Law Council
OF AUSTRALIA

Migration, Pathway to Nation Building

Joint Standing Committee on Migration

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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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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- 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
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The Chief Executive Officer of the Law Council is Dr James Popple. 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 is grateful to the Migration Law Committee of its Federal Dispute Resolution Section, its National Human Rights Committee and the following of its Constituent Bodies—the Law Institute of Victoria (**LIV**); the Law Society of New South Wales (**LSNSW**); the Queensland Law Society (**QLS**); and the Law Society of South Australia (**LSSA**)—for the substantive input they have each provided to the submission.

Executive Summary

1. The Law Council is grateful to the Joint Standing Committee on Migration (**Committee**) for the opportunity to make a submission to its inquiry into the role of permanent migration in nation building (**Inquiry**).

2. In this submission, the Law Council has focussed on measures to better attract and retain migrant workers and enhance their pathways to permanent residency within the Skilled Migration Program—particularly the employer sponsored visa program.[1]

3. The Law Council considers that all employer sponsored visas should provide a certain pathway to permanent residence to attract and retain migrants with appropriate skills, experience and training, and to avoid the increased risk of exploitation that arises for a migrant worker who is 'permanently temporary'.

4. The Law Council recommends pathways to permanent residence for employer sponsored visas be enhanced by:

   - abolishing types of temporary skilled visas which explicitly deprive a migrant worker of a pathway to permanent residence;
   - increasing the flexibility of migrant workers on temporary skilled visas to change employers and remain on a permanent residency pathway (which also mitigates exploitation risks); and
   - easing some formal visa requirements, which impede temporary skilled visa holders progressing on a pathway to permanent residence, such as employment history, age and English-language requirements.

5. The Law Council considers that an efficient, transparent and responsive migration scheme assists to attract and retain migrant workers. The Law Council proposes a number of reforms, which are directed to addressing inflexible, non-dynamic, overly prescriptive and opaque aspects of the Skilled Migration Program. A principle underpinning these proposals is that substantive processes which determine whether a migrant worker may qualify for a visa should be authorised by law, to ensure accountability, transparency and the availability of review.

6. In the context of the employer sponsored visa program, the Law Council's two key proposals to this end are to:

   - abolish or consolidate skilled occupation lists to instead allow employers to determine their occupation needs; and
   - not raise and, ideally, remove a threshold on the salary of a migrant worker who may qualify for a temporary skilled visa, and instead require that the salary offered by the employer be the greater of the average market salary rate for the occupation or the award. This will better ensure a scheme that is responsive to skill and workforce shortages and facilitates pathways to permanent residency, even for workers with appropriate skills, experience and training at lower salary levels.

[1] As discussed at [16], in this submission the term 'employer sponsored visa programme' should be read as reference to the Temporary Skill Shortage (Subclass 482) visa, Temporary – Skilled Employer Sponsored Regional (Provisional) (subclass 494 visa) and Employer Nomination Scheme (Subclass 186) visa.

7. More broadly, and to the same end, the Law Council recommends reforms to:

- the labour market testing process—to be made more flexible and thus dynamic and responsive to business need;
- the expression of interest and visa application processes for the General Skilled Migration and Global Talent visas—to ensure that they are authorised by law and provide more contemporaneous information about current occupation or visa profile priorities; and
- the skills assessment process—to ensure that, where required, an assessment is undertaken which is pursuant to statutory criteria and subject to independent merits review.

8. Finally, the Law Council recognises the intrinsic social and cultural benefits to immigration. While it has not proposed reform measures in these areas, the last part of this submission details previous submissions which may be of interest to the Committee in that context.

Introduction

9. The terms of reference for this Inquiry are:

The [Committee] will inquire into and report on Australia's migration system, with reference to:

1. *The role of permanent migration in nation building, cultural diversity, and social cohesion;*
2. *Immigration as a strategic enabler of vibrant economies and socially sustainable communities in our cities and regional hubs;*
3. *Attraction and retention strategies for working migrants to Australia;*
4. *Policy settings to strengthen skilled migrant pathways to permanent residency;*
5. *Strengthening labour market participation and the economic and social contribution of migrants, including family and humanitarian migrants and the partners of working migrants;*
6. *The role of settlement services and vocational training in utilising migrant experiences, knowledge, and opportunities; and*
7. *Other related matters that may assist the inquiry*.

10. The Law Council has in this submission focused largely on the Skilled Migration Program—and proposed reforms to it—given the central role of permanent skilled migration in nation building (term 1), and that terms 3, 4 and 5 directly relate to the settings within the Skilled Migration Program.

11. The Law Council frames this submission against the reform principles set out in its submission to the 'A Migration System for Australia's Future' review (**Migration Review**):[2]

(a) there should be identifiable pathways to permanent residence for visas in the GSM and employer sponsored visa programs;

[2] Law Council of Australia, *A Migration System for Australia's Future,* 21 December 2022 <https://www.lawcouncil.asn.au/publicassets/b5a9d0f3-c68f-ed11-9478-005056be13b5/2022%2012%2021%20-%20L%20-%20Migration%20Review%20-%20A%20migration%20system%20for%20Australias%20future%20%20end%20note%20correction.pdf> [1] (**Law Council submission to the Migration Review**).

(b) the Skilled Migration Program should be made more flexible and should no longer be based on static assessments of 'skill shortages';

(c) attention should be given to removing overly prescriptive aspects of the visa processing framework which impede dynamic and responsive visa processing;

(d) mitigating migrant worker exploitation requires a holistic approach to addressing employer nomination settings, migrant complaint options, and enforcement;

(e) meaningful access to family reunion is critical to attracting migrants with appropriate skills, experience and training, in addition to the social and community benefits of completing the family unit; and

(f) the Australian Government and the Department of Home Affairs (**Department**) should continue to work expeditiously to reduce visa processing backlogs.

12. For the purpose of this submission, the Law Council adds principle (g): namely, that a migrant worker should be entitled to the same pay and conditions, and workplace protections, as an Australian worker. While this is a corollary of principle (d), it is also relevant to parts of the submission expanding on other principles as applied within the Skilled Migration Program, and is made clear here for that reason.

13. Relevantly, articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights[3] (**ICESCR**) respectively provide that States Parties recognise the right:

- to work, which includes 'the right of everyone to the opportunity to gain [their] living by work which [they] freely chooses or accepts'; and
- of 'everyone to the enjoyment of just and favourable conditions of work' which ensure, relevantly, 'fair wages and equal remuneration for work of equal value without distinction of any kind', 'decent living for themselves and their families' and 'safe and healthy working conditions'.

14. States Parties undertake, under article 2(2), to guarantee all rights under ICESCR without discrimination of any kind, including articles 6 and 7, which is reinforced in the reference to 'everyone' in both provisions[4] these rights apply in relation to employment. Consistently with the principle of non-discrimination, the United Nations Committee on Economic, Social and Cultural Rights (**UNCESCR**) has stated that these rights apply to migrant workers.[5]

[3] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976.
[4] United Nations Committee on Economic, Social and Cultural Rights, *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/GC/23 (27 April 2016) [5].
[5] Ibid; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, E/C.12/GC/1 (6 February 2006) (**UNCESCR General Comment No. 18**); United Nations Committee on Economic, Social and Cultural Rights, *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2017/1 [3].

The Skilled Migration Program

Introduction

15. The Skilled Migration Program is made up of the Employer Sponsored visa program, General Skilled Migration (**GSM**), Global Talent, and Business Innovation and Investment. This submission addresses the first three elements, and is directed towards giving effect to some of the aspirations for the Migration Program within the Inquiry's terms of reference.

Employer Sponsored Visa Program

Overview

16. The employer sponsored visa program makes available temporary and permanent visas to migrants who an employer has sponsored to work in a nominated position; namely:

    - a Temporary Skill Shortage (Subclass 482) visa (**TSS visa**), made up of Short-term, Medium-term and Labour Agreement streams;
    - a Temporary—Skilled Employer Sponsored Regional (Provisional) (**subclass 494 visa**) to work in an occupation in a designated regional area; and
    - a permanent Employer Nomination Scheme (Subclass 186) visa (**ENS visa**), of which there are three streams:
        - Temporary Residence Transition (**TRT**) stream, for TSS visa holders in the Medium-term stream;
        - Direct Entry stream, for persons who have not held a TSS visa; and
        - Labour Agreement stream.

17. Setting aside the Labour Agreement stream, there are essentially two steps to obtain a visa in the employer sponsored visa program.

18. The first step is the employer applies to the Minister for approval of their sponsorship of a migrant worker. The relevant criteria may include:

    - for all visas:
        - the migrant worker will be employed in an occupation prescribed in a list made by the Minister in an instrument (**skilled occupation lists**),
        - there is a demonstrated need for a migrant (as opposed to an Australian) worker, which may be ascertained by labour market testing (**LMT**);
    - for the temporary visa, the applicant will be paid more than the temporary skilled migration income threshold (**TSMIT**) (presently $53,900); and
    - for a permanent visa, unless applying for a visa in the Direct Entry stream, the employer sponsored the visa holder for three years and will employ the migrant worker for two years (**ENS visa**).

19. The other step is the visa application, for which the criteria include the applicant's age, English-language ability, existing work experience, an assessment of skills, medical and penal checks.

20. A functioning employer sponsored visa program—which aims to link Australian business who cannot find employees in Australia with appropriate skills, experience and training with migrants—will help ensure strong labour market participation of migrant workers.

21. QLS considers that the employer sponsored visa program presents better solutions for labour market participation than other skilled visa types. It submits that migrants with a job in Australia and the support of an employer will in general have much higher rates of labour market participation than those without, and ensure that needed skills are directly matched between employers and skilled migrants.

22. In the following section, the Law Council has set out a number of reform proposals relating to employer sponsored visa program visas to give effect to some of the aspirations for the migration program contained within the Inquiry's terms of reference.

Policy settings to strengthen pathways to permanent residency in the employer sponsored program

The importance of pathways to permanent residency

23. The Law Council considers that all visas in the employer sponsored visa program should have a clear and certain pathway to permanent residence.

