



Law Council
OF AUSTRALIA

Policy Consultation Paper

Visa Simplification: Transforming Australia's Visa System

Department of Immigration and Border Protection

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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 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, 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 Migration Law Committee of the Federal Litigation and Dispute Resolution Section and the Law Institute of Victoria, Refugee Law Reform and Migration Law Committee in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to comment on the Department of Immigration and Border Protection's (**DIBP**) Policy Consultation Paper entitled *Visa Simplification: Transforming Australia's Visa System (Policy Consultation Paper)*.
2. The Law Council understands that the Policy Consultation Paper is a preliminary step in what is likely to be a lengthy and multistep process. As such the Law Council looks forward to the opportunity to make more substantive comments once further work has been undertaken by DIBP.
3. The Australian visa system must evolve in order to respond to growth in demand, increasing global competition, evolving technology, and a changing global migration landscape. It is complex, and difficult for applicants to navigate and for the DIBP to administer. The Law Council supports a modernisation of the system.
4. 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.
5. 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.
6. The Law Council understands that the DIBP is considering changes beyond what is covered in the Policy Consultation Paper, including the possibility of a complete overhaul of the *Migration Act 1958* (Cth) (**the Act**) and *Migration Regulations 1994* (Cth) (**the Regulations**) and movement away from using regulations to incorporate such changes into Policy. The Law Council has previously raised in numerous submissions concerns about the move towards instruments being used for substantive matters.¹
7. There is clearly a growing trend towards administrative decision making that is:
 - at the Minister's discretion (eg labour agreements and cancellation of visas); and/or
 - performed by the private sector (eg skills assessment decisions that do not align with the Department's).
8. It is the Law Council's view that the immigration legal system, as part of administrative law, should sit primarily in legislation and regulations, not in policy or in private decision-making bodies. Overuse of policy or overreliance on private decision-making bodies:
 - allows for inconsistent decisions due to differing interpretations of policy;
 - is susceptible to rapid changes in policy which can be done without forewarning or proper consultation within the industry which can have great economic and social impacts; and

¹ Law Council of Australia, Submission no 464 to Senate Legal and Constitutional Affairs Legislation Committee, parliament of Australia, *Inquiry into the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017*, 21 July 2017 <<http://www.aph.gov.au/DocumentStore.ashx?id=df243e4e-e496-421a-9f96-99186db07909&subId=514545>>.

- can lead to unjust decisions if excessive power is provided to decisions makers without the opportunity for review.
9. It is important that immigration decisions be subject to scrutiny both through merits review and judicial review. Rights need to be protected and the Law Council does not support a move to a system where opportunity for scrutiny is limited.
 10. The Law Council supports the DIBP statement in the Policy Consultation Paper that the visa system needs remodelling and simplification to improve responsiveness to Australia's economic, social and security interests but only if it retains a clear legislative basis with avenues for review.
 11. The Law Council notes the work of the Government's Labour Exploitation Working Group (LEWG),² chaired by the President of the Law Council, Fiona McLeod SC, and recommends that the DIBP ensure the LEWG's recommendations regarding Australia's visa system are considered in the context of this review.

Simplifying Visa Arrangements

What would a system with ten visas look like?

12. The current visa system, comprised of 99 individual visa types or subclasses, is complex for applicants to navigate and for the DIBP and other decision-makers to administer. The present number of visas available to applicants, however, is not capricious or arbitrary, and has evolved to respond to the various circumstances that may be relevant to each applicant, and to ensure that different needs of the Australian community are met.
13. Each subclass has been introduced for a particular purpose. The Law Council does not consider any of these subclasses to be manifestly unnecessary, but as contributing to fulfilment of migration outcomes sought by this country. The Law Council is concerned, that a reduction in visa categories, if it is not executed after extensive research and analysis, may adversely impact the Australian community and our migration program.
14. The present migration system is already essentially made up of 'categories' and to simply adjust these categories would not adequately transform the system.
15. The DIBP has stated that:

"Broader visas based clearly around intent, such as visit, study and work, would enable prospective travellers to better understand which visa to apply for, and enable faster processing of applications."
16. The Committee suggests that the proposed intention-based structure with the categories – visit, study and work – is insufficient. This structure does not allow for family or humanitarian entrants, nor for a vast number of other legitimate and necessary purposes that visa applicants may have. Attempting to classify applicants by intention quickly becomes unwieldy and inapt. For example, 'family' is not an intention, and within that there are numerous types of relationship – carer, partner, child, remaining relative, parent – that would need to be contemplated.

