



Australian Government
Department of Home Affairs

Code of Conduct for Migration Agents

**Outcome of consultation process and proposed
approach to the revised Code**

15 October 2019

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1. Overview

1.1. Background

The Code of Conduct for Migration Agents (**the Code**) is set out in Schedule 2 to the *Migration Agents Regulations 1998 (the Regulations)*. The *2014 Independent Review of the Office of the Migration Agents Registration Authority* undertaken by Dr Christopher Kendall (**the Kendall Review**) noted (at page 22):

“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.”

The Kendall Review recommended that the Department consult interested parties and amend the Code as appropriate.

The Office of the Migration Agents Registration Authority (**OMARA**) has since undertaken an extensive consultation process and review of the Code. In October 2017, the OMARA released an Issues Paper¹ on its website and invited written submissions in response to it. The OMARA also conducted a series of focus groups with registered migration agents (**RMA**s) and community representatives. OMARA consulted with its internal departmental stakeholders and other Home Affairs portfolio agencies including Australian Criminal Intelligence Commission (ACIC) and the Australian Transaction Reports and Analysis Centre (AUSTRAC). Other external agencies OMARA consulted with include the Tax Practitioners Board (TPB), the Australian Financial Services Authority (AFSA) and the Administrative Appeals Tribunal (AAT). In late 2018, the Department held a series of internal workshops for the purpose of distilling and considering the results of the consultation process, identifying how the clauses of the current Code may be simplified and identifying any new obligations which could be included in the revised Code. In July and August 2019 the OMARA sought input from the legal sector through a series of meetings with state and territory legal regulators, the Law Council of Australia (LCA) and focus groups with RMA's who hold Australian legal practicing certificates.

The consultation has confirmed that the main problems with the current Code are:

- It is too long.
- It contains duplication.
- Provisions dealing with very similar subject matter are set out in different chapters.
- It contains very prescriptive provisions in relation to certain issues where general principles would be more helpful.
- Provisions relating to fees and record keeping are onerous, confusing and do not align with consumer expectations or modern business practices.

This document sets out some requirements that could be included in the new Code. The content and requirements of the Code are still subject to the Government's approval.

¹ Available at https://www.mara.gov.au/media/583975/Code_of_Conduct_Issues_Paper_for_consultation.pdf

1.2. Proposed structure

If implemented, it is proposed that the new Code be restructured, giving it three main parts dealing with:

- Professional obligations
- Practice Management
- Representations

This structure is modelled on the *New Zealand Licensed Immigration Advisers Code of Conduct 2014 (New Zealand Code)*.²

Unlike the current Code, each substantive provision is proposed to have a meaningful subheading to assist people to easily navigate the Code and understand the obligations contained within it.

The new Code may be supported by policy guidelines to promote an understanding of and assist in the interpretation of the Code.

1.3. Note about drafting

All changes to the Code are subject to Government's approval.

Examples given throughout this proposal are indicative only, and may not be the final format adopted.

² Copy available at <https://www.iaa.govt.nz/assets/subsite-iaa/documents/tools/code-conduct-2014.pdf>. The New Zealand Code has a fourth chapter dealing with supervision of provisional licence holders. The OMARA does not grant provisional registration and so such a chapter is unnecessary in the Australian context.

2. Introduction

The current Code contains a detailed introductory chapter in Chapter 1. Consistent with the intent of the review to remove complexity and improve clarity the introductory paragraph could be shortened and the clauses be made more concise, clear and relevant. A new Code could include a concise introductory clause for the purpose of setting the tone and clarifying the purpose of the Code.

Example:

- 1. The purpose of this Code is to establish a minimum standard for the ethical conduct of a registered migration agent to ensure consumer protection and integrity of the immigration advice industry and Australia's immigration system.**
- 2. This Code is binding on all registered migration agents.**
- 3. If the Authority is satisfied that a registered migration agent has breached this Code, the Authority may make a decision under s 303 of the *Migration Act 1958* to sanction the agent.**

3. Professional obligations

3.1. General standard of a registered migration agent

The first substantive clause could set out the general standard expected of an RMA.

3.1.1. Standard of conduct

The first subclause could require agents to be honest, professional and to act with integrity.

The clause could establish the standard expected of all registered agents. RMAs would be sanctioned if they engaged in conduct that falls below that standard. This approach would be consistent with:

- the general standard clause set out in clause 1 of the Code of Professional Conduct for Australian registered tax agents (Tax Agents Code) found in s 30-10(1) of the Tax Agent Services Act 2009; and
- the general clause set out in clause 1 of the New Zealand Code.

Example:

4. A registered migration agent must be honest, professional and act with integrity.

3.1.2. Abuse of procedure in connection with Australian migration law

The Issues Paper referred to including a requirement not to undermine the integrity of Australia's Migration Program. The Department received feedback that this was too vague and would therefore be difficult to enforce. Migration agents expressed a view that whilst it was the Department's responsibility to maintain the integrity of the Migration Program, the Migration Program is political and is sometimes in conflict with the law. For solicitors in particular, there may be occasions where the migration agents duties to act in the interests of their clients may conflict with acting as the 'third arm of government'. In response to these concerns, the new Code could instead contain a clause prohibiting agents from abusing any procedure in connection with Australian migration law.

A similar provision is contained in the Code of Standards issued by the Office of the Immigration Services Commissioner in the UK (**UK Code of Standards**). Clause 14(e) states: " Organisations and advisers must...not seek to abuse any procedure operating in the UK in connection with immigration or asylum, including any appellate or other judicial procedure, or advise any person to do something which would amount to such abuse."

The concept of an "abuse of process" is well established in law. An abuse of process includes making allegations or bringing court proceedings for ulterior purposes.

