Law Council
OF AUSTRALIA

15 June 2010

Mr Warren Mundy
Associate Commissioner
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Mr Mundy,

**LAW COUNCIL OF AUSTRALIA: SUPPLEMENTARY SUBMISSION**
**RE: ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS**

I refer to the Law Council of Australia's submission of 20 April 2010 to the Productivity Commission's *Annual Review of Regulatory Burdens on Business* (**the LCA submission)**.

I also refer to the subsequent submission by the Department of Immigration and Citizenship, dated 8 June 2010 (**DIAC's submission**).

The following supplementary submission responds to certain issues raised by DIAC's submission, which the Law Council regards as misleading, inaccurate or lacking the appropriate context.

**Consumer protection**

DIAC's submission states *"There is no statistical evidence to suggest that the number of consumer complaints in relation to registered migration agents is proportionately different based on whether the agent has an Australian Legal Practicing Certificate or not. The Office of the MARA may be able to advise you of any trends in this regard"*

In fact, DIAC should be well aware of the statistics. The Office of the Migration Agents Registration Authority (OMARA) has advised that in the three-year period ending 31 March 2010, 195 of the 1126 complaints received were regarding lawyer agents (17%). The Law Council is also advised that persons with a legal practicing certificate make up around 29% of all registered migration agents (RMAs). Clearly there is a statistically significant difference in the proportion of complaints relating to lawyer and non-lawyer RMAs.

It should be noted that it is not known how many complaints about migration lawyers are made directly to the legal services complaints handling bodies in each jurisdiction, or whether all of those complaints are notified to the OMARA. The OMARA advises that it

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www lawcouncil asn au

has referred just four complaints about lawyers to the legal services regulators in the last three years.

Setting aside the lack of any statistical basis for DIAC's claim, the Law Council has consistently stated that the present system of dual regulation means that non-lawyer migration agents are subject to one, less onerous level of regulation, whilst migration lawyers are subject to two, overlapping (and in some cases inconsistent) layers of regulation.

Applying best-practice regulatory policy, the only justification for such excessive regulation applying only to immigration lawyers might be that lawyers pose a significantly greater risk to consumers, compared with migration agents. It should also be demonstrated that the additional regulation is having a demonstrated impact upon standards, proportionate to the cost of the regulation.

The Law Council submits that dual regulation has no impact on consumer protection, because consumers are already much better protected under legal profession regulation.

**Approach of the Office of the Legal Services Commissioner (NSW) (OLSC)**

As advised by the Law Council in earlier submissions, the OLSC now takes the approach of referring all complaints falling within the definition of "immigration assistance" to the OMARA for investigation.

DIAC's submission states: *"Therefore in NSW, and any other jurisdiction which opts to take the same interpretation, the impact of dual regulation is seen to be minimal."*

This statement is incorrect and misleading. The Law Council considers that, in fact, migrants are even more vulnerable in NSW than in any other jurisdiction because:

(1) Clients of migration lawyers who are deemed to be providing "immigration assistance" are not protected by the Law Society of NSW's fidelity fund. However, clients in all other jurisdictions are protected, regardless of whether their migration lawyer was providing "immigration assistance" or "immigration legal assistance". Accordingly, migrants who retain an immigration lawyer in NSW bear the risk in the event that their lawyer defaults or misuses trust money, a risk they may not be aware they are undertaking if they are unaware of the approach in NSW or whether the solicitor's work falls within the definition of "immigration assistance";

(2) It remains unclear to what extent migration lawyers are covered under their professional indemnity insurance policy when providing "immigration assistance", due to the position taken by the OLSC. As noted in paragraph 23(d) of the Law Council's primary submission to this Inquiry, the OLSC stated in its 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) Client legal privilege may not apply to communications made in the provision of "immigration assistance" by an immigration lawyer. This would be very surprising to many clients, who might have sought advice from a migration lawyer because they

assumed the lawyer-client relationship would apply, enabling them to engage with their lawyer freely and fearlessly; and

(4) Migration lawyers investigated and charged with misconduct by legal services regulators will routinely argue that they were providing "immigration assistance", because the consequences of professional misconduct for a lawyer are significantly more severe than for a migration agent (see, for example, *Portale v Law Society of New South Wales (No 2) (LSD)* [2003] NSWADTAP 56).

