



Refugee Council
of Australia

DEPARTMENT OF IMMIGRATION AND BORDER PROTECTION

SUBMISSION ON VISA SIMPLIFICATION FRAMEWORK

The Refugee Council of Australia (RCOA) is the national peak body for refugees, people seeking asylum and the organisations and individuals who work with them, representing over 190 organisations. RCOA promotes the adoption of humane, lawful and constructive policies by governments and communities in Australia and internationally towards refugees, people seeking asylum and humanitarian entrants. RCOA consults regularly with its members, community leaders and people from refugee backgrounds and this submission is informed by their views.

RCOA welcomes the opportunity to provide feedback on the Department's consultation paper on the visa simplification framework, and thanks the Department for the invitation to the briefing on the consultation paper. We note that the proposals are at an early stage of development, with little detail in the consultation paper or the briefing itself, and observe that the proposed reforms are likely to be far-reaching. Given this and the relatively short time to make comment following the briefing, we note that this initial submission should only be considered the start of a dialogue about how these proposals may affect refugees, people seeking asylum and other people of concern, and we look forward to further opportunities to make more detailed comments.

1 Visa simplification framework

1.1 RCOA cautiously welcomes the proposal to simplify the extremely complex visa system and the current patchwork of legislation, Regulations and policy. While we can see potential opportunities in such a visa reform and acknowledge the need for such reform, we are concerned about some of the possible directions the reform could take.

Principled review of legislative and policy framework

1.2 The main opportunity that such a reform presents is the possibility of a principled review of the existing legislative and policy framework. As recognised by the Department of Immigration, the excessive codification of the *Migration Act*, caused in part by a desire to limit judicial review, has resulted in a rigid and highly detailed system that focuses on complex rules at the expense of principles. It is difficult not only for the user to navigate, but for the many service providers who are involved in supporting people navigating the system. The *Migration Act* is characterised on one hand by very detailed rules, and on the other hand by very broad and practically unreviewable ministerial discretions. This is the worst of both worlds.

1.3 In designing a simpler system, we observe that there has been considerable development in new regulatory approaches since the codification of the *Migration Act*, including principles-based regulation, co-regulation, and 'smart regulation'. In our view, the opportunity is greatest in reconceiving the regulatory approach underlying the *Migration Act*, rather than in focusing unduly on reducing the number of substantive visas.

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1.4 Further, we would also encourage the Department to recognise that there is already a wealth of existing research, policy and international legal obligations, that should guide what is appropriate for legislation, regulation and policy reform, given the different levels of public accountability and the balance between certainty and responsiveness.

1.5 At a minimum, we would suggest that the following should be included in the Act:

- the objectives and principles of our migration program
- the purposes of the main visas
- our international law obligations, including the definition of a refugee, human rights principles and our complementary protection obligations
- procedural protections, and
- other matters that affect people's substantive rights and obligations.

1.6 In terms of the objectives and principles of our migration program, we would observe that most modern Acts now include an objects clause that clearly identifies the underlying purposes of the Act. We would also note that, while the briefing focused on skilled migration, there was no reference to the objectives underlying the family and humanitarian parts of our program, which have clearly distinctive purposes that guide different policy outcomes. The principles of family reunification (which is in part an obligation under international law) and refugee protection, in our view, should be expressly recognised in the Act. In this regard, we note that Canada's *Immigration and Refugee Protection Act* lists a set of objectives for immigration and a set of objectives for refugees. Indeed, the Act has different Parts dealing with immigration and with refugees, which may be appropriate given the distinctive objectives of the Refugee and Humanitarian Program.

1.7 In terms of reducing the number of visas, we note that the Act and Regulations currently provide for a range of visas for the purpose of protection. We would suggest that, if the intention is to simplify, there could be a single protection visa. There could be multiple alternative primary criteria, as there currently is under section 36, but these could be extended to encompass the broader criteria under the Special Humanitarian Program and other humanitarian visas such as the safe haven criteria. In our view, it should be possible to frame a single broader humanitarian criterion that would encompass most of the other humanitarian visas, but it would remain important to specify our international obligations under refugee law and in relation to complementary protection.

