



Law Council
OF AUSTRALIA

Managing Australia's Migrant Intake

Department of Home Affairs

29 March 2018

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Contents

| | |
|---|----------|
| About the Law Council of Australia | 3 |
| Acknowledgement | 4 |
| General comments | 5 |
| Responses to Consultation Paper questions | 6 |
| General | 6 |
| How can we plan migration to ensure it is balanced to manage the impact on the economy, society, infrastructure and the environment in a sustainable way? | 8 |
| How can governments, industries and communities help ensure infrastructures and services best support migration as well as the broader population? | 8 |
| Does the current size and balance of the migration program reflect the economic and social needs of Australia? | 9 |
| Planning the migration program..... | 9 |
| How could the permanent migration program be more responsive to global migration trends, including the rise of temporary migration? | 9 |
| Should we have planning levels for the permanent migration program? Should we plan for some streams of migration but not others? Should we have planning levels for any or all of the temporary programs? | 10 |
| How do family and skilled migration differ? Should these differences mean we plan for each differently? | 11 |
| Is Australia maximising the benefits of independent unsponsored migrants in the migration program? How can the Independent stream be strengthened? | 11 |
| Family Migration | 12 |
| How can we ensure family migration best enables Australians to reunite with overseas family members, while supporting the Australian community? | 12 |
| How can we best manage and plan for primary visa applicants as well as the family they bring with them on their visa? Should secondary applicants be counted separately from primary applicants? | 13 |

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Law Institute of Victoria and the Migration Law Committee of the Federal Litigation and Dispute Resolution Section in preparation of this submission.

General comments

1. The Law Council of Australia welcomes the opportunity to provide comments on the Department of Home Affairs' (DHA) Policy Consultation Paper entitled *Managing Australia's Migrant Intake (Consultation Paper)*. The Law Council offers the following comments for DHA consideration which are largely based on material provided to it by the Law Institute of Victoria.
2. The Law Council understands that the Consultation Paper is a preliminary step in what is likely to be a lengthy and multi-step process. As such, the Law Council looks forward to the opportunity to provide more substantive comments once further work has been undertaken by DHA. In this regard, the Law Council welcomes the opportunity for continued dialogue with DHA, and is highly supportive of the regular bilateral policy meetings that currently occur between DHA and representatives of the Law Council's Migration Law Committee.
3. In responding to the Consultation Paper, the Law Council refers to its earlier submission to the 2017 consultation entitled *Visa Simplification: Transforming Australia's Visa System*.¹ Much of the content of that response is relevant to the questions posed by the current Consultation Paper, and it is recommended that these responses be read together. As was noted in the earlier submission:

Australia's visa system must support national interests. It must ensure that Australia is a competitive and attractive destination for prospective migrants who are likely to make a significant contribution to the community while ensuring that only those with a legitimate purpose (visit, study, work, humanitarian, etc.) can travel to and remain in Australia. It must also provide fair and transparent processes that are not discriminatory and enable a humanitarian and compassionate approach to be taken in certain circumstances.

*At the centre of any redesign and modernisation of Australian immigration law must be the rule of law, the principles of certainty and transparency, and efficiency. By carefully approaching the redesign with regard to these factors, Australia has the opportunity to build on a world-leading migration system.*²

4. The Law Council supports DHA's assertion that migration must be managed so that Australia accrues maximum benefit while effectively mitigating risks. However, the Law Council emphasises the need for utmost care and caution as this is a fine balance, and it is imperative that this is given the most comprehensive consideration to set foundations for a strong migration program over the coming decades.
5. The Law Council also notes that there is a need to educate the public and the media about the difference between temporary and permanent migration, given that the permanent migration intake is far less than the temporary arrivals in Australia.
6. As noted in the Consultation Paper, migration has impacts across all aspects of Australian life. If the balance between benefit and risk is not achieved, the impact will be felt Australia-wide. For example, discouraging businesses from operating in Australia, or discouraging highly-skilled individuals from considering migration to Australia, is a real risk of undertaking significant reform in terms of risk management.
7. There are areas of industry which rely heavily on temporary migration, including health care, hospitality and aged care to be able to meet the demands of the industry. When

¹ Law Council of Australia 'Visa Simplification: Transforming Australia's Visa System', September 2017.

² Ibid, at 5.

reviewing migration levels both temporary and permanent, any such planning needs to consider the impact on service related industries and how those positions would be able to be filled with the existing aging work force, noting that areas such as aged care and health are likely to have increases in employment opportunities.

