



Law Council
OF AUSTRALIA

Office of the President

25 October 2022

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Auditor-General
Australian National Audit Office
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By file upload: <https://www.anao.gov.au/work/performance-audit/management-migration-to-australia-family-reunion-and-partner-related-visas>

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Dear Mr Hehir

Law Council of Australia submission—Performance audit - Management of Migration to Australia—Family Reunion and Partner Related Visas

The Law Council of Australia (**Law Council**) is grateful for the opportunity to make a submission to the Australian National Audit Office in relation to its performance audit of the Department of Home Affairs, 'Management of Migration to Australia—Family Reunion and Partner Related Visas'.

Please find the Law Council submission attached.

The Law Council of Australia thanks the Law Institute of Victoria, the Law Society of New South Wales, the Queensland Law Society, and the Migration Law Committee of its Federal Litigation and Dispute Resolution Section for their input into this submission.

If you would like to discuss this matter further, please contact Mr Matthew Wood, Principal Policy Lawyer, on 02 6246 3755 or at matthew.wood@lawcouncil.asn.au.

Yours sincerely

Mr Tass Liveris
President



Law Council
OF AUSTRALIA

Management of Migration to Australia—Family Reunion and Partner Related Visas

Australian National Audit Office

25 October 2022

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes 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 internationally, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933 and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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 Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgements

The Law Council of Australia (**Law Council**) thanks the Law Institute of Victoria (**LIV**), the Law Society of New South Wales, the Queensland Law Society (**QLS**) and the Migration Law Committee of its Federal Litigation and Dispute Resolution Section for their input into this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to make a submission to the Australian National Audit Office (**ANAO**) performance audit of the Department of Home Affairs (**Department**): ‘Management of Migration to Australia—Family Reunion and Partner Related Visas’.
2. In this audit, ANAO proposes to examine the following high-level criteria:¹
 - Are partner and family reunion components of the Migration Program effectively planned?
 - Are visa lodgement and assessment processes effectively managed?
 - Are visa decisions and case load processes effectively managed?
3. The Law Council is aware that:²
 - performance audits involve ‘the independent and objective assessment of the administration of an entity or body’s programs, policies, projects or activities’; and
 - the ANAO ‘focuses on assessing the efficient and effective implementation of government programs, including the achievement of their intended benefits’, rather than commenting on the merits of Government policy.
4. In presenting its views through this submission, the Law Council is informed by the feedback of practitioners who have experience in interacting with Departmental staff and processes, and have insights into the way that these processes affect their clients—persons applying for a family visa in Australia.
5. The planning and management of family reunion and partner-related visas are determined by actions of both the Executive (the Minister and the Australian Government) and the Department. In assessing the performance of the Department, care should be taken in distinguishing between matters that are within or outside the Department’s control.
6. As demonstrated in this submission, the following Executive actions all have a considerable impact on whether a person lodges a family or partner visa application and speed with which their application is processed:
 - Ministerial determinations that set caps on the number of some family visa classes granted in a financial year;
 - Ministerial directions that set the processing priorities to be applied to different classes and types of family and partner visas;
 - the making of regulations that set visa application charges; and
 - Migration Program planning levels, which affect Departmental resourcing.

¹ ANAO, ‘Management of Migration to Australia — Family Reunion and Partner Related Visas’ (webpage, accessed 24 October 2022) <https://www.anao.gov.au/work/performance-audit/management-migration-to-australia-family-reunion-and-partner-related-visas>.

² Ibid.

7. The matters within the Department's control include:
 - clear and transparent communications with visa applicants—this can ensure information is provided efficiently and can help mitigate the anxiety of visa applicants experiencing long delays;
 - the efficient receipting of applications (to determine validity) and handling of evidence provided by applicants during the course of visa processing; and
 - subject to the processing directions, prioritising the processing of visa applications by vulnerable persons.

Are partner and family reunion components of the Migration Program effectively planned?

What is the Family Migration Program?

8. To assist to frame this submission, it is useful to set out what is understood by the 'partner and family reunion components of the Migration Program' (**Family Migration Program**).
9. The Law Council's submission focuses on the aspects of the Family Migration Program that provide for permanent residency. It adopts the following description, extracted from the Senate Legal and Constitutional Affairs References Committee report (**Senate Committee Report**) of its inquiry 'The efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions' (**Family visa processing inquiry**). The Law Council considers that this description remains accurate (footnotes removed):³

Australia's Family Migration Program seeks 'to facilitate the reunification of family members of Australian citizens, permanent residents, and eligible New Zealand citizens'. As of December 2021, the permanent Family Migration Program comprised four categories:

- *the Partner category, which allows Australians to sponsor their spouse, de facto partner, or prospective partner to live in Australia;*
 - *Parent category, consisting of Non-Contributory and Contributory Parent visas, allowing for parents to stay in Australia with their Australian sponsor children;*
 - *the Other Family category, which allows family members to sponsor carers, remaining relatives, aged dependent relatives or orphan relatives to live with them in Australia; and*
 - *the Child category, which allows parents to sponsor their dependent or adopted child to live with them in Australia.*
10. The Law Council agrees with the Senate Committee Report that family reunion is an essential component of a successful visa program.⁴ That report records objectives of the family reunion program include easing and reducing the costs of settlement,

³ Senate Legal and Constitutional Affairs References Committee, 'The efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions' (Final Report), March 2022 [2.10].

