

Department of Home Affairs' Regulation of Migration Agents

Department of Home Affairs

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Canberra ACT

8 May 2024

Dear President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Department of Home Affairs. The report is titled *Department of Home Affairs' Regulation of Migration Agents*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely



Rona Mellor PSM
Acting Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

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Audit snapshot

Auditor-General Report No.26 2023–24

Department of Home Affairs' Regulation of Migration Agents



Why did we do this audit?

- ▶ Significant changes have been made in recent years to the regulation of migration agents.
- ▶ There has been no government response to a February 2019 parliamentary committee report on the efficacy of regulation of Australian migration and education agents.
- ▶ The Joint Committee of Public Accounts and Audit identified an audit of the regulation of migration agents as an audit priority of the Parliament.



What did we find?

- ▶ Home Affairs' regulation of migration agents is not effective.
- ▶ Appropriate arrangements are not in place to support the regulation of migration agents.
- ▶ Migration agents are not effectively regulated. The regulation of agent continuing professional development has also not been effective.
- ▶ There is an absence of regulatory action to monitor the activities of registered agents, and complaints are not actioned in a timely and effective manner.



Key facts

- ▶ As at 30 June 2023, there were 4883 registered migration agents.
- ▶ There were 299 complaints received in 2022–23 in respect to 244 agents (five per cent of agents).
- ▶ In the years 2019 to 2023, Home Affairs approved the registration of 267 applicants that had not met the continuing professional development requirements.



What did we recommend?

- ▶ There were 11 recommendations to Home Affairs.
- ▶ Home Affairs agreed to the recommendations.

59%

of applications to re-register since April 2021 renewed using an automated approval process rather than being considered by a departmental officer.

9%

of complaints in 2022–23 were actioned using the powers under the Migration Act.

0

number of occasions a department officer observed a continuing professional development session in the four years between 2019–20 and 2022–23.

Summary and recommendations

Background

1. The *Migration Act 1958* (the Migration Act) requires that anyone providing immigration advice or assistance must be a registered migration agent (RMA), legal practitioner or exempt person, and that an RMA must conduct himself or herself in accordance with the prescribed Code of Conduct. The Migration Act also establishes the Migration Agents Registration Authority and sets out its powers and functions. The Office of the Migration Agents Registration Authority (OMARA or the Authority) is a section within the Department of Home Affairs (Home Affairs or the department).
2. The role of the OMARA is to protect consumers of migration assistance and the integrity of the Australian visa system by regulating RMAs. It is to do this by:
 - maintaining a register of migration agents and administering the registration process;
 - investigating and assessing complaints made in relation to the provision of immigration assistance by RMAs and where appropriate, taking disciplinary action against RMAs or former RMAs; and
 - approving who can be a continuing professional development (CPD) provider and checking how CPD providers perform against the provider standards (the Migration Act requires that applicants not be registered if OMARA is satisfied that the CPD requirements have not been met).

Rationale for undertaking the audit

3. In recent years there have been some significant changes to the regulation of migration agents including: legal practitioners being removed from the regulatory scheme in March 2021; a new Code of Conduct for registered migration agents being introduced in March 2022; and, also in 2022, a decision to significantly increase OMARA's resourcing.
4. The Joint Standing Committee on Migration conducted an inquiry into the efficacy of regulation of Australian migration and education agents reporting in February 2019 making ten recommendations. There has been no government response. The Joint Committee of Public Accounts and Audit has identified an audit of the regulation of migration agents as an audit priority of the Parliament. This audit provides independent assurance to the Parliament over whether Home Affairs is effectively regulating migration agents.

Audit objective and criteria

5. The audit objective was to assess the effectiveness of the Department of Home Affairs' regulation of migration agents.
6. To form a conclusion against the objective, the following high-level criteria were applied.
 - Have appropriate arrangements been established to support regulatory activities?
 - Is the regulatory approach effective?

Conclusion

7. Home Affairs' regulation of migration agents is not effective.
8. Appropriate arrangements are not in place to support the regulation of migration agents. Some relevant policy and procedural documentation, including a compliance strategy and plan, either does not exist or is not current. The department has not adopted a risk-based regulatory approach informed by analysis of data, evidence and intelligence, notwithstanding the availability of data suitable for this purpose in the department's Migration Agents Regulatory System.
9. Migration agents are not effectively regulated by Home Affairs. The administration of the agent registration process does not sufficiently address whether registered agents are fit and proper to give immigration assistance and are persons of integrity. There is an absence of regulatory action to monitor the activities of registered agents, and the department does not take timely and effective action in response to complaints it receives about the activities of registered agents. The regulation of the continuing professional development of registered agents has not been effective.

Supporting findings

Arrangements to support regulatory activities

10. Appropriate policies, procedures and guidance are not in place for the regulation of migration agents. In particular:
 - there is no ministerial statement of expectations and no responding regulator statement of intent from the department;
 - the department does not have an up-to-date procedure manual or instruction;
 - the most recent version of the department's compliance plan for the regulation of migration agents related to 2018–19; and
 - the department has implemented an automated decision-making process for the approval of applications for re-registration, without the department having taken the necessary steps to obtain assurance that the process meets the requirements of the *Migration Act 1958*. (See paragraphs 2.3 to 2.29)
11. Home Affairs' approach to regulating migration agents has not been informed by an appropriate assessment of compliance risk. In relation to regulating:
 - continuing professional development of agents, the department does not have sufficient data to inform an assessment of risk to meet its responsibility to check that registered migration agents maintain the knowledge they need to give clients accurate advice; and
 - the activities of registered migration agents, the department has data that it has not used as the basis for assessing compliance risk. The department's data enables it to take a risk-based approach to regulatory compliance in order to focus its attention on a small proportion of agents, and shows that an educative approach to regulation would not be appropriate for them. (See paragraphs 2.30 to 2.36)
12. Home Affairs does not have an appropriate compliance plan for the regulation of migration agents. The last compliance plan was for 2018–19, with no plan in place for any of the

next five years including the current year. The 2018–19 plan was not implemented by the department, and a planned evaluation by the department of the impact of the compliance strategy was not undertaken. (See paragraphs 2.37 to 2.44)

Effectiveness of the regulatory approach

13. Migration agents are not being effectively regulated by Home Affairs.

- The registration and re-registration process has not been administered in a way that has ensured the department only registers applicants that the department is satisfied are fit and proper to give immigration assistance and are persons of integrity.
- Planned compliance activity to monitor the conduct of agents was not implemented, the number of monitoring activities recorded by the OMARA has reduced substantially since 2015–16 with no monitoring activities having been recorded since the first quarter of 2020–21.
- Timely and effective regulatory action is not taken by the department when it receives complaints about the activities of individual agents. The regulatory powers provided to the department by the Migration Act are rarely used, and reporting on regulatory action has been inaccurate. (See paragraphs 3.2 to 3.71)

14. Home Affairs does not effectively regulate providers of continuing professional development to migration agents either in relation to the approval of providers or overseeing the performance of providers. (see paragraphs 3.73 to 3.93)

15. Home Affairs does not take appropriate action to use the regulatory powers available to it to sanction migration agents. The department's reporting on its use of regulatory powers has been inaccurate, overstating the extent to which it has acted. Home Affairs is taking sanction action against fewer agents, and the threshold required — in terms of complaints — is increasing. The number of years of experience of those sanctioned over the last seven years indicates that the agent registration and CPD processes are not ensuring those persons being registered by the department are fit and proper persons. (see paragraphs 3.97 to 3.118)

Recommendations

Recommendation no. 1 The Department of Home Affairs apply the *Resource Management Guide 128: Regulator Performance* and:
Paragraph 2.7

- (a) advise the Minister for Home Affairs of the requirements and prepare for the minister's approval a ministerial statement of expectations that outlines the regulatory functions within the department, including those of the Office of Migration Agents Registration Authority;
- (b) prepare and issue in a timely manner a responding regulator statement of intent; and
- (c) make the two statements publicly available.

Department of Home Affairs response: *Agreed.*

Recommendation no. 2 Paragraph 2.17	The Department of Home Affairs take steps to assure itself that the automated approval of applications for registration of migration agents is supported by the <i>Migration Act 1958</i> .
	Department of Home Affairs response: <i>Agreed.</i>
Recommendation no. 3 Paragraph 2.35	The Department of Home Affairs develop, and maintain current, a documented risk assessment based on data, evidence and intelligence for its regulation of migration agents, including the continuing professional development of those agents.
	Department of Home Affairs response: <i>Agreed.</i>
Recommendation no. 4 Paragraph 2.43	The Department of Home Affairs develop, and maintain current, a compliance strategy and compliance plan for migration agents that reflects the scope of its responsibilities under the <i>Migration Act 1958</i> , an assessment of risks and the regulatory powers and resources available to the department to manage those risks.
	Department of Home Affairs response: <i>Agreed.</i>
Recommendation no. 5 Paragraph 3.9	The Department of Home Affairs assure itself that agents are registered only where they meet the continuing professional development requirements within the time period specified by the Migration Agents Regulations 1998.
	Department of Home Affairs response: <i>Agreed.</i>
Recommendation no. 6 Paragraph 3.26	The Department of Home Affairs strengthen its regulation of migration agent registration requirements by making greater use of the powers provided to it by the <i>Migration Act 1958</i> to inform an assessment of whether applications for registration should be granted.
	Department of Home Affairs response: <i>Agreed.</i>
Recommendation no. 7 Paragraph 3.36	The Department of Home Affairs, in accordance with an up-to-date compliance strategy and compliance plan informed by an assessment of identified risk, plan and undertake regulatory monitoring of the activities of registered migration agents and report on those activities.
	Department of Home Affairs response: <i>Agreed.</i>
Recommendation no. 8 Paragraph 3.65	The Department of Home Affairs strengthen its regulation of migration agent registration requirements by making greater use of the powers provided to it by the <i>Migration Act 1958</i> to investigate complaints in relation to the provision of immigration assistance by registered migration agents.
	Department of Home Affairs response: <i>Agreed.</i>

**Recommendation no. 9
Paragraph 3.70** The Department of Home Affairs establish and report (for example, in the Migration Agent Activity Reports) on performance measures that address its performance in actioning complaints, including in relation to the timeliness of its performance and the extent to which it has used the investigation powers provided by the *Migration Act 1958*.

Department of Home Affairs response: *Agreed.*

**Recommendation no. 10
Paragraph 3.92** The Department of Home Affairs improve its regulation of the continuing professional development of registered migration agents by:

- (a) developing, and maintaining current, a documented risk assessment based on data, evidence and intelligence of the population of approved continuing professional development providers as well as data on which entities are providing the continuing professional development to those agents being frequently complained about;
- (b) strengthen the approval process for providers by taking steps to satisfy itself that all persons that will be delivering training have been identified by the provider and that any complaints made about those persons are analysed to assess whether they are a fit and proper person; and
- (c) use its existing powers to implement a risk-based program of quality assurance over the delivery of continuing professional development by approved providers including obtaining relevant documentation to inform desk audit activity as well as attending a selection of activities.

Department of Home Affairs response: *Agreed.*

**Recommendation no. 11
Paragraph 3.117** The Department of Home Affairs implement processes that provide assurance that it is taking timely and effective regulatory action using the powers provided by the *Migration Act 1958*.

Department of Home Affairs response: *Agreed.*

Summary of entity response

16. The proposed audit report was provided to Home Affairs and an extract of the proposed report (in relation to the regulator performance framework discussed at paragraphs 2.3 to 2.6) was provided to the Department of Finance (Finance). The letter of response provided by Home Affairs is included in Appendix 1. Home Affairs' summary response is reproduced below. Finance did not provide a response.

Department of Home Affairs

The department agrees with the recommendations.

In 2022, the department identified the need to enhance the OMARA's capabilities and improve regulatory functions in order to improve the timeliness of progressing complaints to investigation and possible sanction outcomes. The department will continue to focus on enhancing the OMARA's capabilities to ensure that it is able to operate as an effective regulator of registered migration agents in Australia.

The department does not agree with the finding that the OMARA does not take effective action on complaints it receives about the activities of registered agents. While the department agrees that it is important to make use of the powers available to the OMARA under the *Migration Act 1958* (Cth) (Migration Act), the exercise of a statutory power and the imposition of a disciplinary decision are not the only appropriate actions that the OMARA can take in response to complaints and/or concerns about registered migration agents.

The department will continue to respond to risks posed by prospective and current registered migration agents in a timely manner, including through the exercise of relevant powers under the Migration Act as appropriate.

ANAO comment on Department of Home Affairs summary response

17. In relation to the use of powers under the Migration Act, paragraph 1.8 identifies amendments to the Migration Act that have been made over time to strengthen the regulation of migration agents. While the department does not accept that the extent to which it uses the Migration Act powers to be an appropriate benchmark of regulatory performance, the department's formal comments included at Appendix 1: recognise that it must have supporting evidence obtained using the powers under the Act in order to pursue disciplinary action; advise that it will cease the practice of recording a breach without imposing a sanction on the agent under the Act; and state that it is implementing quality assurance processes over sanction decisions under the Act.

Key messages from this audit for all Australian Government entities

18. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

Governance and risk management

- Where Parliament has legislated investigation and sanction powers for regulators, it is important that those powers be used.
- Determining the level of and focus of compliance and enforcement activity on areas of higher risk in relation to the stakeholders that are expected to benefit from the regulation ensures that resources are targeted to the areas requiring the most attention and that resources are appropriately allocated commensurate with identified risk areas.

Performance and impact management

- Performance indicators and any related targets for regulators should be comprehensive by addressing all of the regulatory functions required to be undertaken.

Audit findings

1. Background

Introduction

1.1 The *Migration Act 1958* (the Migration Act) requires that anyone providing immigration advice or assistance must be a registered migration agent (RMA), legal practitioner or exempt person, and that an RMA must conduct himself or herself in accordance with the prescribed Code of Conduct.¹ The Migration Act also establishes the Migration Agents Registration Authority and sets out its powers and functions.² The Office of the Migration Agents Registration Authority (OMARA or the Authority) is a section within the Department of Home Affairs (Home Affairs or the department). OMARA staff are primarily located in Sydney with officers also based in Victoria, Western Australia and South Australia.

1.2 The role of the OMARA is to protect consumers of migration assistance and the integrity of the Australian visa system by regulating RMAs. It is to do this by:

- maintaining a register of migration agents and administering the registration process including the legislated requirements that it not register applicants where it is satisfied they: are not a fit and proper person or not a person of integrity; or have not met the continuing professional development (CPD) requirements. As at 30 June 2023, there were 4883 agents on the register;
- investigating and assessing complaints made in relation to the provision of immigration assistance by RMAs and where appropriate, taking disciplinary action against RMAs or former RMAs. In 2022–23, 299 complaints were received in respect to 243 agents. In 2022–23, four agents were sanctioned in relation to 14 complaints, one of which had been received in 2022–23, with the other complaints having been received up to five years prior to the agent being sanctioned; and
- approving who can be a CPD provider and checking how CPD providers perform against the provider standards (the Migration Act requires that applicants not be registered if OMARA is satisfied that the CPD requirements have not been met). As at September 2023 there were 22 approved CPD providers, three of which deliver CPD only within their own entity.

1.3 Since 2020–21 the OMARA has been included in one of the department's performance outcomes (Outcome 2, Activity 2.1) and its performance reported in the department's annual report. In relation to its regulatory performance:

- in 2020–21 and 2021–22 the performance metric was 'Improvements to information provided to registered migration agents and consumers increase consumers' understanding of their rights and agents' understanding of their obligations under the

1 The Code of Conduct is available at: <https://www.mara.gov.au/tools-for-registered-agents/code-of-conduct>.

2 Prior to 2009, the migration advice industry was subject to statutory self-regulation. In 2009, the OMARA was established as a discrete office, attached to the Department of Immigration and Citizenship, with the CEO reporting directly to the Secretary. It operated under a separate budget and published a standalone annual report. In 2015, as a result of the 2014 Independent Review of the Office of the Migration Agents Registration Authority (the Kendall Review), the OMARA was consolidated within the Department of Immigration and Border Protection, now Home Affairs.

regulatory framework'. While no targets were set, Home Affairs assessed the metric as met in both years;

- the metric was changed for 2022–23 to '100 per cent of proven instances of non-compliance results in disciplinary action taken' with this reported as having been met on the basis that 'appropriate' action was taken with the registration of three agents cancelled and one former agent barred for two years³ from re-registering. The reporting did not include instances where agents had been found to be in breach of the Code of Conduct but sanction actions were not taken⁴; and
- for 2023–24 the metric has been changed again to '75 per cent of less serious complaints received are resolved within 90 days and 50 per cent of serious complaints received are resolved within 180 days'.

1.4 There was no performance measure in any year relating to the administration of the registration process for agents or the regulation of CPD.

1.5 Home Affairs publishes six-monthly reports on its website that present information on the population of RMAs, some statistics on complaint processing by OMARA and some information on regulatory sanction decisions taken by OMARA (tables of sanction decisions and case studies of each instance where an agent has been cautioned, or had their registration suspended or cancelled, or where a former agent has been barred from re-registering). The reports do not set out how many complaints were received during the period or were on hand. The reports also do not include information on the CPD part of OMARA's regulatory role.

1.6 Similar to the reporting on OMARA's performance included by the department in its annual report, a June 2022 internal audit undertaken by the department concluded that the OMARA is 'effectively carrying out its regulatory remit in its role as a regulator and also educator'.

1.7 Home Affairs advised the ANAO in April 2023 that it is working to implement a decision taken in 2022 to support a significant increase in the number of full-time equivalent (FTE) staff in OMARA. Previously staffed and funded at 19 FTE, additional staff have been recruited since September 2022 to reach an FTE of 38.75 as at February 2024, and the target is to reach an FTE of 50 by 30 June 2024.

1.8 Various amendments to the Migration Act have been made over a long period of time, including to strengthen the regulation of migration agents. Key amendments have included:

- 1992: legislating a registration scheme in response to government concerns about the level and nature of complaints about agents;
- 1997: implementing a package of measures reflecting the, at that time, intention to move the migration advice industry towards voluntary self-regulation through a period of statutory self-regulation;

3 The maximum barring period allowed is five years.

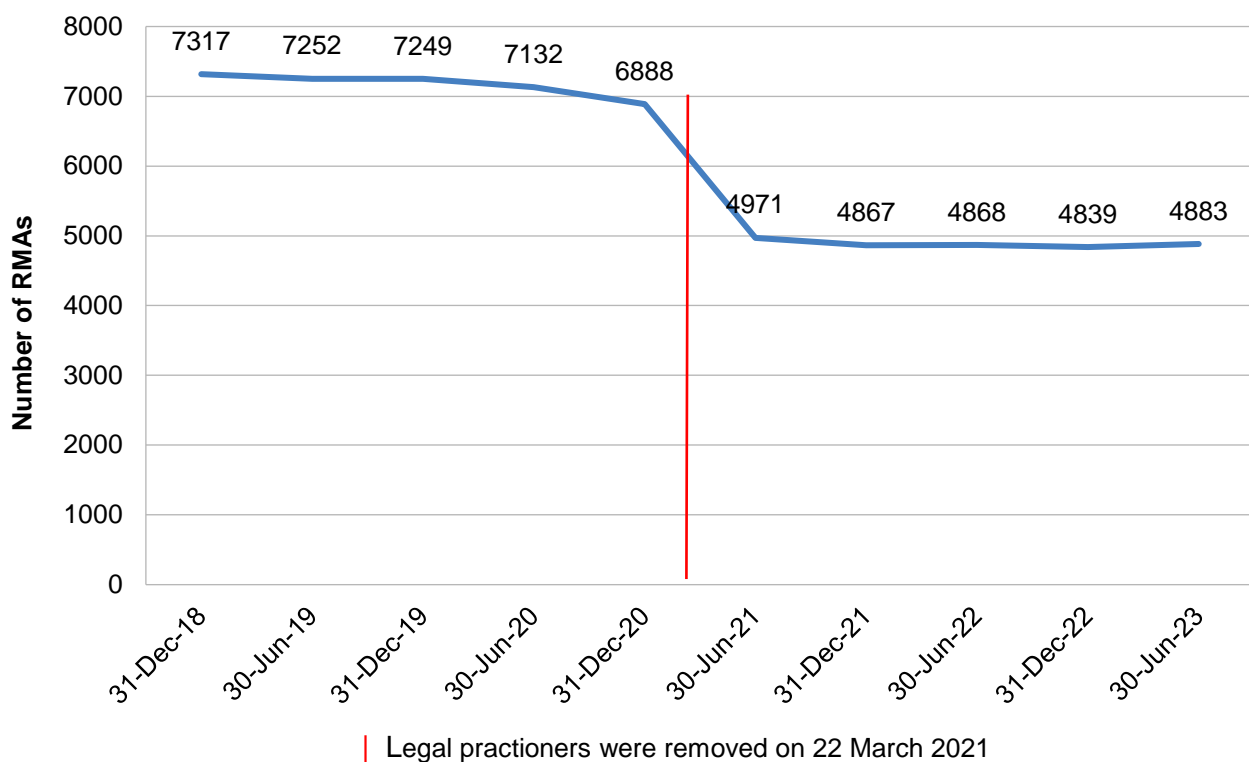
4 In February 2024, the department advised the ANAO that:

As part of the enhancements to OMARA's complaint management and investigations functions, the department implemented a revised triage and assessment model in late 2022. Under this framework, the OMARA no longer makes breach findings without proceeding to consider disciplinary action. If a matter was less serious and didn't warrant disciplinary action, it is dealt with at the earliest opportunity through an educative approach.

