Migration Amendment (Regulation of Migration Agents) Bill 2019 [and] Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019

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Contents

Purpose of the Bills ........................................ 3
History of the Bills .......................................... 3
Structure of the Bills ........................................ 4
  Migration Agents Bill ..................................... 4
  Rates of Charge Bill ...................................... 4
Commencement ............................................... 4
Background .................................................. 5
  Migration Agents Registration Authority ............. 5
  2014 Independent Review of the Office of the Migration Agents Registration Authority .......... 5
  Migration agents: the legal profession and dual regulation ............................................. 6
  Inquiry into efficacy of current regulation of Australian migration and education agents ...... 8
Committee consideration .................................. 9
  Senate Legal and Constitutional Affairs Legislation Committee .................................... 9
  Senate Standing Committee for the Scrutiny of Bills ..................................................... 9
Policy position of non-government parties/independents ....................................................... 9
Position of major interest groups ................. 10
  Law Council of Australia .................................. 10
  Migration Institute of Australia ......................... 11
  Refugee Council of Australia ............................ 12
  Other migration and legal industry bodies ........ 12

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House: House of Representatives
Portfolio: Home Affairs
Commencement: various dates as set out within this Bills Digest
Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the home pages for the Migration Amendment (Regulation of Migration Agents) Bill 2019 and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at February 2020.
Migration Amendment (Regulation of Migration Agents) Bill 2019 [and] Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019

Financial implications ................................................................. 12
Statement of Compatibility with Human Rights ............. 12
Parliamentary Joint Committee on Human Rights ... 13
Key issues and provisions—Migration Agents Bill ........ 13
  Schedule 1—legal practitioners giving immigration assistance .................................................... 13
  About Part 3 of the Migration Act ......................... 13
  Australian legal practitioners providing immigration assistance ........................................ 13
  Scrutiny of Bills Committee ............................................ 15
Schedule 2—registration periods .............................................. 16
Schedule 3—Redundant provisions ........................................ 16
  Scrutiny of Bills Committee ............................................ 17
Schedule 4—Requirement for applicants to provide further information ...................................... 18
Schedule 5—Registration application charges ............ 18
Schedule 6—Other amendments ........................................... 18
Key issues and provisions—Rates of Charge Bill ........... 19
Purpose of the Bills

This Bills Digest relates to two Bills.

The purpose of the Migration Amendment (Regulation of Migration Agents) Bill 2019 (the Migration Agents Bill) is to amend the Migration Act 1958 in order to deregulate the migration advice industry, in particular to remove lawyers who hold unrestricted practicing certificates from regulation by the Migration Agents Registration Authority (MARA). Lawyers would no longer be able to register as migration agents and would be regulated by the relevant state or territory legal professional body.

The purpose of the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019 (the Rates of Charge Bill) is to amend the Migration Agents Registration Application Charge Act 1997 (the Charge Act) to ensure that a migration agent who paid the non-commercial registration application charge in relation to their current period of registration, but gives immigration assistance otherwise than on a non-commercial basis, is liable to pay an adjusted charge.

History of the Bills

The Migration Amendment (Regulation of Migration Agents) Bill 2017 and the Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017 (the original Bills) were introduced together into the House of Representatives on 21 June 2017.¹

In March 2018, the Federation Chamber agreed to Government amendments to the Migration Amendment (Regulation of Migration Agents) Bill 2017. The key amendments provided for a two-year period of eligibility where legal practitioners who hold a restricted practicing certificate may also be registered as migration agents, allowing them the time to obtain an unrestricted practicing certificate.² This is further discussed below under ‘Key issues and provisions’. The measure was a result of a recommendation from the Senate Legal and Constitutional Affairs Legislation Committee report of October 2017 following concerns raised in stakeholder submissions, in particular from the Law Council of Australia.³

The Bills in their amended form were passed in the House of Representatives on 28 March 2018. The Rates of Charge Bill was introduced into the Senate on the same day. The Regulation of Migration Agents Bill was introduced into the Senate on 8 May 2018, and both Bills were debated on 3 December 2018. The Bills subsequently lapsed at the end of the 45th Parliament on 1 July 2019.

The amended Regulation of Migration Agents Bill and the current Regulation of Migration Agents Bill are similar but are not in equivalent terms. A number of notes have been inserted to provide clarification. In addition Schedule 4 of the current Migration Agents Bill has been substantially redrafted.

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The original Rates of Charge Bill and the current form of that Bill are in similar terms. However, the current Rates of Charge Bill contains minor amendments to the relevant definitions.

This Bills Digest replicates much of the relevant material from the Bills Digest for the original Bills.4

Structure of the Bills

Migration Agents Bill

The Migration Agents Bill comprises six Schedules.

• **Schedule 1** removes unrestricted legal practitioners from regulation by the MARA, and provides for a two-year eligible period in which holders of a restricted practicing certificate may also be registered as a migration agent.

• **Schedule 2** provides that the time period in which a person can be considered an applicant for repeat registration as a migration agent is set out in delegated legislation. It also removes the 12-month time limit within which a person must apply for registration following completion of a prescribed course.

• **Schedule 3** removes redundant regulatory provisions related to the MARA now being a part of the Department of Home Affairs.

• **Schedule 4** enables the MARA to refuse an application to become a registered migration agent where the applicant fails to respond to requests for further information.

• **Schedule 5** requires migration agents to notify the MARA if they have paid the non-commercial application charge but have commenced giving immigration advice otherwise than on a non-commercial basis.

• **Schedule 6** provides that assisting a person in relation to a request to the Minister to revoke a character-related visa refusal or cancellation decision under section 501C or 501CA of the Migration Act is included in the definition of ‘immigration assistance’ and ‘immigration representations’ for the purposes of Part 3 of the Migration Act.

