Law Council
OF AUSTRALIA

LAW INSTITUTE VICTORIA

Introducing a temporary visa for parents

Discussion Paper – September 2016

Department of Immigration and Border Protection

Joint submission of the Migration Law Committee of the Federal Litigation and Dispute Resolution Section, Law Council of Australia; and the Migration Law Committee and Refugee Law Reform Committee of the Law Institute of Victoria

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Acknowledgement

The following is a joint submission prepared by the Migration Law Committee, Federal Litigation and Dispute Resolution Section, Law Council of Australia (**MLC**) and the Law Institute of Victoria's Migration Law Committee and Refugee Law Reform Committee (**LIV**).

Introduction

The MLC and LIV welcome the Government's announcement regarding the new temporary visa for parents and the improvement to arrangements for parents of Australians to spend time with their families in Australia.

We are pleased the Government is considering an alternative visa to alleviate waiting times, which will assist those Australian citizens and permanent residents who need the presence of their parents in Australia now rather than in 30 years.

Support for this change is conditional on the current permanent migration categories for parents remaining in their current form. It is crucial that the other extant visa types for parents remain in the migration program.

Whilst we note that the *Migrant Intake into Australia* report by the Productivity Commission[1] highlights the net fiscal impacts of parent migration on the Australian community versus the fiscal benefits and contributions made by migrant parents, we are of the view that the social and health benefits of united families who, in turn, engage in the community as productive economic contributors should not be discounted. For example, the contribution to the economy made by Australians who are able to work and pay taxes, and who would otherwise not have been able to do so had their parents not migrated to provide the relevant support, must be taken into account.

Preservation of family units should have primacy over costs in the Family Stream to encourage community cohesion and united families, as cited in the discussion paper, as well as to comply with Australia's obligations to support the right of individuals to have their family life respected, and to have and maintain family relationships, under the *International Covenant on Civil and Political Rights*.[2] Importantly, protection of the family unit leads to social economic benefits in terms of settlement outcomes. Parent visas can also promote law and order in the community, and older generations of migrants can make a significant contribution to the cultural life of a nation.

The MLC and the LIV recommend careful implementation of this visa is essential to avoid unjust outcomes. For example, parents who have been waiting in the queue for a permanent parent visa for a significant period of time, sometimes many years, should be able to apply for this new visa whilst having the choice of retaining their current place in the queue (or, alternatively, withdrawing that application all together should they wish to do so). Proper consideration should be given to whether it will be allowable for a parent to apply for and spend time with their Australian family on a temporary visa whilst concurrently serving a waiting time on a permanent parent visa application.

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[1] Productivity Commission, *Migrant Intake into Australia* (13 April 2016).

[2] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966,999 UNTS 171 (entered into force 23 March 1976).

We provide the following comments in direct response to the questions posed in the discussion paper.

About this visa

1. Should age limits apply to applications for this visa? If so, how would these be determined?

The MLC and the LIV submit that there should be no applicable age limit, provided reasonable public interest safeguards are in place.

Given the nature of the current parent visa/visitor visa options available to parents of Australian citizens or residents, and with the proposed requirements for this new visa, an age limit (upper or lower) is not necessary.

Where age is of concern due to increasing age related health issues, in our view this is sufficiently addressed by the need for private health insurance and/or the suggested financial commitments/requirements that the sponsor has to meet.

Other benefits may be that Australian children, perhaps particularly younger newly arrived migrants, skilled or otherwise, make significant financial remittances overseas to provide for or take care of their parents. This visa may assist or go some way towards keeping those funds in Australia.

2. A key consideration is what, if any, work rights should be included with this visa. In what situations would temporary parent visa holders need to work?

The MLC and the LIV are of the view that unlimited work rights should be granted with this visa, similar to the work rights applicable for onshore aged parent or contributory parent visa holders/applicants on long term bridging visas.

As mentioned above, unlimited work rights could allow younger parents of working age to work, in whatever capacity (full time, part time or casual) and contribute to the community by transferring or bringing to a job, skills and experience gained with age, as well as the direct contribution by the payment of income tax.

Many parents may also wish to undertake unpaid volunteer or community work to occupy their time, or as a selfless contribution, with direct and consequential benefits to the wider community. Parents and/or grandparents may provide child care, volunteer at their children/grandchildren's schools, local cultural centres or community organisations.

3. How long should any waiting period be before a parent can reapply for a subsequent visa?

Provided that the applicant can continue to meet the health, character and other criteria of these visas, and the sponsor can continue to meet the financial obligations, it is our view that there is no need for a waiting period before reapplying for a subsequent visa.