The triage and assessment model is discussed at paragraph 3.40.

- 2002: allowing investigation of complaints against migration agents even if they are no longer registered and dealing with situations where some time might elapse before the regulator is able to make a decision on an agent's repeat registration application (by providing that, if the regulator has not made a decision within 10 months, the agent's registration application will be deemed to have been granted);
- 2004: stronger registration requirements including: changes to the 'fit and proper person' test; empowering people to make complaints by removing any threat that civil proceedings can be taken against them for doing so; stronger investigation powers including clarifying and strengthening requirements for agents to provide documents and information to the regulator; and strengthening existing powers to sanction agents and introducing new sanction powers; and
- 2020: removal of legal practitioners with unrestricted legal practising certificates (unrestricted legal practitioners) from the regulatory scheme governing RMAs, resulting in a significant reduction in the number of immigration assistance providers regulated by OMARA (see Figure 1.1).

Figure 1.1: Number of migration agents registered with OMARA



Source: ANAO analysis of Home Affairs reporting.

1.9 In January 2023, the department⁵ entered into an engagement deed⁶ with Ms Christine Nixon AO APM to undertake a 'rapid review' into exploitation of Australia's visa system.⁷ The review was to examine the powers, resourcing and sanctions available to relevant regulators, including OMARA. On 4 October 2023, the Minister for Home Affairs and Cyber Security released the *Rapid Review into the Exploitation of Australia's Visa System* (the Nixon Review). While the department's performance reporting (see paragraph 1.3) and the June 2022 internal audit (see paragraph 1.6) concluded that the regulation of migration agents has been effective, the Nixon review found that the regulation of registered migration agents must be strengthened and included nine related recommendations including increased powers for OMARA (earlier increases to regulatory powers are summarised in paragraph 1.8).

Rationale for undertaking the audit

1.10 In recent years there have been changes to the regulation of migration agents including: legal practitioners being removed from the regulatory scheme in March 2021; a new Code of Conduct for registered migration agents being introduced in March 2022; and, also in 2022, a decision to significantly increase OMARA's resourcing.

1.11 The Joint Standing Committee on Migration conducted an inquiry into the efficacy of regulation of Australian migration and education agents reporting in February 2019 making ten recommendations. There has been no government response. The Joint Committee of Public Accounts and Audit has identified an audit of the regulation of migration agents as an audit priority of the Parliament. This audit provides independent assurance to the Parliament over whether Home Affairs is effectively regulating migration agents.

5 In February 2024, Home Affairs advised the ANAO that: 'The department did not decide to undertake a management-initiated 'rapid review'. Because of the seriousness of the issues raised in the 60 Minutes 'Trafficked' reporting in October/November 2022, the department started work to consider whether a management-initiated review should be undertaken. Before a decision was made whether or not to undertake a management-initiated-review, advice was received from the Minister for Home Affairs that the minister would like to appoint an eminent person to conduct an independent review for her.'

6 The department has entered into two contracts to the Rapid Review, each involving a fee of up to \$100 000 (excluding GST). In April 2024, the department advised the ANAO that \$16,500 was paid under the second contract. Neither engagement resulted from a competitive selection process. The first engagement occurred after the Minister wrote to the Prime Minister seeking his approval to appoint Ms Nixon (such appointments are outside the scope of the Commonwealth Procurement Rules, CPRs). In August 2023, the department recorded that the Minister had requested that Ms Nixon return to the department to assist with implementation of the Rapid Review recommendations. The department obtained advice from the Department of the Prime Minister and Cabinet that the Minister could engage Ms Nixon for a further three months without any additional approval. The department subsequently reported that it had conducted a limited tender procurement (relying on an exemption to the requirement to conduct a competitive selection process) and signed a three month contract.

7 The Joint Committee of Public Accounts and Audit's *Report 498 'Commitment issues' - An inquiry into Commonwealth procurement* presented to Parliament on 9 August 2023 sets out lessons on the use of exemption clauses.

Audit approach

Audit objective, criteria and scope

1.12 The audit objective was to assess the effectiveness of the Department of Home Affairs' regulation of migration agents.

1.13 To form a conclusion against the objective, the following high-level criteria were applied.

- Have appropriate arrangements been established to support regulatory activities?
- Is the regulatory approach effective?

1.14 The audit examined OMARA's responsibilities in relation to regulation of migration agents and continuing professional development providers using the powers already provided by the Migration Act, including through the legislative amendments summarised at paragraph 1.8.

Audit methodology

1.15 The audit methodology included:

- review and analysis of relevant Home Affairs records, as well as records held by the Office of Parliamentary Counsel in relation to the drafting of relevant amendments to the Migration Act;
- review and analysis of relevant data held in the Migration Agents Regulatory System (MARS) that is used by Home Affairs as well as the six-monthly reports published by Home Affairs (see paragraph 1.5); and
- meetings with key Home Affairs staff.

1.16 Audit analysis was made more difficult due to issues with the quality of the department's data, including its accuracy, reliability and completeness. The ANAO's approach included the use of examples and case studies to illustrate some of the audit findings. There were 50 examples/case studies of completed/closed cases raised by the ANAO with the department as part of this performance audit and included in this audit report.

1.17 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$680,000.

1.18 The team members for this audit were Sean Neubeck, Tracy Houston, Lachlan Miles, Joshua Carruthers and Brian Boyd.

2. Arrangements to support regulatory activities

Areas examined

The ANAO examined whether appropriate arrangements have been established by the Department of Home Affairs (Home Affairs or the department) to support its regulation of migration agents.

Conclusion

Appropriate arrangements are not in place to support the regulation of migration agents. Some relevant policy and procedural documentation, including a compliance strategy and plan, either does not exist or is not current. The department has not adopted a risk-based regulatory approach informed by analysis of data, evidence and intelligence, notwithstanding the availability of data suitable for this purpose in the department's Migration Agents Regulatory System.

Areas for improvement

The ANAO made four recommendations aimed at adopting a risk-based approach to regulating migration agents that is supported by stronger governance arrangements.

2.1 Procedures and guidance are important to ensure the delivery of policy, including regulation, is consistent with achieving intended outcomes.

2.2 Best practice regulators take a risk-based approach to compliance activities and are informed by data, evidence and intelligence. Regulators that assess the risk of non-compliance are better positioned to focus limited resources on areas of greatest impact.⁸ Regulators should seek to improve how they exercise their powers and deliver their legislated functions, while remaining flexible and responsive to changing circumstances.

Are appropriate policies, procedures and guidance in place?

Appropriate policies, procedures and guidance are not in place for the regulation of migration agents. In particular:

- there is no ministerial statement of expectations and no responding regulator statement of intent from the department;
- the department does not have an up-to-date procedure manual or instruction;
- the most recent version of the department's compliance plan for the regulation of migration agents related to 2018–19; and
- the department has implemented an automated decision-making process for the approval of applications for re-registration, without the department having taken the necessary steps to obtain assurance that the process meets the requirements of the *Migration Act 1958*.

8 'Risk based and data driven' is one of the three best practice principles outlined in the Department of Finance, *Resource Management Guide 128: Regulator Performance* [Internet], available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 10 July 2023].

Statements of expectations and intent

2.3 In April 2021, ministers agreed to issue or refresh ministerial statements of expectations for the regulators within their portfolios, and in July 2021, the *Regulator Performance Guide* came into effect, replacing the previous *Regulator Performance Framework* in operation since 2014. The *Regulator Performance Guide* stated that:

Ministerial Statements of Expectations should be issued or refreshed every two years for all Commonwealth entities with regulatory functions, or earlier if there is a change in Minister, change in regulator leadership, or significant change in Commonwealth policy.⁹

2.4 Under the framework, the regulator is to respond to a ministerial statement of expectations with a regulator statement of intent.¹⁰

2.5 The Minister for Home Affairs issued a statement of expectations to the department in January 2022.¹¹ The department did not respond with a statement of intent.

2.6 After the change of government following the May 2022 Federal election there was a change in Minister for Home Affairs. Notwithstanding the requirement to issue or refresh statements of expectations every two years or earlier if there is a change in minister, no advice has been provided by Home Affairs to the minister and, reflecting this absence of advice, no statement of expectations has been issued to the department. As a result, as at February 2024, the last ministerial statement of expectations was issued more than two years earlier and not by the current minister in the current government, and no responding regulator statement of intent has been issued by the department.

9 Department of the Prime Minister and Cabinet, *Regulator Performance Guide*, PM&C, Canberra, July 2021, p. 10. The Department of Finance issued *Resource Management Guide: Regulator Performance* (RMG-128) in November 2022 and performance reporting under it commenced on 1 July 2023. RMG-128 replaced the previous Regulator Performance Guide which was issued in July 2021. Consistent with the July 2021 Regulator Performance Guide, RMG 128 also provides for Ministers to issue or refresh Ministerial Statements of Expectations for regulators within their portfolios, and for regulators to respond with a Regulator Statement of Intent.

10 Department of Finance, *Resource Management Guide 128: Regulator Performance*, Finance, Canberra, December 2022, available from <https://www.finance.gov.au/government/managing-commonwealth-resources/regulator-performance-rmg-128> [accessed 21 December 2023].

11 The statement was a single statement addressed to the Secretary of Home Affairs and the Commissioner of the Australian Border Force (ABF) outlining the minister's expectations for the regulatory responsibilities within the Department of Home Affairs and the Australian Border Force. It was not specific to the Office of Migrations Agents Registration Authority (OMARA or the Authority).

Recommendation no. 1

2.7 The Department of Home Affairs apply the *Resource Management Guide 128: Regulator Performance* and:

- (a) advise the Minister for Home Affairs of the requirements and prepare for the minister's approval a ministerial statement of expectations that outlines the regulatory functions within the department, including those of the Office of Migration Agents Registration Authority;
- (b) prepare and issue in a timely manner a responding regulator statement of intent; and
- (c) make the two statements publicly available.

Department of Home Affairs response: *Agreed.*

2.8 *The Department agrees with the recommendation and will consult within the Department and with the Minister for Home Affairs on a statement of expectations for the Minister's approval and a responding statement of intent.*

Delegation of powers

2.9 To enable officers in the Office of Migration Agents Registration Authority (OMARA or the Authority) to lawfully undertake the regulatory functions of the OMARA, the minister is required to delegate powers and functions under the Migration Act and the Migration Agents Regulations 1998 (the Regulations). Such regulatory functions include:

- considering and deciding applications for registration as a migration agent;
- deciding if organisations should be approved as continuing professional development (CPD) providers for the migration advice profession;
- issuing statutory notices under the Migration Act; and
- imposing sanctions on migration agents and former migration agents.

2.10 For a nine month period in 2016 and 2017, officers in the OMARA did not have the delegations to perform their functions and duties. Specifically, in early August 2017, the department identified that the *Governance Instrument of Delegation and Authorisation Ministerial, GIDAM 24*, which commenced on 12 December 2016, did not include the delegations to enable the OMARA to carry out its regulatory functions. In September 2017, more than five weeks after identifying the issue, the department advised the Assistant Minister for Immigration and Border Protection of its failure to include all pages in the relevant schedule to the instrument when it was presented to the minister for signature. The department further advised the assistant minister that:

The Department has received internal legal advice that any exercise of powers by officers of the OMARA that have not been properly delegated due to the omission in the current instrument is effective until set aside by a court or tribunal empowered to rule on the validity of that exercise of power. There has to date been no such challenge brought. The advice also provided that while the OMARA is able to continue to collect charges for registration, it would be prudent not to exercise powers that have not been properly delegated until a new instrument is in place.

2.11 Appropriate delegations are now in place. In February 2024, the department advised the ANAO that:

This was an administrative error that occurred within the department in 2016 and 2017 and was not an intentional operational decision. This administrative error does not indicate that OMARA has a tendency to operate unlawfully or that it will operate unlawfully with the autogrant process that was implemented in 2021 (*see paragraph 3.17*).

Departmental policies, procedures, and guidance

2.12 In August 2009, a policy and procedures manual for the OMARA was approved for issue. The manual focused on key issues and decision-making points and implemented a number of recommendations made in the 2007–08 Review of Statutory Self-Regulation of the Migration Advice Profession (the Review). It was divided into separate sections on registration, complaints handling and CPD.

2.13 The introduction to the manual stated that it would be updated and modified over time to reflect changes such as those arising from legislative amendments and further implementation of the Review recommendations with four further versions approved for issue between 2009 and 2012. While amendments for a sixth version were prepared in 2013 this update was not finalised and issued.

2.14 At the time of this ANAO performance audit, the primary governance document supporting the OMARA's activities was a procedural instruction for working with the migration advice industry. The instruction provides information on the provision of immigration assistance, regulatory requirements to become a registered migration agent (RMA), the professional standards required of RMAs and guidance for departmental staff working with the migration advice industry. Home Affairs advised the ANAO in January 2024 that the introduction of the Policy and Procedure Control Framework saw Procedures Advice Manuals (PAMs) replaced with Policy Statements, Procedural Instructions, Standard Operating Procedures (SOPs) and training guides.

2.15 The first version of the *Working with the Migration Advice Industry* procedural instruction was issued in August 2016 with a further version issued in May 2019. Reflecting that no further versions have been issued in the subsequent four and a half years, the procedural instruction is out of date. For example, it does not reflect significant changes made to the regulation of providers of immigration assistance or advice including the March 2021 removal of unrestricted legal practitioners from the regulatory scheme. The instruction also does not reflect current aspects of the regulatory approach taken by the department in respect of:

- the application of the current complaint risk matrix (*see paragraphs 3.38 to 3.40*);
- the implementation of the current 'early resolution' model¹²;
- the approach to allowing applications to re-register of agents for whom there are serious integrity concerns to be 'deemed' rather than approved by the department (*see paragraph 3.15*); and

12 As stated in the Migration Agent Activity Report 1 January 2023 to 30 June 2023, '[u]nder the early resolution model, less serious misconduct matters are triaged and issued with a suspected breach notice which aims to educate the RMA of their requirements under the Code of Conduct'. Department of Home Affairs, *Migration Agent Activity Report 1 January 2023 to 30 June 2023*, Home Affairs, available from <https://www.mara.gov.au/notices-reports-subsite/Files/maar-jan-jun-2023.pdf> [accessed 3 January 2024].

- the implementation of an automated decision-making process for the approval of applications for re-registration (see paragraph 3.17).

2.16 In relation to the latter, in September 2023, the department advised the ANAO that ‘We have not been able to locate any policy or legal document that supports implementation of the auto-grant process’.

Recommendation no. 2

2.17 The Department of Home Affairs take steps to assure itself that the automated approval of applications for registration of migration agents is supported by the *Migration Act 1958*.

Department of Home Affairs response: *Agreed.*

2.18 *The Department is taking steps to assure itself that the automated approval of applications for registration of migration agents is supported by the Migration Act 1958. This includes seeking legal advice as to the relevant legislative framework for automated decision making.*

2.19 The *Working with the Migration Advice Industry* procedural instruction states that it consolidated the 26 page Procedures Advice Manual and the 82 page policy and procedures manual into a 35 page document. The consolidation resulted in significant detail that had been included in the policy and procedures manual on operationalising aspects of the department’s regulatory responsibilities under the Migration Act being removed.

2.20 For example, the procedures manual included guidance on the operation of section 309 of the Act (which requires that OMARA invite submissions in situations to inform decisions about whether to refuse registration or sanction agents) that was not retained in the procedural instruction. In October 2023 the department advised the ANAO in relation to section 309 that:

Wherever possible, we will seek to put the substance, or ‘gist’, of the information to the RMA but this is not always possible. We will also, if possible, seek to substantiate the information through other information or evidence that can be disclosed to the RMA.

2.21 In response to the ANAO’s further enquiries of October 2023 requesting a list of those cases where the department has put the substance, or ‘gist’, of the information to the RMA (as opposed to providing protected information to the agent), or alternatively, some examples if a full list could not be identified, notwithstanding this earlier advice, the department advised the ANAO in December 2023 that:

We do not have any examples of matters where the OMARA provided the ‘gist’ of information to an RMA as a matter of procedural fairness rather than providing security classified/non-disclosable information.

2.22 Similarly, while the procedures manual included guidance on the conduct of hearings under section 308 of the Migration Act (which is one of the investigation powers available to Home Affairs), the procedural instruction does not.

2.23 The department has a template for section 308 notices and advised the ANAO in February 2024 that it ‘is very clear in terms of its approach to issuing section 308 notices and has a standard template available’. Notwithstanding this, in respect to one of the complaints against an agent included in Appendix 3, the department recorded in its database that it had sent a section 308

notice and informed the ANAO that it considered a letter to the agent written in the following terms to be a notice under section 308: 'If I am satisfied that the timeframe you have proposed to provide me with the special medical evidence is reasonable, I will require, under subparagraph 308(1)(c) of the Act, that you provide...'.¹³ The department later advised the ANAO that this letter did not involve using the section 308 power.

2.24 The procedural guidance does not set out the conduct of a hearing. August 2023 legal advice to the department (in respect to a complaint against an agent) was that, noting that the Migration Act provides little guidance on how a hearing is to be conducted and that other regulators with hearing powers have established processes in place for the exercise of their hearing powers in a fair and effective manner, it would be prudent for the department to develop guidelines on the use of the section 308 power if it intends to use it on a more frequent basis.

2.25 In July 2023, the department advised the ANAO that the *Working with the Migration Advice Industry* procedural instruction was being updated. As of February 2024, this update had yet to occur. In February 2024 Home Affairs advised the ANAO that:

The procedural instructions and policy statement have been drafted and are in the review stage, pending the proposed legislative amendments being introduced in 2024 via the 'Strengthening Integrity of Immigration Assistance' Bill.¹⁴

2.26 In relation to Standard Operating Procedures (SOPs), a finding of the June 2022 internal audit (see paragraph 1.6) was that SOPs that outline the step-by-step processes for registration, CPD Provider approval, complaints handling and communications and stakeholder engagement had not yet been developed nor finalised by the department. A related recommendation was that the OMARA should develop and finalise SOPs for all relevant internal business processes and practices within the OMARA, particularly with the forthcoming restructure and increase in staffing levels.

2.27 Home Affairs agreed to implement the recommendation by 30 December 2022. SOPs relating to registrations, CPD provider approval, Capstone management¹⁵, and complaints handling were approved between February 2023 and April 2023. SOPs for communications and stakeholder engagements have not been developed. In April 2024, the department advised the ANAO that 'a separate SOP is not required to address communication and stakeholder engagement because it has developed and approved Terms of Reference for its engagement with the Migration Industry associations and a communications plan.'

2.28 The most recent compliance strategy and plan developed by the department was for the 2018–19 financial year (see further in the section commencing at paragraph 2.37).

13 In other instances examined by the ANAO, the documentation was titled as a notice under section 308 of the Act and would incorporate words to the effect that the document constituted a notice issued pursuant to section 308 of the Act.

14 Updated advice from the department in April 2024 was that 'the department is currently working to redesign the OMARAs regulatory framework material consistent with Department of Finance requirements. This includes development of a Statement of Expectations and Statement of Intent, which will inform updates to the underlying procedural instructions (PIs). The PIs will in part be guided by the introduction of the 'Strengthening Integrity of Immigration Assistance' Bill'. Introduction is tentatively scheduled for Winter 2024, however is subject to Government priorities. Subject to the successful passage of the Bill, the department will endeavour to have drafted the SoE and SoI by 1 July 2024, and the underlying PIs by the end of 2024.'

15 The Capstone is the prescribed exam that an applicant for registration as a migration agent must pass to meet entry requirements for the migration advice profession. The Capstone is developed and delivered by an external organisation (Legal Training Australia) contracted by Home Affairs.

2.29 Training documents and user guides have been developed.

Is the regulatory approach informed by an assessment of compliance risk?

Home Affairs' approach to regulating migration agents has not been informed by an appropriate assessment of compliance risk. In relation to regulating:

- continuing professional development of agents, the department does not have sufficient data to inform an assessment of risk to meet its responsibility to check that registered migration agents maintain the knowledge they need to give clients accurate advice; and
- the activities of registered migration agents, the department has data that it has not used as the basis for assessing compliance risk. The department's data enables it to take a risk-based approach to regulatory compliance in order to focus its attention on a small proportion of agents, and shows that an educative approach to regulation would not be appropriate for them.

