Ending ‘Permanent Temporariness’

Joint submission to the comprehensive review of Australia’s migration system

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Introduction & recommendations

We are a coalition of lawyers, trade unionists, service providers and advocacy groups with a shared commitment to addressing the effects of precarious and 'permanently temporary' visa status. We welcome this opportunity to contribute to the comprehensive review of Australia's migration system.

We work with people across the migration regime – from international students, to employer-sponsored and undocumented workers, refugees and people seeking asylum. We believe that there are certain common experiences of Australia's visa system that affect all people irrespective of their visa status.

Australia's migration system is geared towards temporary and precarious visa status. It is characterised by delay, uncertainty and unnecessary complexity. Uncertain pathways to permanent residency mean that people living on visas in Australia spend longer and longer periods unable to reunite with their families, work or participate in community life on equal footing. Across our clients and members, it is common for people to live in Australia for ten years without permanent residency, or a clear pathway towards it.

In our view, the migration and asylum system has devolved to its current state because it operates in a manner that is primarily extractive: that is, it views individual migrants, and migration flows, as economic units, that might be leveraged or switched off at certain points for economic gain. As well as the inhumanity of that approach, it produces plainly perverse outcomes. For instance, research from the OECD demonstrates that the presence of a person's partner or spouse in the settlement country is associated with higher workforce participation and incomes.[1] This means that preventing migrants and refugees from being reunited with their partners and families – through prolonged temporary visa status, informal caps on family migration, backlogs and deliberate processing policies – is creating worse economic outcomes.

We must accept that all people, after a certain time, become part of the Australian community. That principle, once central to migration policy and planning, is now mostly lost to it. But the residue of the concept remains – for instance, in the prohibition on deporting a person who has lived in Australia for 10 years or more,[2] and the eligibility of children born in Australia for citizenship on turning 10 years old.[3] The principle that a person's membership of the community should be reflected in their status and entitlements must be reintroduced to the migration system, and all people, irrespective of status, must be entitled to equal protection.

We recommend that:

1. **Visa uncertainty** is addressed through introducing standardised visa processing times, ending the punitive use of Bridging visas and abolishing the visa subclasses that are most closely associated with 'permanently temporary' status.

2. Measures are introduced to ensure **equal protection** for visa holders to enforce their conditions at work. This involves removing unnecessary work restrictions on visas and introducing protections for temporary visa holders who experience exploitation at work – including a protection against visa cancellation, and a visa to remain in Australia while taking action against an employer.

[1] OECD, *International Migration Outlook 2019* <https://www.oecd.org/els/mig/IMO-2019-chap4.pdf>.

[2] *Migration Act 1958* (Cth) s 201.

[3] *Australian Citizenship Act 2007* (Cth) s 12(1)(b).

3. **Family reunion** is protected through introducing a presumption of family unity in decision-making, restoring genuinely 'demand driven' family migration and allowing clear access to permanent residency.

4. **Permanent self-nominated pathways to permanent residency** be created, accepting that after a period in Australia, all temporary migrants become indelibly part of the community and deserve the legal recognition that flows from that.

We address these recommendations in turn below.

1. Ending uncertain visa status

Across the migration regime, people experience inordinate delays in processing of their visa applications. A range of 'dead-end' visas exist, permitting the holder to remain in Australia for only a limited period with no future pathway. The migration system must be re-founded on minimum guarantees of certainty and stability for all.

1.1. Standardised processing times

There are no standard visa processing times specified in the Act or accompanying *Migration **Regulations** 1994* (Cth).[4] In practice, this means that people can wait for an indefinite period for their legal status to be determined by a visa application. If they are in Australia, it means that they might linger for months, if not years, on Bridging visas with limited rights to work, relocate, travel, study or otherwise make a home.

While the law generally requires a visa application to be decided within a 'reasonable time,' there is no way for that duty to be enforced other than by individuals taking action through the courts. It should not be necessary for people to take legal action to have their visa application decided, and to be able to plan for their future.

