115. The Law Council notes that customers of migration agents in these circumstances are vulnerable, because they may:

    (a) be unaware that they are not protected by the extensive legal profession regulatory framework, including the law societies' fidelity funds, professional indemnity insurance;

    (b) be unaware that they are not entitled to expect the high standard of professional conduct required of lawyers under the legal profession legislation and professional conduct rules;

    (c) erroneously believe that client legal privilege attaches to their communications, unsuspecting that records of their communications may be taken by DIAC, MARA, or any other agency with coercive information gathering powers.

116. This misapprehensions are fostered by a dual regulatory framework which fails to differentiate between lawyers with legal practising certificates and registered agents who are not admitted and therefore unqualified to give legal advice, and does nothing to proscribe misleading and deceptive conduct by non-lawyer agents when it occurs.

117. A further concern is the implication that a lawyer who is a not registered migration agents is somehow less qualified or competent to advise on migration law issues, an implication which is fostered by the dual regulatory scheme. If a lawyer is approached by a client seeking assistance with an immigration matter, the lawyer is forced to tell the client that they are not registered and therefore not permitted to assist. This is likely to be interpreted by the client as meaning that the lawyer is not competent to assist in this area, or that a registered migration agent is more competent simply because they are registered.

<u>Who should regulate misleading and deceptive conduct?</u>

118. While both MARA and DIAC have ostensibly agreed that the use of business names and advertising, outlined above, is misleading and should not occur, no real steps have been taken to address it, or sanction agents who unethically hold themselves out as legally qualified. On the other hand, it is noted that it is very difficult for the Law Societies to address this conduct. The following outlines

several reasons why the dual regulatory scheme allows this illegitimate conduct to proceed unsanctioned:

- First, it is the obligation of the Law Societies' and statutory Legal Services Boards or Commissioners to regulate the conduct of legal practitioners. The existence of MARA leads to the reasonable conclusion that the Law Societies have no role in regulating the conduct of non-lawyer migration agents.

- MARA is charged with regulating the conduct of registered migration agents. The Law Council notes that the Legal Profession legislation prohibits non-lawyers holding themselves out as legally qualified or trained. Given that the sorts of business titles, outlined above, constitute exactly the sort of conduct which breaches state and territory Legal Profession laws, the Law Council believes there should be a reasonable expectation that MARA will take steps to address the unethical conduct of agents who engage in that behaviour, given it is the body with responsibility for regulating migration agents.

- However, while the MARA maintains a registry containing the name, contact details and registration number of each agent[45], it refuses to differentiate between persons with legal training, persons with practicing certificates or persons who are Accredited Immigration Law Specialists, or agents without formal legal training. This problem has been avoided in the UK, where a 'tiered' system is used to distinguish between different levels of competency to give immigration advice (outlined in **Attachment B**). Despite repeated calls (by registered migration lawyers, state and territory Law Societies and the Law Council) for MARA to simply provide consumers with information about whether a registered agent is legally qualified, there has been no move to address these concerns. The MARA Code of Conduct does not even require non-lawyer agents to inform their clients that they are not authorised to give legal advice or undertake legal work. It is noted that this situation may well persist because MARA and the MIA are one and the same – the MIA has no interest in being seen to highlight the qualifications of lawyers, when those with legal qualifications make up just 30 per cent of all agents and a very small proportion of its membership.

- The response by MARA and DIAC to the Law Council's concerns that misleading conduct be addressed by MARA has been met with the response that the Law Societies are the appropriate bodies to address this form of conduct, as it involves breaches of the legal profession legislation. The Law Council notes that, while the Law Societies are ostensibly empowered to address this form of misleading conduct, the problem in this instance is created by the dual regulatory scheme and exacerbated by the utter complacency of MARA in failing to even provide even the most basic information to consumers about agents' qualifications.

- On the other hand, it is extremely difficult for Law Societies to regulate such conduct because most of the relevant information is held by MARA. Moreover, Law Societies and legal services regulators do not have resources to regulate conduct about which no complaint has been made. However, in most cases, it will be almost impossible for consumers,

[45] This information must be stored on the register, as prescribed under the *Migration Agents Regulations 1998* (Cth), reg.3V.

lawyers or other agents to assess whether the Legal Profession Act has been breached, given there is no information publicly available to assist in such inquiries.

- Finally, the High Court's decision in *Cunliffe v the Commonwealth*[46] casts a shadow over whether such conduct is capable of being addressed under state and territory legal profession legislation, due to the doctrine of supremacy of laws. The *Migration Act 1958* establishes a Federal scheme for regulating the conduct of migration agents, effectively giving the Commonwealth regulatory power over any person registered under that scheme or providing immigration assistance for commercial benefit. In addition, the silence of the scheme on misleading advertising and failure of MARA to regulate such conduct, may effectively prevent Law Societies and Bar Associations from taking action against anybody registered under that scheme. While this matter has not been resolved by any litigation on the issue, it is possible that state and territory legal profession laws are ineffective, insofar they are inconsistent with a federal enactment or purport to address conduct that is impliedly sanctioned under a Federal regulatory scheme. It must also be noted that the *Trade Practices Act 1975* proscribes such conduct at the Federal level, bolstering the conclusion that DIAC and MARA should take concrete steps to address the conduct.

119. There is a substantial amount of anecdotal evidence that the clients of many non-lawyer agents, particularly if English is not their first language, habitually refer to the agent as their "lawyer". There is similar evidence that some agents provide clients with pro-forma Federal Magistrates Court applications and advise them on how to file an application for judicial review. This carries a great potential for abuse of process. Non-lawyer agents are not officers of the court and therefore can seldom be held accountable for professional misconduct or negligence to the same extent as lawyers.

120. The Law Council notes that the DIAC publication 'Using a Migration Agent' states that a migration agent may "provide advice on more complex immigration matters and assist with review applications". However no distinction is made between agents who are solicitors with practicing certificates and migration agents.

121. This problem is exacerbated by the requirement that migration agents provide to clients the information booklet entitled 'Information on the Regulation of the Migration Advice Profession.' This booklet implies that all immigration advisers are part of the 'migration agent profession' and makes no attempt to distinguish between solicitors with practicing certificates and migration agents. The booklet suggests only one complaints mechanism, the MARA. No mention is made of review and investigative powers of Law Societies.