² The Labour Exploitation Working Group was established by the Australian Government's National Roundtable on Human Trafficking and Slavery in August 2016 to consider Australia's response to criminal forms of labour exploitation and provide a report and recommendations to the National Roundtable.

17. If there are fewer 'head' categories, an applicant might be better able to find the correct group of visas he or she may be eligible for, but is no more likely to be able to identify the requirements for that visa if numerous streams and variances remain.
18. It is not clear why the DIBP anticipates faster processing of applications would result from an intention-based system. Reasons for delays in processing of application often relate to the volume of applications, security and character checking, requests by the DIBP for more information from applicants, and the reduction in staffing and resources from frontline visa processing offices. It is unclear how any of these issues would be resolved by the reduction of categories of visa subclasses. Arguably, the experience of practitioners has been that since the 1980s, the greater the departmental discretion within the visa process, the greater the processing times and uncertainty of outcome.
19. The Law Council cautions the DIBP against simply moving the subclasses into streams within visa categories. A redesign of the system that sees visa categories reimagined as streams will likely not simplify the system. Rather, it would likely create needless expense and increased complexity.
20. In the experience of practitioners in the area, visa subclasses that include multiple streams often cause confusion and unnecessary visa refusals due to applicants mistakenly applying under the incorrect stream. For example, the subclass 485 which includes the Graduate Stream and Post Study Work Stream, with slightly alternative criteria, often causes confusion for applicants and in a number of cases has caused applicants to leave Australia after receiving a refusal and being affected by s 48 of the Act which causes them to be unable to apply for another 485 visa onshore. Similarly, the Visitor Visa subclass 600 which includes a number of streams including Business Visitor, Family Sponsored, Tourist, Frequent Traveller and other streams can cause confusion to potential applicants and result in applicants applying under the incorrect stream. In some cases, the applicant is encouraged to apply under the correct stream. The Law Council suggests that efficiency could be gained by avoiding strictly categorised streams, or by allowing applicants to change streams during the processing of an application if necessary.
21. A historical perspective shows the continual move away from a smaller number of classes within numerous subclasses in the 1990's to mid-2013 where very few classes of visa had multiple subclasses. Since mid-2013 the new trend has been the growth of 'streams' within the one visa subclass which, as pointed out above, has itself led to confusion amongst consumers.
22. While a more streamlined system is desirable, it is imperative to ensure significant analysis is undertaken to ensure that in minimising the number of visas, deserving visa applicants are not precluded from obtaining visas to come to Australia. Any simplification of the visa system should pay significant attention to any groups that may be adversely affected.
23. The Law Council cautions the DIBP against expanding its Expression of Interest (**EOI**) system. The current EOI system, which plays a pivotal role in the General Skilled Migration program, has created significant uncertainty for highly skilled applicants, who would otherwise be eligible for a visa, but are discouraged from submitting an EOI at the outset, because of the uncertainty and delay of receiving an invitation to apply for the visa. To ensure the visa system is more responsive to the economic needs of Australia, an EOI based system should be avoided in favour of application-based systems which provide more certainty to highly skilled applicants when considering Australia as a destination for migration.

Alternative possibilities

24. The Law Council submits that extensive and expert research is required before determining an appropriate restructure. The change will be a large one, and it is imperative that it is done the best way possible. The Law Council does not purport to have expertise in designing such a system, but its members' extensive pool of knowledge and experience means it is well-placed to offer feedback on proposals and to anticipate strengths and weaknesses in a proposed system. The Law Council offers its expertise in this capacity in the future.
25. In a reimagining of the system, the Law Council suggests a theme-based structure. The Law Council suggests the following visa themes or categories:
- bridging;
 - family;
 - skilled
 - employment;
 - business, entrepreneur and investor;
 - student;
 - visitor;
 - resident return;
 - refugee and humanitarian; and
 - special purpose, encompassing criminal justice and treaty-based visas.
26. This reflects the present structure in a tighter format. The visas should be application-based, not EOI-based, to improve clarity and efficiency.
27. Reflecting the intention by DIBP to more carefully regulate the duration of a person's stay, within each theme, the Law Council suggests that there may be different visa durations, for example:
- 90 days and under;
 - Four years and under, and
 - Permanent residence.
28. Risk matrices could be created on these, and other, bases, including potential benefit to the community involved in grant.
29. The Department could colour-code these categories for increased usability for applicants.