Rates of Charge Bill

The Rates of Charge Bill consists of one Schedule. It amends the Charge Act to provide that the commercial registration application charge that applies to migration agents is the default charge payable and that the non-commercial charge can only be accessed by those applicants who will be solely offering services on a non-profit basis and in association with a charitable organisation.

Commencement

Sections 1–3 of the Migration Agents Bill commence on Royal Assent. Schedules 1 and 2 commence on the earlier of a day to be fixed by Proclamation, or nine months after Royal Assent. Schedules 3, 4 and 6 commence on the earlier of a day to be fixed by Proclamation, or six months after Royal Assent. Schedule 5 commences at the same time as Schedule 1 to the Rates of Charge Bill.

Sections 1–3 of the Rates of Charge Bill commence on Royal Assent. All other provisions commence on the earlier of a day to be fixed by Proclamation or six months after Royal Assent.

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Background

Migration Agents Registration Authority

The Office of the Migration Agents Registration Authority (MARA) is part of the Department of Home Affairs (the Department). The Department’s Annual Report states that the MARA regulates the activities of the Australian migration advice profession to provide consumers of migration advice with appropriate protection and assurance. In accordance with section 316 of the Migration Act, the MARA undertakes functions including:

- managing registration and re-registration of migration agent applications
- administering provision of the industry’s entrance exam and continuing professional development program
- monitoring the conduct of registered migration agents
- investigating complaints about registered migration agents and
- taking appropriate disciplinary action against migration agents who breach the migration agents Code of Conduct or otherwise behave in an unprofessional or unethical way.

Prior to 1 July 2009, the Migration Institute of Australia (MIA), the industry peak body, acted as the MARA under a Deed of Agreement between the MIA and the Department. The 2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession (the Hodges Review), which was undertaken to assess the effectiveness of the regulatory scheme, recommended that the Government consider establishing a regulatory body separate from the MIA.

In response to this review recommendation, the Minister announced the establishment of the Office of the MARA as a discrete office attached to the Department and headed by a specifically designated senior officer solely responsible for Office of the MARA activities. The new body was located in Sydney and assumed the functions from the MIA from 1 July 2009.

The MARA has subsequently been consolidated into the Department, as a result of a recommendation of the 2014 Independent Review of the Office of the Migration Agents Registration Authority (the Kendall Review, discussed below). The Office of the MARA reports to the Department’s Regional Director of New South Wales (NSW) and the Australian Capital Territory (ACT).

2014 Independent Review of the Office of the Migration Agents Registration Authority

On 24 June 2014 the then Assistant Minister for Immigration and Border Protection, Michaelia Cash, announced that the Office of the MARA would be subject to an independent review to be conducted by Dr Christopher Kendall (the Kendall Review). The Kendall Review’s terms of reference were to:

- examine and report on the Office of the MARA’s organisational capability and challenges, as well as the quality and effectiveness of its internal controls and governance

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• examine and report on the most appropriate organisational structure for regulating the immigration advice sector in order to protect consumers
• examine the regulatory framework and powers for the Office of the MARA to assess if they are still appropriate and identify opportunities to reduce regulatory burden. In releasing the report of the Kendall Review in 2015, Senator Cash said that key measures to be implemented would include:
• removing lawyers from the migration agents regulatory scheme
• reviewing the re-registration process for migration agents
• improving the management of continuing professional development courses
• strengthening the training and entry qualifications for new entrants into the migration agent profession
• consolidating the Office of the MARA into the Department and
• reviewing the scope and content of the code of conduct.

The Department’s Annual Report for 2018–19 states that two outstanding recommendations from the Kendall Review are yet to be implemented: removal of lawyers from the regulatory scheme, and review of the code of conduct.

The Bills considered in this Bills Digest address mainly the first of these recommendations—removing lawyers from the migration agents’ regulatory scheme and, to a lesser extent, the second recommendation—reviewing the registration process for migration agents.

Migration agents: the legal profession and dual regulation

On 30 June 2019, there were 7,252 people registered in Australia as migration agents. The MARA’s Migration Agent Activity Report for 1 January–30 June 2019 includes the following information on migration agents at that date:
• 2,192 (30 per cent) of the total number registered had a legal practising certificate
• 94 per cent were operating on a commercial basis
• 40 per cent reported operating in a business as a sole trader
• 73 per cent had never had a complaint made against them
• nine per cent had been continuously registered for less than one year; 31 per cent registered for between one and three years; and 30 per cent of agents had been registered for more than ten years.

Lawyers have been included in the regulatory scheme for migration agents since 1992. The purported reason for doing so ‘was to achieve consistent standards of professional conduct and quality of service within the migration advice profession’.

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10. M Cash (Assistant Minister for Immigration and Border Protection), Government releases OMARA review, media release, 8 May 2015.
However, the regulation of lawyers as migration agents has been controversial and the subject of much debate and extensive lobbying from those—primarily within the legal profession—who argue that the regulation of lawyers under the current scheme amounts to a system of unnecessary dual regulation. The problems of dual regulation were summarised by the Law Council of Australia in one of its submissions to the Hodges Review as follows:

Australian lawyers practicing migration law are effectively required to register as migration agents. Under the current scheme, it is practically impossible for a lawyer advising on migration issues to provide legal services in this area without being required by law to register as a migration agent. This has the practical effect that lawyers are subject to 2 separate schemes of regulation—the comprehensive legal profession regulatory framework and the migration agents’ registration scheme.\textsuperscript{14}

The Hodges Review did not recommend the removal of lawyers from the current Australian regulatory scheme, noting:

… while many of the arguments for and against the continued inclusion of lawyer agents could be the subject of ongoing dispute, it was clear that the inclusion of lawyer agents provided clarity to consumers.\textsuperscript{15}

The Hodges Review recommended that lawyer agents continue to be included in the revised regulatory scheme.\textsuperscript{16}

In 2010, the Productivity Commission, in a report entitled \textit{Annual Review of Regulatory Burdens on Business: Business and Consumer Services} recommended that dual regulation should cease:

The Australian Government should amend the \textit{Migration Act 1958} to exempt lawyers holding a current legal practicing certificate from the requirement to register as a migration agent in order to provide ‘immigration assistance’ under section 276. An independent review of the performance of these immigration lawyers and the legal professional complaints handling and disciplinary procedures, with respect to their activities, should be conducted three years after an exemption becomes effective.\textsuperscript{17}

The 2014 Kendall Review considered the regulation of lawyers and found that dual regulation risks confusing those persons seeking migration assistance and imposes an unjustified burden on lawyer agents who, as lawyers, are already subjected to one of the strictest regulatory regimes of any profession in Australia.\textsuperscript{18}

The Kendall Review stated that the extent to which lawyers are affected by two schemes of regulation is clear on a number of levels. These include the requirement to pay two sets of registration costs—lawyers must pay annual registration costs as agents and must also pay the cost of their annual legal practicing certificates. Disciplinary procedures are also confusing, caused by the \textit{Migration Act}’s definition of ‘immigration advice’ and ‘immigration legal advice’.\textsuperscript{19} Where the complaint involves a registered lawyer-agent, the threshold issue is whether the conduct

\textsuperscript{14} The Kendall Review, op. cit., p. 40.
\textsuperscript{15} The Hodges Review, op. cit., p. 76.
\textsuperscript{16} Ibid.
\textsuperscript{17} Productivity Commission (PC), \textit{Annual review of regulatory burdens on business: business and consumer services}, Research report, Recommendation 4.2, PC, Canberra, August 2010, quoted in the Kendall Review, op. cit., p. 42.
\textsuperscript{18} Ibid., p. 67.
\textsuperscript{19} Ibid., pp. 40–41. The two definitions are described below under ‘Key issues and provisions’.
constitutes immigration assistance or legal advice. If the conduct is not immigration assistance, then the complaint is referred to the relevant legal services regulator.  

The Kendall Review further explained that it is possible for lawyer-agents to give immigration assistance and, with the same client, give extensive legal advice or representation before the courts. The former conduct is within the MARA’s jurisdiction and subject to its investigation. The latter conduct is referred to the relevant state or territory legal services regulator. Where conduct is within the MARA’s jurisdiction, the process for investigating and sanctioning lawyer-agents is the same as that for non-lawyer agents.

This duplication and confusion led the Kendall Review to support the observation of the Productivity Commission’s 2010 report:

... there appears to be an absence of firm evidence to support the position that an exemption of lawyer migration agents from the Migration Agents’ Registration Scheme would be likely to result in reduced protection for clients of those agents.

The Kendall Review recommended that lawyers be removed from the regulatory scheme that governs migration agents such that lawyers cannot register as migration agents and are entirely regulated by their own professional bodies.

Inquiry into efficacy of current regulation of Australian migration and education agents

On 14 March 2018 the then Assistant Minister for Home Affairs, Alex Hawke, asked the Joint Standing Committee on Migration to inquire into and report on the efficacy of current regulation of Australian migration agents (amongst other things). The Committee’s report was tabled in February 2019 and made ten recommendations, four of which relate to the regulation of migration agents.

The Committee firstly recommended the Government undertake a review of current registration requirements for migration agents, noting that at the time, recommendations from the Kendall Review on assessment and qualifications had only recently been implemented and their effectiveness was not yet known.

Another recommendation was to introduce a period of supervised practice for registered migration agents, similar to that required for legal practitioners prior to granting of an unrestricted practicing certificate. The Committee noted that both the Hodges and Kendall Reviews had made this recommendation.

The Committee also recommended establishing an Immigration Assistance Complaints Commissioner as a statutory authority to address complaints about migration agents and investigate unregistered practice of migration services.
As at the time of writing of this Bills Digest, the Government had not yet responded to the report.28

**Committee consideration**

**Senate Legal and Constitutional Affairs Legislation Committee**

The Bills have been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 18 March 2020. Details of the inquiry are available on the [inquiry webpage](#). Details of the Committee’s inquiry into the original 2017 Bills, referred to in ‘History of the Bills’ above, are available on the [webpage for that inquiry](#).

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny of Bills Committee) reported on the Bills in its Scrutiny Digest of 5 December 2019.29

The Committee raised questions in relation to several provisions in the Migration Agents Bill and sought advice from the Minister in relation to:

- the rationale for a strict liability offence for failing to fulfil a notification obligation in relation to migration agent charges in proposed subsection 312(4) of the Migration Act (item 25, Schedule 1)
- the broad delegation of administrative powers in proposed subsection 320(1) of the Migration Act (item 16, Schedule 3).

The ‘Key issues and provisions’ section below provides further explanation.