⁴ Ibid [6.5].

magnifying social, cultural, and economic contributions of migrants, and increasing the likelihood that primary visa applicants will remain in Australia.⁵

11. As a general point, the Family Migration Program should be managed in a manner that recognises and gives full effect to the understanding that the family is the natural and fundamental unit of society and should be respected and protected by the State.⁶
12. For completeness, it is also worth noting that family reunion can also be given effect through the humanitarian visa program. For example, one of the alternative bases⁷ through which an applicant may satisfy time-of-application criteria for a visa in the Humanitarian Program is that relevantly:⁸
 - the applicant's entry to Australia has been proposed by an Australian citizen or an Australian permanent resident (the **proposer**) who is, or has been, the holder of a humanitarian visa (for example, because the proposer was found to be subject to persecution⁹ or substantial discrimination, amounting to gross violation of human rights,¹⁰ in their home country); and
 - the applicant was (when the proposer was granted that visa) and remains a member of the immediate family of the proposer.¹¹
13. However, this submission focusses primarily on the Family Migration Program, as set out in [9].

Planning the Family Migration Program

Matters within the control of the Minister and Australian Government (the Executive)

Statutory rules

14. Section 47 of the *Migration Act 1958* (Cth) (**Migration Act**) obliges the Minister to consider a valid application for a visa until withdrawn, granted or refused, or prevented by other provisions of the Act not relevant for present purposes. However, subsection 51(1) permits the Minister to consider and dispose of visa applications for visas in such order as he or she considers appropriate. Subsection 52(2) clarifies that 'the fact that an application has not yet been considered or disposed of although an application that was made later has been considered or disposed of does not mean that the consideration or disposal of the earlier application is unreasonably delayed'.
15. The reference to 'unreasonably delay' would appear to be a nod to the administrative law obligation to make a mandatory decision without reasonable delay,¹² for which an order of mandamus (compelling the making of the decision) may be made by a court.

⁵ Ibid.

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23(1).

⁷ Paragraphs 200.211(1)(b), 201.211(1)(b) and 202.211(1)(b) of Schedule 2 to the *Migration Regulations 1994* (Cth).

⁸ Ibid subclauses 200.211(2), 201.211(2) and 202.211(2) of Schedule 2

⁹ Ibid paragraphs 200.211(1)(a) and 201.211(1)(a) of Schedule 2

¹⁰ Ibid paragraph 202.211(1)(a) of Schedule 2.

¹¹ Ibid paragraphs 200.211(2)(b) and (c), 201.211(2)(b) and (c) and 202.211(2)(b) and (c) of Schedule 2.

¹² *AFX17 v Minister for Home Affairs* [2020] FCA 807 [31]-[32], [44]-[46] and [59]-[60] (per Flick J).

16. The Explanatory Memorandum for the bill which introduced section 51 into the Migration Act,¹³ states (emphasis added):¹⁴

*This section expressly allows the Minister this flexibility and **makes it clear that there is no unreasonable delay, and hence no breach of law**, where an application has not yet been considered or disposed of even though an application made later has been.*

17. Aside from the underlying flexibility provided by section 51, the Minister has two primary means by which they can manage the processing of applications made to them for the grant of a visa: the capping power and the direction power. Both have been exercised in the planning of the processing of partner and family reunion visas.

Capping power

18. Section 85 of the Migration Act permits the Minister, by legislative instrument, to determine the maximum number of visas of a specified class or classes (**cap**) in a specified financial year. Once that cap is reached, no more visas of that class may be granted in a year, unless the visa is a partner or child visa.¹⁵ That is, put another way, the number of partner or child visa classes cannot be constrained by the capping power.
19. If a capping determination has been made, section 91 provides that the Minister may process visas within the specified class in any such order as he or she considers appropriate.¹⁶
20. The capping power is currently used to impose processing limits on the contributory parent visa, parent visa, and other family visa classes.
21. Under the instrument setting caps in these classes, which applied to the 2021–22 financial year:¹⁷
- a maximum of 3,600 Contributory Parent visas may be granted;
 - a maximum of 900 Parent visas may be granted; and
 - a maximum of 500 Other Family visas (within which are the Aged Dependent Relative, Remaining Relative and Carer subclasses) may be granted.¹⁸
22. The Parent visas for the 2022–23 financial year are capped at 6,000 and Other Family visas capped at 500.¹⁹

¹³ It was inserted into the Migration Act as section 26S – see the *Migration Reform Act 1992* (Cth).

¹⁴ Explanatory Memorandum, Migration Reform Bill 1992 (Cth) [50] on page 22.

¹⁵ Section 86 of the Migration Act.

¹⁶ *Ibid* section 91.

¹⁷ *Migration (Granting of contributory parent visas, parent visas and other family visas in the 2021/2022 financial year) Instrument (LIN 22/006) 2022* (Cth) – an instrument does not appear to have yet been made for the 2022-2023 financial year.

¹⁸ Subclauses 1123A(4) and 1123B(4) of Schedule 1 to the *Migration Regulations 1994* (Cth).

¹⁹ The Hon Alex Hawke MP, Former Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, '2022-23 Budget supports skilled migration to drive a stronger future' (media release, 29 March 2022), <https://minister.homeaffairs.gov.au/AlexHawke/Pages/2022-23-budget-release.aspx>.

Direction power

23. Subsection 499(1) of the Migration Act permits the Minister to give a written direction (**Ministerial direction**) to a person or body having functions or powers under this Act if the direction is about:

- (a) the performance of those functions; or
- (b) the exercise of those powers.

24. A Ministerial direction is binding on the person or body to whom it is applied.²⁰

25. The Minister has set the order for considering and disposing of Family visa applications in two Ministerial directions: Direction 80 and Direction 83. Under these directions, the Minister has given directions to Departmental delegates regarding the order in which the Minister considers 'appropriate' for the purposes of section 51 and 91 of the Migration Act, respectively.

26. Direction No. 80 includes the following provision clarifying the operation of these Ministerial directions:²¹

For the purpose of processing Family visa applications, the two Directions are intended to work together, with Direction 80 setting out the overall priorities for Family visa processing, and Direction 83 providing more specific directions in relation to the finalisation of applications that are affected by the annual capping arrangements under section 85.