24. The availability of clear pathways to permanent residence assists greatly in attracting and retaining migrants with appropriate skills, experience and training, for whom Australia competes with other similar nations. It is also important for Australia's future capacity as it is a way to take advantage of the experiences that these workers have acquired in Australia, and it will help to stymie the cycle of shortages of workers with appropriate skills, experience and training that sometimes occur.

25. Further, temporary visa holders do not qualify for social security payments.[6] Article 9 of the ICESCR, requires States Parties to 'recognize the right of everyone to social security, including social insurance'. The UNCESCR states, in relation to migrants, 'non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support' and 'any restrictions, including a qualification period, must be proportionate and reasonable'.[7] More generally, article 11 of ICESCR provides that States Parties 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

26. Also, as the Law Council has previously detailed,[8] family members, particularly women, who hold a temporary visa as a secondary holder (i.e. as a partner of a primary visa holder) are particularly vulnerable to domestic and family violence.

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[6] See, in summary, Law Council of Australia, Submission to the Senate Community Affairs Legislation Committee, *Social Services Legislation Amendment (Consistent Waiting Periods for New Migrants) Bill 2021* (5 August 2021) Attachment A <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>.

[7] United Nations Economic, Social and Cultural Rights Committee, General Comment No. 19 – The right to social security (art. 9), 39th sess, UN Doc E/C.12/GC/19 (4 February 2008) [37].

[8] Law Council, Australia's 2022-23 Migration Program, submission to the Department of Home Affairs (10 December 2021) [86]-[99] <https://www.lawcouncil.asn.au/publicassets/7c5b8a3b-5861-ec11-9446-005056be13b5/4140%20-%20Australias%202022-23%20Migration%20Program.pdf> (**2021 Law Council submission on the Australia's 2022-23 Migration program**).

Dependent temporary visa holders, such as skilled visa holders, cannot access the family violence provisions, which exacerbates this risk.[9]

27. There are two kinds of measures to provide pathways to permanent residency:

    (a) cease to make available temporary visas which, intentionally, do not place the holder on a pathway to permanent residence;

    (b) cease measures effectively depriving temporary visa holders of a pathway to permanent residency, where the criteria for the permanent visa effectively make the permanent visa difficult or impossible to obtain.

28. In relation to class (a), presently, a holder of a TSS visa in the Short-term stream does not have a pathway to permanent residence within the employer sponsored visa program: ordinarily a holder of this visa cannot satisfy the criteria for an ENS visa in the TRT stream. The Law Council has an established position that the Short-term stream of the TSS should be merged into the long-term stream to thus abolish a visa type which, by design, does not provide a pathway to permanent residence.

29. Recommendations in relation to class (b) will be discussed in the following sections.

Recommendation

- **As a general principle, the migration framework should ensure a pathway to permanent residence for all skilled visa holders.**
- **The Short-term stream of the TSS visa should be abolished.**

Providing greater flexibility for TSS visa holders to access permanent residency

Provide greater flexibility to change employers

30. Unless an exemption applies, TSS visa holders in the Medium-term stream may qualify for a permanent ENS visa if they have been employed full-time in the position in question for three years in the period four years immediately before the application. The application for the ENS visa must then be with the same employer.

31. The Law Council maintains its existing position that the three-year period should be reduced to *two* years.[10] This measure would both incentivise potential migrants to that pathway and assist to reduce the risk of migrant worker exploitation.

32. The effective requirement on a TSS visa holder to stay with their employer for three years to remain on a pathway to permanent residency acts as a disincentive to TSS visa holders leaving their employer or reporting poor conduct, even if the conditions of their employment are poor or they feel as though they are being exploited. That is because changing employers will restart the minimum three-year pathway to permanent residence and thus prolong their temporary visa status.[11]

[9] Ibid [96].
[10] Ibid [64].
[11] See also, making the same point: Australian Industry Group, 'Submission to the inquiry: A Migration System for Australia's Future' (15 December 2022). https://www.aigroup.com.au/globalassets/news/submissions/2022/inquiry_into_migration_system_dec_2022.pdf; Chris F. Wright and Stephen Clibborn (University of Sydney), 'Submission, Department of Home Affairs Review: A Migration System for Australia's Future' (December 2022) 16.

33. Further, there are other structural disincentives on making a complaint about potentially poor employer conduct which arise in the migration legislative framework:

- if a migrant worker holding a TSS visa ceases employment, it is a condition of their visa that the period during which the holder ceases employment must not exceed 60 consecutive days;[12] and
- it is a requirement of a nomination for an ENS visa[13] and the ENS visa itself,[14] that there is no adverse information known to the Department about the nominating employer. If a TSS visa holder reports poor behaviour by an employer, this could amount to there being adverse information about the employer known to the Department and the applicant's ENS visa application will be refused.

34. The LSSA has expressed concern about the potentially significant adverse consequences for migrant workers who raise legitimate OH&S and/or underpayment of wages concerns, which may dissuade them from raising these concerns.

35. The UNCESCR has said, in relation to the right to just and favourable conditions of work as recognised in article 7 as it applies to migrant workers (emphasis added):[15]

> *Migrant workers: These workers, in particular if they are undocumented, are vulnerable to exploitation, long working hours, unfair wages and dangerous and unhealthy working environments.* ***Such vulnerability is increased by abusive labour practices that give the employer control over the migrant worker's residence status or that tie migrant workers to a specific employer****.*

36. The Law Council has not in this submission proposed specific reforms to address structural disincentives to making a complaint about an employer which arise in the migration framework, in anticipation of a separate process directed to reforms of those kinds later in 2023. A high-level description of the principles which should underpin reform to address migrant worker exploitation is briefly addressed later in the submission.

37. The LIV further recommends that where a visa holder changes employers for reasons beyond their control, such as being subject to exploitation or where a business closes, time spent with that employer should qualify them for permanent residency. The Law Council agrees in-principle with that proposal.

38. Additionally, the Law Council suggests a new optional permanent residence pathway which enables TSS holders to qualify for a permanent skilled visa (ENS or GSM) in the same occupation after *three* years with different employers who are each subject to an approved nomination.

39. A TSS visa holder would thus have two pathways to permanent residence:

- a two-year pathway if they stay with a single employer; or
- a three-year pathway if they change employers.

[12] *Migration Regulations 1994* (Cth) Schedule 8 cl 8607(5).
[13] Ibid paragraph 5.19(4)(b).
[14] For example, ibid Schedule 2 subclause 186.223(3A).
[15] Footnotes removed from original.

40. The introduction of alternative pathways would have dual benefits, being that it would:

- incentivise employers to treat the worker well and thus encourage them to stay with the employer and benefit from a faster pathway to permanent residence; and
- provide the migrant worker with greater scope to leave an employer who treats them poorly or with whom they are unhappy, and with flexibility and autonomy to determine their career path.

Recommendation

- **TSS visa holders should be given more flexibility to change employers without affecting their pathway to permanent residence, by providing them the choice of one of two TSS streams:**
  - **hold a TSS visa with a single employer for two years, before applying for an ENS visa with the same employer; or**
  - **hold a TSS visa with one or more employers in one or more approved occupations for three years before qualifying for a GSM visa or an ENS visa in the same occupation.**

Employment history

41. The Law Council suggests the employment experience required of temporary visa applicants in their nominated occupation be reduced, specifically:

- for TSS visa applicants, from two years to one year; and
- for subclass 494 visa applicants, from three years to one year or lower.

42. The feedback of practitioners is that Australian business want to include, for development purposes, young talent who do not yet have two years' experience and to develop them with a view to sponsoring them for permanent residency.

43. Further, the objective of the subclass 494 visa in incentivising work in regional areas is undermined by the lengthy employment history requirements. A subclass 494 visa holder will still need to work another three years on that visa to qualify for the permanent subclass 191 visa. This being the case, it may be appropriate to set an employment history requirement for the subclass 494 visa which is lower than one year, to provide some incentive for migrant workers to settle in regional areas.

Recommendation

- **The relevant employment experience in their nominated occupation should be reduced:**
  - **for a TSS visa—from two years to one year; and**
  - **for a Subclass 494 visa—from three years to one year.**

Relaxing age requirements

44. While there is no age requirement for applicants for TSS visas, a holder of that visa who wishes to apply for an ENS visa must be under 45 years old at the time of application, subject to limited exceptions. This can in effect render TSS holders unable to access a permanent ENS visa.

45. Further, it can prevent workers with needed skills, experience and training who perform a critical function with their present employer from applying for permanent residency. The Law Council, and all Constituent Bodies which contributed to this submission, support relaxing the age requirement to expand pathways to permanent residency.

46. The Law Council suggests that the age limit should be increased for all permanent skilled visas, to increase the pool of migrant workers with a pathway to permanent residency. The Law Council is not in a position to recommend a specific figure, but suggests that the Departments of Treasury and Finance could undertake modelling to inform a specific figure, potentially between 50–60, drawing on the tax, fiscal, pension and relevant ageing population considerations.

47. The Law Council has previously supported a standing exemption for senior management roles, which in some professions tend to correlate with lengthy work experience, and it maintains that submission here. [16]

48. The QLS notes that TSS visa holders over 45 years are often filling crucial supervisory or managerial roles in Australian business and are invaluable in the training and upskilling of junior staff. It offers this scenario: a state government department had a critical need to retain senior social workers recruited on TSS visas, but the age limit of 45 years prevented an application for an ENS visa. At risk of losing its more senior staff members who were filling crucial supervisory and mentorship roles, the only permanent pathway for retention of this cohort was negotiation of a labour agreement.

49. In addition, the Law Council suggests three kinds of exemptions be provided for:

    (a) extend the exemption to age requirements which applies to 'legacy' temporary skilled visa holders who worked in Australia over the COVID period to persons who held that visa before 18 April 2017—due to their involvement in appeals processes there are still migrants in Australia who are unable to apply for a permanent visa;[17]

    (b) a standing exemption for migrants who have been working in Australia for three years before they reach the applicable age limit. The Law Council understands that the premise of the age limit is that people over that limit will not pay enough tax during the remainder of their working life to make up for their eventual social security costs. A person who has been working full time for a considerable period before that point has already been paying tax, and thus, it is proposed, should be provided with a pathway to permanent residency; and

    (c) consistent with its previous submission,[18] there should be provision to decide when a particular applicant's permanent presence in Australia is of inherent benefit regardless of their age.

