Law Council
OF AUSTRALIA

Code of Conduct for Registered Migration Agents – Third round consultation response

Department of Home Affairs

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Table of Contents

About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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- Australian Capital Territory Law Society
- 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 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
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Executive Member, Vacant

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Migration Law Committee of its Federal Litigation and Dispute Resolution Section for its work in the preparation of this submission. The Law Council also gratefully acknowledges the assistance and input of the Law Institute of Victoria, the Law Society of the ACT and the Law Society of New South Wales.

Executive Summary

1. The Law Council thanks the Office of the Migration Agents Registration Authority (**OMARA**) for inviting its participation, as led by the Migration Law Committee of its Federal Litigation and Dispute Resolution Section, in the recent consultations held in response to the issues paper[1] regarding a new code of conduct (**the Code**) for registered migration agents (**RMAs**). It welcomes and appreciates the opportunity to participate in the 'third stage consultation'[2] of OMARA's stakeholder consultation and engagement process, including responding to the 'Third Stage Code consultation document' (**the Consultation Document**).[3]

2. The new Code represents an important step to increase consumer protection and strengthen professional standards in relation to the migration advice industry. The Law Council strongly supports the efforts of OMARA in this respect.

3. Additionally, the Law Council welcomes and strongly supports the measures contained in the Migration Amendment (Regulation of Migration Agents) Bill 2019 (**Deregulation Bill**) which, once enacted, will remove the burden of dual regulation from RMAs who are legal practitioners. Consistently with the Australian Government's deregulation agenda, the Law Council maintains that the new Code should not apply to legal practitioners who would be exempt from the OMARA scheme as proposed in the Deregulation Bill.

4. The Law Council supports the finalisation of the Code and makes a number of recommendations to further enhance consumer protection and bolster professional standards. These include that:

    - all persons, other than legal practitioners, seeking to become an RMA should undergo a mandatory period of supervised practice;
    - the Australian Government urgently revisit the need for a tiered registration framework for RMAs;
    - careful consideration be given to regulation of business structures for migration service provision which may currently reduce the ability of OMARA to respond effectively to allegations of misconduct; and
    - guidance notes and a communications strategy be developed to raise awareness and support implementation of key provisions of the Code.

5. In addition, the Law Council offers specific feedback and recommendations relating to specific clauses of the Consultation Document.

[1] Office of the Migration Agents Registration Authority, 'Issues paper: Code of conduct for registered migration agents for consultation' (October 2017), https://www.mara.gov.au/media/583975/Code_of_Conduct_Issues_Paper_for_consultation.pdf.
[2] See: https://www.mara.gov.au/news-and-publications/public-consultations/.
[3] Office of the Migration Agents Registration Authority, 'Code of Conduct for Migration Agents: Outcome of consultation process and proposed approach to the revised Code' (15 October 2019), https://www.mara.gov.au/media/667837/Code_of_Conduct_third_stage_consultation_document_October_2019.pdf.

Concerns and recommendations in relation to the application of the new Code to legal practitioners

6. At the outset, the Law Council acknowledges and supports the efforts of OMARA in bolstering consumer protection and strengthening professional standards in relation to the work of RMAs. However, in line with the Australian Government's deregulation agenda, it seeks to ensure that the burden of dual regulation faced by RMAs who are legal practitioners is removed as soon as possible. To that end, the Law Council notes that the Deregulation Bill was introduced into the House of Representatives on 27 November 2019. The Law Council strongly supports measures contained in the Deregulation Bill introduced to Federal Parliament by Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP, removing the dual regulation of migration lawyers.[4] The Law Council is grateful for the leadership shown by the Hon Jason Wood MP for the implementation of these measures.

7. The Law Council maintains that the new Code for RMAs should not apply to those persons who would be exempt from OMARA scheme as proposed in the Deregulation Bill.

8. Much like the exemptions already in place for legal practitioners in relation to the dual Continuing Professional Development (**CPD**) burden,[5] similar arrangements could exist in relation to professional standards where they already apply to a legal practitioner. For example, the Migration Agents Regulations 1998 (Cth) (**the Regulations**) may be amended to include the following provision:

   > *The Code set out in Schedule 2 to these Regulations does not apply in relation to a registered migration agent who is an Australian legal practitioner holding an unrestricted practising certificate.*
   >
   > *Note: Australian legal practitioners who hold an unrestricted practising certificate issued by a relevant legal professional body in a state or territory must uphold a wide range of duties and meet extensive obligations in order to meet the requirements of that legal professional body.*

9. To that end, the Law Council notes OMARA's acknowledgment during the second-stage consultation sessions that such standards are higher than those prescribed in the Code.[6] In line with the Deregulation Bill and the recognition of the benefits to consumers which flow from an advisor having completed a period of supervised practice, the Law Council recommends that legal practitioners with an unrestricted practising certificate[7] be exempt from the Code and that this be specified through amendments which may be made to the Regulations in order to introduce the new Code.

10. It follows that only those RMAs who are not Australian legal practitioners holding an unrestricted practising certificate should be required to conduct themselves in accordance with the Code. In line with section 319 of the *Migration Act 1958* (Cth) (**the Act**), OMARA may continue to refer to an authority responsible for disciplining lawyers the conduct of an RMA, or former RMA, who holds a practising certificate

[4] Law Council of Australia, 'Removal of dual regulation to reduce costs for consumers' (Media release, 27 November 2019), https://www.lawcouncil.asn.au/media/media-releases/removal-of-dual-regulation-to-reduce-costs-for-consumers.
[5] Migration Agents Regulations 1998 (Cth) reg 6A.
[6] Acknowledgement made by Ms Leslely Dalton, OMARA, during consultation session held in Melbourne on 24 July 2019.
[7] As defined in section 275 of the the Migration Amendment (Regulation of Migration Agents) Bill 2019.

(however described) entitling them to practise as a legal practitioner in Australia. Until such time as deregulation takes effect, and after it takes effect, existing arrangements that govern the regulation of Australian legal practitioners who hold a practising certificate will ensure that consumer protection is robustly maintained and that the reputation of the migration advice industry is upheld.