The Scrutiny of Bills Committee made no comment in relation to the Rates of Charge Bill.30

**Policy position of non-government parties/independents**

The Australian Labor Party (ALP) supported the original Bills in 2017 and 2018. Shayne Neumann MP, then Shadow Minister for Immigration and Border Protection, noted in his second reading speech that the Bills addressed a recommendation from the Kendall Review and referred to the arguments set out in the Law Council of Australia’s submission to the Senate Legal and Constitutional Affairs Legislation Committee’s 2017 inquiry on the Bills. He acknowledged the concerns raised by the MIA in its submission to that inquiry, but found the case made in the Kendall Review ‘persuasive’.31

The ALP also referred to the importance of consumer protections. In the Senate second reading debate, Senator Kim Carr stated, ‘[w]e are supporting these bills because, after a Senate inquiry and amendments were introduced into the House, the protection for vulnerable migrants will be retained’.32

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30. Ibid., p. 28.
The Australian Greens did not support the original Bills. Senator Nick McKim argued in the Senate second reading debate in 2018 that the registration of lawyers as migration agents ensured their appropriate qualifications and compliance with the code of conduct, thereby enabling greater consumer protections. He referred to arguments put forth by the MIA, discussed below under ‘Position of major interest groups’.  

**Position of major interest groups**

As at the time of writing, the Senate Legal and Constitutional Affairs Legislation Committee (Senate Committee) had not yet published any submissions on the [inquiry homepage](#) for the Bills.

Stakeholders have made known their views on the key matters of the Bills over the course of the series of reviews and inquiries in recent years (outlined in the ‘Background’). Their positions are summarised below based on submissions to the 2017 Senate Committee inquiry and updated where more recent material is available.

**Law Council of Australia**

As already noted, the Law Council’s policy position, set out in numerous submissions to reviews into migration advice industry regulatory arrangements, is that because lawyers are extensively regulated by their own profession in relation to the provision of legal assistance, lawyers should not also be required to be registered by the migration advice profession for the provision of immigration assistance. Most recently, on the day of the introduction of the Bills to Parliament (27 November 2019), the Law Council issued a media release strongly supporting the measures. In the media release, Law Council President Arthur Moses SC said:

> … dual regulation had diminished consumer protection by allowing regulatory functions and oversight to fall between the cracks of the legal and non-legal regulators. ‘This Bill will fix this problem which is why the Law Council supports it … Dual regulation is a source of confusion for consumers, who may be uncertain about the differences between immigration lawyers and migration agents.’

The release also gives support to the two-year eligibility period where legal practitioners who hold a restricted practicing certificate may also be registered as migration agents, allowing them the time to obtain an unrestricted practicing certificate. This measure was a recommendation in the Law Council’s submission to the 2017 Senate Committee inquiry on the provisions of the Bills.

The 2017 submission further details the Law Council’s position on the provisions. It identifies a number of adverse consequences of dual registration, including:

- uncertainties and compliance burdens of two separate legislative regimes
- annual cost of two registration fees, both for registration as a migration agent and for a legal practising certificate
- two sets of practice and conduct requirements—professional obligations of legal practitioners and the Code of Conduct for Registered Migration Agents

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• uncertainty for clients, including about whether immigration assistance is provided as a legal service and attracts client legal privilege, and regarding consumer complaints and available remedies.\textsuperscript{36}

It argues that the legal profession is now effectively regulated at the state and territory level, including complaints mechanisms, and that professional indemnity insurance standards offer comprehensive consumer protection to clients.\textsuperscript{37}

It notes concerns raised that if lawyers were to be removed from regulation by the MARA, consumers could not be assured of the same level of service and expertise as those who had undertaken specialist studies or demonstrated experience and knowledge. However, it argues that the legal academic qualifications, practical experience and continuing professional development mandated by the profession are sufficient requirements.\textsuperscript{38}

**Migration Institute of Australia**

The MIA is the professional peak body for registered migration agents and, as noted above, was the regulating authority from 1998–2009. As at the time of writing of this Bills Digest, it had not made a recent statement in relation to the issues. It provided a submission to the 2017 Senate Committee inquiry on the provisions of the Bills. The submission argued against the recommendation of the Kendall Review to remove lawyers from regulation by the MARA:

> Central to these arguments [presented in the Kendall Review] was the notion that lawyers already held superior professional qualifications and had professional bodies to regulate their conduct, and as such, the current high level of consumer protection could be maintained if they were removed from the regulatory system. The MIA does not accept this premise.\textsuperscript{39}

The MIA’s principal concern was that the removal of lawyers from regulation by the MARA would weaken consumer protections. It contended that the qualifications, training and continuing professional development required for registered migration agents better equipped them for the role than many lawyers. It also noted that migration agents who were holders of a restricted practising certificate would have to consider giving up work as migration agents in order to progress their legal career. It summarised its position as follows:

> … the MIA strongly objects to the removal and prohibition of persons who hold a legal practicing certificate from the regulatory scheme. The MIA believes that this is in the best interest of vulnerable consumers and of the migration advice profession as a whole.

Requiring lawyers to register as migration agents with the OMARA, would ensure that:

- consumer protection and confidence is maintained through the provisions and requirements of the migration specific OMARA Code of Conduct,
- information for those seeking immigration assistance will be found in one place,
- the many lawyers working in non-legal migration practices will be able to continue to provide immigration assistance.\textsuperscript{40}

\textsuperscript{36} Ibid., p. 6.
\textsuperscript{37} Ibid., pp. 7–8.
\textsuperscript{38} Ibid., p. 11.
\textsuperscript{39} Migration Institute of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2017 and Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017, [Submission no. 10], 2017, p. 3.
\textsuperscript{40} Ibid., pp. 8–9.
Most individual submissions from registered migration agents to the 2017 inquiry were generally not in favour of the proposed measures, with many highlighting the disadvantage of not being able to simultaneously hold a restricted practising certificate and be a registered migration agent under the provisions as they stood at the time. With the 2019 Bills proposing a two-year eligible period for holders of a restricted practising certificate, the revised positions of the MIA and of individuals are not yet known.41

