Law Council
OF AUSTRALIA

Federal Litigation and Dispute Resolution Section

6 May 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

The efficacy, 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's Federal Litigation and Dispute Resolution Section welcomes the opportunity to provide input in relation to the Senate Legal and Constitutional Affairs Committee regarding 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 submission has been prepared by the Section's Migration Law Committee (**the Committee**).[1]

Executive Summary

3. The Committee recommends consideration be given to a number of measures to improve the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions.

4. In summary, the Committee recommends:

- amendments to the Migration Regulations 1994 (**Regulations**) to permit persons to apply for family and partner visas in certain circumstances where they are presently barred from doing so;
- amendments to the Regulations to remove all onshore/offshore subclass distinctions for all family and partner visas;
- that the Department of Home Affairs (**the Department**) give priority to processing for long term partner visas;

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- that the costs of partner visas be reduced so that they are proportionate with visas of other categories;

- that the Department establish a clear visitor visa policy which allows applicants to travel to Australia and lodge partner visa applications onshore;

- that the Minister consider amending Direction 80 so that applicants sponsored by a refugee who arrived in Australia by boat are no longer the lowest priority cohort for processing family visa applications;

- amendments to the Regulations to either:

    - reduce the effective ten-year bar on a person being granted a visa after they have been refused a visa on the basis of not satisfying identity requirements; or

    - provide for a waiver from that effective bar in compelling and compassionate circumstances;

- consistent with Law Council policy, transferring temporary protection visa holders to permanent visas, which will enable them to sponsor their families to join them in Australia; and

- amendments to the Regulations to allow persons who either hold or have applied for certain temporary partner visas, but have experienced family violence in the relationship committed by a sponsoring partner who they have not married, to be granted permanent partner visas.

Response to terms of reference

a. <u>Limitations on eligibility to apply for relevant visas;</u>

5. The Committee recommends that consideration be given to progressing several amendments to the Regulations to remove limitations on eligibility to apply for family and partner visas. Specifically, this would include amendments to:

    - regulations 2.05(4AA) and 2.05(5A) – 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.

    - regulation 2.12 – to include other family visas, and the subclass 408 – Australian Government Endorsed Event - COVID-19 Pandemic Event as visas for which a person may apply after having a visa cancelled or visa application refused, for the purposes of section 48 of the *Migration Act 1958* (Cth). This would permit a person to apply for such visas in situations where an applicant's partner visa has been refused onshore, and the applicant is unable to lodge any further visas onshore. This may assist to preserve family unity especially where young children are involved.

    - regulation 2.12 – to include parent visas. This amendment could be complemented by amendments to improve the current parent visa to include a stream for children under 18 years to sponsor a parent onshore. This new stream

would cover unique situations where there are Federal Circuit Court or Family Court proceedings, and the parent applicant has no avenue to remain in Australia to complete the court proceedings while subject to section 48.

- removing all onshore/offshore subclass distinctions for all family and partner visas, and allowing the *Circumstances applicable to Grant* criteria to include in and outside of Australia.

b. <u>waiting times for processing and integrity checking of applications for relevant visas;</u>

6. The Committee recommends that the Department give priority to processing for long term partner visas – for example, through the use of decision ready checklists.

7. Families form the fabric of society, and most of the Australian citizens as well as their partners working overseas are highly qualified and pay an above average amount of tax.

8. The Committee recommends the Government consider prioritising these visa applications and incentivise these persons to return to Australia to contribute to the economy.

9. The pandemic has necessitated a sweeping transformation, which is likely to influence the decisions of highly qualified Australian citizens to return to Australia.[2] However, if they have developed relationships overseas, and cannot return with their partners due to the long processing times for partner visa applications, they are unlikely to return.

c. <u>waiting times for the granting of relevant visa</u>

10. The Department website has published the following wait times for the following visa subclasses:[3]

    (a) Subclass 300 (Prospective Marriage) – 18 to 29 months

    (b) Subclass 309 (Partner Provisional offshore) – 18 to 23 months

    (c) Subclass 100 (Partner Migrant) – 17 to 23 months

    (d) Subclass 820 (Partner Provisional onshore) – 23 to 28 months

    (e) Subclass 802 (Partner Migrant onshore) – 16 to 22 months

11. Due to the high application cost, applicants may be less able to afford the assistance of a professional to lodge the application, causing further delays.

12. The lengthy processing times for partner visas can have negative impacts on family relationships, and cause avoidable mental health concerns while family members are separated for such long periods.