Fundamental measures for OMARA to consider in order to enhance consumer protection and bolster professional standards within the migration advice industry

Professional indemnity insurance

11. The Law Council continues to urge OMARA to consider strengthening professional indemnity insurance arrangements by:

    (a) ensuring that the Agreement for Services and Fees (**ASF**) of each RMA specifies the insurance coverage available in the event of a claim (specifically the maximum coverage available and any limitations and/or exclusions eg, offshore jurisdictions); and

    (b) increasing the current minimum prescribed level of insurance and ensuring that amount excludes legal costs payable in relation to any dispute or claim. The current level is $250,000.[8] The Law Council believes that this amount is inadequate, and further consideration must be given to this issue to ensure that the requirement under section 292B of the Act (that is, that OMARA will only register a person as an RMA if they hold appropriate professional indemnity insurance) is met.[9]

12. The Law Council notes that regulation 6B in Part 3 of the Regulations specifies the minimum level of prescribed professional indemnity insurance ($250,000). This amount has not increased since the regulatory requirement was first introduced on 1 July 2005. By way of contrast, the minimum level of insurance cover provided to legal practitioners in NSW by LawCover is an indemnity of up to $2.0 million for each claim, including defence costs and claimant's costs (excluding the applicable excess).[10] The same level of cover is available in Victoria, Queensland, ACT, Northern Territory and Tasmania, with cover of $1.5 million per claim in South Australia and $1.75 million per claim in Western Australia.

13. Given the risks associated with the provision of complex immigration assistance and the loss that may be suffered by a client, the minimum level of prescribed professional indemnity insurance should be substantially increased. Based upon risk settings maintained by regulators of the legal profession and the costs that may be incurred as a result of a client relying upon incorrect or negligent immigration advice, the Law Council recommends that the minimum prescribed level of professional indemnity insurance coved be lifted to at least $1 million per claim event.

[8] Migration Agents Regulations 1998 (Cth), sub-reg 6B(1).
[9] Law Council of Australia, *Code of Conduct for Registered Migration Agents*, Submission to the Department of Home Affairs, 30 July 2019, [19].
[10] For an overview of the cover provided by LawCover see: https://www.lawcover.com.au/insurance/.

Supervised practice

14. The Law Council maintains its position that the Australian Government and OMARA should take immediate steps to introduce a mandatory period of supervised practice for all persons, other than legal practitioners, seeking to become an RMA.[11] The report arising out of the *2014 Independent Review of the Office of the Migration Agents Registration Authority*[12] (**the Kendall Report**) recommended supervised practice,[13] but the Law Council understands that this was not initially accepted by the Australian Government.

15. More recently, the Parliamentary Joint Standing Committee on Migration's *Report of the inquiry into efficacy of current regulation of Australian migration and education agents*[14] recommended that all new migration agents be required to complete a period of supervised practice prior to being granted an unrestricted practice certificate.[15] While the Law Council accepts the thrust of this recommendation, it notes that the usage of the term 'practice certificate' is likely to create confusion within the market and strongly recommends that a different term be employed for RMAs. The Law Council proposes that the term 'registration certificate' be considered as an appropriate alternative.

16. The Law Council believes that the period of supervised practice should only be commenced after the person has successfully completed the entry-level qualification. It suggests that persons only undertake the Migration Agents Capstone Assessment (**the Capstone Assessment**) after they have successfully completed their period of supervised practice.

17. The period should be no less than six months (full-time) and up to a maximum of twelve months (full-time), depending upon the category of Tier 1 registration to be sought upon initial registration. Further information in relation to a possible tiered registration framework is detailed later in this submission.

18. During the supervision period, the person would be permitted to work under the supervision of another RMA or legal practitioner (supervisor). The person would not be authorised to provide immigration assistance because they are not an RMA.

19. All supervisors would be pre-approved by OMARA in accordance with relevant criteria relating to the supervisor's good-standing within the profession, and ability to train the person in the field of migration law and practice. 'Ability' would be determined both on legal and practical ability to provide substantive supervision to a person seeking to enter the industry. Supervision terms should be agreed between the parties and lodged with OMARA. OMARA should develop a standard supervised practice agreement and toolkit that can be downloaded from its website.

20. Inadequate and/or improper supervision should give rise to adverse consequences for the supervisor, including restriction, suspension or bar upon holding supervisor status as well as potential professional disciplinary action for the supervisor.

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[11] Law Council of Australia, *Code of Conduct for Registered Migration Agents*, Submission to the Department of Home Affairs, 30 July 2019, [20].
[12] Christopher Kendall, *2014 Independent Review of the Office of the Migration Agents Registration Authority* (Final Report, September 2014), https://www.homeaffairs.gov.au/reports-and-pubs/files/omara-review.pdf.
[13] Ibid Recommendation 14.
[14] Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into efficacy of current regulation of Australian migration and education agents* (Report, February 2019).
[15] Ibid [3.114] Recommendation 2.

21. A supervisee's failure to complete an agreed period of supervised practice should be reported to OMARA by the supervisor along with reason(s) for that failure. The reason(s) may be taken into account by OMARA if, and when, the supervisee makes an application to become an RMA. For example, if the reason was that the supervisee engaged in unlawful activities such as giving immigration assistance during their period of supervision, this information would be relevant to OMARA's assessment of whether the supervisee is a 'person of integrity' or 'fit and proper' to give immigration assistance.[16]

22. The Law Council has serious concerns that, unless approached with significant rigour, the concept of 'supervision' could easily be reduced to a matter of pretence or form rather than ensuring genuine supervision of the conduct of the RMA. Of particular concern will be circumstances when the RMA and supervisor are not physically co-located in the same premises, let alone in the same country.

23. The New Zealand Immigration Advisers Authority Code of Conduct[17] (**NZ IAA Code**) includes clauses relating to the supervision agreement between a full and provisional licence holder,[18] the roles and responsibilities of the supervisor[19] and the roles and responsibilities of the provisional licence holder[20] in the New Zealand context. Aspects of the New Zealand model could be replicated in the Australian context.

Tiered registration framework

24. The Law Council recommends the Australian Government urgently revisit the need for a tiered RMA registration framework or system as a consumer protection measure and to strengthen the integrity of the migration advice industry. Arrangements should be put in place to ensure that a tiered system properly reflects the competency and practice capability of each RMA. By way of example, RMAs would be required to qualify separately to assist and represent clients when dealing with the following.

