



Law Council
OF AUSTRALIA

Office of the President

7 September 2021

Senator the Hon James Paterson
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Senator Paterson

Response to question on notice – hearing of the Parliamentary Joint Committee on Intelligence and Security on 27 August 2021

The Law Council of Australia (**Law Council**) again thanks the Parliamentary Joint Committee on Intelligence and Security (**Committee**) for the opportunity to appear at the Committee's hearing, on Friday 27 August 2021, regarding its Review of the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (**Bill**).

Question on notice

During that hearing, the Law Council took the following question on notice:

1. *Do any of you know the statistics on how many applications are made to the court each year with respect to visas?*

Response

In summary, the Law Council notes that, as set out in the **Attachment**, in 2019-2020, there were:

- 6,555 migration law filings to the Federal Circuit Court;
- 742 migration law filings to the Federal Court in its appellate jurisdiction; and
- 363 migration law filings to the Federal Court in its original jurisdiction.

Not all of these will involve character-related decisions and the Law Council is unable to provide this information. The Law Council also notes that in 2019-2020, there were 1,372 section 501 character-related decisions made under the *Migration Act 1958* (Cth) (**Migration Act**) (see **Attachment**). It is unaware how many of these progress to judicial review. The Law Council is also unable to identify any data on the number of character-related decisions made under the *Australian Citizenship Act 2007* (Cth) (the **Citizenship Act**) The Department of Home Affairs may be able to provide this information.

In this response, the Law Council has detailed the context in which applications may be made to the Administrative Appeals Tribunal (**AAT**), Federal Circuit Court and Federal Court, as well as recorded the publicly available information about those applications.

The AAT

A person may apply to the AAT for most migration decisions made by the Minister (or delegate) under the Migration Act or Citizenship Act. The AAT conducts a merit-based review, which means, in its own words, it takes ‘a fresh look at the relevant facts, law and policy and arrive at [its] own decision’.¹ This may be difficult to do if the information which is at the heart of the decision is withheld from the AAT, as is envisaged under the Bill.

Not all of the character-related decisions affected by the Bill are able to be reviewed by the AAT. Specifically:

- the following character-related decisions under the Migration Act² are not able to be reviewed by the AAT:³
 - a personal decision of the Minister to refuse or cancel a visa on character grounds;
 - a decision to cancel a protection visa on the basis of information provided by the Australian Security and Intelligence Organisation; and
 - a decision of a delegate to refuse or cancel a visa when satisfied the person does not pass the character test because of the operation of a substantial criminal record or sexually based offences involving a child, where the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory;
- the following character-related decisions under the Citizenship Act⁴ are not able to be reviewed by the AAT:⁵
 - a determination of cessation of citizenship if the Minister is satisfied the person has engaged in terrorism-related activities⁶ or been convicted of certain kinds of offences;⁷
 - a decision to refuse an application for citizenship by a person who is 18 years of age or older and is not a permanent resident nor a stateless person.

The decisions listed in the previous paragraph are not subject to any kind of merits review.

¹ AAT website, *About the AAT – Functions and powers – Review of decisions*, <https://www.aat.gov.au/about-the-aat>, accessed on 2 September 2021.

² See proposed 503A(1)(b) of the Migration Act to be inserted by item 9 of Schedule 1 to the Bill.

³ Subsection 500(1) of the Migration Act.

⁴ See proposed 52A(1)(b) of the Citizenship Act to be inserted by item 3 of Schedule 1 to the Bill.

⁵ Subsections 52(1) and (2) of the Citizenship Act.

⁶ Section 36B of the Citizenship Act.

⁷ Section 36D of the Citizenship Act.

