



**Submission to the Senate Legal and Constitutional Affairs Committee
on Migration Legislation Amendment (Migration Agents Integrity
Measures) Bill 2003**

1. Introduction and outline of submissions

(a) Introduction

The Refugee & Immigration Legal Centre (“RILC”) is a specialist community legal centre providing free legal assistance to asylum seekers and disadvantaged migrants in Australia. RILC is the amalgam of the Victorian office of the Refugee Advice and Casework Service (“RACS”) and the Victorian Immigration Advice and Rights Centre (“VIARC”) which merged on 1 July 1998. RILC brings with it the combined experience of both organisations. Since their inception in 1988 and 1989 respectively, the RACS office in Victoria and VIARC have assisted many thousands of asylum seekers and migrants.

RILC specialises in all aspects of refugee and immigration law, policy and practice. We also play an active role in professional training, community education and policy development. In addition, we run a substantial volunteer program, involving approximately 80 persons, many of whom are migration agents and who register under and perform the majority of their work as non-fee charging migration agents within our organisation.

We are also a contractor under the Department of Immigration’s Immigration Advice and Application Scheme (“IAAAS”) and we visit the Maribyrnong Immigration Detention Centre often. RILC has been assisting clients in detention for over eight years and has substantial casework experience. We are often contacted for advice by detainees from remote centres and have visited some of these Immigration Reception and Processing centres on a number of occasions. We are also a regular contributor to the policy debate on a broad range of issues in the refugee and general migration areas.

In the financial year ended June 2003, RILC gave assistance to nearly 3,000 people. Our clientele largely consists of people from a wide variety of nationalities and backgrounds who cannot afford private legal assistance and are often disadvantaged in other ways, such as being victims of torture and trauma.

RILC has had the benefit of reading the submissions made by the Law Institute of Victoria/Immigration Lawyers Association of Australia and the Law Society of New South Wales on the proposed legislation and endorses, in general terms, the comments made in those submissions. In particular, RILC agrees that the proposed obligation on migration agents to notify DIMIA of every person to whom 'immigration advice' is provided is unnecessarily onerous and directly conflicts with the duty to preserve client confidentiality in addition to legal professional privilege.

In this submission, RILC has sought to focus on only three aspects of the proposed legislation, namely:

- (1) The test of 'vexatious activities',
- (2) The proposed power of DIMIA to refer migration agents with high refusal rates to MARA for mandatory de-registration; and
- (3) The requirement that holders of a law degree without a current practicing certificate be required to complete an accredited migration agent's course.

Due to time constraints, our submission has not dealt with other matters the Bill for which we have concerns, and this submission should not be taken as agreeing with any aspects of the Bill unless specifically indicated.

(b) Outline of submissions

- The Migration Legislation Amendment (Migration Agents Integrity Measures) Bill 2003 ("the Bill") is intended to implement various recommendations of the 2001-2002 Review of Statutory Self-Regulation of the Migration Advice Industry ("the Review"). Other recommendations of the Review are proposed to come into effect without the need for express legislative enactment.

RILC supports those provisions of the Bill which provide MARA with greater powers to investigate allegations of unprofessional conduct by current and former migration agents. RILC also welcomes many of the recommendations of the Review, including the recommendations that MARA be made more accessible to complainants, that consideration be given to requiring professional indemnity insurance for all migration agents and that MARA develop community education programs which would include information about average fees charged within the industry. RILC would strongly support the development by industry-specific bodies of a general 'Scale of Fees' - as exists for some other professions - to provide guidance to consumers and migration agents as to acceptable levels of fees and charges.

- RILC fundamentally opposes the introduction of a legislative scheme of sanctioning migration agents based on 'high visa refusal rates' as the primary criterion for whether or not a migration agent is acting properly and professionally.

RILC believes that use of visa rejection rates as a determinant of an agent's professionalism is illogical, unfair and unwarranted. It has the very real potential to lead to serious and undesirable consequences such as a reluctance on behalf of some agents to give immigration assistance, the de-registration of some competent and professional agents and quite possibly an increase in litigation as agents attempt to postpone or correct their rejection rates through the court system.