2.30 Home Affairs collects data about RMAs through the registration processes, providers of CPD, the complaints it receives from consumers of migration advice, tribunals, and from intra-departmental referrals and intelligence work within the department.

2.31 The second (of three) principles outlined by the Department of the Prime Minister and Cabinet in its 2021 *Regulator Performance Guide* is for a risk-based approach informed by data, evidence and intelligence. Home Affairs has not undertaken and documented an assessment of risk consistent with this principle, notwithstanding the availability of data suitable for this purpose in the department's Migration Agents Regulatory System (MARS).

2.32 The department's data enables it to take a risk-based approach to regulatory compliance in order to focus on a small proportion of agents, where an educative approach would not be appropriate for them given:

- the Migration Act requires that applicants not be registered if academic and vocational requirements are not satisfied or if continuing professional development requirements are not satisfied and, in this context, most agents are experienced, with relatively few new entrants each year. Specifically:
 - between 2019 and 2022, on average less than 5 per cent of all applicants were first time applicants;
 - as of August 2023, current registered agents had been registered for an average of 10 years; and
 - seven per cent of current RMAs as at August 2023 had less than one year of experience, and 72 per cent have six or more years (and 39 per cent have 11 or more years of experience).
- there are no complaints, or few complaints, made about the significant majority of RMAs. Specifically:
 - 78 per cent have not been subject to any complaints and a further 11 per cent are complained about once every five years; and

- a small proportion of agents (one per cent) have been subject to 11 or more complaints (less than 1 per cent and 46 in total have been the subject of more than 20 complaints).

2.33 The department's approach to managing compliance risk does not consider the risk of delays in managing and resolving complaints. The number of complaints on hand exceeded 400 complaints for more than half the seven-year period examined (see paragraph 3.43). It is common for the department to take a long time to investigate and resolve complaints. For example, as of March 2024, there is an open complaint dating back to 2017, nine open complaints from 2018, 22 open complaints from 2019, and 14 open complaints from 2020.

2.34 Part of the department's regulatory role is to check that registered migration agents maintain the knowledge they need to give clients accurate advice, through continuing professional development (CPD). The department approves who can be a CPD provider and is responsible for checking how CPD providers perform against the provider standards. The department has access to data that it could use to analyse the population of approved CPD providers (see paragraphs 3.75 to 3.77). In relation to the delivery of CPD by those providers, the department identified a risk that providers may deliver poor quality CPD activities that do not comply with the requirements of the provider standards. The department proposed to address this risk through strategies that it has not implemented and so the data on the results have not been available to inform updates to a risk assessment. The specific strategies in its 2018–19 compliance plan that the department did not implement were:

- a 'desk audit' of 100 per cent of CPD providers; and
- attending a selection of mandatory CPD activities for 40 per cent to 60 per cent of providers.

Recommendation no. 3

2.35 The Department of Home Affairs develop, and maintain current, a documented risk assessment based on data, evidence and intelligence for its regulation of migration agents, including the continuing professional development of those agents.

Department of Home Affairs response: *Agreed.*

2.36 *The Department will develop and maintain a documented risk assessment for its regulation of migration agents across all of its regulatory functions, including the continuing professional development of those agents.*

Has an appropriate compliance plan been documented reflecting an assessment of identified risk?

The Department of Home Affairs does not have an appropriate compliance plan for the regulation of migration agents. The last compliance plan was for 2018–19, with no plan in place for any of the next five years including the current year. The 2018–19 plan was not implemented by the department, and a planned evaluation by the department of the impact of the compliance strategy was not undertaken.

2.37 One of OMARA's functions under section 316 of the Migration Act is to monitor the conduct of RMAs. The department's procedural instruction for working with the migration advice industry of May 2019, outlines that:

The OMARA has a responsibility to give confidence to the Parliament, the Government, consumers and the community, that RMAs are complying with their obligations and the potential for harm is minimised. OMARA has a Compliance Strategy and plan to enhance OMARA's delivery against this remit.

The objectives of the OMARA's planned compliance activities are to protect consumers by raising and maintaining the standards of the migration advice industry.

2.38 The department does not have a current compliance strategy and plan. The most recent compliance strategy was developed by the department for the 2018–19 financial year. The compliance plan to deliver on the strategy was an attachment to the 2018–19 strategy. An updated plan was not in place for 2019–20¹⁶, 2020–21, 2021–22, 2022–23 or 2023–24 and the 2018–19 plan included a number of risk treatment activities the department does not undertake including:

- conducting 200 website audits each year to address the risk of misleading advertising by migration agents;
- in relation to four of the identified risks, issuing notices under section 308 of the Migration Act to provide the information necessary for the department to undertake 35 client file audits per year (which the plan said would involve approximately 0.03 per cent of cases represented by migration agents); or
- the risk treatments relating to the regulation of CPD providers (see paragraphs 2.34 and 3.91).

2.39 In addition, several significant changes to the regulatory environment have occurred since 2018–19, including:

- the removal of legal practitioners from the regulatory scheme in March 2021; and
- the introduction of a new Code of Conduct for RMAs from 1 March 2022.

2.40 The decision taken by the department in 2022 to increase OMARA staff to undertake regulatory functions was not on the basis of a documented compliance strategy.¹⁷

2.41 The 2018–19 compliance strategy stated that it would be evaluated in the first quarter of 2019–20 to ascertain whether the strategy resulted in:

16 In May 2023, the department provided the ANAO with a copy of the compliance strategy and plan for 2018–19 (in response to an ANAO request). Also in May 2023, the ANAO asked the department to clarify if there were more recent versions of the compliance strategy and plan. It was not until February 2024 that the department informed the ANAO that a compliance strategy and plan had been developed for 2019–20. Upon examination, the ANAO identified that the 2019–20 document had not been finalised.

17 In April 2024, the department advised the ANAO that: 'The department's decision in May 2022 to enhance OMARA's capabilities was on the basis of recognising that it had 19 FTE attempting to perform all of OMARA's regulatory functions and activities (processing applications for registration, stakeholder engagement and communications, complaint management and investigations, Capstone, CPD, contract management and procurements (MARS) and general administrative requirements including briefings, reporting, responding to FOI applications, Ministerial representations etc).' As noted at paragraphs 1.3 and 1.6, the department's performance reporting and an internal audit completed in 2022 had concluded the regulation of migration agents by the department was effective.

- an increase in the detection and sanctioning of RMAs who pose high or medium level threats;
- a better understanding of the risk indicators associated with RMAs for whom we don't necessarily currently receive complaints against; and
- a better understanding of the proportion of RMAs who present high, medium and low threats to inform future compliance strategies.

2.42 The department did not undertake this evaluation.

Recommendation no. 4

2.43 The Department of Home Affairs develop, and maintain current, a compliance strategy and compliance plan for migration agents that reflects the scope of its responsibilities under the *Migration Act 1958*, an assessment of risks and the regulatory powers and resources available to the department to manage those risks.

Department of Home Affairs response: *Agreed.*

2.44 *The Department has developed a draft Compliance and Monitoring Framework, Strategy and Plan and will continue to refine this further as the OMARA Risk Management Plan and Risk Register is matured.*

3. Effectiveness of the regulatory approach

Areas examined

The ANAO examined whether the Department of Home Affairs (Home Affairs or the department) has an effective approach to the regulation of migration agents, consistent with the objectives of the regulatory scheme legislated by the Parliament.

Conclusion

Migration agents are not effectively regulated by Home Affairs. The administration of the agent registration process does not sufficiently address whether registered agents are fit and proper to give immigration assistance and are persons of integrity. There is an absence of regulatory action to monitor the activities of registered agents, and the department does not take timely and effective action in response to complaints it receives about the activities of registered agents. The regulation of the continuing professional development of registered agents has not been effective.

Areas for improvement

The ANAO made seven recommendations. Five recommendations are focussed on the department more effectively regulating the activities of registered migration agents, including greater use of the powers provided to it by the *Migration Act 1958* (the Migration Act) when registering agents and in responding to complaints it receives. Further recommendations were made in relation to the regulation of agent continuing professional development and in relation to the use of the regulatory sanctions available under the Migration Act.

3.1 Regulators have a responsibility to give confidence to Parliament, the government and the community that regulated entities are complying with their statutory obligations and that appropriate enforcement action is taken when a regulated entity fails to meet its obligations.

Does Home Affairs effectively regulate registered migration agents?

Migration agents are not being effectively regulated by Home Affairs.

- The registration and re-registration process has not been administered in a way that has ensured the department only registers applicants that the department is satisfied are fit and proper to give immigration assistance and are persons of integrity.
- Planned compliance activity to monitor the conduct of agents was not implemented, the number of monitoring activities recorded by the OMARA has reduced substantially since 2015–16 with no monitoring activities having been recorded since the first quarter of 2020–21.
- Timely and effective regulatory action is not taken by the department when it receives complaints about the activities of individual agents. The regulatory powers provided to the department by the Migration Act are rarely used, and reporting on regulatory action has been inaccurate.

3.2 The functions of the Office of Migration Agents Registration Authority (OMARA or the Authority) specified in the Migration Act include dealing with registration applications, monitoring the conduct of Registered Migration Agents (RMAs) and investigating complaints. As discussed at

paragraphs 2.10 and 2.11, for a nine-month period in 2016 and 2017 the department did not have in place the delegations necessary for officials to exercise regulatory powers provided under the Migration Act. While the department identified that this affected more than 5200 registration decisions, it did not impact the exercise of other powers to monitor agent activities, investigate complaints or sanction agents because the department had not undertaken any monitoring activities, used the legislated investigation powers or sanctioned any agents during the period when there was not a delegation in place.

Registration

3.3 Amendments to the Migration Act in 1992 (see paragraph 1.8) introduced a registration scheme for migration agents. One of the recommendations of the Nixon review (see paragraph 1.9) was to increase the background checks undertaken for initial and repeat applications for registration. As set out at paragraph 2.32, there are relatively few new entrants into the population of RMAs each year with, on average, less than 5 per cent of all applicants between 2019 and 2022 being first time applicants.

Continuing professional development

3.4 As discussed in paragraphs 3.73 and 3.74, RMAs are required to complete a specified amount of continuing professional development (CPD) each year to stay registered. Notwithstanding this requirement, Home Affairs has recorded that it is ‘fairly common’ to receive agent registration applications that have not met the CPD requirements and that ‘we do allow time to provide additional documents or evidence of having accrued CPD points’.

3.5 The department does not have adequate controls to identify whether only those agents who have met the CPD requirements (as set out in Section 290A of the Migration Act) are registered. For example:

- the department’s registrations and CPD standard operation procedure (SOP) does not include procedural guidance for verifying, clarifying, and assessing whether an applicant has met CPD requirements (see paragraph 3.73);
- evidence supporting the assessment of applications to register is not stored in the Migration Agents Regulatory System (MARS)¹⁸ in accordance with the SOP (for example, checklist items are not completed, supporting documents and correspondence are not attached, and sufficient supporting information is not included in records of decision);
- the criteria used to ‘auto-grant’ approval of applications to re-register (see paragraph 3.17 below) do not include CPD requirements; and
- there are data quality issues in the MARS used to store records relating to registrations, including errors that indicate the department has not performed adequate quality assurance of its data held within MARS.¹⁹

3.6 The Migration Agents Regulations 1998 (the Regulations) require applicants to have completed activities worth at least 10 points within the 12 months ending on the day the application

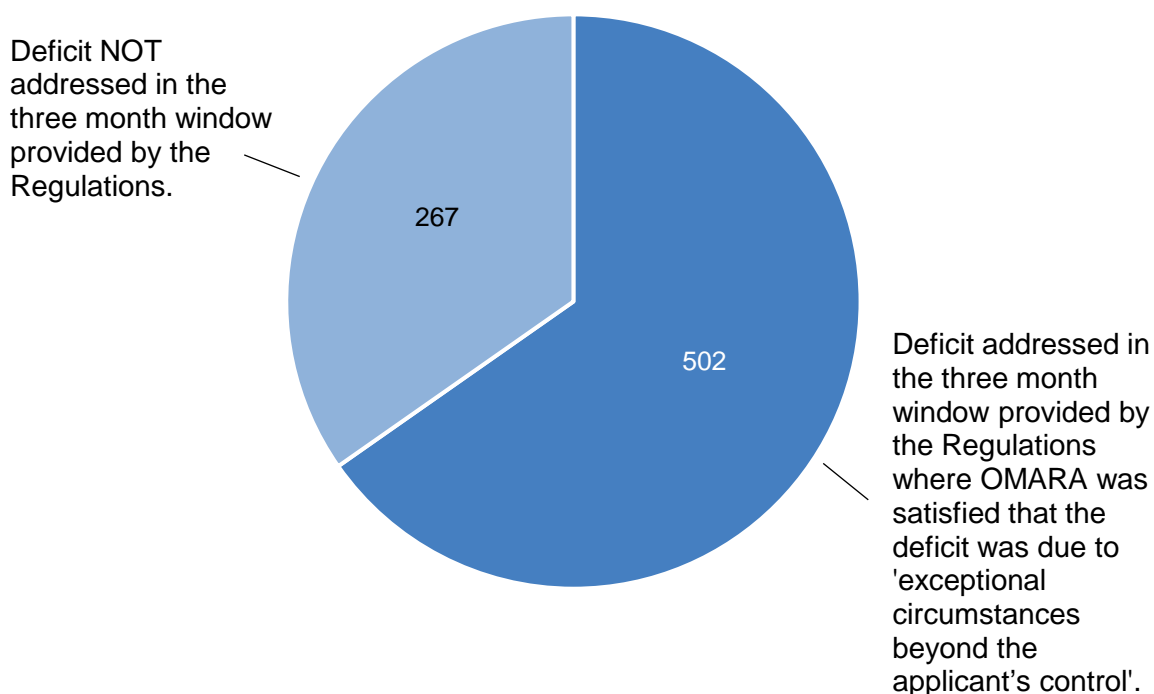
18 MARS is the system used by the department to manage RMA registration, CPD providers, complaints against RMAs, and consumer enquiries.

19 The data quality issues include: dates applications were submitted not recorded; registration dates not recorded; registration dates duplicated for previous years; and registration dates incorrectly recorded one year ahead of the actual registration date, with the result that this carries forward for all future registration.

was made, and provide for an extension of three months if the Authority is satisfied that the applicant did not meet the requirements because of exceptional circumstances beyond the applicant's control. Approved CPD providers are required to send in advice of attendees at CPD activities to the department (which can be used by the department to monitor whether agents are meeting their CPD obligations). The department's data shows that 769 agents (three per cent of registrations over that period) that were registered between 2019 and 2023 had not accrued the required 10 CPD points in the 12 months prior to submitting their applications. After allowing for an additional three months after applications were submitted, the number of applicants who had not accrued 10 points reduced substantially to 267, a reduction of 65 per cent (see Figure 3.1). The proportion of applicants for which the deficit was not addressed in the three-month window increased from 14 per cent in both 2019 and 2020 to an average of 57 per cent from 2021 to 2023. In April 2024, the department advised the ANAO that:

The data extracted by the Department with the assistance of Dialog [*the contracted service provider for the MARS system*], indicates that the vast majority of the applications had met the CPD requirements at the time of application. However, for these identified cases the individual's CPD records were not correctly linked in the system to the correct registration application.

Figure 3.1: Applications submitted without the required 10 Continuing Professional Development points over the 12 months prior to lodging the application



Source: ANAO analysis of Home Affairs data.

3.7 As highlighted in Figure 3.1, there were 502 applications between 2019 and 2023 where the department's actions indicate that the CPD points deficits were due to 'exceptional circumstances beyond the applicant's control'. While the department's processes invite agents to identify the

relevant exceptional circumstances, they do not require that the agent explain how those circumstances were beyond the applicant's control, for example:

- an agent explained to the department he had been overseas²⁰ during the 12 months without outlining how travelling internationally represented exceptional circumstances outside his control (or why he was unable to undertake the CPD remotely); and
- four applications were submitted by an agent in October 2019, October 2020, October 2021, and September 2023, in which the CPD requirements had not been met at the time the applications were made. On all four occasions, the department provided the agent with additional time to meet the requirements, notwithstanding that the agent had not claimed and provided supporting evidence, at the time of application, that exceptional circumstances beyond the agent's control had prevented the agent from meeting the CPD requirements.

3.8 Home Affairs data held in MARS indicates that the applications of ten agents since 2009 have been refused on the basis of the agent not meeting the CPD requirements, the most recent of which was in 2018. The ANAO's analysis is that 267 applications (as shown in Figure 3.1) were approved by the department between 2019 and 2023 without the 10 point deficit having been addressed either in the 12 months prior to lodging the application in which agents are expected to have completed the required amount of CPD (subject to exceptional circumstances beyond their control) or in the three month window provided by the Regulations. Of those 267, 29 applications received an 'auto-granted' approval since April 2021 (see paragraphs 2.15 and 3.17), while three were 'deemed' to have been approved (see paragraph 3.14), without having accrued 10 CPD points.

Recommendation no. 5

3.9 The Department of Home Affairs assure itself that agents are registered only where they meet the continuing professional development requirements within the time period specified by the Migration Agents Regulations 1998.

Department of Home Affairs response: Agreed.

3.10 *The Department agrees that it will take measures to strengthen quality assurance processes relating to the assessment that agents are registered only where they meet the continuing professional development requirements within the time period specified by the Migration Agents Regulations 1998 as set out in section 290A of the Migration Act 1958. The Department will pursue systems changes, undertake staff training and further develop support materials to contribute to the strengthening of quality assurance processes.*

Late repeat applications to re-register

3.11 Section 299 of the Migration Act provides that the registration of a registered migration agent ends 12 months after the day of registration. To remain registered and to continue to lawfully provide immigration assistance, agents are required to submit an application to re-register prior to the expiry date. Under Section 306B of the Migration Act, if an agent has not submitted a repeat

20 The department's *Working with the Migration Advice Industry* procedural instruction of 2019 includes overseas travel as one of six 'issues' that are not considered exceptional for this purpose. The remaining five are: unavailability of a preferred CPD activity or series of activities, heavy workload, financial hardship, technical issues with computer/internet, and limited access to face-to-face activities.

application prior to the expiry date, the agent becomes an 'inactive migration agent' for a period of two years (unless the agent registers again within that two-year period).

3.12 While an agent ceases to be an 'inactive migration agent' after the two-year period, the Regulations define a repeat registration as one where the applicant has previously been registered at some time within the period of three years before making the application. This is reflected in the department's Registrations and CPD SOP, which states that a person has up to three years to submit a late repeat application.

3.13 Automated reminders are sent to RMAs that their registration is due for renewal at 60 days, 30 days and 14 days prior to expiry. Nonetheless, over six per cent of repeat applications since 1 July 2016 are late repeats.²¹

Deemed applications for registration

3.14 Under section 300 of the Migration Act, repeat registration applicants who make a registration application and pay the application charge before their current registration expires will automatically continue to be registered and may continue to provide immigration assistance until:

- a decision is made on the application, or
- a decision is made to suspend or cancel the agent's registration, or
- a period of 10 months has passed since the day after the applicant's registration expired. At the end of the 10-month period, the RMA's application for registration is taken to have been granted or 'deemed'.

3.15 The department's data shows that agents for which there are serious integrity concerns²² are having their repeat applications to register 'deemed' rather than approved by the department, often for multiple years. For example, 40 per cent of the agents identified by the department as suspected of facilitation of criminal enterprise (see paragraph 3.57) have had their registration applications 'deemed'.²³ Based on the Explanatory Memorandum as well as the drafting instructions for the amendments to the Migration Act in 2002 that introduced the deeming provision, this was not the intended purpose of the deeming provision.

3.16 Examples of where applications for repeat registration have been deemed have included:

- an agent for whom the department recorded that it had, since 2009, received a number of allegations relating to matters that included possible fraudulent visa applications, and was identified by the department as a facilitator of fraudulent visa applications in November 2017. The agent has also been the subject of 21 complaints. Each annual registration for this agent has been deemed since 2020, while being the subject of three open complaints. The last time the department approved the agent's application on the basis of a finalised assessment of the re-registration application was in October 2019;

21 Home Affairs advised the ANAO in April 2024 that its analysis is that this was three per cent for the six months to December 2023.

22 Examples of the department identifying 'serious integrity concerns' are included in advice to ministers, such as the department having received 'information regarding allegations of serious criminal conduct', as well as complaints about an agent 'charging excessive fees'; complaints alleging an agent was 'lodging vexatious protection visa applications', and having 'held a contractor position with a 'discredited' migration company'.