27. Under Ministerial Direction 80, the priorities are, in summary:²²

- partner and child visas;
- orphan relative visas;
- Contributory Parent visas and Contributory Aged Parent visas;
- carer visas;
- Parent, Aged Parent, and remaining relative and aged dependent relative visas; and
- any of the above when the sponsor is an unauthorised maritime arrival holding a permanent visa.

Planning allocation

28. The setting of Migration Program planning figure also affects the management of the Family Migration Program. The Migration Program planning level is set by the Australian Government as part of its Budget papers, which have in recent years stipulated the number of places to be filled by the Family and Skilled streams of the Migration Program. It is understood that this is because both the overall figure and, in particular, the allocation to the particular streams has budget implications, including resourcing within the Department.

²⁰ Subsection 499(2A) of the Migration Act.

²¹ Subclause 5(4) of Ministerial Direction No. 80.

²² Ibid clause 8.

29. Until the most recent Federal Budget, the Budget papers stipulated the number of places in the Family and Skilled streams of the Migration Program. There were:
- in 2019–20, 47,732 places in the Family stream;²³ and
 - in 2020–21²⁴ and 2021–22,²⁵ 77,300 places in the Family stream.
30. 'Planning Australia's 2022–23 Migration Program', a paper published by the Department of Home Affairs in late 2021 to inform the planning of Australia's Migration Program for 2022–23,²⁶ suggests that all Family visas except the Child visa were subject to planning—Child visas were described as demand-driven.²⁷ Attachment B to that paper set out planning levels and program outcomes for a number of visa categories, with the program outcomes for Partner visas close to the planning levels in each recorded year.
31. However, the 2022–23 Budget papers stipulated that the 'Partner visa granting arrangements will move to a demand-driven basis going forward'.²⁸
32. This change in approach was discussed in Senate Estimates,²⁹ and is also reflected in the Department's published information about Migration Program planning levels.³⁰
33. This change in approach is a welcome development. Under the Migration Act, Partner visa granting practices cannot be anything but 'demand-driven'. In circumstances where the Minister has an obligation to decide a visa application before them, imposed by section 47 of the Migration Act, and the granting of Partner visas cannot be subject to a cap by operation of section 87, there is no support for imposing an administrative ceiling which effectively operates as an annual cap.
34. Concerns about the previous approach were raised by the Law Council's Federal Litigation and Dispute Resolution Section (the **Section**) in early 2021,³¹ and by others in the Family visa processing inquiry.³² For the purposes of this inquiry, the LIV advised that its members report that these planning ceilings have contributed to

²³ Commonwealth of Australia, 'Budget Measures, Budget Paper No. 2 2019-20', <https://archive.budget.gov.au/2019-20/bp2/download/bp2.pdf> 11.

²⁴ Commonwealth of Australia, 'Budget Measures, Budget Paper No. 2 2020-21' https://archive.budget.gov.au/2020-21/bp2/download/bp2_complete.pdf 9.

²⁵ Commonwealth of Australia, 'Budget Measures, Budget Paper No. 2 2021-22' https://archive.budget.gov.au/2021-22/bp2/download/bp2_2021-22.pdf 11.

²⁶ Department of Home Affairs, 'Planning Australia's 2022-23 Migration Program' <https://www.homeaffairs.gov.au/how-to-engage-us-subsite/files/planning-australias-2022-23-migration-program.pdf>.

²⁷ Ibid 2.

²⁸ Commonwealth of Australia 'Budget Measures, Budget Paper No. 2 2022-23' https://archive.budget.gov.au/2022-23/bp2/download/bp2_2022-23.pdf 12.

²⁹ Commonwealth of Australia, 'Legal and Constitutional Affairs Legislation Committee – Hansard – Estimates' (4 April 2022), https://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/25689/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2022_04_04_Official.pdf;fileType=application%2Fpdf#search=%22budget%20estimates%202022-23%20AND%20legal%20and%20constitutional%20affairs%22 24-26.

³⁰ Department of Home Affairs 'Migration Program planning levels' (webpage, accessed on 20 October 2022), <https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels>.

³¹ The Law Council's Federal Litigation and Dispute Resolution Section, submitted to the Department in February 2021 submission prepared by the Section's Migration Law Committee, that it is unlawful to impose a quota upon partner visa grants by way of planning level allocations: Federal Litigation and Dispute Resolution Section of the Law Council of Australia, 'Australia's 2021-22 Migration Program', 11 February 2021 <https://www.lawcouncil.asn.au/publicassets/d393eb00-1c70-eb11-9439-005056be13b5/3960%20-%20Australias%202021-22%20Migration%20Program.pdf> [13].

³² Senate Legal and Constitutional Affairs References Committee, n 2 [4.92].

creating a steady backlog of applications in recent years, and have resulted in a great number of genuine couples being kept apart for lengthy periods.

35. If estimates for annual Partner visa grants such as the one made for the 2022–23 are maintained, it will be of interest to track that estimated figure against partner visa applications and partner visa decisions (including grants and refusals).

