THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: HumanRightsCommittee:VK:1308326

30 July 2010

BY EMAIL: regulatoryburdens@pc.gov.au

Regulatory Burdens Review: Business & Consumer
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Sir/Madam

Re: Annual Review of Regulatory Burdens of Business – The inclusion of lawyers within the migration agent regulatory framework

The New South Wales Law Society's Human Rights Committee ("the Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation in respect of issues of human rights; and to advise the Law Society Council on any proposed changes.

The Committee welcomes the opportunity of providing submissions on the Productivity Commission's draft Research Report, *Annual Review of Regulatory Burdens on Business* ("draft Report"). In view of its mandate, however, it is appropriate to limit the Committee's submissions to the recommendations made with respect to amendments to the *Migration Act* 1958 to exempt lawyer migration agents from the Migration Agents' Registration Scheme.

These submissions focus on the advantages such an amendment will have for highly vulnerable clients within the migration system, and have been prepared with the benefit of having read the submissions provided by the Law Council of Australia ("LCA") and the response by the Department of Immigration and Citizenship ("DIAC").

The Committee endorses the views put forward by the LCA and the recommendation made by the Productivity Commission, however, makes the following additional remarks:

1. Disincentives and additional barriers

The current system of dual regulation provides a great disincentive for skilled legal practitioners to provide pro bono assistance to some of the most vulnerable clients in a complex area of the law. Many legal practitioners wishing to lend assistance to clients under the Australian immigration law are unjustly precluded under the existing regime. The current system of dual regulation requires immigration lawyers to satisfy two regulatory schemes; pay two sets of registration fees; and be subject to two separate complaints handling processes in relation to the same conduct. The

Committee agrees that dual regulation presents an oppressive and unnecessary burden for legal practitioners to provide immigration advice to vulnerable clients. This could increase the likelihood of clients seeking assistance from rogue migration agents, or from persons not sanctioned to give advice or assistance under the *Migration Act 1958* (the "*Act*").

2. Legal professional privilege

As the LCA identifies in their submissions dated 20 April 2010, the current scheme has "enabled non-lawyers, with no legal qualifications, to effectively pass themselves off as trained to give legal advice". The LCA submitted that this can be to the detriment of vulnerable clients with respect to access to fidelity funds and also made reference to the issue of legal professional privilege.

Legal professional privilege is "a practical guarantee of fundamental, constitutional or human rights"[1]. However, under the *Act*, it is a right that can be denied to clients represented by migration agents, who purported to be immigration lawyers.

Section 18 of the *Act* provides authority to the Minister for Immigration to obtain information and documents about unlawful non-citizens from a 'person' by serving that 'person' with a written notice. Section 21 of the *Act* provides that failure to comply with section 18 of the *Act* is an offence of strict liability. What is clear however is that section 21 of the *Act* does "not abrogate legal professional privilege".[2] The LCA submitted, correctly in the Committee's view, that a serious consequence of the confusion that follows from dual regulation is that clients represented by migration agents, who held themselves out as legal practitioners, do not enjoy the benefit of legal professional privilege. These are rights potentially denied to clients because of the lack of clarity that currently exists amongst the public between legal practitioners and migration agents.

That is not the end of the Committee's concerns however. Another issue not yet fully tested in a judicial forum is the possibility, whether real or remote, that lawyer migration agents would be compelled to provide information about their client because they are deemed to have provided the assistance in their capacity as an agent and not as a legal practitioner. Such circumstances would only exist under the current regime of dual regulation.

It is with concern that the Committee notes the Migration Institute of Australia has proposed a new structure that gives titles to members that include "accredited specialist". Although beyond the scope of a response to this Productivity Commission report, it is another example of a circumstance where clients could easily be misled about the qualifications of their advisor, and misguided about the serious consequences such an error can have with respect to consumer protection[3]. The Committee submits that such confusion is less likely to exist with the abolishment of dual regulation.

3. Conflict of interest

As the Productivity Commission's report identifies, the Office of the Migration Agents Registration Authority is a "discrete office within the Department of Immigration and Citizenship." The LCA submits that DIAC has a "vested interest in ensuring agents not

[1] See *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64 per Lander J at [12] referring to *Carter v Northmore Hale Davy & Leake* [1995] HCA 33
[2] See *MIMIA v Hamdan* [2005] FCAFC 113 at [38]
[3] See for example paragraph 24 of the LCA submissions dated 20 April 2010.

only comply with the law, but also support the Federal Government's immigration policy". This is a view shared by the Committee. A legal practitioner may be required to take on an adversarial approach to the DIAC as a result of the Duty of Care owed to their client. The most appropriate advice or action for a client may not always be in line with the Government's policy, in fact, it may require a challenge to those policies. It is alarming to note that the very authority a practitioner challenges on behalf of their client takes the role to discipline them. The presence of a conflict of interest, even if only apprehended, diminishes confidence in the regulatory system.

4. Recommendation

The Committee welcomes the recommendation of the Productivity Commission in its draft Report with respect to the dual regulation of migration lawyers. It does however endorse the suggested amendments to the Productivity Commission's recommendation by the LCA for the reasons they provide in their submission of 30 July 2010. The Committee submits that it is appropriate for the Productivity Commission's recommendation to read:

> *The Australian Government should amend the Migration Act 1958 to exempt lawyers holding a current legal practising certificate from the requirement to register as a migration agent in order to provide 'immigration assistance' under s 276. An independent review of the performance of legal professional complaints handling and disciplinary procedures, with respect to immigration lawyers, should be conducted three years after an exemption becomes effective."*

Once again, the Committee is grateful for the opportunity to put these views to the Productivity Commission and looks forward to considering the final Research Report in due course.

Yours sincerely,

Mary Macken
President