

Issues paper

Code of conduct for registered migration agents for consultation (October 2017)

Purpose

The purpose of this issues paper is to guide the second-stage OMARA consultation process for the review of the Code of Conduct for registered migration agents. The first-stage of the consultation process took place in December 2016. 12 submissions were received and have been taken into consideration for this second-stage of consultation.

This paper details the issues that need to be addressed through the revision of the current Code of Conduct and a preliminary draft of possible inclusions for the new Code.

This issues paper only serves as a guide to structure the consultation process to ensure that stakeholders can provide comprehensive and useful feedback for consideration.

This issues paper does not indicate either the content or structure of the final revised Code of Conduct.

Review recommendation

Recommendation 18 of the Independent Review of OMARA stated:

The Inquiry recommends that the Department undertake a detailed consultation with interested parties to determine how best to address concerns in relation to the scope and content of the Code of Conduct and, after said consultation, amend the Code as then deemed feasible and appropriate.

The Review noted:

- In the majority of discussions with stakeholders and interested persons or organisations, the Inquiry was advised that the current Code of Conduct is verbose, unclear and, as a result, problematic.
- Having reviewed the Code in detail, the Inquiry agrees. Without a significant re-write, there is a considerable risk that consumers will not be protected from inappropriate behaviour and that agents will not fully understand what is and what is not expected from them.

Proposed structure

Issue: The current Code is verbose, unclear and problematic. Specifically the structure of the current Code is confusing and there is significant duplication which has led to confusion for registered agents and consumers.

Proposal for discussion

In order to simplify the Code and to remove duplication, the following structure is proposed:

Parts:

1. Introduction
 - Purpose
 - Jurisdiction
2. Professional responsibilities
 - Notification obligations
 - Terminating services
3. Conflict of interest
4. Financial matters and client engagement
 - Handling Client Monies
5. Obligations to clients
6. Business Practice Management
 - Marketing
 - Record keeping

Questions:

- I. Is this structure clear?
- II. Are the terms used clear?
- III. Are there topic areas that have not been included? If so what would these be?

Proposed inclusions*

*note: These issues are for discussion - the list is not exhaustive and is not meant to be prescriptive at this stage of the consultation process. We welcome feedback and comments for further consideration.

Part 2: Professional responsibilities

Issue: *An analysis of the complaints caseload has shown that numbers of complaints are increasing, and the proportion of complaints that relate to allegations of serious misconduct has significantly increased. This trend raises the concern that registered migration agents are not understanding their professional responsibilities and obligations and that the current Code of Conduct does not provide clear or sufficient guidance to registered migration agents.*

It is proposed that in a re-drafted Code, this part of the Code would be strengthened to provide more guidance to agents. Below is a list of possible inclusions for comment and discussion:

A registered migration agent must:

- not deliberately or negligently mislead or deceive DIBP (including the Authority) or a review body
- not deliberately or negligently conceal relevant information from the decision maker in the immigration matter.
- notify DIBP if appointed as the registered migration agent in a migration matter. Failing to notify DIBP, either intentionally or negligently is a breach of the Code and S312A of the Act. This includes when a matter is transferred from another migration agent, even if in the same firm.
- notify DIBP if their appointment as the registered migration agent in a migration matter ceases.
- not advise clients and prepare applications that they then lodge in the client's name. If an agent advises and prepares an application, it must be lodged in the agent's name using the agent's ImmiAccount if applicable.
- clearly explain to clients any risks or criteria associated with their application.
- take reasonable care to ascertain, as far as reasonably practicable, that documents and information supplied to them and lodged in support of an application, are genuine
- as far as reasonably practicable, lodge complete, assessment ready applications.
- not knowingly or negligently facilitate any deception.
- not take on a case where they have insufficient knowledge or expertise to provide advice or where that lack of expertise would compromise the outcome for the client.
- not undermine the integrity of Australia's Migration Program
- not make a public statement about another agent in their capacity as a registered migration agent, about the DIBP itself or the Tribunals, or about any employee or other person from DIBP or the Tribunals, that is false or misleading in the general impression it gives.
- not exploit, or facilitate the exploitation, of clients. Agents must not refer clients to situations or workplaces that they know, or would be reasonably aware, are not compliant with Australian workplace or health and safety standards.