[2] 'Brain gain for Australia', https://www.theage.com.au/national/victoria/brain-gain-half-of-australian-expats-are-back-home-and-they-ve-brought-their-talents-with-them-20210327-p57ek5.html, accessed 3 May 2021.
[3] https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times accessed 30 March 2021

13. They can also mean that dependent family members may meet the time of application criteria of being a 'member of the family unit' which requires a child to be under 23 years. However, due to no fault of their own, the dependent applicant may turn 23 while the visa is processing causing them to fail the applicable 'time of decision' criterion for each visa.[4]

14. The long wait times for processing prospective marriage visas, a visa which must be applied for offshore, has meant couples have had to delay commencing families, marrying and in particular during the pandemic have long periods apart. Persons granted such visas are also currently not included on travel exemptions automatically.

d. cost of applying for relevant visas;

e. commitments required for the granting of relevant visas;

15. In relation to the terms of reference d) and e), the Committee notes the following.

16. The cost of the partner visa application is prohibitive to some applicants, particularly those with refugee backgrounds, parents with children and caring responsibilities who cannot work, and people with disabilities who cannot work. Further this cost is disproportionate to other categories of visas. For example, partner visas are more expensive than skilled visas.

17. Moreover, because of the lengthy processing times, applicants must complete medical and police clearance checks several times before the visa is finally granted.

f. government policy settings regarding relevant visas and the role of family reunion in the Migration Program;

18. The Committee recommends that the Department establish a clear visitor visa policy which allows applicants to travel to Australia and lodge partner visa applications onshore. This would allow applicants to be united with their partners and families while awaiting the application to be processed. This would supplement the current policy allowing applicants for visitor visas to travel to Australia while they have a pending offshore partner visa.

19. The requirement that dependents be 23 at the time of decision results in applicants being excluded due to long processing times, despite having paid an application fee.

20. The Committee considers that there has been a lack of proper family reunion in the Migration Program. The availability of family reunion is limited in the skilled program, and the waiting times in carer, remaining relative, aged dependent and parent visas is significant.

21. The Committee considers that the carer visa should be afforded greater value as a visa category. It is important to recognise the importance family members can add to caring for Australian citizens and permanent resident family members who need care. This means less reliance on having to use community resources or put persons into aged care or supported care because they are no longer able to be cared at home.

[4] See for example the combination of regulations 309.321 and r 1.12 of the *Migration Regulations 1994.*

g. eligibility for and access to family reunion for people who have sought protection in Australia;

22. Ministerial Direction No. 62, made on 19 December 2013, listed the order in which certain family visa applications should be prioritised. Visa applicants who were sponsored by a refugee who arrived in Australia by boat would be given lowest processing priority, effectively meaning their visa applications would never be processed**.** The only way 'boat arrivals' could lift their families' visa applications from this lowest priority was if they could obtain Australian citizenship. As a result, many of these refugees lodged applications for Australian citizenship from 2014 onwards.

23. In October 2015, Ms Gillian Triggs, President of the Australian Human Rights Commission made a finding in *CM v Commonwealth of Australia (DIBP)* [2015] AusHRC 99 that Direction 62 was an arbitrary interference with the family, contrary to articles 17 and 23 of the International Covenant on Civil and Political Rights.[5]

24. Concerns were then raised that citizenship applications (for Afghan applicants in particular) began seeing significant delays. In July 2016, the Commonwealth Ombudsman commenced an own motion report into the citizenship delays after receiving a large number of complaints on this issue.[6]

25. The Ombudsman made recommendations for the Department to:

- develop the Australian Citizenship Instructions, policy relating to the operation of the *Australian Citizenship Act 2007* (Cth), provide adequate guidance to delegates about how to be satisfied of identity and character, and to include information about lawful decision making; and

- continue its efforts to implement the capability developments it has envisaged in its Identity Strategy.

26. In *BMF16 v Minister Immigration and Border Protection* [2016] FCA 1530, Bromberg J found that there had been an 'unreasonable delay' by the Minister in making a decision on whether to approve or refuse the citizenship applications of two Afghan refugees. This judgment was handed down on 16 December 2016.