Processing delays across the migration and asylum system have recently reached record levels. So inordinate are the delays that, in some cases, the processing time exceeds the period of the visa sought. Below are examples of visa subclasses in relation to which the processing period approaches or exceeds the visa duration.

Visa Subclass	Visa Duration	Processing Time[5]
Temporary Graduate (Subclass 485) – Graduate Work Stream	18 Months	17 months
Visitor (Subclass 600) – Tourist Stream	3 months (each entry)	4 months
Prospective Marriage (Subclass 300)	9 to 15 months	37 months
Student (Subclass 500) – ELICOS Stream	Up to 12 months[6]	5 months

Delays have substantially worsened over time, even in visa categories whose requirements have remained static. This suggests that the issue arises from under-resourcing and de-prioritisation of visa

[4] Section 91Y of the Act previously required Protection (Subclass 866) visa applications to be processed within 90 days of lodgement.

[5] Department of Home Affairs, Temporary Graduate visa (subclass 485), Visitor visa (subclass 600), Prospective marriage visa (subclass 485), Student visa (subclass 500) (web pages) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/> (accessed 14 December 2022). Processing times are for 90% of applications.

[6] Visa grant period correlates with duration of course – see cl 500.511 of Schedule 2 to the Regulations. ELICOS courses are generally between one to 52 weeks' duration. See eg English Australia, 'Understanding the Sector: How long to students study?' <https://www.englishaustralia.com.au/our-sector/understanding-the-sector>.

processing functions carried out by the Department. The below table sets out the processing times in relation to Skilled – Regional (Subclass 887) visas over the past decade. It shows that processing times have increased nearly six-fold, while the visa requirements have remained largely unchanged over the same period.[7]

Year	10-11	11-12	12-13	13-14	14-15	15-16	17-18	18-19	19-20
Days	83-146	75-124	108-259	251-407	172-574	171-371	192-354	321-528	542-692

Delays are particularly acute in relation to Protection visas. As at October 2022, 26,425 Protection visa applications remain undecided before the Department.[8] The standard processing time for reviews before the Tribunal relating to Protection visas is 1,924 days – that is, over five years.[9]

Processing delays do not merely signal dysfunction or lead to 'reputational damage' to Australia's migration regime, as suggested by the discussion paper. They have consequences in real, human terms. During these ever-extending periods, people remain on Bridging visas. Depending on their circumstances, some may have limited rights to work, restricted rights to travel and study. Bridging visa holders cannot access social benefits, and only a very small number who have applied for permanent visas are entitled to access Medicare. People on Bridging visas commonly experience difficulty dealing with banks and providers of critical services due to their uncertain immigration status. Bridging visas can also deter employers from hiring people who hold them, compounding vulnerability to exploitation. Children of Bridging visa holders are liable to pay international fees to remain in school – at a cost of $12-$18,000 per year, depending on the child's year level.[10]

Addressing delays in the system, and ensuring security during processing, removes key levers of exploitation.

There are currently more than 357,743 Bridging visa holders in Australia experiencing these types of uncertainty.[11]

It is unacceptable that a significant segment of the community is subjected to years of purgatory and heightened insecurity (including at work, as we return to below). The flow-on consequences of such arrangements for people's ability to settle and make a life in the country are obvious.

Recommendation – Introduce processing standards into the Act, and establish a mechanism for complaint and redress if the standards are not met, including by way of refund of the visa application charge or compensation for defective administration

1.2. Ending the punitive use of Bridging visas

It has become increasingly common for the Department to utilise Bridging visas as a means of managing certain visa applicants, particularly people who have sought asylum. That occurs in a number of ways.

[7] Department of Home Affairs, Freedom of information request FA 22/06/00982 (Processing times for subclass 887 visas) <https://www.homeaffairs.gov.au/foi/files/2022/fa-220600982-document-released.PDF>.