122. Non-lawyer agents are not required by the MARA Code of Conduct to actively inform their clients that they are not authorised to give legal advice or undertake legal work. Notwithstanding that the practises of those agents may be misleading and deceptive, the only safeguard against this conduct exists under the *Legal Profession Act*. This effectively places the onus on the Law Societies to take action, either through the courts or by application to the MARA concerning the conduct of a particular agent. As discussed above, the Law Council believes it should not be the responsibility of legal bodies to police this conduct, given that:

[46] (1994) 124 ALR 120

(1) the migration agent regulatory scheme appears to facilitate such conduct by failing to require a differentiation between lawyers and non-lawyer agents and by failing to proscribe the conduct in any way;

(2) MARA possesses, but refuses to publish, relevant information about agents' qualifications and background, making it almost impossible for Law Societies to properly address the conduct;

(3) the activities of migration agents clearly fall within a Federal regulatory scheme, with the relevant conduct apparently sanctioned by the scheme under the *Migration Act 1958,* but proscribed under the *Trade Practices Act 1975*.

123. The Law Council submits that this is clearly a matter which must be addressed under the migration agents' regulatory scheme. By forcing lawyers to register alongside non-lawyer migration agents, the scheme legitimises the behaviour of migration agents who hold themselves out to be lawyers. It is submitted that the current scheme puts consumers at risk of exploitation by agents who are able to pass themselves off as specialists in migration law, despite having no formal qualifications, legal or otherwise.

124. CLP does not attach to communications between a person and a migration agent and a non-lawyer migration agent is not trained, qualified, or obliged to advise a client of ancillary legal issues. The Law Council also notes that while a migration agent is required to have professional indemnity insurance it is unlikely that any such insurance cover would extend to a situation where the agent has illegally held themselves out to be a lawyer or where the non-lawyer migration agent has provided advice outside the scope of "immigration assistance", such as employment law advice or assistance.

Lower standard of protection for clients of registered agents

125. The Law Council notes Section 292B of the *Migration Act* requires migration agents to hold professional indemnity insurance (PII). Lawyers must hold professional indemnity insurance cover to protect against actions for professional negligence, a factor which further adds to protection of clients. The level of indemnity required for migration agents is significantly lower than for legal practitioners and it is therefore apparent that the s 292B requirement is redundant for migration lawyers, given their pre-existing obligations to hold PII.

126. Greater PII obligations and annual auditing requirements imposed on lawyers are examples of the greater protection afforded to clients under existing legal profession regulations.

127. Those who seek legal advice from lawyers are also protected by law society fidelity funds, which guarantee indemnity for clients against defalcation, negligent or unprofessional conduct. The Law Council is not aware of any similar protection offered to clients of non-lawyer agents.

<u>Conflicting approach by LSNSW Professional Standards</u>

128. The Law Council has been advised that clients of NSW solicitors, who are registered as agents, may not be protected by the Law Society of NSW's fidelity fund on the basis that their lawyer is acting as a migration agent, not a legal practitioner. The Law Council notes that this approach appears to have arisen

out of confusion about the role the migration lawyer is actually performing, confusion which is perpetuated by dual regulation[47].

129. It is noted that no fidelity fund currently exists for agents and, if one did (as is contemplated in Chapter 4 of the discussion paper) practising lawyer-agents in NSW would be required to pay into a second fidelity fund to ensure that their clients, in all areas of their practice, are covered.

130. The Law Council has not had opportunity at this stage to discover whether the approach of Law Societies in other jurisdictions is the same, though it is intended that the Law Council will write to its constituent bodies requesting this information in due course. However, this is a clear example of the confusing and deleterious impact of dual regulation, and a very strong basis for concluding that dual regulation is, in fact, damaging for consumer protection.

Dual-regulation creates disincentive for migration lawyers

131. Requiring lawyers to register as migration agents creates a major disincentive for lawyers to practise migration law. Substantial administrative requirements, the diminution of the lawyer-client relationship, unfair CPD burden, the cost of registration and the lack of differentiation between migration lawyers and non-lawyer migration agents are factors which discourage the involvement of lawyers in the migration advice industry.

132. The annual registration fee of $1,595 is substantial and presents a major imposition on practising lawyers who are subject to practising certificate, professional indemnity insurance and fidelity fund fees and other regulatory overheads. Given the choice of a variety of areas of law in which to practise, many practitioners opt not to practise or register as migration lawyers, particularly if migration law advice represents only a small part of their overall business. This reduces the number of qualified legal professionals available to give legal advice to migrants.

133. This situation is compounded by the fact that immigration lawyers have to market themselves to differentiate their services from those provided by non-lawyer migration agents.

134. On 1 January 2004, there were 3,260 registered migration agents, of which 986 (30.2 per cent) had legal qualifications and only 777 (23 per cent) held practicing certificates[48] – out of approximately 50,000 practising lawyers who are currently members of their local Law Society or Bar Association. This illustrates that most lawyers are not seeking registration under the scheme, either due to the necessity of competing with non-lawyers to provide migration law advice or due to the expense and difficulty of doing so. The Law Council has also been advised that there are very few lawyers who practise migration law, who are not registered as agents.

[47] It is noted that the approach of LSNSW Professional Standards is different to LawCover, which continues to insure the activities of registered migration lawyers – although it is not clear whether this is the same for all jurisdictions.

[48] Statistics obtained from DIMA Quarterly Statistical Reports, released under the *Freedom of Information Act 1982*.

Continuing professional development (CPD)

135. The CPD burden for migration lawyers under dual regulation is a major disincentive to practising in this area. Continuing professional development of lawyers is required by State and Territory Bar Associations and Law Societies. It is a condition of renewal of a lawyer's practising certificate each year that the lawyer undertakes 10 hours or more of CPD over the calendar year in relation to their various areas of practise.[49] In some jurisdictions it is mandatory for lawyers to complete a certain number of hours in ethics, trust accounting, and equal opportunity. A lawyer who fails to meet CPD requirements will lose the right to practise.

136. MARA requires that migration lawyers undertake 10 hours of CPD either with MIA or another MARA appointed provider. This adds to the overall CPD burden on lawyers, who are also required to undertake CPD in other areas of practise.