Unlike the visitor visa program, this is a temporary residency visa option which should not necessarily have a restriction on the period of a visa holders' ability to reapply for a subsequent visa and therefore, by default, their continuous stay in Australia. Similar to the 457 program, and as mentioned above, provided that the applicant and the sponsor continue to meet the visa/sponsorship requirements, there seems to be no need to impose a waiting period between the cessation of one visa and the ability to reapply for a subsequent visa.

For working age parents, a waiting period may result in loss of productive long term employment or ability to make long term commitments. For the Australian citizen/resident children, a waiting period may be a strain on the family who are reliant on their parents for child care, before or after school assistance with grandchildren or looking after a sick family member.

We are of the view that there should be provision for parents to apply and reapply onshore as well as from offshore for the initial and any subsequent visas. This is in line with the options available to applicants applying for similar temporary residency visas such as the 457 visa or New Zealand family visas.

We acknowledge the Government's view that many parents will have children living in other countries and/or ongoing commitments in their home countries. However, with multiple travel rights attached to the new temporary parent visa, parents with such commitments are likely to travel throughout their 5 year visa, not necessarily only at the end of the 5 year period.

In our view, a waiting period is not necessary. Should the Government wish to impose a waiting period, we submit that it should not be longer than six months.

4. What limits should be applied to the number of temporary parent visas available each year? Should there also be a limit on the total number of temporary parent visas at any point in time?

Again, provided the applicant and sponsor continue to meet the applicable criteria and obligations, in our view there is no need for a limit on the total number of temporary parent visas, as there is no limit with comparable temporary residency visas such as 457 and visitor visas. We suggest that this could be reviewed after five years of the program running to see if it is fulfilling its intention and/or whether a cap on the number of visa places available each program year is required.

We nonetheless recognise that some temporary residence visas with work rights, such as working holiday visas, have an annual limit, and if necessary, an initial cap may be applied however subsequent visa applicants should fall outside the cap.

If the program is to be capped, we suggest that this is reviewed after a period of five years to evaluate demand on the program, likely processing timeframes and whether the program is fulfilling its intention of providing more flexible arrangements for parents of Australians to spend time with their families in Australia.

By capping the program, the Government should be mindful of the prospect of creating lengthy application pipelines ultimately resulting in the situation such as that for the current permanent parent visa categories. This in turn would ultimately defeat the purpose of the new visa which is to improve the arrangements for parents of Australians to spend time with their families in Australia.

5. What factors need to be considered as to whether there should be a limit to the total time a person can stay in Australia on successive parent visas?

Please refer to the above comments. Where health issues become a major factor/expense, this is counteracted by the requirement to have and maintain health insurance as well as the enforceable financial commitments and obligations on the sponsor.

6. This visa will not provide a pathway to permanent residence. Given the estimated lifetime cost to the budget identified in the Migrant Intake to Australia report, are there any circumstances where permanent residence should be available to parents?

In our view there should be viable pathways for permanent residency similar to what is available now across the whole of the migration program. At the very least a pathway to permanent residence should be made available where applicants do not meet the current pathways but where compassionate and compelling circumstances or a unique change of circumstances exist.

Some examples of such circumstances could be:

- An Australian citizen/permanent resident child becomes seriously ill or requires fulltime care that can be provided by the parent/s. Care provided by parents may alleviate pressure on health services that would otherwise be relied upon.
- Where an Australian citizen/permanent resident child/ren die and minor grandchildren may be left orphaned. For example, Australian citizen/resident parents die in a car accident and leave behind minor children. If assessed as suitable, grandparents may be granted fulltime parental responsibility rather than placing additional burden on government services and/or requiring the Australian citizen children to relocate overseas.
- Other similar scenarios to the above where minor grandchildren and/or a parent are subject to family violence, abandonment, etc.
- Unique or significant change of circumstances for the applicant in their home country or in Australia.
- Where the parent's residence in Australia is consistent with our international non-refoulement obligations.

Visa applicants

7. What, if any, level of English language proficiency should the parent be required to have reached as a prerequisite for this visa? Alternatively, should a minimum level of English language be a requirement in order to apply for a subsequent parent visa?

We submit that this visa must not be subject to Genuine Temporary Entrant requirements such as prerequisite schooling, levels of education or a requirement of English language proficiency, either on original or subsequent application. Such requirements do not exist for the current parent visa pathways nor have they historically existed in reference to the family migration program.