The Department of Home Affairs ('Department - Tier 1')

25. Tier 1 could be separated into three categories:

    - category 1: All visa matters;
    - category 2: Protection visa matters only; and
    - category 3: Student visa matters only.

26. This separation into three categories would allow for recognition of existing market segments (for example, the student visa market, which is dominated by education agents, etc) and facilitate targeted and more effective regulation of RMAs by OMARA. Separate Capstone assessments could be developed for each category of Tier 1 registration. The existing Capstone Assessment would suffice for those seeking to practise in Category 1. A more focussed Capstone assessment could be developed for those seeking accreditation in Categories 2 or 3.

The Administrative Appeals Tribunal ('AAT – Tier 2')

27. Pre-requisite for entry to Tier 2 would be Tier 1 Category 1 registration, and the successful completion of a further Capstone assessment, unless exempted by

[16] See: *Migration Act 1958* (Cth) s 290.
[17] Immigration Advisers Authority, *Licensed Immigration Advisers Code of Conduct* (2014), https://www.iaa.govt.nz/assets/subsite-iaa/documents/tools/code-conduct-2014.pdf.
[18] Ibid [11].
[19] Ibid [12].
[20] Ibid [13].

OMARA. Tier 2 could be further separated into three categories reflecting the various types of matters before the Administrative Appeals Tribunal (**AAT**):

- category 1: General Division matters;[21]
- category 2: Refugee/IAA matters; and
- category 3: Migration matters.

28. Separate capstone assessments could be developed for each category of Tier 2 registration. These assessments could be developed by OMARA in conjunction with subject matter experts from the AAT. A condition of maintaining Tier 2 registration could be the requirement for an RMA to have completed a minimum amount of CPD relating to merits review, conducted by the AAT, since their last application for repeat registration was made.

Ministerial intervention requests ('MI – Tier 3')

29. Pre-requisite for entry to this Tier should be Tier 2 registration and the successful completion of a further Capstone assessment, unless exempted by OMARA. This assessment could be developed by OMARA in conjunction with subject matter experts from the Department's Ministerial Intervention Unit. A condition of maintaining Tier 3 registration could be the requirement for an RMA to have completed a minimum amount of CPD relating to Ministerial intervention requests since their last application for repeat registration was made.

Regulation of immigration service providers

30. The Law Council remains concerned with the use of business structures that effectively disable OMARA from investigating allegations of misconduct. This most commonly arises in the following types of situations:

    (a) an Australian company is incorporated without any of the company directors being an RMA. That business advertises migration services and contracts with end-user clients to provide those services. The company then subcontracts that work to an RMA;

    (b) a business based entirely outside of Australia advertises its ability to provide migration services, contracts with a client outside of Australia and distributes the work to a subcontracted RMA; and

    (c) an existing migration agency with RMAs subcontracts work to an external RMA with the visa applications being lodged under the ImmiAccount of the subcontracted RMA.

31. In these and similar situations, in the event of a complaint being made to OMARA, the RMA who performed the work will commonly have had:

    (a) limited, if any, contact with the client;

    (b) no control over or access to client records such as the client file; and

    (c) no control over or access to accounting records including receipts, clients' account and the like.

[21] Matters in the general division of the AAT comprise matters beyond 'immigration assistance' in relation to which a person must be a lawyer to advise, for example, applications for citizenship, and applications for documents under the National Archives legislation (*Archives Act 1983* (Cth)).

32. As such, the RMA is often not in a position to provide any relevant information and/or records to OMARA apart from their recollection of events.

33. In the first and second business structure scenarios outlined above, OMARA is potentially unable to access any records in relation to the matter. In the third scenario, a contest can then arise as to which RMA holds an obligation to provide records to OMARA.

34. At the heart of this problem is the fact the law currently only regulates the conduct of individual RMAs who provide immigration assistance, and not the businesses through which migration services are provided. This is to be contrasted with the situation for legal practitioners in Australia, whereby legal services can only be provided through the following structures:[22]

    (a) a sole practitioner operating in his or her own name;

    (b) in the case of a law firm – a partner in a legal partnership;

    (c) in the case of a community legal service – the supervising legal practitioner; and

    (d) in the case of an incorporated or unincorporated legal practice – a legal practitioner who holds an Australian practising certificate authorising the holder to engage in legal practice as a principal of a law practice, and is:
        (i) if the law practice is a company within the meaning of the *Corporations Act 2001* (Cth) – a validly appointed director of the company; or
        (ii) if the law practice is a partnership – a partner in the partnership; or
        (iii) if the law practice is neither – in a relationship with the law practice that is of a kind approved by the Legal Services Council[23] under section 40 of the *Legal Profession Uniform Law* or specified in the Uniform Rules for the purposes of this definition.

35. The purpose of these provisions is to ensure that at least one principal legal practitioner is always legally and ethically responsible for all aspects of the legal services provided by the 'law firm', however that is structured. As such, the legal body investigating complaints will always have access to records and files relating to the matter under investigation, including financial and file records.

36. The Law Council recommends that protection of the public interest would be best served by a similar approach to the provision of migration services. The Law Council accepts that such an approach would require significant legislative amendment to Part 3 of the Act, and it recommends that the Australian Government give consideration to this as a matter of priority.

Specific matters that OMARA should consider when introducing and communicating about the new Code

37. The Law Council is broadly supportive of the proposed changes to the Code as outlined in the Consultation Document. Prior to providing specific feedback in relation

[22] See: *Legal Profession Uniform Law* (NSW), s 6 (definitions of 'Law Firm' and 'Principal of a Law Practice').
[23] As established by the *Legal Profession Uniform Law* (NSW), Part 8.2.

to that document, the Law Council wishes to provide some general feedback in relation to the following matters.

Guidance Notes

38. The Law Council notes that the Code may be supported by 'policy guidelines to promote an understanding of an assist in the interpretation of the Code.' The Law Council is supportive of OMARA developing and publishing such policy guidelines (**Guidance Notes**) to, among other things, assist RMAs in meeting their obligations under the Code. However, the Law Council remains concerned about the scope and application of the guidance contained in such forthcoming government publications. Significant questions arise in relation to the reliability and enforceability of such publications. For example, questions include the following.