137. For example, a lawyer whose practice involves 70 per cent civil litigation, 20 per cent criminal law and 10 per cent migration advice may appropriately apportion 10 hours of CPD according to those values. The additional burden imposed by the MARA requires that lawyer to spend an extra 9 hours on CPD, such that lawyers who choose to practise as migration lawyers may have to complete up to 19 hours of CPD.

138. As previously mentioned, the skills required to practise migration law are not substantially different from the skills required to practise in any other area of law. The burden of additional CPD both financially (CPD course costs range from $100 - $300 per hour) and in terms of time lost in billable hours is a major disincentive for lawyers to practise migration law.

139. The Law Council submits that the disincentives created by dual regulation have a direct correlation to the dwindling number of lawyers registering as migration agents, which impacts negatively on the migration advice industry by:

- precipitating 'brain drain' from Community Legal Advice Centres (CLCs); and
- reducing the number of migration lawyers willing and able to advise and receive instructions from clients.

Drain on Community Legal Advice Centres

140. CLCs generally have significant trouble attracting experienced practitioners who are willing to provide *pro bono* legal advice to migrants. This problem is exacerbated by a severe "brain drain" of specialist migration lawyers, who cease practising due to frustration with the oppressive regulatory scheme.

141. 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. CLCs, such as the Refugee Advice and Casework Service, generally rely on the generosity of registered migration lawyers, whose donation of time and experience is integral to the quality of advice and service

[49] The requirements vary, though in each State and Territory the minimum CPD requirement for non-accredited specialists is 10 hours of learning or teaching a course of study in the areas of their practice.

available to migrants, who are often unable to afford to pay for private legal advice.

142. The vast majority of those who are willing to provide legal advice in this capacity have limited experience or must be closely supervised by RACS staff because they are not registered. This substantially restricts the amount and the type of work which may be performed by practitioners who generously donate their time and stretches the resources of CLCs considerably.

143. The problem is exacerbated when matters are referred to the Federal Court for review. While a barrister does not need to be registered as a migration agent to assist with judicial review proceedings, for ethical and practical reasons a barrister needs the assistance of a solicitor to run a case. While a solicitor technically does not need to be registered to provide immigration legal assistance, a client will, for example, require a visa to stay in Australia while the case is on-going. This will require the giving of immigration advice by a registered agent. For practical reasons discussed previously an instructing solicitor will almost inevitably need to be registered as a migration agent in order to provide comprehensive legal advice to the client.

144. These factors combine to significantly disable the capacity of CLCs to adequately brief lawyers and provide comprehensive legal advice and services to migrants.

Shortage of Practitioner Agents

145. Less than 2 per cent of lawyers admitted to practice are registered migration agents. The Law Council submits that this number does not reflect the number of lawyers who are competent to provide advice on immigration issues. Vast numbers of applications are made to the Migration and Refugee Tribunals and to the Federal Courts each year challenging decisions made by the Immigration Minister and DIMA. The shortage of available counsel presents a significant problem for migrants and for courts.

146. In particular, 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.

147. The Law Council is advised that, while an applicant may experience significant difficulty in obtaining legal representation from the relatively small pool of registered migration lawyers, the Government respondent faces no such problem because the Minister will never require immigration assistance and is thus not restricted to retaining a practitioner who is a registered agent.

148. This creates a fundamental power imbalance between the Government, which has vast financial resources and few restrictions in the proceedings, and migrants, whose resources are comparatively meagre and who face considerable restrictions as well as potentially devastating consequences in the event that their interests are not properly represented.

149. The Law Council submits that the shortage of practitioner agents is compounded by dual regulation of migration lawyers. The Law Council believes that the serious consumer protection concerns for the migration advice industry and for the administration of immigration and review services must be addressed.

Lawyers unable to give comprehensive legal advice

150. Lawyers have a duty to provide comprehensive legal advice to their clients which addresses all relevant legal issues. A fundamental problem created by the migration agent regulatory scheme is that lawyers who are not registered are not legally permitted to provide legal advice on a range of immigration issues, regardless of the circumstances in which those issues arise or the lawyer's experience and capacity to do so.

151. Section 280 of the *Migration Act 1958 (Cth)* prohibits a person who is not a registered migration agent from giving immigration assistance. The *Migration Act* defines immigration assistance as assisting a visa applicant by:

- providing assistance to them in the preparation of an application;
- offering them advice in relation to an application;
- assisting them to prepare for proceedings before a court or review authority such as the Migration Review Tribunal in relation to a visa application. [50]

152. However, lawyers are permitted to give 'immigration legal assistance' if they act for or represent a visa applicant in relation to proceedings before a court or give advice to a visa applicant in relation to a visa application which is not for the purpose of the preparation or review of the application.[51]

153. It is confusing for lawyers that the *Migration Act* prohibits them from providing legal advice in relation to a visa application or in relation to the review of that application conducted before a Tribunal, but permits them giving that same advice when identical issues arise in court proceedings.

154. There is also considerable confusion for lawyers, whose primary practice is not migration law and who consequently choose not to register as agents, as to whether they will be in breach of the *Migration Act* if they provide any immigration advice or assistance in the context of a different scheme of regulation.

155. This confusion is difficult to reconcile with a solicitor's duty to provide comprehensive legal advice to their clients which addresses all relevant legal issues. For example, if an immigration issue, such as the need to lodge a visa application, arises in the process of a non-agent lawyer giving advice on a family law matter, unless the lawyer is registered as a migration agent the client will be unable to obtain the comprehensive, strategic advice they require. This conflict can arise in other contexts, such as employment matters, where an in-house solicitor explains an employment contract to a foreign employee who is sponsored by the company to live and work in Australia.

156. In such situations it will always be a burden for a client, who requires advice on immigration issues arising from some other matter, to seek out another solicitor or agent who is registered with the MARA.

157. Clients are currently protected by legal profession conduct rules which require a lawyer to inform a client of their relevant experience in a particular area of law. A client has a choice between funding an advice from counsel or a specialist agent,

[50] Section 276.
[51] Section 277 *Migration Act*.1958 (Cth)

or allowing the lawyer time to research into the unfamiliar area of law in order to provide advice on the matter. Often a client will have a preferred and trusted lawyer. It is undesirable that lawyers, who seek to provide basic migration law advice to clients in these circumstances, are required to cause additional delays and expense to their clients by commissioning advice from another practitioner who is registered.