[16] Law Council, Submission to the Senate Legal and Constitutional Affairs References Committee, 'Inquiry into the effectiveness of the current temporary skilled visa system in targeting genuine skills shortages' (21 December 2018) (**2018 Law Council submission to the inquiry into skills shortages**) [74] <https://www.lawcouncil.asn.au/publicassets/86f83be3-ab1e-e911-93fc-005056be13b5/3562%20-%20Skilled%20visa%20system%20inquiry.pdf>.
[17] See Migration (LIN 19/216: Exemptions from Skill, Age and English Language Requirements for Subclass 186, 187 and 494 Visas) Instrument 2019.
[18] 2018 Law Council submission to the inquiry into skills shortages [71]-[73].

50. The LIV supports the complete removal of age caps for ENS and subclass 494 visas, however recognises, alternatively, tailored exemptions could operate to allow the applications of highly skilled workers over the age of 45 years.

Recommendation

- **The age requirement for all visas in the employer sponsored visa program should be increased to at least 50 years.**
- **Exemptions should be provided for temporary visa holders:**
  - **who worked in Australia over the COVID period and held their temporary visa before 18 April 2017;**
  - **who have been working in Australia for a considerable period, before seeking to settle in Australia;**
  - **whose permanent presence in Australia is of inherent benefit regardless of their age; or**
  - **are employed in senior management roles.**

English-language requirements

51. Currently, the English-language requirements for a TSS visa (vocational English)[19] are at a lower level than for an ENS visa (competent English).[20] This can impede a migrant's pathway to permanent residency and result in employers losing valuable employees if they have no prospect of attaining higher-level English requirements. A TSS and ENS visa should set the same English-language requirements for each occupation, with a higher-level English for certain occupations which demand it.

52. The LSNSW notes that the current English-language requirements, which demand competency in four linguistic areas—speaking, reading, writing and listening—can present an obstacle for people who may have good spoken English but struggle with written skills. It suggests that it would be useful to rethink ways in which the English-language requirement could take such variations in linguistic ability into account.

Recommendation

- **A TSS and ENS visa should have the same English-language requirements for each occupation, with a higher-level English for certain occupations that require it.**

Reforms to better attract and retain migrant workers to Australia

53. In the following discussion, the Law Council has proposed reforms to better attract and retain high-quality migrant workers to Australia, to address Term of Reference 3.

54. These reforms are directed to addressing inflexible, non-dynamic, overly prescriptive and opaque aspects of the employer sponsored visa program. In the experience of practitioners, an efficient, clear, transparent and responsive scheme assists to attract and retain migrant workers and better enables Australian businesses to promptly recruit migrant workers to service business needs.

[19] See *Migration (IMMI 18/032: Language Test Requirements—Subclass 482 Visa) Instrument 2018.*
[20] Migration Regulations clause 186.222 of Schedule 2.

Abolish or consolidate skilled occupation lists

These lists are not updated frequently enough to be effective

55. Applicants for employer sponsored visa program visas must nominate an occupation contained in one of three skilled occupation lists[21] prescribed by the Minister in a complex set of legislative instruments.[22]

56. Skilled occupation lists are designed to capture occupations that are currently subject to skill shortages. However, these lists are not sufficiently dynamic to capture areas of genuine shortage in real time, and actually contribute to longer processing times, backlogs, and frustration for applicants.[23] Even though a 2019 Senate Committee inquiry expressed concern that occupations in the skilled occupation lists did not appear to be suffering from a skill shortage[24] and recommended that future list updates include an explanation of the changes made,[25] the occupation lists have not been updated since 5 March 2019.[26]

57. The QLS observes, by way of example, that numerous metropolitan state government hospitals are facing significant shortages of anaesthetists, resulting in significant pressure on current staff to work overtime shifts, and reduced capacity at these hospitals to provide critical medical services. It notes that the occupation list does not permit TSS visa sponsorship of anaesthetists in metropolitan areas, resulting in an inability to sponsor critically required overseas anaesthetists to address this shortage. The only current pathway for recruitment of anaesthetists is through negotiation of a labour agreement.

58. Further, even if these lists were more frequently updated, the reliance in these lists on occupations in the Australian and New Zealand Standard Classification of Occupations (**ANZSCO**) further exacerbates the lists' inflexibility. In the experience of practitioners, ANZSCO occupations are not updated frequently, and do not reflect roles and occupations within emerging technologies.[27]

59. Practitioners have reported instances where migrants with appropriate skills, experience and training are prevented from making an application because their occupation is not on the list. It should be recognised that at a time of rapid

[21] Department of Home Affairs, 'Skilled occupation list' (webpage, accessed on 19 March 2023) < https://immi.homeaffairs.gov.au/visas/working-in-australia/skill-occupation-list >.
[22] See, for example, Migration (LIN 19/051: Specification of Occupations and Assessing Authorities) Instrument 2019 (Cth), Migration (LIN 19/049: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2019 (Cth); Migration (LIN 19/219: Occupations for Subclass 494 Visas) Instrument 2019 (Cth); Migration (LIN 19/048: Specification of Occupations—Subclass 482 Visa) Instrument 2019 (Cth); and Migration (LIN 19/047: Specification of Occupations—Subclass 187 Visa) Instrument 2019 (Cth).
[23] See, for example, 2018 Law Council submission to the inquiry into skills shortages [17].
[24] Senate Legal and Constitutional Affairs References Committee, 'Effectiveness of the current temporary skilled visa system in targeting genuine skills shortages' (April 2019) [3.78] (**2019 Senate Committee report from its inquiry into skills shortages**).
[25] Ibid [3.83].
[26] That was the date which the Migration (LIN 19/048: Specification of Occupations—Subclass 482 Visa) Instrument 2019 (Cth) – which prescribes the *Short-term Skilled Occupation List and the Medium and Long-term Strategic Skills List* – was made. That instrument has been amended, but the occupations on those lists have not changed.
[27] Ibid; Law Council, Submission to the Joint Standing Committee on Migration, 'Inquiry into Australia's skilled migration program' (1 April 2021) (**2021 Law Council submission to the inquiry into Australia's skilled migration program**) [12]-[13] <https://www.lawcouncil.asn.au/publicassets/09b70340-edbc-eb11-943c-005056be13b5/3985%20-%20Australias%20Skilled%20Migration%20Program.pdf>]; 2021 Law Council submission on the Australia's 2022-23 Migration program [64].

technological advancement, new jobs are continually being created and the skills required for particular jobs may be subject to change.

60. The Law Council is aware that the Australian Bureau of Statistics is currently undertaking a review of ANZSCO[28] and its processes for updating it.[29] The review is intended to result in an update to the ANZSCO, which is due to be released in December 2024, with public consultation rounds to be held in 2023 and 2024 targeting selected occupations.[30]

Occupation lists should be consolidated or abolished

61. The Law Council suggests the Skilled Migration Program would be more flexible and better able to address labour market needs if skilled occupation lists were at least consolidated,[31] as recommended by the Joint Standing Committee on Migration in 2021,[32] or abolished. The LSNSW notes that it is possible that the abolition of an occupation list specific to regional visas would assist to address significant job shortages in these areas and may even contribute to the revitalisation of regional Australia by incentivising more businesses to relocate to regional areas, as the policies in place will meet the skill and labour needs of their businesses.

62. The Law Council suggests that the abolition of skilled occupation lists and the employer sponsored visa program being made available to any applicant who can obtain employer sponsorship in any occupation in any of the ANZSCO skill levels 1–3.[33] Presently not all occupations within these skill levels are contained on a skilled occupation list. For example, the occupation of 221212 Corporate Treasury is specifically excluded, despite being a senior position with oversight of key business functions, thereby requiring significant skill and experience. As a further example, the occupation of 312412 Electronic Engineering Technician, which includes highly skilled specialisations such as Aircraft Electronics Technician and Combat Systems Technician, is similarly ineligible for sponsorship. So too are occupation classifications recently added to ANZSCO, such as 139917 Regulatory Affairs Manager, 224115 Data Scientist and 262114 Cyber Governance Risk and Compliance Specialist. These highly skilled emerging occupations have not yet been incorporated into the skilled occupation lists, despite their particular relevance within an environment of increased cyber security vigilance.

63. Under this option, if a person seeks a TSS visa in relation to one of the lower skill levels, they may be able to apply to access the employer sponsored visa program on an exceptional basis, for example, because there is a genuine skill and workforce shortage in their occupation and vacant positions cannot be filled by an Australian citizen or permanent resident.

64. Any assessment of skills or workforce shortage should be performed by an independent agency, with a statutory responsibility for regularly performing the assessment based on clear, publicly available criteria. The Law Council suggests it

[28] Australian Bureau of Statistics, 'Updating ANZSCO' (webpage, accessed on 24 March 2023) <https://www.abs.gov.au/about/consultation-and-conferences/updating-anzsco>.
[29] Australian Bureau of Statistics, 'Participate in ANZSCO consultations' (webpage, accessed on 24 March 2023), <https://www.abs.gov.au/articles/participate-anzsco-consultations>.
[30] Ibid.
[31] 2021 Law Council submission to the inquiry into Australia's skilled migration program [50]-[51]; 2021 Law Council submission on the Australia's 2022-23 Migration program [64].
[32] Joint Standing Committee on Migration, 'Final Report of the Inquiry into Australia's Skilled Migration Program' (August 2021) Recommendation 4.
[33] Australian Bureau of Statistics, 'Conceptual basis of ANZSCO' (release dated 22 November 2022), < https://www.abs.gov.au/statistics/classifications/anzsco-australian-and-new-zealand-standard-classification-occupations/2022/conceptual-basis-anzsco>.

should not, as it is now, be based on a discretionary, permissive Ministerial power to determine occupations which is not informed by any specific criteria.