1.8 We would also consider it important to focus on groups in vulnerable situations currently identified through visa subclasses, such as the Woman at Risk visa, by directing the attention of the Department to such groups. This could be done by identifying key legislative principles for the Department to consider in the allocation of resettlement places, reflecting both current visa categories and longstanding policy such as resettling people from protracted refugee situations.

1.9 In terms of simplifying the Regulations, we would suggest that the default position would be to have consistent conditions and eligibility for the single protection visa.

1.10 The other main visa that could be dramatically simplified in our view is the bridging visa. The different visa types and their different rights and conditions are a source of unnecessary complexity not only for those who hold them, but for service providers including mainstream providers. For example, a long-expressed wish of many of our members is a guide that would help them identify the varying eligibility of people with bridging and protection visas across Commonwealth and State jurisdictions. However, this is currently a very complex task because of the complexity of the visas.

1.11 Our main concern, however, is that the visa simplification process is driven by a desire to put more of the criteria and conditions into policy. We note that many visa criteria and conditions would directly affect important rights, most notably the right to continue to reside in Australia. For example, the duration of a visa and the requirement for health and character checks are not in our view appropriately placed in policy.

1.12 We would observe that there is already insufficient accountability and scrutiny of matters that directly affect people's lives, and we would strongly resist any proposals that would decrease scrutiny

and accountability of conditions that directly affect people's rights. As a minimum, we would suggest that if detail is to be moved into policy, there must be a sufficiently robust set of guiding principles to ensure consistency, and that any criteria or conditions that directly affect people's basic rights to live, work and study in Australia would need to be in primary or secondary legislation.

1.13 We would also observe that the Department's policies are at present very difficult for the public to access, as they are available only on the Department's subscription-only database which can only be freely used at State libraries. This falls far short of the principle of the rule of law, transparency and accountability which requires that laws be accessible to those affected by them.

Recommendation 1

The Department of Immigration and Border Protection should, in the process of visa simplification:

- a) *ensure there is extensive and appropriate consultation with key stakeholders, including those with an interest in humanitarian protection and family migration, at key points throughout the process*
- b) *take the opportunity to reconsider the underlying regulatory approach in the Migration Act, rather than focus on the number of visas, and*
- c) *incorporate existing and well-known obligations and principles for determining what is to be dealt with in the Migration Act, Regulations and in policy, including principles that require adequate parliamentary scrutiny of rights and obligations that affect people's basic rights to live, work and study in Australia.*

Recommendation 2

The Department of Immigration and Border Protection should consider simplifying the Migration Act to include a single protection visa and a single bridging visa, with a consistent set of conditions and eligibility.

The protection visa should include express recognition within the Act of our international legal obligations under refugee and human rights law, and also encompass the broader criteria for other humanitarian visas.

There should be legislation that sets out well-established principles for allocating resettlement places, including for example to women at risk and other priority groups.

2 Provisional periods

The value of permanence

2.1 The most detailed part of the consultation paper, and the focus of much of the briefings, was the suggestion that all prospective migrants should be considered either temporary or provisional, with the possible removal of the option of permanent residency on arrival. RCOA has long maintained that all refugees, whether recognised overseas or in Australia, should be granted permanent protection in accordance to our obligations under international law. We therefore express very serious concerns at the prospect of temporary or provisional periods being applied to refugees and humanitarian migrants. As we have said many times, and as illustrated by the experience of many of our members working with refugees and humanitarian entrants, security and certainty is essential for people to recover from the experience of persecution and begin to build a new life in Australia. Research on people on temporary protection visas clearly demonstrates that keeping people in limbo has very serious consequences on their mental health and their settlement in Australia.¹

¹ See, eg, Zachary Steel et al, 'Impact of immigration detention and temporary protection on the mental health of refugees' (2006) 188 *The British Journal of Psychiatry* 58.

