

5 March 2021

Sophie Dunstone
Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
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Dear Ms Dunstone

Response to Question on Notice: Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020

We refer to our appearance as witnesses before the Senate Legal and Constitutional Affairs Legislation Committee (Committee) regarding the Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020 (Bill) on 2 March 2021. During our evidence, we took a question on notice from Senator Carr regarding the numbers of unrepresented applicants seeking review of decisions to refuse or cancel their visas.¹

Our response to this question is below.

In relation to the judicial review process, in FY 2019/20, 120 applications were filed nationally seeking **review of character-based decisions of visa refusals or cancellations**. Of those, 62 – over 50% – were unrepresented litigants, and 19 were represented by Legal Aid Commissions. These numbers exclude applications filed in the appellate jurisdiction and, we understand from the Judicial Registrar in migration matters, are generally reflective of the number of applications over the past several years.²

In relation to **judicial review of decisions to refuse applications for protection visas**, from 2013–2019 there were 5812 cases decided in the Federal Circuit Court. Fifty-seven per cent of applicants were unrepresented; 38% had some form of legal representation (with the presence of a solicitor and/or barrister) and 5% of applicants made no appearance. An analysis of judicial review data suggests that applicants with legal representation were on average six times more likely to succeed than unrepresented applicants. Unrepresented applicants were successful in

¹ Legal and Constitutional Affairs Legislation Committee, Migration and Citizenship Legislation Amendment (Strengthening Information Provisions) Bill 2020, 2 March 2021, Senator Carr: 'Could I ask both of you, because the presumption here is that judicial review processes are available to everyone: what percentage of applicants do you service, in terms of the refugee case load? I know that the statistics more generally, in terms of legal aid, suggest that very few people get access to legal aid in this country. How many people, in your judgement, don't have resources to engage with the court system? Do you have any advice for us on that matter? Either group—New South Wales or Victoria—could you provide us with advice?'

² Statistics provided by the Judicial Registrar, Migration Federal Court of Australia.

judicial review in just 79 cases out of the 422 successful cases in total. In contrast, represented applicants were successful in 343 cases out of the 422 cases.³

In FY 2019/20, VLA approved **funding in 139 migration matters**. This figure includes applications and appeals in relation to administrative decisions to refuse protection visas in the Federal Circuit Court and the Federal Court, as well as applications and appeals of character related decisions. Many of the character related matters involve a decision made personally by the Minister for Home Affairs, which can only be reviewed by the court on a question of law.

We provided **1100 advices** via our daily telephone advice service in FY 2019/20 and a significant proportion of these advices relate to visa cancellation or refusal on character grounds. Most commonly we receive calls from people held in immigration detention centres across Australia. These clients face a range of difficulties obtaining even the most minor assistance including access to correct application forms, understanding the contents of written material, payment of filing fees, reliance on detention centre guards to file documents within strict time limits.

VLA's funding guideline does not provide funding for casework in the **Administrative Appeals Tribunal (AAT)**, which is the other avenue of review open to some people where the decision to cancel or refuse an application was made by a delegate of the Minister, and not the Minister personally. According to the AAT's 2019/2020 Annual Report, there were 317 **visa-related decisions relating to character** finalised during the financial year. Of those, 31 were represented by an advocate or agent, 17 by a friend or relative, 144 by a legal representative and 125 were self-represented.⁴ Again, this amounts to less than 50% of people receiving legal representation.⁵

In response to Senator Carr's question, we hope the above data clarifies that there are low rates of representation for people seeking review of decisions to refuse or cancel their visas on character grounds. It is a complex and protracted legal process that is very difficult to participate in without legal representation.

Please let us know if the Committee needs any further information in relation to this question, our evidence or our submission.

Yours sincerely

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³ Keyvan Dorostkar, Judicial Review of Refugee Determinations: More by Luck than Judgement (12 February 2020). Available at SSRN: <https://ssrn.com/abstract=3536740> or <http://dx.doi.org/10.2139/ssrn.3536740>.

⁴ Administrative Appeals Tribunal, *Annual Report 2019/20*, 152.

⁵ We note that it is not clear what level of legal representation people received.