



**Law Council**  
OF AUSTRALIA

---

*Federal Litigation and  
Dispute Resolution Section*

# Migration Agents Instruments Review

Department of Home Affairs

30 June 2021

*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

# Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>About the Section</b> .....	<b>4</b>
<b>Executive Summary</b> .....	<b>5</b>
<b>Citizenship Matters</b> .....	<b>6</b>
Feedback sought in Consultation Report.....	6
Previous submissions.....	6
Committee response .....	7
Summary of position .....	7
Discussion of the law .....	7
‘Immigration assistance’ under the Migration Act.....	7
State laws relating to legal practice .....	8
Discussion of position .....	9
<b>Migration Litigation</b> .....	<b>10</b>
Feedback sought in Consultation Report.....	10
Committee response .....	11
Judicial review matters require legal expertise .....	11
Addressing the proposed circumstances in which RMA’s may assist in court matters .....	11
Responsibilities of OMARA.....	14

## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

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:

- Australian Capital Territory Bar Association
- 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.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

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

## About the Section

The Federal Litigation and Dispute Resolution Section is made up of lawyers who have litigation and dispute resolution practices in Federal Courts and tribunals. But it is also much more than that. Its real areas of activity may be seen from an outline of its committee structure. This is where all the work is done and all the action takes place.

The main activities of the Section may be categorised as follows:

- maintaining professional contact between practitioners in all parts of the country within the areas of interest covered by the Section;
- conducting seminars, conferences and other information sessions on the latest developments; and
- advising the Law Council on matters of law and procedure, both to assist in the development of policy and as background (and often foreground!) for the Council's liaison and lobbying functions.

Members of the Section Executive are:

- Mr Peter Woulfe, Chair
- Ms Heidi Schweikert, Deputy Chair
- Ms Georgina Costello QC, Treasurer
- Mr Ian Bloemendal
- Mr Simon Daley
- Mr David Gaszner
- Mr Robert Johnston
- Ms Bronwyn Lincoln
- Mr Ingmar Taylor SC
- Mr Peter Papadopoulos
- Ms Valerie Pereira
- Ms Pip Mitchell
- Ms Katherine Hooper

## Executive Summary

1. The Migration Law Committee (**Committee**) of the Federal Litigation and Dispute Resolution Section of the Law Council of Australia (**Law Council**) welcomes the opportunity to comment upon the consultation report of the Migration Agents Instruments Review (**Consultation Report**)<sup>1</sup> published by the Department of Home Affairs (**Department**).
2. The Committee supports strong and effective regulation of the migration advice sector to maintain the integrity of Australia's immigration system and to protect the interests of consumers.
3. The Committee refers to its recommendations and suggestions provided in its original submission of 29 July 2020.<sup>2</sup> The Committee takes this opportunity to provide additional feedback in relation to certain reform options addressed within Theme 3 of the Consultation Report concerning the proposed definition and scope of immigration assistance, particularly as it relates to citizenship matters and migration litigation.
4. The Committee does not support the proposal in 3.1.4.1 of the Consultation Report to release a factsheet explaining the distinction between general advice and legal advice on matters under the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**) – at least, not in the terms proposed in the Consultation Report.
5. If the Department does produce a factsheet relating to the assistance provided by registered migration agents (**RMA**s) in relation to the Citizenship Act it should:
  - clarify what amounts to legal advice relating to the Citizenship Act and is thus unable to be provided by an RMA;
  - provide information to consumers and RMA's on how they may obtain legal advice relating to the Citizenship Act; and
  - provide links to relevant information published by the Department.
6. The Committee does not support the proposal in 3.1.4.2 of the Consultation Report to retain a definition of immigration assistance that permits an RMA (unless they are a restricted legal practitioner) to offer immigration assistance in connection with court related work. Instead, the Committee recommends:
  - amending subsections 276(1)(c), 276(1)(d) and 276(2)(c) of the *Migration Act 1958* (Cth) (**Migration Act**) so that it no longer defines 'immigration assistance' as 'preparing for proceedings before a court'; and
  - inserting a provision into the definition of 'immigration assistance' in section 276 of the Migration Act which clarifies that '*nothing in this definition shall be construed as in any way permitting a person other than a lawyer to provide legal advice or services*'.

---

<sup>1</sup> Department of Home Affairs, Migration Agents Instruments Review – Report to the Assistant Minister for Customs, Community Safety and Multicultural Affairs, the Hon Jason Wood MP (May 2021) <https://www.homeaffairs.gov.au/reports-and-publications/submissions-and-discussion-papers/migrations-agents-instruments-review-report>.