Further, the inter-relationship between the sanctions scheme and persons providing limited 'immigration assistance', a second opinion, or 'immigration assistance' for only part of the proceedings is unclear. It is inherently unfair and, indeed, absurd, that migration agents acting in these circumstances would automatically have visa refusals noted against them.

- The sanctions scheme will impact particularly on persons who are obliged to apply for certain types of visas merely in order to directly access the Minister's personal, discretionary powers of 'public interest' intervention.¹ There are no objective *legal* criteria for the exercise of these personal powers. Moreover, the powers are non-compellable and non-appellable. Further, as the Minister intervenes under these powers only rarely, migration agents who assist applicants to make proper humanitarian applications will be penalised with inevitably high refusal rates, without the ability to seek administrative or judicial review of these decisions.
- It is of particular concern that the proposed legislation provides DIMIA with powers, which more properly belong to regulatory bodies, such as MARA. Once DIMIA makes a referral, MARA is obliged to de-register an agent. MARA has no discretionary power in the matter and becomes merely a vehicle for a disciplinary decision taken effectively by DIMIA. This is inconsistent with the scheme of self-regulation and, more disturbingly, creates a situation of direct, systemic and acute conflict of interest which is completely inconsistent with one of the fundamental, guiding obligations of migration agents: namely, that agents not act for a client where there is a conflict of interest which would in any way affect their ability to act in the legitimate interests of their client.²

This would create a situation where DIMIA will be statutorily empowered not only to decide visa applications and cancellations, but also how and who will be entitled to assist visa applicants and others in preparing and putting their cases to the very same Department, resulting in an intolerable power imbalance between consumer and decision-maker.

It would also have the very real potential to drive a wedge between applicant and agent to the extent that any agent would be placed in an unavoidable situation in which they were prevented from freely and fully acting in the 'legitimate' (best) interests of their client.

¹ See sections 351, 417 and 48B of the *Migration Act* 1958.

² See Item 2.1A (d), Schedule 2 of Regulation 8 of the Migration Agents Regulations 1998

Thus, a key proposal of the Bill sets up a scheme, which is completely at odds with one of the fundamental obligations of agents. We further note that in the area of provision of legal and other advice in the context of fiduciary relationships (e.g. lawyer/client; doctor/patient etc), acting in the ‘best interests’ of the ‘client’ is, for good reason, considered essential and sacrosanct.

- RILC would welcome any reforms designed to improve both legal knowledge and ethical standards in the profession, providing that they are implemented in ways which do not interfere with the professional obligations of a migration agent to act on instructions within the law and in the clients best (“legitimate”) interests, whilst maintaining client confidentiality.

2. ‘Vexatious activity’ sanctions scheme

Recommendation 16 of the Review suggested that measures be taken:

To support the integrity of the migration and humanitarian programs, improve the monitoring of agents and develop more effective means of sanctioning agents who lodge high numbers of vexatious, unfounded or incomplete applications.

Courts in Australia have, in numerous decisions, commented on the difficulties of precisely defining what constitutes vexatious activity. In the High Court case of *Oceanic Sun Line Special Shipping Company v Fay*, Deane J, after considering various authorities, stated that “vexatious” should be understood as meaning “productive of serious and unjustified trouble and harassment”. Deane J also referred to the range of factors that must be taken into account when deciding whether or not a particular course of action is vexatious, and stated that determinations as to what constitutes vexatious conduct should not be taken lightly, but exercised with extreme caution by decision makers.

In this context, we note that administrative decision making is not technically bound by the doctrine of precedent. Further, in practice, it is our experience that in a number of

areas, there is a distinct, systemic lack of consistency and predictability in both the application of law and policy, as well as in approaches to the assessment of credibility and ‘objective’ country or other information. It is an unfortunate aspect of the system that, with depressing regularity, like cases are *not* treated alike. This is but one significant reason why the reduction of a concept as complex as ‘vexatious activity’ into a simplistic statistical formula in a jurisdiction as uncertain and arbitrary as the migration and refugee jurisdictions is inherently misguided, overambitious and could well result in serious injustice to both applicants and agents alike.

