



Law Council
OF AUSTRALIA

*Federal Litigation and
Dispute Resolution Section*

14 July 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Colleague

Response to questions on notice regarding inquiry into the efficiency, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions

1. The Law Council of Australia's Federal Litigation and Dispute Resolution Section (**the Section**) again thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to provide evidence at the Friday 25 June 2021 hearing of its inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions (**the Inquiry**).
2. This response has been prepared by the Section's Migration Law Committee (**the Committee**), whose members attended the hearing.

Question

1. *According to the Department of Home Affairs, in the last five years, the refusal rate for the Partner visa category (subclasses 300, 309 and 810) has been less than 10 per cent, and the most common refusal reason is not meeting the 'genuineness of the relationship' criterion.¹ Could you provide us with advice on your response to the assertion made on the assessment of genuineness and the questions that have arisen in regard to timing?²*

Response

3. Each of the three visa subclasses referred to in the Department's submission³ requires some assessment of the genuineness of the relationship between the applicant and sponsor.

¹ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, 25 June 2021 (Senator Kim Carr), 4.

² Ibid, 5.

³ Department of Home Affairs, Submission No 22 to the Senate Legal and Constitutional Affairs References Committee, *The efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions*, 5 May 2021, 31.

4. In relation to the Subclass 300 – Prospective Marriage visa:
 - the applicant must establish that the parties genuinely intend to marry;⁴ and
 - the Minister must be satisfied that the applicant and their prospective spouse ‘genuinely intend to live together as spouses’.⁵
5. In relation to the Subclass 309 – Partner (Provisional) and Subclass 820 – Partner visas, the issue of genuineness arises in the definition of ‘spouse’ and ‘de facto partner’. The criteria for those visas include that the applicant be a spouse or de facto partner an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.⁶
6. The definitions of both ‘spouse’ and ‘de facto partner’ in the *Migration Act 1958* (Cth) (**Migration Act**) both require as a condition that, among other things, the relationship between the applicant and sponsor to be ‘genuine and continuing’.⁷
7. The *Migration Regulations 1994* (Cth) (**Migration Regulations**) require the Minister (and thus the Minister’s delegates) to, in determining whether the conditions in the definitions ‘spouse’ and ‘de facto partner’ exist, consider ‘all the circumstances of the relationship’, including:
 - the financial aspects of the relationship;
 - the nature of the household;
 - the social aspects of the relationship; and
 - the nature of the persons’ commitment to each other.
8. In practice, applicants are required to provide evidence in support of each of these factors. If insufficient evidence is provided, a delegate may not have enough information to positively satisfy themselves that the couple are in a ‘genuine relationship’, and therefore the application may be refused because the relationship is found not to meet what the Department refers to as the ‘*genuineness of the relationship criterion*’.
9. A partner visa refusal for this reason does not necessarily mean that the application is affected by fraud – in some cases it may simply mean that the visa applicant did not provide sufficient information to support their application and prove their relationship.
10. It is unclear from the Department’s submission what proportion of the refusals for failure to meet the ‘genuineness of the relationship’ criterion have included positive findings of fraudulently obtained, altered or contrived documents or information or false statements, as opposed to a delegate simply not being satisfied, on the evidence, that the couple are in a genuine relationship.

⁴ Paragraph 300.215(a) of Schedule 2 to the *Migration Regulations 1994* (Cth).

⁵ Clause 300.216 of Schedule 2 to the *Migration Regulations 1994* (Cth).

⁶ Regarding the Subclass 309 – Partner (Provisional) visa: clause 309.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) (time of application) and clauses 309.223 and 309.224 of Schedule 2 to the *Migration Regulations 1994* (Cth) (time of decision); regarding the Subclass 820 – Partner visa: paragraphs 820.211(a) and (c) of Schedule 2 to the *Migration Regulations 1994* (Cth).

⁷ Paragraph 5CB(2)(b) of the *Migration Act 1958* (Cth) and paragraph 5F(2)(c) of the *Migration Act 1958* (Cth).