The Courts

Judicial review

The Migration Act regulates applications for judicial review in relation to decisions made under it. Specifically, an application for judicial review may be made to the:

- Federal Circuit Court in relation to migration decisions made by the AAT, other than character-related migration decisions;⁸
- Federal Court of Australia (**Federal Court**) in relation to character-related migration decisions of the AAT and character related decisions made personally by the Minister (**original jurisdiction**).⁹

The Citizenship Act does not regulate applications for judicial review in relation to decisions made under it, so applications for judicial review may be made to the Federal Circuit Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or the Federal Court or the High Court under their original jurisdiction.¹⁰

Judicial review does not involve consideration of the merits of the decision – the question is whether there is a legal error in the decision under review. Legal errors could include legal unreasonableness, failure to make a relevant consideration, making an irrelevant consideration and bias, among others. As above, these will be difficult to argue, should the basis of the decision be withheld from the applicant both in the reasons provided and at merits review, as is envisaged under the Bill.

The Law Council notes that the specific fee for an application to the Federal Circuit Court in relation to the migration decisions was introduced in 2020.¹¹ Specifically, the fee for an application for judicial review of a migration decision is \$3,330, compared to \$665 for a non-corporation in standard applications to the Federal Circuit Court.¹²

Appellate jurisdiction

The Federal Court also exercises an **appellate jurisdiction** in relation to decisions of the Federal Circuit Court or decisions of a single judge of the Federal Court.¹³ In such matters, the question for the Federal Court is whether the first instance judge has made a legal error in the original decision.

Statistics

Character decisions

The Department of Home Affairs (**Department**) records¹⁴ the character-related decisions made under the Migration Act¹⁵ – these are the decisions which are covered by the

⁸ Subsection 476(2) of the Migration Act.

⁹ Subsection 476A(1) of the Migration Act.

¹⁰ To the High Court of Australia under section 75 of the Constitution, or to the Federal Court under section 39B of the *Judiciary Act 1903* (Cth).

¹¹ *Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020* (Cth).

¹² See items 201 and 201A in the table in Part 2 of Schedule 1 to the *Federal Court and Federal Circuit Court Regulation 2012* (Cth).

¹³ Section 24 of the *Federal Court Act 1976* (Cth)

¹⁴ Department of Home Affairs, *Visa statistics*, <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>, accessed 2 September 2021.

¹⁵ That is, refusals or cancellations made under section 501 of the Migration Act.

Protected Information Framework to be inserted by the Bill. These are set out in Table 1 of Attachment.

The Law Council has not been able to identify any data on the number of character-related decisions made under the Citizenship Act.¹⁶

Review applications

The AAT, Federal Circuit Court and Federal Court record the number of migration-related filings in their respective annual reports. According to those annual reports, migration law filings have mostly increased in recent years. These figures are set out in Table 2 in Attachment A.

It is noted that neither the Federal Circuit Court and Federal Court explicitly distinguish between matters arising in relation to decisions made under the Migration Act and the Citizenship Act. It seems that the Federal Circuit Court only identifies matters arising from decisions made under the Migration Act as 'migration' decisions,¹⁷ while the Federal Court may identify matters arising from decisions made under both the Migration Act and the Citizenship Act as 'migration' decisions, although it is not clear.¹⁸ The figures in Table 2 in Attachment in relation to 'migration' decisions should be understood in that light.

Further, neither Court identifies which matters related to character-related decisions.

There have been more migration-related filings than migration-related finalisations in the Federal Circuit Court in each of the last five financial years,¹⁹ with the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs indicating the backlog of migration cases in that Court was 14,000 as of 30 April 2021.²⁰

There have been more migration-related filings than finalisations in the Federal Court in three of the last five years (with total filings over the period greater than total finalisations).²¹

The AAT separately identifies 'Australian citizenship', visa-related decisions relating to character' and 'migration and refugee' decisions. All figures are separately recorded in Table 2 in Attachment. As can be seen in that table, visa-related decisions relating to character are a minority of the AAT's work.

Representation

Self-represented litigants will have limited practical capacity to argue legal errors based on documents non-disclosed under the proposed regime particularly given the fact that the documents will not be disclosed in Court Books filed by the Minister in the judicial review proceedings.