These requirements operate to exclude applicants from developing nations and nations where English is not the first language who have not had access to schooling and education and may have no proficiency in English. They can nonetheless fulfil family requirements such as providing care for children and grandchildren, and support for family members while in Australia. They also contribute to the cultural wealth of our society, thus making their contribution to the Australian community not only of economical benefit but of cultural and social benefit.

If the aim is to maintain family units, facilitate family reunion and create community cohesion, there must not be discriminatory bars applied to the criteria of these visas that will exclude some applicants because of their origin or their educational background.

If the Government considers that it is necessary for community support that an applicant has English language ability, it should only be at a functional level of proficiency. Consideration should also be given to the way that parents could provide evidence of functional English other than the traditional English language test methods. It may be inappropriate to subject parents, particularly elderly parents or parents with impairment/health restrictions to an examination environment so there should be other alternative ways to show English language proficiency.

An alternative may be that the applicant enrols in a suitable privately funded English course and presents a certificate of attendance/completion within a reasonable period of time from first arrival in Australia.

8. Are there any specific groups of parents (for example parents who have young grandchildren living in Australia) who should be afforded priority access to this visa?

We consider there may be some merit to providing priority access if the Australian citizen/permanent resident children may be in need of immediate assistance, however this would depend on whether the new temporary visa is capped and the general processing timeframes etc.

It would be difficult and/or inappropriate to justify prioritising one group of parents over others given that there may be equally urgent, albeit different, needs for immediate parental assistance or support.

The MLC and LIV do not support the proposition that any specific group of parents should be afforded priority over others, provided that the new temporary parent visa provides a timely alternative pathway for families to have their parents spend time with them.

9. New applicants for this visa will always have to pass a comprehensive health assessment. Note elderly parents in particular generally become more fragile and less healthy as they age. To what extent should a person's health status be a consideration if they apply for subsequent parent visas?

All applicants should be required to meet the health requirements when applying for the initial and any subsequent visa application. An appropriate health assessment may be that which is currently required for temporary long stay visas, such as the 457 visa or New Zealand family visas.

There should also be provision, where an applicant fails to meet the health requirement, for a health waiver along the lines of Public Interest Criteria 4006A. Similar to the 457 program, the sponsor should to be able to provide a health undertaking that they will cover all costs, if any, associated with a known medical condition that may result in the parent failing to meet the health requirements.

In any case, applicants should be required to maintain a sufficient level of private health insurance for the initial and any subsequent visas.

Sponsors

10. Australian citizen sponsors will be given higher priority under the new arrangements, as generally they have been contributing to Australia for a greater period of time. Under what circumstances should non-citizen Australian sponsors be given priority?

We are of the firm view that there should be no distinction between Australian citizen and permanent resident sponsors. Provided a sponsor can meet the sponsorship obligations proposed, then there should be no discrimination as between Australian citizens and permanent residents.

The Government may wish to consider a "settled sponsor" requirement, along the lines of that which currently exists for various family sponsored visas. That is, the sponsor must have been resident in Australia for a period of 2 years generally, unless they can show how they are settled earlier than 2 years.

Many skilled migrants (newly arrived or otherwise), as well as the general migrant population may choose to maintain permanent residency status in Australia and not take up Australian citizenship. For example, they do not wish to give up citizenship in their country of origin which does not recognise dual nationality, or for any other number of other reasons, financial or social. Such individuals may be long term residents of Australia and have made significant contributions through their employment, taxes etc. Such individuals should therefore not be afforded any less priority in sponsoring their parents than an Australian citizen.

If a financial bond or arrangement is required to offset potential future health costs incurred by the visa holder, we submit that the person entering into the financial arrangement should not be limited to only the sponsor. In our view, there should be scope for other individuals (such as other family members or organisations) to provide such financial support, in circumstances where the financial resources of the sponsor are limited. This is similar to the arrangement under an Assurance of Support (**AoS**), where the provider of the AoS is not restricted just to the sponsor, but can be any Australian resident.

11. If a financial bond is imposed on the sponsor to offset potential future health costs incurred by the visa holder, what form should this take—that is an upfront one-off payment, a contingent loan arrangement, payment in instalments (such as through a second VAC) or payment into a government investment?

We are concerned not to place an undue burden on sponsors whose parents may not incur health costs, or who may not have access to significant sums of money upfront. However, if a bond is necessary, in our view preference should be given to a contingent loan arrangement (similar to that of the Higher Education Loan Program referred to in the discussion paper).