Visa lodgement fees

36. The visa application charges are prescribed in the *Migration Regulations 1994* (Cth) (**Migration Regulations**) and are thus another tool which the Australian Government may use to manage and plan the Family Migration Program.
37. With some exceptions, visa application charges are generally payable on application.
38. Fees can be used as an incentive or a disincentive to making applications for certain visas, in concert with other tools such as the Ministerial direction and program allocation. An example is Parent visa applicants, where priority is given to applicants who are willing and able to pay a premium. For example, in 2020–21:
 - Contributory Parent visas—each of which ordinarily has a minimum cost of \$47,825—had an allocation of 3,600 places; and
 - (non-contributory) Parent visas—each of which ordinarily has a minimum cost of \$6,490—had an allocation of 900 places.
39. Under Direction 80, Contributory Parent visas have a greater processing priority than Parent visas.
40. The Section submitted to the Family visa processing inquiry that priority should be given to reducing the costs of the Partner visa application fee, to bring it into line with other permanent visa application fees.³³ Eighteen months after that submission, the visa application charge set for a subclass 300, 309 or 820 Partner visa application (\$8,025)³⁴ remains almost double that set for other visas to live and work in Australia, such as general skilled migration charges (\$4,240).³⁵
41. The Law Council queries the comparative expense of Partner visas. In addition to the clear social, community and cultural benefits of the Family Migration Program, as noted above, evidence suggests that Partner visa holders contribute positively economically.
42. For example, the Department's 'Planning Australia's 2022–23 Migration Program' document, with reference to data from its Continuous Survey of Australia's Migrants', states:³⁶

³³ Law Council of Australia, 'Response to questions on notice regarding inquiry into the efficiency, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions', (14 July 2021), <https://www.lawcouncil.asn.au/publicassets/18b547b8-0ef4-eb11-943f-005056be13b5/4042%20-%20Response%20to%20questions%20on%20notice.pdf> [20].

³⁴ Department of Home Affairs, 'Fees and charges for Live visas – Partner Migration' (webpage, accessed on 20 October 2022), <https://immi.homeaffairs.gov.au/visas/getting-a-visa/fees-and-charges/current-visa-pricing/live>.

³⁵ Department of Home Affairs, 'Fees and charges for work visas' (webpage, accessed on 20 October 2022), <https://immi.homeaffairs.gov.au/visas/getting-a-visa/fees-and-charges/current-visa-pricing/work>

³⁶ Department of Home Affairs, 'Planning Australia's 2022-23 Migration Program' (undated) <https://www.homeaffairs.gov.au/how-to-engage-us-subsite/files/planning-australias-2022-23-migration-program.pdf> 4.

Partner visa migrants have traditionally had a high labour force participation rate of 76.6 per cent (11 points higher than for the general population), as well as an employment to population ratio of 69.6 per cent (7.3 points above the general population) after 18 months of arrival in Australia.

The impact of Executive planning decisions on processing rates

43. It would appear that exercise of the capping power, combined with Direction 80, has contributed to long delays in the processing of some classes of Family visas.

Parent visas

44. The number of on-hand (received but not determined) Parent visa applications has increased in each of the last four years, as the number of visa application lodgements has been consistently higher than the number of grants.
45. The following table recording Parent visa applications, grants and on-hand numbers is adapted from a table produced by the Department,³⁷ with an additional row for the program cap.

Parent visas

Activity type	2017–18	2018–19	2019–20	2020–21
Lodgements	13,590	13,246	12,664	14,827
Cap	8,675 ³⁸	8,675 ³⁹	7,321 ⁴⁰	4,500 ⁴¹
Grant	7,371	6,805	4,399	4,500
On-hand on 30 June	99,239	102,854	108,659	114,359
Grant rate	93.7%	93.6%	81.2%	93.3%

46. This table demonstrates that, up until the most recent financial year, the cap of Parent visas was not coming into effect, which suggests that other factors—potentially the Ministerial directions or Departmental resourcing—could be affecting grant numbers. This may be a matter to raise with the Department.
47. In any event, in both cases, even if the cap had been reached in each of the four years, noting the grant rates, it was still not set at a figure that reduces the number of on-hand applications.
48. At the date of writing, the Department estimates that new Contributory Parent visa applications lodged that meet the criteria to be queued are likely to take at least

³⁷ Department of Home Affairs, '2020-21 Migration Report' <https://www.homeaffairs.gov.au/research-and-stats/files/report-migration-program-2020-21.pdf> 56.

³⁸ Clauses 6 and 7 of the *Migration (IMMI 18/054: Granting of Contributory Parent, Parent and Other Family Visas in the 2017/2018 Financial Year) Instrument 2018* (Cth).

³⁹ Clauses 6 and 7 of the *Migration (LIN 19/087: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2018/2019 Financial Year) Instrument 2019* (Cth).

⁴⁰ Clauses 6 and 7 of the *Migration (LIN 19/131: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2019/2020 Financial Year) Instrument 2019* (Cth).

⁴¹ Clauses 4 and 5 of the *Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021* (Cth).

73 months to be released for final processing;⁴² this figure was 64 months in December 2021.⁴³

49. The Department also estimates that new Parent and Aged Parent visa applications lodged, which meet the criteria to be queued, are likely to take at least 30 years for final processing!⁴⁴

Other family visas

50. The following table recording Other Family visa applications, grants and on-hand numbers is adapted from a table produced by the Department, with an additional row for the program cap.

Other Family visas

Activity type	2017–18	2018–19	2019–20	2020–21
Lodgements	2,051	1,391	1,215	947
Cap	50045	50046	56247	50048
Grant	562	524	444	496
On-hand on 30 June	14,702	9,277	8,785	8,712
Grant rate	33.8%	30.2%	26.9%	48.5%

51. This table demonstrates that the cap has in fact been exceeded in recent years and not reached in the most recent two years. (The steep reduction in applications on-hand, despite the number granted being far fewer than applications, is due to a high refusal rate.)
52. The Department estimates ‘based on current planning levels and the allocation of the majority of Other Family category places to Carer visa applications’ that Carer visa applications that meet the criteria to be queued are likely to take approximately 7 years to be released for final processing’.⁴⁹ Meanwhile, the Department estimates that it will take approximately 50 years to process Remaining Relative and Aged Dependent Relative visa applications that meet the criteria to be queued!⁵⁰

⁴² Department, ‘Visa processing times – Parent visas – queue release dates and processing times’, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates> (accessed on 26 September 2022).

