Law Council
OF AUSTRALIA

10 August 2010

Mr Warren Mundy
Associate Commissioner
Regulatory Burdens: Business and Consumer Services
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

By email to: regulatoryburdens@pc.gov.au

Dear Mr Mundy

ANNUAL REVIEW OF REGULATORY BURDENS ON BUSINESS

I refer to the Law Council of Australia's submission of 20 April 2010 and supplementary submissions of 15 June and 30 July 2010 to the Productivity Commission's *Annual Review of Regulatory Burdens on Business* (the Review).

The Law Council strongly supports Recommendation 4.2, subject to the suggested amendment to the recommendation outlined in the Law Council's submission of 30 July 2010. The Law Council also acknowledges the many submissions to the Review by individual law practices and legal practitioners, which demonstrate the strong desire of immigration lawyers to see dual regulation removed. It is noted that many of those submissions outline first-hand the impact of dual regulation on legal practice in this area, both for commercial and non-commercial immigration lawyers.

It is noted, however, that there are a number of statements made in submissions by the Department of Immigration and Citizenship, including comments from the Office of the Migration Agents' Registration Authority (OMARA), and the Migration Institute of Australia (MIA), which the Law Council regards either as misleading or factually incorrect. The Law Council provides this further supplementary submission by way of response to the submission by DIAC of 30 July 2010 and the submission of the MIA, dated 4 August 2010.

Yours sincerely

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Annual Review into Regulatory Burdens on Business

COMMENTS ON SUBMISSIONS BY THE DEPARTMENT OF IMMIGRATION AND CITIZENSHIP

1. It is noted that all of the arguments and comments put forward by DIAC concern anomalies that are a direct result of dual regulation.

2. This includes artificial attempts to delineate 'legal assistance' and 'immigration assistance' in order to accommodate lawyers within a regulatory framework designed for non-lawyers.

3. The Law Council submits that nothing in DIAC's submissions, or the comments from the OMARA, support the view that ending dual regulation of immigration lawyers would be damaging to consumer protection.

> DIAC's submission states: *"...the Office of the Legal Services Commissioner (NSW) (OLSC) does not consider immigration assistance to be within its remit and therefore will leave a significant proportion of the Department's clients without any form of protection."*

4. This statement is incorrect.

5. Whilst the OLSC does currently refer complaints falling within the definition of "immigration assistance" to the Office of the Migration Agents' Registration Authority (OMARA) for investigation, this is because the OLSC is following decisions of the NSW Administrative Decisions Tribunal (NSWADT)[1], including *Portale v Law Society of NSW (No.1) (LSD)* [2003] NSWADTAP 56, where it was held that conduct falling within the definition of 'immigration assistance' was effectively removed from the ordinarily broad concept of 'business conducted by a solicitor'.[2] *Portale* was decided under the *Legal Profession Act 1987* (NSW) and this position has been qualified by the enactment of the *Legal Profession Act 2004* (NSW). The present position under Law Society of New South Wales v Jayawardena [2008] NSWADT 187 (4 July 2008), is that *"a person who is a lawyer holding a current practicing certificate and who provides immigration legal assistance and who is also a registered migration agent, becomes subject to the disciplinary powers of MARA and the disciplinary powers under the Legal Profession Act 2004."*[3] The OLSC continues to refer complaints against lawyers relating to 'immigration assistance' to the OMARA in accordance with these decisions.

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[1] *Portale v Law Society of NSW (No.1) (LSD)* [2003] NSWADTAP 56

[2] Ibid, paragraphs 149 and 153

[3] Law Society of New South Wales v Jayawardena [2008] NSWADT 187 (4 July 2008), paragraph 130.

6. As noted in the submission of the OLSC to the Productivity Commission on 26 July 2010, the OLSC strongly opposes inclusion of lawyers within the migration agents' registration scheme (MARS), notwithstanding that the OLSC has regulatory power over all conduct by a legal practitioner in NSW.

7. Further, DIAC's claim that consumers may be without protection if dual regulation were discontinued is, with respect, without any logical foundation. If immigration lawyers were excluded from the MARS, the basis for the current practice by the OLSC, would disappear. Put simply, there could be no basis for an interpretation that immigration lawyers were intended to be regulated by the OMARA. Therefore, the OLSC would resume regulatory control over all conduct by lawyers, including 'immigration assistance' – as is the case in all other jurisdictions.

8. The Law Council has discussed this issue with the Professional Standards Department of the Law Society of NSW and it has confirmed that there would be no doubt about the power of the OLSC to regulate immigration lawyers if dual regulation were removed. If there is any doubt, the Law Council suggests that the Productivity Commission should inquire of the OLSC whether it would be likely to prosecute misconduct by lawyers providing immigration assistance if lawyers were to be excluded from the MARS.

9. Finally, the Law Council queries why DIAC or the Office of Legislative Drafting would be unable to clarify that immigration lawyers are subject to legal services regulation in respect of 'immigration assistance', thereby removing any doubt?