65. The Law Council considers that Jobs and Skills Australia has the potential to adequately perform that function as a statutory body established under the *Jobs and Skills Australia Act 2022* (Cth) (the **Jobs and Skills Act**). Subsection 9(1) of the Jobs and Skills Act sets out its various functions including to provide advice to the Minister of Employment and Workplace Relations or the Secretary in relation to, amongst other things, Australia's current, emerging and future skills and training needs and priorities. Jobs and Skills Australia has published a quarterly Labour Market Update which includes an Appendix A which sets out the 'Top 20 occupations in demand for each state and territory'.[34]

66. As of 29 March 2023, a bill had been introduced to amend the Jobs and Skills Act to provide Skills Australia with the additional function of 'analys[ing] skills needs and workforce needs, including in regional, rural and remote Australia, and in relation to migration'.[35]

67. The Law Council notes that, pursuant to subparagraph 9(1)(g)(i), the *Migration Act 1958* (Cth) or *Migration Regulations 1994* (Cth) could be amended to expressly confer on Jobs and Skills Australia the function of periodically performing a bespoke assessment of skills and workforce shortages for the purposes of migration law.

Flexibility for high-income earners

68. Further, both QLS and the LIV suggest that there should be additional flexibility for high salary earners—specifically, where the position being nominated has guaranteed annual earnings over $100,000.

69. The QLS considers that it is it worth exploring how the current 'one size fits all' approach to employer sponsored visas could be altered to improve efficiency for employers and visa holders/prospective visa holders while ensuring that workers in Australia on employer-sponsored visas are protected from exploitation. At present, application criteria and compliance requirements are essentially identical for all employers, regardless of size, location and the type of role being filled.

70. While QLS does not advocate for a system that would preference different categories of employer or roles in terms of processing priority, it considers that it may be possible to improve efficiency for all parties (including the Department) by not applying what it terms unnecessary application criteria and compliance mechanisms to a subset of accredited employers sponsoring employees to fill certain types of roles. These would be 'model employers' with the demonstrated ability to comply with all sponsorship requirements, filling high salary roles where employees are not likely to be vulnerable to exploitation.

71. It suggests that applying a risk model to the TSS visa program would ensure that nomination and visa evidentiary requirements are better aligned to the level of scrutiny required for a particular application.

72. The QLS view is that if the position being nominated has guaranteed annual earnings over $100,000 or if the employer nominating the position holds accredited sponsorship (as per the current accredited sponsor guidelines), then employers should be able to nominate individuals to positions without needing to align with

[34] Jobs and Skills Australia, *Labour Market Update* (Report, February 2023), <https://www.jobsandskills.gov.au/reports/labour-market-update-december-2022> 26.
[35] Jobs and Skills Australia Amendment Bill 2023 (Cth) paragraph 9(1)(ca).

specific ANZSCO codes. It suggests that this would provide accredited sponsors with greater flexibility in nominating individuals for skilled positions that do not fit neatly within an existing code, and to reflect the constantly evolving nature of Australia's workforce.

73. The QLS proposes, to ensure that positions nominated under this stream are for skilled positions, either:

- that positions must be within an ANZSCO occupation group at the major group levels 1, 2 or 3; or
- if the migration program moves away from relying on the ANZSCO dictionary, requiring minimum qualification/experience levels.

74. It also suggests that this high income/accredited sponsor stream should not be subject to strict labour market testing, which is discussed below.

75. The Law Council supports more flexibility being provided to high-income occupations and generally supports the QLS proposal, although it has no view as to the actual salary threshold that could apply.

76. The Law Council also notes that the accredited sponsorship program is applied under policy, rather than law. It suggests that consideration may be given to reviewing this program, with a view to providing it with a statutory basis and to ensure it is structured in a manner which meets its objective of providing accredited sponsors with access to prompt processing with little scrutiny.

Recommendation

- **Skilled occupation lists should be abolished in favour of permitting employers to determine their occupation needs.**
- **Consideration should be given to allowing, as a default position, any employer who is unable to find an Australian worker to fill a shortage in any occupation of skill level 1–3 to nominate a worker for a sponsored visa.**
- **If skills and workforce shortages are to in any way determine the availability of a TSS visa, for example, as an exception to the default occupational requirements as suggested in the previous recommendation, this should be performed by an independent agency, with a statutory responsibility for regularly performing the assessment based on clear, publicly available criteria, such as Jobs and Skills Australia.**
- **Consideration should be given to providing flexibility to higher income occupations by allowing applications above a salary threshold, such as $100,000, without listing an ANZSCO code.**

The TSMIT and other salary limits on TSS visas

Concerns about the impact of raising the TSMIT

77. The TSMIT effectively sets a salary floor for the occupations for which a person may be sponsored by an employer to work in Australia on a temporary TSS visa—currently $53,900. It was an outcome of the Jobs and Skills Summit that the Australian

Government will progress work to 'raise the [TSMIT] following broad engagement on equitably setting the threshold and pathway for adjustment'.[36]

78. Concerns have been raised within the profession about raising TSMIT.

79. The LIV recommends that the TSMIT be maintained at $53,900. Its members have suggested that a $70,000, as has been proposed, is too high for many positions, including those from core and essential industries such as hospitality, the aged care sector and transport. The LSNSW agrees that a review of the TSMIT is long overdue, given it has not been reviewed since 2013. However, it expressed some concerns that a significant increase in the TSMIT may prevent small to medium businesses from sponsoring overseas skilled workers. Further, it suggests there may be some classes of occupation, for example in the hospitality or retail industries, where the average market salary rate does not meet the TSMIT.

80. The Law Council shares concerns that key occupations which may experience skills and workforce shortages may be omitted from the employer sponsored program. It suggests consideration be given to no longer imposing any static salary floor which applies across the employer sponsored visa program. It suggests that, instead, a flexible criterion be set whereby the salary offered by the employer must be the greater of the average market salary rate for the occupation or the award, whatever is higher.

81. It is a premise of the employer sponsored visa program that, generally speaking, in order to sponsor a migrant on a temporary visa, the employer must demonstrate that the position cannot be filled by an Australian citizen or permanent resident. From a policy perspective, if this can be assured, then not raising or (preferably) abolishing the TSMIT would ensure flexibility in the Skilled Migration Program to respond to labour market shortages going forward.

82. The Law Council notes that the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Cth), introduced to Parliament on 29 March 2023, is ostensibly directed towards clarifying that migrant workers are entitled to the workplace protections under the *Fair Work Act 2009* (Cth).[37]

Arguments in favour of raising the salary floor

83. Both the Grattan Institute and the Committee for the Economic Development of Australia (**CEDA**) are in favour of raising the TSMIT or a salary floor for temporary skilled visas. Both note that if the TSMIT had been indexed to growth in average earnings since it was first made, it would be about $66,000-$67,000 today.[38]

[36] The Treasury, 'Jobs + Skills Summit – Outcomes' (1-2 September 2022) https://treasury.gov.au/sites/default/files/inline-files/Jobs-and-Skills-Summit-Outcomes-Document.pdf 4.
[37] Hon Tony Burke MP, Minister for Employment and Workplace Relations, 'Stronger protections for temporary migrant workers' (Media Release, 28 March 2023) https://ministers.dewr.gov.au/burke/stronger-protections-temporary-migrant-workers#:~:text=%E2%80%9CTemporary%20migrant%20workers%20make%20an,residents%2C%E2%80%9D%20Minister%20Burke%20said.
[38] Grattan Institute, Submission 17 to the Joint Standing Committee on Migration, Inquiry into Australia's migration system, (February 2023) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/MigrationPathway/Submissions> ('**Grattan Institute Submission'**) 77; CEDA, *Australia's future migration system* (report, 2022) <https://cedakenticomedia.blob.core.windows.net/cedamediacontainer/kentico/media/attachments/australia-s-future-migration-system.pdf> ('**CEDA Paper**') 16.

84. The Grattan Institute states:

- highly skilled workers are most likely to address the 'most genuine skills shortages, since workers in genuine shortage are likely to attract a wage premium over time, and workers that attract high wages are likely to be harder to train quickly when in short supply';[39]
- 'targeting high-wage rather than low-wage jobs would allow the rules for sponsorship to be more flexible, further simplifying the sponsorship process for employers and migrants',[40]
- high-wage migrant workers 'are more likely to bring knowledge and ideas, and generate big fiscal dividends because they pay much more in taxes but can't access most public services and benefits';[41]
- less-skilled temporary migration may 'undercut the wages of low-paid Australians' given 'migration that is highly concentrated in sectors of the labour market can have bigger impacts on the wages of incumbents working in those sectors'.[42]

85. The Grattan Institute proposes that permanent employer sponsorship be made available for workers in any occupation who earn more than $85,000 a year.[43]

86. CEDA's justification for supporting a raise to the TSMIT is an economic one:

> *Areas of skills shortage should generally experience wage increases to attract workers. As a market-based, demand driven system, the temporary-skilled-migration system should not be impeding wage growth or entrenching poor wage dynamics.*[44]

87. Both the Grattan Institute and CEDA address the concern expressed above that raising the TSMIT will result in some occupations being effectively excluded from the employer sponsored visa program, particularly care workers.

88. As the Grattan Institute submission shows, currently, the TSS program is effectively not available to care workers.[45] While migrants are filling unmet demand in these occupations, these migrants are largely outside the skilled program, as CEDA makes clear:[46]

> *Caring industries have relied on migration indirectly through working-holiday, student or family-member visas. Just over 30 per cent of workers in the aged-care industry are migrants. Approximately 64 per cent of migrants in caring professions are on temporary visas, and around 38 per cent arrived on student visas. The permanent skilled-migration scheme includes registered nurses but not personal-care workers.*

89. The Grattan Institute and CEDA diverge as to whether the Skilled Migration Program should be opened to these sectors. The Grattan Institute considers that offering permanent places to these workers would come 'at a potentially large long-term cost to the composition of the permanent skilled intake'[47] and ultimately suggests

[39] Grattan Institute Submission 25.
[40] Ibid 76.
[41] Ibid 78.
[42] Ibid 28
[43] Ibid 58.
[44] Ibid 16.
[45] Ibid 91.
[46] Footnotes in the original omitted.
[47] Grattan Institute Submission 88.