[8] Department of Home Affairs, *Monthly Update: Onshore Protection (Subclass 866) Visa Processing – October 2022* <https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-october-2022.pdf>.

[9] Administrative Appeals Tribunal, Migration and Refugee Division processing times (Processing times in calendar days for reviews finalised between 1/05/22 and 31/10/22 <https://www.aat.gov.au/resources/migration-and-refugee-division-processing-times> (accessed 14 December 2022).

[10] See eg Victorian Government, *2022 Standard International Student Tuition and Non-Tuition Fees* <https://www.study.vic.gov.au/Shared%20Documents/en/StandardTuition-FeeRateCard.pdf>.

[11] Department of Home Affairs, *Temporary visa holders in Australia* (updated 25 November 2022) https://data.gov.au/dataset/ds-dga-ab245863-4dea-4661-a334-71ee15937130/details. The figure for Bridging visas in this dataset does not include people on Bridging Visa Es.

Firstly, the Department commonly issues short-term Bridging E visas to people who have requested the personal intervention of the Minister or have been brought to Australia from a **R**egional **P**rocessing **C**ountry. The Department has persisted in this practice, even in the knowledge that Ministerial requests take several months (sometimes years) to decide, and that it may not be possible (either in the short term, or possibly ever) to return people to an RPC.

The use of short-term Bridging visas in these circumstances, often with punitive reporting conditions and limitations on work and study, serves to hold people seeking asylum at ransom and replicate the conditions of their detention.[12] There is no reason for Bridging visas to be utilised in this manner, other than to induce uncertainty and fear in the holder and coerce their return to their country of origin.

Secondly, Bridging E visas with mandatory 'no work' conditions are issued particularly to people seeking asylum who have commenced proceedings in court. Court proceedings can take upwards of four years to resolve – mandatory 'no work' conditions mean that, for this lengthy period, people are forced to accept precarious jobs or face destitution. A report released by the Human Rights Law Centre this year documents the egregious labour exploitation that Bridging E visa holders are subjected to, specifically on account of their precarious visa status and lack of other means for survival.[13] It is unacceptable to subject people to four or more years of destitution through imposition of inflexible visa conditions.

Thirdly, Bridging visas are often withheld from or denied to a significant cohort of people seeking asylum who arrived by sea and are therefore subject to the bar on making visa applications at s 46A of the Act. People in this group are reliant upon Ministerial intervention to receive a Bridging E visa. Delay or refusal of Ministerial intervention mean that people may remain in the community for years without lawful status, unable to work 'on the books' and constantly fearful of detention. Inflicting this degree of social and material hardship upon people simply because of their mode of arrival is unacceptable.

Recommendation – All Bridging visas must allow visa holders to work, study and travel

Recommendation – The 'bar' at s 46A(2) of the Act must be permanently lifted, to permit people seeking asylum who have been deemed 'unauthorised maritime arrivals' to make Bridging visa applications as of right, rather than being required to rely upon Ministerial intervention for each visa grant

Recommendation – Bridging visas connected with an event that will take place at an unknown time in the future (such as Ministerial intervention, 'third country resettlement' or the conclusion of a court case) should be granted with an indefinite stay period, and allow full permission to work and study

1.3. Ending 'short term' Skilled visas

At present, there are a number of 'dead end' skilled visa pathways, that allow visa holders to remain in the country for a decade or more without any possibility of transitioning to permanent residency. These arrangements must be abolished and replaced with pathways to permanent residency which recognise that people who remain in Australia for several years become part of the community.

These 'dead end' pathways have long existed as a function of ever-changing visa requirements, meaning that applicants who once met the criteria for permanent residence no longer do as a result of visa

[12] Elyse Methven and Anthea Vogl, 'We will decide who comes to this country, and how they behave: A critical reading of the asylum seeker code of behaviour' (2015) 40(3) *Alternative Law Journal* 175.