<sup>2</sup> Law Council of Australia's Federal Litigation and Dispute Resolution Section Submission to the Department of Home Affairs, Creating a world class migration advice industry (29 July 2020) <https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf>.

# Citizenship Matters

## Feedback sought in Consultation Report

7. The Consultation Report indicates that an issue has been raised by ‘stakeholders in the legal profession’ about whether or not RMAs should be allowed to provide assistance in relation to matters under the Citizenship Act.

8. The Consultation Report states that:

*Advice on matters under the Citizenship Act does not fall within the definition of immigration assistance, therefore, the OMARA does not have powers to sanction RMAs for providing such assistance. While there would be restrictions – at state level – for example on the provision of legal advice or representation at court proceedings by an unqualified person, there does not appear to be any impediment to RMAs providing general (non-legal professional) assistance in relation to the Citizenship Act.*

9. The Consultation Report seeks public feedback on whether it should prepare a factsheet explaining the distinction between general advice and legal advice on matters under the Citizenship Act.

10. Under the proposal, in the Consultation Report:

*[t]he factsheet could state that any person is allowed to assist another person with completing a citizenship application, and caution RMAs from providing legal advice in relation to the Citizenship Act, unless they are a restricted legal practitioner.*

## Previous submissions

11. As the Consultation Report notes, in May 2018 the Law Council (as distinct from the Committee per se) made a submission to the Joint Standing Committee on Migration (**JSCOM**) which addressed the provision of assistance relating to the Citizenship Act by RMAs.<sup>3</sup>

12. In that submission, the Law Council expressed the opinion that legal advice on citizenship law should only be provided by legal practitioners and recommended that RMAs be prohibited from providing advice to clients on citizenship law.<sup>4</sup>

13. That point was also made in the Committee’s submission to the Commonwealth Government’s Migration Advice Industry Reform Discussion Paper ‘Creating a world class migration advice industry’ in July 2020 (**Discussion Paper**).<sup>5</sup>

14. In the latter submission, the Committee submitted that:<sup>6</sup>

*Citizenship law, policy and procedure is not taught in the prescribed course and there is no requirement for a RMA to maintain sound working knowledge of citizenship law, policy and procedure. As a result, there is a significant risk for clients that they will receive incorrect and contrary advice from a RMA that is unfamiliar with citizenship laws*

---

<sup>3</sup> Law Council of Australia, Submission No 18 to the Joint Standing Committee on Migration, Parliament of Australia, *Efficacy of current regulation of Australian migration agents* (18 May 2018).

<sup>4</sup> *Ibid*, 14.

<sup>5</sup> Law Council of Australia’s Federal Litigation and Dispute Resolution Section, (n 2).

<sup>6</sup> Law Council of Australia’s Federal Litigation and Dispute Resolution Section, (n 2), [184].

15. A similar point was made in a submission made in relation to the Discussion Paper by Ms Roz Germov of the Victorian Bar.<sup>7</sup>
16. The Consultation Report also refers to a joint submission made to the JSCOM by Newland Chase Australia and Acacia Immigration Australia (**Newland/Acacia submission**) which addressed the issue of citizenship assistance in response to the Law Council's submission.<sup>8</sup>
17. The Newland/Acacia submission noted that the Graduate Diploma in Migration Law and Practice, the entry level qualification for migration agents,<sup>9</sup> includes study and assessment material which also encompasses the Citizenship Act.
18. That submission stated that RMAs in those firms:<sup>10</sup>

*... regularly come into contact with enquiries in relation to citizenship. This is particularly evident when working on permanent visa applications where a client's ultimate goal is Australian citizenship. In this instance it is vital that migration agents are knowledgeable in the requirements for Australian citizenship to provide appropriate and accurate advice.*

## Committee response

### Summary of position

19. The Committee does not support the proposal in 3.1.4.1 of the Consultation Report to release a factsheet explaining the distinction between general advice and legal advice on matters under the Citizenship Act – at least, not in the terms proposed in the Consultation Report.
20. It is helpful to start by discussing the relevant legal principles, before explaining the Committee's position in light of those principles.