    (a) What is the legal force of such publications?

    (b) What are the consequences in relation to an RMA not adhering, strictly or otherwise, to the advice in such publications?

    (c) How will these publications be developed, maintained and updated where required?

    (d) What level of consultation, if any, will occur with industry and other stakeholders when developing such publications?

    (e) When will these publications be released and will their release be accompanied with RMA education sessions and broader community outreach initiatives?

39. The Law Council is concerned that an OMARA Guidance Note, which will be a government publication, could result in litigation by people dissatisfied with government 'advice' in the event it contained elements contrary to law. This raises several further questions, including the following.

    (a) What latitude does OMARA have in expressing an opinion about the scope and effect of the law it administers?

    (b) Does OMARA have the 'right to go wrong' in publications of this kind, such that a tribunal or court should not or cannot intervene?

    (c) Who might have standing to seek declaratory relief in relation to a publication of this kind?

40. If Guidance Notes are to be utilised, then their legal impact would be strengthened if reference were made to the existence and role of Guidance Notes in the Code itself.

Communications strategy

41. The Law Council strongly recommends that OMARA create and publish on its website consumer information in the form of videos and/or infographics showing the journey of the RMA-client relationship, by identifying the key events during that journey (ie, initial inquiry, initial consultation, formation of the ASF contract, application preparation, pre-application lodgement confirmation, lodgement, post-lodgement communication with the Department, notification of decision, billing and file closure). This will provide guidance to clients as to 'best practice' by RMAs and a realistic understanding of the level of service that they should expect (including for example the prompt provision of

all correspondence from the Department and government agencies, as well as a copy of any lodged visa application upon request).

42. The use of infographics and other forms of visual content will ensure that clients with varying levels of literacy and from a range of culturally and linguistically diverse backgrounds will better understand the nature and journey of the RMA-client relationship and are better informed about their consumer rights and the expectations of the RMA.[24]

Referral guidance

43. The Law Council recommends that OMARA provide clearer consumer information on its website and referral guidelines to other bodies, including:

    (a) Legal Services Commissioners in each state/territory for conduct of legal practitioners;

    (b) consumer protection agencies in each state/territory and relevant small claims tribunals for fee disputes;

    (c) the Australian Competition and Consumer Commission for Australian Consumer Law disputes;

    (d) the Department of Home Affairs (Australian Border Force) for unregistered conduct; and

    (e) the Australian Securities and Investments Commission for dealing with insolvent companies.

44. In line with its recommendation above pertaining to ending dual regulation, and cognisant of the need to ensure that consumers are protected, the Law Council recommends that all complaints involving legal practitioners with current practising certificates (particularly those with unrestricted practising certificates) be immediately referred to the Legal Services Commissioners in each State/Territory.

Specific comments and observations in relation to OMARA's Third stage Code consultation document dated 15 October 2019

45. These submissions are structured to provide comments and recommendations under each of the following topics:

    (a) Part 1: Overview;

    (b) Part 2: Introduction;

    (c) Part 3: Professional obligations; and

    (d) Part 4: Practice Management.

[24] It has been estimated that visual information can be processed 60,000 times faster than text and can be easier to remember. See, for example: Rachel Gillet, 'Why We're More Likely To Remember Content With Images And Video (Infographic)', *Fast Company* (online, 18 September 2014) <https://www.fastcompany.com/3035856/why-were-more-likely-to-remember-content-with-images-and-video-infogr>, citing 3M, *Polishing Your Presentation* (online, 24 July 2019).

46. Feedback and commentary is sequenced this way in order to reflect the proposed structure of the new Code as articulated in the Consultation Document. While it is understood that the example clauses given throughout the Consultation Document are indicative only, and may not be in the final format adopted, specific feedback is provided below in relation to specific example clauses.

Part 1: Overview

47. The Law Council remains supportive of a Code reform agenda that will:

    (a) strengthen some areas of the Code;

    (b) remove duplication in the Code;

    (c) clarify certain aspects of the Code; and

    (d) revise other aspects of the Code.

48. The Law Council maintains that the new Code must be user-friendly from the perspective of RMAs and their clients. It must also be responsive to the changing immigration industry and environment.

49. The Law Council notes that the latest draft version of Code has three main parts. The Law Council commends the effort taken to ensure that these parts are clearly defined and discrete (ie, they do not overlap) to ensure clients and RMAs are able to follow and understand the provisions.

50. However, while overall simplification is to be commended, the Code may still need to be prescriptive on some particular matters in order to address any unacceptable and unethical RMA behaviour and practices. Further comments in this regard are detailed later in this submission.

Part 2: Introduction

Purpose, application and effect (clauses 1-3)

51. The Law Council is pleased to note that the purpose of the Code will be set out at the start of the document. The example clauses ensure that the Code aligns with the need to ensure consumer protection and maintain the integrity of the migration advice industry and Australia's immigration system.

52. The Law Council notes that the jurisdiction or application of new Code has been made clear. However, as stated above, the Law Council recommends that, in line with the Australian Government's deregulation agenda, the Code should not apply to legal practitioners with an unrestricted practising certificate. Example clause 2[25] should be amended to reflect this:

> *This Code is binding on all registered migration agents other than those who are legal practitioners holding an unrestricted practising certificate authorising them to engage in legal practice in an Australian jurisdiction. Legal practitioners are subject to a wide range of professional duties and obligations and are thereby exempted from having to also be bound by the Code.*

[25] Office of the Migration Agents Registration Authority, 'Code of Conduct for Migration Agents: Outcome of consultation process and proposed approach to the revised Code' (15 October 2019), 6.

53. Pre- and post-implementation of the Deregulation Bill, the Code will apply to the following classes of RMAs:

    (a) RMAs who are not lawyers; and

    (b) RMAs who are lawyers but not Australian legal practitioners who hold an unrestricted practising certificate.