An RMA would breach this proposed clause in the following case examples:

- **Case 1:** After the Department refuses to grant Jenny a Student visa on grounds that she was not a genuine entrant, Jenny's RMA, Sam, advises her to return to her country of origin and change her name. Sam advises Jenny to obtain identity documents in her new name and to re-enter Australia using an Electronic Travel Authority (ETA). Sam tells Jenny to apply for a new visa on return to Australia using her new name. Sam has sought to abuse a procedure in connection with Australian migration law and has breached the Code.
- **Case 2:** Simon holds an Electronic Travel Authority (ETA) which is due to cease. He has spent a couple of months in Australia and has decided he would like to extend his stay in order to build his savings. He has discovered he can make more money working in a low skilled job in Australia than he can earn in his

home country. He seeks advice from his RMA, James who advises him that he can assist him to stay in Australia for up to three years. He assists Simon lodge a Protection visa application and then to appeal the refusal of this application with the Administrative Appeals Tribunal (AAT). James has sought to abuse a procedure in connection with Australian migration law and has breached the Code.

- Case 3: Eva, an RMA, frequently advises her clients to lodge unmeritorious Protection visa applications in order to prolong their lawful stay in Australia. None of her clients advance any claims for protection. Eva has sought to abuse a procedure in connection with Australian migration law and has breached the Code.

An RMA would not breach this proposed clause in circumstances where:

- They lodged a visa application that had no prospects of success in order to seek a merits review decision for the purpose of requesting that the Minister exercise his or her public interest powers to substitute a more favourable decision; and
- There are unique and exceptional circumstances of the case, which are consistent with those set out in the relevant Minister's guidelines.

Example:

5. A registered migration agent must not seek to abuse any process or procedure in connection with Australian migration law or advise any person to do something which would amount to such abuse.

3.1.3. Reputation of the migration advice industry

The general standard clause could retain an obligation similar to that stated in existing clause 2.23, requiring RMAs to take all reasonable steps to maintain the reputation and integrity of the migration advice profession.

Example:

6. A registered migration agent must take all reasonable steps to maintain the reputation and integrity of the migration advice profession.

3.2. Legislative requirements

The new Code could retain the requirement that agents comply with the laws of Australia, or the law of the country that they are practising in. That obligation is set out in existing clause 2.1 of the Code. The language could be simplified along the lines of the equivalent provision in clause 3 of the New Zealand Code.

Example:

7. A registered migration agent must:

- a. if operating in Australia, act in accordance with Australian law;
- b. if operating in a country other than Australia, act in accordance with the law of the jurisdiction they are operating in; and
- c. whether in Australia or offshore, act in accordance with Australian migration laws, which includes this Code.

3.3. Competence

The new Code could collate a number of existing clauses into one clause dealing broadly with competence. This approach is similar to the 'Competence' provisions in clauses 7-10 of the Tax Agents Code.

The new Competence clause could obligate RMAs to:

- deal with his or her client competently, diligently and fairly (currently set out in existing clause 2.1 of the Code)
- act in the lawful interests of the agent's client (also contained in existing clause 2.1)
- act in accordance with the client's instructions (currently set out in existing clause 2.8(b))
- take reasonable care to apply Australian migration laws correctly to the circumstances of his or her client (based on clause 10 of the Tax Agents Code); and
- have due regard to a client's dependence on the agent's knowledge and experience (existing clause 2.4)

The competence clause could also set out the obligation, which is currently reflected in existing clause 2.5, to maintain knowledge and skills relevant to providing immigration assistance, including by maintaining onsite access to a professional library. The materials which are to be included in the professional library could include those materials currently listed on the OMARA website under the tab Professional Library and these could be specified in an instrument.

Example:

8. A registered migration agent must:

- a. deal with his or her client competently, diligently, fairly and responsively;
- b. act in the lawful interests of the agent's client;
- c. act in accordance with the client's informed lawful instructions in a timely manner;
- d. take reasonable care to apply Australian migration laws correctly to the circumstances of his or her client; and
- e. have due regard to a client's dependence on the agent's knowledge and experience.

9. A registered migration agent must maintain knowledge and skills relevant to providing immigration assistance, including by maintaining onsite access to a professional library. The Minister may specify in a legislative instrument the reference material which the professional library must include.

3.4. Conflict of interest

The Code currently contains a number of provisions dealing with conflict of interest at clauses 2.1A to 2.2.

Clause 2.1A prohibits RMAs accepting a person as a client if they would have “any of the following conflicts of interest” listed in that clause. Paragraph 2.1A(a) refers to “the agent has had previous dealings with the person, or intends to assist the person, in the agent’s capacity as a marriage celebrant. Paragraph 2.1A(d) refers to “any other interest of the agent that would affect the legitimate interests of the client.”

Clauses 2.1B obligates agents to cease acting for a client if it becomes apparent that there is a conflict of interest of a kind described in clause 2.1A. Clause 2.1D obligates RMAs who have ceased acting for a client in accordance with clause 2.1B to inform the Department that they are no longer acting for the client.

The revised Code could include a simplified clause dealing with conflicts of interest. The new clause could obligate RMAs, if they are aware of a potential or actual conflict of interest, including the existence of any financial or non-financial benefit the agent will receive as a result of the relationship with the client, to notify their clients (or potential clients) of that conflict, in writing. Under the proposed clause, RMAs should only continue to act for the client where the client gives consent in writing. A “financial benefit” would include a commission.

There could also be a general prohibition on RMAs acting for clients where there is an actual conflict that means:

- the agent’s objectivity or the relationship of confidence and trust between the agent and the client would be compromised; or
- the agent would breach the confidentiality of a client.

This structure is similar to the conflict of interest provisions contained at clauses 5 to 7 of the New Zealand Code. Unlike the existing Code, it is proposed the new Code not refer to specific examples of types of conflict, although these could be given in policy guidelines.

Example:

10. Where a registered migration agent is aware that there is a potential or actual conflict of interest relating to the client, including the existence of any financial or non-financial benefit the agent will receive as a result of the relationship with the client, the agent must disclose the nature and extent of the potential or actual conflict to the client in writing.

11. For the avoidance of doubt, a financial benefit includes a commission.

12. Where a registered migration agent is aware that there is a potential or actual conflict of interest relating to the client, the agent may only represent or continue to represent the client where the client gives informed written consent.