What factors should we consider when simplifying the visa system?

30. There are a range of factors which should be considered in the pursuit of simplifying the visa system. The Law Council identifies the following factors:
- **Cost:** There would undoubtedly be very significant cost to the taxpayer in overhauling the visa system in Australia. The DIBP should ensure that costs are justified and in line with the objectives of creating a more efficient and navigable system. A conversion to a stream-based system would likely not deliver such an outcome.

- **Uncertainty and error:** A new visa system may result in an increase in people applying under the wrong stream or category of visa. The validity and eligibility requirements for each visa category need to be clearer than they presently are.
- **Transparency:** The DIBP should ensure that the matrix for visa applications and the approval and rejection processes are transparent to ensure that applicants understand their options, their application and their visa.
- **Discretion of officers:** The Law Council is concerned that if there is a lack of clarity in the legislation and increased discretion for decision-makers, there will be excessive room for erroneous decision-making. Decision-makers must be highly trained and accountable to minimize litigation and longer-term costs.
- **Accountability:** While decision-making may in some instances be automated for certain types of visas, there must be accountability where incorrect decisions are made. The DIBP should be contactable and accessible by users of the programs. Review rights should also be expanded to applicants offshore in certain circumstances.
- **Uniformity:** The implementation of mechanisms that streamline processing times and encourage uniform decision-making is key to a simplified visa system. There is currently immense uncertainty for visa applicants arising from inefficiency, inconsistency and opacity within the system. There are many instances where different documents are requested for similar applications. This could be improved by ensuring uniformity across different posts and processing areas. This would undoubtedly make immigration to Australia more attractive. However, the Department should ensure it does not unfairly preclude certain groups from migrating to Australia.
- **Streamlining:** Using innovative technology and moving towards auto-grants may significantly reduce processing times. However, automation of visa processing increases the risk of the manipulation of data to achieve unjustified outcomes. There must be mechanisms in place to ensure the integrity of the system is not at risk.
- **Future projection and planning:** Applicants should be able to easily view the possible transitions they can make into other visas, should they be eligible.
- **Integrity:** The DIBP should consider how integrity will be maintained should a new visa system be introduced in Australia. If services are increasingly outsourced, the DIBP must ensure the integrity and accountability of partners to guarantee the Australian public retains trust in the system.
- **Expressions of Interest:** If the DIBP decides to retain a EOI system for certain visas, such as skilled and business visas, it is important that the system is more transparent in its features. This will provide greater certainty and in turn make Australia more attractive to the appropriate applicants.

If a certain occupation is no longer in demand and is subsequently removed from a skills shortage list, there must be transitional arrangements in place to ensure that applicants who have received invitations to apply for the visa are still given the opportunity to continue with their visa application lodgement, and have the certainty that their application will be processed.

It would also be beneficial for estimated invitation times to be published so that applicants who have lodged an expression of interest can plan and manage their EOIs and visa status given an EOI does not entitle a person to a bridging visa.

- **Bridging visa provisions:** Bridging visas should attach to sponsorship and nomination applications and to EOIs, if these are required to be submitted and

approved prior to visa application. While rationalisation of the bridging visa framework and simplification is welcome, immediate steps can be taken to amend the bridging visa provisions in order to ameliorate their inflexibility and decrease DIBP resources spent in relation to receipting and processing such applications.

For example, the Bridging Visa A (BVA) regulations should be amended to allow for the grant of a BVA with a multiple re-entry travel facility (possibly for an additional fee commensurate with the current Bridging Visa B (BVB) application fee if an applicant requested the grant of such a re-entry travel facility) thereby removing the need for such BVA holders to apply for and secure a BVB prior to travel.