[13] Human Rights Law Centre, *Labour in Limbo: Bridging Visa E Holders and Modern Slavery Risk in Australia* available https://www.hrlc.org.au/reports/2022/11/8/labour-in-limbo-bridging-visa-e-holders-and-modern-slavery-risk-in-australia.

requirements changing during their time in Australia. This was the fate of several thousand international students who were affected by sudden changes to the occupations on the 'Migration Occupations in Demand List' in 2010.[14] When enacting sweeping changes to the migration program, successive governments have given little to no regard to the rights of people who have already spent years building their lives in Australia based on previous visa requirements.

The skilled migration 'dead end' was made a feature of the migration system with the introduction of the Temporary Skills Shortage (Subclass 482) visa and its associated 'Short Term Skilled Occupation List' in 2018. As it was initially introduced, the 'Short Term Stream' of the TSS visa permitted holders to remain for up to two years, with the ability to apply for only another TSS visa – after which there was no further possibility of transition to permanent residency via the Employer Nomination Scheme (Subclass 186).[15]

The introduction of the Short-Term Skilled Occupation List meant that skilled workers in certain occupations – such as cooks, café managers and disability workers – could hold successive temporary visas without ever becoming permanent residents. The below table sets out the trajectory of a TSS visa holder who is qualified as a cook, based on processing times published by the Department.[16]

Student visa	**Bridging visa (485)**	**485 visa**	**Bridging visa (482)**	**482 visa**	**Bridging visa (482)**	**482 visa**
3 years	17 months	18 months	11 months	2 years	11 months'	2 years
Total time on Temporary visas – 11 years, 9 months						

While exemptions were introduced to the Regulations to allow certain 'short term stream' TSS visa holders to apply for permanent residence through the Employer Nomination Scheme, they are limited to 'specified' 457 visa holders and people who were in Australia for 12 months between 1 February 2020 and 14 December 2021.[17] People who have not previously held a 457 visa, or were not in Australia during the specified period – for instance, temporary visa holders who arrived after January 2021 – do not have access to these concessions and therefore cannot transition to permanent residency based on 'short term' occupations.

It is entirely possible for a skilled visa applicant to remain in Australia for over ten years and be specifically precluded from access to permanent residency. Indeed, that was the intention of the 'short term stream' of the TSS, when it was introduced in 2018. The 'Statement of Compatibility with Human Rights' with the instrument that introduced Subclass 482 baldly stated that:

> Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria. The aim of the skilled entry program is to maximise the benefits of skilled entrants to the Australian economy. This includes channelling permanent skilled migrants into occupations that have been identified to be in the long-term strategic interest of the Australian economy, and restricting short-term temporary skilled migrants to occupations that are currently in shortage but for which there may not be a long-term requirement.[18]

[14] Parliamentary Library, *Australia's Migration Program* (29 October 2010) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/AustMigration>.

[15] The operation of the TSS visa and its various 'streams' is summarised in the report of the Senate Standing Committee on Legal and Constitutional Affairs in its 'Review of the Effectiveness of the Current Temporary Skilled Visa System in Targeting Genuine Skills Shortages' <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/SkilledVisaSystem/Report/c02>.

[16] Department of Home Affairs, Temporary Graduate visa (subclass 485), Temporary Skill Shortage Visa (subclass 482) (web pages) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/> (accessed 14 December 2022).

[17] Legislative instrument LIN22/038 for the purposes of subreg 5.19 (5)(a)(iii), (6), (8)(b).

[18] Explanatory Statement to the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.

There is no mention in the explanatory statement of the interests or rights of visa-holders, as distinct from mechanistic economic considerations, and no mention of the social consequences of denying the same rights as others to a proportion of the Australian population. No explanation was given for the rationale of the 'short term' occupation list – indeed, the list has remained largely static since its first iteration four years ago, suggesting a 'long term' demand for the occupations on that list. And yet, visa holders qualified in those 'short term' occupations remain locked out from permanent residency – irrespective of how long they have lived in Australia.