¹⁶ The Department reports to Parliament on the number of citizenship cessation decisions made under section 36B (terrorism-related activities) and 36D (certain types of offences) of the Citizenship Act

¹⁷ Federal Circuit Court and Family Court of Australia, FACT SHEET – Federal general law matters, <https://www.fccoa.gov.au/sites/default/files/2021-08/General-federal-law-matters-0921V1.pdf>, accessed on 2 September 2021.

¹⁸ See, for example, <https://www.fedcourt.gov.au/law-and-practice/guides/migration>, accessed on 2 September 2021.

¹⁹ Federal Circuit Court of Australia, *Annual Report 2019-20*, Figure 3.9, 38.

²⁰ Explanatory Statement, *Migration Amendment (Merits Review) Regulations 2021* (Cth). As noted, the Federal Circuit Court does not hear matters relating to character-related decisions under the Migration Act.

²¹ Federal Court of Australia, *Annual Report 2019-20*, Table A5.9.10, 141.

The majority (76% in 2019-20) of applicants in migration matters filed in the Federal Circuit Court are self-represented.²² Most applicants to the Federal Court in its original jurisdiction are represented (80% in 2019-20) – this is the context in which the Court would consider applications for review of character-related decisions under the Migration Act.²³ However, the majority of self-represented appeals to the Federal Court (88% in 2019-20) are in migration matters.²⁴

Further contact

If you would like to discuss this matter further, please do not hesitate to contact me directly on [REDACTED] u. Alternatively, please contact Mr [REDACTED]

Yours sincerely

[REDACTED]

Dr Jacoba Brasch QC
President

²² Federal Circuit Court of Australia, *Annual Report 2019-20*, 40.

²³ Federal Court of Australia, *Annual Report 2019-20*, Table 3.7, 32.

²⁴ *Ibid*, Table 3.8, 32, noting there were 234 migration applications in the Court's original jurisdiction – see Attachment.

ATTACHMENT A – CHARACTER DECISIONS AND APPLICATIONS TO THE AAT AND COURTS

Table 1 – section 501 character-related decisions

Financial year	Character-related decisions
2019-2020 ¹	1,372
2018-2019	1,212
2017-2018	1,441
2016-2017	1,909
2015-2016	1,409

Table 2 – applications to the AAT and courts

Financial year	Migration applications to the AAT				Migration law filings to the Federal Circuit Court ²	Migration law filings to the Federal Court in its appellate jurisdiction ³	Migration law filings to the Federal Court in its original jurisdiction ⁴
	Australian citizenship	Visa-related decisions relating to character	Migration and refugee	Total			
2019-2020 ⁵	715	317	29,976	31,008	6,555	742	234
2018-2019 ⁶	708	308	36,172	37,188	5,597	1,139	295
2017-2018 ⁷	605	235	37,933	38,773	5,312	1,022	248
2016-2017 ⁸	322	183	26,604	27,109	4,981	764	181

¹ Administrative Appeals Tribunal, *Annual Report 2019-20*, 151.

² Federal Circuit Court of Australia, *Annual Report 2019-20*, Figure 3.9, 38.

³ Federal Court of Australia, *Annual Report 2019-20*, Table A5.3, 132.

⁴ Ibid. Figures generated by subtracting new filings in the appellate jurisdiction (see n 8) from all filings in Figure A5.9.10 on page 141.

⁵ Administrative Appeals Tribunal, *Annual Report 2019-20*, 151.

⁶ Administrative Appeals Tribunal, *Annual Report 2018-19*, 29.

⁷ Ibid.

⁸ Administrative Appeals Tribunal, *Annual Report 2016-17*, 120.

2015-2016⁹	275	77	18,929	19,281	3,544	653	117
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⁹ Administrative Appeals Tribunal, *Annual Report 2015-16*, 129.