13. Where a registered migration agent or a third party is to receive a commission as a result of the agent’s relationship with the client, the informed written consent must specify:

- a. The person or organisation paying the commission;**
- b. The person to whom the commission will be paid;**
- c. The purpose of the commission;**
- d. The amount of the commission;**
- e. When the commission will be paid; and**
- f. Whether the payment of the commission is dependent on any factor or event.**

14.A registered migration agent must not in any circumstances represent or continue to represent the client where they are aware that there is an actual conflict of interest that means:

- a. the agent's objectivity or the relationship of confidence and trust between the agent and the client would be compromised; or**
- b. the agent would breach the confidentiality of a client.**

3.5. Futile matters

The new Code could include a clause which imposes certain obligations on RMAs with respect to futile matters. The current Code contains several clauses related to this subject. They are at:

- clause 2.6 (which requires RMAs to be frank and candid about prospects of success)
- clause 2.7 (which requires RMAs to give clients, if asked, an opinion about the probability of a successful outcome in writing and must not hold out unsubstantiated or unjustified prospects of success)
- clause 2.17 (which prohibits RMAs from encouraging clients to lodge vexatious or grossly unfounded applications, requires agents to advise in writing if an application is vexatious or grossly unfounded and only lodge such an application with the written acknowledgment of the client that the application is vexatious or grossly unfounded)

These obligations could be consolidated into a single clause which obligates agents dealing with a proposed application, review application, request or claim that is futile, grossly unfounded, or has little or no prospect of success to:

- advise the client in writing that, in the agent's opinion, the immigration matter is futile, grossly unfounded or has little or no hope of success; and
- if the client still wishes to make or lodge the immigration matter, obtain written acknowledgement from the client that they have been advised of the risks.

This proposed inclusion is similar to clause 9 of the New Zealand Code.

Example:

15.If a proposed application, review application, request or claim is futile, grossly unfounded, or has little or no prospect of success, a registered migration agent must:

- a. advise the client in writing that, in the agent's opinion, the immigration matter is futile, grossly unfounded or has little or no hope of success; and**
- b. if the client still wishes to make or lodge the immigration matter, obtain written acknowledgement from the client that they have been advised of the risks.**

3.6. Confidentiality

The current Code deals with client confidentiality at clauses 3.1 and 3.2. These obligations could be consolidated into a single clause under the subheading "Confidentiality".

This clause could prohibit an RMA from disclosing, or allowing to be disclosed, information relating to a client's affairs to a third party without the client's written consent, unless required by law. The phrase "information relating to a client's affairs to a third party" is used in clause 6 of the Tax Agents Code.

Example:

16. Unless he or she has a legal duty to do so, a registered migration agent must not disclose any information relating to a client's affairs to a third party without the client's written permission.

3.7. Complaints

The new Code could contain a clause imposing certain obligations on RMAs when responding to complaints that are being investigated by the OMARA. This topic is the subject of:

- existing clause 6.3 (obligating RMAs to respond to a request for information from the Authority within a reasonable timeframe specified by the Authority)
- existing clauses 9.1, 9.2 and 9.3 in Part 9

These existing provisions could be consolidated into a single, simplified clause.

Example:

17.A registered migration agent must respond properly to a complaint by a person (whether or not the person is a client) about the work or services carried out by the agent or the agent's employee.

18.If the Authority gives a registered migration agent details of a complaint made to the Authority about:

- a. the work or services carried out by the agent or the agent's employees; or**
- b. any other matter relating to the agent's compliance with this Code—**

the agent must respond properly to the Authority, within a reasonable time specified by the Authority when it gives the details to the agent.

3.8. Notification obligations

3.8.1. Changes of details on the Register of Migration Agents

The current Code obligates agents to notify the OMARA of certain matters at:

- clause 2.22B (any changes to "registration details" either in advance or within 14 days if advance notice would be unreasonable)
- clause 3.5 (any changes to any details recorded on the Register of Migration Agents³)

In addition to notifying the OMARA, clause 3.5 also obligates RMAs to give written notice of any changes to details recorded on the Register to:

³ The details that are required to be recorded on the Register of Migration Agents are set out in paragraphs 287(2)(a) to (d) in the *Migration Act 1958* and in paragraphs 3V(a) to (da) in the *Migration Agent Regulations 1998*.

- the Department
- any review authority and
- all current clients of the RMA.

These clauses could be consolidated and simplified. The new clause could impose an obligation on an RMA, in circumstances where any details recorded on the Register of Migration Agents in respect of the RMA change, to give written notice of the change to the Department, the Authority, any review authority and all current clients of the agent within 14 days after the change or changes.

We note that, since 2015, the OMARA has been fully incorporated into the Department. However, given that Part 3 of the Act retains the ability of the Minister to appoint, under s 315, the Migration Institute of Australia as the Authority, the new Code could retain the separate obligations to notify both the Department and the OMARA of changes of registration details.

Example:

19.If any details recorded on the Register of Migration Agents in respect of an agent change, the agent must give a written notice of the change to the Department, the Authority, any review authority and all current clients of the agent within 14 days after the change or changes.

3.8.2. Factors relevant to fitness and propriety to give immigration assistance

The new Code could contain a clause which obligates RMAs to notify the Authority in writing within 14 days if there are any changes to the agent's personal circumstances, which may impact upon their integrity, capacity or fitness and propriety to provide immigration assistance.

Subsection 290(1) of the Migration Act provides that an applicant for registration must not be registered if the Authority is satisfied that the applicant is not a person of integrity or is not a fit and proper person to give immigration assistance or is related by employment to a person who is not a person of integrity and should not be registered because of that relationship. When applying for registration, applicants are asked to declare certain matters relevant to their fitness and propriety to give immigration assistance.

Subsections 303(1)(a)(b)(c) and (f) of the Migration Act provide that the Authority may take disciplinary action against an RMA (cancel or suspend an RMA's registration, or issue a caution to an RMA) if it finds that the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance.

The purpose of the new obligation would be to require agents to notify the OMARA at the point at which they become aware of a change to their personal circumstances, rather than at the time that they are applying for registration.