As processing times become increasingly protracted and global mobility increases, BVA holders increasingly seek to travel offshore until such time as their substantive visa application is finally determined. In many cases, the period between initial BVA grant and final determination of a substantive visa application may be as long as three years or more. This reform would immediately remove the DIBP processing burden in relation to initial and potentially repeat BVB applications, many of which require urgent attention, as well as remove the potential visa processing pressures arising in cases where applicants find themselves unable to re-enter Australia in circumstances as they have travelled offshore without having secured a BVB for re-entry. The reform would also overcome the processing burden in relation to securing another appropriate visa for re-entry and the reinstatement of a further BVA onshore after re-entry.

- **Review of Decision Making:** This should remain an integral part of any future system as it is vital to ensure consistency in decision making, procedural fairness and transparency and to also encourage persons to temporarily reside in Australia, migrate to Australia and for businesses to invest in Australia.
- **Transitional Arrangements:** Previous migration reforms allowed a long lead time for changes to take effect, which ensured confidence in the Australian migration system and legal system. It also allows the Department time to fine-tune the system to avoid errors. Transitional arrangements provide certainty for current applicants affected by the changes and allows Australian businesses and industries to plan and prepare for new reforms. Where reforms are announced and take effect almost immediately, with no transitional arrangements in place, this impacts adversely on Australian businesses and industries that rely on a migrant workforce to fulfil skills shortages. It also increases the risk of litigation.
- **Time of application requirements:** Fewer mandatory 'time of application' requirements would simplify the application process for many migrants. For example, the subclass 485 visa requires visa applications to be accompanied with evidence of English language, character tests, overseas health cover and in some cases an application for skills assessment. In our experience, this extremely strictly enforced time of application criteria results in a large number of unnecessary refusals for applicants who have applied without the assistance of a migration agent. For example, an applicant may upload evidence of an incorrectly issued Australian Federal Police Clearance at the time of lodging their visa only to have their application refused, with no chance of remittal at the Administrative Appeals Tribunals in the future.

The Law Council understands the requirement for applicant to provide all necessary documents to the DIBP for efficient processing of visa applications. However, the Law Council submits that this type of time of application criteria is

unnecessarily burdensome for some applicants and results in the loss of potentially desirable skilled applicants in Australia. The Committee recommends the DIBP move away from stringent time of application criteria.

31. In addition to the factors listed above, the Law Council maintains that the DIBP must ensure that the rule of law and Australia's obligations under the international law are respected. Furthermore, all processes should be sufficiently clear and transparent to enable an unrepresented applicant to understand their situation. Migration agents and lawyers also require clarity and consistency to properly advise applicants. Ultimately, this will immeasurably reduce costs and improve efficiency.

What should be the key characteristics of a simplified and flexible visa system?

32. Any new system should be world-leading and nation-building.

33. The key characteristics of a simplified and flexible system are:

- efficient and fair processes and decision-making;
- accountable and well-trained decision-makers;
- clarity, certainty and predictability;
- integrity, including with outsourcing;
- limited costs and delays, and
- processes that foster respect and confidence of users, and respect those users.

Temporary and Permanent Residence

What distinctions should apply to temporary and permanent visas?

34. Without knowing why such a matrix is necessary or how it would work in practice, we request the opportunity to comment once more information is available. At this stage, the Law Council is hesitant to recommend such a matrix that is based on determinative factors that are set out in policy and are subjective and subject to potential discrimination.

35. The Law Council is not also necessarily supportive of the concept of provisional visas as a step forward and notes that administratively they are burdensome on decision makers as they require a two-stage processing arrangement. They also allow for less opportunities for persons to integrate and do not necessarily attract the best and the brightest to Australia where other countries do not have such requirements.

What requirements should underpin a migrant's eligibility for permanent residence?

36. There are difficulties in determining what requirements should underpin a migrant's eligibility for permanent residence. It will depend on the type of visa category. For skilled and employment related visas, consideration should be placed on the occupational requirements of businesses and industries, as well as the contribution the visa applicant can make to the community. Highly skilled professionals, including medical professionals, international academics, and individuals with distinguished talent, entrepreneurial skills and business acumen, will bring significant benefit to Australia, and should be eligible for direct permanent residence.

37. Similarly, a person's need, if no character concerns arise, should be a significant factor.
38. Where the basis on which a person applies for a visa is immovable – for example, a family relationship – there is no basis for denying permanent residence.