⁴³ Law Council of Australia, ‘Australia’s 2022-23 Migration Program’ (10 December 2021) <https://www.lawcouncil.asn.au/publicassets/7c5b8a3b-5861-ec11-9446-005056be13b5/4140%20-%20Australias%202022-23%20Migration%20Program.pdf> [52].

⁴⁴ Department, ‘Visa processing times – Parent visas – queue release dates and processing times’, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates> (accessed on 26 September 2022).

⁴⁵ Clause 8 of the *Migration (IMMI 18/054: Granting of Contributory Parent, Parent and Other Family Visas in the 2017/2018 Financial Year) Instrument 2018* (Cth).

⁴⁶ Clause 8 of the *Migration (LIN 19/087: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2018/2019 Financial Year) Instrument 2019* (Cth).

⁴⁷ Clause 8 of the *Migration (LIN 19/131: Granting of Contributory Parent Visas, Parent Visas and Other Family Visas in the 2019/2020 Financial Year) Instrument 2019* (Cth).

⁴⁸ Clause 6 of the *Migration (Granting of contributory parent visas, parent visas and other family visas in the 2020/2021 financial year) Instrument (LIN 21/025) 2021* (Cth).

⁴⁹ Department, ‘Visa processing times – Other Family visas – queue release dates and processing times’, <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/other-family-visas-queue-release-dates> (accessed on 20 October 2022)..

⁵⁰ *Ibid.*

53. Practitioners report that there has been a significant deterioration in processing times of Other Family visas over the last few years. For example, for child visas lodged offshore, the processing time was previously significantly quicker than the current published processing times. These cases used to be given the highest priority by processing posts in acknowledgement of the importance of a short processing time for this visa category, given that this caseload consists of largely dependent minor children. It is reported that this is no longer the case.

Impact of long processing times on applicants

54. The Law Council considers that the inordinate time it takes to process Parent, Aged Parent, Remaining Relative and Aged Dependent Relative visa applications undermines the objectives of the family reunion program cited above at [10].
55. The Law Council has been provided examples of matters where the impact and length of the processing times has adversely affected applicants. It is worth noting that in several respects, this impact is a result of the system—the capping, the directions, the available visas, and the conditions and benefits associated with these visas—rather than the actions of the Department per se.
56. These anecdotal examples cannot be fully conveyed for privacy reasons, but some ‘take-aways’ are possible.

Parent visas

57. The long waiting times for parent visas can be distressing for parent applicants of children based in Australia who are under the age of 18. Those children are required to remain in Australia as a criterion for the visa application, but it can be difficult for the parent applicant to be in Australia while they wait for their application to be processed.
58. While there are temporary Contributory Parent visas available, these are also subject to the cap and, according to the Department’s website, are also subject to the same long processing times. In any event, the temporary Contributory Parent visa only allows a two-year stay, which is far less than the processing time for a permanent Contributory Parent visa.
59. As a result, the Law Council is advised that the applicants for a Parent visa may apply for other temporary visas in order to visit their children, which may not be best directed towards the actual purpose of their stay. For example, visitor visas may be granted for six to twelve months at a time, and permit a three month stay at a time. Further, such visas require decision makers to be satisfied that the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted.⁵¹ The Law Council understands that this can come into question when multiple applications are lodged.
60. Holders of most temporary visas do not qualify for most social security payments,⁵² and holders of visitor visas will not be permitted to work.⁵³

⁵¹ Clause 600.211 of Schedule 2 to the Migration Regulations.

⁵² Law Council of Australia ‘Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021’, submission to the Senate Community Affairs Legislation Committee (5 August 2021), <https://www.lawcouncil.asn.au/publicassets/348538fd-1efe-eb11-9440-005056be13b5/4054%20-%20Social%20Services%20Legislation%20Amendment%20%20Consistent%20Waiting%20Periods%20for%20New%20Migrants%20%20Bill%202021.pdf> Attachment A.

⁵³ Clause 600.612 of Schedule 2 to the Migration Regulations.

61. The Law Council has also previously suggested that the allocation of the visas to these programs be increased to bring waiting times down and provide citizens and permanent residents with a realistic prospect of being reunited with their parents.⁵⁴ The Law Council has questioned the fairness and appropriateness of managing a visa program in which applicants are required to pay \$6,490 to apply for a visa which they can expect to wait over 30 years to receive.⁵⁵ However, the Law Council acknowledges that a more systemic solution is required, and notes the current Minister's recent comments that the Australian Government is committed to working on parent visa reform.⁵⁶

Carer visas

62. The Law Council has received input emphasising the adverse impact of the long (seven year) wait time for carer visas in particular. Amongst other criteria for this visa, the applicant is required to be a 'carer':
- the applicant must be a relative of an Australian citizen or permanent resident who:
 - has a medical condition which is causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life; and
 - will continue for at least two years to have, a need for direct assistance in attending to the practical aspects of daily life; and
 - the assistance cannot reasonably be:
 - provided by any other relative of the resident in Australia; or
 - obtained from welfare, hospital, nursing or community services in Australia.
63. The Law Council has received anecdotal examples—not detailed here for privacy reasons—that suggest elderly persons in quite dire circumstances can experience significant hardship while waiting long periods for these visas to be processed.

Other impacts of Executive planning decisions on family reunion applicants under the humanitarian program

64. The Law Council has long advocated⁵⁷ for changes to the way that family reunion is managed under the Humanitarian Program, to remove the disadvantages imposed on unauthorised maritime arrival (**UMA**) (persons who entered Australia by sea without a valid visa).⁵⁸ The Law Council considers that measures that penalise people, who are found to be refugees, based on their mode of arrival are inconsistent with Australia's international obligations.⁵⁹

⁵⁵ Ibid [66].

⁵⁵ Ibid [66].