'workforce shortages in the care economy will only be resolved if wages increase to better reflect what these jobs demand of workers'.[48] It implies that any short-term demand for these places should be met by international students and working holiday makers.[49]

90. By contrast, CEDA is of the view that the Skilled Migration Program should accommodate care sector workers. It states:[50]

> *Many visas, such as student or working-holiday visas, also have conditions around hours of work, length of time with an employer and industry of employment that mean they are inappropriate for building a long-term career. A lack of clear visa status and pathway to longer-term residency also means workers are more at risk of exploitation and poor workplace conditions, while employers may be less likely to invest in training and long-term career development.*
>
> *…*
>
> *[Australia relies] on these workers to fill key positions and should reward them with good conditions and certainty over their visa arrangements. Longer-term visas and pathways to permanent residency are likely required to attract people and encourage them to stay in Australia to develop their careers.*
>
> *Instead of relying on sideways entrants to the workforce, Australia should actively recruit for industry need, attracting qualified, motivated applicants, rather than those who end up working in caring roles purely because they need a job.*

91. CEDA proposes an Essential Skills Visa based on principles, including the following:

- applicants must work in an area of critical need such as aged care, childcare, disability or healthcare;
- applicants would need a job offer from an Australian employer, with pay and conditions at least equivalent to local workers; and
- it would provide a pathway to permanent residency.[51]

92. Notably, CEDA is open to the expansion of its Essential Skills Visa to other sectors:[52]

> *Subject to its effectiveness in caring sectors, this visa could also be used in other industries, if there is a compelling need. These industries would have to provide robust evidence of unmet labour demand and actions taken to overcome.*

Law Council views on arguments to raise TSMIT

93. The Law Council agrees with CEDA that the Skilled Migration Program, as opposed to other visa programs, should be used to fill workforce shortages and labour market demand, largely for the reasons outlined in the passages extracted above: reducing the risk of exploitation; recruiting migrant workers with sufficient skills, experience and training to perform the work; and ensuring pathways for permanent residency. This benefits the migrant worker, the employer and the Australian community, and thus enhances the role of permanent migration in nation building, cultural diversity, and social cohesion.

94. In relation to CEDA's Essential Skills Visa proposal however, the Law Council queries whether it is necessary to confine the availability of this visa to the care-sector

[48] Ibid.
[49] Ibid 76, 96.
[50] CEDA Paper 19.
[51] Ibid 20.
[52] Ibid 19.

workforce or other sectors which can demonstrate a 'compelling need'. If the rationale for an Essential Skills Visa exists in other sectors, by virtue of a compelling need, as a matter of principle the Skilled Migration Program should be flexible and dynamic enough—including through the approach to identifying skills and workforce shortages proposed above—to be able to service this need, without a manual, case-by-case determination of that need.

95. Having said this, in the event that the TSMIT is increased, as the Australian Government has committed to, the Law Council would support an Essential Skills Visa, as described by CEDA, which provides an effective exception to the TSMIT to ensure the Skilled Migration Program is able to service shortages in high-demand occupations which are below the TSMIT.

Recommendation

- **The TSMIT should not be increased and, ideally, should be abolished. Instead there should be a requirement that the salary offered by the employer be the greater of the average market salary rate for the occupation or the award**.
- **Any reform to the Skilled Migration Program should be founded on the design principle that the Program should service skills and workforce shortages, even in occupations below the average median wage for an Australian worker.**
- **Ideally, the Skilled Migration Program would be sufficiently flexible to service this demand without the need for an 'Essential Skills Visa' based on a pre-determination of compelling need. However, in the event that the TSMIT is raised, the Law Council would support the introduction of an Essential Skills Visa as an exception to the TSMIT.**

Miscellaneous measures to improve flexibility

96. The Law Council also proposes the following miscellaneous measures, raised by the LIV, to increase flexibility and decrease discrimination with respect to the migrant workers who may obtain a visa through the Employer Sponsored Scheme:

- the requirement that the migrant worker work under the 'direct control' of the sponsor be removed for General Practitioner Doctors and other occupations where the common employment arrangement is as a 'contractor' not an 'employee'; and
- the full-time work requirements of the direct entry stream of the ENS visa excludes many child-caring parents, those with families or other persons with vulnerabilities or circumstances which only afford them ability to work in permanent part-time arrangements. There should be more flexibility to allow part-time workers' pro-rata employment to be considered (e.g. 20 hours per week for six years equals three years full-time employment).

Intra-corporate transfers

97. The Law Council reiterates its previous submissions that a dedicated visa stream be created for intra-corporate transfers.[53] These roles are likely to be filled internally and

[53] 2018 Law Council submission to the inquiry into skills shortages [67]-[68]; 2021 Law Council submission to the inquiry into Australia's skilled migration program [14]; Law Council submission on the Australia's 2022-23 Migration program [64].

are generally not available to the open labour market in Australia. They are also roles that often involve knowledge or skills often not available in Australia. Measures such as labour market testing, skills assessments, a training levy, and attempts to limit access to occupations based on labour market forecasts, are not useful for intra-corporate transfer appointments. The heightened restrictions and the additional processing times they create only serve to frustrate international trade and business.

Labour agreements

98. The Law Council does not offer a view on industry or labour agreements, other than to note that an employer sponsored visa program without status skilled occupation lists may result in a reduced need for them.

99. The Law Council further notes the following input from Constituent Bodies:

- the QLS strongly supports the continuation of the labour agreement program, which it considers provide flexibility for Australian employers where the standard visa programs are not appropriate and allows input from industry and the creation of industry specific requirements and compliance frameworks;
- the LSNSW considers that employers who are found not to have complied with Australian employment standards should not be eligible to apply for labour agreements in the future and reserves its position on industry agreements, noting it is supportive in principle of a sponsorship model which seeks to reduce a migrant worker's reliance on an employer and, in turn, the risks of workplace exploitation; and
- the LIV highlights the importance of an agile and well-resourced Labour Agreements team to support fast and efficient processing.

Reforms to labour-market testing

Overview

100. Currently, employers who wish to nominate a person for a temporary skilled visa—that is, for a TSS visa or a subclass 494 visa[54]—must undertake LMT to satisfy the Minister that there is no suitably qualified and experienced Australian citizen or permanent resident, or 'eligible temporary visa holder', readily available to fill the nominated position.[55]

101. It was an outcome of the Jobs and Skills Summit that the Australian Government would 'progress work to … reform the current labour market testing process following consultation with unions and business'.[56]

102. The Law Council generally supports the principle that 'temporary skilled visas are utilised only where suitably qualified Australian residents and citizens are not available and cannot be trained in a reasonable time' (**LMT principle**). Its position is that LMT:

- should be retained in some form for many positions, but the cumbersome and inflexible process should be streamlined and modernised; [57] and

[54] *Migration Act 1958* (Cth) (**Migration Act**) paragraph 140GBA(1)(a).
[55] Ibid paragraph 140GBA(3)(d).
[56] The Treasury, 'Jobs + Skills Summit – Outcomes' (1-2 September 2022) https://treasury.gov.au/sites/default/files/inline-files/Jobs-and-Skills-Summit-Outcomes-Document.pdf 4.
[57] 2018 Law Council submission to the inquiry into skills shortages [30]-[42]; Law Council submission to the Migration Review [18].

- should not be required for a greater number of positions, including high-salary positions and occupations with demonstrated skill and workforce shortages.

103. An LMT process which is cumbersome and unnecessarily lengthy, or which is not necessary in the circumstances to support the LMT principle, can reduce the attractiveness of Australia as a migration destination. It can also impede the ability of Australian business to bring migrant workers quickly into Australia in times of business need, thus impairing the contribution that skilled migration might otherwise make as a strategic enabler of a vibrant economy (Term of Reference 2).

Current process

104. Under the Migration Act, the LMT condition is satisfied if:

- the Minister is satisfied that it was undertaken within the specified period[58]—currently LMT must not start earlier than four months before the nomination is received by the Minister;[59]
- it was undertaken in the specified manner,[60] which includes being published on the *Workforce Australia* website in at least two advertisements on or in one or more of: a different national recruitment website; print media with national reach in Australia; radio with national reach in Australia; and if the approved sponsor is an accredited sponsor—the approved sponsor's website;[61] and
- in at least two advertisements on or in one or more of: a different national recruitment website; print media with national reach in Australia; radio with national reach in Australia; and if the approved sponsor is an accredited sponsor—the approved sponsor's website;
- any Australian citizens or permanent residents were, in the previous four months, made redundant or retrenched from positions in the nominated occupation in the nominated business or associated entity, these must be detailed[62] and LMT be undertaken after the redundancies or retrenchments;[63]
- having regard to the evidence and information, the Minister is satisfied that a suitably qualified and experienced Australian citizen, permanent resident or eligible temporary visa holder[64] is not available to fill the nominated position.[65]

Proposed reforms to the LMT process

105. The Law Council proposes the following reforms to the LMT process to make it more dynamic and responsive to business need, while still serving the LMT principle.

[58] Migration Act paragraph 140GBA(3)(a).
[59] Migration (LIN 18/036: Period, manner and evidence of labour market testing) Instrument 2018 subclause 6(1).
[60] Migration Act paragraph 140GBA(3)(aa).
[61] Migration (LIN 18/036: Period, manner and evidence of labour market testing) Instrument clause 8.
[62] Migration Act paragraph 140GBA(3)(b).
[63] Ibid subsection 140GBA(4A).
[64] A working holiday visa holder working in the agricultural sector employed by the nominating employer: see Migration Act subsection 140GBA(7).
[65] Migration Act paragraph 140GBA(3)(d).

106. The Law Council suggests that greater flexibility be provided in relation to the timing of LMT advertising and the provision of related evidence, specifically by:

- allowing advertising to be conducted for a period longer than four months before the nomination, where the sponsor can demonstrate that the advertising is for the role that is being nominated;

- as the QLS suggests, allowing the evidence of LMT to be provided by time of nomination decision, rather than, as now, time of the nomination application, to ensure that employers have the opportunity to deal with any identified or perceived issues with whether the evidence satisfies requirements.[66]

107. The Law Council suggests that greater flexibility be provided in relation to the process of conducting LMT, specifically by as the QLS suggests, allowing employers to advertise within their own local market or on their business website to achieve a more targeted approach (the latter currently is available only to accredited sponsors). Further, the Law Council suggests that two advertisements, rather than three, should be considered sufficient.

108. The LSNSW observes that since the introduction of LMT on the Workforce Australia website, some employers have received an overwhelming number of applications from individuals who are unsuited to, and who even appear uninterested in, the role. It suggests that it is possible that the Workforce Australia website is used as a forum for some job seekers to meet their quota of job applications without the intention of genuinely seeking employment. This results in a high administrative burden for employers sorting through these applications, which is proving unmanageable for some small businesses, particularly in rural areas.