RILC acknowledges the importance of discouraging persons from making applications for migration, refugee or humanitarian visas when they do not meet the criteria. However RILC does not accept that visa rejection rates in and of themselves are in any way an accurate determinant of whether or not an applicant (or the migration agent that assists them) is acting vexatiously within the proper legal meaning of the term.

There are many reasons for a visa applicant believing that they satisfy the relevant criteria, but eventually failing in their application. This is acknowledged to some degree in the Explanatory Memorandum,³ where examples are provided of instances where DIMIA may decide to exercise their discretion not to refer a migration agent with a ‘high refusal rate’ to MARA based on the agent’s explanation for the refusal.

Neither the DIMIA discretion to not refer certain agents with high refusal rates to MARA, nor the right of appeal to the AAT of a DIMIA referral, provide a sufficient safeguard against abuse. There are no criteria as to how DIMIA will exercise their discretion or what factors will be taken into account on review by the AAT.

Further, even were the proposed legislation to set out the circumstances in which DIMIA might exercise its discretion not to refer a migration agent with a high refusal rate to MARA, this would not prevent inconsistent and arbitrary exercise of the discretion. The fact that there is no reference or attempt to articulate such circumstances in the Bill compounds our concerns regarding this matter.

³ See explanation for Section 306AE.

The examples listed in the Explanatory Memorandum underscore the practical difficulties in the administration of such a test. There are an infinite number of variables in the migration and humanitarian visa jurisdictions which affect an applicant's chance of success including; changing country information, Federal Court decisions, differing interpretations of what constitutes concepts such as 'persecution' or 'compelling circumstances', inconsistency and arbitrary decision making at primary and review levels, an applicant's changing health status and other factors.

It would also be improper for a decision maker who has refused a visa application (DIMIA) to later make determinations as to whether there was a reasonable basis for the lodgement of the application in the first place.

A category of particular concern to RILC are those persons who apply for migration or humanitarian visas in order to access the Minister's humanitarian discretion. The Minister's humanitarian intervention is designed to give effect to protection obligations owed under certain human rights treaties signed by Australia, as well as providing an avenue for relief to persons with other compelling humanitarian circumstances. There is no specific humanitarian visa class, nor are there any specific criteria for the exercise of the Minister's humanitarian intervention. Instead, guidelines have been developed which provide examples of some of the circumstances in which the Minister may intervene.

The Minister's humanitarian discretion is absolute and there is no obligation upon the Minister to consider any application. Without any objective legal criteria, it is impossible to say whether or not an applicant satisfies the criteria at the time of their request for humanitarian intervention. Provided that there is some humanitarian element to an applicant's situation - as there is, in our experience, for a great many unsuccessful requests - it would be untenable for DIMIA to declare such a request manifestly unfounded. Moreover, given that humanitarian requests are entirely discretionary in nature, and in particular, non-compellable and non-appellable, there is no merits review or form of scrutiny in relation to such decisions.

The sanctions scheme is made all the more arbitrary and objectionable by the ability of DIMIA to adjust the levels of the 'high visa refusal rate' and other relevant indicia (including the numbers of applications to be assessed and the time period in which they are to be assessed) by Ministerial determination. This sliding scale approach provides scope for serious abuse and selective adjustment of 'visa refusal rate' levels to suit policy considerations.

RILC believes that the appropriate forum for allegations of unprofessional conduct should be via the MARA complaints mechanism, not through mandatory de-registration based on an arbitrary success rate and DIMIA referral.

Clause 2.17 of the Code of Conduct⁴ states that agents must not encourage vexatious applications and must obtain written acknowledgement if a client wishes to proceed with an application against the advice of a migration agent. RILC considers this to be the proper codification of the responsibilities of a migration agent.