Questions:

- I. Are the proposed inclusions regarding professional responsibilities clear?
- II. Are there concerns with any of the inclusions? If so, what are the concerns?
- III. Are there any other matters that should be considered? If so what would these be?

Part 3: Conflict of interest

Issue: *The analysis of the complaints caseload has identified that registered migration agents do not clearly understand what constitutes a conflict of interest and what steps they must take to ensure that their migration advice practice does not raise any conflicts of interest.*

It is proposed to separate out a section of the Code to specifically detail registered migration agent obligations in regard to conflict of interest. The aim is to provide more detail and clarity around what constitutes a conflict of interest, which is not generally well understood.

Following are some proposed inclusions for this new section for comment and discussion:

In essence there is a conflict of interest when:

- the registered migration agent's objectivity or the relationship of confidence and trust between the registered migration agent and the client would be compromised, or
- the registered migration agent would compromise the legitimate interests of the client.

A registered migration agent is prohibited from acting for two clients in the same matter, when there is disagreement or conflicting interests between those two clients.

Commissions

Issue: *Agents frequently contact the OMARA seeking guidance in regard to accepting commissions, which indicates that the current Code of Conduct does not provide sufficient guidance and clarity in regard to this subject area.*

Following is a list of possible inclusions for this proposed section of a re-drafted Code for comment and discussion:

- If a registered migration agent, or their organisation, could gain any commission in agreeing to act for a client, the agent must provide a full written explanation to a client and obtain their consent in writing.
- If a registered migration agent receives, or could receive, a financial benefit or commission from giving advice of a **non-migration** nature to the client, or on referral from another agent, they must tell the client in writing and fully disclose the details of the benefit in the Agreement for Fees and Services, so that the client gives their consent.

Questions:

- I. Are the proposed inclusions regarding conflict of interest clear?
- II. Are there concerns with any of the inclusions? If so, what are the concerns?
- III. Are there any other matters that should be considered? If so what would these be?

Part 4: Financial matters and client engagement

Issue: *An analysis of the complaints caseload has identified that there continues to be a significant number of complaints which relate to poor business administration by registered migration agents. Additionally, OMARA reviews of agent practices in regard to handling client monies has identified poor understanding and poor practices. The OMARA has also received feedback from some agents that the process around fees and statements of services are onerous.*

Following are a list of possible inclusions for a revised Code which would seek to clarify registered migration agent obligations in a simpler way, for comment and discussion:

Handling Client Monies

- When monies are received from clients, an agent must issue a receipt.
- The money is banked into the Clients' Account if received in advance. The account is to be called Name of agent/Name of business "clients' account" in the name or description of the account. This account must be kept separate from the operating account.
- An agent cannot draw on the clients' account unless the block of work has been completed and an invoice has been issued to the client.
- When a service is performed and the agent wishes to be paid for it, the agent must issue an invoice. The money can then be moved from the clients' account to the operating account and any GST obligations met (if applicable).
- If the agent has not been paid in advance, the (tax) invoice will be a request for payment.
- An agent must issue a Statement of Services within 28 days of the immigration matter decision, accounting for all charges and services performed. This is a requirement of S313 of the Act. A stakeholder has asked that this be increased to 60 days to allow for monthly account reconciliations.

Questions:

- I. Are the proposed inclusions regarding financial matters and client engagement clear?
- II. Are there concerns with any of the inclusions? If so, what are the concerns?
- III. Are there any other matters that should be considered? If so what would these be?

Part 5: Obligations to clients

Issue: *There is very little succession planning by agents, so that when an agent falls ill and is unable to complete their work and needs to terminate services, no action is taken to assist existing clients or to refer the client elsewhere.*

Following is a draft of proposed guidance for inclusion in the Code for comment and discussion:

A registered migration agent must have arrangements in place for death, incapacity or ceasing the business (succession planning) including who will take carriage of the matter and arrangements for accessing client files, documents and fees. Client files must be held for 7 years.