This arrangement requires the sponsor to enter into a legally binding commitment and be responsible and accountable for such costs, but only if they are actually incurred. There should also be a limit on the total liability of sponsors where their parents incur significant health or aged care costs not covered by their private health insurance. See our comments in reference to the next question.

Alternatively, we suggest that there should be a range of options available to sponsors such as those examples set out in the discussion paper at page 10 under the heading *Bond arrangement, similar to the AOS scheme*. Such options may include, but are not limited to, an AOS scheme arrangement or a legal binding agreement signed by the sponsor whereby the Government or the ATO are able to access funds to go towards any

accrued debt through the sponsor's annual income, provided a sponsor can satisfy the requirements of one of them.

12. What (if any) limits should be placed on the total liability of sponsors where their parent incurs significant health or aged care costs not be covered by their private health insurance?

There should be a limit on the total liability of sponsors where their parents incur significant health or aged care costs not covered by their private health insurance. In our view it is necessary to ensure that a sponsor is not put in a position where his or her Australian family are left with a financial debt that may lead to bankruptcy. The health issues of the Australian child as a result of such a burden or loss of income which ultimately will result in even more cost to the community.

One way to ensure that this liability does not rest upon or with the community or the sponsor alone is to ensure and regulate private health insurance policies available to this cohort of clients, making sure that such policies are comprehensive and transparent.

13. In the event that the holder of a parent visa is unable to depart Australia due to illness or accident:

- **what responsibility should be borne by the sponsor and their immediate family; and**
- **to what (if any) extent would it be reasonable for these costs to be borne by the Australian community?**

We suggest that similar provisions to those that apply to medical treatment visas for such situations may be relevant to these scenarios or the ability to consider compelling and compassionate circumstances and grant the person a visa to remain in Australia.

We suggest that sponsors continue to be responsible for health costs in accordance with their sponsorship obligations. However as set out above, there should be a limit on the total liability of sponsors where their parents incur significant health or aged care costs not covered by their private health insurance.

14. If a sponsor dies:

- **In what circumstances, and what timeframe, should their parent be required to leave Australia**

Parents should be allowed to stay for the remainder of their visa period. If that period is very short and does not allow sufficient time for the usual mourning or burial practices to take place, consideration should be given to the grant of a short term visitor visa for the parent. We would also recommend the Government allow applicants to access other visa pathways if applicable.

- **what liability should remain with their immediate family**

Any accrued debt as at the date of death of the sponsor, should remain only the sponsor's liability and the Government may seek to recover such debts from the deceased sponsor's estate. The immediate family of the deceased sponsor should not have to take on such a debt unless a surviving partner entered into a joint sponsorship arrangement. The continued responsibility with the immediate family should only be to ensure that the parent continues to hold the requisite health insurance throughout their stay in Australia until such time that they depart or the sponsorship obligations are taken over by another party.

- **and in what circumstances should their immediate family be able to take over the sponsorship to enable the parent to remain in Australia?**

In all circumstances provided the immediate family can demonstrate financial capacity to do so. Some thought may be given to the transferring of the sponsorship obligations to another relative of the parent who is an Australian citizen or permanent resident. For example perhaps another Australia citizen or permanent resident child, (i.e. a sibling of the deceased), or a sibling of the parent, would be appropriate?

15. **Should there be an option for parents of minor children to be sponsored on the child's behalf? Who should be allowed to take on this role and what liability for sponsorship obligations should apply to them?**

It is our suggestion that the same options that currently exist for the permanent parent visas in regard to such scenarios should be applicable to this visa.

16. **In what circumstances should it be an option or requirement for couples to lodge a joint-sponsorship of a parent?**

We are of the view that this should be available in all circumstances, should a couple wish to do so.

If this suggestion is not taken up, then we propose joint sponsorship should at least be an option where the sponsoring child fails to meet any income threshold on their own, but a combined income with their partner and/or sibling – another child of the parent in question, allows them to reach any income requirements. This provides flexibility in much the same way as the Joint Assurance of Support principles apply.

Costs

17. **What factors need to be considered in setting the level of the VAC for the new visa to adequately reflect the extended stay available?**

In our view any new VAC needs to be reflective of the fact that this is a temporary visa.

It should also be reasonable and sufficiently lower than the current VAC for the permanent parent visa options, so as to provide incentive for families to apply for such visas over current permanent residency options – despite the lengthy processing times.