If the approach in NSW is adopted in all jurisdictions, the existence of protections, which ordinarily apply by virtue of the lawyer/client relationship, will depend on whether the conduct falls within ss 276 or 277 of the *Migration Act 1958*. The Law Council submits that most clients will be unaware of the definitions in those sections, and will be much less able to determine whether certain conduct falls into either section.

It is further noted that there appears little prospect that legal services regulators will adopt the approach taken in NSW. The following quote is from a recent informal advice from the Complaints Manager at the Law Institute of Victoria (who works closely with the Victorian Legal Services Commissioner):

> *"Whether an Australian Legal Practitioner practices in the migration area or elsewhere is really irrelevant: they are covered by the Legal Profession Act. Likewise, whether they are providing 'migration assistance' or 'migration legal advice' is also irrelevant when a legal profession regulator is looking at misconduct issues (which is conduct whether in connection with the practice of law or otherwise in connection with the practice of law). When looking at unsatisfactory professional conduct, the Act applies if the conduct occurs in providing 'migration legal advice' (as this is conduct in connection with the practice of law) but probably not if the conduct occurs in providing 'migration assistance'. It depends how you define 'legal advice' and 'assistance'.*
>
> *"So MARA cannot displace the role of, say, the LSC or VCAT (despite the strange arrangement in NSW where 'migration assistance' complaints are apparently referred on to MARA: what if it involves misconduct?).*
>
> *"Also, any legal practitioner as an officer of the court always remains subject to the inherent jurisdiction of the Supreme Court.*
>
> *"So while MARA can deal with legal practitioners who happen to be registered migration agents, it cannot displace the jurisdiction of the LSC/VCAT and ultimately the Supreme Court in regulating the profession and dealing with disciplinary matters."*

Despite the approach it has taken to immigration lawyers in NSW, the OLSC has itself consistently opposed dual regulation. It is noted in the Final Report of the *2007/08 Review of Statutory Self Regulation in the Migration Advice Industry* (the 2007/08 review) that:

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

The Law Council has also made clear that dual regulation effectively leads to 'double jeopardy' in respect of many complaints. For example, an immigration lawyer accused of misusing trust money received from a client many be subject to two separate investigations into misconduct. If the complaint is made to the legal services commissioner and an investigation clears the lawyer of any wrongdoing, a disgruntled client may subsequently complain to the OMARA, which will also investigate the complaint in accordance with its statutory functions. The same problem will arise in respect of many other areas of overlapping regulation.

**Impact on the legal assistance sector**

The immigration *pro bono* and legal assistance sector relies heavily on the benevolence of legal practitioners, who are willing to donate their time and expertise to help migrants in need of advice and assistance. Usually, pro bono work is carried out by students, young lawyers or more senior retired or semi-retired lawyers, assisting in refugee and migration legal services after hours, in addition to their ordinary paid employment and busy personal lives.

There are some concessions offered to lawyers working in the non-profit sector, including reduced registration fees. However, the cost and administrative trouble involved with becoming registered as a migration agent has been identified as the single most important factor inhibiting the supply of willing lawyers to the non-profit immigration advice sector and restricting the services those bodies are able to provide.

This is because legal professionals can provide pro bono legal assistance in any other area of legal practice, without being subject to onerous registration requirements in order to generously donate their time, skills and experience to vulnerable refugees and migrants.

The shortage of qualified immigration lawyers is reflected across the migration advice sector. The OMARA reports that in March 2010 only 1167 of the 4476 registered migration agents held a legal practising certificate. Given there are over 55,000 lawyers currently practising in Australia and roughly 16,000 new law graduates each year, the small number of lawyers specializing in immigration law is remarkable and clearly undermines the capacity of the legal assistance sector to provide immigration and humanitarian services to refugees and other vulnerable migrants. This was confirmed recently by a number of immigration and refugee legal service providers at an OMARA 'Forum for Not-For-Profit Organisations providing Pro Bono services', which was also attended by the Law Council.

**'Better cooperation' not sufficient**

DIAC claims that good communication between the legal services regulators and the OMARA should minimize the risk of any regulatory duplication. This is incorrect, because there are 2 regulatory agencies overseeing all immigration lawyers, each with a statutory function and independent of the other.