158. By virtue of their admission, lawyers are recognised as qualified to practise, interpret and apply the law. Assisting clients to prepare documentation that complies with prescribed legal regulations is a legal task which no practising lawyer should be restricted from providing. The *Migration Act* prevents a lawyer from assisting a client in preparing a visa application by, for example, checking to ensure that the application complies with the legal rules and regulations relating to the lodgement of visa applications. The Law Council submits that this is an untenable restriction on the practise of lawyers. In effect the regulatory provisions prevent a lawyer from assisting clients to ensure compliance with a relevant law.

159. The Law Council has previously stated that there is nothing particularly complex or challenging in providing immigration law advice or immigration assistance, if it is compared with any other area of legal practice. The skills involved in providing immigration advice or assistance, beyond direct knowledge of the specific legislative scheme, are similar to any form of administrative law practice. However, those who are experts in tribunal applications and Federal Court will very often choose not to specialise in migration law due to the additional regulatory burden.

7B – Dual Regulation: the discussion paper

160. The discussion paper refers to a number of the arguments outlined above, noting several that the Law Council has previously advised DIAC and the Parliamentary Secretary to the Minister for Immigration about 'disadvantages' of regulating lawyers under the migration agents registration scheme.

161. DIAC then refers to four 'advantages' of including lawyers in the scheme, which the following will consider.

Dual regulation supports a unified migration advice profession

162. The first alleged 'advantage' of including lawyers in the migration agents' registration scheme (hereafter referred to as 'Statement 1') is the

> *It supports a unified migration advice profession that will better benefit consumer awareness and protection through consistent standards of professional conduct and quality of service across the profession.*

163. It is clear that DIAC is very eager to ensure that the regulation of migration advisers is managed under a single banner of regulation. However, Statement 1 fails to acknowledge that the professional competence of lawyers is currently regulated under different standards than those applying to non-lawyer agents, which reflect professional obligations that extend beyond those contemplated by the migration agents' registration scheme. The Law Council has made repeated submissions on this point – dual regulation of lawyers does not result in a 'unified migration advice profession', it results in excessive regulation of a group of

migration law advisers who are already subject to the most comprehensive professional regulatory regime in the country.

164. Statement 1 appears to convey that DIAC is believes consistent standards are necessary, however it is unclear how consistent standards can be achieved while dual regulation exists (or whether such an objective is desirable). If lawyers are not removed from the migration agents' regulatory scheme, the only way to achieve consistent standards of consumer protection is to strike all migration lawyers from the roll of legal practitioners and revoke their legal practising certificates, so that they are not subject to the supervision of the courts or the legal services regulators. This would, in effect, would have the curious result that practising lawyers would not be permitted to register as migration agents and would certainly lower regulatory standards of legally trained advisers (thus achieving consistency).

165. Alternatively, it may be that DIAC is suggesting that requiring both lawyers and non-lawyer agents to register as migration agents will give consumers a single mechanism for complaint about unprofessional or unethical conduct. The Law Council notes that dual regulation has been in place for several years, and submits that, as outlined above, there is significant confusion among consumers, lawyers, agents, MARA, the Law Societies and perhaps even DIAC, about who is the appropriate body to address alleged misconduct, where it occurs. When people have a complaint against a lawyer, it makes perfect sense that they should take their complaint to the legal services regulator. If they have a complaint against a non-lawyer, they should be advised to lodge their complaint with MARA. However, at present, consumers are expected to differentiate as to when their lawyer was acting as an agent, to know whether their agent is qualified to provide legal advice, or understand when their non-lawyer agent was illegitimately providing legal services.

166. The Law Council notes that it is unclear how DIAC can suggest that the present scheme is achieving 'consistent standards of professional conduct and quality of service across the profession'. The Law Council strongly disagrees with this statement for the following reasons:

    (1) Clients of lawyers and non-lawyer agents <u>are not</u> subject to the same standards of professional conduct as those required of the legal profession. It is not appropriate, or desirable, to seek to achieve this aim, unless the objective is to require all agents to obtain law degrees and practising certificates.

    (2) No evidence is presented by DIAC to suggest that dual regulation is improving the standards of non-lawyers or lawyers. In fact, the Law Council submits that the opposite is probably true in relation to those with legal qualifications. If complaints are not directed to the legal services regulator, lawyers are not subject to the same administrative, pecuniary or professional penalties as apply to other lawyers who engage in unprofessional conduct. As noted above, in 2004/05 just 16 of 113 complaints in relation legally qualified agents which resulted in a 'sanction decision' by MARA were referred to the Law Society or Legal Services Commissioner or Board.

    (3) CPD courses managed by MARA and other approved CPD providers are not directed at those with formal legal training and, consequently, do not generally assist lawyers to improve their knowledge of current immigration

law and practise. The Law Council is advised that the Law Societies and Bar Associations have generally ceased providing immigration law courses because of the dwindling number of lawyers practising in the area, the requirement to compete with the MIA and other providers, and the frustration of having to seek approval from MARA to run courses which the Law Societies design and run in every other field of practise.

The fact that MARA is now awarding 5 CPD points per unit completed in what is ostensibly supposed to be an entry level course for migration agents' registration is a clear demonstration that standards within the migration advice industry are not consistent. The vast majority of registered migration agents have not completed a Graduate Diploma in Migration Law and Practice (GDMP) and many do not even have formal qualifications. By virtue of having completed a law degree and practical legal training (which the GDMP appears to be intended to mimic), lawyers already have the skills and training necessary to commence practising in any field. Lawyers subsequently hone their skills in their relevant fields of practice by undertaking quality continuing legal education. Lawyers also have the opportunity to obtain Specialist Accreditation, which is a signal to consumers and clients that the relevant practitioner has undergone specialist training in migration law and will provide the highest standard of legal advice in that area.

167. The Law Council submits that dual regulation has not achieved consistent standards in the migration advice profession, that it threatens to lower the standards of migration lawyers who would ordinarily be subject to complete regulation by the Legal Services regulator, and that lawyers should not be required to register with MARA under the scheme.