RILC believes that the most appropriate way to deal with unfounded but valid visa applications is to fast track those applications through the system so that minimal advantage is gained by claimants wishing merely to prolong their stay in Australia, or by unscrupulous migration agents encouraging such applications. RILC points out that a number of mechanisms are currently used by all tiers of decision making (i.e. DIMIA, the Refugee Review Tribunal and Migration Review Tribunal, and the Federal/High Courts) to accelerate certain categories of cases through the system. Any benefits that accrue to claimants during this process must be accepted as an inevitable consequence of an administrative law system which is guided primarily by ensuring that individuals can have their cases heard fairly.

3. Inappropriate role of DIMIA in disciplining migration agents

⁴ See Item 2.17, Schedule 2 of Regulation 8 of the Migration Agents Regulations

The Review recommends that the current statutory self-regulation of the migration industry be continued until such a time as the industry is capable of effectively managing complete voluntary self-regulation.

RILC agrees that the continued statutory self-regulation of migration agents is necessary and that MARA has been a less than effective watchdog. RILC continues to receive a significant number of complaints against MARA concerning the difficulty and cost of accessing MARA, especially for those of a non-English speaking background, delays in MARA responding to complaints, lack of information on the progress of complaints, unsatisfactory or delayed outcomes resulting from complaints and administrative errors, delays and inefficiencies in re-registering migration agents.

Many applicants are frightened of lodging complaints against their migration agent on account of fears that this may prejudice their application, that it will incur additional costs, adversely draw DIMIA's attention to their case or result in loss of original documents held with their migration agent. MARA's complicated telephone voice recording in English is a significant deterrent to potential complainants. RILC believes that the total number of complaints made to MARA during 2000-2001 (168) reflects only a fraction of the actual number of complaints against agents within the industry.

RILC believes that MARA should be established as an independent government agency, independent of both DIMIA and the MIA, which is not fully representative of the migration industry and certainly not of the community sector. There are significant benefits in having the migration industry regulated by an independent watchdog, which is not a professional association. As the Review points out "There is considerable risk that under a voluntary regulation scheme the MARA would not have the tools it needs to effectively modify the professional conduct of agents, or where appropriate, to remove them completely from the industry."

As an independent watchdog, MARA should be empowered to take action against both registered and unregistered practice, removing this function from DIMIA.

Of great concern to RILC in the proposed legislation is the fact that DIMIA will be given power to determine whether or not to refer a migration agent with a high visa refusal rate to MARA, thus undermining the role of MARA as the agency responsible for disciplining migration agents. MARA will have no discretion but will be required to de-register the agent within 7 days. Although there is provision for a review of the DIMIA decision by the AAT, natural justice requires that there be an independent decision maker at primary level as well as secondary level.

It is a basic principle of law that a government department whose decisions are being challenged not be responsible for making disciplinary decisions concerning agents who are challenging those decisions. To do otherwise is to create a fundamental and systemic conflict of interest. Impartial and independent decision making is required at both primary and review levels.

Further, as stated above there are no criteria within the legislation specifying how DIMIA will exercise its discretion not to refer a migration agent to MARA. This provides considerable scope for arbitrary decision making. Asking DIMIA to accept a reasonable explanation for the lodgement of a certain number and percentage of visa applications it has itself refused places DIMIA itself in a conflict of interest situation, as it would the RRT or MRT were they to be given similar powers.

It is in the interests both of consumers and of the integrity of the migration industry that DIMIA act, and is seen to be acting, at arms length from decisions requiring de-registration of agents who are challenging DIMIA decisions.

RILC submits that an independent MARA should maintain formal and effective control over the registration and discipline of migration agents.

4. Sound knowledge requirement

Recommendation 3 of the Review states that:

Only lawyers with a current practising certificate would be exempted from [current] initial entry requirements.

The MARA should be given the power to refuse to register a person seeking initial registration unless they have sound knowledge of migration procedure or other relevant qualifications.