⁵⁶ Natasha Kaul, 'Australia's Immigration Minister says clearing visa backlog is his 'top priority'', *SBS Hindi*, (online, 21 June 2022), <https://www.sbs.com.au/language/english/audio/australia-s-immigration-minister-says-clearing-visa-backlog-is-his-top-priority>.

⁵⁷ Law Council of Australia, '2022 Federal Election – Call to Parties', <https://www.lawcouncil.asn.au/publicassets/919cc01e-23b9-ec11-944c-005056be13b5/Call%20To%20Parties%20Final-Web.pdf> 30.

⁵⁸ Section 5AA of the Migration Regulations.

⁵⁹ Law Council of Australia, Asylum Seeker Policy, <https://www.lawcouncil.asn.au/publicassets/129a0b1b-bed6-e611-80d2-005056be66b1/Policy-Statement-Asylum-Seeker-Policy.pdf>, [7(d)].

65. These disadvantages include:
- rendering Family visa applications sponsored by UMAs the final processing priority in Direction 80, as discussed above;
 - a UMA is prevented from being a proposer for a Special Humanitarian Program visa application;⁶⁰ and
 - the cohort of UMAs who may only be granted temporary protection visas and safe haven enterprise if found to be owed protection, given holders of such visas are unable to sponsor family to come to Australia under the Family Migration Program as they are not permanent residents.⁶¹
66. From a practical perspective, the Law Council considers that actions to cease these disadvantages experienced by UMAs will improve settlement outcomes for affected refugees, given the deleterious impact on mental health and general well-being that has been found to result from a prohibition on family reunion and the scheme of temporary protection,⁶² adding to the intersectional disadvantage already experienced by asylum seekers,⁶³ thus enabling those affected to better participate in Australian society.
67. It has been suggested to the Law Council that reduced fee applications and priority processing should be available where the sponsor for a visa under the Family Migration Program is on a humanitarian or protection visa.
68. The Law Council notes and welcomes the commitment of the Australian Government to make amendments to ensure asylum seekers who arrive by irregular means will not be punished for their mode of arrival, and to abolish temporary protection visas,⁶⁴ and its recognition that family reunion for migrants and refugees is important to successful settlement.⁶⁵ The Law Council has been pleased to engage with the Government about implementing these commitments.

Are visa lodgement and assessment processes effectively managed?

General comments

69. The Law Council is aware that, as a general principle, the Department's ability to efficiently process visa applications is to some extent affected by the resources

⁶⁰ Paragraph 202.211(2)(e), paragraph 202.212(b) and subparagraph 202.225(a)(ii) of Schedule 2 to the Regulations.

⁶¹ For example: an applicant for a Subclass 101 (Child) visa must be the child of an Australian citizen, permanent visa holder or eligible New Zealand citizen: cl 101.211(1)(a) of Sch 2 to the Migration Regulations. An applicant for a Subclass 103 (Parent) visa must be the parent of a settled Australian citizen, permanent visa holder or eligible New Zealand citizen: cl 103.211(1) of Sch 2 to the Migration Regulations. The applicant for a Subclass 100 (Partner) visa must be sponsored by a person who is an Australian citizen, permanent visa holder or eligible New Zealand citizen: cl 100.111 of Sch 2 to the Migration Regulation. All applicants for a TPV or a SHEV must satisfy the primary criteria and there are no secondary criteria which permit members of a family unit to be granted a visa: see cll 785.3 and 790.3 of Sch 2 to the Migration Regulations.

⁶² Law Council of Australia, 'The Justice Report – Asylum Seekers' (August 2018), <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Asylum%20Seekers%20%28Part%201%29.pdf> 13, 15-16.

⁶³ Ibid 16-18.

⁶⁴ Australian Labor Party, 'ALP National Platform – As adopted at the 2021 Special Platform Conference', March 2021, <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>, paragraph 2 on page 126 and paragraphs 9 and 10 on page 123 respectively.

⁶⁵ Ibid paragraph 14 on page 119.

allocated to it, such as the allocation of processing staff. In general, the Law Council is aware that the Department diverted resources to deal with the closed international borders and processing of travel exemption applications, which has contributed to a backlog of applications across the caseload. The current Minister has expressed a commitment to reduce visa processing rates, and the Australian Government has committed resources to do so.⁶⁶

Communication issues

70. Effective management of visa lodgement and assessment processes requires clear and transparent communications between the Department and visa applicants.
71. Effective transparency and communication are also essential in maintaining an applicant's confidence and certainty in the visa system, especially when considering the significant cost of Partner visas for many vulnerable applicants.
72. Practitioners have advised that these processes are not effectively managed, and clients often receive 'bland and generic' communications, which omit estimated processing times and other significant details. Requests to the Global Feedback Unit seeking information about processing times have often not yielded a substantive response. Furthermore, requests for documentation such as medicals, police clearances or other supporting documents, made through Immi Account emails are not also sent by the Department to notify applicants, or where represented, to the registered practitioner. As applicants may overlook or misunderstand needing to log into the Immi Account, thorough communication is necessary to ensure efficient lodgement processes. The Law Council queries, for example, whether it may be possible to provide for automated email alerts that a request has been made through Immi Account.
73. Practitioners suggest that, where documents are requested, procedural fairness requires the Department to make more than one attempt to contact applicants (by phone, post and email) before refusing the application on the basis of failing to receive documents. The Senate Committee Report highlights similar occurrences, with contributors indicating that a lack of clear and consistent communication from the Department causes distress for applicants, and leads to difficulty in understanding visa requirements, eligibility, and processing timeframes.⁶⁷

Documents, health and character expiry

74. Practitioners advise that a common difficulty faced by clients is the need to re-submit documents and medicals that have expired, due to a lack of transparency in Departmental communication and a delay in commencing the processing of applications or acting on evidence provided. Where medicals or other documents expire prior to processing commencing, the applicant is required to undergo repeat medical tests and to source updated documents. This involves further costs and causes emotional stress for applicants. Practitioners report a lack of communication updates on the status of applications, and learning of the expiration of materials when

⁶⁶ The Hon Andrew Giles MP, 'Migration Institute of Australia National Conference' (speech transcript; 13 October 2022), <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/migration-institute-of-australia-national-conference.aspx>; The Hon Andrew Giles MP, 'More than two million visas processed as demand soars' (media release; 14 October 2022), <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/more-than-two-million-visas-processed-as-demand-soars.aspx>; the Hon Julie Collins MP, 'Tackling shortages for small business' (media release, 2 September 2022).