23 Conversely, 20 per cent of the agents have had registrations 'auto-granted' approval (see paragraph 3.17).

- an agent for whom the department had integrity concerns since at least 2015 and was the subject of nine complaints received between 2014 and 2019 (all of which were dismissed by the department), had been ‘deemed’ for four consecutive years between 2016 and 2019 before the agent’s application for re-registration was refused in June 2020; and
- an agent that is the subject of an open complaint (as of February 2024) that was submitted in June 2019 relating to fraudulent and/or criminal behaviour, had been ‘deemed’ in November 2020, November 2022, and November 2023. In relation to that complaint:
 - the complaint was submitted to the department in June 2019;
 - a section 308 notice was issued to the agent 34 months later in April 2022 requesting a statutory declaration and supporting information relating to the complaint;
 - the agent responded to the notice the same month;
 - in February 2023, the agent’s legal representative contacted the department for information about the status of the complaint. The department did not respond;
 - the agent’s legal representative again contacted the department in July 2023 outlining concerns that it was over a year since the agent had responded to the section 308 notice and that he had not received a reply to his email of February 2023. In response, the department advised that the legal representative’s correspondence on behalf of the agent was ‘on file’;
 - the department requested further information from the agent in July 2023, a further 15 months since issuing and receiving a response to its section 308 notice, and over four years since receiving the complaint; and
 - as of February 2024, the complaint remains open and the department has not issued a section 309 notice to the agent regarding the complaint.

Automated registration approvals

3.17 As mentioned at paragraph 2.15, in April 2021²⁴, the department implemented an automated decision-making process for the approval of applications for repeat registration.²⁵ MARS, used by the department to manage RMA registration, CPD providers, complaints against RMAs, and consumer enquiries, automatically approves an application for repeat registration (or re-registration) based on certain criteria. The criteria include, but are not limited to: agent experience (the date first registered is greater than 12 months); character (the agent’s answer must be ‘no’ to the questions set out in relation to the agent’s integrity and fitness and propriety to provide immigration assistance); complaints (no open complaints and two or less closed complaints in less than 5 years); OMARA disciplinary action (the agent must not have been subject to a caution, suspension, cancellation or barring).

3.18 Fifty-nine per cent of repeat registrations have been subject to automated approval since April 2021.

24 In February 2024, Home Affairs advised the ANAO that: ‘From March 2016, system changes implemented the recommended self-declaration re-registration process for the large portion of agents identified as being of good standing. Further system deployments in MARS occurred in March 2021 that automated this process.’

25 As outlined at paragraph 2.16, when implementing the automated registration process the department did not take steps to assure itself that this process is supported by the *Migration Act 1958*.

3.19 Those repeat registrations being ‘auto-granted’ rather than having a departmental officer assess the application have included, similar to the department’s approach to the deeming provisions outlined above, agents for which the department holds integrity concerns. For example, an agent’s application for repeat registration was ‘auto-granted’ after a complaint related to fraud and/or criminal behaviour was dismissed by the department notwithstanding that it had ‘residual concerns’.

- The agent was first registered in July 2018. The agent’s first repeat registration was ‘deemed’ as approved in May 2020 and the most recent application received an ‘auto-granted’ approval in July 2023.
- The agent has been the subject of one complaint. The complaint was a referral from another area of the department that was submitted in August 2019 and related to allegations of fraud and/or criminal behaviour. Notwithstanding the serious nature of the allegations, the department recorded in its risk assessment a score of ‘minor’.
- The department dismissed the complaint three years later in August 2022 with a primary outcome recorded as ‘insufficient evidence’.
- In dismissing the complaint, the department did not exercise any of its available regulatory powers to investigate the complaint. For example, the department did not issue notices under sections 305C or 308 of the Migration Act to require the RMA to give information or documents.
- The department recorded that it had ‘residual concerns’ about the agent’s likely involvement in the alleged activity. Nevertheless, approval of the agent’s repeat application to register was ‘auto-granted’ the following year in July 2023.

3.20 Further examples include:

- an agent’s application for repeat registration was ‘auto-granted’ approval in September 2023, notwithstanding that the agent had been the subject of an earlier complaint resulting from an intra-departmental referral involving allegations of criminal and/or fraudulent behaviour. The department dismissed the complaint as having ‘insufficient evidence’ 17 months after receiving it, during which time the department had not issued any notices to the agent or exercised any of its regulatory powers to investigate the complaint.
- an agent’s applications for repeat registration were ‘auto-granted’ approval in November 2021 and November 2022, after three complaints had been received against the agent, one of which had resulted in the department finding that the agent had breached the Code of Conduct. No disciplinary action was taken by the department. Another complaint was finalised by the department as having been ‘addressed with agent’ (which is not a disciplinary action prescribed in the Migration Act). The agent is the subject of a fourth complaint, which the department identified as of ‘high risk’ of fraud and criminal behaviour, received in March 2023, four months after the most recent of the two ‘auto-granted’ approvals.
- an agent’s application for repeat registration was ‘auto-granted’ approval in March 2022. The agent had been the subject of five complaints between 2010 and 2019, including two complaints received in 2018 and 2019 related to fraud and/or criminal behaviour that the department dismissed as having ‘no permission to publish’. This means the complainant

did not agree to have the details of their complaint provided to the agent (the functions of OMARA under the Migration Act includes investigating complaints, and this is not limited to only complaints where the complainant has agreed that details of the complaint be provided to the agent²⁶ (see also Case Study 1 in Appendix 3)). While the department advised the ANAO in October 2023 that, '[w]here warranted and where the matter is serious, the OMARA can commence an own motion investigation to source evidence that would not reveal the complainant's identity', this was not the case for either of these two complaints.

Powers to obtain information to inform registration refusal and sanction decisions

3.21 The Migration Act (section 305C) provides a power for OMARA to, by written notice to the agent, require him or her to provide prescribed information or prescribed documents in circumstances where it is considering refusing a registration application or making a decision to cancel or suspend an agent's registration, or cautioning an agent.²⁷ In December 2023, Home Affairs advised the ANAO that:

there may be very clear reasons why the OMARA may not exercise the power in section 305C of the Act. These may include, for example, where:

- evidence has already been obtained from the relevant RMA under section 308 of the Act initially²⁸
- evidence is already available to support the allegations
- the OMARA is not considering sanctioning the agent due to the OMARA having determined that available evidence does not support the allegations (or not considering refusing a registration application).

3.22 Analysis did not support the department's advice as to why it may not exercise the power provided by section 305C. For example, an agent's applications for registration and re-registration had been approved annually between 2005 and 2022 (although on four occasions the applications were 'deemed' to have been approved (see paragraphs 3.14 to 3.16). Between 2006 and 2019, 15 complaints had been made against the agent, including allegations related to undeclared assistance and misrepresentation. The department stated in a brief to the Minister for Immigration, Citizenship and Multicultural Affairs in November 2022 that 'All 16 [sic] complaints were investigated and dismissed, due mainly to insufficient evidence'. In the matter/s covered in the brief, the department had not:

- issued notices under sections 305C or 308 of the Migration Act to require the RMA to provide information; nor

26 The department's website does not advise complainants that it is able to investigate complaints where the complainant has not agreed that details of the complaint be provided to the agent. Rather, Home Affairs states on its website that: 'We cannot investigate your complaint unless you agree that we can tell your registered migration agent about your complaint'. In April 2024, the department changed its website such that it no longer advises complainants that it is unable to investigate complaints where they do not consent to the details of the complaint being provided to the agent.

27 In addition, section 309 governs situations where consideration is being given to refusing a registration application or cancelling or suspending or cautioning an agent, requiring that the agent be informed of the fact and the reasons and invited to make a submission.

28 Analysis of the use of the section 308 powers is at paragraphs 3.49 to 3.64.

- at any time considered whether it should reopen prior complaints that were relevant to the allegations at hand.

3.23 The department did not advise the minister that it had not used the powers available to it.

3.24 The agent's registration was cancelled in December 2022, 15 months after a complaint was submitted by another area of the department in September 2021 relating to undeclared assistance, and one month after media reporting (see paragraphs 3.39 and 3.40), which the department identified as alleging the agent was engaged in conduct which undermined the migration law.²⁹

3.25 In February 2024, the department advised the ANAO that it accepts that it needs to 'uplift its capabilities' to use the Migration Act powers without specifying the regulatory actions it plans to undertake. Of the 50 examples/case studies of completed/closed cases raised by the ANAO with the department as part of this performance audit, there was only one (see paragraph 3.52) where the department indicated OMARA is considering whether further action might have been, or is, warranted. In April 2024, Home Affairs advised the ANAO that:

the Department considers that an increase in administrative investigative capabilities includes everything on the continuum – governance, SOPS, procedures, team structures and functions, training and development, skilled and qualified staff, case management system and reporting capabilities, sophistication of evidence collection capabilities (access to systems, intelligence gathering and skilled staff trained to navigate and interpret those systems and intelligence/information), consideration of all powers available to the OMARA and future powers and identifying and using levers from other functions and capabilities across the Department, working with key stakeholders both internal and external with dual interests, streamlining decision making (focus on key allegations, well-reasoned and evidence based decisions, timeliness etc), quality review processes etc.

29 The section 309 notice was sent to the agent in November 2022, after the media reporting. No section 305C or 308 notices were issued in relation to the complaint.

Recommendation no. 6

3.26 The Department of Home Affairs strengthen its regulation of migration agent registration requirements by making greater use of the powers provided to it by the *Migration Act 1958* to inform an assessment of whether applications for registration should be granted.

Department of Home Affairs response: *Agreed.*

3.27 *The Department agrees that it is important to make use of the powers available to the Authority under the Migration Act (such as through issuing a Notice under sections 288B, 305C, 308 or 309), where it is relevant, appropriate and lawful to do so.*

3.28 *The Department will continue to enhance its ability to appropriately assess whether an application for registration should be granted having regard to available evidence before the Authority including through the exercise of relevant powers under the Act. The Government has agreed to implement an AusCheck scheme to undertake a background check for all registered migration agents, to replace the existing requirement to provide a National Police Check. This will strengthen the assessment of the character requirements for registration to ensure individuals applying to become RMAs are more thoroughly vetted before they can register and at subsequent renewals of their registration. The OMARA will implement these changes subject to the passage of legislation through Parliament.*

3.29 *The Department is investigating system enhancements to enable more effective reporting on registration caseload management including to report on when powers are utilised in order to make an assessment whether an applicant for registration is fit and proper and a person of integrity.*

Monitoring agent conduct

3.30 As discussed in paragraph 2.37, one of the functions under section 316 of the Migration Act is for OMARA to monitor the conduct of RMAs in their provision of immigration assistance. The department's most recent compliance strategy of 2018–19, states that:

The OMARA uses its powers under section 308 of the Act to require RMAs to give information (specified documents) and answer questions or to provide specified documents or records relevant to the agent's continued registration. The OMARA uses this power to monitor and investigate complaints against RMAs.

Where OMARA's monitoring activities yields evidence of conduct that causes a delegate to have concerns that an RMA may have either breached the Code of Conduct or is otherwise not a person of integrity or fit and proper to provide immigration assistance, the OMARA has the power to initiate an own motion complaint against them.

3.31 While the associated compliance plan for 2018–19 to deliver on the strategy included using section 308 powers as a monitoring activity (see paragraph 2.38), this was not done. As highlighted by Table 3.1, no monitoring activities were conducted in accordance with the department's most recent compliance plan of 2018–19.

3.32 Table 3.1 further highlights that:

- the number of monitoring activities recorded by the OMARA in MARS has reduced substantially since 2015–16;
- of the 38 quarters in the period examined, only 37 per cent included any monitoring; and
- no monitoring activities have been recorded since the first quarter of 2020–21.

Table 3.1: Number of monitoring activities recorded by Home Affairs

Financial year	Quarter 1	Quarter 2	Quarter 3	Quarter 4	Total
2014–15	281	177	251	9	718
2015–16	462	476	133	72	1143
2016–17	15	0	0	3	18
2017–18	0	0	0	0	0
2018–19	0	0	0	0	0
2019–20	0	65	55	118	238
2020–21	58	0	0	0	58
2021–22	0	0	0	0	0
2022–23	0	0	0	0	0
2023–24	0	0	n/a	n/a	0

Source: ANAO analysis of Home Affairs records in MARS.

Reporting on monitoring activities

3.33 The department does not report on monitoring activities in the six-monthly Migration Agents Activity Reports it publishes. The most recent reporting available of these activities was in the department's 2015–16 Annual Report.³⁰ The department reported that a 'range of monitoring activities were conducted during the 2015–16 year', including:

- self-audit surveys to ensure agent compliance with various aspects of the code;
- review of agent websites to verify adherence to advertising requirements;
- checking that new agents held the required elements of a professional library;
- office visits to assess business processes in accordance with the code;
- review of client files; and
- review of CPD providers and activities.

3.34 The department did not report on the results of those monitoring activities.

3.35 In February 2024, the department advised the ANAO that it:

is working to update the Migration Agent Activity Report to ensure it is fit for purpose and accurately captures OMARA's intent for publishing such material. The OMARA plans to capture its new processes for complaint and investigation processes and outcomes (such as through the early

30 Department of Immigration and Border Protection, *Annual Report 2015-16*, available at <https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/dibp-annual-report-2015-16.pdf> [accessed 10 January 2024], p.294.

resolution framework). Reporting will also capture OMARA's Compliance and Monitoring activities once commenced.

Recommendation no. 7

3.36 The Department of Home Affairs, in accordance with an up-to-date compliance strategy and compliance plan informed by an assessment of identified risk, plan and undertake regulatory monitoring of the activities of registered migration agents and report on those activities.

Department of Home Affairs response: *Agreed.*

3.37 *Similar to the Department's response to recommendation 4, the Department has developed a draft Compliance and Monitoring Framework, Strategy and Plan and will continue to refine this further as the OMARA Risk Management Plan and Risk Register is matured.*

Selecting complaints for investigation

3.38 As stated in paragraph 1.2, the role of the OMARA is to protect consumers of migration assistance and the integrity of the Australian visa system by regulating RMAs, and assessing and investigating complaints that it receives about RMAs or former RMAs is one of the ways in which it is to do this. The introduction of an agent registration scheme in 1992 was in response to 'government concerns' about the level and nature of complaints about agents (see paragraph 1.8).

3.39 Under a revised triage and assessment model for complaints implemented by OMARA in late 2022, a matrix is to be used to assess the severity and impact of specific RMA conduct and to inform treatment strategies to assist 'OMARA to manage, disrupt and effectively deal with alleged inappropriate conduct'.

3.40 The OMARA complaint matrix includes nine criteria for which scores are to be allocated ranging from 0 (where the risk is assessed as 'not applicable') to 3 (where the risk is assessed as 'major'). The scores are then calculated to arrive at a severity rating of either minor (a score less than 14), moderate (a score of 14 to 18), or major (a score of 19 or greater). The complaint matrix does not weight the nine criteria. For example, the nature of the conduct is of the same importance in deciding whether to take action on the complaint as Home Affairs' priorities and political sensitivities.³¹ More broadly, while five of the nine criteria relate to the nature of the alleged conduct, four of the criteria are concerned with awareness of the alleged conduct outside the OMARA and political and/or media interest. Four of the nine criteria focused on those issues means that significant emphasis in deciding which complaints to action is given to matters that are not related to protecting consumers and the integrity of the visa system (see paragraph 1.2).

31 This is reflected in the example highlighted in paragraphs 3.107 and 3.108, where, notwithstanding numerous complaints being received about the agent over many years, OMARA gave little scrutiny to the agent's applications for re-registration (on three occasions the applications were 'deemed' to have been approved — see paragraphs 3.14 to 3.16 on 'deeming') and was not investigating complaints. As outlined at paragraph 3.104, agents that are sanctioned by OMARA are on average registered for 10 years and are the subject of 10 complaints before they are sanctioned and, as at March 2024, there are 66 current RMAs that have received 10 or more complaints that have not been sanctioned.

Complaints handling

3.41 Home Affairs states on its website³² that:

Many complaints we receive are complex and take time to investigate. We finalise most complaints within 6 to 12 months.

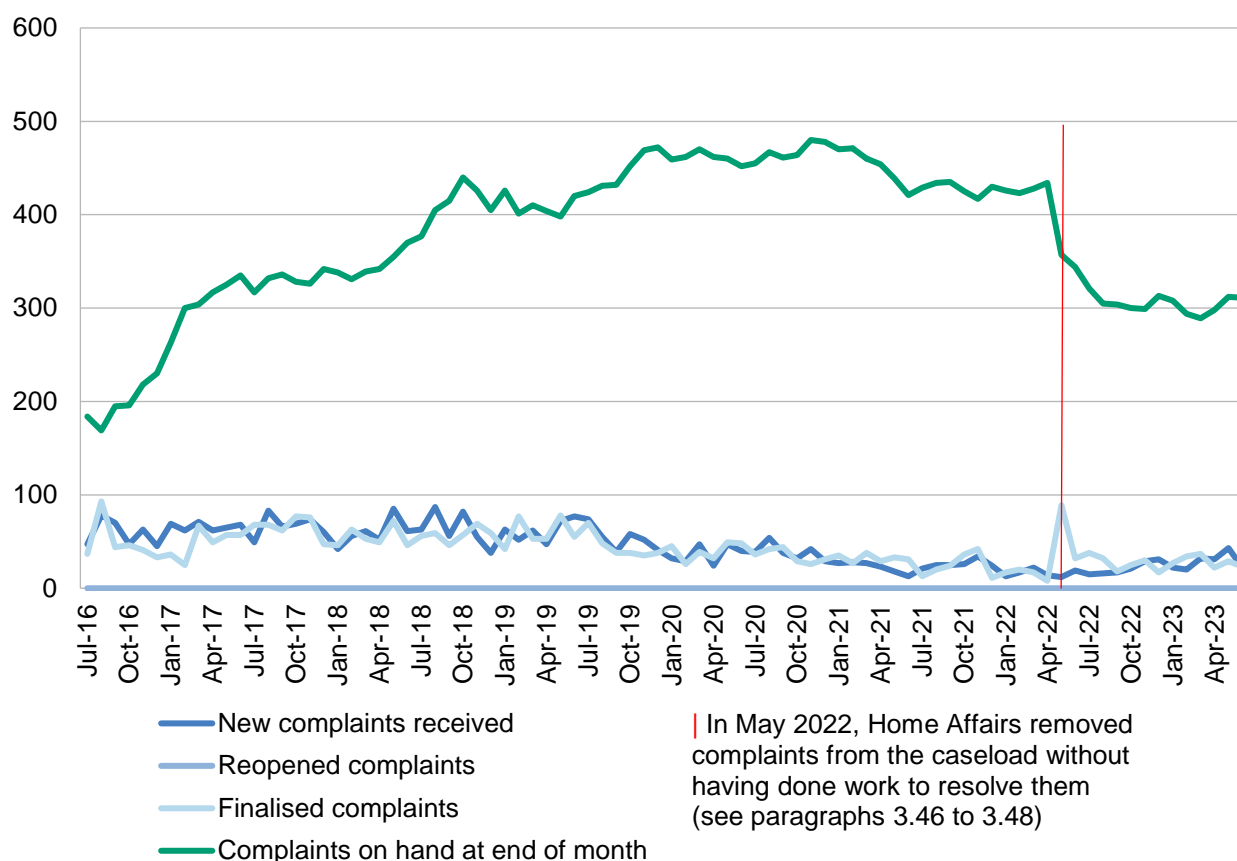
3.42 The ANAO's analysis of the department's monthly statistics identified that between July 2016 and June 2023, the average number of complaints recorded as finalised by the department was 42 per month, compared to an average of 376 complaints on hand at the end of each month.

3.43 Figure 3.2 highlights that for 73 of the 84 months (87 per cent) analysed, the number of complaints on hand exceeded 300 complaints (and 44 of the 84 months exceeded 400 complaints). Case Study 2 in Appendix 3 below illustrates that one reason for the high number of complaints on hand relates to delays with the department progressing the investigation of complaints.³³

32 See <https://www.mara.gov.au/get-help-with-a-visa/help-from-registered-agents/steps-to-choose/complain/outcomes>.

33 A further example is of an agent in respect of whom OMARA received four complaints in December 2018, January 2019, February 2019, and June 2020, which as at February 2024 and more than five years after the first complaint, remain open and under consideration by the OMARA. Section 308 notices were sent in December 2018, and February 2019 and May 2019 in respect of the first three complaints. After a review of five open complaints against the agent was conducted in October 2022 (more than three years after the last of these notices was issued), a section 309 notice in respect of the four complaints (that remain open and under consideration) was sent to the agent in November 2023 (13 months after the case review) to inform the agent that the OMARA was considering a sanction and invite a submission from the agent as to why he should not be sanctioned. The agent responded to the section 309 notice in January 2024.