Refugee Council of Australia

The Refugee Council of Australia has not yet made a statement in relation to the 2019 Bills, but supported the provisions of the 2017 Bills on the basis that removal of lawyers from regulation by the MARA would remove an administrative hurdle from lawyers wishing to provide pro bono migration assistance to refugees and asylum seekers, particularly at short notice.42

Other migration and legal industry bodies

The Migration Alliance, an advocacy organisation of registered migration agents, posted in support of the Bill in its Australian Immigration Daily News blog on 27 November 2019.43

The College of Law, a provider of legal education and continuing professional development, is also the provider of the Capstone assessment, an entry requirement for registration as a migration agent with the MARA.44 It wrote in a news post on its website on 10 September 2019 that in addition to removing ‘the burden of dual registration’, the legislation would allow more lawyers to expand their professional capacity:

While this will be of immense value to the 2,400 legal practitioners already practising immigration law, this change will also create a wealth of possibility for the other 70,000 legal practitioners currently not practising in the field.45

Financial implications

According to the Explanatory Memoranda for the Bills, they will have low financial impact.46

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bills’ compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bills are compatible.47

41 For submissions received by the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2017 and Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017 highlighting the potential disadvantage to registered migration agents holding restricted practicing certificates, see for example: Mr Sergio Zanotti Stagliorio [Submission no. 14]; Mr Mark Northam [Submission no. 21]; and Ms Leila Reypour [Submission no. 4].
42 Refugee Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Migration Amendment (Regulation of Migration Agents) Bill 2017 and Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017, [Submission no. 8], 2017.
46 Explanatory Memorandum, Migration Amendment (Regulation of Migration Agents) Bill 2019, p. 3; Explanatory Memorandum, Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019, p. 2.
47 The Statement of Compatibility with Human Rights can be found at pages 51–57 of the Explanatory Memorandum to the Migration Agents Bill and pages 10–11 of the Explanatory Memorandum to the Rates of Charge Bill.
**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered that the original Bills did not raise any human rights issues.\(^{48}\)

At the time of writing this Bills Digest, the Human Rights Committee had not commented on the Bills.

**Key issues and provisions—Migration Agents Bill**

**Schedule 1—legal practitioners giving immigration assistance**

**About Part 3 of the Migration Act**

The Migration Agents Bill proposes amendments to Part 3 of the *Migration Act*, which regulates the provision of immigration assistance and migration agents.

In general terms, Division 1 of Part 3 deals with preliminary matters and includes definitions relevant to Part 3. Of specific relevance to the Bill are the definitions of ‘immigration assistance’ and ‘immigration legal assistance’. Section 276 of the Act broadly defines *immigration assistance* as advice or assistance in relation to a visa application, or preparation of a visa application.\(^{49}\) Section 277 essentially defines *immigration legal assistance* as a lawyer providing assistance in relation to litigious immigration matters before a court. The two definitions have long been considered confusing and problematic.\(^{50}\)

Division 2 (sections 280 to 285) of Part 3 sets out restrictions on giving ‘immigration assistance’, making immigration representations, charging fees and advertising. Division 2 places restrictions in relation to these types of conduct on persons who are not registered migration agents. It also provides that such restrictions do not apply in relation to lawyers giving ‘immigration legal assistance’.

Part 3 consists of nine further Divisions, which, among other things, deal with the registration of migration agents (Division 3); disciplining of registered migration agents and former registered migration agents (Divisions 3AA and 4A); investigation and decision-making by the MARA (Division 4); obligations of registered migration agents, including notification of certain circumstances to the MARA (Division 5); and the appointment and functions of the MARA (Division 6).

**Australian legal practitioners providing immigration assistance**

*Item 15* along with *items 7 and 8* are the key amendments in Schedule 1.

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\(^{49}\) This includes assistance with nomination or sponsorship of a visa applicant, preparation and/or representation for proceedings before a court or review authority, and preparation of a request to the Minister. Note that *Schedule 6 (item 1)* to the Migration Agents Bill makes an amendment to extend the definition of ‘immigration assistance’ to include assisting a person in relation to a request to the Minister to revoke a character-related visa refusal or cancellation decision. A similar amendment (*item 3*) broadens the circumstances where a person makes ‘immigration representations’.

\(^{50}\) The Hodges Review noted that, in practice, it is often difficult to determine whether the assistance being provided by lawyers is immigration assistance or immigration legal assistance. The net effect of this confusion is that any lawyer practicing in the area of migration law is required to be registered with the Office of the MARA if the lawyer purports to use knowledge of, or experience in, migration procedure to provide advice to applicants regarding visa or review applications. Quoted in the Kendall Review, op. cit., p. 39.
Item 15 inserts proposed section 289B, which provides that an applicant must not be registered as a migration agent if that person is an unrestricted legal practitioner. An unrestricted legal practitioner is an Australian legal practitioner whose practicing certificate is unrestricted (item 5, amending section 275). An Australian legal practitioner is to be defined as a lawyer who holds a practising certificate (whether restricted or unrestricted) granted under a law of a state or territory (item 1, amending section 275 of the Migration Act).

Proposed subsection 289B(2) provides that a restricted legal practitioner must not be registered as a migration agent unless eligible. A restricted legal practitioner is to be defined as an Australian legal practitioner whose practising certificate is restricted, that is, subject to a condition requiring the practitioner to undertake supervised legal practice for a specified period (item 3, amending section 275 of the Migration Act). Item 7 inserts proposed section 278A to set out the circumstance in which a restricted legal practitioner is eligible to be registered as a migration agent. It provides for an eligible period of two years (with a possible extension) in which restricted legal practitioners may also be registered as a migration agent, enabling them to complete the required period of supervised legal practice and qualify for an unrestricted practicing certificate. Following the end of the period, or upon gaining an unrestricted practicing certificate, these legal practitioners would also be removed from regulation by the MARA. The Explanatory Memorandum states that without these provisions, lawyers with restricted practicing certificates would be disadvantaged, in particular those who are currently registered migration agents, in being unable to provide unsupervised immigration assistance.