Part 3: Professional obligations

Standard of conduct (clause 4)

54. The Law Council welcomes the proposed standard of conduct provision in example clause 4.

55. It notes that specific reference has not been made to the Occupational Competency Standards for Registered Migration Agents (**OCS**) in the Code. The OCS has been embedded in the systems relating to the education of, and entry to, the profession for over five years. The OCS is already a recognised and accepted standard for assessing a migration agent's competency. The structure of the standards is aligned to the 'lifecycle' of immigration assistance to clients and practice management. Adherence to the OCS would generally guide or inform the minimum standard of professional conduct when servicing a client.

56. The Law Council recommends that the OCS be referred to in a Guidance Note as a basis for evaluating the conduct and expected level of performance of RMAs, especially when complaints arise.

Abuse of process (clause 5)

57. The Law Council welcomes the inclusion of clause 5 in the Code. However, the Law Council urges OMARA to provide further information in relation to the examples in its Guidance Notes which illustrate the unacceptable conduct this clause purports to address. The case scenarios provided in the Consultation Document require further exposition and clarification as follows:

    (a) Case 1: this example involves more than an abuse of process amounting to a breach of the Code. It involves, among other things, the commission of a fraud on the Commonwealth and related criminal behaviour.

    (b) Case 2: further information relating to Simon's ineligibility for a protection visa is required in order to underscore James' mischief. In order to make this example more informative and realistic, it should be stated that James' advice to Simon amounts to an abuse of process regardless of whether James represents Simon before the Department and/or the AAT.

    (c) Case 3: this example is good but further information should be provided in relation to how this case scenario might enliven a referral to OMARA under section 306AC of the Act.

58. The Law Council notes the exception to abuse of process specified in the Consultation Document where an RMA has assisted a person to lodge a visa application/merits review application with no prospects of success in order to access Ministerial intervention. This exception, while important, should only be afforded to RMAs who provide an undertaking to the client (and the Department/AAT, where they are the RMA on the record), that they have fully assessed the client's circumstances and have

advised the client to lodge and/or pursue the application because they reasonably believe that unique and exceptional circumstances currently exist which are consistent with those set out in the relevant Minister's Guidelines. The undertaking should specify the information and evidence reviewed by the RMA before it is given. If it is subsequently found by OMARA that there was limited or no evidentiary basis for the undertaking at the time it was given, OMARA may take steps to discipline a RMA on the basis that they have abused a procedure in connection with Australian migration law.

Reputation of the migration advice industry (clause 6)

59. A Guidance Note should give examples of the types of conduct that would give rise to a breach of this clause. Previous OMARA disciplinary decisions relating to a breach of clause 2.23 of the current Code[26] (**the Current Code**) could inform that Guidance Note.

Legislative requirements (clause 7)

60. While important, this clause may appear meaningless to clients and RMAs unless a Guidance Note is developed which illustrates the basis upon which OMARA will take action and discipline an RMA, especially in connection with their failure to act in accordance with the law of a jurisdiction of a country other than Australia in which they operate.

Competence (clauses 8 -9)

61. The Law Council maintains that the Code should contain a clause that requires an RMA to ensure that they only assist and represent clients in cases for which the RMA has the requisite competency and expertise. In the absence of a tiered registration system, where there is currently a large pool of RMAs who have entered the migration advice industry without having to pass an independent competency assessment such as the Capstone Assessment, it is incumbent upon OMARA to ensure that RMAs appropriately self-assess their levels of competency and suitability to act before assisting clients with their particular matters.

62. Members of the Migration Law Committee and the Law Institute of Victoria report that there have been many situations where RMAs have taken on specific matters in which they do not have experience. Poor handling of those matters has resulted in any or all of the following adverse consequences for the client:

    (a) undue professional fees and other costs;

    (b) unnecessary stress and heightened vulnerability;

    (c) unlawful status, detention, removal and/or blemished migration record; and

    (d) delayed or lost migration opportunity.

63. The Law Council observes that this is an issue which frequently appears in OMARA sanctions. Where an RMA was well-intentioned but acting beyond his or her competency or experience, serious adverse consequences for the client have often resulted. The need for such an obligation is underscored by the fact that many clients

[26] Department of Immigration and Border Protection, *Code of Conduct for registered migration agents* (18 April 2017), https://www.mara.gov.au/media/553229/Code_of_Conduct_April_2017.pdf.

of RMAs are especially vulnerable and rely upon the RMA to properly self-assess whether they are capable of handling the client's case.

64. For this reason, the Law Council considers that the Code should include a stronger and clearer version of the clauses 4.1 and 4.2 as contained in the Current Code. Robust provisions around the prompt and ethical referral of matters are required in order to realise the Australian Government's objective to ensure consumers are protected and that representations made to the Department on behalf of clients are made by RMAs who are competent in the area of concern. For example, a new revised Code obligation relating to referrals should specify that an RMA must:

    (a) not take on a case where he or she has insufficient knowledge or expertise to provide advice or where their lack of expertise might compromise the outcome for the client;

    (b) immediately refer a client or potential client to another RMA or Australian legal practitioner as soon as they become aware that they have insufficient knowledge or expertise to provide advice to the client or where that lack of expertise might compromise the outcome for the client; and

    (c) when making that referral (a copy of which must be kept on the file, and receipt of which should be acknowledged by the client or potential client), the RMA should send a written notification to the client or potential client:
        (i) detailing why the referral must be made (ie, the requirement for further knowledge or more specialised expertise in the given area);
        (ii) detailing the basis upon which the RMA has made their recommendation for a referral to a specified third party (eg, the seniority, relevant expertise, known success rate, etc. of that third party); and
        (iii) disclosing whether any fee, reward or advantage (eg, financial or other benefit, incentives, membership association fee discounts, CPD fee discounts and the like) is being received by the RMA as a result of making the referral and, if so, the precise nature of that fee, reward or advantage.

65. The Law Council also notes that example clause 9 of the Consultation Document requires further clarification in relation to what is meant by maintaining 'onsite' access to a professional library.[27] RMAs may work remotely or visit clients and therefore 'onsite' access may not be viable. The Law Council suggests that the term 'onsite' either be removed or clarified by way of a Guidance Note. Further, the Guidance Note should set out clearly what should be the required content of the professional library, and the ability to access that professional library.

