

**Visa Simplification:
Transforming Australia's Visa
System**

Legal Aid NSW submission to the
Department of Immigration and
Border Protection

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Immigration Service provides legal advice, assistance and representation about family, refugee and humanitarian visas and Australian citizenship. We also give advice on detention, removal, cancellation procedures and exclusion periods.

In partnership with Settlement Services International, Legal Aid NSW provides accessible legal services to culturally and linguistically diverse community

members experiencing disadvantage and limited access to legal assistance. Outreach clinics are operated in eight locations, according to need. Legal Aid NSW also provides community legal education workshops to Migrant Resource Centre staff, clients and communities.

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Immigration and Border Protection (**the Department**) in relation to the Policy Consultation Paper, *Visa Simplification: Transforming Australia's Visa System*. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to comment on the proposed simplification of Australia's visa system. By way of general comment, we consider that any changes to the visa program should support family reunion and should acknowledge the unique and difficult circumstances of those coming to Australia under the Humanitarian Program. Legal Aid NSW supports a visa program that is accessible, transparent and timely. Changes that reduce waiting times for family and humanitarian visas would also be welcome.

There are benefits of permanent residence for vulnerable and disadvantaged visa applicants that may not apply to other visa holders. Applicants under the Humanitarian Program are unable to return to their home country or are stateless, and the security and safety of a permanent visa is of great benefit to them. The ability to sponsor family members and be reunited with family is crucial for these vulnerable visa holders, particularly where family remaining outside Australia are in danger. Both of these elements are integral to allowing vulnerable applicants to engage with a new environment and culture and to establish their lives in Australia.

We would welcome the opportunity to make further submissions when the Department has more specific proposals under consideration.

The following submissions respond to a number of the questions posed in the Department's Policy Consultation Paper.

Simplifying our visa arrangements

A system with approximately 10 visas

Question 1: What would a system with approximately 10 visas look like?
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Applicants seek visas to live, visit and work in Australia in a very wide variety of circumstances. Legal Aid NSW is not persuaded that a reduction in the number of visas alone will provide greater efficiency or adequately address the diverse circumstances of visa applicants.

The current variety of visa subclasses is a result of efforts to codify eligibility criteria in order to reduce discretion and associated inconsistent decision making. Legal Aid NSW does not support any simplification of the visa program that reduces codification and its associated benefits of predictability and transparency. A visa system that appears to be unpredictable creates risks for applicants and can deter migrants and visitors. We address these issues further below in response to Question 3.

Factors to consider when simplifying the visa system

Question 2: What factors should we consider when simplifying the visa system?

Retention of the Humanitarian Program

Legal Aid NSW considers it imperative to retain the Humanitarian Program, which includes both onshore and offshore visas for refugees and their families, and the subclass 204 visa category for Women at Risk.

Retaining these categories ensures that Australia continues to provide safety and the chance of a new life to those who are disadvantaged and vulnerable because of war and by virtue of their race, nationality, religion, political opinion or membership of a particular social group. These categories also support compliance with our international obligations under the *Convention relating to the Status of Refugees*, the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child (CROC)*.

We would support a simplification that resulted in the abolition of temporary protection visas of all kinds, and the removal of the Temporary Protection Visa and the Safe Haven Enterprise Visa categories.

We recommend the removal of the low priority given to the families of those proposers who hold subclass 866 Protection Visa holders, including both boat arrivals and those who have been cleared by immigration. Applications for family reunion under the Humanitarian Program should be prioritised based on the time of application and immediate family relationship, so that priority is given to the partners and children of all those given protection by Australia, by whatever means.

We also recommend the withdrawal of Direction 72, a Ministerial Direction which gives low priority to people who arrived by boat, in the consideration and disposal of Family Visa applications such as Partner Visas. There is a \$7,000 application fee for this visa, but the low priority given means that the processing of Family Visa applications from boat arrivals is postponed indefinitely. Although Direction 72 provides for departure from this policy where there are special circumstances or where processing would otherwise be unreasonably delayed, in practice boat arrivals are given lowest priority and must take extra steps to have their applications processed in a timely way or, in effect, at all.