DIAC's submission states: *"... the LCA stated that it would be "reasonable" for other jurisdictions to adopt the NSW position."*

10. This claim by DIAC is false and misleading. In fact, the LCA stated the following in its first supplementary submission to the *2007-08 Review of Statutory Self Regulation of the Migration Advice Profession* of 11 January 2008:

11. *The Law Council emphasises that this submission describes the current approach of some of the Law Council's constituent bodies. It is noted that a number of the Law Council's constituent bodies are currently considering their approach to migration agents and others may reconsider their approach in the future, in the interests of uniformity**. If legal regulators and representative bodies in other jurisdictions adopt the approach of the OLSC and Law Society of NSW, which the Law Council regards as a reasonable response to the confusion caused by dual regulation, consumers of migration legal services will be left in a highly unfavourable predicament**.* [emphasis added]

12. Clearly, the Law Council does not provide endorsement of the approach by the OLSC or any decision by legal services regulators in other jurisdictions to adopt the same approach.

DIAC states that: *"In July 2009, the Minister for Immigration and Citizenship, Senator Chris Evans invited the respective Presidents of the LCA and the LIV to clarify this position with the Department. They have yet to do so to date."*

13. Neither the Law Council nor the LIV has any record of receiving such a request from the Minister.

14. Since reading DIAC's submission, the Law Council has been provided with a copy of the correspondence and will seek to address a response to the Department in relation to the matters raised in the letter, in due course.

15. In any event, the Law Council understands that the Law Society of NSW is the only body to exclude coverage of its fidelity fund for 'immigration assistance' and none of the other law societies have considered adopting the same approach.

DIAC states that: *"The Department has previously requested the LCA's advice on how the various legal bodies have addressed complaints about lawyers providing services outside of direct legal practice in the past and how the individual state codes of conduct would apply to the provision of immigration assistance, in particular."*

16. This comment clearly demonstrates that DIAC has chosen not to inform itself of the approach of the legal services regulators in complaints handling before deciding to impose dual regulation on immigration lawyers.

17. Such an approach is at odds with the Productivity Commission's stated "Principles of Good Regulatory Process",[4] including that:

> *Governments should not act to address 'problems' through regulation unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue*

18. DIAC refers in this statement to informal email correspondence between DIAC and the Law Council in which DIAC inquired as whether various legal professional *Conduct and Practice Rules* would enable sanctions against a lawyer for:

    (a) repeatedly lodging vexatious or incomplete applications;

    (b) failing to advise DIAC or the tribunals of the immigration assistance they provide;

    (c) failing to act in a timely manner, say by not passing on a refusal decision until after a review period has ended;

    (d) being rude and/or abusive to DIAC/tribunal staff;

    (e) promising specific outcomes, such as the granting of a visa, or imply a special relationship with the Department;

    (f) not promoting to clients relevant consumer protection information; or

    (g) allowing staff to provide immigration assistance.

19. It is noted that the majority of these 'offences' would be covered by the overarching duties of legal professionals to act honestly and fairly, serve the interests of justice and comply with the law, serve the best interests of their clients, and to not behave

[4] In 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.

in any way which might diminish the confidence of the public in the legal profession.[5] If lawyers were removed from dual regulation, DIAC would continue to have the right to lodge complaints with a legal services regulator if it considered a lawyer had acted in any way contrary to these overarching duties (or any other aspect of the Rules). The Law Council notes that these duties are interpreted broadly by legal services regulators in performance of their duties.

20. It is also clear that any residual concerns, such as ensuring only legal professionals, not non-legal staff, prepare visa applications or engage in other conduct which might be regarded as immigration assistance, could be dealt with administratively by DIAC rather than through the imposition of an unnecessary and inapt regulatory scheme.

DIAC states that: *"The Department would also like to address the LCA's incorrect representation of the Department's position in relation to recommendations made by the Hodges Review.*

"The Department has been moving ahead with the recommendations wherever possible. This includes continuing, to seek to amend the Migration Act 1958 to provide greater clarity to the definitions of both "immigration assistance" and "immigration legal assistance" as well as removing the ability of non lawyer migration agents to prepare documents for court."

21. The Law Council stands by its description of the Department's progress with respect to the recommendations of the Hodges Review intended to ameliorate some of the consequences of dual regulation.

22. On page 60 of its submission to the *2007-08 Review of Statutory Self Regulation of the Migration Advice Profession* (2007/08 Review) of May 2008, DIAC provided the following Recommendation:

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

23. At present the definitions of 'immigration assistance' and 'immigration legal assistance' remain unchanged. In the 2 years since the recommendation was made, DIAC has not consulted with the Law Council in relation to the recommended changes to ss 276 or 277 of the *Migration Act 1958* or provided an exposure draft for comment. The Law Council would expect to have been consulted at some stage during the development of the revised definitions, which would be consistent with the Office of Best Practice Regulation consultation guidelines.[6]

24. As a result, agents continue to be permitted to effectively engage in legal practice, including the preparation of Tribunal and Federal Court applications, whilst legal professionals who are not migration agents are precluded from offering even the blandest advice in relation to a visa application.

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[5] Refer, for instance, to the Law Institute of Victoria's *Professional Conduct and Practice Rules*, or the Law Society of NSW's Revised Professional Conduct and Practice Rules 1995.

[6] http://www.finance.gov.au/obpr/consultation/gov-consultation.html

25. The 2007/08 Review also recommended:

> *"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."*

26. This recommendation has not been implemented and the Law Council has no indication that there is any intention to do so. It is noted that, at the time of the 2007/08 Review, this recommendation was the most significant for the legal profession, as its implementation would have resolved a number of the key issues of concern.