Recommendation – Replace the current skilled and employer-sponsored migration schemes with an accessible, self-nominated temporary visa scheme in areas of skills shortage, with a clear pathway to self-nominated permanent residency after two years[19]

2. Ensuring equal protection

All workers in Australia – irrespective of their visa status – must have access to the same workplace rights and protections. While all workers are notionally subject to the same labour laws, the impediments created by their visa status effectively channel migrant workers toward workplace conditions far below the minimum national standards.

In the experience of our organisations, this is a function of the visa system itself, rather than the result of external factors – such as migrant workers' lack of English language proficiency or unfamiliarity with Australian labour laws. Visa conditions and settings that create vulnerability to exploitation must be abolished, and protections must be created for migrant workers who take action against their employers.

2.1. Removing punitive conditions

Temporary visa holders are subject to a number of conditions limiting their right to work. These include the 40-hour fortnightly work limit on Student visas,[20] the 6-month employment limit for Working Holiday makers[21] and the prohibition on work applied to Bridging C and E visa holders.[22]

In reality, these conditions do not prevent people from working. It is impossible for a Student visa holder to service astronomical tuition fees, which can increase at any time without notice, and living expenses in a major capital city in Australia, without working effectively full-time. Likewise, Working Holiday makers, who are young self-supported workers or students, must work full-time to support themselves. People seeking asylum who are party to court proceedings that may last up to four years and have been granted Bridging E visas with a mandatory 'no work' condition, are precluded from government support and must find work to survive.

In the face of these realities, work restrictions simply function to prevent visa-holders from freely choosing the terms and conditions of their work. These conditions force visa holders to take up work with the types of employers who are willing to break the law. In other words, they lead to the creation of a 'black economy,' constituted by employers who underpay and exploit their workers in the knowledge that they will not take action against them.

[19] A qualifying period of two years was historically required of employer-sponsored Temporary Work (Subclass 457) visa holders and Skilled Regional (Provisional) (Subclass 489) holders in order to access permanent residency. That qualifying period has been progressively increased over time and should be restored to its original standard.

[20] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8105.

[21] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8547.

[22] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8101.

Work-related visa conditions function as a powerful disincentive to reporting breach of labour laws and other employer misconduct, because of the imminent threat of visa cancellation,[23] detention and removal from Australia.[24] There is a vast body of research that links under-reporting of wage theft with concerns regarding visa consequences.[25]

Recommendation – Remove work-related conditions such as 8104, 8105, 8547 and 8101 from temporary visas (including Bridging visas) and permit all visa-holders to work full-time

2.2. Enshrining migrant worker protections

2.2.1. Protection against visa cancellation

Migrant workers who wish to take action against their employers have no legal protection against visa cancellation in circumstances where they may have breached their visa conditions. The 'Assurance Protocol' offered by the **F**air **W**ork **O**mbudsman[26] does not extend to action beyond the FWO. For instance, a Student visa holder who wished to pursue a discrimination complaint to the Human Rights Commission, or a police complaint for sexual harassment, would not have the benefit of the Assurance Protocol – and would therefore have no protection against visa cancellation or other adverse impact on their visa status resulting from their complaint.

Research shows that the threat of visa cancellation has a powerful chilling effect on temporary visa holders and prevents them from even considering whether to act on their workplace rights.[27] A protection against visa cancellation needs to be clear and reliable in order to encourage visa-holders to come forward. A limited protection – extended only in relation to matters investigated by the FWO – is nowhere near sufficient to address the power imbalance between visa-holders - who risk detention and removal from Australia - and employers who stand to benefit from this vulnerability.

Recommendation – Introduce a protection against visa cancellation, to ensure that temporary visa-holders will not have their visa cancelled for a breach of conditions that comes to light in connection with action taken in relation to their employer's non-compliance with labour or other laws

2.2.2. Providing visa security

There is currently no visa to allow migrant workers to remain in Australia while they attempt to take action against their employer.