Conflict of interest (clauses 10-14)

66. The Law Council welcomes the revised conflict of interest clauses but maintains that a clear and comprehensive Guidance Note is required in order to support this section of the Code to ensure a strong message is sent to the profession, consumers and other stakeholders that conflicts of interest are to be avoided and/or managed immediately and appropriately should they arise.

67. In relation to example clauses 10 and 12, the Law Council urges OMARA to ensure that the Code requires RMAs to disclose the existence of a real or potential conflict

[27] Office of the Migration Agents Registration Authority, 'Code of Conduct for Migration Agents: Outcome of consultation process and proposed approach to the revised Code' (15 October 2019), 9.

and obtain the client's informed written consent *prior* to the engagement commencing. Such disclosure and written consent would ideally be found in the ASF accepted by the client.

68. The Guidance Note should ensure that RMAs undertake conflict checks before agreeing to assist or represent a client.

69. Furthermore, RMAs should be reminded of the importance of being alive to the prospect of a conflict arising during the conduct of a matter and aware of the need to take immediate steps to resolve such conflict. In some instances, resolution will involve termination of service and referring the client(s) to another RMA.

70. The Guidance Note should clearly explain and exemplify concepts and matters central to this area such as dual representation, information barriers, informed consent, obligations arising out of a conflict including notification, cessation of services and referral to a non-conflicted party.

71. The Guidance Note should contain specific, practical, real-life examples of the provision of services or types of conduct that would typically give rise to an actual or potential conflict. Such examples would include situations where an RMA, or person closely related to the RMA:

    (a) offers or provides marriage celebrant or introduction agency services;

    (b) offers or provides education agent services. Urgent consideration should be given to requiring all education agents to have some form of prescribed RMA status by way of a tiered registration system. Alternately, education agents should be prohibited from holding RMA status and any immigration assistance provision by them should be prosecuted as unregistered practice as a matter of priority;

    (c) offers or provides recruitment agency services;

    (d) offers or provides accounting or bookkeeping services; and/or

    (e) holds a shareholding or ownership interest in a business seeking sponsorship, investments and the like.

72. Specific Guidance Notes should be developed to address the resolution of conflicts that commonly arise between concurrent clients when their interests no longer coincide, for example where there has been a:

    (a) relationship breakdown between a family visa sponsor and a visa applicant; or

    (b) dispute between an employer sponsor and a visa applicant.

Futile matters (clause 15)

73. The Law Council suggests that example clause 15, which generally relates to futile matters, should be expanded upon to clarify that RMAs can continue to assist and represent a client with such a matter if:

    (a) they obtain written acknowledgement from the client that they have been advised of the risks; and

    (b) the matter does not involve an abuse of process or procedure as contemplated by clause 5.

Confidentiality (clause 16)

74. The Law Council supports the consolidation of this part of the Code and suggests that a Guidance Note is required to explain proposed clause 16 which, governs confidentiality. In particular, OMARA should set out what constitutes 'a client's affairs' and provide specific examples in relation to when a 'legal duty' arises so as to afford greater transparency for RMAs and their clients.[28]

Complaints (clauses 17-18)

75. The Law Council supports the consolidation of this part of the Code and suggests that a Guidance Note is required to explain, for the purposes of example clause 17, what constitutes a 'proper' response and 'reasonable timeframe' in any given set of circumstances.[29] Such explanation would best be provided by way of worked examples to give practical guidance to RMAs.

76. The scope of example clause 18 should be extended to include an RMA's subcontractors, in addition to his or her employees.

Notification obligations (clauses 19-21)

77. The Law Council supports the consolidation of this part of the Code and suggests that a Guidance Note be developed to exemplify circumstances requiring notification under example clause 20 (eg, criminal conviction etc).

78. Clause 21 should be amended such that the word 'prior' is inserted as follows:[30]

> *A registered migration agent must notify the Authority in writing within 14 days of becoming aware their MARN is being used or has been used without their prior knowledge or permission.*

79. This amendment will curtail a practice whereby an RMA grants permission with retrospective effect so as to evade the notification obligation.

Other obligations (clauses 22-24)

80. In relation to example clause 22, the Law Council refers to its submissions above in relation to the need to strengthen professional indemnity insurance arrangements governed by regulation 6B of the Regulations.

Part 4: Practice management

Effective control of practice (clauses 25-27)

81. The Law Council supports the consolidation of these provision and suggests a Guidance Note be developed to explain the types of misconduct that would give rise to breach (eg, the conduct that was subject of the decision in *Patel and Migration Agents Registration Authority* (Migration) [2018] AATA 4277).

[28] Ibid 12.
[29] Ibid 12.
[30] Ibid 14.

Supervision (clause 28)

82. The Law Council refers to its submissions above in relation to supervised practice and suggests augmentation of this part of the Code to prescribe obligations that will enable and support the proposed supervised practice system, should government wish to introduce such a system. Clauses 10-13 of the NZ IAA Code may be relied upon as a basis for drafting such clauses.[31]

83. Further, a Guidance Note should be developed to explain the scope of 'administrative support' prescribed by example clause 28.[32] Such guidance should ensure that administrative support is defined so as to:

    (a) not include any conduct related to the giving of immigration assistance as defined in sub-sections 276(1), (2) and (2A) of the Act; and

    (b) include the conduct prescribed in sub-section 276(3) of the Act.

Initial consultations (clause 29)

84. The Law Council supports the introduction of this clause in the Code.

Written agreements (clauses 30-31)

85. Consumer protection is better realised when consumers are well-informed at the commencement of the RMA-client relationship. The Law Council welcomes the inclusion of the specific matters set out in example clauses 30-31 of the Code.

86. By way of preliminary comment, the Law Council recommends, for the sake of clarity and consistency, that the term 'Agreement for Services and Fees' is the only term used in the Code and any Guidance Note to refers to a contractual arrangement between an RMA and a client. This approach is necessary so as to ensure that only one contract is understood to have been formed between the RMA and the client. Any other agreement made between the RMA and the client should only be regarded as a change or variation as allowed for in the ASF. References to multiple or different types of agreements (eg, written agreement, service agreement etc.) may give rise to confusion and complex legal issues involving privity of contract and the operation of collateral contracts.