27. It is further noted that, the last time the Law Council requested an update from DIAC as to progress in implementing this recommendation, DIAC stated that there were concerns about whether it could share relevant information regarding an application or complaint with legal services regulators, citing issues of security classification, confidentiality and privacy.

28. The Law Council notes that this again highlights the bizarre anomalies which have arisen from dual regulation. The OMARA apparently has a practice of referring complaints relating to 'immigration legal assistance' to the NSW OLSC, but not to any other legal services regulator. It is unclear why the same concerns about confidentiality and secrecy do not apply to 'immigration legal assistance', or why DIAC would be unable to resolve this issue through agreements with legal services regulators generally or, if necessary, legislative changes.

29. As noted by the OMARA, section 319 of the *Migration Act 1958* enables the OMARA to refer complaints about legal practitioners to a legal services regulator. Clearly, it was envisaged that the OMARA would be able to refer complaints about lawyers. The emergence of this concern about secrecy and confidentiality again highlights that dual regulation is a hopelessly ill-considered approach to regulation.

30. The 2007/08 Review further recommended:

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

31. The Law Council is pleased to advise that the OMARA has very recently announced its intention to ensure consumers are able to identify legal practitioners on the register of migration agents (the announcement was first made in July 2010). This is regarded as an excellent step forward and will result in the provision of important information to consumers about the qualifications of migration agents listed on the register, as well as providing an important incentive to migration agents to enhance their qualifications and knowledge.

DIAC states that: *"The Department would like to take this opportunity to reject the LCA's statement in its supplementary submission that the elements of the Migration Agents Code of Conduct intended to support the efficient processing of applications for entry to, or to remain in, Australia as* [sic] *attempts to "control or punish" migration agents.*

32. In its supplementary submission to the Productivity Commission's *Annual Review of Regulatory Burdens on Business*, the Law Council provided:

> *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.* [emphasis added]

33. The Law Council's reference was to the control or punishment of *conduct*, not migration agents. It is unclear why DIAC considers this to be an unfair representation of the purpose of the MARA Code of Conduct. The Code includes rules requiring an agent not to submit 'vexatious or incomplete applications' or fail to advise the OMARA of certain things in a timely fashion. In its submission, DIAC states that these rules are included to "support the efficient processing of applications". Clearly, therefore, DIAC seeks to control the completeness and quality of applications it receives from agents, by requiring the use of sanctions for misconduct if necessary.

34. This is not substantially different to the purpose of the Conduct and Practice Rules followed by legal professionals and, as noted above, DIAC would have the right to complain against a legal practitioner whom it considered had behaved unprofessionally or in breach of their duties, the Rules or the law.

35. However, it is implicit in DIAC's statement that the primary concern regarding the differences between the Code and the Rules is the "efficient processing of applications" – not consumer protection, as is often claimed to be the justification for dual regulation.

> DIAC states that: *"The Department... will review the inclusion of lawyers with the current regulatory framework for migration agents once the national scheme for legal profession reforms is finalised. Should the Council of Australian Government's National Legal Reform process result in a true national approach to the handling of immigration assistance by lawyers, the Department would be better placed to consider the removal of lawyers from the current regulatory arrangements for migration agents. Any consideration would be predicated on assurances being received that all clients will be covered by the relevant legal body's oversight regardless of location within Australia.*

36. The Law Council queries why it is necessary for DIAC to wait until the national scheme for legal profession reforms is finalised. The Law Council cannot understand why DIAC does not recognise the comprehensive system of legal professional regulation that already exists to regulate lawyers. All lawyers are subject to comprehensive legal profession regulation in respect of any area of practice; and all clients of lawyers already have recourse to legal professional complaints handling and disciplinary systems, regardless of where they are in Australia.

37. The Law Council submits only minor differences exist between legal profession laws and statutory rules across all jurisdictions. The present drive by the Council of Australian Governments toward uniform national legal profession regulation is aimed at simplifying legal profession regulation and establishing a seamless national market for legal services. High standards of consumer protection exist already in legal profession regulation throughout Australia.

38. The Law Council supports the observation of the Productivity Commission in its draft Report, that :

> *"…there appears to be an absence of firm evidence to support the position that an exemption of lawyer migration agents from the Migration Agents' Registration Scheme would be likely to result in reduced protection for clients of those agents."*[7]

COMMENTS FROM OMARA

39. The Law Council notes that OMARA and DIAC have been eager to give the regulatory framework for migration agents the appearance of independence from DIAC (which is the chief complainant against migration agents). It is considered that inclusion of the comments prepared by the OMARA in DIAC's submission significantly undermines those efforts. The Law Council considers that it may have been more appropriate for the Department to maintain an arms-length relationship with the regulatory body in relation to these matters.

The OMARA states: *"There is no quantitative evidence that the issue of 'dual regulation' creates a major disincentive for lawyers to practice migration law. Over one quarter of registered migration agents are lawyers holding a practising certificate. This proportion has increased since 2001, reflecting a higher growth than that of agents without a practising certificate"*

40. The Law Council considers that data on the proportion of agents who are lawyers is not particularly relevant to an assessment of whether dual regulation is a disincentive for legal professionals to practice migration law.