2.2 We welcome the Department's reassurances that it takes its international obligations to refugees and humanitarian entrants seriously. In this context, we see no good reason to apply a provisional period to these people, who by definition have been identified as being highly vulnerable and in need of a durable solution.

2.3 The stated intention of this proposal is to ensure that people commit to Australia. However, refugees already prize Australian citizenship highly, as evidenced by the high take-up of citizenship among them. For many refugees, Australian citizenship is the first time they will have benefited from the effective protection of a State and the possibility of living in safety and dignity. In our view, a provisional period for this group will impede rather than enhance their integration into the Australian community.

Recommendation 3

People resettled under the Refugee and Humanitarian Program should continue to be granted permanent resident status upon arrival in Australia and permanent status should be extended to all people given refugee protection in Australia.

Practical consequences of being provisional or temporary

2.4 As well as the significant symbolic consequences of being treated as 'provisional' or 'temporary', being classified as provisional or temporary has very significant consequences for access to basic social rights and protections in Australia. With the current policy of temporary protection for refugees who came by boat, and with the large number of people seeking asylum on bridging visas, RCOA and our members are all too aware of the complexities and risks of provisional status in a very practical sense.

2.5 Our current social security framework is essentially premised on the well-established division between Australian citizens and permanent residents, on the one hand, and others. People on bridging or temporary visas have variable access to Medicare and the health system, employment services, transport, social security payments, further and higher education, and the National Disability Insurance Scheme. A significant part of RCOA's policy and research work in the past years has involved identifying gaps in the protection of some of our most vulnerable because of their temporary or transitional status, including:

- Practical difficulties in accessing Medicare and health services, including mental health services
- Variable access to, and the ineffectiveness of, employment services
- The complexity of access to differing social security payments especially for those with temporary visas
- The inability of temporary protection visa holders to access subsidies or financial support for further or higher education, and
- The exclusion of people on temporary visas from the National Disability Insurance Scheme.

2.6 We hear from some of our members that there are similar issues for international migrants, including international students. In our view, any shift to provisional periods is likely to create more unnecessary complexity and fragmentation of health and social services including increased public health concerns. If people are living in Australia in the long term, it would be better for the Australian community if they were able to access a suite of essential services and protections.

2.7 For example, it would be better for the health system if all long-term residents have access to Medicare and the Pharmaceutical Benefits Scheme, so that they can treat medical issues promptly rather than delaying treatment until expensive emergency treatment is required. Their exclusion could have significant consequences to public health, such as for example where they do not have access to vaccinations or are carriers of infectious diseases. We would also suggest that access to federally funded employment services would be economically worthwhile both for migrants and for the Australian community more broadly.

2.8 Some basic protections and access to at least some social security payments are likely to be necessary. It is common for many migrants, including refugees and humanitarian entrants, to need some financial support in the early years of settlement, as they navigate the complexity of the Australian workplace system. As research shows, without financial support it is likely 'provisional' migrants will be forced early into work that is below their skill level and become stuck there, limiting their potential contribution to Australian society. We also note that there would need to be protections to ensure that children who are provisional migrants retain equal access to services, including public schools and appropriate health services.

2.9 The scale of the potential consequences in a shift from permanent residence, with access to most entitlements and benefits (subject to some waiting periods) to provisional or temporary residence, should not be underestimated. In our view, there does not appear to be sufficient justification for such a fundamental change.

2.10 Permanent residence, at present, can be readily cancelled on very broad grounds, including on extensive 'character' grounds. RCOA already has very significant concerns about the breadth and lack of accountability of the powers to cancel permanent visas. The public interests of national security and protection of the community, in our view, are already amply covered by these provisions.

2.11 We note that if there is to be a wholesale shift towards provisional periods, there would need to be a fundamental reform of our social security laws to address similar issues on a much wider scale. There would also need to be a strong engagement with States and Territories as many of their policies are similarly premised on federal distinctions (for example, many transport or utilities concessions depend on whether the person holds a relevant Commonwealth card).