### Discussion of the law

#### *'Immigration assistance' under the Migration Act*

21. The enforcement and compliance functions of the Office of the Migration Agents Registration Authority (**OMARA**) – to monitor the conduct of RMAs and to investigate complaints about RMAs – only arise in relation to the 'provision of immigration assistance' by RMAs.
22. The term 'immigration assistance' is defined in section 276 of the Migration Act.
23. The definition makes no reference to 'citizenship' – it is defined by reference to assistance relating to applications or requests which engage powers under the Migration Act.

<sup>7</sup> See page 5 of Ms Roz Germov's Submission to the Department of Home Affairs, Creating a world class migration advice industry (24 July 2020) <https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-roz-germov.pdf>.

<sup>8</sup> Newland Chase Australia and Acacia Immigration Australia, Submission No 30 to the Joint Standing Committee on Migration, Parliament of Australia, *Efficacy of current regulation of Australian migration agents* (18 May 2018).

<sup>9</sup> This remains the case – see cl 6 of the *Migration (IMMI 18/003: Specified courses and exams for registration as a migration agent) Instrument 2018*.

<sup>10</sup> Newland Chase Australia and Acacia Immigration Australia (n 8), 4.

24. Relevantly, subsection 276(1) of the Migration Act provides:

- (1) For the purposes of this Part, a person gives **immigration assistance** if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by:
  - (a) preparing, or helping to prepare, the visa application or cancellation review application; or
  - (b) advising the visa applicant or cancellation review applicant about the visa application or cancellation review application; or
  - (c) preparing for proceedings before a court or review authority in relation to the visa application or cancellation review application; or
  - (d) representing the visa applicant or cancellation review applicant in proceedings before a court or review authority in relation to the visa application or cancellation review application.

25. The other subsections of the definition in section 276 provide that a person gives immigration assistance if the person uses, or purports to use, knowledge of, or experience in, migration procedure to assist another person by nominating or sponsoring a visa applicant<sup>11</sup> and requests for the Minister to exercise certain discretionary powers under the Migration Act.<sup>12</sup>

26. The term 'migration procedure' is defined to mean 'the law, and administrative practice, relating to immigration'.<sup>13</sup> The term 'immigration' is not defined, but its ordinary meaning is 'the coming of people into a country in order to live and work there'.<sup>14</sup> The Committee considers that the Citizenship Act is not part of the law relating to immigration – it does not relate to the coming into Australia in order to live and work here; it relates to how people already in Australia may become citizens of Australia.

27. As a result, a person who 'uses, or purports to use, knowledge of, or experience in' *citizenship law* (e.g. the Citizenship Act) to advise a visa applicant about a visa application is not providing immigration assistance.

28. Further, Australian citizenship law, policy and procedure is not taught as a unit in the prescribed course for RMAs.<sup>15</sup> Also, there is no separate requirement in or under the Migration Act for an RMA to maintain a sound working knowledge of citizenship law, policy and procedure.

#### *State laws relating to legal practice*

29. In each State and Territory, it is unlawful for a person who is not an Australian legal practitioner to engage in legal practice.<sup>16</sup>

---

<sup>11</sup> Subsection 276(2) of the Migration Act.

<sup>12</sup> Ibid, subsections 276(2A) and (3).

<sup>13</sup> Ibid, section 275.

<sup>14</sup> Collins Dictionary online, <[link](#)>.

<sup>15</sup> A search of the OMARA approved Courses revealed that only two universities make mention of a "brief overview of Australian Citizenship Laws", in the context of Visa Cancellation and Review (<http://handbook.westernsydney.edu.au/hbook/unit.aspx?unit=201029.1>) and as part of an Introduction to Migration Law <https://www.acu.edu.au/handbook/handbook-2021/unit/LAWS503>.

<sup>16</sup> Section 18 of the *Legal Profession Act 2006* (NT); section 12 of the *Legal Profession Act 2008* (WA); section 16 of the *Legal Profession Act 2006* (ACT); section 13 of the *Legal Profession Act 2006* (Tas); section