41. Of significantly greater relevance is the fact that there are roughly 57,000 lawyers in Australia holding a legal practising certificate and, as of March 2010, only 1167 out of 4467 migration agents held a practising certificate. This means that just 2% of all legal practitioners are eligible to provide immigration assistance, a startlingly small number given the complexity of Australian immigration law and policy frameworks, the numbers of migrants who require assistance and the importance of a strong immigration program to Australian society.

42. When considering raw data on the proportion of immigration lawyers compared to non-lawyer migration agents, it is also important to consider other factors, including:

    (a) the large numbers of migration agents who enter and exit the industry in any given year;

[7] PC draft report, page 133.

(b) significant fluctuations in the size of Australia's immigration programme since 2001; and

(c) the existence of an unknown number of unregistered off-shore migration agents (DIAC may be in a position to clarify or advise whether it has conducted a recent census).

43. Further, the Law Council refers to the submissions of pro-bono immigration legal services, such as the Refugee Advice and Casework Services, the Salvation Army (Courtyard Legal), and the submissions of private law practices to the inquiry, which clearly outline the disincentive for lawyers to practice in this area, caused by dual regulation.

44. The Law Council maintains that dual regulation is a significant disincentive to lawyers seeking to specialise in immigration law.

The OMARA states: *"In the 3 years to March 2010, seventeen per cent of all complaints received were against lawyer agents. Twenty per cent of the sanction decisions made related to lawyers. More detailed analysis is required to determine whether lawyers are more or less likely to engage in misconduct.*

45. The MARS has existed now for 18 years, during which time immigration lawyers have been subject to dual regulation. Assuming data has been collected and maintained over that period, there should be ample information to enable a thorough analysis of whether lawyers are more or less likely to engage in misconduct.

46. It must also be noted that the OMARA has ignored the fact that, as of March 2010, legal professionals made up approximately 26 per cent of all migration agents. As stated in the Productivity Commission's draft report, this is clearly evidence that lawyers "are less likely to engage in misconduct than other migration agents".

The OMARA states: *"The issue is not the integrity of the process but communication of the outcome. With the exception of NSW, the Office of the MARA is not informed of action taken by Legal Service Regulators. In a recent matter, an agent was suspended for 12 months for not disclosing investigation by a legal services regulator that was independently brought to the attention of the Office of the MARA."*

47. By this comment, the OMARA has succinctly illustrated a fundamental problem with the present regulatory framework. Whilst the OMARA is interested in forging closer links with legal professional regulators, the only body with which it has anything like a 'cooperative' relationship is the OLSC in NSW. Respectfully, the Law Council notes that the NSW Legal Services Commissioner has stated his strong opposition to dual regulation in a submission to this Review.

48. If there is no problem with the integrity of legal professional complaints handling and disciplinary processes, why does DIAC continue to insist that dual regulation is necessary? If the only issue is "communication of the outcome", how can DIAC maintain its position that dual regulation is justified?

49. The Law Council submits that the concern identified by the OMARA resulting from communication breakdown would be quite simply resolved if dual regulation were ended. For example, if the "agent" referred to by the OMARA above were not subject to dual regulation, any disciplinary action by the Legal Services

Commissioner against that lawyer, resulting in suspension of the right to practice, would also exclude that lawyer from providing 'immigration assistance' unless he/she subsequently obtained registration as an agent (at which point it is highly likely that the OMARA's vetting processes would reveal the successful prosecution of the lawyer for misconduct). It would not be particularly difficult for the OMARA to then check whether any sanction decisions (or pending decisions/investigations) have been made against a lawyer if they happen to seek registration or re-registration as a migration agent – particularly given the likelihood that instances of a qualified lawyer seeking registration would be a relatively rare occurrence.

50. Similarly, removing dual regulation would preclude lawyers from being subject to "double jeopardy", as outlined in earlier submissions.

The OMARA states: *"Any need for attracting experienced lawyers relates to the provision of immigration legal assistance and this can be provided without the requirement to be a registered migration agent.*

51. As the OMARA and DIAC are well aware, the narrow definition of "immigration legal assistance" and broad definition of "immigration assistance" precludes legal practitioners from practising in this area without registering as a migration agent.

52. "Immigration legal assistance" for intending migrants is limited to judicial review on account of jurisdictional error, which will never result in a visa outcome for a non-citizen. It is generally not possible to assist a client with an immigration law matter unless the capacity to advise in relation to visa options also exists, especially considering that a non-citizen in Australia running a judicial review case will need a visa to remain lawfully in Australia while that case is on-going.

53. This problem has been clearly illustrated by the *pro bono* legal service providers who submitted to this review and in the previous submissions of the Law Council.

The OMARA states: *"Lawyers who register as non-commercial migration agents pay a significantly reduced application fee. Pro bono services are also recognised as part of their continuous professional development. The Office of the MARA is currently looking at additional measures it may be able to take to support the pro bono sector."*

54. The concessions offered to non-commercial migration agents are welcome.

55. However, as noted by *pro bono* immigration and legal service providers, dual regulation continues to impede their efforts to service their significant client base.

56. The Law Council strongly supports the submissions of pro bono immigration legal providers which submitted to this Review.