Figure 3.2: Department's handling of the complaints caseload July 2016 to June 2023



Note: To retain consistency with reporting across the period, the ANAO has removed the effect of 'Close and Hold' (19 in total) and 'Suspected Breach notified' (40 in total) categories from the 'finalised complaints', as these were introduced in October 2022 and January 2023, respectively, and do not represent an appropriate resolution of the complaint (particularly in relation to 'close' and 'hold' (see paragraph 3.45)).

Source: ANAO analysis of departmental records.

3.44 As illustrated by Table 3.2 the majority of complaints are dismissed by the department rather than being investigated. There is a risk that the department's new performance measure for 2023–24 (see paragraph 1.3) will result in complaints being dismissed more quickly rather than greater investigation of complaints that are received.

Table 3.2: Complaints dismissed by the department per year according to reasons for dismissal

Reason for dismissal	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Already sanctioned	16	12	42	7	10	9	1
Close and Hold	0	0	0	0	0	0	19
Created in error	0	0	0	0	1	0	1
Duplicate case	16	39	39	40	23	12	12

Reason for dismissal	2016–17	2017–18	2018–19	2019–20	2020–21	2021–22	2022–23
Handled by parent case	0	1	0	0	0	16	6
Insufficient evidence	56	144	131	107	75	65	106
Internal MARA referral	4	1	1	0	0	0	3
No further action	7	73	6	8	1	8	17
No jurisdiction	55	109	106	72	87	53	56
No merit	122	79	71	70	47	44	49
No permission to publish	43	31	23	12	17	5	6
Withdrawn	31	18	14	11	9	6	4
Total	350^a	507	433	327	270	218	280

Note a: The ANAO identified discrepancies between what is recorded in MARS and what is reported in the department's Migration Agent Activity Reports. In 2016–17, 361 complaints were reported as having been dismissed by the department compared to 350 records in MARS. The department advised the ANAO in November 2023 that 'As there is no documentation to confirm what constituted a dismissed case at this time, the discrepancies are assumed to be inclusions in the dismissed category of: Addressed with agent =7, Internal MARA referral = 4. Total 11'. The department further advised that 'the 'Executive summary' to the [Migration Agent Activity Report] states that while the data contained in the report is formulated with all due care, the OMARA does not warrant or represent that the data is free from errors or omission'.

Source: ANAO analysis of departmental records.

3.45 Departmental records, and the six-monthly public reporting (see paragraph 1.5), do not provide an accurate reflection of the extent to which complaints are investigated and regulatory action taken. Specifically:

- complaints for which the department has taken no action to investigate using the powers provided by the Migration Act or otherwise resolve, are reported as 'finalised' with an outcome of 'close and hold';
- similarly, complaints are reported as 'finalised' with an outcome of 'already sanctioned' when the department has not investigated or taken any regulatory action to resolve this particular complaint (rather than other complaints against the same RMA). This approach inflates reporting on the extent to which the department is sanctioning agents on the basis of having investigated complaints received. In response to ANAO enquiries of October 2023, the department advised the ANAO in December 2023 that 'These complaints (as well as a sanction outcome) may be considered should the former agent make an application for registration in the future'. In February 2024, the department advised the ANAO that it does not have any recent examples where a former agent's application to register was refused because of complaints that were finalised as 'already sanctioned';
- complaints are reported as being found to have involved a breach of the Code of Conduct, although no sanction was applied;

- complaints are reported as resulting in an outcome of having been ‘addressed with the agent’, which is not a disciplinary action prescribed in the Migration Act;
- complaints are reported as resulting in a ‘suspected breach notice’, which is not an action prescribed in the Migration Act; and
- complaints previously identified for investigation have been closed, without investigation work using the powers provided by the Migration Act having been undertaken.³⁴

3.46 In this latter respect, as highlighted in Figure 3.2 above, in May 2022, the department recorded that it had finalised 89 complaints. This represented 81 more than the previous month and 67 more than the average of 22 for 2021–22 (excluding May 2022). Of the 89 complaints recorded as finalised:

- 74 (83 per cent) were dismissed by the department;
- 63 (71 per cent) were over 12 months old, including 42 (48 per cent) over 24 months old; and
- four resulted in sanction decisions against two agents. One agent received a caution, and the other agent’s registration was suspended for two years on the basis of three complaints.^{35 36}

3.47 One of the three complaints that resulted in the suspension of the agent was almost five years old. Further, in deciding to remove the complaints from the caseload, the department did not appropriately resolve the complaints. For example:

- an intra-departmental referral for a complaint against an agent concerning possible cash-for-visa conduct was received in March 2019;
- as the holder of an unrestricted legal practising certificate, two years later the agent was removed from the Register of Migration agents on 22 March 2021 when the legislative changes to remove lawyers from the regulatory scheme came into effect (see paragraph 1.10);
- it took the department a further 14 months to decide to close the complaint as ‘no jurisdiction’ in May 2022; and
- in the three years that the complaint was open, the department did not issue any notices to the agent or undertake any investigation into the complaint.

34 For example, the department recorded that five complaints received between August 2020 and April 2022 against one agent had been reviewed by the OMARA in May 2022 and were to be published to the agent, noting that the RMA was the subject of multiple complaints. In December 2022, seven months after the case review of the five complaints, all five of the complaints were dismissed with the department recording that none of the complaints had been published to the RMA or otherwise investigated. The agent is one of the 66 agents referred to in paragraph 3.104.

In relation to another of the 66 agents referred to in paragraph 3.104, two complaints submitted in January 2019 and March 2019 that were accepted for investigation were dismissed over four and a half years later in September 2023, with the department recording that it has ‘insufficient evidence to proceed to section 308/309 and/or [the complaints] are quite aged now’.

35 The department takes considerable time to arrive at sanction decisions. Reflecting this, the three complaints that resulted in the suspension of the agent’s registration were 59, 42 and 34 months old when the decision was taken to suspend the agent.

36 The remaining 11 complaints against 11 agents resulted in: four recorded as ‘no breach’, six as ‘addressed with agent’, and one as a ‘breach’ (although no disciplinary action was taken).

3.48 Also of note is that 12 of 16 complaints relating to seven agents that were dismissed by the department in May 2022 as being ‘handled by parent case’ were removed from the complaints caseload and re-categorised as ‘information cases’, which the department does not report on and does not investigate.

Use of the information gathering power

3.49 One of the recommendations of the Nixon review (see paragraph 1.9) was that the compliance and investigative powers of OMARA be increased.³⁷ At present, section 308 of the Migration Act provides OMARA with the power to require that an RMA: make a statutory declaration in answer to questions in writing; appear before an individual or individuals specified by the Authority and to answer questions³⁸; or provide the Authority with specified documents or records relevant to the agent’s continued registration. Section 308 was introduced as part of the 1992 amendments to the Migration Act to legislate a registration scheme in response to concerns about the level and nature of complaints about agents (see paragraph 1.8).

3.50 In December 2023, Home Affairs advised the ANAO that:

The OMARA is not required to exercise its powers in relation to each matter/complaint and some powers available to the OMARA, such as s308, are discretionary. The individual powers exercised in relation to each investigation will depend on the specifics of the matter itself, the evidence available to support the allegation and the strategic direction that we wish to take in respect to investigating a matter.³⁹ For example, the OMARA will not issue a section 308 notice to require an RMA to provide documents and information in all matters. This is an information gathering power that *may* be exercised if the OMARA wishes to seek information from an RMA or have them provide documents or to answer questions. If the OMARA already has sufficient evidence to suspect the agent has engaged in misconduct (obtained independently by the OMARA through other sources such as directly from the client, through caseload analysis in ICSE etc.), the OMARA will not necessarily exercise this power as there is limited, to no utility.

As flagged above, this power is a tool available to the OMARA and may (or may not) be utilised strategically in terms of advancing a matter. In some instances, the OMARA may request the RMA to provide information by way of a statutory declaration in relation to what is alleged to have occurred. Requesting a statutory declaration can impose more weight on the RMA to be truthful,

37 The Nixon review stated that: ‘The powers and sanctions available to the OMARA need strengthening so that it has the compliance and investigative capabilities to respond effectively to suspected exploitation. The OMARA should be empowered to exercise all of the powers currently provided by the legislation under threat of penalty for non-compliance (compelling the provision of documents, the making of a statutory declaration, and appearance to answer questions). This should apply to any individual, including RMAs.’

38 As outlined at paragraph 2.22, the department has been advised that it would be prudent for it to develop guidelines on the use of the section 308 power if it intends to use it on a more frequent basis.

39 Home Affairs further advised the ANAO in relation to the use of the section 308 power prior to commencing an investigation:

in order to assess a matter under the OMARA Complaint Risk Matrix, the substance of the allegations is considered and preliminary enquiries are conducted including an initial review of departmental systems and the gathering of any other available evidence to support the allegations. This may or may not involve the exercise of OMARA’s information gathering power under section 308 of the Migration Act 1958 (the Act) at this stage. It is often the case that the OMARA will seek the provision of further information from the complainant, or the RMA directly (with consent), without issuing a section 308 notice, in order to make an assessment or will clarify the concerns raised by reviewing the specifics of the visa application activity within the Department’s system, ICSE, for example. This information can inform the assessment and how the matter will be dealt with by the OMARA, including whether there is a need to seek additional information using OMARA’s regulatory powers.

noting the legal consequences for making false statements in a statutory declaration (which in itself may lead to further potential breaches of the Code of Conduct and may support a potential finding that the RMA lacks integrity through their dishonesty). In other instances, it is not necessary, as the OMARA may have obtained independent evidence to support the allegations and does not need the RMA to provide anything further at that stage of the process. Where the OMARA has looked at independently available information and determined that the evidence contradicts allegations raised, there is no need to consider exercising this power.

3.51 In terms of OMARA's preparedness to use the investigatory powers provided by the Migration Act, in 2022–23, for example, of the 299 complaints received against 244 agents, only 26 (nine per cent) complaints were actioned via a substantive regulatory response indicated by the use of the powers available under the Migration Act.⁴⁰

3.52 One example where the Migration Act powers were not used was in relation to an agent for which information on integrity concerns was provided to the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs in March 2021. The information brief stated that the department had:

- received numerous allegations from the community and industry bodies regarding the RMA's business;
- opened a complaint against the agent; and
- sought additional information to support an allegation provided to it.

3.53 The department also informed the minister that the complaint 'remains open with the OMARA until evidence can be provided to pursue disciplinary action'.

3.54 Two complaints against the agent related to fraud and/or criminal behaviour were received from another area of the department in May 2019 and October 2019.

- The department dismissed the May 2019 complaint in April 2023, almost four years after receiving the complaint, due to having 'insufficient evidence' (in contrast to stating in the brief to the minister that additional information would be sought and the complaint would remain open until evidence can be found to pursue disciplinary action (see paragraph 3.53 above)).
- The department dismissed the October 2019 complaint in January 2021, 15 months after receiving the complaint, based on having 'no permission to publish'.⁴¹ The outcome is not supported by the department's records which outline instead that the department would pursue the allegations as part of its investigation of the May 2019 complaint (which was dismissed 27 months later).

3.55 Neither of the responses involved the department exercising the available regulatory powers, including issuing notices under the Migration Act, to investigate either of the two

40 Included in the 91 per cent of complaints that were not actioned via a substantive regulatory response, was a complaint dismissed as having 'insufficient evidence' in May 2023 against an agent that has been the subject of 20 complaints, including five others that were dismissed by the department between September 2020 and May 2022 as having 'insufficient evidence' without the department having exercised its powers to investigate the complaints.

41 As noted in paragraph 3.20, the functions of OMARA under the Migration Act include investigating complaints, and this is not limited to only complaints where the complainant has agreed that details of the complaint be provided to the agent.

complaints. Notwithstanding the integrity concerns referred to in the brief to the minister, and the requirement in section 290 of the Migration Act that an ‘Applicant must not be registered if not a person of integrity or not fit and proper’, as of January 2024 the agent’s applications for registration and re-registration have been approved by the department annually from 2017 (although on one occasion, in December 2022, the application was ‘deemed’ to have been approved (see paragraphs 3.14 to 3.16 above on ‘deeming’)).

3.56 In April 2024, the department advised the ANAO that it ‘will reassess the particulars to determine what further action is required to address the allegations’.

Agents suspected of facilitation of criminal enterprise

3.57 In the same brief to the Minister for Immigration referred to in paragraph 3.22, the department stated that the agent referred to in that paragraph was on a ‘list of 20 RMAs the Department has compiled, who are suspected of facilitation of criminal enterprise’. The ANAO’s analysis of the department’s use of its regulatory powers in relation to the 20 agents was that:

- the department has not applied section 290 of the Migration Act, which requires that an applicant must not be registered if not a person of integrity or not fit and proper, to refuse the application for registration of any of the 20 agents;
- the department has not exercised the available regulatory powers under the Migration Act to investigate 15 of the 20 agents (75 per cent) at any stage, either in relation to complaints received directly from complainants or from intra-departmental referrals, or in relation to the allegations of facilitating criminal enterprise;
- one of those 15 is no longer registered with the department as the agent holds a legal practicing certificate and is no longer required to be registered to provide immigration assistance;
- only two of the agents have been sanctioned by the department. The registration of the two agents was cancelled (one in December 2022 and the other in January 2023) following media reporting (see paragraphs 3.39 and 3.40 regarding the criteria used to assess the severity and impact of RMA conduct and to inform the OMARA’s approach to dealing with inappropriate conduct), which the department identified as alleging the agents were involved in conduct that undermined the migration law; and
- 15 of the 20 agents are current RMAs.

3.58 Case study 3 in Appendix 3 illustrates a further example of where the department did not exercise its legislated powers in dismissing an own motion complaint against an agent.

Agents suspected of involvement in cash-for-visa scheme subject to NSW ICAC inquiry

3.59 In September 2020, an RMA was named in an inquiry by the NSW Independent Commission Against Corruption (NSW ICAC) in relation to an alleged ‘cash-for-visa’ scheme. The department identified a further nine RMAs of concern in November 2020.

3.60 The department informed the Minister for Home Affairs and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs in November 2020 that four agents had been referred to the Australian Border Force (ABF) for investigation and that the department would continue its analysis of the remaining five RMAs. In a further update, the department informed the ministers that in ‘January 2021 the ABF advised the OMARA that there was no evidence to suggest

these four RMAs were involved in the cash for visa scheme in the Riverina, and as a result, they are not currently in scope for further investigation by the ABF. The OMARA is continuing its analysis of the remaining five RMAs and will assess any new information as it becomes available’.

3.61 The ANAO’ analysis of the department’s use of its regulatory powers in relation to the ten agents highlights that:

- three of the agents have not been the subject of any complaints;
- three of the agents have each been the subject of 15 or more complaints;
- the department has not exercised any of its available regulatory powers under the Migration Act to investigate seven of the ten agents;
- only two of the ten agents have been the subject of any regulatory action under the Migration Act by the department; and
- seven of the ten agents are current RMAs and one is a lawyer with a practising certificate and no longer required to be registered with the OMARA to provide immigration assistance.

3.62 Of the two agents subject to regulatory action by the department, one was the agent named in the September 2020 public inquiry. The agent had been registered annually since 2007 and had lodged an application for re-registration in October 2020.⁴² The agent’s application was refused by the department in March 2021 after issuing the agent two ‘Notices of intention to consider refusing the registration application’ under subsection 309(1) of the Migration Act, one in November 2020 and one in February 2021.

3.63 The agent was the subject of three complaints received between 2015 and 2018. All three complaints were referrals from other areas of the department. In a brief to the ministers in November 2020, the department stated that information relating to an allegation in 2014 against the agent of providing false information/documents on client’s visa applications ‘has been referred to the OMARA to conduct inquiries into the outcome of the referral allegation and any actions undertaken at the time’. The ANAO’s analysis of the department’s systems identified that:

- the complaint relating to the allegations had been submitted in September 2015 following a departmental referral ;
- the department dismissed the complaint in October 2015 as having ‘no merit’. The reason recorded was that ‘This allegation is hearsay and there is no permission to put it the agent for comment.’⁴³ No merit’; and
- in dismissing the complaint, the department did not use any of the available regulatory powers under the Migration Act to investigate the complaint.

3.64 In relation to the two other complaints:

42 An RMA’s registration continues while a repeat application is under consideration by the department for approval.

43 As highlighted in paragraph 3.20, the functions of OMARA under the Migration Act includes investigating complaints, and this is not limited to only complaints where the complainant has agreed that details of the complaint be provided to the agent.

- the first was submitted in April 2015 and related to the provision of undeclared assistance to visa applicants. The complaint was dismissed in May 2015 as ‘no breach’. The department did not exercise any of its available powers to investigate the complaint; and
- the second was submitted in December 2018 and related to fraud and/or criminal behaviour. The complaint was dismissed three and a half years later in June 2022 (and 15 months after the agent’s application for registration was refused) as having ‘no merit’. The department did not exercise any of its available powers to investigate the complaint.

Recommendation no. 8

3.65 The Department of Home Affairs strengthen its regulation of migration agent registration requirements by making greater use of the powers provided to it by the *Migration Act 1958* to investigate complaints in relation to the provision of immigration assistance by registered migration agents.

Department of Home Affairs response: Agreed.

3.66 *Similar to recommendation 6 above, the Department agrees that it is important to make use of the powers available to the Authority under the Migration Act (such as through issuing a Notice under sections 305C, 308 or 309), where it is relevant, appropriate and lawful to do so.*

3.67 *The Department will continue to enhance its ability to monitor complaints and investigations processes to ensure that it appropriately addresses inappropriate conduct in a timely manner including through the exercise of relevant powers under the Act.*

3.68 *The Department is investigating system enhancements to enable more effective reporting on caseload management including to report on when powers are utilised. OMARA has also implemented regular case management reviews with the Senior Leadership Team to track and monitor case progression and decision making.*

OMARA’s internal performance measures

3.69 OMARA has not established internal performance measures that would enable it to assess its performance in processing and managing complaints. For example, OMARA does not monitor or have targets in relation to:

- the time between a complaint being received and a decision being taken to investigate or otherwise dismiss a complaint (which is the outcome of the vast majority);
- the time taken to exercise its powers to issue notices under the Migration Act; and
- the time taken to take regulatory action on a complaint.

Recommendation no. 9

3.70 The Department of Home Affairs establish and report (for example, in the Migration Agent Activity Reports) on performance measures that address its performance in actioning complaints, including in relation to the timeliness of its performance and the extent to which it has used the investigation powers provided by the *Migration Act 1958*.

Department of Home Affairs response: *Agreed.*

3.71 *The Department will report on its performance in actioning complaints including in respect to timeliness in assessing, investigating and finalising complaints (including reporting on outcomes) and the extent to which a power may been exercised.*

3.72 *The Department is investigating system enhancements to enable more effective reporting. The Department has already established and currently reports on timeliness of performance in actioning complaints within the Annual Report. The Department will consider if additional performance targets in relation to performance in actioning complaints are appropriate for inclusion in the 2024–25 Performance Framework.*

Does Home Affairs effectively regulate continuing professional development providers?

The Department of Home Affairs does not effectively regulate providers of continuing professional development to migration agents either in relation to the approval of providers or overseeing the performance of providers.

3.73 The Migration Act (section 290A) requires that applicants to be an agent must not be registered if OMARA is satisfied that the applicant has not met the prescribed requirements for continuing professional development (CPD). Specifically, RMAs are required to obtain 10 CPD points each year to stay registered as a migration agent. The 10 CPD points must include at least one point on either ethics or the Code of Conduct for migration agents⁴⁴, and at least five points from ‘category A’ activities which comprise:

- workshops (defined as ‘face-to-face or online in real-time that teach migration law topics in an interactive and engaging way’) that are delivered by approved CPD providers. Agents can claim one point for each hour of a workshop; and
- a program of education (defined as ‘a unit of study related to Australian migration law’) provided by an approved CPD university. Five CPD points can be claimed for each unit in a program of education.

3.74 Category B activities comprise: conferences, seminars and lectures; and ‘private study with assessment’, which can include written material or e-learning (without a facilitator) for which the agent must complete and pass a test. For both types of category B activities, one CPD point can be claimed per 1.5 hours.