Example:

20.A registered migration agent must notify the Authority in writing within 14 days if there are any changes to the agent's personal circumstances, which may impact upon their:

- a. capacity;**
- b. integrity; or**
- c. fitness and propriety to provide immigration assistance.**

3.8.3. Use of MARN without an RMA's knowledge or permission

The new Code could contain a clause which obligates RMAs to notify the Authority in writing within 14 days of becoming aware their MARN is being used or has been used without their knowledge or permission. This clause could support the proposed clause which would require RMAs to take reasonable steps to ensure no other person or organisation uses their MARN which is outlined below at 4.1 Effective control of practice.

Example:

21.A registered migration agent must notify the Authority in writing within 14 days of becoming aware their MARN is being used or has been used without their knowledge or permission.

3.9. Other obligations

There are a number of miscellaneous clauses that could be incorporated into the Professional Obligations chapter.

3.9.1. Professional indemnity insurance

The new Code could retain the existing obligation in clause 2.3A, requiring RMAs to hold the professional indemnity insurance (**PII**) mentioned in regulation 6B for the duration of the migration agent's registration.

Section 292B of the Act obligates RMAs to hold PII to be registered. The Department considers it necessary to retain a provision in the Code to require agents to continue to hold PII for the duration of their registration so that agents are prevented from cancelling their PII policies once registered.

Example:

22.A registered migration agent must hold the professional indemnity insurance mentioned in regulation 6B for the duration of the migration agent's registration.

3.9.2. Interpreters

The new Code could retain the existing obligation in clause 3.6 to ensure that clients have access to an interpreter if necessary.

Example:

23.A registered migration agent must ensure that clients have access to an interpreter if necessary.

3.9.3. Intimidating, harassing, threatening or coercive conduct

The new Code could retain the existing obligation in clause 2.15 not to engage in conduct which intimidates, harasses, threatens or coerces their client or any other person.

Example:

24.A registered migration agent must not engage in conduct which intimidates, harasses, threatens or coerces their client or any other person.

4. Practice Management

4.1. Effective control of practice

The new Code could include a clause intended to prohibit RMAs from authorising the use of their Migration Agent Registration Number (MARN) by another person, in circumstances where the RMA is not directly involved in the provision of immigration assistance provided by that other person.

This proposed clause could retain the existing obligation in clause 8.1 of the Code to exercise effective control over the provision of immigration assistance to his or her clients.

The proposed clause could also require RMAs to ensure that no unregistered person(s) provide immigration assistance on their behalf. A similar obligation is set out in clause 8 of the UK Code of Standards.

The clause could also require an RMA to take reasonable steps to ensure that no other person or organisation uses the agent's MARN, unless the RMA is directly involved in providing the immigration assistance, irrespective of whether the immigration assistance is provided inside or outside Australia. The focus on taking "reasonable steps" to avoid misuse of a MARN recognises that a RMA's MARN may be misused without the RMA's knowledge or consent. Misuse in those circumstances would not constitute a breach of this proposed clause. However, if an RMA were to become aware that their MARN is being misused by others, that RMA would be required to notify that conduct to the OMARA (see notification obligation referred to above at paragraph 3.8.3).

An example of a breach of this proposed clause would be where an RMA receives a commission from "associate offices" overseas in exchange for the use of the RMA's name and MARN where the RMA has no personal involvement in the provision of immigration assistance provided by persons in those associate offices.⁴

Example:

25.A registered migration agent must exercise effective control over the provision of immigration assistance to his or her clients.

26.A registered migration agent must ensure that no unregistered person(s) provide immigration assistance on his or her behalf.

27.A registered migration agent must take reasonable steps to ensure that no other person or organisation uses his or her MARN, unless the RMA is directly involved in providing the immigration assistance, irrespective of whether the immigration assistance is provided inside or outside Australia.

4.2. Supervision

The new Code could include a clause requiring RMAs to properly supervise any persons (whether registered or not) undertaking administrative support for the RMA in the course of the RMA's provision of immigration assistance. The purpose of this proposed clause would be to ensure that an RMA cannot attribute fault to others in the event of a dispute with a client, when they are the appointed agent representing the client. RMAs are required to take responsibility for the provision of immigration assistance to their clients.

A similar obligation is set out in existing clause 8.2. That clause is located in Part 8, which is headed "Duties of registered agents to employees". Clause 8.2 provides that a RMA "must properly supervise the work carried out by staff for the agent". Feedback received during the consultation process indicated that there is

⁴ This conduct was the subject of the Administrative Appeals Tribunal's decision in *Patel and Migration Agents Registration Authority* (Migration) [2018] AATA 4277.

a lack of clarity about whether this clause only applies to supervision of persons who are directly employed by an RMA. The new clause is intended to apply to any person undertaking work on behalf of the RMA, regardless of the employment relationship.

Example:

28.A registered migration agent must properly supervise any other person undertaking administrative support for them in the course of the registered migration agent's provision of immigration assistance.

4.3. Initial consultations

An issue that was identified a number of times during the consultation process is that there is a lack of clarity around how the existing Code provisions apply to initial consultations. RMAs often offer an initial consultation, either for free or for a set fee, to discuss the client's situation, what options may be available to the client and the range of services the RMA could provide the client.

Feedback from RMAs suggests that there is confusion around whether the current Code provisions apply to initial consultations. For example, do the existing provisions relating to recordkeeping and the need to execute an Agreement for Services and Fees apply to the initial consultation or only at the point at which the client and RMA agree to proceed?

The new Code could include a new provision, modelled on clause 16 of the New Zealand Code, to deal specifically with initial consultations.

The clause could provide that, whether charging a fee or not, RMAs must comply with all clauses in the Code except for the clauses dealing with written agreements (see part 4.4 below).

Example:

29.A registered migration agent when conducting an initial consultation with the client or potential client, whether charging a fee or not, is not required to meet the requirements to have a written agreement (see part 4.4 below), but must adhere to all other requirements of this Code.

4.4. Written agreements

Part 5 of the existing Code requires agents to execute an “Agreement for Services and Fees”. That part is headed “Fees and charges” and requires agents to:

- Before starting work, give the client an estimate of the charges in the form of an hourly rate and an estimate of the time likely to be taken (cl 5.2(a))
- As soon as possible after receiving instructions obtain written acceptance of the estimate (cl 5.2(b))
- Give the client an Agreement for Services and Fees (cl 5.2(c)).

