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The Hon Teresa Gambaro MP
Parliament House
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19th November 2007

Dear Ms Gambaro,

Re: NLA response - Discussion Paper, 2007-08 Review of Statutory Self-Regulation of the Migration Advice Profession

I refer to your letters to the Directors of the Legal Aid Commissions of Australia dated the 12th September 2007 in relation to the Discussion Paper, the 2007-2008 Review of Statutory Self-Regulation of the Migration Advice Profession.

About National Legal Aid (NLA)

National Legal Aid (NLA) represents the Directors of the Legal Aid Commissions of all Australian states and territories. Legal Aid Commissions provide legal services to socially and economically disadvantaged people. The legal services delivered by Commissions include representing clients who are eligible for legal assistance in federal, and state and territory courts and tribunals, the provision of dispute resolution services as appropriate, and the provision of information, advice, assistance and education to members of the public.

NLA aims to ensure the protection or assertion of the legal rights of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice
- afford the financial cost of appropriate legal representation
- obtain access to the federal and state and territory legal systems
- obtain adequate information about the law and the legal systems.

Introduction

Commissions have for many years provided advice and representation in migration matters. The amount of migration work undertaken varies from Commission to Commission with the Legal Aid Commission of NSW providing the most services and having greater experience of matters related to some of the questions posed by the Discussion Paper. This response is therefore largely based on the experience of the Legal Aid Commission of NSW and is endorsed by other Commissions.

Commissions provide advice and representation to visa applicants in the community and representation to protection visa applicants in Immigration Detention Centres, under the Immigration Advice and Application Assistance Scheme. General immigration advice is also provided and grants of legal assistance are made subject to means, merit and restricted legal aid guidelines, for judicial review of Migration Act decisions.

Some Commission legal practitioners are also registered as migration agents. For example, six of the legal practitioners in the Government Law Unit of the Civil Litigation Branch of Legal Aid NSW are registered migration agents. As public servants, legal practitioners employed by Legal Aid NSW are “officials” within the meaning of s275 of the Migration Act 1958 (Cth). A number of Legal Aid NSW clients, particularly criminal clients, receive immigration advice which is given by “officials” as defined under the Migration Act.

Terms of Reference

The terms of reference of the Review are:

- a) evaluate the capacity of the migration advice profession to move to full self-regulation;
- b) evaluate the role of the MIA as the industry regulator in a deregulated environment;
- c) examine the effectiveness of the legislation and other relevant documentation in delivering the policy objectives under review. This includes Part 3 of the Migration Act 1958 (the Act), the Migration Agents Regulations 1998 (the Regulations) and the Deed of Agreement between the Commonwealth and the MIA (the Deed);
- d) evaluate the costs and benefits of the scheme to consumers and the community, and to fee charging and non-fee charging agents;
- e) evaluate the dual regulation of lawyer migration agents;
- f) examine the success of the Continuing Professional Development (CPD) scheme as well as its relevance and accessibility to agents;
- g) examine the options for priority processing of applications submitted to DIAC by registered migration agents; and
- h) report on the effectiveness of, and possible improvements to, the current statutory framework in regulating the migration advice profession.

Purpose of the Review

The purpose of the review is to assist the government assess the readiness of the migration advice profession for a move from statutory self-regulation to self-regulation by examining, among other things:

- the legislative framework within which the Migration Institute of Australia Limited (MIA),
- acting as the Migration Agents Registration Authority (MARA), operates;
- the level of professionalism within the industry;
- consumer confidence and protection; and
- the capacity of the MARA to deal with complaints.

NLA response to the issues for discussion

NLA's submission is confined to the Terms of Reference and issues which are of particular relevance to legal aid work, being Continuing Professional Development, Dual Regulation of Lawyer Agents and Priority Processing for Migration Agents.

Chapter 3 - The Regulatory Framework

- **Should further limitations be placed on who can represent visa applicants? For example, should DIAC limit communications to visa applicants, registered migration agents or those exempt from the need to be registered in section 280 of the Act.**

The restriction on who can 'represent' visa applicants should remain confined to registered migration agents and exempt agents. However authorised recipients should not be abolished. Authorised recipients are useful in so far as they can receive a visa applicant's post for them. Many of the applicants that Commissions deal with live in remote areas, refugee camps, and so on and have real logistical difficulties receiving post. Some therefore have their sponsor or another person receive their post on their behalf. So long as an authorised recipient's role is confined to the receipt of correspondence only (and not the provision of immigration assistance), it is a useful concept.