In addition, as this visa may become an option for many families previously prevented from accessing the parent visa categories, it should be sufficient to provide some benefit to the Government, but not so expensive as to prevent certain families from accessing the visa, as currently occurs with the contributory parent visa categories.

Given the nature of this visa (i.e. a temporary visa), it is likely to be accessed by young families who are already facing financial constraints associated with the costs of having a young family, or relatively newly arrived migrants seeking to establish themselves financially in Australia. Considering these categories of likely applicant/s any VAC would need to be reasonable and in line with VAC for long-stay temporary visas.

18. **In what circumstances should refunds be available for applicants who want to withdraw an existing permanent visa application and apply for the new temporary parent visa?**

Subject to the possibility of administrative consequences, we support refunds being available for withdrawing an existing application and applying for this visa in all circumstances. Where the VAC for the new temporary visa is less than that paid by the applicant for the permanent residency visa, the difference should be refunded to the applicant.

Additionally, we suggest that applicants should be allowed to convert their existing permanent residency applications into an application for the new temporary parent visa, and seek a refund of any difference in VAC. This is similar to the arrangements that exist for applicants of a non-contributory parent visa seeking to apply for a contributory parent visa. One mechanism is that an application for any parent visa is, upon withdrawal, a deemed application for a parent temporary visa. This creates a streamlined process for both the Department and the applicant.

19. **What might constitute a suitable level of annual income available to the applicant for their period of time in Australia, noting they will not have access to government support services? Should the source of this income be the sole responsibility of the parent, or should their Australian child be allowed to contribute to this?**

It is our view that the source of income may be a combination of the parent and their Australian child or Australian children combined (i.e. the Australian siblings of the sponsoring child). Subsequent applications could allow for a parent's income earned in Australia, both prospectively and retrospectively. The figure could be indexed to a suitable Australian retirement income or amount of capital.

Additional comments/suggestions

In our view there should be no "Balance of Family Test" (**BoF**) requirement applicable to this new temporary parent visa.

While BoF test is relevant to the permanent residency options, this is a temporary long stay visa and not permanent residency. As such we are of the view that so long as the applicant and sponsor for this new visa meet the requirements of the visa and the sponsorship obligations, it should not matter how many children are in Australia, permanently or temporarily or overseas.

This new visa provides a good alternative for longer periods of stay for many parents who cannot meet the BoF, which usually eliminates many client cohorts with larger families. This visa is intended to provide another pathway for parents to stay with their Australian citizen and resident children in Australia, and to encourage community cohesion and united families. Limiting its applicability to only those parents with a BoF in Australia would defeat the purpose and aims and perpetuate barriers faced in other visa categories.

Unlimited permission to study should be granted for these visas. Some parents may wish to undertake studies for any number of reasons and provided the visa holder covers the costs for any such studies, they should be granted permission to study.

Multiple travel rights should be granted for these visas.

Given concerns of possible exploitation, we recommend that the Department liaise with the Fair Work Ombudsman to develop information that is provided to visa applicants at the time of acknowledgement of receipt of application, and at grant, to minimise the risk of exploitation.

The ATO should be consulted on whether the Australian community could benefit from those parents who hold assets, or who earn income overseas, being subject to worldwide tax after the grant of a rollover visa. This would allow some quid pro quo for those temporary resident parents who seek to remain in Australia on a longer term basis.

For those parents considering purchase of property for personal purposes, we recommend that the Government consult with the Foreign Investment Review Board (FIRB) about considering an amendment to FIRB residential property purchases. FIRB could provide an exemption for a person acquiring a single property for personal purposes as their principal place of residence in Australia.

About the Law Council of Australia

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

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

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

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

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

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

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

About the Law Institute of Victoria

The Law Institute of Victoria ('LIV') represents lawyers and people working in the law in Victoria, interstate and overseas. Our members offer their commitment, diversity and expertise to help shape the laws of Victoria and to ensure a strong legal profession for the future.

The LIV promotes justice for all by advancing social and public welfare in the operation of the courts and legal system, as well as advancing education and public confidence both in the legal profession and in the processes by which the law is made and administered.

As the peak body for the Victorian legal profession, the LIV initiates programs to support the needs of a changing profession, promotes an active law reform advocacy agenda, responds publicly to issues affecting the profession and broader community, delivers continuing legal education programs, and continues to provide expert services and resources to support our members.

The LIV is a non-profit organisation dedicated to its members and the development, maintenance and the sustenance of the law for the benefit of the community.