⁶⁷ Senate Committee Report 73.

receiving a 'request for information' from the Department. This is particularly the case with medical examinations and police clearances. The expiry of submitted materials delays visa applications, creates additional work for the Department and applicants, and can impact adversely on the mental health of long-term applicants.

75. Practitioners suggest that an effectively-managed lodgement process would ensure that requests for documents from applicants are made at an appropriate time, and valid materials are reviewed by the Department prior to their expiry.

Partner visas

Processing rates in general

76. As Partner visas are now being treated as 'demand-driven', it would appear that processing times are within the control of the Department, subject to its resourcing capacity. The present processing times for Subclass 801 visas is still quite high (90 per cent of applications are processed in 23 months).⁶⁸
77. As a general statement, the Law Council suggests that the Department should provide priority to applicants who are in a long-term relationship with sponsors (including children), as this would take a lot of pressure off the queue and thus relieve average processing times. This often occurs when Australian citizens are working or posted overseas and need to return to Australia with their partner of many years. Delays prevent these citizens from returning home.

Genuineness criterion

78. During the Senate Committee inquiry, the Department advised that '[i]n the last five years, the refusal rate for the Partner visa category (subclasses 300, 309 and 820) has been less than 10 per cent', and indicated that 'the most common refusal reason is not meeting the "genuineness of the relationship" criterion'.⁶⁹
79. In fact, the definitions of 'de facto partner' and 'spouse'—an applicant must be a de facto partner or spouse of their sponsor to be granted a Partner visa⁷⁰—require satisfaction of a number of elements. These include that the couple has a 'mutual commitment to a shared life ... to the exclusion of all others',⁷¹ in addition to a relationship that is 'genuine and continuing'.⁷²
80. Where an application is refused on the 'genuine relationship' ground, this does not necessarily mean that the relationship is contrived or fraudulent. Rather, the application may have been refused because insufficient evidence has been provided to the Department to establish the committed relationship. Put another way, a relationship may be genuine, but not have reached the stage of lifelong commitment. This can arise in matters where, for example, there are unrepresented applicants who do not understand the process and the level of evidence required by the Department.

⁶⁸Department of Home Affairs, 'Subclass 801 Partner visa (Permanent)', <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/partner-onshore/permanent-801> (webpage, accessed on 20 October 2022).

⁶⁹ Senate Committee Report [4.124].

⁷⁰ See, for example, subclause 820.211(2)(a) of Schedule 2 to the Migration Regulations.

⁷¹ Paragraph 5CB(2)(a) (definition of 'de facto partner') and paragraph 5F(2)(b) (the definition of 'spouse') of the Migration Act.

⁷² Ibid paragraph 5CB(2)(b) and paragraph 5F(2)(c).

81. Given this, with reference to an exchange recorded in the Senate Committee report, refusals on the 'genuineness of the relationship' criterion should not be conflated with the incidence of fraudulent applications.⁷³

Family violence

Determination of the family violence criterion

82. The QLS submits, as it did to that inquiry, that 10 per cent of applications refused on the genuineness ground relate to relationships that involve claimed domestic and family violence.
83. Applicants for Partner visas who have experienced family and domestic violence can apply for consideration under special provisions relating to family violence under the Migration Regulations. This process requires the applicant to first establish that there was a genuine relationship and then the Department may consider whether they experienced family violence.⁷⁴
84. In relationships involving violence, it can be difficult for applicants to meet the first threshold of genuineness because the dynamics of violence can interfere with the applicant's ability to provide evidence of the relationship. This can be for reasons including: (1) the sponsor lodged and controlled the application; (2) the sponsor's statement in support of the partner relationship uploaded to the application was unsigned; (3) the sponsor makes allegations to the Department about not supporting the lodgement of the partner visa application; or (4) the sponsor has control of the couple's financial records
85. It is submitted that the Department consider evidence of a genuine relationship in the context of the violence which is claimed to have occurred during the course of the relationship, in acknowledgement of how the dynamics of domestic and family violence can affect an applicant's ability to obtain and produce evidence.
86. The establishment of the existence of family violence by its very nature is relevant to the consideration of whether or not a relationship existed between the visa applicant and sponsor. The Law Council suggests that these two issues be considered in context of each other, rather than as a stepped, separate process.
87. The Law Council further queries the approach sometimes taken by the Department of revisiting the relationship assessment after a temporary partner visa has been granted. The Law Council submits that, if the Department has granted a temporary partner visa, then the Department must have been satisfied of the genuineness of the relationship at the time of grant and that that should be sufficient.
88. The Law Council submits that a subsequent claim of family violence is not evidence of the falsity of statements and evidence that were taken into account in granting the temporary visa. In circumstances where a temporary partner visa has been granted, unless there is evidence of a false statement / bogus document, the Law Council submits that the Department should not require a visa applicant claiming the family violence exception to provide further evidence of the relationship.

⁷³ Senate Committee Report [4.119]-[4.128].

⁷⁴ See, for example, cl 801.221(6)(b) of Sched 2 to the Migration Regulations.

Processing priority to be given to family violence matters

89. The Law Council refers to the note on the Department's website that:⁷⁵

We are processing some older and more complex Partner visa applications. These cases can take longer to finalise and impact our published processing times.