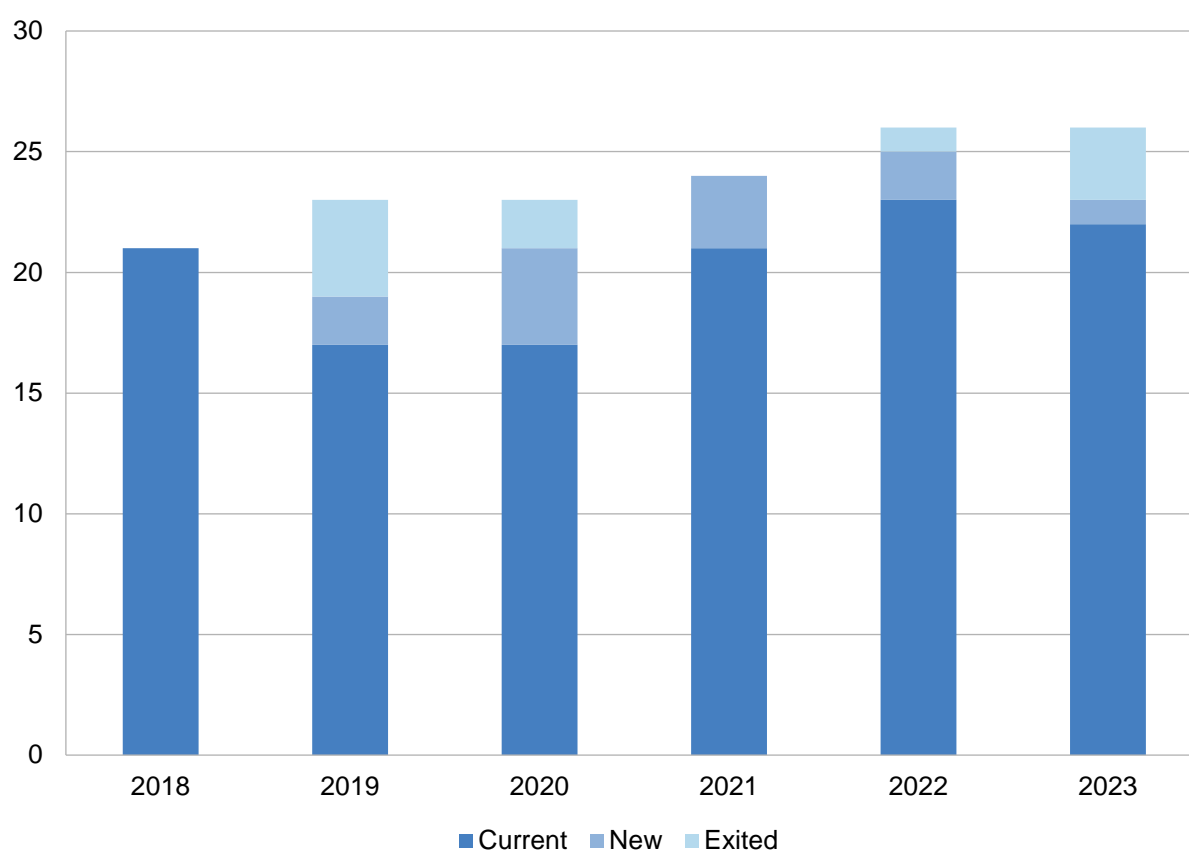
44 In February 2024, Home Affairs advised the ANAO that ‘Code of Conduct/ethics can be either category A or Category B but is included in, not additional to, the 10 annual CPD points’.

CPD provider population

3.75 Home Affairs has not undertaken and documented a risk assessment of the population of approved CPD providers.

3.76 As of September 2023, there were 22 providers approved by OMARA. While 19 CPD providers were listed on the OMARA website, the department advised the ANAO in February 2024 that three providers do not deliver CPD external to their entity. As illustrated by Figure 3.3, there are few new entrants or exits to the list of approved CPD providers, with 87 per cent of training provided to agents by one of four providers that have been approved for at least the last six years. Where providers have exited, this has largely been voluntarily rather than OMARA employing the power provided by the Regulations to cancel a provider. OMARA has used the power to cancel a provider once, in September 2023, more than five years after the new arrangements came into effect. February 2024 advice to the ANAO from the department was that it had also refused the initial registration of one entity and refused two repeat registrations.

Figure 3.3: Numbers of approved CPD providers

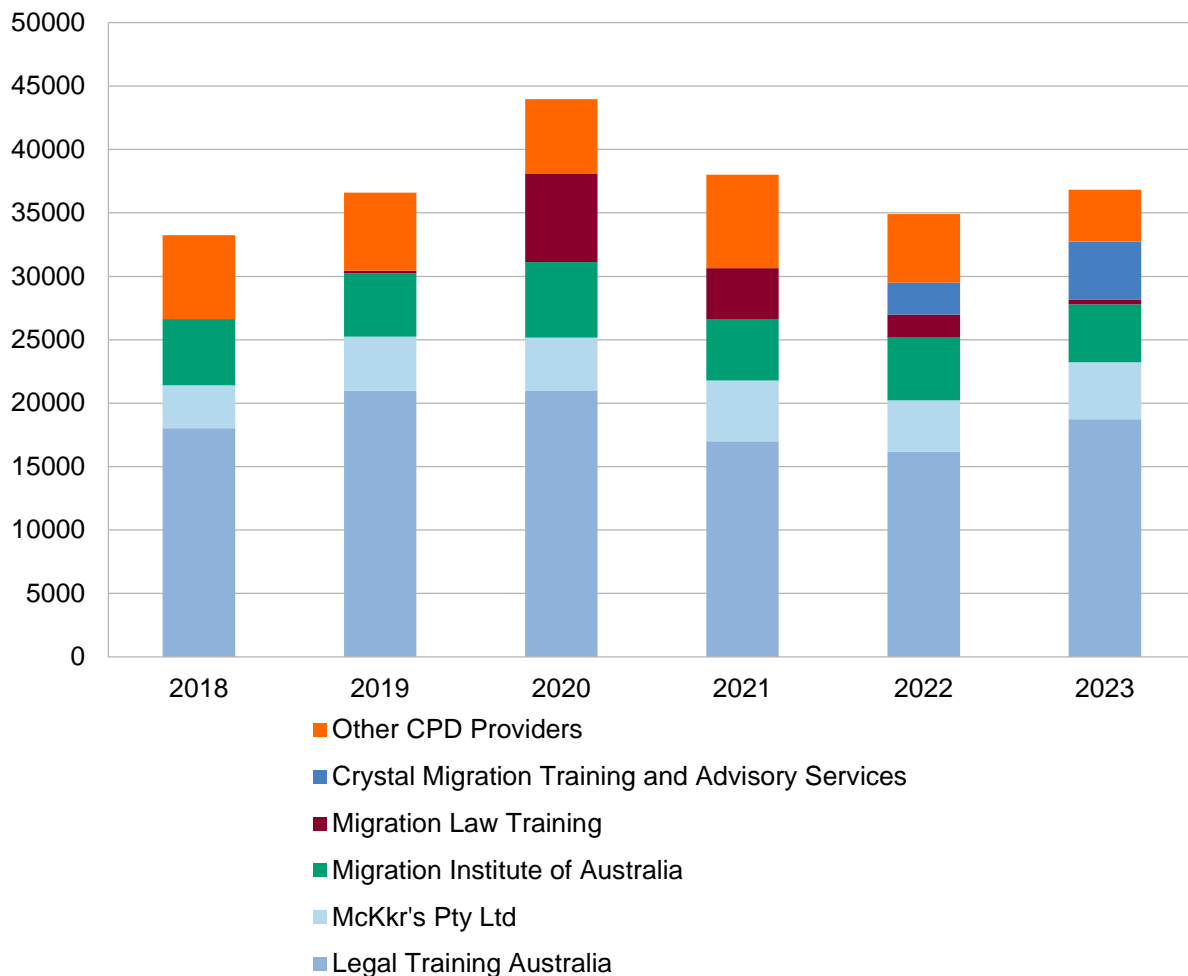


Source: ANAO analysis of Home Affairs data.

3.77 As illustrated by Figure 3.4, one provider (Legal Training Australia) provided more than half of the reported CPD in 2023 (and between 45 per cent and 57 per cent of reported CPD in each of the last six years). Another feature of the approved CPD providers has been that a small number of other providers (three between 2020 and 2023, and two in 2018 and 2019) have provided between 57 per cent and 75 per cent of the CPD not provided by Legal Training Australia. From a regulatory perspective, the situation outlined in Figure 3.3 and Figure 3.4 means that a focus by Home Affairs

on a small number of CPD providers would allow it to obtain assurance over the significant majority of CPD being undertaken by RMAs. The department's regulation of CPD providers could be further targeted if it undertook analysis of complaints data to identify which providers of CPD are being used by agents that are regularly the subject of complaints.

Figure 3.4: Providers of continuing professional development



Source: ANAO analysis of Home Affairs data.

Approving providers

3.78 To be approved as a CPD provider requires applicants to meet requirements as set out in the provider standards and Part 3C of the Regulations. An approval expires after two years, meaning providers must periodically apply for re-approval.

Fit and proper person

3.79 The Regulations set out the application of the fit and proper person requirements for CPD providers:

- subregulation 9N(2) states that the 'Minister must not approve the applicant as a CPD provider if the Minister has any reason to doubt that the fit and proper person requirements set out in subregulation 9P(2) are met'; and

- subregulation 9P(2) states that the fit and proper person requirements are that each of the following persons is a fit and proper person and a person of good character, good reputation and integrity:
 - the applicant; and
 - any person employed by, or providing services to or on behalf of, the applicant in relation to the conduct of CPD activities or activities that would be CPD activities if the applicant were approved as a CPD provider.

3.80 To determine if a person is fit and proper and of integrity, the department's Standard Operation Procedures (SOP) for the regulation of CPD providers sets out that consideration is given to whether the person is currently or has previously been the subject of a complaint investigated, or disciplinary action taken, by the Migration Agents Registration Board⁴⁵, the former Migration Agents Registration Authority (the former MARA) or the OMARA.⁴⁶

3.81 Based on departmental records, the extent to which the department considers prior complaints in its assessment is limited. For example, the department received an application from an existing CPD provider in November 2021. Thirteen of the personnel named in the application were current RMAs or former RMAs that are legal practitioners no longer required to be registered with OMARA. The application form included a section that required the applicant to:

- certify that all current and future employees, or persons providing services on behalf of the organisation are fit and proper persons to deliver CPD to RMAs and are persons of good character, good reputation and integrity; and
- provide details if those persons were currently or had previously been the subject of a complaint investigated, or disciplinary action taken, by the Migration Agents Registration Board, the former MARA or the OMARA.

3.82 In its November 2021 application, the CPD provider issued a certification dated January 2020 and answered 'not applicable' to the section requesting details of complaints investigated by the OMARA, Migration Agents Registration Board or former MARA. In its assessment of the application, the department recorded that 'although a few of the agents have some complaints against their names, the complaints appear minor in nature and have not affected their ability to register as agents'. Of the thirteen RMAs or former RMAs named in the application:

- ten have been the subject of complaints;
- four of the agents have been the subject of more than five complaints, and two of those more than 10 (13 and 16 complaints);
- two agents were found to have breached the Code of Conduct (in relation to three complaints), although no disciplinary action was taken; and

45 The Migration Agents Registration Scheme was established in 1992 and in operation until 1998. The scheme included the Migration Agents' Registration Board administered by the Department of Immigration, Local Government and Ethnic Affairs; it was charged with regulating the migration advice sector.

46 While the June 2022 internal audit noted that the 'OMARA has not received any complaints regarding CPD providers' as relevant to its findings, it did not consider the department's assessment of the complaints received against the applicants, its employees or persons providing services to or on behalf of the applicant in their capacity as RMAs. Further, the ANAO identified that OMARA has received at least four complaints in relation to CPD providers (see paragraph 3.86).

- of the 62 total complaints against the 13 agents, the department has not retained for 33 of the complaints (53 per cent) records of the substance of the complaints, the actions taken by the OMARA or the former MARA, or of the outcome of the complaints in MARS.

3.83 In respect to the latter, the department's assessment of the fit and proper person requirements of the Regulations refers to the former MARA and previously existing Migration Agents Registration Board, meaning that recent complaints are not the only complaints relevant to the assessment. That no records are available in MARS regarding more than half of the complaints means that the department is not able to evidence that it has properly considered those complaints in arriving at its decision.

3.84 Similarly, in respect of its approval of the CPD provider's most recent application of November 2023, the department noted in its assessment of the fit and proper person requirements that there were no open complaints but did not assess any of the closed complaints.

Personnel delivering CPD

3.85 The CPD Provider Standards set out that a CPD provider must ensure that a CPD activity is prepared or presented by persons who are suitably qualified, whether formally or by experience, to conduct the CPD activity. The department has not put in place arrangements to assure itself that CPD providers are meeting this standard either when considering whether to approve provider applications, or in assuring itself about the quality of the training that is being delivered.

3.86 The June 2022 internal audit (see paragraph 1.6) stated that the OMARA had not received any complaints regarding CPD Providers. Inconsistent with this finding, the ANAO identified that the department has received at least four complaints in relation to CPD providers. One complaint was received in September 2020 about a provider not reporting to OMARA CPD activities the agent stated that she had completed. Another example related to a May 2019 complaint in relation to a CPD Provider with allegations that the RMAs delivering the training for the provider were not sufficiently experienced to be authorities on their subject matter, in particular an agent that was first registered in 2017.

3.87 The department has inadequate controls in place to identify whether approved CPD providers have identified all RMAs that are delivering training for them, and whether there have been any complaints made about those RMAs. For example, the department received a complaint in September 2020⁴⁷ that raised concerns about whether the agent was fit and proper to be a provider of CPD.

3.88 The agent was the subject of a sanction decision by the OMARA in June 2022. The agent included in a submission to the OMARA that she is a CPD provider as a mitigating factor to be taken into account in making its decision. The department did not identify that the applications it had received from the provider (which has been approved as a provider since January 2019) had not identified this agent as a CPD provider in its application forms for 2019 and 2021. The department has not raised this matter with the provider, or sought to assess whether there are other individuals

47 The letter requested that the department give the complaint a high priority and urgent attention after the complainant was informed by an OMARA officer that it 'can take 6-12 months or longer to investigate a complaint made against a Registered Migration Agent'. The complaint was submitted to the OMARA in June 2020 and was one of three that resulted in a sanction against the agent in June 2022 (two years after the complaint was received).

providing training (for this or other providers) that are not being included in the relevant provider applications.

3.89 In February 2024, Home Affairs advised the ANAO that:

It is difficult for OMARA to ensure CPD providers include all staff delivering training in their applications. Applications are taken at face value with the onus on the applicant to provide complete and correct information.

CPD providers have a responsibility to ensure staff/trainers they use are of good character, have qualifications and meet fit and proper requirements.

There is no requirement for OMARA to inform the CPD provider of a sanction against an agent who delivers training. There is also a system limitation in MARS of not linking agents to a CPD provider.⁴⁸

Checking provider performance

3.90 Under the CPD framework that has been in place since 2018, CPD providers may develop and deliver CPD activities without further approval from OMARA. Instead of pre-approving CPD activities, the provider standards made by the minister state that CPD providers:

must accommodate and cooperate with quality assurance processes conducted by the OMARA, including, but not limited to:

- a. providing access to OMARA staff to conduct evaluations of the delivery of a CPD activity; and
- b. providing OMARA with any information or documentation requested regarding the CPD provider's CPD activities, and operations in relation to the conduct of CPD activities; and
- c. participating in periodic reviews undertaken by the OMARA of compliance with the CPD provider standards specified in this Schedule.

3.91 Consistent with this provision, the letters of approval that the department sends to providers includes the following statement: 'The OMARA will undertake monitoring to ensure that providers understand and comply with the new standards and framework.' Further, the department's most recent (2018–19) Compliance Plan (see paragraphs 2.37 to 2.42) recognised the department's responsibility for undertaking quality assurance processes over CPD provider performance by including two planned strategies, although those strategies were not implemented (see Table 3.3). Those strategies were not implemented notwithstanding the following statement included by the department in its submission to the Joint Standing Committee on Migration's 2019 inquiry into the efficacy of the regulation of migration agents:

The new CPD arrangements commenced on 1 January 2018. As a part of developing a Compliance Strategy, plans are underway to review these arrangements progressively over the next two years by undertaking audits of the CPD providers' operations. There will be data available on complaints and monitoring outcomes to measure the impact of this measure from the beginning of 2020.⁴⁹

48 In April 2024, the department's advice was that '[t]he OMARA acknowledges this feedback and following this matter being highlighted in the [ANAO's report preparation papers] for the first time, the OMARA has updated its processes and now adds notes to alert delegated decision makers about agents providing CPD training. The CPD Provider Assessment Guide has been updated to reflect this change in process'.

49 Department of Home Affairs, *Submission 6*, Joint Standing Committee on Migration inquiry into efficacy of current regulation of Australian migration agents, p.5.

Table 3.3: Delivery of planned provider quality assurance activities

Planned activity	2018–19 delivery	Delivery in the four years 2019–20 to 2022–23
Requesting documents relating to CPD delivery from approved providers so that a desk audit could be undertaken of 100 per cent of providers so as 'to determine compliance with the Provider Standards'.	Not implemented in respect to the planned 100 per cent of providers. Rather, departmental records indicate that it conducted evaluations of workshops presented by five providers between November 2018 and May 2019, and that it would publicise the issues identified (for the benefit of all approved providers).	Departmental records indicate four desk audits conducted in 2019–20. No program of desk audits in any subsequent year.
For between 40 per cent and 60 per cent of providers, attending a selection of mandatory CPD activities to assess compliance with the provider standards.	A selection of mandatory activities were not attended for between 40 per cent and 60 per cent of providers. Rather, departmental records indicate that, instead of observing the delivery of activities, it undertook a desk audit of three providers in relation to their 'Practice Ready Program'. The department recorded that the three providers examined had complied with the Provider Standards although issues were raised in relation to one provider with respect to 'interactivity and tuition time as distinct from assessment time'.	No program of the department attending a selection of activities in any year.

Source: ANAO analysis of Home Affairs records.

Recommendation no. 10

3.92 The Department of Home Affairs improve its regulation of the continuing professional development of registered migration agents by:

- (a) developing, and maintaining current, a documented risk assessment based on data, evidence and intelligence of the population of approved continuing professional development providers as well as data on which entities are providing the continuing professional development to those agents being frequently complained about;
- (b) strengthen the approval process for providers by taking steps to satisfy itself that all persons that will be delivering training have been identified by the provider and that any complaints made about those persons are analysed to assess whether they are a fit and proper person; and
- (c) use its existing powers to implement a risk-based program of quality assurance over the delivery of continuing professional development by approved providers including obtaining relevant documentation to inform desk audit activity as well as attending a selection of activities.

Department of Home Affairs response: *Agreed.*

3.93 *The Department agrees to enhance its regulation of CPD providers.*

3.94 *The Department will develop and maintain a documented risk assessment based on data, evidence and intelligence of the population of approved CPD providers as well as data on the entities providing continuing professional development to those agents being frequently complained about.*

3.95 *The Department will strengthen its approval process for providers by enhancing the current framework to consider the complaint history as it relates to a registered migration agent who is included in an application from an entity seeking approval as a CPD provider. This is in line with Regulation 9P of the Migration Agent Regulations 1998 (Migration Agent Regulations).*

3.96 *The Department will include within its Compliance and Monitoring Framework, monitoring activities for CPD providers including desk audit activities and consideration of attendance at a selection of activities to ensure that the provider is compliant with their ongoing CPD approval requirements under Regulation 9P.*

Does Home Affairs take appropriate action upon identified non-compliance?

The Department of Home Affairs does not take appropriate action to use the regulatory powers available to it to sanction migration agents. The department's reporting on its use of regulatory powers has been inaccurate, overstating the extent to which it has acted. Home Affairs is taking sanction action against fewer agents, and the threshold required — in terms of complaints — is increasing. The number of years of experience of those sanctioned over the last seven years indicates that the agent registration and CPD processes are not ensuring those persons being registered by the department are fit and proper persons.