11. Statistics available in the Administrative Appeals Tribunal, Migration and Refugee Division Caseload Report 2020 – 21 demonstrate that a large percentage of partner visa refusals were set aside or remitted by the Administrative Appeals Tribunal (**Tribunal**).
12. For example, between 1 July 2020 and 31 May 2021, 60 per cent of subclass 309 partner visa refusals were set aside by the Tribunal, 59 per cent of 820 partner visa refusals were set aside by the Tribunal and 66 per cent of subclass 300 partner visas were set aside by the Tribunal.⁸
13. This suggests that over half of the partner visa refusals that are subject to review by the Tribunal are overturned. The same report shows that the total average remittal rate for all Tribunal reviews of non-refugee visa refusal decisions is 40 per cent, which suggests this may be an issue which particularly affects partner visas.
14. The Committee supports the Department's efforts to maintain the integrity of the migration system. However, the Committee suggests the Department examine the comparatively high remittal rate of partner visa refusal decisions and, in particular, whether this relates to findings as to the genuineness of the couple's relationship.

Question

2. *The Department has provided a list of figures as to timelines for visa classes. Could you look through those and give us advice as to whether you believe these estimates to be accurate and, in your opinion, whether the waiting times have improved in recent years or deteriorated?*⁹

Response

15. We confirm that the processing estimates provided at Attachment A of the Department of Home Affairs' submission are, in our experience, generally accurate.
16. The Committee appreciates the significant efforts made by the Department in reducing the waiting time for partner visas and to clear the backlog of on-hand partner visas by prioritising onshore partner visas. Committee members have noticed an improvement in processing times for onshore applications, as well as offshore applications if the applicants are onshore on a substantive visa.
17. However, there are outlier cases – the Committee's members report that some partner visa applications taking over eight years to process. The Committee suggests that more attention could be paid to these difficult cases and efforts made to finalise them.
18. Anecdotally, Committee members report that in recent years, processing times of family visas have deteriorated, and processing times have increased significantly when compared to processing times around three to five years ago. Therefore, the recent response to COVID-19 and efforts made by the Department over the last year have been greatly appreciated.

⁸ Administrative Appeals Tribunal, MRD caseload summary by subclass – For the period 1 July 2020 to 31 May 2021, 2, available at <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-caseload-statistics-by-subclass-2020-21.pdf> accessed on 9 July 2021.

⁹ Senate Legal and Constitutional Affairs References Committee (no 1), (Senator Kim Carr), 5.

Question

3. *Prioritise the most significant changes you would like to see in regard to the family and partner reunions and visas relating directly to this inquiry.*
- a. *Can you summarise what you consider are the ways in which the government can resolve the many concerns that you have raised in your submissions? What are the priorities?*¹⁰

Response

19. Broadly, the Committee considers that the most significant barriers to family and partner reunions include:

- cost;
- processing times;
- barriers affecting family reunion of all visa applicants including refugees prohibiting family reunion; and
- other bars such as ‘no further stay’ conditions, no clear visitor pathways for some family members, and rigid identity requirements that disadvantage refugee applicants.

20. In relation to these, the Committee recommends, as priorities:

- reducing the costs of the partner visa application fee to bring it into line with other permanent visa application fees;¹¹
- reducing processing time of all family visas, especially partner visas;
- reducing processing times by having decision ready checklists;
- reducing processing times for partner visa applications involving couples in long-term relationships;
- facilitating family reunion by making it possible for families to be united onshore while waiting for their visas to be processed, by removing bars such as ‘no further stay’ conditions,¹² and adopting clear visitor pathways for some family members;
- removing rigid identity requirements and bars that disadvantage refugee applicants, thus prohibiting family reunion;¹³
- removing all barriers to the families of ‘unauthorised maritime arrivals’ (**UMAs**), such as allowing UMAs to propose family members under the humanitarian program and

¹⁰ Ibid, (Senator Kim Carr), 6 and (Senator Sarah Henderson), 7.