## Discussion of position

30. It follows from the above discussion of the law that RMAs who are not legal practitioners should not provide legal advice about the Citizenship Act – it is not an activity regulated by the Migration Act and may contravene State laws relating to legal practice.
31. The Consultation Report appears to accept that proposition. However, the proposal in the Consultation Report seems to proceed on the premise that there is a kind of assistance that can be provided in relation to citizenship matters which amounts to something less than legal advice, such as mere mechanical assistance with a citizenship application.
32. Assistance with a citizenship application is clearly not immigration assistance. As a result, even if such assistance does not include the giving of legal advice and is instead confined to a mere administrative-type action, it would not be an activity regulated by the Migration Act.
33. That would mean that the OMARA would have no authority to monitor RMA conduct in relation to that kind of assistance, nor to investigate any complaints about it. Further, RMA professional indemnity insurance coverage may not extend to citizenship-related advice as it is outside the scope of ‘immigration assistance’.
34. The Committee suggests that the Department should be cautious about endorsing conduct which would be effectively unregulated under the legislation it administers.
35. Should a government factsheet be released stating that an RMA (who is not an Australian legal practitioner) could provide advice or assistance in connection with a citizenship matter, a consumer may then adopt an assumption or belief that an RMA is allowed to assess the person’s eligibility for citizenship for the purposes of a citizenship-related application (which an RMA is unqualified to do) and assist with lodgement. Providing such advice may expose consumers to an unacceptable level of risk and potentially give rise to an RMA facing penalties for engaging in unqualified legal practice.
36. The Committee notes that the situation may be more complex in circumstances like those identified in the Newland/Acacia submission, where a person seeks assistance from a person relating to a visa application (which is ‘immigration assistance’) but in the context of ultimately seeking Australian citizenship.
37. In those circumstances, the Committee considers that RMAs should either refer the person to publicly available information provided by the Department of Home Affairs,<sup>17</sup> or to a lawyer for any advice on how the Citizenship Act applies to their specific circumstances. The Committee considers that an RMA should not purport to provide expert advice about the operation of the Citizenship Act.
38. Should the Department develop a factsheet, the Committee suggests that it should:
  - make clear what amounts to legal advice relating to the Citizenship Act and is thus unable to be provided by an RMA;

---

10 of the *Legal Professional Uniform Law (NSW)*; Clause 10 of *Legal Profession Uniform Law (Schedule 1 to the Legal Professional Uniform Law Application Act 2014 (VIC)*; section 21 of the *Legal Practitioners Act 1981 (SA)*; section 24 of the *Legal Profession Act 2007 (Qld)*.

<sup>17</sup> See for example, this webpage accessed on 28 June 2021: <https://immi.homeaffairs.gov.au/citizenship/become-a-citizen>.

- provide information to consumers and RMAs on how they may obtain legal advice relating to the Citizenship Act; and
  - provide links to information published by the Department on citizenship matters.
39. The Committee suggests that any factsheet be developed in consultation with the Law Council and the relevant State and Territory legal services regulators.

**The Committee recommends:**

- **that the Department does not produce a factsheet which suggests that an RMA who is not a legal practitioner may be able to provide ‘general advice’ on a citizenship application;**
- **if the Department does produce a factsheet relating the Citizenship Act it should:**
  - **clarify what amounts to legal advice relating to the Citizenship Act and is thus unable to be provided by an RMA;**
  - **provide information to consumers and RMAs on how they may obtain legal advice relating to the Citizenship Act; and**
  - **provide links to information published by the Department on citizenship matters.**

## Migration Litigation

### Feedback sought in Consultation Report

40. As noted above, the definition of immigration assistance includes a person who uses, or purports to use, knowledge of, or experience in, migration procedure to assist a visa applicant or cancellation review applicant by preparing for proceedings before a court in relation to the visa application or cancellation review application.<sup>18</sup>
41. The Consultation Report refers to the recommendation in the Hodges Review<sup>19</sup> that the definition 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’.
42. The Consultation Report notes that there is a risk that RMAs (who are not legal practitioners) may erroneously infer from that definition that they are able to act on behalf of clients in court proceedings in relation to visa decisions and be ‘subsequently sanctioned by the court’.
43. However, the Consultation Report states that the Department does not recommend amending the Migration Act to clarify this matter. The Consultation Report states:

*...RMAs may still have a legitimate supporting role in preparing for court proceedings, including collating documents, interviewing or advising clients. An RMA could potentially assist in the review of and advice on the visa decision, or provide referrals to accredited migration legal practitioners. An RMA may also provide assistance to a*

<sup>18</sup> Paragraph 276(1)(c) of the Migration Act.

<sup>19</sup> The Hon John Hodges, Glenn Ferguson, Helen Friedmann, Len Holt, *2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession*, May 2008 [<link>](#).