Chapter 5 - Continuing Professional Development

- **Are there ways in which the regulation of the CPD scheme and its provision could be improved?**
- **Are there issues associated with the MIA being both the regulator and the main provider of CPD activities? If so, how might these be addressed?**
- **To what extent do CPD activities contribute to improved professionalism of registered migration agents?**
- **Should the Graduate Certificate, or parts of it, be either compulsory CPD or a requirement for continuing registration for migration agents who were registered prior to it being a requirement of registration? If so, over what time frame?**
- **Would a tiered system, such as that which operates in the United Kingdom, resolve issues relating to the level of knowledge and professionalism of registered migration agents? If so, how might such a system operate within the Australian regulatory framework.**

All registered migration agents must complete a minimum of 10 CPD points annually to qualify for repeat registration. If an agent fails to obtain 10 points, their application for repeat registration cannot be approved and the agent will be excluded from practising in the industry for a period of 12 months, after which time they may reapply for registration. At least six of the 10 points must be accrued from the completion of approved core activities that relate specifically to the Migration Act (1958) and to portfolio policies and procedures. Agents may accumulate their

remaining points by completing additional core activities or selecting from a range of elective activities.

Legal Aid NSW is a leader in the provision of quality legal education and professional development, not only to its own staff but also to staff who work in Community Legal Centres (CLC) and to some private legal practitioners performing legal aid work. Legal Aid NSW did provide Migration Agents Registration Authority (MARA) approved Continuing Professional Development (CPD) to its legal practitioners and to CLC staff doing immigration work, but no longer provides this service because the MARA approval process proved far too time consuming and cumbersome. The CPD provided by Legal Aid NSW was targeted to cover topics often not covered by other providers but which were particularly relevant to the areas of immigration work typically carried out by the not for profit/community sector, including; refugee law, offshore refugee and humanitarian applications, judicial review of migration decisions, the character test, and family migration.

Because of the dearth of professional education training courses in these areas, Legal Aid NSW develops and runs its own courses which specifically address these areas of immigration law, but which are not CPD approved by MARA. Legal Aid NSW also runs training courses on topics which are very relevant to working with immigration clients from diverse backgrounds and with clients who are socially and economically disadvantaged. These courses include African Culture and Migrant/Refugee Issues, Demystifying Mental Illness, African Cultural Awareness and Working With Muslim Clients.

We are concerned that often the topics covered by commercial CPD providers are not relevant to the not for profit/community sector which typically does not act for applicants applying for skilled, student or business visas. Topics covered are often quite generic and the information, while useful, is basic.

Notwithstanding that Legal Aid NSW provides high quality continuing professional development in these very relevant areas of migration law for its staff and CLC staff, their migration agents are still required to attend approved CPD, which as stated above is not always relevant and often too simplistic. The requirement to attend compulsory CPD, we submit, puts undue pressure on the already limited resources of the not for profit/community sector.

Further it is submitted that the complicated approval process also makes it very difficult to develop and run one-off CPD courses on topics of current interest, such as the effect of new case law and amendments to legislation and on topics which combine aspects of migration law, family law and criminal law, relevant to many migration clients who often have interconnected legal problems.

Core and non-core activities

We suggest that the distinction between core and non core activities is confusing and unhelpful. The majority of CPD activities appear to us to be offered at Level 1, where there are no prerequisites for participation and there is insufficient opportunity for experienced migration agents to deepen their knowledge and skills. To this extent we consider that CPD activities do not sufficiently contribute to improved professionalism of migration agents.

The tiered system

A tiered system, such as operates in the United Kingdom, would not operate well for migration agents working in the not for profit/community sector where agents, often working in small offices, are required to provide advice and representation in a wide range of complex immigration matters from the commencement of their work with clients and where the three levels of initial advice, casework and advocacy and representation must be undertaken immediately.

Activities which are approved for continuing legal education for the purpose of renewing practising certificates should count for CPD points, thereby preventing duplication and cutting down on unnecessary time and money spent by lawyer agents on satisfying different requirements to renew their practising certificates and migration agent's registration.