Should a prospective migrant spend a period of time in Australia before becoming eligible for permanent residence? What factors should be considered?

39. The Law Council is of the view that not all prospective migrants should spend a period of time in Australia before becoming eligible for permanent residence and that it would be unduly harsh to require family, refugee and humanitarian visa applicants to undergo a period of temporary residence before being granted permanent residency. The Law Council is of the view that such a requirement would serve no discernible purpose. Further, such a process could lead to many prospective applicants who are likely to make a significant contribution to the community rejecting Australia as a visa option, particularly where long term security for spouses and children is concerned.

Skilled Migrants

40. The Law Council suggests that forcing all migrants to complete a period of temporary residence will discourage highly educated and skilled migrants from moving to Australia with their families. Australia should encourage further stability for those seeking permanent residency to benefit the individual, his or her family, the community, and the industry in which the migrant works. We submit that the current model of direct permanent residency for various visa subclasses is working well and we see no reason to change this model.
41. Skilled migrants will inevitably review migration programs across the globe, opting for those with the most advantageous opportunities for themselves and their families. If they are required to undergo a period of temporary residency before being able to settle as permanent residents, skilled migrants may choose not to travel to Australia which may deprive Australia of in-demand and highly skilled individuals who would benefit society immensely.
42. In his book, *'Not Quite Australian: How Temporary Migration is Changing the Nation'*, Peter Mares states that:
- '[d]espite all rules and pronouncements that supposedly guarantee equal treatment in the workplace, temporary migrants do not stand on the same firm legal ground as citizens and permanent residents, and are consequently at a greater risk of exploitation and abuse'.³*
43. Migrants are aware of these vulnerabilities and are less likely to consider Australia an attractive place to move if required to undergo a period of temporary residence prior to permanent residence.
44. The addition of a temporary stage of visa for some categories is, at present, unjustified by fact. For example, the DIBP may be concerned about welfare access, but denying capable and eligible applicants permanent residence would need to be supported by data regarding skilled applicants accessing welfare at early stages of their residency.

³ Peter Mares, *Not Quite Australian: How Temporary Migration Is Changing the Nation* (Text Publishing, 2016) 6.

Refugee and Humanitarian visas

45. With respect to refugee and humanitarian visas, the Law Council submits that applicants of these categories should not be required to obtain temporary visas prior to being granted a permanent visa. Individuals within these cohorts require certainty of their safety and well-being that would be greatly undermined by requiring them to obtain temporary residence first, especially if it may remain unknown whether they will be able to obtain permanent residence in the future.

46. An example of the negative implications that temporary residence can have on refugees is shown through the recent introduction of the Temporary Protection Visa (TPV) and Safe Haven Enterprise Visa (SHEV) programs. We refer to the [Final Report](#) of the Select Committee on Strengthening Multiculturalism (the **Select Committee**) published in August 2017 entitled *Ways of protecting and strengthening Australia's multiculturalism and social inclusion*. The Select Committee heard evidence that:

... people on [temporary protection visas] will never be able to truly call Australia home. The temporary protection regime means not only that a person must reapply every few years and be found again to be a refugee but, that they may be returned to danger. That also means that they are unable to access settlement supports that other refugees can access. People who live here for decades, or even their entire lives, do not have access to the same supports and opportunities as other residents and citizens.⁴

47. In its evidence to the Select Committee's inquiry, the Australian Psychological Society contended that the impacts of this are twofold:

Not only do incoming people not feel valued and recognised when they do not get this help but the broader community also gets the message that incoming people do not deserve support.⁵

48. Refugee and humanitarian entrants to Australia require the settlement benefits and stability that is linked with permanent residency. This includes:

- various social security and *Medicare* entitlements;
- access to the *Higher Education Loans Program (HELP)* for students;
- the ability to sponsor family members under the family migration humanitarian programs;
- the ability to plan their lives by purchasing property or signing long-term leases; and
- improved chances of obtaining meaningful employment when a resident can evidence their permanent status in Australia, rather than a temporary visa.