A consistent message received through the consultation process is that these requirements are cumbersome, do not align with modern business practices and are unnecessary in that they do not promote consumer protection.

The new Code could simplify current requirements so that:

- When an RMA and their client/s decide to proceed, the RMA provides the client/s with a written agreement;
- Before any written agreement is accepted, the RMA explains all significant matters in the written agreement to the client/s;
- The written agreement needs to clearly identify all clients who will be receiving immigration assistance under the agreement. The *Migration Agents Regulations 1998*, Part 1 (3) Interpretation sets out that “**client**, of a registered migration agent, means a person to whom the agent agrees (whether or not in writing) to provide immigration assistance.” The definition of “immigration assistance” is set out in s276 of the *Migration Act 1958* and the corresponding regulations.
- All parties to a written agreement, including each of the clients who will be provided immigration assistance under the agreement, need to sign the agreement; and
- Any changes to a written agreement are recorded and accepted in writing by all parties.

The clause could be modelled on clauses 18 and 19 of the New Zealand Code and could specify the matters which are required to be included in a written agreement.

Example:

30.A registered migration agent must ensure that:

- a. when they and the client/s decide to proceed, they provide the client/s with a written agreement;
- b. before any written agreement is accepted, they explain all significant matters in the written agreement to the client/s;
- c. the written agreement needs to clearly identify all clients who will be receiving immigration assistance under the agreement. The *Migration Agents Regulations 1998*, Part 1 (3) Interpretation sets out that “**client**, of a registered migration agent, means a person to whom the agent agrees (whether or not in writing) to provide immigration assistance.” The definition of “immigration assistance” is set out in s276 of the *Migration Act 1958* and the corresponding regulations
- d. the registered migration agent and all clients who are identified in the written agreement and are over the age of 18, sign the written agreement, or confirm in writing that they accept it; and
- e. any changes to a written agreement are recorded and accepted in writing by all parties.

31.A registered migration agent must ensure that a written agreement contains:

- a. the name and MARN of the primary registered migration agent with carriage of the matter; and
- b. the name and MARN of any other registered migration agent who may provide immigration assistance to the client;
- c. authority from the client for the agent to act on the client's behalf;
- d. an itemised list of services to be provided by the registered migration agent, which must describe the nature of the services to be provided and be tailored to the individual client;
- e. where fees are to be charged, the fees for the services to be provided by the registered migration agent, including either the hourly rate and the estimate of the time it will take to perform the services, or the fixed fee for the services, and any Goods and Services Tax (GST) or other tax or levy to be charged;
- f. the likely disbursements that will be incurred (including any Visa Application Charges), including the amount, if known, or a reasonable estimate;
- g. where disbursements will be incurred, whether the disbursements will be paid directly by the client or by the agent on the client's behalf;
- h. where fees and/or disbursements are to be charged, the payment terms and conditions for any fees and/or disbursements;
- i. where fees and/or disbursements are to be charged, what interest on unpaid accounts will be charged, if any;
- j. where fees and/or disbursements are to be charged, the registered migration agent's refund policy;
- k. if applicable, a record of any potential or actual conflict of interest relating to the client, including the existence of any financial or non-financial benefit the agent will receive as a result of the relationship with the client; and
- l. a record that a copy of the Consumer Guide has been provided and explained to the client.
- m. an explanation of what will happen to the file if the agent becomes incapacitated/unable to continue with the case.
- n. Instructions about how the client may access their visa application(s) online and any associated processing information.

4.5. Fees

The new Code could contain a single clause dealing with obligations relating to fees. Those obligations are to:

- ensure that any fees charged are fair and reasonable in the circumstances (existing cl 5.1)
- work in a manner that does not unnecessarily increase fees (existing cl 5.3(a))
- inform the client of any additional fees or changes to previously agreed fees, and ensure these are recorded and agreed to in writing (similar to existing cl 5.2(d))

Example:

32.A registered migration agent must:

- a. ensure that any fees charged are fair and reasonable in the circumstances;**
- b. work in a manner that does not unnecessarily increase fees; and**
- c. inform the client within a reasonable period of any additional fees or changes to previously agreed fees, and ensure these are recorded and agreed to in writing.**

4.6. Disbursements

The Code could contain a single clause dealing with disbursements. That clause could require agents to:

- charge disbursements to the client at the actual amount, if known, or at a reasonable estimate
- work in a manner that does not unnecessarily increase disbursements
- inform the client of any additional disbursements, or changes to previously agreed disbursements, and ensure these are recorded and agreed to in writing

Existing clause 2.20 deals specifically with Visa Application Charges (**VACs**). The revised Code may not deal specifically with VACs.

Example:

33.A registered migration agent must:

- a. charge disbursements to the client at the actual amount, if known, or at a reasonable estimate;**
- b. work in a manner that does not unnecessarily increase disbursements; and**
- c. inform the client of any additional disbursements, or changes to previously agreed disbursements, and ensure these are recorded and agreed to in writing.**

4.7. Itemised invoices and receipts

The existing Code contains a number of clauses in relation to fees, disbursements, issuing invoices and receipts.⁵ Feedback from RMAs indicates that there is a significant level of confusion about how to implement the existing requirements and that those requirements do not align with modern business practices. The new Code could simplify current requirements and require RMAs to:

- provide an itemised receipt whenever they receive a payment;
- provide an itemised invoice after the services are rendered; and
- where multiple itemised invoices have been issued the final invoice to be issued must itemise all services provided under the written agreement with the corresponding previous invoice reference numbers.

Section 313 of the *Migration Act 1958* provides that a registered migration agent is not entitled to be paid a fee unless the agent gives the assisted person a Statement of Services. The intended effect of the new proposed clause is that the Statement of Services may take the form of one or more itemised invoices. The effect of regulation 71 of the Regulations is that a client may sue an agent to recover money paid to an agent where they have not received a Statement of Services within 28 days after the decision on which immigration assistance is provided, as described in that regulation.

Example:

34. A registered migration agent must, each time a fee and/or disbursement is payable, provide the client with an itemised invoice containing a full description of the services the fee relates to and/or disbursements that the invoice relates to.