*client that chooses to lodge their court application as a self-represented litigant (or obtain legal representation or legal aid assistance).*

*Further, removing references to 'court' from the definition of immigration assistance would remove the OMARA's direct capacity to consider any complaints or potential disciplinary action in relation to an RMA restricted legal practitioner's performance or behaviour in relation to court proceedings.*

## Committee response

44. The Committee does not support the proposal in 3.1.4.2 of the Consultation Report to retain a definition of immigration assistance that permits an RMA (unless they are a restricted legal practitioner) to offer immigration assistance in connection with court related work.

### Judicial review matters require legal expertise

45. The Committee notes that judicial review of migration decisions, unlike proceedings in the Administrative Appeals Tribunal or the Immigration Assessment Authority, does not turn on the merits of a person's visa application. Instead, any judicial review application to a court will need to demonstrate that there is a legal error in the decision under review.

46. The grounds for judicial review are very limited and only Australian legal practitioners should be advising on judicial review prospects or preparing documentation for court proceedings. As discussed above, such advice may amount to legal practice and thus be unlawful for a person who is not a legal practitioner to provide.

### Addressing the proposed circumstances in which RMAs may assist in court matters

47. The Consultation Report appears to accept that RMAs should not advise on the prospects and substance of judicial review matters, but considers that it may be possible for RMAs to:

- perform a supporting role in preparing for court proceedings, including collating documents, interviewing or advising clients;
- assist in the review of and advice on the visa decision;
- refer persons to accredited migration legal practitioners; or
- provide assistance to a client that chooses to lodge their court application as a self-represented litigant.

48. It is worth working through each of these in turn.

49. The Committee considers that '*preparing for court proceedings, including collating documents, interviewing or advising clients*' amounts to legal work which should only be handled by Australian legal practitioners. In particular:

- '*preparing for proceedings before a court*' requires legal knowledge and training in court processes and procedures, matters which are not taught in the prescribed course for RMAs;

- ‘*collating documents*’ requires legal knowledge and training in determining the appropriate supporting documents that assists the court in its judicial proceedings, matters which are not taught in the prescribed course for RMAs;
  - ‘*interviewing and advising clients*’ requires legal knowledge and training in determining the underlying issues that relate to judicial review and matters that assist the court in its judicial proceedings, which are not taught in the prescribed course for RMAs.
50. In relation to the suggestion that ‘*[a]n RMA could potentially assist in the review of and advice on the visa decision*’, the Committee notes that an RMA could assist in reviewing a visa decision made at the Department level, in determining review prospects at the relevant Tribunal, which is not ‘court’ work. This is because, like with the primary decision, the relevant question is the merits of the application.
51. However, the Committee maintains that ‘*reviewing and advising on a visa decision*’ for the purposes of determining prospects of judicial review (in particular, identifying jurisdictional error and drafting grounds of review accordingly) requires legal knowledge and training in administrative law, which should only be handled by Australian legal practitioners.
52. In relation to the suggestion ‘*[a]n RMA may also provide assistance to a client that chooses to lodge their court application as a self-represented litigant*’, may incorrectly imply that an RMA can assist a self-represented litigant in the background as ‘shadow representation’.<sup>20</sup> The Committee is also concerned that consumers may be (mis)led to believe that instead of seeking legal assistance from an Australian legal practitioner, the person could seek the same legal assistance from an RMA to lodge a court application as a self-represented litigant. That clearly sends the wrong message, is inconsistent with other provisions of the Migration Act (which seek to dissuade that kind of conduct), and may not be in the best interests of the affected person.
53. Part 8B of the Migration Act imposes an obligation on persons not to encourage other persons to commence or continue unmeritorious migration litigation in the courts. It reinforces the powers of courts having jurisdiction in relation to migration litigation to make personal costs orders against persons who encourage unmeritorious migration litigation. Further, only lawyers acting in migration cases are required to certify at the institution of proceedings that the application has merit.
54. Those provisions are designed both to deter the initiation or continuation of proceedings that are an abuse of a court’s process and which waste court resources and to safeguard litigants so that they are not encouraged to pursue unmeritorious migration litigation. Costs orders may be made against lawyers, migration agents or other persons who have encouraged the prosecution of unmeritorious migration claims by litigants. Courts will be able to make a personal costs order against an adviser promoting litigation behind the scenes if the person has given no proper consideration to the prospects of success or has acted for an ulterior purpose.