Issue: *Risks to consumers have been identified in circumstances where registered migration agents establish agreements in the name of their business. In these circumstances, registered migration agents often deny any obligations to the client when they leave the business and furthermore the business often does not advise the client or DIBP that their agent has left, leading to poor client service and the risk of administrative errors.*

Following is a draft of proposed guidance for inclusion in the Code for comment and discussion:

The Agreement for Fees and Services must be between the registered migration agent and the client. Agreements must not be issued solely in a business name.

Questions:

- I. Are the proposed inclusions regarding obligations to clients clear?
- II. Are there concerns with any of the inclusions? If so, what are the concerns?
- III. Are there any other matters that should be considered? If so what would these be?

Part 6: Business Practice Management

Issue: *OMARA analysis of the complaints caseload has identified conduct of concern by agents in regard to the businesses in which they operate. For example, some agents have allowed their MARN to be used by other staff within an office or by other offices off-shore, where they have no involvement in the visa application. The OMARA has also identified circumstances where registered migration agents have begun working in businesses which are suspected or known to be operating unlawfully.*

Following is a draft of proposed guidance for inclusion in the Code for comment and discussion:

A registered migration agent must:

- properly supervise the work of staff, regardless of their employment relationship to ensure that they are not providing immigration assistance or using the agent's MARN.
- take full responsibility for any applications lodged using their MARN.
- ensure that no unregistered person(s) provide immigration advice or assistance on their behalf.
- not allow an organisation to advertise immigration assistance using the agent's MARN, unless the registered agent is involved in providing the immigration assistance, irrespective of whether the immigration assistance is given inside or outside Australia.
- not maintain an association, employment or otherwise, with a person or organisation that misleads or deceives in relation to the giving of immigration advice or otherwise operates in a manner that is inconsistent with the Code.
- not maintain an association, employment or otherwise, with a person or organisation that misleads or deceives in their business operations or otherwise operates in a manner that is unlawful.

Questions:

- I. Are the proposed inclusions regarding Business Practice Management clear?
- II. Are there concerns with any of the inclusions? If so, what are the concerns?
- III. Are there any other matters that should be considered? If so what would these be?

Marketing

Issue: *Agents have advised that the advertising provisions of the code are confusing.*

Following is a draft of proposed guidance for inclusion in the Code for comment and discussion:

A registered migration agent must:

- display their MARN when advertising or in business documents, including business cards, letterhead, website, social media and email.
- ensure clients are aware of and have access to the Code of Conduct. This includes providing a link to the Code on their website, in documents or contracts or providing the client with a copy of the Code if requested. (Electronic or otherwise)
- not imply any privileged relationship with DIBP
- not engage in false or misleading advertising, including, but not limited to, success rates, specialist or expert knowledge or experience, faster or more favourable outcomes, implied advantage over any other agent.
- not use social media in the agent's capacity as a registered migration agent, or where the agent is identified as a migration agent, in a manner that may bring the profession into disrepute or otherwise be inconsistent with the requirements, purpose or intent of the Code of Conduct.
- not use the Commonwealth crest in marketing.

Questions:

- I. Are the proposed inclusions regarding marketing clear?
- II. Are there concerns with any of the inclusions? If so, what are the concerns?
- III. Are there any other matters that should be considered? If so what would these be?

Record keeping

Issue: *Agents have sought guidance from the OMARA as to how they can comply with the Code's record keeping requirements when they leave employment. The OMARA has also frequently identified poor agent practice in regard to record keeping, including circumstances where electronic communication is not being adequately captured.*

Following is a draft of proposed guidance for inclusion in the Code for comment and discussion:

A registered migration agent must:

- arrange backup of any electronic communication.
- keep records of using SMS or web chat for communication.

- write to their clients giving them the opportunity to appoint a new agent and advise about continued access to their records, prior to leaving or changing employers.
- where operating a business, comply with any request by the Authority to supply a client file handled by another agent who has left the business.

Questions:

- I. Are the proposed inclusions regarding record keeping clear?
- II. Are there concerns with any of the inclusions? If so, what are the concerns?
- III. Are there any other matters that should be considered? If so what would these be?

Your feedback

Feedback on any aspect of this paper can be sent by email to mara.comms@border.gov.au

The OMARA website will provide updates and details of closing dates for feedback.