109. To address this, the LSNSW suggests that sponsors should be able to accept job applications via one nominated forum, even though they may advertise on several fora. However, members of the Migration Law Committee of the Law Council's Federal Litigation and Dispute Resolution suggest that the Workforce Australia website is beneficial from a compliance perspective, given there is an objective legitimacy to its use by a business. However, those members have pointed out that the Workforce Australia website should be easier to access, noting presently its use requires a mygov account.

Expansion of exceptions to LMT

110. Consistent with previous submissions, the Law Council suggests:

- there should be an LMT exemption for all nomination applications in which the nominee is already employed by the sponsor on a different visa or the same visa and the visa holder is renewing their existing visa. This latter circumstance may arise, for example, if an employer recruits a TSS visa holder, previously working for a different Australian employer, towards the end of the term of their TSS visa to a contract longer than the remaining time on their visa. If the applicant has already been selected as the best candidate for the role and is performing well in it, then running a recruitment campaign would generate additional and unnecessary administration expense;[67] and

- the requirement to conduct LMT after redundancy from 'positions in the nominated occupation' should not apply to redundancies in a different role

[66] By way of example, see Grattan Institute Submission 83.
[67] 2018 Law Council submission to the inquiry into skills shortages [34]—[36].

classified under the same ANZSCO code, if a sponsor provides information as to why the redundancy is not relevant to the particular nominated position.[68]

111. The Law Council further suggests an exception from LMT requirements when Jobs and Skills Australia has identified the occupation to which the position relates as one subject to a skills and workforce shortages. This could be given effect through an assessment by that entity designed for the purpose of ascertaining whether migrant workers are required to fill labour demand. In those circumstances, advertising the position to Australian workers is not necessary to satisfy the LMT principle and unnecessarily delays Australian businesses recruited required staff.

112. The Law Council notes some of its constituent body's practitioner members have remarked that it was arguable that in times of low unemployment, LMT should not be mandated at all. It referred to a suggestion that LMT only be required of organisations or industry that rely heavily on skilled migration on an ongoing basis.[69] The Law Council prefers the exception be confined to identified skills and workforce shortages only.

113. Finally, the QLS proposes that there be no LMT required when the position will be paid over $100,000 or is offered by an accredited sponsor. In those circumstances, it suggests that instead sponsors be obliged to make a declaration on the nomination form that they have made a genuine commitment to recruiting from the local labour market and are unable to find an Australian to fill the role. It suggests that this declaration should be taken at face value, unless the case officer holds broader concerns about the genuine need for the position. The Law Council supports this proposal.

[68] Ibid [40]-[42].
[69] Australian Chamber of Commerce and Industry, A Migration System for Australia's Future(Submission, December 2022) https://www.australianchamber.com.au/wp-content/uploads/2023/01/ACCI-Submission-Migration-System-for-Australias-Future.pdf.

Recommendations

- **LMT should be retained, subject to the following recommended changes to the process and additional exemptions.**
- **The LMT process should be made more flexible by allowing:**
  - **advertising to be conducted for a period longer than four months before the nomination application;**
  - **evidence of LMT to be a time of nomination decision requirement; and**
  - **greater flexibility in the modes and number of advertisements;**
- **LMT should not be required when:**
  - **the nominee is already employed by the sponsor on a different visa, or the same visa and the visa holder is renewing their existing visa;**
  - **the redundancies are a different role classified under the same ANZSCO code when the sponsor can demonstrate the redundancy is not relevant to the particular nominated position;**
  - **when Jobs and Skills Australia has identified the occupation to which the position relates has been identified as subject to skills and workforce shortages; or**
  - **when the position will be paid over $100,000, or is offered by an accredited sponsor.**

The issue of migrant worker exploitation

114. The Law Council emphasises its commitment to contributing to measures to reduce migrant worker exploitation. It was an outcome of the Jobs and Skills Summit that the Australian Government will progress work to 'bring forward a package of reforms to address migration worker exploitation during 2023'.[70] As noted, this would appear to include the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023 (Cth), which the Law Council has not at the time of writing had the opportunity to form a view upon. For this reason, it has not examined this issue in detail in this submission.

115. For present purposes, at a high-level, the Law Council considers that a holistic response to migrant worker exploitation is required which:

    (a) reduces the incentives for exploitation that arise by tying a visa applicant to a single employer in order to stay on a pathway to permanent residency;

    (b) supports workers to make complaints about unscrupulous employers and providing visa certainty while they seek a new employer; and

    (c) enforces the offences for migrant worker exploitation which already exist.

116. In relation to (a), the Law Council has already detailed proposals to allow temporary skilled visa holders greater flexibility in changing employer sponsors and permitting

[70] The Treasury, 'Jobs + Skills Summit – Outcomes' (1-2 September 2022) https://treasury.gov.au/sites/default/files/inline-files/Jobs-and-Skills-Summit-Outcomes-Document.pdf 4.

them to remain on a permanent residence pathway, while providing appropriate certainty for model employers.

117. In relation to the other matters, the Law Council draws attention to its previous submission detailing measures[71] to better support migrant workers to make complaints, including the procedures of the Fair Work Commission,[72] the operation of the Assurance Protocol between the Fair Work Ombudsman and the Department,[73] and a new migrant exploitation visa.[74] It notes the continuing need for increased compliance and enforcement of existing prohibitions,[75] and for resources to educate employers and employees about their obligations and rights.

118. For the purpose of this submission, the QLS expressed the view that while it considers the current compliance framework is appropriate, it requires more robust enforcement, together with additional resources being allocated to:

- educating employers about their sponsorship obligations;
- assisting employers to navigate the compliance framework; and
- educating employees about their rights if they are being exploited (for example, that their visa will not be cancelled if they are progressing a matter through Fair Work Australia).

General Skilled Migration (GSM)

Overview

119. GSM visas enable migrants to apply for a skilled visa independently, nominated by an Australian State or Territory or be sponsored by an eligible relative.

120. There are two permanent GSM visas: the Skilled Independent (subclass 189) visa and the Skilled Nominated (subclass 190) visa (which are sponsored by a State or Territory government agency). There are, relevantly, three temporary GSM visas: Skilled—Recognised Graduate (subclass 476), the Temporary Graduate (subclass 485), and the Skilled Work Regional (Provisional) (subclass 491) visa. The subclass 476 visa and subclass 485 visas are available to offshore and onshore graduates, respectively. The subclass 491 visa enables the holder to work in a regional area specified in the visa grant letter.

121. The GSM program provides a means for the Commonwealth, and State and Territory Governments, to recruit high-performing skilled migrants to address labour market needs. As such, the discussion below addresses measures which go to Term of Reference 3—the attraction and retention strategies for working migrants to Australia.

Reform proposals

Expression of interest process and points test

122. Visa applicants for permanent GSM visas and the temporary subclass 491 visa:

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[71] Law Council, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, 'Migration Amendment (Protecting Migrant) Bill 2021' (28 January 2022) [139]-[146], < https://www.lawcouncil.asn.au/publicassets/04c9cd66-f38a-ec11-9449-005056be13b5/4163%20-Migration%20Amendment%20%20Protecting%20Migrant%20Workers%20%20Bill%202021.pdf>.
[72] Ibid [187]-[195].
[73] Ibid [196]-[198].
[74] Ibid [147]-[150].
[75] Ibid [181]-[185].

- must score a certain number of points—presently specified by the Minister as '65'—in order to qualify for the visa;
- before lodging an application, must make an expression of interest (**EOI**) and if seeking state or territory nomination potentially also lodge a registration of interest and/or state or territory nomination application; and
- may only lodge a visa application following receipt of an invitation to apply issued by the Minister.[76]

123. An invitation to apply may state a higher number of points than 65 which must be satisfied 'depending on [the applicant's] claims in their EOI'.[77]

124. Points are allocated by reference to qualifications relating to age, English language, overseas employment experience, Australian employment experience, Australian professional year, education including Australian study and study in regional areas, community language, study in designated regional area and their partner.[78]

125. The Law Council generally supports the EOI process as providing flexibility to the Department and Ministerial delegates to issue invitations to applicants whose skills and experience can be matched to labour market need. However, the Law Council suggests law reform and procedural changes to improve the process.

Authorisation under law

126. The EOI process is not authorised by law, nor are the bases upon which an invitation may be offered. The Migration Regulations pick the process up at the time of invitation, by requiring a person to have been invited to apply in order to make a valid application[79] and satisfy the criteria for the visa.[80]

127. The broad discretion to issue an invitation—unbound or unguided by express statutory criteria—raises ostensible issues with respect to the rule of law principles that the law must be both readily known and available and certain and clear,[81] and any action undertaken by the Executive should be authorised by law.[82]

128. The absence of any statutory process guiding or underpinning the issuance of invitations to apply reduces the ability for independent review and scrutiny of the Department's process for determining both the occupations generally allocated places and the individual applicants to whom applications are issued. It can also reduce confidence in the system. The LSNSW suggests that unrealistic qualifying scores or invitations issued only for scores significantly higher than the qualifying score have the potential to undermine the integrity of the program and deter highly skilled migrant workers from expressing their interest.

129. The Law Council recommends that the EOI process be prescribed under law. A statutory prescription of the EOI process would assist to provide transparency in the Department's processes, and ensure invitations are issued in a non-discriminatory

[76] Temporary Graduate (subclass 485) visa applicants do not require an invitation.
[77] Department of Home Affairs, 'Points-tested stream' https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/skilled-independent-189/points-tested#Eligibility (webpage, accessed on 29 March 2023).
[78] Migration Regulations subregulation 2.26AC(3) and Parts 6D.1 to 6D.11 of Schedule 6D.
[79] Migration Regulations item 1 of the table in subclause 1137(4B) of Schedule 1 and item 1 of the table in subclause 1138(4) of Schedule 1.
[80] Ibid clause 189.221 of Schedule 2 and clause 190.211 of Schedule 2.
[81] Law Council, Policy statement – Rule of Law Principles (March 2011) Principle 1 <https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.
[82] Ibid Principle 6.

and reasonable manner. This would be done, for example, by amending the Migration Act to provide general rules or guidance in relation to the factors generally underpinning EOIs and express discretion to the Minister or Secretary to determine occupation or visa profile priorities, with these published from time to time.