Practising lawyers not experienced or knowledgeable

168. The second alleged 'advantage' of dual regulation referred to by DIAC (hereafter referred to as 'Statement 2') is that:

> *Practising lawyers are not necessarily experienced or knowledgeable in migration law and policy, which are very complex and change frequently. This lack of knowledge is demonstrated by the considerable number of lawyer agents who contact DIAC seeking advice, which, as practising agents, they would be expected to know.*

169. Statement 2 appears to assert that practising lawyers are not performing at a standard ordinarily expected of registered migration agents. According to DIAC, a 'considerable number' of practising lawyers, subsequently referred to as 'lawyer agents', contact DIAC seeking advice. Why DIAC would conclude that these enquiries imply that the clients of practising lawyers are not receiving sound legal advice is not at all clear. In order to justify Statement 2, the Law Council expects that DIAC must have some statistical evidence or other data, or a system for recording the nature, content and source of inquiries that it receives.

Empirical basis

170. The Law Council has made some inquiries into the possible background to Statement 2 and notes the following:

- The Law Council contacted the Migration Agents Section of DIAC asking about the basis for Statement 2. The Law Council was advised by email dated 25 October 2007 that:

  > "The background to this statement is that at the time of writing the discussion paper the then Agents Initiatives and Monitoring Section (now Migration Agents Section) had received a flurry of queries from lawyers - both registered and unregistered - to our mailbox and our Integrity Unit - about a number of issues, many of which were covered in legislation and publicly available policy documents.
  >
  > In addition, DIAC Contact Centres and Client Service areas have consistently raised this with us as an issue."

- The Law Council subsequently contacted Optus/NEC (which the Law Council was advised has managed DIAC's call centres over the last 10 years) In the course of these inquiries, the Law Council was advised, as follows:

  (i) The NEC call centre does not record information about the composition of callers or the general nature of inquiries, as it receives approximately 20,000-30,000 calls every month;

  (ii) Staff at call centres are given the following instructions on direction from DIAC:

    (1) Ask if a caller is an immigration officer or a lawyer;

    (2) If they say they are an immigration officer, put the call straight through to appropriate legal team;

    (3) "If they say they are a lawyer, then put the call through to the regional office not to the legal areas because the legal areas do not want to talk to lawyers" (direct quote);

- The Law Council then contacted the DIAC Contact Centre, which handles basic inquiries on behalf of all DIAC divisions and policy areas, referred from the call centre. The Law Council was advised that:

  (i) The DIAC contact centre records basic information about a caller, such as their name and MARA registration number. The contact centre operators generally do not ask if the agent is legally trained, holds a practising certificate or has completed a Graduate Certificate, and such information is never recorded;

  (ii) Call centre operators provide basic information to callers, most of which is available on the DIAC website. More complex or detailed inquiries are distributed to the relevant Section of DIAC, depending on the nature of the call.

- The Law Council subsequently contacted the Migration Agents Section of DIAC again and asked whether officers in that section, which is responsible for producing the discussion paper and administering the review, had a

general practice of asking those who contact the Section whether they hold a legal practising certificate. The Law Council was advised that:

(i) There is no practice of asking callers whether they are agents, or if they have a law degree or whether they are admitted to the Bar or hold a legal practising certificate.

(ii) There is no practice in the Migration Agents Section of recording the details of callers or telephone conversations or inquiries.

(iii) DIAC is unable to provide information to corroborate the claim in the discussion paper that 'a considerable number of lawyer agents contact DIAC seeking [information], which, as practising agents, they would be expected to know'.

171. As a general comment before proceeding, it is very difficult understand why DIAC would issue instruction to its call centre operators requiring them to refer inquiries from lawyers *away* from their legal areas, and perhaps this matter will need to be corroborated or explained by DIAC. However, this information (provided by Optus/NEC) appears to demonstrate a practice by DIAC of 'weeding out' inquiries by lawyers and forcing them to direct their inquiries to those without legal training. It is not known what happens to these inquiries once they are referred to the 'regional office'. However, if DIAC is concerned about a 'unified migration advice profession' with 'consistent standards of professional conduct', the Law Council queries why inquiries from lawyers should be treated differently to any other agent or member of the public.

172. In light of the information outlined above, the Law Council is concerned about whether any empirical basis for Statement 2 exists at all. This is particularly concerning, given the statement is put forward in support of the contention that migration lawyers should be subject to dual regulation. The Law Council doubts whether any scientific or statistical analysis has underwritten Statement 2 and, if this is in fact the case, the Law Council calls upon DIAC to retract the statement.

Relevance

173. Notwithstanding the Law Council's concerns about whether an empirical basis for Statement 2 exists, the Law Council also queries its relevance to the matters under consideration,

174. It is unclear what matters a registered agent should be 'expected to know'. DIAC, in its response to the Law Council's queries on 25 October 2007, appears to have indicated that migration lawyers have been contacting DIAC seeking information that was either publicly available through DIAC's website or outlined in the *Migration Act 1958*. Unfortunately, DIAC provides no information or examples to illustrate the sorts of queries it receives, why such queries are a cause for concern and how many such queries are received from practising lawyers and non-lawyers respectively.

175. The Law Council notes that it is not irregular for lawyers, or any other member of the public, to contact government departments seeking information about government policy, particularly concerning a legislative scheme which DIAC itself claims is 'very complex and change[s] frequently'. Therefore, it is unclear how this point is relevant to the question of whether lawyers should be subject to a dual regulatory scheme, which creates a substantially more onerous regulatory

burden for a relatively small proportion of migration lawyers, compared with the remainder of non-lawyers registered under the scheme.

176. The Law Council notes that, even if the practising lawyers form a significant proportion of those who contact DIAC with inquiries, this may in fact reflect a responsible practice by lawyers working in this area. It should be of greater concern to DIAC that there may be some registered agents who do not avail themselves of the advice and information that public servants with relevant policy expertise are able to provide.