The barriers to family reunion placed before people who arrive by boat and to subclass 866 visa holders mean that Australia is arguably in contravention of our obligations under article 10 of CROC, which requires that 'applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by State parties in a positive, humane and expeditious manner'.

Remaining relative and aged dependent relative category

We are concerned that it is still possible for applicants to apply for the Remaining Relative and Aged Dependent Relative (**RR/ADR**) visas from outside Australia, when waiting times for both visas mean that processing of the application is unlikely to occur within the lifetime of many applicants. The Department's website indicates that only 500 places are currently

available each year for these two categories (as well as the Carer Visa category), and that RR/ADR visa applications lodged in 2014 are likely to take approximately 50 years to be processed.

There is benefit for certain applicants in applying for these visas, particularly where the applicant is already in Australia and can be granted a Bridging Visa to stay with relatives while waiting for the outcome. However, in our experience, substantial visa application fees are paid in many cases by offshore applicants without any prospect of them ever arriving in Australia. We have advised many clients who are sponsoring relatives applying for RR/ADR visas who have paid application fees of nearly \$4,000 in ignorance of the likely waiting times. These clients are often financially disadvantaged and have prepared applications without the benefit of legal advice and with limited knowledge of written English. This is demonstrated by the following case study:

Case Study 1 – Lee

Lee is an Australian citizen who migrated to Australia approximately 30 years ago. Over the years, Lee's siblings and extended family made their way to Australia on various skilled and family visas and have become Australian citizens. Only two of Lee's brothers remain in Lee's home country. Three years ago, Lee's older brother died after a long illness. Lee's younger brother never married and is now alone without any close family members. He is lonely and misses being with family. Two years ago, Lee sponsored her brother's application for a Remaining Relative visa. She was helped by a friend with better English skills than Lee.

Lee recently approached Legal Aid NSW and asked why the decision on her brother's application was taking so long. Lee was shocked to discover that she might have to wait 50 years for a decision. Her brother is now 40 years old and she is not confident that he will live to old age or that she, herself, will be alive in 50 years. She is even more worried to learn that there is also a health examination, which her brother is likely to fail if assessed at an old age. Lee is advised by Legal Aid NSW that if she withdraws the application she will not be entitled to any refund of the visa application fee.

Legal Aid NSW proposes that RR/ADR visa quotas be increased so that waiting times are reduced. Alternatively, we propose that the Department introduce staggered fees for these visas so that the initial visa application is minimal and involves a much smaller loss for those who are unaware of the waiting periods and wish to withdraw the application at a later date.

Further, we consider that staggered visa application fees should be available for all visa categories in the family stream where there is financial hardship, to ensure that all Australian residents have access to family reunion. Staggered payments have been introduced for Parent Visas, and this approach could be expanded. This would contribute to meeting our obligations under CROC.

Predictability

An important feature of the rule of law is that laws should be prospective and capable of being known and understood by those who are subject to it. To that end, we consider that the considerable breadth and variety of current ministerial discretions in respect of visa refusal and cancellation should be significantly reduced or removed.

The Visitor Visa application process should be more accessible and transparent for applicants. Many Australian families sponsoring family for Sponsored Family Visitor Visas seek advice from Legal Aid NSW when visas are refused, despite the prospective visitors apparently meeting all the criteria to demonstrate that they genuinely intend to stay on a temporary basis. We have seen many refusals for family members who, as in the case study below, have previously visited Australia on a Visitor Visa, have never overstayed, are of good character, who have adhered to visa conditions on multiple travel occasions and who have strong ties to their home country.

Legal Aid NSW is concerned that Sponsored Family Visitor Visa applications from applicants from certain countries considered to be 'high-risk' are subject to overly rigorous examination of the genuine temporary stay criteria. This not only removes the prospect of economic benefits that such visits may bring to Australia, but also leads to painful uncertainty for families, often in relation to significant life events such as weddings and the birth of children. The increased scrutiny of such applications, the increase in appeals to the Administrative Appeals Tribunal and the lodging of repeat applications for Visitor Visas also entails significant administrative costs for the Department.