8. Whilst Australia is presently fortunate in attracting significant numbers of high net worth individuals³, this does not equate to facilitation of business transactions or sponsored visa applications. Instead, this migration trend appears to be connected to perceptions of Australia as safe, as having a low population density, and as having beneficial taxation arrangements. Further, migration by high net worth individuals may be jeopardised by a decrease in business confidence, by delays, and by uncertainty of decision-making.
9. The Law Council notes DHA's appropriate consideration of the Productivity Commission's 'Inquiry Report Migrant Intake into Australia'.⁴ That Inquiry, while reporting that English language ability, age, level of education, employment, time spent in Australia and family connections are factors in successful settlement for migrants, also stated that:

*[S]ocial cohesion also depends on the extent to which immigrants themselves and the Australian born population accept diverse ethnic identities as consistent with a common 'national' identity, which itself evolves over time. A high level of acceptance is conducive to better integration.*⁵

10. Whilst the economic outcomes discussed in the Consultation Paper, such as claims on social services, income generated, the ability to invest, or the amelioration of skills shortages are undoubtedly important, there are also much broader factors that must be considered that are not only important in their own respect but will also have flow-on economic outcomes. These factors include the integrity of the family unit, the social support provided by families, social cohesion, facility and benefits offered by a migration program and the fostering of community.
11. Finally, the Law Council notes its concern with the substantial processing delays and uncertainty currently being experienced throughout Australia's migration program, which has the potential to deter business and development. In order to achieve the desired outcomes, these issues must be addressed as a priority. They influence business confidence, the attractiveness of Australia as a destination in the short and long terms, and Australia's reputation on the world stage.

Responses to Consultation Paper questions

General

What factors are important in planning the migration program over the next five, ten and fifteen years?

12. The Law Council considers the following factors critical in planning the migration program over the next five, ten and fifteen years:

(a) *Local employment rates in Australia, and occupations taken up by Australians*

³ Pash, C., 'Australia is attracting more of the world's wealthy migrants than any other country', Sydney Morning Herald, 25 January 2018, <www.smh.com.au/business/the-economy/australia-is-attracting-more-of-the-world-s-wealthy-migrants-than-any-other-country-20180124-p4yyup.html>.

⁴ Productivity Commission 'Inquiry Report Migrant Intake into Australia' Report No.77, 13 April 2016.

⁵ Ibid, at 11.

Local graduates in Australia have preferences and priorities for particular career paths. By local graduates choosing certain jobs and occupations, some industries may experience a decline in their ability to find locally trained graduates. The result is that certain industries may need to rely on foreign skilled labour to fill gaps.

It is important to consider the potential skills gap for certain occupations as a result of demographic trends and predictions.

This requires forecasting for both the short and long terms, including up to fifteen years in advance and further. It also involves the establishment of a clear vision regarding the national and global position that Australia seeks to establish over those periods.

It is also important to look at occupations with high temporary migration levels, as to why those occupations are unable to attract Australians, particularly when reviewing employment rates.

(b) Business opportunities and investments – growing trends in non-traditional investment platforms (Cryptocurrency, Bitcoin, etc.)

Australia needs to be competitive for its investment offerings to compete with non-traditional investments. To attract the best and the brightest, Australia needs to be competitive. Business migrants play an important role in injecting capital into the Australian economy and maintaining employment for certain industries. Australia needs to consider and ensure that the return on investments for business migrants remain competitive.

The digital world requires more reliance on information technology infrastructure, and therefore Australia needs to consider how it will keep up with fast-paced developments. New and emerging technology and trends require making provision and allowances for skills that are not prevalent in Australia. It involves prescience and data analysis regarding how best to facilitate Australia's position as a world leader in this essential area.

(c) Increased sophistication of technology

DHA is aware of this significant threat to integrity of the migration program if it fails to maintain pace with technological developments.

(d) Facilitation of a visa system that promotes social cohesion and commerciality

The migration program must play a lead role in ensuring social cohesion and commerciality. There is a risk that business and skilled migration will be significantly and adversely affected by changes to the visa program that do not take a holistic view of individual and business incentives.

It is imperative that DHA recognise the human factors in migration, including the value of the family unit and that that effective settlement outcomes are benefited from family migration.

(e) Recognition of the fluctuating needs of Australian society, particularly in terms of family migration

It is submitted that family migration should be separated from the permanent migration program planning to give DHA flexibility in this respect.

How can we plan migration to ensure it is balanced to manage the impact on the economy, society, infrastructure and the environment in a sustainable way?