90. This is welcome. The Law Council is advised that complex caseloads such as family violence affected partner visa applications are subject to significant and ongoing delays, which has a detrimental impact on this vulnerable client group.

91. Those who have not had their temporary partner visa decided are subject to limited social service payments.⁷⁶ Practitioners report that this can lead to a decision to remain in a violent relationship, particularly when there are children the applicant needs to support.

92. Practitioners have also seen women get 'stuck' in refuges. This is because they are unable to transition from a refuge to Department of Housing accommodation. Similarly, they are unable to commence work because of the prohibitive costs of unsubsidised childcare. Refuges are designed as immediate crisis accommodation and are not suitable as medium- to long-term housing. Long-term stays in refuges also put pressure on scarce refuge accommodation, which may then not be available to other women and children who seek to leave violent relationships.

93. In this context, the Law Council submits that applications relying on the family violence provisions should be given the highest priority.

Carer visas

94. While it is understood these wait times are largely affected by Ministerial decision-making, the practitioners have cited experiences with departmental processes that are inefficient and difficult for a vulnerable migrant cohort to navigate.

95. Furthermore, the Law Council is advised that, to be valid, the applicant must appear to the Minister (or delegate) to be a 'carer'⁷⁷ and there is an initial waiting time of approximately two years for the application to be assessed as valid and added to the queue. This may suggest that, in addition to a need to increase the annual quota for Carer visas, there is a need for further staffing/resources to process the receipt of these visas.

96. Practitioners advise that, as the assessment process proceeds, carer visa applicants face significant challenges in demonstrating, for example, the criterion for that visa that the required care cannot reasonably be provided by other relatives or obtained from welfare, hospital, nursing or community services in Australia. Those practitioners observed that many applicants (and their sponsors) lack a sufficient understanding of immigration law, and the disability and aged care system, to be able to gather acceptable evidence to address this requirement without the assistance of a migration agent or lawyer.

⁷⁵ Department of Home Affairs, 'Visa processing times' <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-processing-times#> (webpage, accessed on 20 October 2022).

⁷⁶ Law Council of Australia, n 55.

⁷⁷ Subparagraph 1123A(2)(a)(i)(A) of Schedule 1 to the Migration Regulations.

Direction 80

97. In relation to Direction 80, the Law Council has received advice from practitioners that the adverse impact on UMAs from being the final cohort for processing is exacerbated by the Department's processing practices.
98. Examples provided include:
- the Department not commencing any aspect of the visa processing until the sponsor becomes an Australian citizen;
 - applications for approval of an exemption to the order of processing (under clause 9 of the Direction) not being granted despite a long processing time and the sponsors providing evidence of significant hardship as a result of family separation;
 - the time taken to process a long-term applicant, recognised as being subject to that exemption, being exacerbated by medical examinations and passports expiring.
99. Practitioners have reported experiencing three-year processing times following receipt of an exemption from the processing priority under Direction 80.
100. To address these matters, the Law Council recommends that additional transparency and guidance be made available to applicants, including details on the Department website of the criteria to be fulfilled, and the supporting documents needed to satisfy requirements for a successful application eligible for priority processing. This will support applicants in submitting decision-ready applications, and aid the Department's assessment.

Are visa decisions and case load processes effectively managed?

Parent visas

101. Visa application charges for the Contributory Parent visa are paid in tranches:
- a first instalment 'payable at the time the application is made', between \$385 and \$4,355, depending on the circumstances of the applicant;⁷⁸ and
 - a second instalment 'payable before grant of visa', of up to \$43,600.⁷⁹
102. The Department website simply indicates that an applicant should 'pay the second instalment when we ask you to'.⁸⁰
103. Practitioners report that decisions on these visas—particularly arrangements to pay the second instalment—are managed effectively. Practitioners indicate that clients are often not notified when their applications are due for approval and subsequent payment, leading applicants to face financial and emotional hardship in paying for the visa.

⁷⁸ Paragraph 1130(2)(a) of Schedule 1 to the Migration Regulations.

⁷⁹ Ibid paragraph 1130(2)(b) of Schedule 1.

⁸⁰ Department of Home Affairs, 'Contributory Parent visa', <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/contributory-parent-143#About> (webpage, accessed on 20 October 2022).

104. It is submitted that the significant cost of this visa mandates transparent and consistent processing times, with sufficient communication to provide applicants surety regarding when to have access to the relevant funds.
105. The Law Council has previously suggested that consideration be given to providing for a fast-track processing stream for non-contributory Parent visa where there are strong compassionate grounds.⁸¹

Remaining Relative

106. Practitioners report that the lengthy (50-year) processing times for Remaining Relative visas create ongoing difficulties in advising clients and managing client expectations concerning their visa application.
107. Practitioners report experiences where Remaining Relative visas are refused without the Department writing to request further information between lodgement and when the applications are released for final processing, which can be some years later. This results in applicants having to seek merits review in the Administrative Review Tribunal when matters could have been dealt with at the primary level with the Department.

Conclusion in relation to the Department's management of the Family Migration Program

108. The Department's management of the Family Migration Program is affected by Ministerial and Australian Government decisions about the number of family reunion and other partner visas that should be processed, and the priority to be given to processing particular classes of visas. The Department's performance in managing the Program should also be understood in the context of the resourcing it is provided to manage the Program, particularly visa-processing staff. However, subject to these external factors, the Law Council considers matters within the Department's control to ensure that it effectively manages the Program include:
 - maintaining clear and transparent communications with visa applicants;
 - efficiently receipting visa applications (to determine validity) and handling evidence provided by applicants during the course of visa processing; and
 - subject to the processing directions, prioritising the processing of visa applications by vulnerable persons.

⁸¹ Law Council of Australia, n 43 [68].