130. The Department's website presently includes information about how it sorts EOIs to determine which invitations to extend.[83] It details the use of occupation ceilings to provide for a balanced program and giving priority to higher ranked applicants, sorted by reference to the order of applications. While that approach does not appear unreasonable, the Law Council sees no reason why it should not be informed by or made under a statutory process.

Contemporaneous information about priorities and processing times

131. Whether or not the EOI process is authorised by law, the Law Council suggests that it would assist applicants and their representatives to determine whether they are likely to be favourably considered for an application if contemporaneous information is published about current occupation or visa profile priorities or factors otherwise considered relevant to a decision about whether to issue an application. This transparency would enhance Australia's attractiveness as a destination for a worker with appropriate skills, experience and training who wishes to settle in Australia permanently. The input of the profession is that the uncertainty of this process makes it difficult to advise potential visa applicants.

132. Currently, the Department website records the number of invitations issued by occupation over the last invitation round—however, it does not contain any information to assist to determine the likelihood that invitations in relation to a particular occupation are likely to be issued in a future round. The state migration authorities (who assess EOIs for subclass 190s and 491s visas) similarly do not provide processing times for assessing invitations.

133. Practitioners suggest the kind of granular information which would assist visa applicants and their representatives includes positions by state, numbers per occupation, and cut-off scores for applications to be issued.

Notice to applicants about when evidence will run out

134. Some qualifications relevant to points which are provided with an EOI, such as skills assessments, expire, as does the EOI two years after lodgement. Practitioners have reported that some of their clients have indicated that they believe this process to be unfair as it requires them to incur high costs for a process that is not guaranteed to result in an outcome before the expiry dates of their various documents.

135. To address this, it is recommended that the visa criteria be able to be satisfied with documents that were valid at the time of submission of the EOI, rather than the time the invitation was issued. This is particularly the case for skills assessments and English-language testing where, if applicants were successful the first time, it is unlikely that there will be a negative change after the expiry of the first assessment. Further, consideration could be given to allowing a person to resubmit a skill assessment or English-language assessment after lodging their EOI, to potentially claim more points if they wish to do so.

[83] Department of Home Affairs, 'SkillSelect' (website, accessed on 26 March 2023) https://immi.homeaffairs.gov.au/visas/working-in-australia/skillselect/invitation-rounds.

Clarity when there are multiple EOIs

136. Some applicants may lodge concurrent EOIs for both a subclass 189 visa and a subclass 190 visa. When that occurs, both Departmental officials and State and Territory officials, respectively, will consider the EOI with a view to deciding whether to issue an invitation to apply for the visa. However, practitioners observe that there is not transparency between these processes, which means that, for example, a State may expend resources in reviewing an EOI and issuing an invitation to potential applicant, who has by that time received an invitation for a subclass 189 visa. The Law Council suggests that there should be greater transparency as to the progress of various EOIs made by a person for these visas.

Direct pathway

137. The LIV recommends the permanent GSM and subclass 491 visas should have a direct pathway, where a person meets a set of criteria relating to their skills and experience and is able to achieve a certain number of points (e.g. 80 points) without lodging an EOI and being issued with an invitation. The EOI process could be used to supplement the program where a person has not accrued the required points.

Points test

138. The LIV recommended the points test requirements be reviewed to ensure the test is working to attract skilled workers. Its view is:

- the test should omit relationship status as this is not relevant;
- the points allocated for the English language skills are too high;
- the points test for age should be reviewed and should not be reduced at the threshold age of 33 years.

Recommendations

- **The process under which the Department determines which persons who have made expressions of interest are issued invitations to apply should be authorised by law.**
- **The Department should publish granular information about the profile of forthcoming invitation rounds, to better enable would-be applicants to plan their migration pathway.**
- **Skills assessment and English language tests satisfactory at time of EOI should be able to be used to satisfy visa criteria.**
- **There should be greater transparency regarding the processing of multiple EOIs be a single person for a subclass 189 and 190 visa.**
- **Consideration should be given to providing for a direct pathway for skilled independent applicants, where a person meets a set of criteria relating to their skills and experience and is able to achieve a certain number of points.**

Age requirements

139. The Law Council considers that the age limit for a permanent GSM visa and subclass 494 visa should be increased from 45 years to 50 years, to increase the pool of available applicants. However, unlike the employer sponsored program, there should

not be a discretionary power to waive this requirement, given the formulaic application of a points test. It is noted that the LIV suggests it should be 55 years.

140. There is an arguable illogicality in imposing an age limit of under 50 years for a subclass 485 visa, when most applicants for this visa use it to gain local experience and improve their chances for permanent skilled visa options, which have an age limit of 45 years. The age limit for a subclass 485 visa should be set with that pathway in mind. If the GSM visa is raised to 50 years, the subclass 485 visa need not change.

Recommendations

- **All permanent GSM visas and the subclass 485 visa should have an age limit of 50.**

Skilled occupations lists

141. The Law Council suggests a reduction in the skilled occupation lists to which some GSM visas and the subclass 485 visa are subject.

142. Specifically, it is suggested that consideration be given to there no longer being a Commonwealth-determined skills occupation list for the subclass 190 visa and the state-sponsored subclass 491 visa, to provide States and Territories flexibility to determine their own occupational requirements. The Law Council does not propose a change, at this stage, to the use of skilled occupation lists for the subclass 189 visa.

143. The current suspension of the skilled occupation list for subclass 485 visa has been welcomed by employers and students as they now have certainty in being able to continue with their current employment for the two years under the Graduate Work stream. Practitioners have noted that the processing times have improved dramatically. The LSNSW reports that this change has allowed several of its clients to enter the Australian workforce with greater ease and without the reliance on employer sponsorships, particularly in regional areas where small regional businesses may be hesitant to engage in the migration process due to perceived complexities and the high costs of sponsorship.

Recommendations

- **All permanent GSM visas, and the subclass 485 visa, should not be subject to finite skills occupation lists.**

Education requirements

144. The Law Council draws attention to the following law reform proposals which relate the education requirements for the subclass 485 graduate visa proposed by its Constituent Bodies. These proposals address unnecessarily technical criteria which are preventing otherwise sound applicants from obtaining a visa.

145. The QLS observes that the requirement (unlike with most skilled visas) that subclass 485 visa applicants submit certain documents (a letter of completion from the education provider, an AFP certificate and English language test) at the time of lodgement regularly results in the refusal of otherwise 'genuine and highly skilled applicants'. The refusal will result in a bar on them making further applications in Australia.[84] While it understands this requirement to be directed towards ensuring

[84] Migration Act section 48.

decision ready visa applications are made, it observes the requirement can prevent excellent candidates from pursuing work experience post qualification and therefore a permanent residency pathway in Australia. The Law Council supports this recommendation.

146. The LIV points out that not all graduates with qualifications in trade industries are able to satisfy the criteria for a subclass 485 visa, which deprives those industries of skilled graduates. The Law Council understands that the issue is the way in which 'trade qualification' in reg 2.26AC(6) of the Migration Regulations is defined. The Law Council suggests consideration be given to broadening the definition to encompass all Certificate III and IV qualifications under the Australian Qualifications Framework, not just those 'for a skilled occupation in Major Group 3 in ANZSCO'.

147. Finally, an applicant for a subclass 485 must have completed their studies within six months of applying for that visa.[85] However, the LSNSW observes that during the pandemic, there were extensive delays which left several onshore student visa applicants in limbo when they had applied for a student visa (for example to complete the studies in which they were already enrolled) but the visa application was not finalised before they completed their studies. This cohort could not satisfy that requirement, which left many in distress. It suggests there be some flexibility in this requirement to avoid future issues of this kind. The Law Council supports this recommendation.

Other measures to improve pathways for permanent residence

148. The LSNSW suggests that there should be better pathways for holders of Graduate visas to obtain permanent residency as well as added incentives for employers to hire such graduates. It notes that in the absence of established pathways, holders of such visas pursue job opportunities for which they are not qualified or overqualified while they wait for applications for permanent skilled visas to be assessed.

149. The LIV also suggests that an easier pathway to permanent residency for international students should be introduced. It suggests that this could focus on students who are highly skilled in target sectors, but are unable to meet the requirements for an employer skilled visa or the points test requirements for a points-tested visa.

150. Similarly, the LIV suggest that pathways to permanent residency be introduced for individuals who:

- have worked in Australia for a number of years (e.g. four years or longer);
- earn a certain level of income in a skilled occupation, evidenced by payment summaries and notices of assessment;
- have spent extended periods studying in Australia or those with strong ties to Australia; and
- worked in critical industries throughout the pandemic, modelled on the redundant subclass 887 visa, without a link to a specific employer and capturing more than those who work in regional and rural Australia.

151. The LIV also proposes a three to four- year 'regional pass' visa, which allows a person to work in unlimited roles in any regional area, with the ability to seek permanent residence once they have worked with an employer for a certain period.

[85] Subclause 485.221(a) of Schedule 2 to the Migration Regulations.

152. The Law Council supports consideration by the Committee of these proposals.

Reforms to Skills Assessments

153. Many temporary and permanent skilled visas require a skills assessment by a prescribed assessing authority.[86] Specified assessing authorities assess applicants against standards they set outside of the legislative framework and their assessments are not subject to independent merits review (although are subject to internal review processes designed by those bodies). These standards can differ from each other and from ANZSCO.

154. The Law Council understands, in the experience of practitioners, these assessment processes can be lengthy, opaque and are a disincentive for prospective migrants. They can also effectively prevent the entry of a migrant into Australia, without independent resource. These outcomes impact Australia's ability to attract high-quality migrants.

155. The LIV suggests that the skills assessment requirement be removed for the subclass 494 visa and other regional visas, and a pathway similar to the Regional Sponsored Migration Scheme visa subclass 187 (without the three years of experience) be reinstated, to allow an employee already working with a regional employer to apply for permanent residency without needing a skills assessment. It suggests that subclass 494 visa applicants often have a history of exploitation and thus struggle to receive a skills assessment evidencing their work skills. The Law Council supports this change.