Recommendation 4

If a shift is made to provisional periods, the reform must also encompass a full review of social security laws and engage with State and Territory governments to ensure consistent and appropriate access to basic social rights and protections.

Protection of the most vulnerable

2.12 A particular concern would be the pervasive effects of visa insecurity on some of our most vulnerable. For example, RCOA members have repeatedly highlighted to us their concerns about victims of family violence, who are inhibited from reporting or addressing family violence because of concerns that their visa status may be revoked, and who are often left on temporary visas as a result of family violence.

2.13 We note that the Migration Amendment (Family Violence and Other Measures) Bill proposed amendments to establish a sponsorship framework for the sponsored family visa program. While we would agree that there should be measures to ensure that likely perpetrators of family violence are unable to sponsor partners from overseas, it is important to recognise that many perpetrators of family violence do not have a history that would flag them as a concern. It is therefore essential to ensure that victims have access to appropriate supports and visa pathways at all stages of the visa process.

2.14 The current immigration laws allow for a family violence exception to protect against such changes, but this exception currently only applies to partner visas. Such an exception should be extended to all temporary or provisional visas, and include provision for access to essential supports during the period of claim. We have heard, for example, from service providers that people on temporary visas are especially difficult to transition from shelters because of their lack of access to basic supports and entitlements. We also note that there was a full review by the Australian Law

Reform Commission on family violence and immigration law recently,² but its recommendations were only partly adopted.

2.15 Another vulnerable group that would need protection are victims of human trafficking, which is currently being considered under the proposal to establish a Modern Slavery Act. There needs to be recognition within any visa system that temporary or provisional visas can be used as a tool of power, including where people are smuggled or trafficked, and appropriate safeguards to prevent such abuse.

Recommendation 5

If a shift is made to temporary and provisional visas, there should be clear and practically effective protections for the most vulnerable, including victims of family violence and human trafficking.

3 Settlement and integration

3.1 Apart from a potential reduction in entitlements, the other main practical change from permanent to provisional residence is to shift the burden of proving that they are fit to be part of Australian society from the government to the individual migrant. We note that as yet there are no proposed criteria for how people could 'graduate' from provisional to permanent status, but are concerned that a new 'integration test' is being proposed similar to that flagged in the recent citizenship Bill.

3.2 We also express particular concern at the continuing indications that these reforms are being driven by concerns that people are not settling well in Australia, in line with the philosophy underpinning the recent proposed changes to Australian citizenship.

3.3 As we said in our submission to that Bill, RCOA and its members are profoundly interested in helping people from refugee backgrounds settle into Australia, and to feel a sense of belonging here. Our members, and others in the sector, are actively supporting people into education and employment, and involved in the daily work of helping people to learn about and navigate through Australian laws and norms.

3.4 Even more so, refugees themselves are often desperate to achieve these things: work, study, a renewed sense of community and educating their children. Time and again, RCOA has heard refugees say that they are desperate to contribute and give back to the Australian community.

1.1. While we strongly endorse measures to support people in achieving these goals, in our view making people 'temporary' or 'provisional' is fundamentally counterproductive to integration, because it makes people vulnerable and their situation precarious. For refugees, who already have had to cope with so much vulnerability and uncertainty, being kept in limbo will only undermine their efforts to rebuild their lives and to connect with the wider community.

1.2. As we have said time and again, our successful multicultural society has been built on a policy of inclusion and integration, and on encouraging people to join our community fully as members. Ensuring that people feel invested and belong to the Australian community is the best way of improving social cohesion. We note that, in this respect, the model of granting permanent residence upon arrival and immediate access to a broad suite of support and entitlements has been critical to our success as a multicultural society.

² Australian Law Reform Commission, *Family Violence and Commonwealth Laws—Improving Legal Frameworks* (2012).