35. The invoice must indicate:

- a. the particulars of each service performed; and
- b. the charge made in respect of each such service.

36. Where multiple invoices are provided for services relating to a service agreement, the final invoice issued must itemise all services performed with the corresponding previous invoice reference numbers

37. A registered migration agent must, each time a payment is received from the client, provide the client with an itemised receipt, which indicates which services the receipt relates to.

4.8. Refunds

The current Code contains a provision relating to refunds at clause 7.6. The revised Code could contain a simplified clause dealing with refunds. The new clause may be similar to clause 24 of the New Zealand Code.

⁵ See clauses 2.20, Part 5 and Part 7.

Example:

38.A registered migration agent must:

- a. ensure that refunds given are fair and reasonable in the circumstances;**
- b. ensure that refund obligations can be met; and**
- c. promptly provide any refunds payable upon ceasing a contract for services.**

4.9. Client funds

The revised Code could obligate RMAs, if taking payment for fees and/or disbursements in advance of being payable and invoiced, to:

- recognise that these client funds remain the property of the client until payable and invoiced;
- establish and maintain a separate client account for receiving and holding all client funds paid in advance;
- deposit any mixed funds (funds including payable payments and advance payments) into the client account at the outset;
- cover any administrative costs of maintaining the client account;
- withdraw client funds only when payments for fees and/or disbursements are payable and invoiced;
- use client funds only for the purpose for which they were paid to the registered migration agent; and
- when requested by the Authority, provide a copy of business accounts to show that any client funds taken in advance are held in a separate client account and only withdrawn when payments for fees and/or disbursements are payable and invoiced.

The proposed new client funds clause is intended to be a simplified reformulation of the substantive obligations expressed in clauses 7.1, 7.2, 7.3, 7.4 and 7.5 of the existing Code. The new clause may be similar to clause 25 of the New Zealand Code.

The current Code has a caveat at 7.7 with respect to the application of a number of the current clauses relating to financial duties for RMAs who are legal practitioners to deal with clients' funds in accordance with the relevant law relating to legal practitioners. It is proposed that no equivalent caveat be required with respect to the proposed obligations for the new Code however the Department would welcome submissions on this.

Example:

39.A registered migration agent must, if taking payment for fees and/or disbursements in advance of being payable and invoiced:

- a. recognise that these client funds remain the property of the client until payable and invoiced;**
- b. establish and maintain a separate client account with an Australian deposit-taking institution for receiving and holding all client funds paid in advance;**
- c. deposit any mixed funds (funds including payable payments and advance payments) into the client account at the outset;**
- d. cover any administrative costs of maintaining the client account;**
- e. withdraw client funds only when payments for fees and/or disbursements are payable and invoiced;**
- f. use client funds only for the purpose for which they were paid to the registered migration agent; and**
- g. when requested by the Authority, provide Chartered Accountant audited business accounts to show that any client funds taken in advance are held in a separate client account and only withdrawn when payments for fees and/or disbursements are payable and invoiced.**

4.10. Applications

4.10.1. Notifying client when application lodged

The revised Code could contain a clause obligating RMAs to:

- confirm in writing to the client when applications have been lodged;
- provide a copy of the application to the client upon request; and
- promptly update clients of material developments in the processing of their immigration matter.

The current Code, in subclauses 2.8(c) and (d), requires agents to keep the client informed in writing and advise the client of the outcome of the client's case in writing.

The current Code does not explicitly obligate agents to confirm in writing to the client when an application has been lodged. This obligation is contained in clause 26(b) of the New Zealand Code.

Example:

40.A registered migration agent must:

- a. confirm in writing to the client when applications have been lodged;**
- b. provide a copy of the application to the client upon request; and**
- c. promptly update clients of material developments in the processing of their immigration matter.**

4.10.2. Full and complete documentation with applications

Existing clause 2.19 obligates agents to provide “sufficient relevant information...to allow a full assessment of all the facts against the relevant criteria”, subject to a client’s instructions otherwise.

Existing clause 2.21 provides that RMAs must not submit an application without “the specified accompanying documentation” unless the agent has a reasonable excuse or the client has requested the agent to act despite incomplete documentation.

The revised Code could strengthen obligations on RMAs in this area. It could require RMAs, when lodging any application with the Department or a review body, to provide, together with the application, all documentation that the decision-maker needs in order to assess the application. However, it is proposed an agent who has a reasonable excuse for not doing so should not be in breach of the Code.

Acting on a client’s instructions may not necessarily constitute a ‘reasonable excuse’. Further guidance on what constitutes a reasonable excuse could be provided in policy guidelines.

The Issues paper proposed that there be a requirement to lodge complete, assessment ready applications. The purpose of this provision would be to support efficient processing outcomes for clients and to protect consumers from over servicing whereby clients are charged a separate amount for each submission to the Department in circumstances where separate submissions are not warranted or justified. The purpose of this clause is not to penalise registered migration agents for minor omissions or oversights.

Example:

41. When lodging any application with the Department or a review body, a registered migration agent must provide, together with the application, all documentation that the decision-maker needs in order to assess the application.

42. A failure to comply with the obligation in this clause does not constitute a breach of the Code if the agent satisfies the Authority that the agent has a reasonable excuse for the failure.

4.11. Recordkeeping

Part 6 of the current Code sets out a number of obligations in relation to recordkeeping and management. The obligations in Part 6 could be simplified and reformulated under the headings “Recordkeeping”, “Document security” and “Document return”.

The new recordkeeping clause could require agents to maintain a “client file” and could specify what that file must include. It could also require that file notes are sufficiently detailed for a third party auditing the record to understand what transpired. The client file may be a hard copy or electronic copy or both. The clause could also require agents to make a contemporaneous written record, in the form of a file note, of certain types of communications.

RMAs should be required to ensure arrangements are in place to maintain each client file and records of the client’s account for a period of no less than 7 years from closing the file (as required in existing clause 6.1A), and make those records available for inspection on request by the Authority (as required in existing clause 6.1).

We recognise that many RMAs operate in businesses and many of those businesses take the view that client files are the property of the business and not the property of the individual RMA with carriage of those files.