156. The Law Council considers the skills assessment process should at least be reviewed and fundamentally reformed. As a general principle, given these assessments form part of the criteria for a visa, they should be the responsibility for Departmental delegates. To the extent some independent assessment is required, it should be based on factors determined under law and subject to independent merits review.

157. Within the context of the current approach, the Law Council further maintains its existing submission that skills assessments should not be required:[87]

- for TSS applicants who have demonstrated a substantial number of years of work experience in their occupation; and
- for ENS Direct Entry stream applicants in certain highly paid occupations.

158. The Law Council also suggests reviewing whether international graduates with an Australian qualification should require a skills assessment for an ENS application. Further, the LIV suggests that applicants could be excluded from undertaking a skills assessment where they hold a degree or diploma that is unrelated to the nominated occupation but have a strong employment competency, akin to competency assessments undertaken by VETASSESS in engineering and trades occupations.

[86] Department of Home Affairs, Skills assessment, (website, accessed on 29 March 2023) < https://immi.homeaffairs.gov.au/visas/working-in-australia/skills-assessment>.
[87] Law Council of Australia, 2018 Law Council submission to the inquiry into skills shortages [21]-[26].

Recommendations

- **The skills assessment process should be reviewed and fundamentally reformed to ensure at least that, where required, it is performed pursuant to statutory criteria, consistent with ANZSCO, and subject to merits review.**
- **Within the context of the current system, skills assessments should not be required:**
  - **for TSS applicants who have demonstrated a substantial number of years of work experience in their occupation;**
  - **for ENS Direct Entry stream applicants in certain highly paid occupations; or**
  - **for holders of a PhD completed in Australia.**

Global Talent Program

159. The Global Talent Program makes available permanent visas for prominent persons with an internationally recognised record of exceptional and outstanding achievement, who would be an asset to the Australian community and would have no difficulty in obtaining employment, or in becoming established independently, in Australia in the relevant area.

160. The Law Council supports retaining the Global Talent Program. However, it should be more focused, and reforms considered to ensure it meets its objective of being a streamlined visa pathway for highly skilled individuals.[88] The Law Council has previously addressed[89] the opaque application process, with an EOI to be made and applicants assessed to 'meet the program parameters' are invited to apply for the visa.[90] The initial assessments are not supported by legislative prescription or policy guidelines setting out the criteria or skills sought in the stated priority sectors. Applicants are then assessed again in the visa application.

161. Further, the listing of 'Global Talent pathway priority sectors',[91] like skilled occupation lists, can effectively omit applicants with unique skill sets that do not fit within the occupation list.

162. Further, the allocation to the Global Talent visa has fallen from 15,000 in 2021–22 to 5,000 in 2022–23. Further, Ministerial Direction No. 100, renders it effectively the lowest priority processing rung for skilled visas and processing times have increased.

[88] Department, 'Visas for innovation – Global Talent Visa Program' (webpage, accessed 29 March 2023) < https://immi.homeaffairs.gov.au/visas/working-in-australia/visas-for-innovation/global-talent-independent-program>.
[89] 2021 Law Council submission on the Australia's 2022-23 Migration program [71]-[72].
[90] Department, 'Visas for innovation' (webpage, accessed on 29 March 2023) https://immi.homeaffairs.gov.au/visas/working-in-australia/visas-for-innovation/global-talent-independent-program/eligibility>.
[91] Department, 'Global Talent visa' (webpage, accessed on 29 March 2023) https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/global-talent-visa-858#About.

Recommendations

- **The Global Talent Program should be reviewed and reformed to ensure that it meets its objective of being a streamlined visa pathway for highly skilled individuals. At a fundamental level, there should be a single assessment (rather than the current two) based on criteria prescribed in law.**

High-level comments on additional issues

The importance of communication and dealing with backlogs and delays

163. The chronic visa processing backlogs, and backlogs at the merits and judicial review stages, impede expeditious entry of migrants into Australia, are a disincentive to skilled migrants, and prevent migrants in Australia from being able to work, leaving them vulnerable to poverty and exploitation.

164. The Law Council acknowledges the recent efforts by the Australian Government to address these backlogs at the Departmental level.[92] The employer sponsored visa program, and associated policy, is complex. In this context, to assist sponsoring employers to understand their obligations and attain certainty in workforce planning and visa pathways for required staff, the QLS emphasises the importance of open communication and feedback from the Department processing units to employers and their representatives. It suggests that this helps ensure that correct visa pathways are pursued, decision ready applications are able to be lodged, and contributes to the overall streamlined processing of employer sponsored visas.

165. Further, the Law Council suggests that a whole-of-system approach be considered, which includes backlogs at the merits and judicial review stages. The Law Council has previously detailed the considerable backlogs at the Administrative Appeals Tribunal[93] and looks forward to participating in a reform process to establish a new administrative review body.[94] It also notes the comments of Chief Justice Will Alstergren of the Federal Circuit and Family Court (**FCFCOA**) in relation to the impact of the critically high migration caseload on that court.[95] As discussed in the Law Council's recent pre-budget submission[96], the addition of 75 new members to the AAT

[92] Hon Andrew Giles MP 'Speech at the Law Council of Australia, Immigration Law Conference' (18 March 2023) < https://minister.homeaffairs.gov.au/AndrewGiles/Pages/law-council-australia-immigration-law-conference.aspx>. The recent media release issued by the Hon Mark Dreyfus KC MP, which announces that the Administrative Appeals Tribunal (**AAT**) will be abolished, refers to the 'extraordinarily large and growing backlog of applications' in the AAT and announces funding for 'an additional 75 members to address the current backlog of cases and reduce wait times while the new body is being set up': Hon Mark Dreyfus KC MP, 'Albanese Government to abolish Administrative Appeals Tribunal' (media release), 16 December 2022.
[93] Law Council', Submission to the Legal and Constitutional Affairs References Committee, 'Performance and integrity of Australia's administrative review system' (7 December 2021) [43]-[54] <https://www.lawcouncil.asn.au/publicassets/b3de0516-505d-ec11-9445-005056be13b5/4137%20-%20Inquiry%20into%20administrative%20review%20system.pdf>.
[94] Law Council of Australia, 'Merits review critical to accountable government decision making' (Media Release. 16 December 2022) https://www.lawcouncil.asn.au/media/media-releases/merits-review-critical-to-accountable-government-decision-making.
[95] Michael Pelly, 'Migration law system 'unsustainable and unfair': top judge' (Australian Financial Review, 28 November 2022) https://www.afr.com/politics/federal/migration-law-system-unsustainable-and-unfair-top-judge-20221122-p5c0gv.
[96] Law Council of Australia, *2023-24 Pre-Budget Submission*, Submission to The Treasury, 3 February 2023, https://www.lawcouncil.asn.au/publicassets/ab6bba63-bea5-ed11-9479-005056be13b5/2023%2002%2003%20-%20S%20-%20Pre-Budget%20Submission%20%202023-24.pdf.

to address backlogs is welcome. However, it is also likely to exacerbate existing FCFCOA backlogs. A whole-of-system approach should be implemented, which relies on a multiple portfolio approach, drawing on the expertise of the Department, AGD and Treasury, as well as critical stakeholders including the courts, AAT, the Law Council and others.

166. The Law Council notes comments by the Minister linking visa backlogs to manual visa processing[97] and notes its previous analysis of the Department's efforts to move towards visa processing automation.[98] Automated decision-making can be beneficial to administrative law outcomes when properly employed;[99] however, the empowering legislation must ensure automation is authorised and used consistently with the administrative law principles of lawfulness, fairness, rationality, and transparency.[100] This is a matter which in the Law Council's view deserves broader parliamentary and government scrutiny.

Recognition of the social and cultural benefits of migration

167. The first Term of Reference relates to the role of permanent migration in nation building, cultural diversity, and social cohesion. The Law Council recognises the intrinsic social and cultural benefits of immigration. Its view is that communities and society are enriched by the proliferation of different cultural influences and customs.

168. As previously outlined,[101] the Law Council considers that social cohesion of migrants is enhanced by policies that facilitate family reunion. The availability of family reunion pathways not only attracts skilled migrants to Australia, but it assists them to settle into communities and retain their wealth in Australia. As a result, the Law Council considers that it is important that the Family stream remains strong and that the visa types within it remain accessible, with reasonable fees and wait times.

169. Last October, the Law Council made a substantive submission to the Australian National Audit Office (**ANAO**) in relation to its performance review, Management of Migration to Australia—Family Reunion and Partner Related Visas.[102] That submission outlined the statutory powers under which the Minister and Executive generally may plan and manage the Family Migration Program.[103] It pointed out the manner in which those powers had affected processing rates and waiting times, particularly of parent and other family visas[104] and the detailed the impact of long processing times on applicants.[105]

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[97] Julian Bajkowski, 'O'Neil blasts broken Immigration tech, fix still years away' (The Mandarin online, 5 September 2022) https://www.themandarin.com.au/198952-oneil-blasts-broken-immigration-tech-fix-still-years-away/.

[98] Law Council, Submission to the Digital Technology Taskforce, Department of the Prime Minister and Cabinet, 'Positioning Australia as a leader in digital economy regulation – Automated decision making and AI regulation – Issues Paper' [31]-[42] <https://www.lawcouncil.asn.au/publicassets/06c499e1-5be5-ec11-9452-005056be13b5/2022%2006%2003%20-%20S%20-%20Automated%20Decision%20Making%20and%20AI%20Regulaiton%20Issues%20with%20attachments.pdf>.

[99] Ibid [45].

[100] Ibid [69].

[101] 2021 Law Council submission on the Australia's 2022-23 Migration program [111]-[117].

[102] Law Council of Australia, *Management of Migration to Australia—Family Reunion and Partner Related Visas* (25 October 2022) https://www.lawcouncil.asn.au/publicassets/56eebcbe-5256-ed11-9475-005056be13b5/2022%2010%2025%20-%20L%20%20%20S%20-%20Management%20of%20Migration%20to%20Australia%20Family%20Reunion%20and%20Partner%20Related%20Visas.pdf

[103] Ibid [14]-[42].

[104] Ibid [43]-[53].

[105] Ibid [54]-[63].

170. As raised in that submission, the Law Council suggests 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.[106] However, it 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.[107]

[106] 2021 Law Council submission on the Australia's 2022-23 Migration program [59] and [61].
[107] 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.