87. In order to support these clauses, a template ASF could be provided on OMARA website and a Guidance Note could be developed to assist RMAs to understand their obligations in this regard by way of addressing the following matters:

    (a) what constitutes having primary carriage of a matter;

    (b) how any change or variation to the ASF should be made in writing and agreed to by all parties to the ASF; and

    (c) what arrangements need to be put in place in the event that, during the carriage of the matter, the RMA with primary carriage of the matter:
        (i) ceases to practise;
        (ii) becomes incapacitated;
        (iii) moves to another business; or

[31] Immigration Advisers Authority, *Licensed Immigration Advisers Code of Conduct* (2014), 2-3.
[32] Office of the Migration Agents Registration Authority, 'Code of Conduct for Migration Agents: Outcome of consultation process and proposed approach to the revised Code' (15 October 2019), 16.

(iv) dies.

88. Failure to offer reasonably appropriate contingency or succession planning, taking into account all of the circumstances of the case, should be capable of constituting a breach of the Code.

89. The Law Council disagrees with the inclusion of example clause 31(n) in the Code. RMAs should not be obliged to permit clients' access to the ImmiAccount during their carriage of the matter. Enabling such access may give rise to instances where clients, without the RMA's permission or knowledge, take action on the application, thereby undermining the efficient carriage of the matter and/or its prospects of success (eg, unauthorised importing of the application, unauthorised uploading of documents that have not been reviewed by the RMA etc).

Fees (clause 32)

90. The Law Council reiterates that OMARA should consider specifying in the Code the various matters that an RMA must take into account when determining a fee for service, to ensure that the fee is fair and reasonable in the circumstances. For example, this may include whether the costs reasonably reflect the level of skill, experience, specialisation and seniority of the RMA(s) concerned, as well as reasonably reflect the level of complexity, novelty or difficulty of the issues involved, and the extent to which the matter involved an issue of public interest. Overcharging should be capable of constituting a breach of the Code.

Disbursements (clause 33)

91. The Law Council welcomes the detailed nature of the obligation of example clause 33.

Itemised invoices and receipts (clauses 34-37)

92. The Law Council queries the utility and need for duplication in the area of itemised invoices and itemised receipts. In particular, it questions the purpose served by a requirement to provide an itemised receipt if an invoice is already itemised. Further, if payment is made in advance as a partial payment of work to be performed, the Law Council questions how work 'to be performed' could be itemised on a receipt provided prior to the conduct of that work.

Refunds (clause 38)

93. Clause 38 should be broadened to allow for the possibility of a refund (including a partial refund) during the carriage of the matter, and not only in the event of termination.

Client funds (clause 39)

94. The Law Council supports the introduction of example clause 39, which recognises the obligations of an RMA when managing clients' funds. The Law Council maintains that a range of OMARA disciplinary decisions reveal that inappropriate handling of client funds often arises due to a lack of RMA training in this area, rather than a calculated intent of the RMA to act inappropriately. The Law Council recommends that early-career RMAs be required to undertake client accounts training to improve their ability in managing client funds.

95. Further, the Law Council supports OMARA in its efforts to undertake regular inspection of clients' accounts. Clause 39 (g) should be amended so as to restrict auditing of

business accounts only to persons who are registered as an Australian Chartered Accountant or otherwise approved as an auditor for this purpose by OMARA.

96. An additional clause should be inserted after clause 39 which requires all clients' accounts to be held at an Australian deposit-taking institution (**ADI**). This will enable OMARA readily to undertake targeted audits of RMA client accounts to ensure compliance.

97. The Law Council recommends the interest on all clients' accounts be directly diverted to OMARA by the ADI on a monthly basis, in a manner similar to the interest from Trust Accounts held by legal practitioners in NSW. These funds should be used by OMARA for matters relating to RMA and public education about the Code and professional standards, the development of Guidance Notes, OMARA consumer protection initiatives etc. Consideration may also be given to the diversion of this interest into a Fidelity Fund, that serves to compensate persons who suffer pecuniary loss due to defaults by RMAs arising from dishonest acts or omissions relating to client funds (where such persons have otherwise been unable to recover against the RMA's professional indemnity insurance provider).

Applications (clauses 40-41)

98. The Law Council agrees with the obligations specified in example clause 40.

99. However, it considers that example clause 41 is too broad and does not take into account the common situation where an RMA's ability to lodge complete applications is impacted by the client's failure to provide instructions and documents in a timely manner. Furthermore, the clause provides too much weight to the opinion of the decision-maker as to what information and documentation is necessary for the purposes of assessing the application. It is recommended that this clause be amended as follows:

> *When lodging any application with the Department or a review body, a registered migration agent must, subject to their client's instructions and ability to provide documentation, lodge all documentation that the decision-maker would ordinarily be expected to require in order to assess the application.*

100. The Law Council considers that example clause 41 in its current form would give rise to contests between RMAs and OMARA. For example, queries arise including the following.

(a) How can an RMA reasonably be expected to predict all of the documents that a decision-maker will need in order to assess an application?

(b) What is a reasonable excuse?

(c) Would an RMA be allowed to offer an excuse that they were unable to provide documents in a timely manner prior to lodgement because they were frustrated in doing so by their client, without their client knowing that this was the basis of their defence?

101. Whether or not amendment is made to clause 41, the Law Council considers that further clarity is needed by way of a comprehensive Guidance Note on this issue.