27. On 13 September 2016 the Minister revoked Direction 62 and replaced it with Direction 72.[7] The amendments in Direction 72 made it clear that decision makers could depart from the order of priority in two circumstances set out in section 9, including where:

(a) the applicant has satisfied the delegate that:

[5] Gillian Triggs, *CM v Commonwealth of Australia (DIBP)* [2015] AusHRC 99, Report into arbitrary interference with family, October 2015, <link>, [7].
[6] Commonwealth Ombudsman, Michael Manthorpe, *Delays in processing of applications for Australian Citizenship by conferral – Investigation into the Department of Immigration and Border Protection's administration of a cohort of applicants requiring enhanced integrity and identity checks*, December 2017 (**Report**) <link>.
[7] Direction 72 was made subsequent to a challenge in the High Court to the validity of Direction 62 – *Plaintiff S61/2016 v Minister for Immigration and Border Protection*. The High Court (Gageler J) made orders dismissing the application on the basis that the effect of Direction 72 was to remove the limitations on processing which formed the substantial basis of the challenge to the validity of Direction 62. See *Plaintiff S61-2016 v Minister for Immigration and Border Protection* [2016] HCATrans 226 (26 September 2016).

(i) the application involves special circumstances of a compassionate nature; and

(ii) there are compelling reasons to depart from the order of priority set out in section 8, having regard to the special circumstances identified in subparagraph 9(a)(i) and to any other matters that the delegate considers relevant; or

(b) otherwise, the application would not be disposed of within a reasonable time.

28. On 12 December 2018, Direction 72 was revoked and replaced with Direction 80. Direction 80 essentially removed the 'unreasonable delay' exemption under paragraph 9(b).

29. Therefore, unless the exception is granted under paragraph 9(a) of the Direction or the Sponsor can obtain Australian citizenship, the families of 'boat arrivals' remain at the lowest priority, which can effectively mean that their applications are not processed. According to members of the Committee, obtaining citizenship or an exemption under Direction 80 are not easily achievable for many refugee applicants.

30. Anecdotally, Committee members have reported that even when a family's application is granted the exemption under paragraph (9)(a) of Direction 80, processing of the visa application is still delayed and may take over three years from the date of the exemption being granted for the application to begin processing.

31. The Committee's members have reported that they have clients who have been waiting up to nine years for partner visa applications to process. They have reported cases where multiple requests for exceptions were made based on the visa applicants being ethnic Hazaras being persecuted while living as undocumented refugees in Pakistan. These requests for exceptions were not accepted, and unfortunately one of the family members was killed in a targeted terrorist attack.

32. The Committee considers that Direction 80 unjustifiably penalises people who are found to be refugees based on their mode of arrival. This is inconsistent with the Law Council's Asylum Seeker Policy, Principle 7(d), which recognises that, in line with international law, asylum seekers who enter Australia should not be penalised for doing so without a valid visa or based on their mode of arrival provided they present themselves to the authorities without delay and show good cause for their entry or presence.[8]

33. The Committee recommends that the Minister consider ending the distinction applied to refugees and their families based on their mode of arrival in Australia and amending the Direction to remove paragraph 8(1)(g) – which places applicants who were sponsored by a refugee who arrived in Australia by boat at the lowest priority for processing family visas.

34. The Inquiry may also wish to seek advice from the Ombudsman regarding its satisfaction of the extent to which its recommendations discussed above have been addressed.

[8] Law Council of Australia, *Asylum Seeker Policy*, <link>, [7(d)].

Public Interest Criterion 4020(2A)

35. All family visas are subject to public interest criterion 4020, known as the 'fraud PIC'.[9] PIC 4020 commenced on 2 April 2011. It requires that there be no evidence that the applicant had provided a bogus document or information that was false or misleading in the material particular in relation to the visa application or in relation to a visa that the applicant held in the 12-month period before the visa application was made: PIC 4020(1). If a person (or a member of the person's family unit) is refused a visa on the basis of PIC 4020(1) they effectively face a three year bar on being granted for any visas, including partner and family visas.[10] The PIC 4020 includes a waiver provision, meaning the PIC 4020(1) criteria could be waived if there were 'compelling and compassionate circumstances affecting Australian citizens, permanent residents or eligible New Zealand citizens, or in the interest of Australia': PIC 4020(4).

36. On 22 March 2014, the Regulations were amended to introduce an identity requirement into PIC 4020. This requires an applicant to satisfy the delegate of their identity in the current visa application being assessed: PIC 4020(2A). If the delegate is not satisfied of the applicant's identity, the visa application will be refused and the applicant effectively faces a ten-year bar on being granted for any further visas: PIC 4020(2B). There is no waiver provision available under the identity provisions in PIC 4020(2A) and (2B).

37. The Committee considers that this identity requirement disproportionately impacts families who are refugees, or come from developing countries where formal documents and record keeping are not of a high standard or, in some cases, not available to citizens.