¹¹ Compare, for example, subclass 300, 309 and 820 visa application charges to the charges imposed on applications for other visas to live and work in Australia. See <https://immi.homeaffairs.gov.au/visas/getting-a-visa/fees-and-charges/current-visa-pricing>, accessed on 13 July 2021.

¹² See paragraph 5 of the Committee’s submission.

¹³ See paragraphs 35-40 of the Committee’s submission.

amending Ministerial Direction 80 so not to disadvantage refugees based on their mode of arrival.¹⁴

21. The Committee understands that the Department has to conduct extensive checks in order to finalise permanent visas. As detailed in paragraph 5 of the Section's original submission, the Committee also considers that efficiencies could be achieved by amending regulations 2.05(4AA) and 2.05(5A) of the Migration Regulations to add family and partner visas to the visas for which the Minister (or delegate) may waive conditions 8503 and 8534 – commonly referred to as No Further Stay conditions. This will reduce the manual processing burden on the Department in considering applications to allow visa holders subject to conditions 8503 or 8534 to apply onshore for a partner visa.

Question

- b. If these barriers were lifted, what impact would that have on the numbers of families able to unify with other family members? Are you able to quantify the number of people that this is currently impacting?*¹⁵

Response

Partner visas

22. According to the evidence provided by the Department at the hearing of the Inquiry on 25 June 2021, there were at that time 64,500 on-hand partner visa applications.¹⁶
23. It is difficult to quantify the number of people who would actually be affected by the priorities identified above – this information is a matter for the Department. Further, those priorities are not directed at processing numbers, but at the other focus points of this Inquiry – efficacy of the Department's systems and fairness for persons seeking to be reunited with the family through the grant of a partner visa.
24. The Department's submission details the economic and social benefits of partner visa grants. Based on recent findings from the Continuous Survey of Australian Migrants:¹⁷
- partner visa holders have a labour force participation of 78 per cent within six months of settlement;
 - 53.5 percent of partner visa holders possess university degrees;
 - in 2019-2020 the highest proportion of partner visa holders was aged between 25-29. This may help to offset challenges posed by Australia's ageing population.
25. The entry of migrants with higher-than-average labour force participation and productivity can only benefit the economy and assist in bringing new knowledge and skills into Australia.

¹⁴ See paragraphs 22-34 of the Committee's submission.

¹⁵ Senate Legal and Constitutional Affairs References Committee (no 1), (Senator Sarah Henderson), 8.

¹⁶ Evidence to the Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, 25 June 2021, 32 (Michael Willard, First Assistant Secretary, Immigration Programs, Department of Home Affairs).

¹⁷ Department of Home Affairs, (no 3), 7-8.

Parent visas

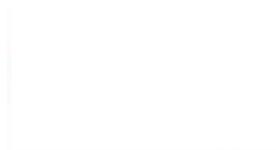
26. Parent visa applications (contributory) pending approval are 12,664. The yearly cap has now been reduced to just 4,500.¹⁸ This will make the waiting time for even the fast-track visa applications five years.
27. If these parents were allowed to be onshore during that waiting time, it would be beneficial to families, especially when both parents have to work and child-minding facilities are limited. This will in turn have a positive impact on the economy as both parents will productively contribute to the tax system in Australia.

Applications from boat arrivals

28. The Committee does not have the data on how many visa applicants are affected by paragraph (8)(g) of Ministerial Direction 80 – which places applications relating to the families of boat arrivals at the lowest processing priority. The Department may have this information.
29. Having said this, the Committee is aware of UMAs simply not lodging partner visa applications for immediate family members because they are aware of the impacts of Direction 80, and therefore a true figure of how many people affected by this Direction may not be possible to obtain.

Thank you once again for providing the opportunity to respond to these questions on notice and to contribute to the Inquiry. Please contact
should you have any further queries.

Yours sincerely



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Chief Executive Officer

¹⁸ Evidence to the Senate Legal and Constitutional Affairs References Committee (n 16), 36 (Michael Willard, First Assistant Secretary, Immigration Programs, Department of Home Affairs).