49. In 2017, the then Special Rapporteur on the Human Rights of Migrants, François Crépeau, criticised Australia's temporary protection visa program, stating that 'the unbearable uncertainty of "permanent temporary" situations should be avoided at all costs'.⁶ He goes on to state that:

⁴ Evidence to Select Committee on Strengthening Multiculturalism, Parliament of Australia, Melbourne, 27 June 2017, 2 (Mr Asher Hirsch, Senior Policy Officer, Refugee Council of Australia).

⁵ Evidence to Select Committee on Strengthening Multiculturalism, Parliament of Australia, Melbourne, 27 June 2017, 57 (Professor Ann Sanson, Fellow, Australian Psychological Society).

⁶ François Crépeau, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, UN Doc A/HRC/35/25/Add.3 (24 April 2017) 17 <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/35/25/Add.3&Lang=E>> .

... while the Special Rapporteur welcomes the fact that temporary protection visa and safe haven enterprise visas provide access to work rights and a range of key services in the Australian economy, these visas do not offer a long-term solution for asylum seekers. In addition, applications for temporary protection visas need to be lodged on a regular basis and the uncertainty contributes to anxiety and mental distress. This two-tier system, with differentiations in the rights enjoyed by those on full protection visas and those on temporary protection visas, is discriminatory.⁷

50. The Law Council opposes the introduction of a compulsory provisional period for all refugee and humanitarian migrants.

New Zealand Citizens

51. An example of the negative effects of temporary residence is illustrated by the subclass 444 cohort of New Zealand citizens residing in Australia on these temporary visas.
52. New Zealand citizens who hold a subclass 444 visa are entitled to an indefinite period of residency in Australia and often remain on the subclass 444 visa for their lifetime. Peter Mares has stated that the predicament faced by subclass 444 holders has become a 'source of growing anger, frustration and resentment'.⁸ Mares sites the lack of access to social and welfare services for as a source of social disadvantage and attributes to large rates of homelessness within this cohort.⁹
53. As has been seen this with cohort of subclass 444 visa holders, decisions made on these issues can well lead to serious societal challenges years into the future that future Departments and Governments then need to address.

National Interest and Security

54. The Policy Consultation Paper cites the need for Australia's visa system to be 'robust in protecting Australia from those who have no legitimate purpose or who could even wish to do us harm'. The Law Council does not believe that the introduction of a mandatory period of temporary or provisional residency in Australia prior to obtaining permanent residency across all visa subclass will necessarily support this aim. The DIBP continues to have broad cancellation powers under ss 109, 116, 137Q and 501 of the Act in regard to permanent visa holders and therefore can continue to protect the integrity of the visa process if required through the use of these cancellation powers. The Law Council supports the continuation of an element of discretion in the use of such cancellation powers as there can be other considerations which may be of importance to justify a visa not being cancelled.
55. The Law Council suggests that 'front-end' testing for character and health criteria at the initial stages of a migrant's pathway to permanent residency may be an alternative way of vetting for national security risks prior to the migrant's arrival in Australia.

⁷ Ibid 18.

⁸ Mares, above n 3, 130.

⁹ Ibid.

Provisional Period – conditions and criteria for permanent residency

56. The Policy Paper is silent on three issues of interest to the Law Council;

- the proposed period of the provisional visa;
- the conditions and entitlements that will be granted to provisional visa holders and their dependent family members; and
- the criteria that the provisional visa holders will be required to meet in order to transition to the permanent visa (and the consequences if these criteria are not met).

57. The Law Council welcomes the opportunity to provide further feedback once the DIBP has further progressed this concept as highlighted above and noting our concerns raised as to whether such provisional period is necessary in all or many cases. However, the Law Council offers the following suggestions in relation to these issues:

Period of Provisional Visa

58. In the event that a provisional visa is introduced, the Law Council proposes a short period of either one or two years at maximum.

59. In the event that the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill is passed, prospective Australian Citizens will be required to demonstrate four years of permanent residency before being eligible to apply. Imposing a mandatory provisional period of residency prior to permanent residency will have the effect of creating even longer waiting periods for Australian Citizenship. The Law Council opposes the introduction of longer waiting periods for Australian Citizenship which may act as a deterrent for highly skilled and valuable migrants.

Proposed Provisional Visa conditions and entitlements

60. The conditions and entitlements of a provisional visa should be no less favourable than those attached to a permanent visa. This should include:

- full work and study rights;
- entitlement to Medicare;
- exemption from international student school and university fees; and
- the ability to sponsor family members under the visitor visa (family sponsored stream) and family migration program.