The proposed legislation requires persons with a law degree but without a current practising certificate to demonstrate their sound knowledge of migration law by completion of an accredited migration agents course.

In principle RILC considers that every person practising as a migration agent - whether a lawyer with a current practising certificate or without a current practising certificate - should be required to demonstrate sound knowledge of migration law, and not rely on other qualifications as a substitute for 'sound knowledge'.

RILC considers that the introduction of CPD training has been a particularly positive development in the jurisdiction in recent years.

Despite this, RILC is concerned about the financial impact the proposed change will have on volunteers in the community sector who have a law degree, but are not currently practising and are unable or unwilling to pay to undertake a migration agents accreditation course in order to volunteer their time to a community organisation. RILC believes that the suggested amendment may force a number of community migration agent volunteers out of the sector. This would severely compromise the provision of free migration advice to disadvantaged migrants through services such as those provided by RILC and other non-profit organisations. It would also be inconsistent with the stated aim of the Review to 'ease the financial burden of the smaller, non-commercial (not for profit) sector's continued participation in the industry.'

We note that through a number of different services and special projects, RILC has in recent years been providing free legal assistance to between 2,000 and 3,000

disadvantaged migrants, asylum seekers and refugees per annum. Such assistance has included both provision of full application assistance to, for example, East Timorese asylum seekers and Temporary Protection Visa holders, and face-to-face advice at our weekly Night Service. Much of this assistance has been provided by experienced, fully trained and supervised volunteer migration agents. Without this volunteer assistance, much of the work we perform would simply not be possible. Most of those individuals, families and communities assisted would not otherwise be able to access migration advice due to financial hardship and other, often acute, forms of disadvantage. The matters where we assist routinely involve matters as grave as whether someone will be protected from persecution or be able to re-unite with their spouse and children. Thus, vital services in a jurisdiction where there remains an acute situation of unmet legal need would be unnecessarily and dangerously jeopardised.

A number of volunteers at RILC have law degrees but not current practising certificates, including lawyers working for government or organisations whose work does not require them to hold a current practicing certificate, and lawyers completing full-time post-graduate studies. In our experience, the relevant knowledge, experience and quality of advice and assistance provided are in no way diminished by the failure to hold a current practising certificate. We further note that all RILC volunteers, whether practising lawyers or not, are strictly supervised in their work by RILC staff, and are offered an extensive range of professional development activities which are not restricted to gazetted Continuing Professional Development seminars.

In addition, the current cost for completing an accredited migration agents course ranges from \$1400 - \$2000. In our experience, community organisations are in no position to subsidise their volunteers to this degree.

RILC suggests that the proposed legislation be amended to provide an exemption from completion of an accredited migration agent's course for persons with a law degree who are supervised by the provider of an accredited migration agents course. This would be consistent with the concept of 'supervised practice' provided elsewhere in the legislation.

RILC would also like to make brief comment on the proposed ‘bulk registration’ requirement, allowing “bulk publishing to be permitted of community organisation employee’s details in the one newspaper notice where more than one employee of the organisation is making an initial registration application.” In order for this provision to meet its stated objectives, it should apply not only to ‘employees of a community organisation’ but also to *volunteers* at a community organisation.

RILC has over 70 volunteers who have provided and continue to provide invaluable pro bono migration assistance to disadvantaged migrants. Such volunteers should also be able to utilise the bulk registration process as many of those who volunteer at RILC register under us, and undertake all or most of their work as migration agents as volunteers of RILC. Our experience confirms that restricting bulk advertising to employees only will have the very real potential to act as a major disincentive to encouraging people to become involved in the provision of pro bono assistance.

A further consequence of the proposal will be that access to free competent legal advice will be further restricted for those who cannot afford to pay, resulting in an increase in applications that are misguided, hopeless and/or poorly prepared – an outcome directly contrary to the stated purposes of the Bill.

Refugee & Immigration Legal Centre Inc.

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