The OMARA states: *"Whilst it is acknowledged that legislative changes need to be made to clarify 'immigration assistance' and 'immigration legal assistance', there is no evidence to suggest there is confusion amongst consumers as to which body is the most appropriate to address misconduct. In any event, the Office of the MARA would refer a complaint it did not have jurisdiction to deal with."*

57. The Law Council submits that this comment is incorrect.

58. The confusion of consumers is demonstrated by the number of consumers who complain to legal services regulators about conduct falling within the definition of 'immigration assistance'. Given the NSW OLSC is the only legal services regulator which has a practice of referring such complaints to the OMARA, how can the OMARA be aware of how much confusion exists amongst consumers in other jurisdictions, or how many complaints against lawyers regarding 'immigration assistance' have been dealt with by legal services regulators outside NSW?

59. The Law Council also queries whether there can be a clear process for dealing with complaints affecting the professional standing of a lawyer-migration agent, when most forms of misconduct may affect the person's standing both as a lawyer and a migration agent. For example, a lawyer-agent who defrauds his client by misappropriating trust monies may breach both the OMARA Code of Conduct and the Law Societies' Conduct and Practice Rules. If a complaint is lodged with the Legal Services Commissioner (LSC) or Law Society and it is subsequently investigated, the lawyer may have his/her practising certificate cancelled but will not lose the right to practice as a migration agent unless the OMARA is advised of the decision and then carries out its own investigation. Similarly, if the complaint is made to the OMARA and the lawyer-agent's registration is suspended, the lawyer may continue to practise as a lawyer until such time as the LSC/Law Society is advised and carries out its own investigation into the conduct. However, if dual regulation were ended, suspension or cancellation of the lawyer's practising certificate would also make it illegal for the lawyer to provide 'immigration assistance'.

60. Consumers of immigration lawyers' services can also take advantage of dual regulation by lodging complaints with both the OMARA and the LSC/Law Society. For example, a consumer, being dissatisfied with the outcome of one investigation by the OMARA, might then lodge another complaint with the LSC/Law Society, or vice versa. This may subject the lawyer to two investigations and/or disciplinary proceedings in relation to the same conduct.

61. The issue here is not only confusion amongst consumers – there exists confusion amongst regulators, migration agents and disciplinary Tribunals. For example, in *Law Society of New South Wales v Jayawardena* [2008] NSWADT 187 (4 July 2008), the Tribunal made the following observations:

> "128 Pausing at this point it is plain that the operations of MARA are to a degree similar to the operations of the Commissioner and the Law Society in that it is not only the registration body for migration agents but it also has disciplinary powers. There is no need to review the balance of the Migration Act 1958 other than to observe that it gives to MARA wide investigatory powers.
>
> "129 The second observation is this: it appears clear from sections 276, 277 and 280 that a lawyer can give immigration legal assistance without being a registered migration agent. It is also clear from section 276 coupled with section 280, that a person cannot give immigration assistance (whether for a fee or otherwise) unless the person is a registered migration agent.
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> "130 It thus follows that a person who is a lawyer holding a current practicing certificate and who provides immigration legal assistance and who is also a registered migration agent, becomes subject to the disciplinary powers of MARA and the disciplinary powers under the Legal Profession Act 2004. Why? Because

that person is such a lawyer providing immigration legal assistance under section 277 and is caught by sections 316 and 319.

"131 Putting it another way, if the Respondent was simply a registered migration agent and not a lawyer holding a current practicing certificate then it would only be MARA which could exercise disciplinary powers in relation to his actions. But, so it seems to us, if the Respondent was a lawyer holding a current practicing certificate at the relevant time as well as being a registered migration agent, then by virtue of him wearing two hats he becomes subject to two disciplinary regimes. So, if a lawyer wishes to engage in migration work and does not wish to be also subject to the legal disciplinary regime then that person ought to cease to hold a practicing certificate and remove his/her name from the local roll (see [138] below) and practice only as a migration agent."

62. The Law Council queries whether it is reasonable to expect consumers not to be confused about which body to complain to when, under existing precedent, they could reasonably complain to either – or both – of them.

The OMARA states: *"Tribunal decisions in both NSW and Victoria support the proposition that a solicitor who provides 'immigration assistance' is acting in the capacity of a migration agent, not a solicitor."*

63. The Law Council is not aware of any decisions in Victoria supporting this proposition. In fact, recent Victorian Civil and Administrative Tribunal (VCAT) decisions state the opposite. See, for example, *Legal Services Commissioner v Wong (Legal Practice)* [2009] VCAT 318, which states:

> "In my view the complaints mechanisms in the *Migration Act* and in the [*Legal Profession Act 2004* (Vic)] may operate in parallel and the operation of the MARA complaints mechanism does not impliedly exclude the Commissioner's capacity to investigate a practitioner in respect of the same conduct."[8]

64. The Law Council understands that the approach in other jurisdictions is the same as in Victoria.

65. The Law Council has sought clarification from the OMARA on this issue and was advised as follows:

> "In relation to these cases, our approach remains that the Authority has a positive obligation under *the Migration Act 1958* (the Act) to deal with a complaint made to the Authority in relation to a registered migration agent regardless of whether the agent's conduct also falls under the jurisdiction of another regulator. As noted in *Wong*, where the Authority does refer a complaint it receives to the relevant regulator, it is constrained by section 319 of the Act from taking action under section 303 of the Act. In practice, the Authority would consider the outcome of the relevant regulator's deliberation in the context of its obligations under section 290 of the Act at the time the agent in question applied for repeat registration.