However, the Authority has no power to require businesses to produce client files. The Authority has power to:

- issue a notice to an RMA under s 308 requiring them to provide documents to the Authority which are “relevant to the agent’s continued registration.
- Issue a notice to an RMA under s 305C if they are considering refusing that agent’s registration or making a decision under s 303.

These circumstances present a challenge for the Authority when investigating a complaint made by a client which relates to the conduct of an RMA who has since ceased employment with the business which employed them during the time that the RMA provided the relevant immigration assistance.

To overcome this challenge, the new Code could include a clause requiring employee RMAs to enter into a written agreement with a business which employs them to provide to the RMA copies of any client files which are the subject of a request issued by the Authority to the RMA after the RMA has ceased employment with the business.

Example:

43.A registered migration agent must maintain a client file for each client, which must include:

- a. a full copy of the client’s application or other immigration matter;**
- b. copies of all written agreements and any changes to them;**
- c. copies of all written communications (including any electronic communications) between the agent, the client and any other person or organisation;**
- d. all file notes recording material oral communications;**
- e. copies of all invoices and receipts relating to the client;**
- f. copies of all personal documents relating to the client supplied to the agent; and**
- g. evidence of the safe return of the client’s original documents.**

44.The client file may be a hard copy or electronic copy or both.

45.If a registered migration agents is seeking to maintain client records using a cloud computing service they must first obtain their client’ written informed consent.

46.A registered migration agent must make a contemporaneous written record, in the form of a file note, which describes the nature and substance of the following communications:

- a. all instructions received from the agent’s clients and advice given;**
- b. all telephone conversations made or received in connection with immigration assistance;**
- c. all enquiries made in connection with the immigration matter and responses given.**

47.A registered migration agent must ensure arrangements are in place to maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Authority.

48.An agent operating in a business must put arrangements in place with that business that will ensure client files are provided to the Authority if the RMA requests them to be provided after they have ceased operating for that business.

4.12. Document security

Clause 6.2A provides that “documents to which a client is entitled include (but are not limited to) documents that are:

- provided by, or on behalf of, the client; and
- paid for by, or on behalf of, the client;

such as passports, birth certificates, qualifications, photographs and other personal documents.

Clause 6.2 obligates agents to keep all documents “to which a client is entitled” securely.

The revised Code could simplify this obligation so that it requires RMAs to ensure any financial and personal documents belonging to or relating to the client, whether held physically or electronically, are held securely whilst in the agent’s possession. This obligation is similar to clause 27(a) of the New Zealand Code.

Example:

49.A registered migration agent must ensure any financial and personal documents belonging to or relating to the client, whether held physically or electronically, are held securely whilst in the agent's possession.

4.13. Document return

As noted above, clause 6.2A provides that “documents to which a client is entitled include (but are not limited to) documents that are:

- provided by, or on behalf of, the client; and
- paid for by, or on behalf of, the client;

such as passports, birth certificates, qualifications, photographs and other personal documents.

Clause 10.1B of the existing Code provides that, in circumstances where an agent terminates their contract with a client and gives reasonable notice to the client of that fact, the agent must, within 7 days of giving the notice, deliver “all documents to which the client is entitled to the client or to the appointed registered migration agent”. Clause 10.2 to 10.6 contain several additional obligations relating to document return.

The new Code could simplify these obligations under a single clause with the heading “document return”. The concept of “documents to which a client is entitled” is proposed to be retained.

The clause could provide that, when a request is made in writing by a client or a client's new RMA, within 14 days of the request, an RMA must release a copy of all documents to which a client is entitled as well as any information that is necessary for the proper conduct of the client's immigration matter.

It is proposed that the policy set out in existing clause 10.4 is retained. That policy prohibits registered migration agents from withholding any document as part of a claim that the agent has a right to withhold a document by a lien over it, unless the agent holds a current legal practising certificate.

Example:

50. When a request is made in writing by a client or a client's new registered migration agent, a registered migration agent must, within 14 days of the request, release a copy of all documents to which a client is entitled as well as any information that is necessary for the proper conduct of the client's immigration matter.

51. Documents to which a client is entitled are all documents that are:

- a. provided by, or on behalf of, the client; and**
- b. paid for by, or on behalf of, the client.**

52.A registered migration agent must not withhold a document that belongs to a client, as part of a claim that the agent has a right to withhold a document by a lien over it, unless the agent holds a current legal practising certificate issued by an Australian body authorised by law to issue it.

4.14. Termination of services

The existing Code provisions dealing with termination of services are set out in Part 10. It is proposed that the obligation set out in clause 10.1 be retained with some minor amendments. Rather than referring to “the agent’s instructions” in paragraph (b) and to “the contract” in paragraph (c), the new clause is proposed to refer to the termination of the “services” of the agent.

The new Code could include a provision obligating RMAs that receive correspondence from the Department or a review authority, which relates to an ongoing immigration matter of a former client, to forward to the client, or their nominated representative, copies of that correspondence.

Example:

53.A registered migration agent must complete the services in accordance with the written agreement unless:

- a. the agent and the client have otherwise agreed, or**
- b. the client terminates the services of the agent, or**
- c. the registered migration agent terminates the provision of services to the client in writing.**

54. Where a registered migration agent receives correspondence from the Department or a review authority, which relates to an ongoing immigration matter of a former client, the agent must forward to the client, or their nominated representative, copies of that correspondence.

4.15. Notice to client that agent ceases to act

Existing clause 10.1A sets out what must be included in a written notice given by a RMA who is terminating their contract with a client. It provides that the notice must state:

- that the agent ceases to act for the client; and
- the date from which the agent ceases to act; and
- the terms of any arrangements made in respect of appointing another registered migration agent.

The new Code could contain a similar provision that will apply where an RMA ceases to act for a client for any reason other than the completion of agreed services (including where a client terminates the agent’s services). If the client has a pending immigration matter, the RMA could be required to provide written notice to the client of certain specified matters. The notice would need to be provided in advance of the agent ceasing to act for the client or, if advance notice would be unreasonable in the circumstances, within 14 days from when the agent ceased acting for the client.

This clause would not require an agent to give a notice to a client in circumstances where the matter will be transferred to one of the secondary agents listed in the written agreement as an RMA authorised to provide immigration assistance to the client.