Chapter 7 Dual Regulation of Lawyer Agents

- **Should lawyer agents continue to be required to be registered with the MARA in order to act as migration agents? If not, why not? If so, are there some requirements currently placed on lawyer agents by the MARA that could be changed or removed?**

Our view is that lawyer agents should not continue to be required to be registered with MARA. We support the submission made by the Law Council of Australia on the Regulation of Migration Lawyers, 3 November 2006, to this effect.

The costs of initial registration, re-registration, CPD and subscription to Legend are simply too burdensome and costly for small, poorly funded community organisations to have to pay. Pro bono assistance, often provided through Law Societies and by private legal practitioner in other matters, is available only on an ad hoc basis for matters which require a migration agent and therefore does not readily present as an option for clients in migration matters.

The dual registration requirement is costly and resource intensive and has a negative effect on the capacity of not for profit and non commercial legal organisations such as CLCs, to provide assistance and deliver quality legal services to socially and economically disadvantaged people.

If lawyer agents are to continue to be required to be registered with MARA, it is submitted that the costs of initial registration, re-registration and subscription to Legend ought to be reduced for lawyer agents working in not for profit and non commercial organisations. Reduced fees coupled with a more flexible approach to the CPD requirements, as set out in our submission above, would go some way to ameliorating the impact on the not for profit/community sector.

Providing immigration advice

Under section 280 of the Migration Act "immigration assistance" may only be given by a registered migration agent.

As lawyers and migration agents, we prepare visa applications and represent applicants before Department of Immigration and Citizenship (DIAC) and the Refugee Review Tribunal (RRT) and Migration Review Tribunal (MRT). Applicants are also represented by us for judicial review of migration decisions. In judicial review applications we brief barristers experienced in Administrative law and in particular Immigration law, but who are rarely registered migration agents.

This creates particular difficulties obtaining advice from barristers when, in addition to needing to know whether an application to a court has reasonable prospects of success, we also need to seek an advice from the barrister on prospects of success on remittal to the RRT or MRT. Barristers will not give advices on this important aspect of law because they are not registered migration agents.

We believe that the distinction between advising on judicial review and on visa applications, both of which require detailed knowledge of migration law, is artificial and works against the interests of clients.

The dual registration requirement has created a myriad of problems, particularly we believe for the not for profit/community sector. The requirement for legal practitioners to register as a migration agent is onerous particularly given the registration to practice requirement already in place for legal practitioners. Legal practitioners are highly trained professional and officers of the court who are bound by strict codes of ethics and conduct. Given the high level of professional regulation which exists for legal practitioners, it is our submission that legal practitioners should not be required to register as migration agents.

Chapter 8 Priority Processing for Migration Agents

- **Should priority processing for applications lodged by registered migration agents be introduced?**

NLA opposes priority processing for applications lodged by registered migration agents. It is particularly inappropriate for agents operating in the not for profit/community sector.

Whilst there may be advantages of such a scheme for commercial agents lodging large volumes of applications in some areas, for example student visas and employer nomination, this would not be the case in the not for profit sector.

The proposed scheme would add yet another level of complexity, bureaucracy and cost to an already highly regulated area. Agents who have gone through the migration agent registration and re-registration process have been recognised by MARA as competent to prepare visa applications and represent clients. Creating a further registration process on top of the existing one is unnecessary.

Priority processing could suggest to some client groups that some agents have special access and status and could cause anxiety to applicants who cannot afford an agent. Applications should be dealt with on their merits as they are received by DIAC.

NLA would be very concerned if the potential for marketing and profits were to inadvertently intrude on the decision-making process.

It is further submitted that if a priority scheme was introduced where Agents were required to lodge “borderline” applications for non priority processing, we believe it could easily lead to Agents being reluctant to indicate to the Immigration Department and to their clients that some applications were indeed “borderline”.

Conclusion

Thank you for the opportunity to provide this submission. If you have any questions please do not hesitate to contact Geraldine Read on (02) 9219 5910 or via e-mail geraldine.read@legalaid.nsw.gov.au

Yours sincerely,

A handwritten signature in black ink, appearing to read 'H. Gilmore', with a stylized flourish at the end.

Hamish Gilmore
Chairperson
National Legal Aid