[8] *Legal Services Commissioner v Wong (Legal Practice)* [2009] VCAT 318, paragraph 68.

"We are not suggesting that the cases quoted support a view that the relevant legal services regulator does not or should not have jurisdiction also."[9]

66. These comments appear to clarify that the OMARA is aware that immigration lawyers are subject to dual regulation, may be subject to two separate complaints handling mechanisms and may be prosecuted twice for the same conduct.

> The OMARA states: "*Further, where a solicitor is acting in the capacity of a migration agent, only matters with the potential to impact on the fitness and propriety of a solicitor would enliven the disciplinary jurisdiction of legal regulators. This view appears consistent with the practice of the Legal Services Commissioner in NSW, who refers complaints about a solicitor agent to this Office where those complaints involve the provision of immigration assistance."*

67. The Law Council notes that the OMARA appears to be implying that there are matters affecting the professional standing of a migration agent which would not necessarily affect the professional standing of a legal practitioner. The Law Council submits that this is incorrect and refers to the very high standards of professional conduct required of legal practitioners, both as lawyers and as Officers of the Court.

68. As noted above, misconduct in relation to matters which are peculiar to the OMARA Code of Conduct would most likely be actionable by legal services regulators under the general duties required of lawyers under Conduct and Practice Rules. However, if DIAC or the OMARA remains concerned that they may be unable to enforce certain conduct, such as ensuring agents submit complete and accurate visa applications, DIAC should explore means by which it could enforce such matters administratively, rather than subjecting immigration lawyers to dual regulation. This would be consistent with the Productivity Commission's Principles of Good Regulatory Policy,[10] including:

    (a) Governments should not act to address 'problems' through regulation unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue.

    (b) A range of feasible policy options — including self-regulatory and co-regulatory approaches – need to be assessed within a cost-benefit framework (including analysis of compliance costs and, where relevant, risk).

    (c) Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.

69. Further, as is apparent from the submission of the OLSC to this review, the practice of the OLSC in referring complaints to the OMARA is not "consistent" with any purported belief that the OLSC does not have the power to address misconduct falling within the definition of 'immigration assistance'.

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[9] Email from Stephen Woods, Deputy CEO of OMARA, to the Law Council on 6 August 2010.

[10] Ibid, *op cit* 1.

70. The OLSC, similar to all other legal services regulators, has very broad powers to address misconduct under general offence provisions. These powers are more than sufficient to enable the OLSC to enforce conduct in relation to all areas of legal practice, including immigration law.

The OMARA states: *"The Office of the MARA respects common law legal privilege, and that client legal privilege between the solicitor and client prevails, and will protect communication from being disclosed without the consent of the client – recognising that the privilege is that of the client and not the solicitor. The Office of the MARA manages common law legal privilege by ensuring that the client/complainant has provided written consent to waive that privilege. The Office of the MARA's approach is to resolve with the solicitor agent issues relevant to legal privilege in the interest of progressing and resolving the complaint."*

71. The Law Council welcomes the attitude of the OMARA to client legal privilege and notes that it may be worthwhile discussing measures to ensure the OMARA's enforcement procedures do not cause clients to inadvertently waive privilege and ensures that they seek legal advice before revealing potentially privileged information to the OMARA or DIAC. The Law Council considers client legal privilege to be a fundamental common law right which should not be abrogated or limited in any way, except where absolutely necessary in the public interest.

72. In *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64, the Full Court of the Federal Court held that the Refugee Review Tribunal had a duty to afford procedural fairness to the appellant, by warning him of his right to claim client legal privilege over legal advice given by his solicitor. It is noted that the OMARA should consider adopting procedures requiring that clients be warned of the right to claim client legal privilege, in accordance with the requirement set out under *SZHWY*.

73. The common law doctrine of client legal privilege is described as follows:

> "It provides that, in civil and criminal cases, confidential communications passing between a lawyer and her or his client, which have been made for the dominant purpose of seeking or being furnished with legal advice or for the dominant purpose of preparing for actual or contemplated litigation, need not be disclosed in evidence or otherwise revealed. This rule also extends to communications passing between a lawyer or client and third parties if made for the purpose of actual or contemplated litigation."[11]

74. Under existing precedent, client legal privilege cannot be abrogated or limited except by clear, express statutory provision or by "necessary implication".[12]

75. Recent Federal Court decisions (including *SZHWY*, referred to above) have considered the issue of client legal privilege generally, however the Law Council is not aware of judicial consideration of whether advice falling within the definition of 'immigration assistance' is considered "legal advice" to which client legal privilege would apply. At present however, immigration lawyers will routinely advise their

[11] S McNicol, 'Implications of the Human Right Rationale for Legal Professional Privilege—The Demise of Implied Statutory Abrogation?' in P Mirfield and R Smith (eds), *Essays for Colin Tapper* (2003) 48, 48.

[12] *Daniels Corporation Pty Ltd v ACCC* (2002) 213 CLR 543.

clients not to waive privilege and will assist their clients to resist any attempt by regulatory or judicial bodies to access their client's privileged communications.