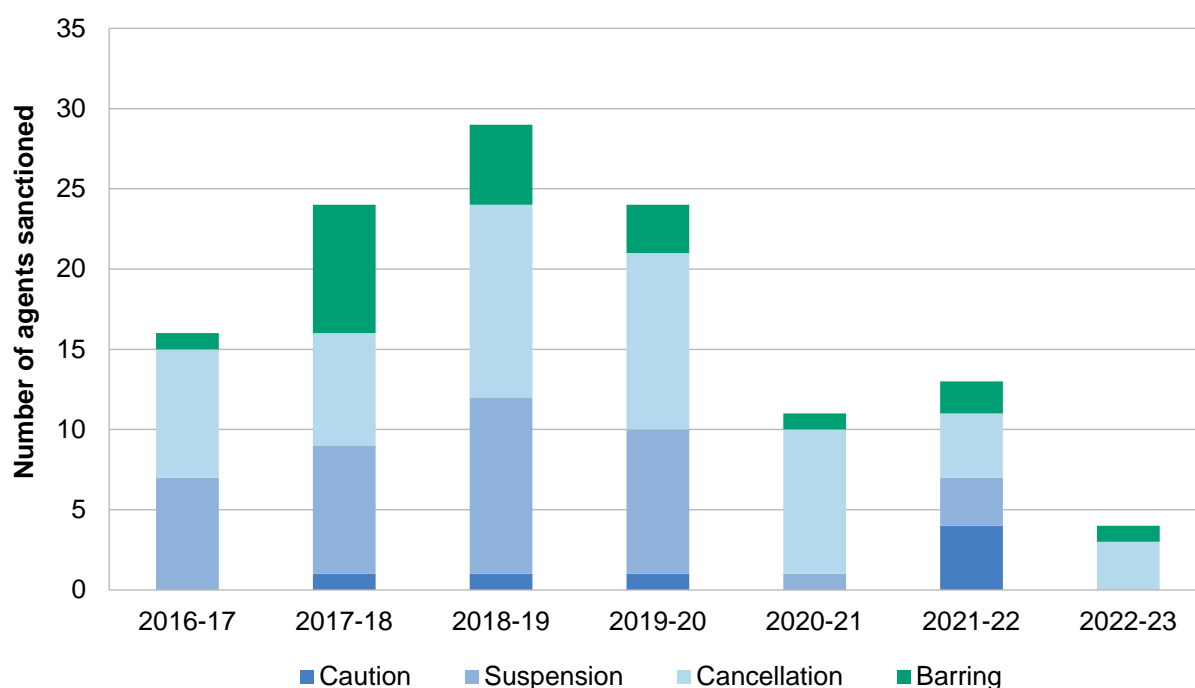
3.97 Disciplinary action available to the OMARA under section 303 of the Migration Act includes cautioning the agent; or cancellation or suspension of an agent's registration, if the OMARA is satisfied that, for example:

- the agent's application for registration was known by the agent to be false or misleading in a material particular;
- the agent becomes bankrupt;
- the agent is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance;
- an individual related by employment to the agent is not a person of integrity; and
- the agent has not complied with the Code of Conduct prescribed under section 314.

3.98 The OMARA can also bar former RMAs from being registered for up to 5 years, under section 311A of the Migration Act.

3.99 Figure 3.5 highlights that the number of agents sanctioned reduced by 64 per cent in the last three years when compared to the three prior years. The 2022–23 year has had the lowest number of sanctions (four) in the seven-year period examined. In the same period, suspensions have also declined. A total of 28 suspensions were imposed between 2017–18 and 2019–20, while only four were imposed between 2020–21 to 2022–23. This represents an 86 per cent reduction.

Figure 3.5: Number of agents sanctioned per year 2016–17 to 2022–23



Source: ANAO analysis of Home Affairs records.

3.100 Also shown in Figure 3.5, is that the department rarely uses its available powers to caution an agent. The department issued a caution to more than one agent in only one of the years in the period examined (four agents were cautioned in 2021–22), while only one agent in each of three consecutive years (2017–18 to 2019–20) was cautioned. In the remaining three years (2016–17, 2020–21 and 2022–23) no cautions were issued to any agents.

3.101 A total of seven cautions were issued to agents between 2016–17 and 2022–23. In contrast to this situation, as highlighted in Table 3.4, a total of 483 complaints were finalised as the department either having identified breaches of the Code of Conduct or suspected breaches of the Code of Conduct. In each of those cases, no disciplinary action available to the department under the Migration Act was applied.

Table 3.4: Breaches of the Code of Conduct identified by the department without sanction 2016–17 to 2022–23

Year	Number of complaints finalised as a breach with no sanction	Number of complaints finalised as suspected breach with no sanction ^a	Total
2016–17	65	n/a	65
2017–18	99	n/a	99
2018–19	78	n/a	78
2019–20	79	n/a	79
2020–21	51	n/a	51
2021–22	36	n/a	36

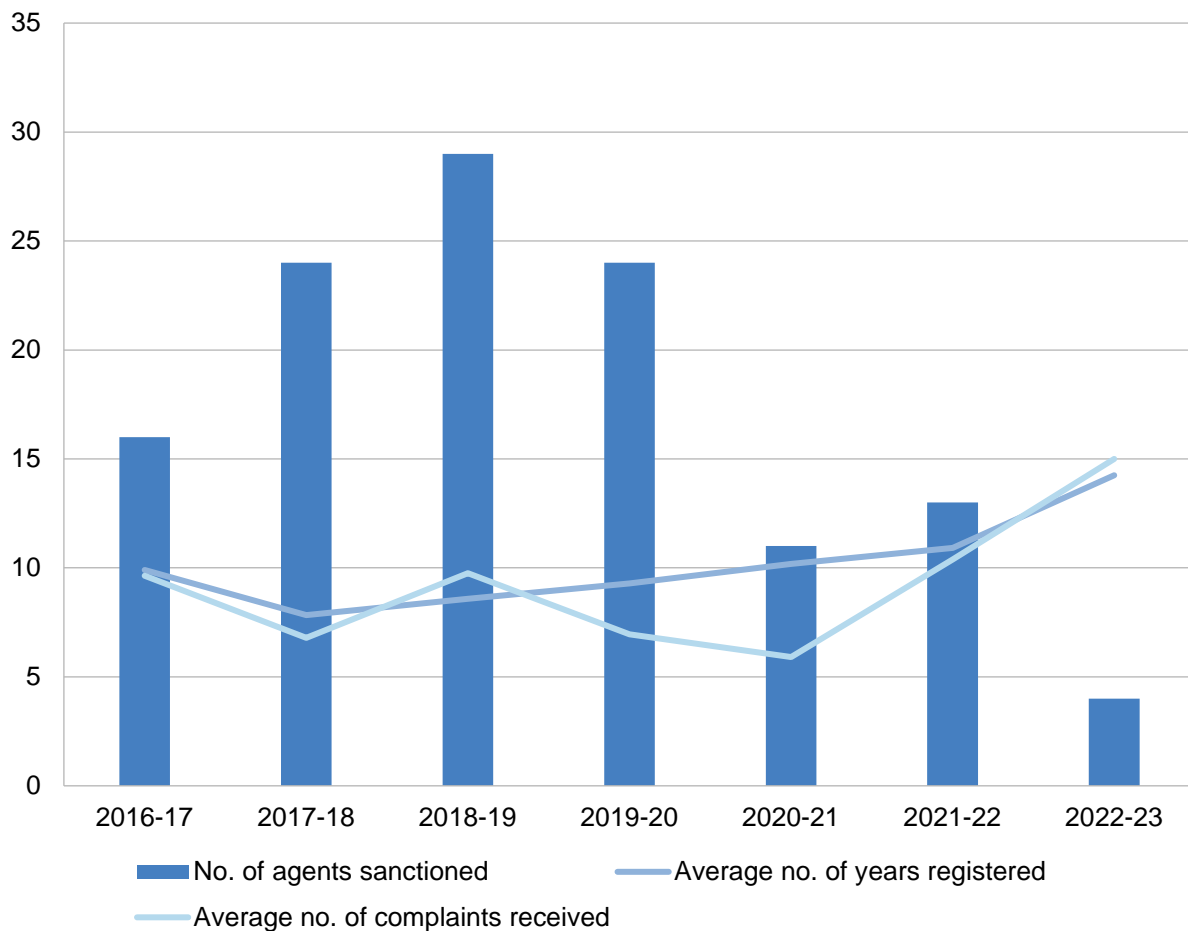
Year	Number of complaints finalised as a breach with no sanction	Number of complaints finalised as suspected breach with no sanction ^a	Total
2022–23	35	40	75
Total	443	40	483

Note a: The practice of finalising complaints with a 'suspected breach notice' began in January 2023. The 40 complaints referred to in the table were finalised in the six-month period between January 2023 and June 2023.

Source: ANAO analysis of Home Affairs records.

3.102 Figure 3.6 highlights that in comparison to the declining number of agents sanctioned per year, there was an increase in both the average number of years registered (44 per cent) and number of complaints received per agent (56 per cent).

Figure 3.6: Sanctioned agents' average number of years registered and average number of complaints received 2016–17 to 2022–23



Source: ANAO analysis of Home Affairs data.

3.103 Agents are generally sanctioned by the department only after being registered for a number of years and after being the subject of a large number of complaints. For example:

- An agent was registered annually over a six-year period between 2009 and 2015. The agent's 2015 application for repeat registration was not finalised, with records indicating that it was withdrawn or incomplete in December 2015.
- The agent was the subject of 46 complaints between 2010 and 2016.
- In June 2016, the department decided to bar the by then former agent from re-registering for the maximum period of five years on the basis of 23 of the 46 complaints received about the agent's conduct.
- Prior to the sanction, the agent had been the subject of 20 complaints, including eight for which the agent was found to have breached the Code of Conduct, although no disciplinary action was taken against the agent at the time.

3.104 Overall, agents that are sanctioned are on average registered for 10 years and are the subject of 10 complaints before they are sanctioned by the OMARA. As at March 2024, there are 66 current RMAs⁵⁰ that have received 10 or more complaints that have not been sanctioned. Based on Home Affairs data available in MARS:

- five of the 66 agents (eight per cent) had been sanctioned previously, either by OMARA or the former MARA, and had received 10 or more subsequent complaints;
- OMARA had used the powers available under the Migration Act to investigate complaints for 32 of the 66 agents (48 per cent) meaning the majority of the agents were not investigated using the legislated powers⁵¹;
- overall, seven per cent of the complaints were actioned via a substantive regulatory response indicated by the use of the powers available under the Migration Act; and
- OMARA considered sanctioning 6 of the 66 agents (none were sanctioned).⁵²

3.105 Included in the 66 RMAs, is an agent that has been registered annually since 2009 and is the subject of 64 complaints (including four complaints received in 2019, 2021, 2022 and 2023, which remain open as of February 2024). The 2019 complaint is recorded by the department as 'yet to be allocated' meaning the department has not allocated an officer to assess the complaint more than four years after it was received. While 52 of those complaints were dismissed by the department, eight resulted in breaches against the Code of Conduct being identified but no disciplinary action taken by the department.

3.106 It is common for Home Affairs to not take appropriate action when non-compliance is identified (see Table 3.4 above), even when the department records that it has serious concerns regarding a person's integrity and fitness and propriety, and when it does act it takes a considerable period of time.

50 Of the 66 agents, one agent is included in paragraph 3.43 (footnote 31), one agent is included in paragraph 3.45 (footnote 34), one agent is included in paragraph 3.57 and in Appendix 3, two agents are included in paragraph 3.60, (one of which is also referred to in paragraph 3.16), and another two agents are included in Appendix 3.

51 Where an agent was previously sanctioned, the analysis was of the 10 or more complaints received since the agent was sanctioned.

52 This was indicated by OMARA issuing a section 309 notice to the agent, or a section 311D notice in the case of one agent (who was considered a former agent at the time the relevant complaint was being considered), inviting the agent to make a submission.

3.107 In October 2020 Home Affairs recommended to the Assistant Minister for Customs, Community Safety and Multicultural Affairs that he not appoint two RMAs to an industry advisory group as the department had ‘serious integrity concerns’ about those two agents.⁵³ While Home Affairs advised the assistant minister that it would be putting three open complaints to one of the two agents ‘shortly’, the department did not put one of those complaints to the agent⁵⁴ and, for the other two complaints, which related to inadequate service provision and lodgement of visa applications without merit, the department:

- issued a section 308 notice (on 8 December 2020) requiring the agent to provide information, 16 and 14 months after receiving the complaints (the complaints had been received in August 2019 and October 2019);
- took a further 23 months to, in November 2022 (after the agent was identified in media reporting — see paragraph 3.40 and footnote 31), issue a section 309 notice to advise the agent that it had investigated six complaints (including the two complaints which were the subject of the December 2020 section 308 notice) and was considering cautioning the agent, or suspending or cancelling the agent’s registration; and
- in January 2023, more than two years after advising the assistant minister that it had ‘serious integrity concerns’ about this agent, cancelled the agent’s registration.

3.108 In total, the agent’s applications for registration had been approved annually over a more than 20 year period between 2001 and 2023⁵⁵ during which time a total of 27 complaints had been received. There were 14 complaints closed prior to the 2020 advice to the assistant minister of which 13 had been dismissed and one resulted in the department identifying a breach of the Code of Conduct in 2015 (although no sanction action was taken at the time). Two of the complaints dismissed, on the basis of ‘insufficient evidence’, were the result of intra-departmental referrals in 2017 and 2018 of alleged fraud and/or criminal behaviour. The department dismissed the two complaints without exercising any of its available regulatory powers to investigate.⁵⁶

3.109 For the second of the two agents that Home Affairs had recommended the assistant minister not appoint to the advisory group due to ‘serious integrity concerns’, the department did not exercise any of its regulatory powers in relation to the complaint open at the time of the advice, including not issuing any notices to the agent. Rather, two years later in October 2022, and almost three years after receiving the complaint, Home Affairs finalised the complaint with an outcome of

53 This advice was in response to a request earlier that month from the assistant minister that Home Affairs include five RMAs in addition to the department’s proposed membership of a Migration Advice Industry Advisory Group.

54 The complaint was in relation to a number of concerns, including how the RMA was advertising and purporting to be a legal practitioner. After the complainant, wishing to remain anonymous, did not agree to provide permission to publish in October 2020, the department advised the complainant that ‘matters of persons purporting themselves to be legal practitioners when they do not have the appropriate qualifications or registration are usually investigated by the Victorian Legal Services Board and Commission. You may wish to contact the LSBC directly with the information you have provided to the Authority so that they can also investigate the matter’. There is no evidence of the department having addressed the matter with the agent at this time. The complaint was later finalised as ‘Addressed with Agent’ in July 2022.

55 Although on three occasions, October 2019, October 2020, and October 2022 (one month before the section 309 notice was sent to the agent), the applications had been ‘deemed’ to be approved (see paragraphs 3.14 to 3.16 above for more information).

56 The second complaint which was submitted in 2018 was dismissed in September 2020, the month prior to the advice to the assistant minister.

‘Close and Hold’. The following month, in November 2022, the approval of the agent’s application for registration was ‘auto-granted’ (see paragraphs 2.15, 2.16, and 3.17 to 3.20).

3.110 Another example involved a period of inactivity in relation to a complaint during which more complaints were received that finally led to the agent being sanctioned. On this occasion, the department:

- received a complaint in May 2018 regarding an agent’s inadequate provision of service leading to a negative outcome for the client;
- requested from the complainant, also in May 2018, permission to publish the complaint to the agent, as well as evidence to support the claims made in the complaint⁵⁷;
- issued a section 308 notice to the agent in November 2018 requesting a response in the form of a statutory declaration to the allegations set out in the complaint;
- in December 2018, approved an extension to respond to the section 308 notice after receiving a request for extension (prompted by a reminder email sent by the department 10 days after the deadline) from the agent two weeks after the original deadline;
- issued a section 309 notice to the agent in January 2019 advising the agent that the department was considering sanctioning the agent for failing to respond to the section 308 notice;
- in February 2019, received:
 - an email from the complainant that stated the agent was threatening the complainant to withdraw the complaint;
 - an email from the agent, advising that the agent had contacted the complainant in January 2018 and the complainant had agreed to withdraw the complaint⁵⁸; and
 - a response to the section 309 notice from the agent;
- requested further information from the complainant in March 2019;
- received three complaints, two in April 2019 and one in June 2019, against the agent alleging incompetence resulting in major negative impacts to the client (for two complaints) and for not rendering services after a fee had been paid (for one complaint);
- in June 2021, issued a further section 309 notice advising the agent that the department was considering sanctioning the agent in relation to four complaints (including the May 2018 complaint), 29 months after issuing the original section 309 notice in relation to the May 2018 complaint;
- requested further information from the complainant in July 2021; and
- cancelled the agent’s registration in August 2021, 39 months after receiving the May 2018 complaint. The sanction decision was based on four complaints and was made 26 months after receiving the most recent (in June 2019) of the four complaints.

3.111 Another example of considerable periods of inactivity by OMARA in the handling of complaints being investigated relates to a complaint received in July 2019. The complaint was an

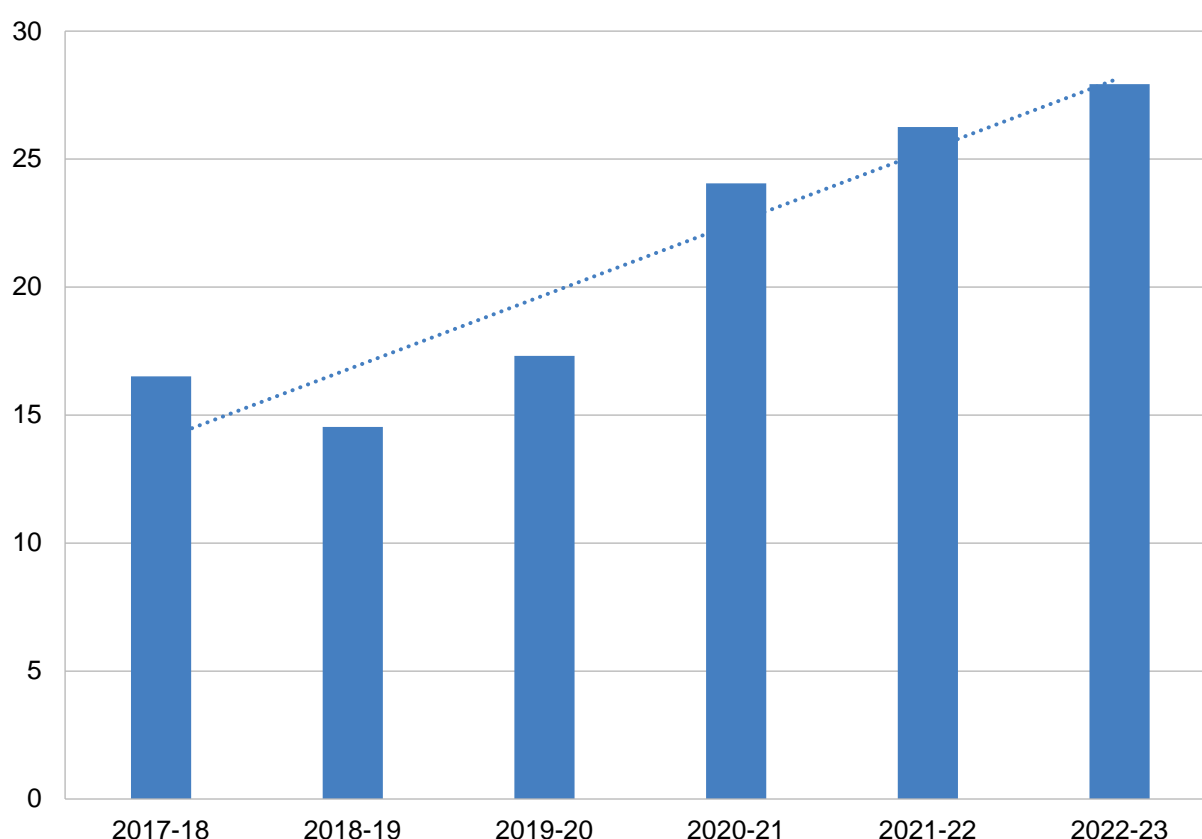
57 The department advised the complainant to return by email the signed declaration and provide the information requested by no later than 4 June 2018.

58 In response, the department advised the agent that the complainant had written to it indicating the agent was trying to coerce the complainant into withdrawing the complaint.

intra-departmental referral in relation to nominations being made without the consent or knowledge of an employer. As at December 2023, there had been no action taken on this complaint since May 2021, and the agent's repeat applications for registrations are being deemed. That last action (in May 2021) related to the department receiving a response to a second section 308 notice that it had issued in March 2021. The first section 308 notice had been sent in September 2019 which the agent responded to the following month.

3.112 The department is taking longer to sanction fewer agents. As illustrated in Figure 3.7 below, the time taken to investigate and finalise complaints leading to sanctions has increased from an average of 17 months in 2017–18 to an average of 28 months in 2022–23, an increase of 65 per cent. In 2022–23 the time taken to finalise the 14 complaints that led to four agents being sanctioned ranged from two months to 57 months.

Figure 3.7: Average number of months to finalise complaints that resulted in sanctions



Source: ANAO analysis of Home Affairs records.

Former agents

3.113 The Migration Act states:

- In performing its function under paragraph (1)(c), the Authority may start, or complete, an investigation of a complaint about a person at a time when he or she is no longer a registered migration agent.⁵⁹

⁵⁹ Subsection 316(1A) of the *Migration Act 1958*.

- However, the Authority can investigate a complaint about a former registered migration agent only if the complaint is received within 12 months after he or she ceased to be a registered migration agent.⁶⁰

3.114 The ANAO's analysis is that it is uncommon for the department to take action against former agents when complaints are within the window provided by the Migration Act. For example, an agent's registration ceased on 1 January 2020 and a complaint was submitted to the department the same month.