Employer-sponsored visa holders are dependent upon their employer for their ability to remain in Australia, in a way that renders them uniquely vulnerable to exploitation. For instance, TSS visa holders

[23] Under s 116(1)(b) of the Act, for breach of visa conditions.

[24] Freya Dinshaw and Susan Kneebone, *Labour in limbo: Bridging visa E holders and modern slavery risk in Australia*, November 2022 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/63699ff8f357294cefb84f88/1667866637322/HRLC_MSEI_LabourInLimbo_Report.pdf>.

[25] Alexander Reilly, Joanna Howe, Laurie Berg and Bassina Farbenblum, 'Understanding International Students' Professed Satisfaction with Underpaid Work in Australia' (2021) 46(3) *Monash University Law Review* 50.

[26] There were only 76 referrals made by the Fair Work Ombudsman to the Department of Home Affairs under the Assurance Protocol from its introduction in 2017 to 30 November 2021, despite the thousands of complaints from migrant workers during the same period: Department of Home Affairs, Freedom of information request FA 21/12/00662 <https://www.homeaffairs.gov.au/foi/files/2022/fa-211200662-document-released.PDF>.

[27] Laurie Berg and Bassina Farbenblum, *Wage theft in Australia: Findings of the National Temporary Migrant Work Survey*, November 2017 <https://www.migrantjustice.org/publications-list/findings-national-temporary-migrant-work-survey>.

looking to leave an exploitative employer have only 60 days to find and seek nomination from another employer. If they cease work for their sponsoring employer for a longer period, they will be in breach of their conditions, and vulnerable to visa cancellation.[28] TSS visa holders may have their visa cancelled if their employer has not complied with a sponsorship obligation[29] (eg to keep records, issue payslips). There is no effective way for a TSS holder to leave and take action against an exploitative employer without also jeopardising their life in Australia.

A Working Holiday maker near the end of their visa period, whose wages are stolen while completing the work experience required for a second visa, has no way of extending their visa period to take action against their employer. The same is the case for a Student visa holder, nearing the end of their visa period.

Research shows that workplace complaints become effectively impossible to pursue once a person leaves Australia, as it becomes prohibitively difficult to produce evidence, seek out witnesses and communicate with lawyers. This means that temporary visa holders who do not have the visa security required to take action against their employers are forced to leave Australia without receiving their entitlements.

Recommendation – Introduce an 'Employment Justice visa' available to migrants who take action against their employer for breaches of employment or other laws, which allows the holder to remain in Australia and work full-time while their action against their employer continues

Recommendation – Amend qualifying requirements for visas, so that holders of Employment Justice visas are taken to have 'substantially complied with conditions'[30] of their previous visa in any future visa application and work undertaken on an Employment Justice visa is counted towards qualifying employment requirements for permanent visas[31]

3. Ending family separation

The migration system enforces family separation in a number of ways.

Since 2013, visa applications made from outside Australia by the family members of Protection visa holders who arrived by sea were given the lowest level of processing priority. This policy kept families apart for years, with almost no prospect of reuniting unless and until the visa sponsor obtained Australian citizenship. Even now that the processing priority has been (or shortly will be) removed, thousands of applications remain pending with no end in sight.[32] This is in part because of the massive backlog of unprocessed applications, and also in part because of the informal cap that the Department imposes on the number of family visas granted annually.

[28] *Migration Regulations 1994* (Cth), Schedule 8, Condition 8607(5).

[29] *Migration Act 1958 (Cth)* s 116(1)(g) and *Migration Regulations 1994* (Cth) r 2.43(1)(l).

[30] Various temporary and permanent visas require applicants to demonstrate that they have 'substantially complied' with the conditions of their previous visas. This requirement should be taken to be met for all Employment Justice visa holders so that they are not penalised in any future visa application for non-compliance with conditions which resulted from the conduct of their former employer.