13. The Law Council submits that careful planning and transparency is essential to the aim of achieving a sustainable and world-leading migration program. The recruitment of leading expertise in areas such as demographics, future planning and adjacent industries is also critical.
14. In conducting such planning, DHA should be mindful of the factors that have not yet necessarily been documented by research and data analysis. These factors include human imperatives and considerations in migrating, such as the facility and speed of the program, as well as impact on business and trade of uncertainty and delay.
15. The Law Council also notes the following options are open to DHA:
 - (a) In terms of accessibility to social welfare, DHA may expand the waiting periods applicable to some sub-classes to additional categories of visas. For example, there is currently a two-year wait for Independent (Skilled) (189) visa holders before welfare can be accessed. DHA could consider imposing a two-year wait for social security benefits on subclasses 186 and 187 visas, as it is expected that such visa holders remain in employment for at least two years after the visa grant.
 - (b) DHA could undertake an analysis of the statistics and data regarding how many migrants use settlement services, such as AMES free English classes, and have sought a refund on the second Visa Application Charge.
 - (c) For the skilled (nominated) (subclass 190) visa category, there is currently no monitoring or provision for cancellation where a person is granted a subclass 190 visa after nomination by a particular State or Territory government, but who does not attempt to live and work in that area following the visa grant. There may be ways to ensure that there is compliance or to impose penalties for non-compliance, including, for example, restrictions on eligibility for citizenship for non-compliance.

How can governments, industries and communities help ensure infrastructures and services best support migration as well as the broader population?

Do you think migration is currently being planned with a sufficient view of Australia's long-term needs?

16. The Law Council does not consider that migration is currently being planned with a sufficient view of Australia's long-term needs. Specifically, the Law Council is concerned that DHA's current planning may adversely impact businesses and may discourage highly-skilled migrants from choosing to migrate to Australia.
17. Further, the Law Council considers that delays in visa processing across the board damages the integrity and reputation of the program and discourages business confidence and individual migration.

If not, how could these considerations be better incorporated?

18. The Law Council proposes that Australia's permanent migration program should be focused on attracting the best and brightest migrants, with family applications being considered separately, for the reasons set out below in paragraph 54.

19. DHA must consider the growing millennial workforce, and the transition of baby boomers to retirement. There must be planning for how to deal with what may lead to a skills gap in more traditional occupations, and trade occupations, where there are less training facilities or courses being offered to local Australians or being taken up by local Australians.
20. Further, it is submitted that businesses located in regional Australia need more support to attract employees and investments in their local region and industries.

Does the current size and balance of the migration program reflect the economic and social needs of Australia?

21. The Law Council considers that Australia's migration program, as it currently stands, does not adequately reflect the economic and social needs of Australia.
22. There are presently 190,000 places in Australia's migration program. This number has remained steady since the 2012-2013 financial year, however Australia's population has grown significantly since that time. As at 30 June 2013, Australia had a preliminary estimated resident population of 23,130,900.⁶ As at 30 June 2017, Australia had a preliminary estimated resident population of 24,598,900, representing growth of over 1.4 million residents.⁷
23. The growth in population increases the likelihood that more family stream visas, and in particular, partner visas, will be required to meet the needs of the Australian populace.

What information do you need about migration? Would information about future migration planning level numbers assist you?

24. Information about future planning numbers would assist the Law Council to make informed comment, as would separate statistics regarding secondary applicants.
25. Statistics regarding the uptake of social benefits and ongoing employment would also assist to provide meaningful feedback to DHA.

Planning the migration program

How could the permanent migration program be more responsive to global migration trends, including the rise of temporary migration?

26. The permanent migration program must take account of the needs of migrants. Migrants will often review migration programs across the globe, opting for those with the most advantageous opportunities.
27. The program needs to offer certainty and transitional arrangements if new laws are introduced. Visa requirements and criteria need to be clear and certain. Discretion should be limited to where it is essential. Further, application fees and costs of migrating to Australia must be competitive with other countries.
28. DHA must be transparent in its processes, specifically how visas are approved or refused, to ensure visa applicants understand their options, their conditions and obligations once they obtain the visas.

⁶ Australian Bureau of Statistics, '3101.0 - Australian Demographic Statistics, Jun 2013', <www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3101.0Main+Features1Jun%202013?OpenDocument>.

⁷ Australian Bureau of Statistics, '3101.0 - Australian Demographic Statistics, Jun 2017', <www.abs.gov.au/AUSSTATS/abs@.nsf/mf/3101.0>.