38. The Committee's members have reported this criterion is frequently exercised with respect to family members of refugees, particularly Afghan refugees.

39. The consequence of a refusal under this criterion is a further 10 years of separation for families, which the Committee considers to be disproportionate and to have potentially detrimental impacts on the family for persons who have been unable to satisfy the delegate of their identity.

40. The Committee considers that possible solutions include the following:

    - a reduction in the effective ten-year bar on a person being granted a visa if a previous visa application has been refused on the basis of the delegate not being satisfied of the applicant's identity;

    - providing for a waiver of the ten-year bar which applies to a refusal on identity grounds, consistent with the waiver power available for person's subject to a three-year bar which applies to a refusal on bogus document or false and misleading information grounds;

    - greater flexibility employed in the application of the identity requirement.

[9] See Part 1 of Schedule 1 to the Regulations.
[10] See PIC 4020(2) and, for example, cl 100.222(a) of Schedule 2 to the Regulations (Partner) and cl 101.223(a) of Schedule 2 to Regulations (Child).

Temporary Protection Visas

41. The introduction of Temporary Protection Visas (**TPVs**) and Safe Haven Enterprise Visas (**SHEVs**) has meant that there are large number of TPV and SHEV holders in Australia who have been found to be refugees by the Australian Government, but are not allowed to sponsor their families to join them in Australia given that family and partner visas require sponsors to be citizens or permanent residents. This has significant mental health impacts on visa holders in Australia as they are indefinitely separated from their immediate family members, including children and spouses.

42. The Law Council of Australia has previously made submissions in relation to the obligation of family unity towards people who are accepted as refugees, as it is a well-established human right.[11]

43. The Committee notes Principle 7(a) of the Law Council's Asylum Seeker Policy, which provides that Australia should provide durable (rather than temporary) protection outcomes for those found to invoke Australia's protection obligations.[12] Consistent with this, the Committee recommends that TPVs and SHEVS be transferred to permanent protection visas.

h. the suitability and consistency of government policy settings for relevant visas with Australia's international obligations;

44. No comment.

i. the budgetary and governmental impacts of relevant visas, including on state, territory and local governments; and

45. No comment.

j. any other matters deemed relevant by the committee.

Family violence provisions

46. The family violence provisions (set out in Division 1.5 of Part 1 of the Regulations) allow visa applicants in the following scenarios to be eligible for permanent residency where their relationship has broken down and there was family violence in the relationship committed by the sponsoring partner:

    (a) Non-citizens who are onshore and have applied for a subclass 820 or 801 (Partner) visa;

    (b) Non-citizens who are onshore and hold a subclass 309 (Partner (Provisional)) visa;

    (c) Non-citizens who are onshore and hold a subclass 300 (Prospective Marriage) visa and have married their sponsor.

[11] Law Council of Australia response to Inquiry into the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* dated 5 November 2014 <link>. accessed 31 March 2021 and letter to Ms Sophie Dunstone, Committee Secretary, Senate Legal and Constitutional Affairs Legislation Committee. See also, Law Council or Australia, Asylum Seeker Policy, s 7(f).
[12] Law Council of Australia, *Asylum Seeker Policy*, <link>, s 7(a).

47. The Regulations do not permit non-citizens who have arrived in Australia as the holder of a subclass 300 prospective marriage visa, who have not married their sponsor, to obtain a Partner visa.[13] If these people are subjected to family violence, there is no pathway available to them to obtain permanent residency, simply because they did not get married upon arrival to Australia. People in this category fall through the gaps of the family violence provisions.

48. Further, the Regulations also do not permit applicants who have suffered family violence while they are waiting for a subclass 309 visa application to be processed, whether or not they are located onshore or offshore, to be granted that visa. The family violence provisions (as well as provisions allowing a visa grant where there are custody provisions of children) only apply to permit a person be granted a permanent Partner (subclass 100) visa once the subclass 309 visa has been granted.[14] The Committee considers that this fails to protect victims of family violence and children.

49. The Committee recommends amendment to the Regulations to ensure that subclass 300 visa holders, and applicants for the subclass 309 visa, who have experienced family violence in the relationship committed by a sponsoring partner who they have not married, are able to be granted permanent partner visas.

50. Thank you once again for the opportunity to respond to the Inquiry.

Yours sincerely

Michael Tidball
Chief Executive Officer

[13] See subclauses 820.211(8) and (9), and cl 820.221(3), of Schedule 2 to the Regulations.
[14] See cl 100.221(4) of Schedule 2 to the Regulations.