Example:

55. Where a registered migration agent ceases to act for a client for any reason other than the completion of agreed services, the agent must, if the client has a pending immigration matter, provide written notice to the client of the following matters:

- a. the date from which they will cease acting for the client;**
- b. the status of their immigration matter;**
- c. if the matter is to be allocated to another registered migration agent:**
 - i. the name and contact details of the receiving agent;**
 - ii. a statement to the effect that the client may choose to cease the services should they wish to do so;**
- d. if the matter is not to be allocated to another registered migration agent, information about how the client may obtain further immigration assistance.**

56. If the registered migration agent holds client funds paid by or on behalf of the client, the notice referred to in this clause must also advise the client of the following:

- a. the balance of money held on the client's behalf; and**
- b. whether the balance is to be refunded to the client or allocated to another registered migration agent, unless advised by the client to the contrary.**

57. The notice referred to in this clause must be provided:

- a. in advance of the agent ceasing to act for the client, or**
- b. if advance notice would be unreasonable in the circumstances, within 14 days from when the agent ceased acting for the client.**

58. This clause does not obligate a registered migration agent to provide a notice to a client where primary carriage of the matter is transferred to another registered migration agent listed in the written agreement as being authorised to provide immigration assistance to the client.

4.16. Written notice to Department or review body that agent ceases to act

The Issues paper (see Part 2) proposed inclusion of a requirement for registered migration agent to notify the Department if their appointment as the registered migration agent in a migration matter ceased. The new Code could contain a new obligation on RMAs to provide written notice to the Department or review authority (as appropriate) that they are no longer representing his or her client in circumstances where the RMA ceases to act for the client for any reason other than the completion of agreed services. This would not be required where the client's matter is transferring to another registered migration agent within the firm or business who was identified under the provisions of example 31(b).

The notice would be required to be provided within 14 days from when the agent ceased acting for the client.

The purpose of this requirement would be to ensure consumer protection. It would alert the Department or a review body that the client is no longer represented and of the requirement to make direct contact with the client where relevant. It would also prevent the forwarding of potentially confidential client information to an agent who is no longer representing that client, thereby protecting the client's privacy.

Example:

59. Where a registered migration agent ceases to act for the client for any reason other than the completion of agreed services, the agent must provide written notice to the Department or review body (as appropriate) that they are no longer representing the client.

60. The notice referred to in this clause must be provided within 14 days from when the agent ceased acting for the client.

5. Representations

The final part of the Code could be headed “Representations” (or “Misrepresentations”) and contain two substantive clauses; one dealing with representations to clients and prospective clients and one dealing with representations to decision makers in immigration matters.

5.1. Representations to clients and prospective clients

The existing Code contains obligations relating to advertising in clauses 2.10 to 2.14A.

The new Code could retain a simplified version of the obligation in clause 2.11 which requires RMAs to display their MARN when advertising or in business documents, including business cards, website, social media and email.

The new Code could also prohibit RMAs from misrepresenting or promoting in a false, fraudulent or deceptive manner themselves, including their qualifications or their registration status, their business, their employees, the client, immigration opportunities or risks, or Australia’s immigration requirements and procedures. This language is similar to that used in clause 29 of the New Zealand Code.

The obligation in existing clauses 2.12 and 2.14 could be merged into a single clause prohibiting RMAs, when advertising, from:

- implying that registration involves a special or privileged relationship with the Minister, officers of the Department or the Authority; and
- representing that he or she can procure a particular decision for a client under the Migration Act or the Migration Regulations.

Example:

61.A registered migration agent must display their MARN when advertising or in business documents, including business cards, website, social media and email.

62.A registered migration agent must not misrepresent or promote in a false, fraudulent or deceptive manner:

- a. themselves, including their qualifications or their registration status**
- b. their business**
- c. their employees**
- d. the client**
- e. immigration opportunities or risks, or**
- f. Australia's immigration requirements and procedures.**

63.A registered migration agent must not, when advertising:

- a. imply that registration involves a special or privileged relationship with the Minister, officers of the Department or the Authority; or**
- b. represent that he or she can procure a particular decision for a client under the Migration Act or the Migration Regulations.**

5.2. Representations to a decision maker in an immigration matter

Existing clause 2.9 provides that an RMA “must not make statements in support of an application under the Migration Act or Migration Regulations, or encourage the making of statements, which he or she knows or believes to be misleading or inaccurate.”

Existing clause 2.9A deals with communications to the Authority. It provides that “[i]n communicating with, or otherwise providing information to, the Authority, a [RMA] must not mislead or deceive the Authority, whether directly or by withholding relevant information.”

The Issues Paper proposed to strengthen the Code in these areas. The proposed inclusions referred to in the Issues Paper included that a RMA 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.

The new Code could incorporate a provision (or provisions) which gives effect to these “proposed inclusions”. Clause 2.9 currently prohibits RMAs from making statements that the RMA knows to be misleading. However, the new prohibition is intended to apply to RMAs that deliberately or negligently mislead or conceal relevant information.

In addition, the new Code could include a clause which details obligations on RMAs where they become aware that false or misleading documentation has been or will be provided to, or concealed from, the decision maker. It could require them to:

- inform the client about the potential consequences of continuing to misrepresent themselves to the decision maker;
- discuss with the client the ways the misrepresentation or concealment could be remedied; and

- terminate their services to the client in writing, should the client not consent to take action to remedy the situation.

This approach is adopted in clause 31(b) of the New Zealand Code.

Example:

64.A registered migration agent must not deliberately or negligently provide false or misleading claims or documentation to, or deliberately or negligently conceal relevant information from, the decision maker in relation to any immigration matter they are representing.

65.If a registered migration agent becomes aware that false or misleading documentation has been or will be provided to, or that relevant information has been, or will be concealed from, the decision maker in regard to any immigration matter they are representing, they must:

- a. inform the client about the potential consequences of continuing to misrepresent themselves to the decision maker;**
- b. discuss with the client the ways the misrepresentation or concealment could be remedied; and**
- c. terminate their services to the client in writing, should the client not consent to take action to remedy the situation.**