177. The Law Council again notes that lawyers practice in many areas, in which legislation and government policy is constantly changing and evolving. Immigration law is not significantly different from family law, criminal law, corporations, taxation, conveyancing, wills and probate, liquor licensing, or any specific area of administrative law. Each area changes regularly and has its own peculiarities. If lawyers and agents are contacting and discussing government policy with DIAC, the Law Council cannot understand why this is regarded by DIAC as a cause for concern.

178. The Law Council rejects Statement 2 entirely as a basis for supporting dual regulation of migration lawyers.

Complaints against migration lawyers

179. The third alleged 'advantage' of dual regulation (hereafter 'Statement 3') has been put forward by DIAC in the following terms:

> *Since 1998 over 18 per cent of MARAs sanction decisions have been against lawyer agents with a legal practising certificate. It has been found that state and territory law societies may not always action complaints about lawyer agents in a timely manner, thus demonstrating the need for this additional consumer protection.*

180. The Law Council notes again in relation to Statement 3 that no evidence, empirical or statistical basis has been provided by DIAC to assist stakeholders in responding.

181. However, on its face, the statement is quite surprising to the Law Council. The Law Council is aware that the Law Institute of Victoria has previously requested information concerning the nature of complaints received by MARA, the scope of such complaints and the types of sanctions which have been applied. The Law Council is informed that such efforts have been unsuccessful because MARA has indicated the cost of extracting such data would be in excess of $50,000.

182. Notwithstanding MARA's apparent incapacity to extract information that could assist this review, DIAC has now provided specific information that 18 per cent of MARA's sanction decisions have been against lawyers with a legal practising certificate, and that Law Societies 'may not always action complaints about lawyer agents in a timely manner'.

183. The Law Council notes that the first half of Statement 3 is hopelessly vague and impossible to appropriately assess. The statement may also be obstructive in a proper debate about the merits of dual regulation. Statement 3 provides no information about the content of the complaints received or severity of the sanction issued by MARA, and ignores the fact that lawyers with practising

certificates make up around 25 per cent of all registered migration agents. Accordingly, if it is true that practising lawyers are subject to 18 percent of all sanction decisions, this would mean that lawyers are generally less likely to engage in conduct which would invoke MARA's discretion to take action than non-lawyer agents. This certainly does not support a case for dual regulation of lawyers.

184. It is similarly impossible to assess or respond to DIAC's claim that Law Societies 'may not always action complaints about lawyer agents in a timely manner'. First, the statement does not acknowledge that lawyers in most jurisdictions are now subject to regulation by a statutorily independent Legal Service Commission or Board. Second, as noted above, just 16 of 113 complaints in relation to legally qualified agents which resulted in a 'sanction decision' by MARA were referred to the Law Society or Legal Services Commissioner or Board in 2004/05. The Law Societies and Bar Associations work closely with the Legal Services Board in each jurisdiction to ensure complaints against practitioners are investigated swiftly and addressed appropriately. The Law Council submits that this regulatory role is carried out efficiently, effectively and independently. (The Law Council refers to the information outlined above under Part 7A concerning regulation of the legal profession and the complaints handling procedures under the Legal Profession legislation, in support of these claims.) It is noted that the legal profession's complaints handling procedures would withstand significantly more scrutiny than the complaints handling procedures overseen by MARA, given its perceived lack of independence from the MIA and DIAC. The Law Council calls upon DIAC to either provide evidence to support its claim that the Law Societies are complacent in pursuing complaints about migration lawyers, or withdraw Statement 3 altogether.

MARA better able to address complaints

185. The fourth 'advantage' put forward by DIAC in support of dual regulation (herafter referred to as 'Statement 4') is that:

> *The MARA is able to address complaints against lawyer agents that state law societies might not consider sufficient to warrant disciplinary action.*

186. Statement 4 is, again, impossible to analyse or assess against the numerous cogent and well-supported arguments put forward by the Law Council against dual regulation. The statement does, however, invite speculation about the aims of dual regulation – which may be simply to ensure lawyers and agents comply with government policy.

187. No information is provided about what sort of misconduct MARA would be willing to pursue, but which legal profession regulators would be unwilling to prosecute. The MARA's Code of Conduct does not contain any remarkable provisions, which would exceed or add to the more onerous obligations of lawyers under the Law Societies' Rules of Professional Conduct, or the general duties of lawyers as officers of the Court.

188. The Law Council notes that breaches of the Migration Act, including the provisions of the *Migration Legislation Amendment (Migration Agents' Integrity Measures) Act 2004*, would be capable of referral to the Legal Services Board or Law Society for investigation. If it were found that a lawyer had behaved unprofessionally, had misled a client about their prospects of success in a visa application, or had wasted court resources by lodging spurious applications and

appeals which were simply designed to frustrate the proper administration of justice, the Law Societies and the courts would have discretion to issue a range of sanctions against them, including costs orders, fines, requirements to attend CPD courses in ethics and professional responsibility, suspension or revocation of a practising certificate or removal from the Roll of Legal Practitioners.

189. Given the range of powers available to the Law Societies, Legal Services Boards and the Cour, to sanction unprofessional conduct by lawyers, the Law Council does not believe it is possible for DIAC to contend that unprofessional or illegal conduct by lawyers will go unchecked. The Law Council is not aware of any attempt by DIAC to address these matters through dialogue with legal profession regulators, which would be an obvious starting point if such concerns are well founded. This invites speculation that DIAC may actually be concerned that Law Societies will not sanction behaviour that does not accord with government policy. Such behaviour might include lodging a visa application in the knowledge that it will be rejected by DIAC, with the intention pursuing the issue by way of judicial review, or other conduct which DIAC wishes to control or prevent, or which it believes frustrates to objectives of the government's immigration program[52].

190. If Statement 4 does actually have its underlying basis in DIAC's desire to ensure lawyers and agents comply with government policy, this demonstrates an inappropriate level of control by DIAC over the regulatory process. If the MARA is an independent regulatory agency (as was the apparent intention of statutory self-regulation), why does DIAC distinguish between the MARA's role as a regulator and the role of the statutorily independent legal services commissioners? The role of both is to ensure appropriate professional conduct, compliance with the law and appropriate consumer protection. Neither of these bodies should be required to apply, or ensure compliance with, government policy.