Case Study 2 – Luisa

Luisa is a permanent resident. She first arrived in Australia on a Student Visa. During her studies, her parents visited her on a regular basis on Visitor Visas, staying for four weeks on each occasion and returning to their home country before the visas expired. Two years ago, Luisa married an Australian citizen. Luisa's family, including her parents, sister and her brother and his family, were granted Visitor Visas to attend the wedding. Luisa is now pregnant with her first child. She is nervous about becoming a first-time mother and needs her mother's support. Luisa supported her mother's recent application for a Sponsored Family Visitor Visa to enable her mother to be with her for the first three months of her baby's life. The information provided in support of this application was identical to that provided in previous applications which resulted in Luisa's mother being granted a visa. However, the application was refused on the basis that Luisa's mother did not intend a 'genuine temporary stay'. Luisa is distressed and confused. She is concerned about the cost of seeking review of the decision in the AAT. She is equally concerned that if her mother lodges a new application, it will not be determined in time for her mother to arrive for the birth of the child. Legal Aid NSW notes that Luisa's mother has met the eligibility criteria for the visa, that her mother has an impeccable character and travel record and there is no evident reason for the refusal of the visa.

Any simplification of the visa system should address such arbitrary outcomes for Visitor Visa applicants, ensuring transparency in the criteria applicants are required to meet and predictable outcomes should they meet the relevant criteria.

Key Characteristics of a Simplified and Flexible Visa System

Question 3: What should be the key characteristics of a simplified and flexible visa system?
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Legal Aid NSW considers that any reforms to the current visa system should include or enable:

- clear, predictable and transparent application processes
- objective and relevant visa criteria to promote consistency, predictability and transparency in decision making
- expeditious decisions on applications concerning family reunion
- permanent visas being available to family members entering Australia, whether sponsored under the family stream or proposed under the Humanitarian Program (except in the case of Partner Visas)
- onshore protection visa applications, and
- provisions to enable those in financial hardship to pay visa application fees by instalments or via staggered payments.

Legal Aid NSW supports an increase in the overall annual humanitarian intake.

Legal Aid NSW considers the visa system should operate without excessive ministerial discretion. We are concerned that any simplification of the current system may result in higher levels of discretion and undermine the integrity of a codified, legislated system. It is vital that all visa applicants, sponsors and proposers are able to ascertain the requirements for each kind of visa. We would not support simplification if it resulted in criteria for visa eligibility being moved from the *Migration Act 1958* (Cth) and the Migration Regulation 1994 to unpublished internal Departmental policies and guidelines.

Temporary and Permanent Residence

Question 4: What distinctions should apply to temporary and permanent visas?

Question 5: What requirements should underpin a migrant's eligibility for permanent residence?

Question 6: Should a prospective migrant spend a period of time in Australia before becoming eligible for permanent residence? What factors should be considered?

Family reunion

Legal Aid NSW considers that it is appropriate to require certain visa holders, such as provisional Partner Visa holders, to hold a temporary visa for a certain time. However, the family migration visa stream is based on the principle of the acknowledged benefits of family reunion. The visa criteria for family migration currently focus on the existence of family relationships with Australian permanent residents or citizens. We submit that such criteria ought to remain the basis upon which permanent residence is granted.

The Consultation Paper notes that a temporary resident gains familiarity with Australian customs, culture and laws, and that such temporary period of residence is not a uniform prerequisite to attaining permanent residence. Currently, humanitarian entrants and holders of family relationship visas (except Partner Visas) are not required to have a period of temporary residence. Legal Aid NSW does not support an extension of the requirement for a period of temporary residence to humanitarian entrants, including onshore protection visa applicants, or holders of family relationship visas (except Partner Visas).

Familiarity with customs, culture and laws should not be the primary concern for those being granted visas. Australia is a multicultural nation that has derived great economic, social and cultural benefit from migrants, many of whom have arrived without familiarity with the culture and customs. There are now processes in place to ensure that prospective Australian citizens have an adequate knowledge of the English language, Australian culture and the responsibilities of citizenship, and it seems unnecessary to introduce these concerns at the visa stage.