76. The concern with respect to client legal privilege is this: whilst the common law has not addressed this question, in the view of the Law Council it may be open to a party in proceedings to argue that advice given to a client, which is characterised as 'immigration assistance', is not legal advice and therefore client legal privilege would not apply to it. That is, the determination as to whether client legal privilege applies may depend on whether or not the advice is characterised as "legal advice", which may depend on whether it arises from legal assistance provided under section 277 of the *Migration Act 1958*.

77. Section 277 of the *Migration Act 1958* provides:

> (3) A lawyer does not give immigration legal assistance in giving advice to a person about nominating or sponsoring a visa applicant for the purposes of the regulations if the advice is for the purpose of:
>
> (a) the preparation or lodging of an approved form putting forward the name of a visa applicant; or
> (b) the preparation or lodging of an approved form undertaking sponsorship; or
> (c) proceedings before a review authority that relate to the visa for which the person was nominating or sponsoring a visa applicant (or seeking to nominate or sponsor a visa applicant); or
> (d) the review by a review authority of a decision relating to the visa for which the person was nominating or sponsoring the visa applicant (or seeking to nominate or sponsor the visa applicant).
>
> (4) A lawyer does not give immigration legal assistance in giving advice to another person that is for the purpose of the preparation or making of a request to the Minister to exercise his or her power under section 351, 391, 417, 454 or 501J in respect of a decision (whether or not the decision relates to the other person).
>
> (5) A lawyer does not give immigration legal assistance in giving advice to another person that is for the purpose of the preparation or making of a request to the Minister to exercise a power under section 195A, 197AB or 197AD (whether or not the exercise of the power would relate to the other person).

78. The Law Council's concern is that s 277 sets out matters which are not immigration legal assistance. If it is accepted by a court or tribunal that advice falling within these sub-divisions does not therefore constitute "legal advice", client legal privilege may not apply to advice excluded from the definition of "immigration legal assistance". This is not a fanciful or remote concern, given Tribunal decisions which have held 'immigration assistance' not to be 'legal assistance' and DIAC's enthusiastic support for that interpretation.

79. The Law Council regards this as extremely concerning, because a person with limited knowledge of Australian law or evidentiary principles could not be expected to determine which aspects of the advice given by his migration lawyer might be privileged. That person may be forced to disclose that advice either on request by DIAC or the OMARA, or during Tribunal or Court proceedings. Client legal privilege exists in the public interest, to ensure frankness and candour in communications between a legal practitioner and their client. Limitation or abrogation of that right would be highly oppressive, particularly for potentially vulnerable clients.

The OMARA states: *"The fact of deregistration is publicly available information, as are sanction decisions by the Office of the MARA. The relevant legal professional regulator is not prevented from considering a sanction where appropriate. Where the Office of the MARA decides not to investigate a complaint but refer it to the relevant legal profession regulator, the current legal framework specifically guards against double jeopardy (refer section 319 of the Migration Act 1958)."*

80. This statement is incorrect.

81. The Law Council notes that the powers of referral under section 319 of the *Migration Act 1958* do not prevent a person complaining at first instance to a legal regulatory body and subsequently lodging a separate complaint with the OMARA.

82. In this way, immigration lawyers are regularly subject to 2 separate investigations in respect of the same conduct. There is also nothing to stop an immigration lawyer being subject to 2 separate disciplinary processes in relation to the same conduct – something which may in fact be required in most circumstances, where the conduct breaches both the Code and the Conduct and Practice Rules.

83. Contrary to the OMARA's view about this, being subjected to prosecution for the same conduct twice, without fresh evidence, amounts to "double jeopardy".

84. As stated previously, if dual regulation were removed, a single disciplinary process carried out by the legal services regulator would ensure that immigration lawyers who engage in misconduct are dealt with swiftly and fairly. Suspension of the right to practice law would also disqualify the lawyer from providing 'immigration assistance', without the need for separate proceedings to determine whether that should occur.

The OMARA states: "*The approach taken by the OLSC is very clear and works well. There is no evidence that complaints from clients are adversely affected by these arrangements. There may be some confusion in other states because other Legal Regulators do not follow the same procedures."*

85. This statement is clearly incorrect.

86. As noted previously, the OLSC has rejected DIAC's and the OMARA's contention that clients are not adversely affected by the arrangements in NSW.

87. This statement is also indicative of DIAC's attitude to dual regulation. DIAC has refused to accept or acknowledge that the regulatory framework is causing unforeseen problems which would be avoided, for the benefit of consumers, if dual regulation were ended.

88. As stated in the Law Council's previous submissions, consumers in NSW are worse off as a direct consequence of dual regulation, because:

    - people who seek immigration assistance from an immigration lawyer in NSW are not protected by the Law Society of NSW's fidelity fund. The Law Council is advised that if lawyers were excluded from dual regulation, the fidelity fund would cover all assistance provided by immigration lawyers;

- immigration lawyers prosecuted by the OLSC for misconduct may argue that they were acting as a migration agent, avoiding serious professional consequences under the *Legal Profession Act 2004* and subjecting themselves only to the possibility of a maximum penalty of suspension of their OMARA registration for up to 5 years (during which time they might be permitted to continue practising as a lawyer). This is contrasted against the much tougher penalties available to legal professional regulators, including heavy fines, suspension or cancellation of practising certificate, removal from the roll of legal practitioners, public reprimand, orders to complete additional training, etc;

- it is unclear whether clients of immigration lawyers 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'*; and

- it is unclear whether their communications with their adviser are confidential and subject to client legal privilege, particularly in view of the fact that the existing interpretation of the *Migration Act 1958* in NSW is that 'immigration assistance' does not constitute legal assistance.