---

<sup>20</sup> Shadow representation undermines the integrity of Australia’s immigration and legal systems. For an explanation of integrity issues arising out of shadow representation in the judicial review context, see paragraphs 177-180 of the Law Council of Australia’s Federal Litigation and Dispute Resolution Section Submission to the Department of Home Affairs, Creating a world class migration advice industry (29 July 2020) <https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf> For an explanation of integrity issues arising out of shadow representation in the merits review context, see paragraphs 22-27 of the AAT Submission to the Department of Home Affairs, Creating a world class migration advice industry (July 2020) <https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-administrative-appeals-tribunal.pdf>.

55. The problem arising out of persons promoting litigation behind the scenes was highlighted by Wilcox J in *Muaby v Minister for Immigration & Multicultural Affairs*:

*Challenges to decisions of the Refugee Review Tribunal may not be motivated in all cases by a careful consideration of the relevant legal principles and an assessment of the prospects of success. Those challenges, it is suspected, may in some cases be driven more by a determination to remain in Australia for as long as possible, whatever may be the ultimate prospects of success in the courts. And even more disturbing is the potential that some challenges may be pursued by unrepresented litigants who have been given ill-considered advice as to their prospects.*<sup>21</sup>

56. The Committee maintains that only Australian legal practitioners should be allowed to provide advice in relation to migration-related court matters. The Committee is concerned that an RMA may be unable to sufficiently advise a client relating to court matters, thereby exposing consumers to an unacceptable level of risk and potentially give rise to RMAs facing penalties for engaging in unqualified legal practice.<sup>22</sup>
57. The Committee is concerned that by retaining ‘court’ work in the definition of ‘immigration assistance’ there is a risk that RMAs may be involved in the lodgement of unmeritorious cases<sup>23</sup> thereby adding to the migration case backlog in the courts, which facilitates the ongoing residence of non-citizens in Australia who may have no lawful basis to remain onshore.<sup>24</sup>
58. The Committee recommends that Part 3 of the Migration Act be amended to ensure there is no ambiguity, and that it is clear that the provision of advice about the commencement or continuation of migration litigation, certification of reasonable prospects of success and representation before the court are matters that should only be undertaken by Australian legal practitioners.
59. In that regard, the Law Council’s submissions to the Hodges Review (which are recorded within that Review) provide a useful starting point:

*In its submission, the LCA noted that it believes that the current definitions of immigration assistance and immigration legal assistance in sections 276 and 277 of the Act lack clarity and may effectively sanction legal practice by non-lawyers. In particular, it takes issue with the definition of immigration assistance, which includes ‘preparing proceedings before a court or review authority’ and ‘representing an applicant in proceedings before a court or review authority.’ The LCA recommends that the definition of immigration assistance be changed to clarify that nothing in the Act permits the practice of law by non-lawyers. It suggests that this could be achieved by inserting a provision in section 276 which contains words to the effect of ‘Nothing in this definition shall be construed as in any way permitting a person other than a lawyer to provide legal advice or services’. The submission from the IARC shares the concerns that the current definition of immigration assistance could lead to the practising of law by migration agents who are not qualified to do so. It recommends that section 276 of the Act be amended to exclude references to court proceedings.*

---

<sup>21</sup> *Muaby v Minister for Immigration & Multicultural Affairs* (Unreported, Federal Court of Australia, Wilcox J, 20 August 1998).

<sup>22</sup> Above, n 15.

<sup>23</sup> Only lawyers are required to provide the court with written certification that there are reasonable prospects of success as part of lodging migration-related judicial review applications.

<sup>24</sup> See paragraphs 176-181 of the Law Council of Australia’s Federal Litigation and Dispute Resolution Section Submission to the Department of Home Affairs, Creating a world class migration advice industry (29 July 2020) <https://www.homeaffairs.gov.au/reports-and-pubs/files/world-class-submissions/submission-law-council-of-australia.pdf>

## Responsibilities of OMARA

60. Finally, the Committee notes the suggestion in the Consultation Report that the reference to 'court' in paragraphs 276(1)(c), s276(1)(d) and s 276(2)(c) of the Migration Act should be retained to enable the OMARA to regulate the activity.
61. The Committee does not consider it to be good practice to include an activity within the definition of 'immigration assistance' for the sole or primary purpose of enabling it to be regulated.

### **The Committee recommends:**

- **amending paragraphs 276(1)(c), 276(1)(d) and 276(2)(c) of the Migration Act so that it no longer defines 'immigration assistance' as 'preparing for proceedings before a court'; and**
- **inserting a provision into the definition of 'immigration assistance' in section 276 of the Migration Act which clarifies that 'nothing in this definition shall be construed as in any way permitting a person other than a lawyer to provide legal advice or services'**