That said, Legal Aid NSW supports the key statement in the Consultation Paper that 'permanent visas allow for the stay of persons whose long-term residence in Australia will benefit the Australian community'. When considering the benefits that long-term residents bring, weight should be given to:

- the unity of the families of Australian permanent residents and citizens
- the best interests of children, and
- the caring and domestic duties undertaken by migrating family members who support permanent residents and citizens, enabling them to contribute to the economy through paid employment.

Humanitarian Program

Legal Aid NSW considers that family reunification should remain available to refugees. This is an important aspect of Australia fulfilling its obligations under CROC.

People applying under the Humanitarian Program (both onshore and offshore), should not be required to undergo a period of temporary residence. We are concerned that requiring a period of temporary residence for such vulnerable applicants may undermine their well-being and discourage successful settlement and engagement with Australian culture and society.

Legal Aid NSW sees many clients who have been recognised as refugees before arriving in Australia, or who have been granted refugee status onshore. For those with family remaining in danger outside Australia, their primary concern is their family's safety. Under current rules, a temporary resident cannot sponsor any other visa applicants, including their partners and children. If humanitarian and refugee migrants were required to undergo a period of temporary residence, they would not be able to take the important step towards reunification with their families. The likely effect of such a requirement is demonstrated by the following case studies:

Case Study 3 – Mohammad

Mohammad is a 45 year old Hazara from Afghanistan. He arrived legally in Australia several years ago on a Tourist Visa and applied for a Protection Visa as soon as he arrived. While waiting several years for a decision on his application, he suffered considerable anxiety and depression due to concerns about the safety of his family including his wife of 20 years and several children. Government policy changed after he arrived in Australia, affecting the priority given to family reunification under the Humanitarian Program. Because of this, Mohammad worked hard not only to provide for his family overseas but so that he could pay the application fee for a Partner Visa, if ever he was granted a permanent visa. As soon as Mohammad was granted a permanent Protection Visa, he lodged a Partner Visa application to bring his wife and children to Australia. This application took a further three years to be decided. Finally, in 2017, Mohammad's family were granted visas and joined him in Australia. Even though Mohammad was granted a permanent visa, due to delays in visa processing, the family were separated for six years in total. Had a temporary visa been granted to Mohammad, he would have waited even longer before reuniting with his family.

Case Study 4 – Fatimah

Fatimah is a 23 year old refugee from Syria. She and her family spent the last few years in precarious circumstances in Turkey after fleeing the war. The whole family were registered with the United Nations High Commissioner for Refugees. Fatimah was proposed by her cousin in Australia. Her parents and younger siblings were proposed by Fatimah's paternal uncle in a separate application. Fatimah was granted a visa under the Special Humanitarian program and recently arrived in Australia. Three days after her arrival, the application for the rest of her family was refused on the basis that there were not enough places for all applicants.

Fatimah is devastated to be separated from her family indefinitely and concerned that they remain in a precarious situation in Turkey. She is heartened by the advice that, because she is a permanent resident, she can propose her family and make another application. However, the waiting time for determinations of Special Humanitarian visa applications is often years, with no right of appeal for refusals. This period would be even longer if Fatimah was subject to a temporary residence requirement.

Finally, we note the suggestion in the Consultation Paper that a period of provisional residence could play a potential role in reducing the burden on taxpayers. Most newly arrived permanent residents (except for refugee and humanitarian entrants) are already subject to a two year waiting period for access to social security payments.¹ The waiting period is waived for refugee and humanitarian entrants in recognition of the fact that they often arrive in Australia with minimal financial resources, and need to undertake English language instruction and other training before they are ready to work. We consider that this waiver should be maintained, as access to social security helps refugee and humanitarian entrants to settle and integrate in Australia.

¹ Department of Human Services *Newly arrived resident's waiting period*
<https://www.humanservices.gov.au/individuals/enablers/newly-arrived-residents-waiting-period>