29. Crucially, DHA decision-makers must be appropriately qualified and trained, noting that litigation, merits review and ultimately reconsideration of initial decisions can lead to significant costs to DHA and the Australian government, and is a key factor in discouragement of potential migrants and business from using Australia's migration program. To encourage greater transparency and accountability in decision-making, it is recommended that contact details and identification of case officers is provided in as much detail as still protects the safety of the officers. Moreover, the Law Council considers that the compartmentalising of decision-making may discourage case officers from taking responsibility for their decision-making.
30. The Law Council notes that the growth in temporary migration may be attributed to lengthy processing time for permanent migration. A lot of migrants wanting to become permanent residents may consider a temporary migration visa before considering transitioning to a permanent visa, to 'try before you buy'. Other migrants may travel on working holiday visas or visitor visas initially for a holiday and find that they want to extend their stay and pursue permanent visas while onshore.
31. The migration program needs to consider the economic benefit that temporary migrants bring to Australia, prior to becoming permanent migrants.

Should we have planning levels for the permanent migration program? Should we plan for some streams of migration but not others? Should we have planning levels for any or all of the temporary programs?

32. It is submitted that there ought to be planning levels for permanent migration, but there should be exceptions in certain categories.
33. Streams that should have planning levels include independent visas in the skilled streams and some employer-sponsored visas.
34. Regional employer-sponsored visas should not have planning numbers. The occupations permissible under these programs are already recognised by Regional Certifying Bodies as skilled shortage areas or genuine vacancies, and hence no restriction on numbers should be set.
35. Adjustments need to be made in the Business Innovation and Investment program to allow a higher number of successful applications. The processing time for business skills visas is very lengthy, which can discourage business owners and investors from continuing to pursue their business interests in Australia.
36. In the family stream, the partner visa category should be removed from planning levels, as DHA has done with child visas. It seems logical to the average Australian that immediate family (in the form of children under 18 and partners) would not be included in the ordinary migration program. Children have now been rightly excluded from planning levels, and it is similarly appropriate for partners to be properly excluded from the planned migration program and for an indicative visa range to be set out in the program statistics.
37. There should not be any planning levels for any of the temporary programs, as they are temporary visas for a particular purpose. If planning levels were imposed on the temporary program, this would cause major concerns for industries and sectors that rely on the quick processing and availability of temporary visas.

How do family and skilled migration differ? Should these differences mean we plan for each differently?

38. As there are significant differences in the criteria for, and assessment of, the family and skilled migration programs, there should be differences in how the programs are planned for these visas.
39. The portion of the migration program taken up by the family stream in Australia sits just above 30 per cent. Figures presented at the Organisation for Economic Co-operation and Development International Migration Outlook Conference in 2017 shows that Australia sits in the middle of the table. Countries including Germany, Sweden and France all allocate higher percentages to family visas; in the USA, the family stream counts for over 70 per cent of the program.⁸ Australia therefore maintains a relatively strong economic program, bringing considerable benefits to Australia.
40. Parent visa category applicants, by way of example, are often seen as offering limited economic outcomes, and likely to make considerable claims on aged care, health and social security systems.⁹ However, the contributions to the economy made by Australians who are able to work and pay taxes, who would otherwise not have been able to do so had their parents not migrated to provide the relevant support, must be taken into account.¹⁰
41. If parent visa numbers are limited, this has the effect of limiting the working ability of Australians with young children who may be compelled to leave the workforce to stay at home to care for their children, as they are unable to bring their parents to Australia to support their young families. This may lead to further reliance on social security benefits by Australians of working age and capacity. Many Australian parents confront issues relating to their participation in the workforce, and face decisions about caring for their children, especially if a child is young. Care provided by grandparents is especially valued by Australian parents, with this care not only helping parents manage their work responsibilities but also providing opportunities for development of relationships across generations. According to the Australian Institute of Family Studies, 65 per cent of grandparents aged 40 to 69 years undertake caring duties at least once a week.¹¹
42. Moreover, given the stated policy imperative of attracting the best and brightest migrants, an attractive parent migration facility is essential. If there is no facility for the relocation of parents to join an established Australian family unit, or if this country is seen as one that does not value family or the role of parents, the most accomplished migrants may determine to migrate elsewhere with more attractive facilities for families.
43. Some applicants in the family stream are of working age and/or may have considerable assets. Often, they wish to bring their wealth to Australia or consider business and investment opportunities.

Is Australia maximising the benefits of independent unsponsored migrants in the migration program? How can the Independent stream be strengthened?

44. DHA can continue to impose the two-year restriction on accessing social security benefits. Further, DHA might consider analysing how many 189 visa holders find or

⁸ Organisation for Economic Co-operation and Development 'International Migration Outlook 2017' <<http://www.oecd.org/migration/international-migration-outlook-1999124x.htm>>.

⁹ Productivity Commission 'Inquiry Report Migrant Intake into Australia' Report No.77, 13 April 2016.