- The complaint submitted on 9 January 2020 was originally dismissed the following day by the department as having 'no merit' as 'there is no evidence to support [the] claims' (in contrast to the claims themselves having no merit).
- The complaint was re-opened by the department three days later, on 13 January 2020, as 'evidence to support [the] claims has been provided'.
- The complaint was then dismissed a second time three months later, on 2 April 2020, as 'no jurisdiction' with the department recording that 'Breaches of the code seem to exist however as the RMA is no longer registered, a full investigation cannot be conducted to determine breaches'.

3.115 It was also evident that the department has not taken regulatory action in circumstances where agents have allowed their registration to lapse so as to avoid a sanction. For example:

- An agent was registered annually between 2009 and 2016 as an Australian applicant, and has been approved by the department annually since 2018 as a Trans Tasman Mutual Recognition Applicant (TTMRA).⁶¹
- In total, the agent has been the subject of 23 complaints since 2010. Seventeen of those complaints were submitted to the department prior to the agent becoming a former agent in May 2016. Eleven of those complaints were dismissed by the department and two resulted in the department identifying that the agent had breached the Code of Conduct, however, no disciplinary action was taken against the agent.
- Four of the complaints were dismissed by the department in May 2016 (when the agent became a former agent), although it recorded the outcome of each as a 'breach'. In dismissing the complaints, the department advised the agent that:
 - it was closing the complaints as the agent became a former registered migration agent in May 2016;
 - the department no longer had power to make formal findings against the agent but could make a decision to bar the agent from being registered for up to five years; and
 - it had decided not to invite the agent to make a submission in relation to a barring but would re-open the complaints and may make a final decision should the agent decide to make a new registration application.

⁶⁰ Subsection 316(1B) of the *Migration Act 1958*.

⁶¹ Under section 16 of the *Trans-Tasman Mutual Recognition Act 1997* (TTMRA) a person who is registered in connection with an occupation in New Zealand, may carry on an equivalent occupation in Australia.

- The department recorded that the agent withdrew his registration in May 2016 to avoid potential disciplinary action.⁶²
- Two further complaints were received in 2016 while the agent was not registered and both were dismissed by the department with a primary outcome of ‘no merit’ and ‘no further action’.
- The agent applied for re-registration as a TTMRA applicant in July 2018 and the department approved the application in August 2018.
- Contrary to its previous advice, the department did not re-open the four prior complaints.
- The agent has been subject to a further four complaints since July 2018, all of which have been dismissed by the department.

Quality assurance

3.116 One finding of the June 2022 internal audit (see paragraph 1.6) was that ‘there is no systematised approach to ensuring decisions are sound and peer reviewed’. A related recommendation was aimed at ensuring consistency of decision-making through introduction of quality assurance and controls over the registrations and complaints handling. The implementation of this recommendation did not include the department taking steps to address the risk of it not employing its regulatory sanction powers in circumstances where action should have been taken but was not.

Recommendation no. 11

3.117 The Department of Home Affairs implement processes that provide assurance that it is taking timely and effective regulatory action using the powers provided by the *Migration Act 1958*.

Department of Home Affairs response: *Agreed.*

3.118 *The Department agrees that it is important to implement documented processes and procedures to provide assurance that it is taking timely and effective regulatory actions across all functions through applying a data and evidence based approach.*

3.119 *Since June 2022, the Department has implemented weekly case management reviews to track case progression and critical decision points. Complaints are triaged and assessed as soon as they are received and reports are compiled on a monthly basis to monitor the age of on-hand complaints, their complexity and classification.*

3.120 *In January 2023, the OMARA commenced quality assurance activities on the assessment of registration applications (including the assessment of whether a person has met their CPD requirements under s290A of the Migration Act) under the OMARA Quality Management Plan (QMP). The quality assurance activities adhere to the Department’s Immigration Group Assurance Framework. Sanction decisions were included in the Line 1 Assurance process in August 2023. The*

62 The Migration Legislation Amendment (Migration Agents) Bill 2002 was introduced to ‘ensure that migration agents cannot avoid the disciplinary provisions of the existing regulatory scheme simply by deregistering or allowing their registration to expire’.

Department will include those complaints finalised through means other than sanction activity in Line 1 Assurance activities.

A handwritten signature in black ink, appearing to read 'Rona Mellor', with a large, stylized initial 'R'.

Rona Mellor PSM
Acting Auditor-General

Canberra ACT
8 May 2024

Appendices

Appendix 1 Entity response



Australian Government
Department of Home Affairs

SECRETARY

EC24-002075

Ms Rona Mellor PSM
A/g Auditor-General
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Dear Ms Mellor

Thank you for the opportunity to provide feedback and comments on the section 19 Report for the *Department of Home Affairs' regulation of migration agents* that was provided to the Department of Home Affairs on 18 March 2024. The department agrees with all of the recommendations.

The department agrees that there are opportunities to strengthen the performance of the Office of the Migration Agent Registration Authority (OMARA) and will continue to focus on enhancing the OMARA's capabilities to ensure that it is able to operate as an effective regulator of registered migration agents in Australia.

In mid-2022 the department identified the need to strengthen the OMARA's regulatory performance through an expansion of the OMARA. One of the primary factors for the decision to uplift the OMARA's capabilities was to improve the timeliness of progressing complaints through to investigation and a possible sanction outcome.

Activities contributing to the expansion and uplift of the OMARA's regulatory capabilities have been progressing in phases during the ANAO audit. These include:

- an enhanced framework for triaging, assessing and investigating complaints to distinguish the severity and impact of specific conduct. This includes the development of an early resolution framework for minor matters to ensure inappropriate conduct is dealt with at the earliest opportunity with the aim to disrupt and correct inappropriate conduct and to re-educate registered migration agents as to their obligations
- a change in dealing with complaints where there is no permission to publish through raising own-motion complaints
- improvements to record keeping practices, particularly around critical decisions
- peer review and enhanced quality assurance processes for registration and sanction decisions
- ceasing the practice of making breach findings without consideration of imposing a sanction, and
- development of a suite of training materials to support these improved processes.

Improvements are also being made to compliance and monitoring, governance, use of data, timeliness of decision making and enhancing reporting capabilities. This includes the development of the OMARA Compliance Strategy, Framework and Plan and further work around the quality assurance processes. This work is ongoing and will continue to evolve as the department prepares to implement the agreed recommendations of the *Rapid Review into Exploitation of Australia's Visa System*.

The department does not agree with the finding that the OMARA does not take effective action on complaints it receives about the activities of registered agents. While the department agrees that it is important to make use of the powers available to the OMARA under the *Migration Act 1958* (Cth) (Migration Act), the exercise of a statutory power and the imposition of a disciplinary decision are not the only appropriate actions that the OMARA can take in response to complaints and/or concerns about registered

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migration agents. Consequently the number of times that the OMARA exercises such powers is not an appropriate or accurate benchmark of performance or regulatory outcomes. The report does not take account of the reasons why statutory notices were or were not used and it does not recognise that an allegation must have supporting evidence to reasonably pursue disciplinary action following investigation.⁶

Allegations of non-compliance, even when serious integrity concerns may be alleged through intelligence reporting, are not conclusive evidence that the OMARA can immediately use to prove, based on the balance of probabilities, that an agent has engaged in misconduct. General intelligence is used to guide OMARA's focus and further enquiries. The report is missing important context for many of the specific historical matters referenced.⁶ This information is relevant as to why the OMARA may or may not have taken certain actions. For example, the timeliness of finalising a particular matter highlighted in the report was directly affected by a request for the OMARA to place an administrative investigation on hold so as not to prejudice the outcome of a criminal investigation.⁶

The department will continue to refine its policies and procedures to assess registration applications and monitor complaints and investigations to ensure that it appropriately responds to risks posed by prospective and current registered migration agents in a timely manner, including through the exercise of relevant powers under the Migration Act.⁶ System enhancements are being investigated to enable more effective reporting on caseload management, including to report when powers are utilised. Regular case management reviews now occur to track and monitor case progression and decision making.

Please find attached a summary response to the report for inclusion in the formal report (**Attachment A**), as well as a response to the recommendations (**Attachment B**). Editorial comments, specific areas of disagreement and additional supporting information as requested by the ANAO have been provided separately.

Should your team wish to discuss any aspects of the Department's response, please contact Assistant Secretary Audit and Assurance, Alison Sommerville on 0478 401 706 or via Alison.Sommerville@homeaffairs.gov.au. Please feel free, of course, to contact me directly if that would be helpful.

Yours sincerely

Stephanie Foster

Stephanie Foster PSM

17 April 2024

ANAO comment on the Department of Home Affairs response

- (a) The audit examined the department's records of its reasons for why statutory notices were or were not used at the time the complaint was processed, as well as advice from the department to the ANAO during the course of this audit (the department's formal comments acknowledge that it needs to improve its recordkeeping particularly around critical decisions). The audit also recognised that an allegation must have supporting evidence for the department to reasonably pursue disciplinary action following an investigation, which is one reason why the ANAO examined the extent to which the Migration Act powers have been used by the department. See, for example, paragraphs 3.21 to 3.25 in the audit report relating to the department's use of the Migration Act power to obtain information to inform registration refusal and sanction decisions.
- (b) Paragraph 1.8 identifies amendments to the Migration Act that have been made over time to strengthen the regulation of migration agents. While the department does not accept that the extent to which it uses the Migration Act powers to be an appropriate benchmark of regulatory performance, the department's formal comments: recognise that it must have supporting evidence obtained using the powers under the Act in order to pursue disciplinary action; accept that it should not have been deciding not to investigate complaints solely because the complainant had not given permission to publish; advise that it will cease the practice of recording a breach without imposing a sanction on the agent; and implement quality assurance processes over sanction decisions. Chapter 3 in the audit report sets out that: in 2022–23 only 26 complaints (nine per cent of those received) were actioned via use of the powers available under the Migration Act; and the number of agents sanctioned reduced by 64 per cent in the last three years when compared to the three prior years; and agents that are sanctioned are on average registered for 10 years and are the subject of 10 complaints before they are sanctioned.
- (c) The request by the Australian Border Force to take no further action against the agent until advised otherwise was not the reason the department decided to close the complaint as 'no jurisdiction'. As stated in paragraph 3.47 of the audit report, the department decided to close the complaint in May 2022, 14 months after the agent, a holder of an unrestricted legal practising certificate, was removed from the Register of Migration agents on 22 March 2021 when the legislative changes to remove lawyers from the regulatory scheme came into effect.
- (d) Paragraph 2.31 of the audit report sets out that the department has not undertaken and documented an assessment of risk consistent with the principles outlined by the Department of the Prime Minister and Cabinet in its 2021 *Regulator Performance Guide*. Paragraph 2.38 of the audit report sets out that the department does not have a current compliance strategy and plan and that most recent compliance strategy was developed by the department for the 2018–19 financial year.

Appendix 2 Improvements observed by the ANAO

1. The existence of independent external audit, and the accompanying potential for scrutiny improves performance. Improvements in administrative and management practices usually occur: in anticipation of ANAO audit activity; during an audit engagement; as interim findings are made; and/or after the audit has been completed and formal findings are communicated.
2. The Joint Committee of Public Accounts and Audit (JCPAA) has encouraged the ANAO to consider ways in which the ANAO could capture and describe some of these impacts. The ANAO's Corporate Plan states that the ANAO's annual performance statements will provide a narrative that will consider, amongst other matters, analysis of key improvements made by entities during a performance audit process based on information included in tabled performance audit reports.
3. Performance audits involve close engagement between the ANAO and the audited entity as well as other stakeholders involved in the program or activity being audited. Throughout the audit engagement, the ANAO outlines to the entity the preliminary audit findings, conclusions and potential audit recommendations. This ensures that final recommendations are appropriately targeted and encourages entities to take early remedial action on any identified matters during the course of an audit. Remedial actions entities may take during the audit include:
 - strengthening governance arrangements;
 - introducing or revising policies, strategies, guidelines or administrative processes; and
 - initiating reviews or investigations.
4. In this context, the below actions were observed by the ANAO during the course of the audit. It is not clear whether these actions and/or the timing of these actions were planned in response to proposed or actual audit activity. The ANAO has not sought to obtain assurance over the source of these actions or whether they have been appropriately implemented.
 - In April 2024, the department changed its website such that it no longer advises complainants that it is unable to investigate complaints where they do not consent to the details of the complaint being provided to the agent (see footnote 26).
 - In April 2024, the department updated its Continuing Professional Development (CPD) Provider Assessment Guide to improve its processes for assessing whether CPD providers have identified all registered migration agents (RMAs) that are delivering training for them (see footnote 48).

Appendix 3 Case studies

1. Set out below are case studies that illustrate particular findings included in the report chapters.

Case study 1. Complaints dismissed due to having no permission to publish

In this example, Home Affairs dismissed four complaints resulting from intra-departmental referrals against an agent involving similar allegations, due to having 'no permission to publish'.

- The agent was first registered in March 2015. Applications for re-registration have been approved by the department annually, with the most recent application being deemed in January 2024 (see paragraphs 3.15 and 3.16).
- The agent was the subject of 13 complaints between 2015 and 2022. As of January 2024, two of the complaints (submitted in July 2022 and December 2022) remain open. Of the complaints recorded as finalised, one complaint resulted in a breach of the Code of Conduct having been identified although no disciplinary action was taken, and the remaining 10 were dismissed by the department.
- Of the 10 complaints that were dismissed, four of those complaints, which resulted from intra-departmental referrals were finalised due to the department having 'no permission to publish', meaning that the complainant did not provide permission to publish details of the complaint to the agent:
 - The first complaint was received in November 2015 and related to unregistered practice and cash-for-visas. The department assessed the complaint as a 'minor complaint for an early resolution approach... given he is a new agent it might be useful to have a word with him about the allegations of unregistered practice and buy-a-visa issues so we can get something on record for future reference. Also the source of the allegation is a good one (overseas post)'. The department dismissed the complaint the same month on the basis of it resulting from an anonymous source with no permission to publish. The department's reasoning was inconsistent with its assessment that it was a good source.
 - A second complaint was received six months later in May 2016. The department assessed the complaint as a 'likely no jurisdictional referral of persons who have facilitated cash-for-visa arrangements. Please check the persons and business name on Simba [the system used by the department prior to MARS] to ensure that no one is registered. If not, close no jurisdiction. If yes, close no permission to publish'. The department dismissed the complaint in the same month due to having 'no permission to publish'. In finalising the complaint, the department did not investigate the complaint (its comments reflect that it had no intention to investigate the complaint) and did not consider reopening the prior complaint even though the allegations were of a similar nature.
 - A further four months later, in September 2016, a third complaint was received. The department recorded its assessment of the complaint as 'To be closed – no permission to publish repeat allegation – anonymous source'. The department dismissed the complaint in the same month due to having 'no permission to

publish'. As above, it did not investigate the complaint and it did not consider reopening the prior complaints despite the repeated allegations.

- In April 2019, a complaint relating to fraud and or/criminal behaviour was received along with advice from the referring area of the department that the 'Complaint is anonymous so cannot do anything further with allegations. Whilst there is no permission to publish it should be opened and then closed No Permission to Publish as there will probably be more allegations about the agent.' The complaint was dismissed on the same day due to having 'no permission to publish'. The department had no intention of investigating the complaint.
- The department advised the ANAO in October 2023 that, '[w]here warranted and where the matter is serious, the OMARA can commence an own motion investigation to source evidence that would not reveal the complainant's identity'.⁶³ This was not the case for any of these complaints.

Case study 2. Time taken to use legislated powers to investigate a complaint

The department dismissed a complaint against an agent after a five-year investigation.

- The agent was first registered in 1993 and the agent's registration has been renewed annually to date.
- The agent had been the subject of 24 complaints between 1999 and 2013, many of which were referrals from another area of the department regarding high failure rates for protected visa applications. In 2013, the department also identified that over half of the protection visa applications lodged by the agent were for 'imposter arrivals'.
- In April 2011, the department received a complaint against the agent from the Federal Magistrates Court of Australia (FMC) relating to:
 - the agent's non-attendance at Refugee Review Tribunal hearings for clients and failure to respond to invitations to hearings, and
 - the agent's assistance in client's judicial review applications when unqualified.
- In August 2011, four months after receiving the complaint, a section 308 notice was sent to the agent requesting the client records for the matter reviewed by the FMC. The department received the agent's response via the agent's legal representative in October 2011.⁶⁴
- A further five months later, in March 2012 (and 11 months after receiving the complaint), the department sought internal legal advice on the use of powers under sections 306AC and 306AD of the Migration Act in relation to disciplinary action where

63 See paragraph 3.20.

64 In the response, the agent's legal representative stated that the department should take no further action, and one of the reasons given for non-attendance at the tribunal was the need to attend another tribunal hearing. This was not the case as the only hearings relating to the agent that day was the unattended hearings of the agent and another RMA to whom the agent is related by employment.

the agent has a high rate of visa application refusals (these sections were repealed in 2021).

- A further twelve months later, in March 2013, and two years after receiving the complaint, the department issued a section 309 notice advising the agent that it was considering disciplinary action and inviting a submission from the agent on why the agent should not be sanctioned. The agent's legal representative responded to the notice requesting the departmental file on the client. The department provided several records and advised the agent to contact the Tribunal and request tribunal and court records under the Freedom of Information Act.
- A second section 309 notice was sent to the agent in September 2013, six months after the first section 309 notice and two and a half years after the complaint was received. A submission including a statutory declaration from the agent responding to the section 309 notice was received in February 2014.
- A third section 309 notice was sent to the agent in September 2014, 12 months after the second section 309 notice and three and a half years after the complaint was received.⁶⁵ The agent's legal representative provided the department with the response in October 2014.
- A fourth section 309 notice was sent to the agent in July 2015, eight months after the third section 309 notice and over four years after the complaint was received.⁶⁶ The agent's legal representative provided the department with the response the same month.
- In April 2016, the department dismissed the complaint with an outcome of 'no breach' five years after receiving the complaint.

In April 2024, the department advised the ANAO that 'OMARA's capacity to investigate in 2023 is significantly different to the capacity it had in 2011-2016. In 2023, OMARA began to obtain access to a variety of systems as well as avenues to exchange information with other agencies within the portfolio. In 2011-2016, OMARA did not have this capacity and its actions then do not reflect the OMARA's current practices or capabilities.'

Case study 3. Department did not exercise powers

In this instance Home Affairs did not exercise its powers in dismissing an own motion complaint against the agent.

- The agent was first registered in 1998. Two applications to re-register were refused by the then authority, in 2001 and 2004. The agent's application to register was approved in 2007 and has been approved annually to date.

65 The third section 309 notice followed legal advice from May 2014 stating that the RMA to whom the agent is related by employment referred to in Footnote 64 could have his registration cancelled in relation to fabricated evidence, but the case against the agent required more information as the business relationship between the two is not sufficient reason for sanction.

66 The fourth section 309 notice followed internal legal advice from April 2015 on options for sanctions against the agent that also encouraged the department to make a swift decision due to the length of time taken to investigate.

- The agent has been the subject of 12 complaints since 1998.
- Home Affairs instigated an own motion complaint against the agent in November 2022. The agent was named in Operation Resonate in November 2020 in relation to migration agents facilitating the exploitation of foreign national sex workers. The agent was also identified in later media reporting in relation to exploitation of foreign workers.
- The department dismissed the complaint in July 2023 with a primary outcome of 'No Further Action'.
- In dismissing the complaint, the department:
 - did not address all of the relevant substantive matters related to the complaint. A section 309 notice was sent to the agent in November 2022 outlining the allegations from the media reporting as well as the department's concerns with the agent's fitness to provide immigration assistance based on a letter it received from the agent following the media reporting. It did not address the allegations identified in Operation Resonate;
 - did not use the full range of powers available to investigate and substantiate the allegations. While a section 309 notice was issued to outline the allegations to the agent and invite a submission, Home Affairs did not issue a notice under section 308 of the Migration Act to require the agent to provide information (see paragraph 2.22); and
 - did not consider whether it should reopen and investigate prior complaints that were relevant to the allegations. Two prior complaints, one related to human trafficking and the other related to the provision of false information were dismissed by the department as being a 'duplicate case' and as having 'insufficient evidence', respectively. The former was a departmental referral from another area of Home Affairs while the latter was an own motion complaint instigated by the department. Neither of those responses involved the department using its regulatory powers to investigate, for example issuing notices under the Migration Act (as outlined above).
- While the department did not prepare a 'Case Investigation Summary', it did prepare a 'Media Handling Strategy'.⁶⁷

67 Auditor-General Report No.14 of 2023-23 *Department of Home Affairs' Management of its Public Communications and Media Activities* concluded that Home Affairs was 'largely effective in its management of public communications and media activities'.

The subject of the media handling strategy was 'Potential public criticism of the Office of the Migration Agents Registration Authority (OMARA) about perceived failure to take action in relation to allegations against registered migration agent'. It highlighted that 'The OMARA investigation has produced no evidence to support the media report allegations and as result the matter was finalised on 15 June 2023 with no further action to be taken'.