89. Further, it should be noted that the legal services regulators in other jurisdictions do not follow the approach of the NSW OLSC. Immigration lawyers in other jurisdictions are regulated by legal services bodies, regardless of whether they are providing immigration assistance or otherwise.

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90. The Law Council has read the submission of the MIA and has concerns in relation to the views and comments it has expressed.

91. It is noted that the MIA's submission expresses a position which is contrary to the majority of its lawyer members. It is understood that around 30 per cent of the MIA's membership are legal practitioners. The MIA advises that a survey of its members found that 80 per cent of its lawyer members supported removal of dual regulation (a finding the Law Council queries in view of the fact that the survey was apparently publicly available and anonymous, and the only means of identifying lawyers was a question in the body of the survey).[13]

92. The MIA has not identified any aspect of the MARS which is not covered to an equal or greater extent by legal services regulation.

93. The MIA's submissions are also inconsistent. While the MIA argues that "consistent regulation is vital", it concedes that many concessions should be made for legal professionals under the MARS in recognition of their legal qualifications.

[13] To view the survey, go to http://www.oneminutepoll.com/OneMinutePoll/OneMinuteSurvey.aspx?SID=-2147479643

94. In particular, the Law Council rejects the following contentions in the MIA's submission:

(a) That there are consistent standards of consumer protection under dual regulation.

As outlined by the Law Council, there are not consistent standards of regulation in the migration advice industry, given immigration lawyers are subject to dual regulation. The OMARA has little or no relationship with legal services regulators, other than in NSW, and would therefore have incomplete knowledge of how many complaints are received by legal services regulators about immigration lawyers.

(b) That it is "vital" that there be consistent standards.

Contrary to the MIA's submission, immigration lawyers are not "undertaking the same work, for the same clients". It is not appropriate therefore that the same form of regulation apply to each. Immigration lawyers are legal practitioners who provide assistance with immigration visa applications as a necessary part of their immigration law practice, which may include advice and assistance in relation to other related areas of law. However, advice and assistance with visa applications is the bulk of the practice of non-lawyer migration agents and it is appropriate therefore that non-lawyer migration agents be subject to regulation by the OMARA.

(c) That dual regulation is justified because "migration law is a complicated area".

The fact that immigration law and policy is "complicated" is a poor basis upon which to suggest dual regulation is justified, particularly when non-lawyer migration agents are subject to a lesser standard of regulation than lawyers. Lawyers engage in many complicated areas of legal practice, however immigration lawyers are the only legal practitioners in Australia subject to dual regulation. No other country, of which the Law Council is aware, subjects its immigration lawyers to dual regulation.

(d) That the consequences for misconduct are not more severe than for migration agents.

One need only glance at the list of sanctions available to legal services regulators to understand that legal services regulators can issue much heavier penalties for misconduct than the OMARA – as outlined above.

However, it is also important to note that, under dual regulation, for a lawyer the consequences of deregistration by the OMARA are relatively minor, as the maximum penalty is deregistration for a maximum period of 5 years. During that time, there is nothing to stop the person practising as a lawyer, particularly if the matter is not referred, or no complaint is made, to relevant the legal services regulator, a separate investigation and prosecution carried out to address professional misconduct as a lawyer (a particularly wasteful, duplicative process that is open to abuse). However, if dual regulation were removed, a sanction by a legal services regulator would affect an immigration lawyer's capacity to practise either as a lawyer or migration agent, as outlined above.

In support of its proposition, the MIA has, very mischievously, cited two cases as evidence that either legal services regulators impose 'softer' sanctions or fail to address misconduct expediently. Regard must be had to the objective facts of any given case, as well as the reasoning of the Tribunal, before conclusions can be drawn about whether the decision of the Tribunal or OMARA was more appropriate.

Further it is noted that *Brott v Legal Services Commissioner* [2009] VSCA 55, which is cited by the MIA as an example of delay by the legal services regulators, is actually a very good example of a fundamental problem with dual regulation. Whilst, in *Brott*, the MARA (as it then was) took action in relation to a complaint against Brott (a lawyer-migration agent), it failed to inform the Law Institute of Victoria. Consequently, the Law Institute was not informed until 7 years later, when Justice Brown of the Family Court wrote to the Law Institute providing information, including a transcript of evidence by Mr Brott, which would support a complaint against him. The subsequent investigation was carried out and the matter was prosecuted by the Legal Services Commissioner relatively quickly, given the long delay in notification.

Were it not for dual regulation, the matter would have been referred directly to the Law Institute/Legal Services Commission and there would not have been any delay. The Law Council rejects any assertion by the MIA that legal services regulators delay investigation into a complaint, once it is received.

(e) That "the consequences of abandoning dual regulation may outweigh any so called 'perverse' effects that flow from dual regulation".

As outlined throughout this submission, dual regulation undermines consumer protection and is excessive and unnecessary. The MIA has not provided any basis upon which its contention is supported, such as a list of any 'consequences of abandoning dual regulation' and how they might arise.