Existing section 280 of the Migration Act sets out the restrictions on giving of immigration assistance. Amongst other things it provides that a lawyer is not prohibited from giving ‘immigration legal assistance’. Item 8 amends subsection 280(3) to provide that an Australian legal practitioner is not prohibited from giving ‘immigration assistance’ in connection with legal practice. The use of the term ‘immigration assistance’ rather than ‘immigration legal assistance’ is significant. The latter term, currently defined in section 277, is to be repealed (item 6).

The effect of these amendments in combination is to exclude Australian legal practitioners who hold an unrestricted practising certificate from registration as a migration agent but allow them to give legal advice on immigration matters while regulated solely by their own legal professional bodies.

Schedule 1 makes various other consequential amendments resulting from the removal of Australian legal practitioners from the migration agent regulatory scheme. The more significant are described below.

Existing section 282 sets out restrictions on charging fees for making immigration representations and in particular provides that a person who is not a registered migration agent must not ask for or receive any fee or other reward for making immigration representations. Item 11 inserts proposed subsection 282(2A) and provides that section 282 does not prohibit an Australian legal practitioner from asking for or receiving a fee or other reward for making immigration representations in connection with legal practice.

Section 284 sets out restrictions on self-advertising of the giving of immigration assistance. Currently, subsection 284(3) provides that the section does not prohibit a lawyer from advertising

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51. Explanatory Memorandum, Migration Amendment (Regulation of Migration Agents) Bill 2019, p. 12.
52. Ibid., p. 14.
that he or she gives immigration legal assistance. **Item 12** amends this subsection and provides that the restrictions in section 284 do not prohibit an Australian legal practitioner from advertising that the practitioner gives immigration assistance in connection with legal practice.

**Item 17** inserts proposed section 302A into the *Migration Act* so that the MARA must cancel a migration agent’s registration if satisfied the agent is an unrestricted legal practitioner or a restricted legal practitioner who is not eligible. The decision to cancel registration takes effect at the time that the registered migration agent is given written notice of that decision by the MARA.

Existing section 312 sets out obligations of registered migration agents regarding notification to the MARA of certain events and the applicable penalties for failing to do so. **Item 25** inserts proposed subsections 312(4) and (5) requiring a registered migration agent to notify the MARA in writing within 28 days after becoming an Australian legal practitioner (unrestricted or restricted). A failure to comply with the requirement gives rise to an offence of strict liability which is subject to a maximum penalty of 100 penalty units.\(^{54}\)

Section 316 of the *Migration Act* sets out the functions of the MARA. Consistent with the removal of lawyers from the migration agent regulatory scheme, **Item 27** amends the wording of paragraph 316(1)(b), the effect being to remove from the MARA the function of monitoring the conduct of lawyers in their provision of immigration legal assistance. **Item 28** repeals paragraph 316(1)(e), the effect being to remove from the MARA the function of investigating complaints about lawyers in relation to their provision of immigration legal assistance.

**Item 32** inserts proposed Division 8 at the end of Part 3 of the *Migration Act* and sets out the transitional arrangements for Australian legal practitioners following commencement of the amendments in Schedule 1. The Division broadly ensures that from commencement all unrestricted legal practitioners will be immediately removed from the migrations agents’ regulatory scheme, while setting out transitional arrangements for restricted legal practitioners. **Proposed subsection 278A(3)** of the *Migration Act*, at **Item 7**, provides that generally the eligible period is the period of two years after the person first held a restricted practicing certificate. However, to ensure that people who held a restricted practicing certificate prior to the commencement of the Bill also get a full two years in which they are able to be registered as a migration agent, **proposed section 333C** provides that, despite **proposed subsection 278A(3)**, their eligible period is two years from the commencement of Schedule 1 to the Bill.\(^{55}\)

**Scrubty of Bills Committee**

The Scrutiny of Bills Committee drew attention to the creation of an offence of strict liability in section 312 of the *Migration Act* by **item 25** in the context of the guidance on these matters in the *Guide to Framing Commonwealth Offences, Infringement and Notices and Enforcement Powers* (the *Guide*).\(^{56}\) Amongst other things, the *Guide* recommends a maximum penalty of 60 penalty units for an individual where strict liability applies. The Committee noted the statement in the Explanatory Memorandum that the 100 penalty unit penalty imposed by **item 25** was consistent with the other obligations and penalties which are set out in existing subsection 312(1) of the

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53. The imposition of strict liability means that a fault element does not need to be satisfied, but the offence will not criminalise honest errors and a person cannot be held liable if he, or she, had an honest and reasonable belief that they were complying with relevant obligations: see section 6.1 of the *Crimal Code Act 1995*.

54. Section 4AA of the *Crimes Act 1914* provides that a penalty unit is currently equivalent to $210, subject to indexation.