[31] For instance, time spent by the holder of an Employment Justice visa working in their nominated occupation should be counted towards the three-year employment requirement, for the purpose of qualifying for permanent residency under the Employer Nomination Scheme (Subclass 186) visa.

[32] The Hon Andrew Giles MP, Minister for Immigration, Citizenship and Multicultural Affairs, 'Goodwill measures for TPV/SHEV holders' 19 November 2022 <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/goodwill-measures-for-tpvshev-holders.aspx> (accessed 14 December 2022).

Uncertain visa status inherently prevents families from reuniting. People who hold Temporary protection visas and Bridging visa holders, cannot sponsor their family members. Other temporary visa holders often struggle to bring their family members to Australia because of the restrictive interpretation of certain visa criteria, such as the 'genuine temporary entrant' requirement.

Keeping families apart is a unique form of cruelty. This has been recognised by the current government when promising to extend permanent visas to people living in Australia on Temporary Protection visas and Safe Haven Enterprise visas. It was again recognised when the government announced it would end the policy that has separated Protection visa holders who arrived by sea from their family members. The same principle of family unity must inform the operation of the migration regime as a whole.

3.1. Removing delays, caps and barriers

Family visas are intended to be 'demand driven' – that is, applications are to be processed and granted according to the number of eligible visa applicants, and not based on a limited supply of places available. This is expressed in the Act, which states that caps are not to be imposed on Partner or Child visas.[33]

Despite this, the Department continues to observe an informal cap on the number of Partner visas available by way of annual programming levels,[34] which some Departmental officials refer to erroneously as a 'ceiling.'[35]

There has always been broad public support for a 'demand driven' approach to family visas. This reflects the community's recognition of the fundamental importance of family unity. Parliament voted in 1989, and again in 1996-1997, to affirm the protection of 'demand driven' family visa processing. Facilitating family unity in a manner that is timely and accessible is an essential function of the migration system that must be restored.

Recommendation – Resource Family Stream visa processing so that visas can be processed on a genuinely 'demand driven' basis, in accordance with standard processing times

Family visa processing times have increased significantly over the past ten years. The below data shows that offshore Partner (Subclass 309) visa processing times have doubled over the decade:[36]

Year	**2011-12**	**2012-13**	**2013-14**	**2014-15**	**2015-16**	**2016-17**	**2017-18**	**2018-19**	**2019-20**	**2020-21**
Months	4-11	5-11	6-13	7-14	7-14	6-15	6-16	6-17	9-20	7-23

Delays effect some groups more profoundly than others. The following table compares the standard processing times between Partner (Subclass 309) visa applications granted to applicants from Afghanistan as against the UK:[37]

	2013	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**
Afghanistan	456	540	429	364	446	646	607	835	1326
UK	206	252	283	224	160	190	251	297	296

[33] *Migration Act 1958 (Cth)* ss 86 and 87.

[34] Department of Home Affairs, 'Migration Program planning levels' <https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels> (accessed 14 December 2022).

[35] The Guardian, 'Turnbull says ministers, not cabinet, discussed migration numbers', 12 April 2018 <https://www.theguardian.com/australia-news/2018/apr/12/turnbull-says-ministers-not-cabinet-discussed-migrationnumbers>.

[36] Department of Home Affairs, Freedom of information request FA 21/10/00542 https://www.homeaffairs.gov.au/foi/files/2021/fa-211000542-document-released.PDF.

[37] Department of Home Affairs, Freedom of information request FA 21/04/00110 https://www.homeaffairs.gov.au/foi/files/2021/fa-210400110-document-released.PDF.

Recommendation – Create a task force to clear all pending Family Stream visa applications, with particular priority given to applications previously affected by Direction 80

The cost associated with Family Stream visa applications has also increased dramatically over time, making family reunion inaccessible, particularly for people holding Protection visas. In July 2012 the Partner visa application fee was $2,060. In 2022, the partner visa fee is $8,085 for the primary applicant and an additional fee of $2,025 or $4,045 per dependent child (depending on whether they are under or over 18 years of age). Other hidden costs associated with applications can include fees for immigration assistance, DNA testing, interpreting and translating, and the cost of police and health checks. Fees of this kind are sometimes incurred repeatedly due to extended processing delays, compounding the cost for families.