191. It is important to this process that DIAC recognise that regulatory agencies are required to carry out their functions independently of government to avoid any perception of interference by the Executive. This is a fundamental tenet of the rule of law – that individuals and companies are subject to laws, which are approved by Parliament and subject to consistent application by the courts and law enforcement and regulatory agencies. Governments are restrained from arbitrarily punishing or penalising people simply because they do not like their attitude or behaviour. If the government believes that it is appropriate and necessary to create new offences or penalties for certain conduct, it should do so through the Parliamentary process, not policy papers or 'Henry VIII' clauses granting government officials power to summarily penalise conduct which would otherwise be legal.

192. In light of the matters raised above, it must be queried whether statutory self-regulation is appropriate. It is clearly inappropriate for the regulatory process to be driven by policy makers. It is also inappropriate for the chief complainant (DIAC) to exert such extensive control or to maintain such a close relationship with the 'regulator'. It is also inappropriate for the migration agents' industry representative body (the MIA) to share such a close relationship with the regulatory body, particularly when the MARA is required to regulate those who

[52] Although, DIAC has advised that, since the *Migration Legislation Amendment (Migration Agents' Integrity Measures) Act 2004* was introduced, no sanction decisions have been issued against an agent for submitting too many unsuccessful applications, which does not appear to support any notion that this sort of conduct is a problem.

are not, and have no interest in being, members of the MIA. The Law Council believes that this very boldly underlines the case for the MARA to be replaced by a statutorily independent Immigration Services Commissioner, similar to the United Kingdom Office of the Immigration Services Commissioner to ensure that the regulatory body is both independent of influence by the migration agents representative body and government policy makers, and is seen to be independent as well.

193. The Law Council also submits that, for the purposes of this review, DIAC should outline the following:

- what forms of misconduct are not likely to be addressed under the legal profession regulatory scheme;
- why this is the case; and
- what is the actual extent of the problem?

194. The Law Council submits that, until these matters are answered by DIAC, it is impossible to respond to Statement 4, beyond noting the very serious concerns outlined above concerning the perceived independence of MARA under current arrangements.

7C – Dual Regulation: Summary and Recommendations

195. The Law Council submits that dual regulation of migration lawyers is oppressive, unnecessary, creates significant conflicts for lawyers and is inconsistent with both the uniform legal profession regulatory scheme, which the legal profession and Standing Committee of Attorneys-General have striven to implement over the last 5-7 years, and the Federal Government's policy of removing unnecessary regulation.

196. The Law Council submits that:

- lawyers with current practising certificates should not be required to register or be subject to regulation by the MARA; and
- the MARA should be wound up and replaced with a Commonwealth statutorily body or commissioner that is independent of the MIA, DIAC or any other government agency.

197. 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, outlined in **Attachment B**.

198. If dual regulation continues, the Law Council submits that:

- 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;

- 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;

- 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 specialist accreditation from a Law Society; and

- 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.

199. The Law Council strongly believes that the present scheme actually weakens consumer protection by failing to provide any differentiation between lawyers and non-lawyer agents, or between those who have basic university and post-graduate qualifications, and those who do not. It is a grave paradox that the scheme, as it stands, imposes a significantly greater burden on lawyers comparative to non-lawyers, despite that practising lawyers are already required to meet the highest standards of ethical and professional conduct. The discussion paper provides no defensible or evidentiary basis to support dual regulation and, for the several cogent reasons outlined above, the Law Council submits that dual regulation should be ended as soon as possible.

8 – Priority processing

200. The Law Council opposes that there be any scheme of priority processing for migration agents. The suggested scheme is fraught with problems and seems overly complicated.

201. Visa applications are granted on the basis that an applicant meets the visa criteria. An application that has been prepared competently and attaching all of the appropriate documentation should expect to be processed and granted faster than one that has not been (as indicated at 8.2 in the discussion paper). Presumably if an application presents complex issues this would be flagged by the agent and should receive attention by DIAC.

202. Many people may be preparing their own applications and are able to do so quite competently and thoroughly. The Law Council believes it would be inappropriate and unfair to place unrepresented parties at a disadvantage by not paying an agent to complete their visa application.

203. Many migration agents at community legal centres assist clients in preparing their applications and have developed expertise in the areas of family and humanitarian migration and prepare competent and thorough applications. While agents have to note in the application that they assisted in the preparation of the application they do not go on the record to act in an ongoing way to receive communications on behalf of the client. The effective method therefore is to enable applicants to apply, rather than carry out that function for them. It is very important that impecunious applicants, who seek assistance through legal aid and migration resources centres, are not placed at a disadvantage to those people who are financially better off. Preserving this practice is also important,

given the meagre resources available to legal aid offices and migration resource centres.

204. It is noted that the Code of Conduct currently prohibits an agent advising a client that they have a relationship with DIAC (Clause 2.12), or holding out that they can obtain priority processing on an application (Clause 2.14). The logic behind this provision is presumably to protect clients from agents acting unscrupulously or representing that their 'insider' contacts will make things happen.

205. Other than submitting a completed application, priorities in terms of the processing of visa applications should be on the basis of need - not on whether or not a person has engaged a migration agent. The Minister already issues directions pursuant to s.499 of the Migration Act 1958 (Cth) in terms of the priority of the processing of applications. For example, Direction 35: Order of Consideration of Applications for Sponsorship, Nomination and Visas under the Skill Stream of the Migration Program and the Temporary Residence Program; and Direction 34: Order of Consideration and Disposal of Applications for Visas in the Family Stream under subsection 51(1) of the Migration Act 1958.

206. The Law Council considers that priority processing would privilege those who can access and afford a registered migration agent. Given there are only approximately 3000 in Australia and only a small number that operate overseas this creates a tiered system – what if a person overseas cannot legitimately access a registered migration agent?

207. In addition, priority processing has potential to be used as a tool to punish agents who do not 'toe the line' on government policy. The Law Council notes the concerns expressed above (at paragraphs 89-91) with respect to inappropriate control by DIAC over the regulatory process. The Law Council believes priority processing will further exacerbate this problem by enabling DIAC to penalise agents or lawyers for conduct which cannot be dealt with by MARA or the Law Societies (because, for example, the conduct has not breached any existing rules or legislative provisions).