55. Explanatory Memorandum, Migration Amendment (Regulation of Migration Agents) Bill 2019, p. 27.

56. Attorney-General’s Department, *A guide to framing Commonwealth offences, infringement notices and enforcement powers*, Attorney-General’s Department, Canberra, September 2011.
Migration Act, but it was not satisfied that this constituted sufficient justification. That being the case the Committee has requested more detailed justification from the Minister.\footnote{57}{Senate Standing Committee for the Scrutiny of Bills, \textit{Scrutiny digest}, 10, 2019, op. cit., pp. 15–16.}

At the time of writing this Digest, the Minister’s response had been received, but not yet published by the Scrutiny of Bills Committee.\footnote{58}{Senate Standing Committee for the Scrutiny of Bills, \textit{Ministerial responses}, Australian Parliament website, as at 4 February 2020.}

\textbf{Schedule 2—registration periods}

Existing section 288 of the \textit{Migration Act} sets out the requirements for applying to register as a migration agent. In relation to re-registration, applicants have a 12-month period after registration has lapsed in which to re-register and therefore be exempt from certain entry qualifications.\footnote{59}{Migration Act, subsection 288(2).}

Section 289A provides that an applicant who has never been registered as an agent or who is applying to be registered more than 12 months after the end of his or her previous registration must not be registered unless the MARA is satisfied that he or she has completed and passed a prescribed course and exam within the prescribed period or holds the prescribed qualifications.

\textbf{Item 1} amends subsection 288(2) with the effect of providing that the time period in which a person can be considered an applicant for repeat registration as a migration agent is the period prescribed in delegated legislation. The Explanatory Memorandum states that the intention is to prescribe a period longer than 12 months in a legislative instrument made under the \textit{Migration Agents Regulations 1998}.\footnote{60}{Explanatory Memorandum, \textit{Migration Amendment (Regulation of Migration Agents) Bill 2019}, p. 30.}

\textbf{Item 2} repeals and substitutes section 289A, the main effect being to remove reference to the 12-month time frame for re-registration and remove the reference to the prescribed period within which an applicant must complete a prescribed course. According to the Explanatory Memorandum, this amendment complements broader changes made in respect of entry qualifications into the migration advice industry. It states:

These changes include the introduction on 1 January 2018 of a Graduate Diploma in Australian Migration Law and Practice, replacing the Graduate Certificate in Australian Migration Law and Practice as the prescribed course for the purpose of current paragraph 289A(c). Once an individual completes the Graduate Diploma, the qualification will never lapse. Similarly, the Graduate Certificate will never lapse. The prescribed exam, known as the Capstone assessment, will lapse after three years.\footnote{61}{Ibid., p. 31.}

Section 290A deals with continuous professional development in relation to re-registration. \textbf{Item 3} repeals and substitutes section 290A which amongst other things removes the references to a 12-month period for re-registration. The effect of the new provision is that an applicant who applies within the prescribed period will not be able to be re-registered as a migration agent unless they have met the prescribed requirements for continuing professional development within the prescribed period.

\textbf{Schedule 3—Redundant provisions}

As noted above, the Office of the MARA has undergone a number of restructures in recent years. Prior to 1 July 2009, the MIA acted as the MARA under a Deed of Agreement between the MIA and

\footnotesize{\textsuperscript{57} Senate Standing Committee for the Scrutiny of Bills, \textit{Scrutiny digest}, 10, 2019, op. cit., pp. 15–16.\textsuperscript{58} Senate Standing Committee for the Scrutiny of Bills, \textit{Ministerial responses}, Australian Parliament website, as at 4 February 2020.\textsuperscript{59} Migration Act, subsection 288(2).\textsuperscript{60} Explanatory Memorandum, Migration Amendment (Regulation of Migration Agents) Bill 2019, p. 30.\textsuperscript{61} Ibid., p. 31.}
the Department. On 1 July 2009, the Office of the MARA was established as the independent regulator of the migration advice industry. More recently, the MARA has been progressively integrated into the Department and is no longer attached as a discrete office.

Schedule 3 contains amendments to the *Migration Act* to remove redundant provisions and make amendments so that provisions more accurately reflect the current structure of the MARA. This includes the removal of redundant references to the Migration Institute of Australia. These references date back to the period when the MIA was appointed as the MARA.

For example, item 13 repeals and substitutes section 315, which currently provides for the appointment of the MIA as the MARA. Proposed subsection 315(1) clarifies that the MARA is a distinct body established within the Department to administer Part 3 of the *Migration Act*. Proposed subsection 315(2) provides that the MARA’s powers and functions under Part 3 may only be exercised or performed by the Minister or a delegate under section 320.

Item 16 repeals and substitutes subsection 320(1) which provides that the Minister may delegate any of the powers or functions given to the MARA under Part 3 to any Australian Public Service (APS) employee in the Department.

Schedule 3 also repeals certain provisions to reflect the consolidation of the MARA into the Department, including:

- powers of the Minister to refer agents and former agents to the MARA for disciplinary action
- powers authorising the sharing of personal information between the Department and the MARA
- the requirement for the MARA to produce an annual report independent from the Department.

**Scrutiny of Bills Committee**

The Scrutiny of Bills Committee raised questions regarding proposed subsection 320(1) (item 16) and, in particular, the ability of the Minister to delegate power to ‘any APS employee in the Department’. The Committee questioned why the provision allows the delegation of powers to a relatively large class of people, noting also that some of these powers and functions are significant including, for example, the power to cancel or suspend the registration of a migration agent, require registered migration agents or former migration agents to give information, and barring former migration agents from being registered for up to five years.

The Scrutiny of Bills Committee’s preference is that delegates be confined to the holders of nominated officers or to senior executive service (SES) officers. The Committee noted the explanation provided in the Explanatory Memorandum as to why broad delegations are considered necessary, being that the delegation was consistent with the *Migration Act*, that specifying the level of delegation would be unnecessarily burdensome, and that existing delegated powers under Part 3 of the *Migration Act* were working effectively.