Record-keeping (clauses 43-48)

102. The Law Council reiterates its previous submissions in relation to record-keeping:

(a) OMARA should ensure that any record-keeping and management obligations properly reflect the realities of the various types of RMA practice in the industry. RMAs work in various capacities throughout their careers, and any obligations should reflect such capacities. The obligations to keep records should rest with RMAs in sole practice and those who employ other RMAs (Principals). Employee RMAs, while subject to obligations relating to the making of accurate client records, should not be subject to record-keeping obligations contemplated in example clause 47 of the Code. In many cases, compliance with such obligations may well put an employee in breach of a standard employment contract;

(b) OMARA should develop a Guidance Note in relation to cloud computing[33] in order to support the operation of example clause 45; and

(c) OMARA should work with migration software providers to develop protocols that enable faster and more reliable reporting to OMARA by RMAs, and auditing by OMARA.[34]

103. The Law Council notes typographical errors in example clause 45 which may require correction.

104. OMARA should consult further with industry in relation to what type of 'arrangements' would be acceptable for individual RMAs to have in place order to satisfy clauses 47 and 48.[35]

105. In the event that the Australian Government does not equip OMARA with powers and resources to regulate immigration service provider businesses, example clause 48 would place a burden on the RMA. A 'run-off' access to documents clause would need to be inserted in all contracts between businesses and their RMA staff. The Law Council anticipates that this would likely be met with significant resistance from sectors of the migration advice industry, especially larger employers who will be concerned about the risk of client confidentiality being compromised and the solicitation of their clients by former staff. Difficulties would also be faced by individual RMAs seeking to compel their former employer to produce a file to OMARA. It is unclear why OMARA believes it does not possess the necessary authority under section 308 of the Act.

Document security (clause 49)

106. The Law Council queries why the scope of documents contemplated by this example clause has been restricted to 'financial and personal' documents.[36] It suggests that the clause be amended to refer to any documents belonging to or relating to the client, and that a Guidance Note be developed to exemplify the types of documents contemplated by this clause (ie, financial, personal or other).

Document return (clauses 50-52)

107. For sake of clarity, a Guidance Note should be developed that specifies the documents 'to which a client is entitled' when an RMA facilitates the return of

[33] See for example: Office of the Legal Services Commissioner, *Cloud Computing Practice Note* (online), http://www.olsc.nsw.gov.au/Documents/Practice%20Note%20Cloud%20Computing%20AC.pdf.
[34] Law Council of Australia, *Code of Conduct for Registered Migration Agents*, Submission to the Department of Home Affairs, 30 July 2019, [49].
[35] Office of the Migration Agents Registration Authority, 'Code of Conduct for Migration Agents: Outcome of consultation process and proposed approach to the revised Code' (15 October 2019), 25.
[36] Ibid 26.

documents in accordance with these clauses.[37] In particular, it should be clarified whether this includes all of the RMA's file notes, the RMA's independent research undertaken in relation to the client's matter, those documents which have been provided to the RMA by third parties in furtherance of the matter, or other documents. The Law Council considers that, at the very least, internal file notes and records of the RMA ought not fall within this obligation.

108. In relation to example clause 50, further consideration and clarification is required in relation to what may constitute 'any information that is necessary for the proper conduct of the client's immigration matter'.[38] In particular, the Law Council questions in what circumstances that information would include a Transaction Reference Number pertaining to a previously lodged application. It expresses its concern about the breadth of this obligation and the prospect that it may serve to open up another line of dispute between an RMA and their former client. For example, once services have been terminated, which party will be authorised to determine what information must be conveyed to the former client or their new representative in order to facilitate the ongoing proper conduct of the immigration matter?

Termination of services (clauses 53-54)

109. The Law Council recommends that example clause 54 be removed from the Code. Once a RMA's services have been terminated and the Department or review body have been notified accordingly, in accordance with example clause 59, the obligation to forward correspondence to the former client should then cease immediately.

110. RMAs should not be obliged to remedy, or otherwise facilitate the communication of, defective notifications issued thereafter by the Department or review body to a former client.

Notice to client that RMA ceases to act (clauses 55-58)

111. The Law Council commends OMARA for the inclusion of these clauses in the Code.

Written notice to Department or review body that RMA ceases to act (clauses 59-60)

112. The Law Council supports the inclusion of these clauses in the Code.

Part 5: Representations

Representations to clients and prospective clients (clauses 61-63)

113. In relation to advertising or marketing of services by RMAs, the Law Council supports the inclusion of these three example clauses in the Code and recommends that a Guidance Note be developed which details the following:

(a) That RMAs must not engage in false or misleading advertising, whether in or outside Australia, including but not limited to:
   (i) success rates;
   (ii) extent of professional indemnity insurance coverage;
   (iii) faster or more favourable outcomes;
   (iv) specialist, expert knowledge or experience as an RMA; and

[37] Ibid.
[38] Ibid.

(v) implied advantage over any other RMA or Australian legal practitioner.

(b) Sub-clauses 62a, 62b and 62c should serve to ensure that RMAs do not engage in advertising that creates confusion within the market and/or involves passing off or other misleading or deceptive conduct. To that end, the Guidance Note should specify that, in light of the varied professional qualifications of RMAs with or without legal backgrounds, an RMA must not engage in false or misleading advertising, whether in or outside Australia, by way of:

(i) marketing themselves as an Accredited Specialist in Immigration Law unless they hold that status as a result of fulfilling the requirements of the Specialist Accreditation Scheme administered by an Australian State or Territory legal profession body;

(ii) marketing themselves as an Australian legal practitioner and/or holder of a practising certificate unless they hold a legal practising certificate issued by an Australian State or Territory legal profession body;

(iii) marketing themselves as an Australian lawyer unless they hold an Australian qualification in law (specifically an LLB or JD from an Australian university that is recognised as an entry-level qualification to practise as an Australian legal practitioner); and

(iv) marketing themselves as providing legal services or engaging in legal practice unless they are the holder of a legal practising certificate issued by an Australian State or Territory legal profession body.

Representations to a decision-maker in an immigration matter (clauses 64-65)

114. The Law Council appreciates OMARA's desire to ensure that RMAs do not misrepresent or mislead decision-makers in relation to client matters. However, the Law Council seeks further clarification from OMARA in relation to how OMARA considers that an RMA might 'negligently conceal' or 'negligently provide' information or a document.[39] The Law Council may make further comment once that clarification has been received.

115. The Law Council considers that example clause 65 is convoluted. For sake of clarity, it recommends that clause 65 be broken down into two separate clauses:

(a) firstly, addressing false or misleading documentation that has been provided and relevant information that has been concealed; and

(b) secondly, addressing false or misleading documentation that will be provided and relevant information that will be concealed.

Conclusion

116. The Law Council is once again grateful for the opportunity to make a submission regarding these important issues. It would be very happy to elaborate on any of the above discussion items and recommendations.

[39] Ibid 31.