¹⁰ LIV/LCA Joint Submission to Department of Immigration and Border Protection *Introducing a temporary visa for parent's discussion paper*, September 2016, 3.

¹¹ Australian Institute of Family Studies 'The Modern Australian Family' (May 2016) <<https://aifs.gov.au/publications/modern-australian-family>>.

maintain employment in their nominated occupation. Previously statistical data was collected from visa holders, over a period, but this does not appear to be the case currently. It may be worth surveying granted 189 visa holders over a two to four year period after grant to be able to properly analyse the benefits, rather than base any changes on assumptions.

45. DHA could also consider providing further concessions to visa holders from New Zealand, to allow all such visa holders to gain access to the subclass 189 (New Zealand stream) visa, not restricting the visa to only those who arrived on or before 19 February 2016. This will be more likely to encourage New Zealand visa holders to work in Australia and contribute to the economy if they have certainty in accessing a permanent visa under the subclass 189 (New Zealand stream). It is submitted that the current 16 February 2016 cut-off date is restrictive and unnecessary.
46. DHA could also consider increasing the capacity of the distinguished talent visa subclass. This visa category has the capacity to attract the best and brightest from overseas and retain those persons in Australia on a range of visas who have demonstrated a significant benefit to the country. Adjustments to the program, such as expressions of interest or removing the need for an international reputation to national reputation, may assist to achieve this end. There would be the potential to develop positive stories regarding such migration to increase support for the migration program and contributions to the community by migrants.

Family Migration

How can we ensure family migration best enables Australians to reunite with overseas family members, while supporting the Australian community?

47. The economic and social benefit of family migration and in particular the resettlement outcomes, have been established through family migration and yet our current settings place little to no focus on it. The carer visa for example, has a significant waiting period yet provides the opportunity for an overseas relative to provide care to an Australian citizen or permanent resident.
48. Further, the rate of partner visa applications is continuing to increase. While there is disquiet at the perceived misuse, this is at the margins and the overwhelming majority of applications are genuine. This increase is due to growing trends of Australians studying and travelling overseas. The Overseas Arrivals and Departures statistics compiled by the Australian Bureau of Statistics¹² show the number of permanent and long-term departures increasing from 95,000 in 1987 to 495,000 in 2016-17. This trend is underscored by the increase in short-term departures of Australians from 1.6 million in 1987 to 10.2 million in 2016-17.
49. Australians spending a considerable period of time working, studying or travelling will encounter opportunities to form genuine, long-term relationships of the kind the government would see as acceptable relationships meeting the legal criteria.
50. These figures highlight a considerable tension in the overall planning framework. With the significant increase in processing times, it is not sustainable to allow the times to blow out much more than at present, unless the partner visa (subclass 820) were to be increased in duration.
51. It is submitted that currently, partner visa applications are taking too long to process. As not all Australians can take time off to travel overseas to be with their family, Australian

¹² Australian Bureau of Statistics, Catalogue 3401.0 - Overseas Arrivals and Departures, Australia.

partners may feel the need to leave their employment in Australia to visit their partner or family member overseas because they are unable to obtain a visa in Australia. Anecdotally, the Law Council understands from its members that this occurs not infrequently. This has adverse impacts on the Australian businesses relying on the Australian employee. The pressure placed on the interpersonal relationship between the partners is also significant. The overwhelming proportion of cases in the back-log highlights the need for the number of visa places for partners to be increased.

52. The Law Council suggests that, rather than varying the number of places available, partner visa categories could be removed from the migration program and be placed alongside the child visa program. This will allow the Government to better manage the other family stream pathways.
53. There needs to be better and faster processing of all family stream applications. Parent visas take too long to be finalised: a waiting period of 30 years under the non-contributory parent category is discouraging, and not all parents can afford the contributory categories. A three-year wait is similarly too long.

How can we best manage and plan for primary visa applicants as well as the family they bring with them on their visa? Should secondary applicants be counted separately from primary applicants?

54. In the family stream, it is neither necessary nor appropriate to question the skills or likely contribution to Australia of an applicant (primary or secondary). The eligibility for the visa arises because of the family relationship, and not on merit.
55. In other applications, secondary applicants should be counted separately. At present, the benefits of having secondary applicants are overlooked, as their skills are not assessed as part of the visa application process. Many skilled primary applicants have equally skilled dependents, and it is likely that such dependents will bring in just as much economic benefit as the primary applicant themselves, if not more. The children who are included in applications will probably provide more economic benefit in the longer-term. Most migrant children from skilled visa streams achieve strong academic results and aspire to pursue careers in specialised fields of study that contribute to the Australian economy. Similarly, migrant children from family streams have the family support and network to pursue successful careers.