Recommendation – Reduce the cost of Family Stream visa applications, or introduce a reduced- or no-cost application charge for families who are in financial hardship

3.2. Ensuring family unity

Temporary visa holders are either precluded from, or find it difficult to, reunite with their family.

Even if family members of temporary visa holders are able to make applications in their own right to come to Australia, the 'genuine temporary entrant' requirement presents a serious barrier. According to that requirement, visa applicants must show that they genuinely intend to return to their country origin. In assessing that requirement, decision-makers consider the strength of the family connections in Australia – meaning, perversely, that family members of temporary visa-holders in Australia find it extremely difficult to meet the requirement.

In practice, this means that temporary visa holders must remain separated from their family members until they obtain permanent residency. As we have explained, that may take a decade or more to achieve.

Recommendation – Remove the 'genuine temporary entry' requirement from temporary visas for secondary applicants, or alternatively amend policy to ensure that the principle of family unity is taken into consideration when assessing applications made by family unit members of temporary visa holders

4. Permanent pathways

Despite the safeguards we have proposed above, the fundamental difficulty with the migration regime remains the inaccessibility of permanent status.

Across visa subclasses – from students, employer sponsored visa holders, refugees and people seeking asylum – visa holders are subjected to an open-ended period of uncertainty as they navigate ever-changing requirements that evolve without regard to their future or the life that they have built in Australia.

The Australian community is opposed to a migration system characterised by uncertainty and temporariness, and supports the notion that people should be able to remain in Australia permanently after a number of years of residence.[38] The migration regime, as it currently operates, is drastically out of step with community standards.

[38] Human Rights Law Centre, 'Australians overwhelmingly support permanent residency for migrants' 2 February 2022 <https://www.hrlc.org.au/news/2022/2/1/Australians-overwhelmingly-support-permanent-residency-for-migrants>.

For the extraordinary benefits that Australia reaps from migration, set out in the discussion paper, we must recognise people's fundamental right to remain.

Recommendation – Introduce a self-nominated pathway to permanent residency, based upon length of stay in Australia

5. Need for holistic review

Finally, we wish to reflect on the limited terms of the review.

The terms of reference for the review purport to exclude from its scope matters relating to 'irregular migration and status resolution,' and 'functions and activities of the Australian Border Force, including but not limited to immigration compliance, removals and detention.'[39]

The exclusion of these matters from the terms of reference is illusory; or rather, the review cannot achieve its task of addressing the exploitation of migrant workers without engaging with these matters. It is impossible to address the exploitation of migrant workers without, for instance, engaging with the conditions of people who are undocumented – including people seeking asylum, who have been subjected to the 'fast track' assessment process and no longer have lawful visa status. Likewise, it is not possible to address exploitation without engaging with the various settings in the visa system which render people vulnerable to detention and removal.

It is not possible for the review to meaningfully address the public confidence in migration programs without addressing the erosion of independence in review bodies, the continuing practice of mandatory and indefinite detention, the gap between the provisions of the Act and Australia's international obligations and the dearth of publicly funded, free legal services for people who migrate and seek asylum.

The strategy developed through this review ought to include an integrative consideration of all aspects of Australia's migration system. Failing to do so will necessarily result in an incomplete picture and Strategy for addressing the challenges of our current and future environment.

We welcome the opportunity to consult on these broader issues to ensure this opportunity is not missed.

[39] Department of Home Affairs, 'A migration system for Australia's future - Terms of Reference for the Independent Strategy Leads' <https://www.homeaffairs.gov.au/reports-and-pubs/files/terms-of-reference-migration-strategy.pdf> (accessed 14 December 2022).