Criteria for transition from Provisional to Permanent

61. At the DIBP Round Table of Visa Simplification held in Melbourne on 8 September 2017, representatives from the DIBP proposed the idea of an ‘integration requirement’ which would require provisional visa holders to demonstrate some form of ‘integration’ with the Australian community when applying for permanent residency. Examples such as demonstrating ongoing paid employment or voluntary work were provided. The Law Council opposes such a criterion being introduced.

62. The Law Council reiterates similar concerns expressed in its [submission](#) in response to the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017, in regard to the introduction of an

integration requirements into the Australian citizenship test. 'Integration' requirements may preclude single parents, those with mental or physical health issues, the elderly and those with refugee or humanitarian backgrounds from permanent residency. The whole of the applicant's circumstances must be taken into account when assessing integration.

63. The Law Council suggests that it is likely that the introduction of a provisional visa prior to permanent residency may actually hinder integration by migrants as, in the experience of many Law Council Migration Law Committee members, many migrants holding temporary or provisional visas cite their temporary status as a reason for being denied employment or loans. It also causes them to delay making life decisions such as buying a home, opening a business or starting a family due to the uncertainty of their visa situation.
64. The Law Council recommends that there be no criteria for dependent provisional visa holders to remain as members of the family unit of the primary provisional visa holder. In the event that the DIBP does introduce requirements for dependent applicants to remain members of the family unit of the primary visa holder as criteria for the permanent visa, the Law Council recommends the inclusion of the 'family violence exceptions' as set out in regulations 100.221(4) and 801.221(6) to ensure protection of victims of family violence.

Modernising Australia's Visa Arrangements

What role does the Visa system play in ensuring Australia remains attractive to the best and brightest Temporary and Permanent migrants?

65. The visa system plays a vital role in ensuring Australia remains attractive to the best and brightest temporary and permanent migrants. Such applicants will not be interested in an uncertain, complex system with protracted processing times. Ensuring that the process of obtaining a visa is simple, efficient and transparent are necessary elements of a successful visa system. These are hallmarks of an effective, high-quality system.
66. Particularly where proposed changes to citizenship legislation create significant lead times and uncertainty, increasing the hurdles to deserving and eligible applicants obtaining permanent residence will actively deter applicants of the calibre Australia seeks.
67. Eligibility requirements should be clear and applied consistently. Decision-makers should be highly skilled and accountable to promote trust in the system. Applicants will then feel confident to pursue applications and to invest in those applications.
68. It is vital that the visa system provides opportunities for individuals from a range of different backgrounds to migrate to Australia. It would be inappropriate for a new system to focus entirely on the 'best and brightest'. A person's education or employment background does not define their ability to positively contribute to the Australian community. As such, there needs to be a variety of migration options that provide for consideration of the needs of different groups and the wishes of the Australian community: for example, to facilitate family reunion and caring roles, and to protect the vulnerable.
69. Mechanisms need to be in place to ensure that errors arising from the use of technology are minimized, and that redress is available where error does occur.

Do you think an efficient Visa system that is simple to understand and quickly assesses risk will make Australia a more attractive destination? Why?

70. A modern migration program with efficient visa systems and integrity would assist in making Australia a more attractive destination.

To what extent should the Government collect biometrics from Visa applicants?

71. The Law Council understands that identity assessment is an important part of risk management. This consideration must be balanced against the individual's right to privacy. The rationale for biometric collection must be made clear, and the extent of use of any biometrics collected must be clearly defined to protect individuals. It should be limited to assessing identity, and available to law enforcement agencies only for the purposes of criminal investigation.

72. Where there is an identity or security concern or risk, biometrics may be an appropriate solution, but unless it is foreseen that biometrics will be used widely to enhance entry processes, it should not necessarily be a blanket policy.

Conclusion

73. Members of the Law Council of Australia have extensive experience under various legislative regimes. Our committees are comprised of leading practitioners, many of whom are accredited specialists in immigration law.

74. The reform proposed is of great importance and significance, and it is crucial that it be done well. The Law Council, given the expertise available to it, offers to engage with the Department in formulating and implementing changes to the system on a confidential basis.