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62. Item 9 repeals Division 3AA and item 12 repeals Subdivision 8 of Division 4A of Part 3. As the MARA is consolidated within the Department, the Minister no longer requires legislative power to refer matters to the Authority.

63. Item 17 repeals section 321.

64. Item 18 repeals section 322.

65. These powers are set out in sections 303, 308, 311EA and 311A of the *Migration Act*. Senate Standing Committee for the Scrutiny of Bills, *Scrutiny digest*, 10, 2019, op. cit., p. 16.

66. Explanatory Memorandum, Migration Amendment (Regulation of Migration Agents) Bill 2019, p. 38.
The Committee stated that it has generally not accepted a desire for administrative flexibility or the existence of similar provisions in existing legislation as sufficient justifications for allowing a broad delegation of administrative powers to officials at any level. Accordingly, the Committee requested the Minister’s advice as to:

... why it is considered necessary to allow for the minister to delegate any of the powers or functions given to the Migration Agents Registration Authority to APS employees at any level; and

whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.67

As stated above, at the time of writing this Digest, the Minister’s response had been received, but not yet published by the Scrutiny of Bills Committee.68

**Schedule 4—Requirement for applicants to provide further information**

Schedule 4 makes only one amendment, the purpose being to address an anomaly in relation to the requirements by applicants for registration as migration agents to provide information to the MARA.

Existing section 288B of the *Migration Act* provides that the MARA may require an applicant to make a statutory declaration in relation to information or documents provided by the applicant, or appear before one or more individuals specified by the MARA in relation to the application. Should the applicant not oblige, then the MARA is unable to give any further consideration to the application. According to the Explanatory Memorandum, as a consequence there are a number of outstanding applications which remain open that the MARA has no power to refuse.69

**Item 1** repeals and replaces section 288B, the purpose of the amendment being to allow the MARA to refuse an application to become a registered migration agent where the applicant has been required to, but has failed to, provide information or answer questions in relation to their application.

**Schedule 5—Registration application charges**

The amendments in Schedule 5 are closely related to the amendments proposed in the Rates of Charge Bill and are discussed under that heading below.

**Schedule 6—Other amendments**

Schedule 6 provides that assisting a person in relation to a request to the Minister to revoke a character-related visa refusal or cancellation decision under section 501C or 501CA of the *Migration Act* is included in the definition of ‘immigration assistance’ and ‘immigration representations’ for the purposes of Part 3 of the *Migration Act*. As a result of the amendments, a person must be a registered migration agent in order to assist a person in relation to a request to the Minister to revoke a character-related visa refusal or cancellation decision under section 501C or 501CA.

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69. Explanatory Memorandum, Migration Amendment (Regulation of Migration Agents) Bill 2019, p. 40.
Key issues and provisions—Rates of Charge Bill

Registration fees for migration agents are set out in the Charge Act and the Migration Agents Registration Application Charge Regulations 1998 (Charge Regulations). Registration application costs vary depending on whether or not a person registers as a non-commercial agent (on a non-profit basis). Currently the charges are as follows:

- initial charges:
  - general: $1,760
  - non-commercial or non-profit: $160

- repeat registration application charges:
  - general: $1,595
  - non-commercial or non-profit: $105.

Currently, under section 5 of the Charge Regulations, a person may pay a lower registration application charge (a non-commercial charge) where that person meets two criteria which are:

- the person provides immigration assistance solely on a non-commercial or non-profit basis and
- the person acts as a member of, or associated with, an organisation that operates in Australia solely on a non-commercial or non-profit basis, and as a charity or for the benefit of the Australian community.

Section 10 of the Charge Act currently imposes an adjusted charge in relation to registered migration agents who have paid the non-commercial charge but have given immigration assistance on a commercial basis. Immigration assistance is given on a commercial basis where it is given on a commercial or for-profit basis, or if the migration agent is a member of, or person associated with, an organisation that operates on a commercial, or for-profit basis.

Item 6 of the Rates of Charge Bill repeals section 10 and substitutes a proposed section 10 so that a charge is imposed in respect of a registered migration agent:

- who paid the non-commercial application charge in relation to the agent’s current period of registration and
- who, at any time during that period, begins to give immigration assistance otherwise than on a non-commercial basis.

The term non-commercial basis is defined (item 3). It provides that a registered migration agent gives immigration assistance on a non-commercial basis if the assistance is given solely:

- on a non-commercial or non-profit basis and
- as a member of, or a person associated with, an organisation that operates in Australia solely:
  - on a non-commercial or non-profit basis and
  - as a charity, or for the benefit of the Australian community.

This mirrors the circumstances in which a non-commercial charge is payable under section 5 of the Charge Regulations. It is not simply the inverse of the existing definition of commercial basis, repealed by item 6. Rather, to fall within the scope of the definition of non-commercial basis, the

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70. Migration Agents Registration Application Charge Regulations 1998, subsections 4(2) and 5(2).
71. Note that this additional requirement for the organisation to operate as a charity or for the benefit the Australian community was inserted into the Regulations by the Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017, presumably in anticipation of the corresponding changes to be made to the Charge Act.
72. Charge Act, subsection 9(2).
migration agent must be a member of, or associated with, an organisation that operates as a charity or for the benefit of the Australian community. The Explanatory Memorandum states that the intention is that migration agents must pay the general application charge as the default position, and that the exception is where applicants can demonstrate that they are eligible to pay the lower non-commercial application charge.\footnote{Explanatory Memorandum, Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2019, p. 4.}

Related to these amendments, item 1 in Schedule 5 to the Migration Agents Bill will amend section 312 of the Migration Act to require a migration agent who has been registered on a non-commercial basis to notify the MARA if they begin providing immigration assistance on a commercial basis.