208. The Law Council opposes priority processing for applications submitted by registered migration agents. The Law Council believes that any well-prepared and properly documented application should go through the system as quickly as any other. Granting priority to agents would simply foster a situation that DIAC has sought to avoid in the past - allowing certain agents to obtain commercial advantage over their competitors.

9 – Self-Regulation of the Migration Advice Profession

209. For the reasons outlined above, the Law Council strongly opposes industry self-regulation in the migration advice profession.

210. It is noted, as a general comment, that the relevant question should not be whether the migration advice profession has 'demonstrated a level of professionalism indicative of an industry ready to self-regulate'. The real issue is whether there will be a perception of independence under a regulatory scheme that is entirely operated by a professional body – being the MIA. The Law Council believes that there is no perception of independence at present and cannot see how this situation will improve if statutory regulation is replaced by industry regulation.

211. It is noted that concerns about the perceived independence of the legal profession regulatory framework was the basis for the majority of jurisdictions appointing an independent statutory legal services regulator, which works with the Law Societies and Bar Associations to ensure complaints are appropriately investigated and appropriate action taken.

212. If, following this review, it is decided that the MIA/MARA will move from statutory self-regulation to industry self-regulation, it would be utterly unacceptable to require that migration lawyers continue to be subject to dual regulation.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.

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Attachment B

International Regulation of Migration Lawyers

The regulatory environment in Australia is at odds with most countries in the western world. The regulatory schemes in the United Kingdom, New Zealand, the United States, Canada and South Africa exist for similar reasons – that is, to protect consumers of immigration advisory services. However, a common theme for each is the recognition that lawyers are more appropriately regulated as lawyers, by legal institutions charged with regulating the legal profession. The following compares the regulatory schemes of those countries[53]:

United Kingdom

- The *Immigration and Asylum Act 1999* established the Office of the Immigration Services Commissioner (OISC) as an independent public body to regulate the immigration advice profession in the United Kingdom. It is a criminal offence in the UK to provide immigration advice unless the adviser or organisation is registered with the OISC, or has been granted a certificate of exemption.

- Notably, persons who are members of a "designated professional body" may give immigration advice without registering with the OISC. Those bodies include the Law Society of England and Wales, the Law Society of Scotland, the Law Society of Northern Ireland, the Institute of Legal Executives, the General Council of the Bar, the Faculty of Advocates and the General Council of the Bar of Northern Ireland.

- Immigration services advice can also be given at different levels of competency, ranging from level 0, permitting sign posting and information, to level 3, which indicates capacity to provide specialist legal advice and advocacy services.

United States of America

- The *Immigration and Nationality Act* defines when a person is entitled to legal representation and counsel. Generally, the provision of legal advice by persons who are not licensed as attorneys is illegal in the US. Immigration Laws provide that only attorneys or employees of non-profit organisations certified by the US Board of Immigration Appeals may assist a person with their immigration forms and other matters. "Consultants" are able to provide non-legal service to persons, though the problem of these consultants posing as licensed immigration attorneys is currently under review.

- In southern States, particularly Texas, many illegal migration advisers have adopted the name "notarios", a ploy designed to confuse clients, many of whom are Mexican or Hispanic, into believing the adviser has legal qualifications. Prosecutions of "notarios" and illegal immigration consultants are generally carried out by the office of the Attorney-General in the State in which the complaint is made.

[53] This is a summary of a research paper prepared by Maria Jockel of the Immigration Lawyers Association of Australasia, 'A Comparative Analysis of the Regulation of Immigration Lawyers – Australia, United Kingdom, USA, Canada, New Zealand and South Africa', 15 October 2004.

Canada

- Canada commenced regulation of "immigration consultants" in 2004, with the establishment of the Canadian Society of Immigration Consultants (CSIC), a not-for-profit, self-regulating body for immigration consultants. The *Immigration and Refugee Protection Regulations* provides that no one who is not an 'authorised representative' may, for a fee, represent, advise or consult with a person who is the subject of a proceeding or application before the Minister, an officer or the CSIC Board. An 'authorised representative' is defined as a member in good standing of a Bar of a province, the Chambre des Notaires du Quebec, or the CSIC.

- Lawyers are not required to register with CSIC and the law in Canada actually prohibits members of the Bar from holding membership with any other professional body, to avoid any potential for conflicts of interest. There are calls for the registration scheme to be removed and for the government to outlaw the practise of migration consultancy by persons without appropriate, recognised educational qualifications.

- The new Canadian regulatory scheme has been criticised[54] for:

    1. effectively sanctioning the practise of law by non-lawyers; and

    2. granting legitimacy to migration law advisory services by non-lawyers, who lack the background, education or experience of persons admitted to practise.

- It is noted that these concerns mirror the concerns of the Australian legal profession and highlight the serious consumer protection concerns that exist, where non-lawyers are given a green light to provide legal services to a particularly vulnerable minority.[55]

New Zealand

- The New Zealand Parliament recently passed the *Immigration Advisers Licensing Bill* (270-2). The bill creates a licensing regime for people who provide immigration advice both in New Zealand and overseas. The Law Council understands that the working committee consulted heavily with the DIAC and other professional bodies before and during the drafting of the bill.

- Importantly the bill expressly exempts lawyers from registering as immigration advisers. The Law Council notes that the prospect of dual regulation of migration lawyers was expressly rejected by the Transport and Industrial Relations Committee which stated In its commentary "requiring lawyers to be licensed in order to provide immigration advice would be duplicative and might create unnecessary complications."[56]

[54] Sergio Karas, 'Canadian Immigration Bar Under Attack: Regulation of "Consultants" Sets Dangerous Precedent' (2004) Immigration Law Weekly.
[55] Ibid.
[56] *Immigration Advisers Licensing Bill (270-2)*: Commentary: Transport and Industrial Relations Committee, Wellington, New Zealand. at p4.

South Africa

- The South African *Immigration Act 2002* provides that no one, other than an attorney, advocate or immigration practitioner, may conduct the trade of representing another person in proceedings or procedures flowing from the *Immigration Act*. All immigration practitioners must be registered with the Department of Home Affairs and are subject to a scheme of statutory self-regulation, similar to Australia. Notably, the South African scheme does not require legal practitioners to register under the scheme as they are already subject to regulation under the law.