Almost all professional conduct issues covered in the *Migration Regulations 1994* and the OMARA *Code of Conduct for Migration Agents* are also covered in the various legal professional *Conduct and Practice Rules* (which contain only minor variations from jurisdiction to jurisdiction). The legal profession rules are specifically concerned with

regulating legal practitioners and therefore contain a number of clauses which, in the view of the legal profession, set stronger standards than those applying to migration agents. The migration agents' *Code of Conduct* also contains some rules peculiar to dealings with DIAC and the OMARA, which are designed to enable DIAC/OMARA to control or punish conduct such as failing to provide relevant information with a visa application and stating the agents registration number in any advertisement. All other duties and obligations imposed under the migration agents' *Code of Conduct* are covered under either the specific or general duties impose by the legal profession acts or legal professional *Conduct and Practices Rules*.

The OMARA has advised that, in the last 3 years, just 4 out of 195 complaints to the OMARA regarding immigration lawyers were referred to the legal services regulators. 10 of those 195 complaints resulted in administrative action by the OMARA, which is notified (not referred) to the legal services commissioner *after* the sanction decision has been made. If the conduct in any of those cases affected the professional standing of the lawyer, the legal services regulator must institute a fresh investigation and apply a secondary sanction for breach of legal profession rules, giving rise to double jeopardy (as noted above and in the Law Council's primary submission).

In order to address dual regulation, the Law Council has suggested on numerous occasions that the OMARA should simply refer all complaints against immigration lawyers to the legal services regulators for investigation and decision. This was also a primary recommendation of the 2007/08 review. However, DIAC and the OMARA have refused to implement the recommendation. The primary express reason given by DIAC for not implementing a blanket referral system is that DIAC is presently unsure to what extent the OMARA would be permitted to share information relevant to complaints with a State/Territory Government statutory regulator. This concern, expressed to the Law Council by DIAC as a reason for not implementing a referral scheme, somewhat undermines any capacity the OMARA and the state/territory legal services regulators would have for close communication over issues relevant to their regulatory functions. It is understood that legal services commissioners are similarly restricted in the information they are permitted to share.

In any event it is reasonably clear from the Law Council's discussions with the OMARA and legal services regulators that there is not a close liaison relationship and there appears little scope for one to develop.

**2007/08 review into statutory self-regulation**

As noted by DIAC, the 2007/08 review recommended that

> *"That lawyer agents continue to be included in a <u>revised</u> regulatory scheme"* [emphasis added]

Clearly, this recommendation was intended to be read with the other recommendations of the review, none of which have been implemented, including:

1. That complaints about lawyer agents be referred to relevant Legal Services Commission/Ombudsman for investigation. Resulting decisions from investigations to be subject to review by the migration advice regulator. As the requirement of the

migration advice regulator to allocate resources to address complaints about lawyer agents would decrease, that registration fees payable by lawyer agents be decreased as appropriate.

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

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

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

With respect, it is disingenuous for DIAC to state that it is merely following the recommendation of the 2007/08 review, when it has not implemented any of its other recommendations (other than to end statutory self-regulation altogether). DIAC has also advised the Law Council (when pressed by the Law Council to implement the other recommendations of the review) that it is not intending to respond to the 2007/08 review and is under no obligation to accept or apply its recommendations. It is therefore inappropriate that DIAC identifies the 2007/08 review as endorsing its position on dual regulation, when in fact it does nothing of the sort.

**National Legal Profession Reforms**

Whilst DIAC declares that the introduction of national legal profession reforms will provide an opportune time to reconsider the inclusion of lawyers within the migration agents' registration scheme, it has not explained what aspects of present legal profession regulation it considers deficient. Nor has DIAC resolved to consider any alternatives to dual regulation that might address its concerns as well as those of the legal profession.

DIAC's present position on dual regulation is no different to the position it has maintained since the migration agents' registration scheme was introduced in 1992. This position is inconsistent with the Productivity Commission's guiding principles for best-practice regulation and eschews any compromise that would address the legitimate concerns of the legal profession.

The Law Council would be pleased to provide further information, as required. Please contact Nick Parmeter on (02) 6246 3736 or nick.parmeter@lawcouncil.asn.au should you have any queries.

Yours sincerely,

Bill Grant
Secretary-General