



**Law Council**  
OF AUSTRALIA

# **COVID-19 concession proposals**

**Department of Home Affairs**

**01 October 2021**

*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

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## About the Law Council of Australia

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

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

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

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

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

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

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council of Australia (**Law Council**) acknowledges the contribution of the Law Institute of Victoria (**LIV**) to this submission. This includes adapting a number of the proposals made by the LIV in its letter to the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs on 13 September 2021. The Law Council also acknowledges the contribution of the Migration Law Committee of the Federal Litigation and Dispute Resolution Section to this submission.

## Executive Summary

1. The Law Council appreciates the invitation from the Department of Home Affairs (**Department**) to make a submission on possible additions or changes to the concessions provided for certain visa applicants or holders impacted by the COVID-19 pandemic (**COVID-19 concessions**). It also welcomes recent comments from the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs that there 'will be ongoing flexibility within the migration program to respond to uncertain health, border and economic conditions arising from COVID-19'.<sup>1</sup>
2. The Department's website describes COVID-19 concessions as being 'to help [persons] continue on [their] visa pathway if [they] have been disadvantaged by COVID-19 border closures, business restrictions or the economic downturn'.<sup>2</sup>
3. The Law Council recommends consideration be given to a number of additional COVID-19 concessions which could be given effect by either amendments to the Migration Regulations 1994 (Cth) (**Migration Regulations**) or through policy changes. In summary, the Law Council recommends consideration be given to:
  - a number of amendments to ease the transition to the 'extension' stream of the temporary Business Innovation and Investment visas and to the permanent Business Innovation and Investment visas and preserve the unity of families holding temporary Business Innovation and Investment visas for longer than anticipated due to COVID-19 restrictions;
  - prescribing regulations under section 48 of the *Migration Act 1958* (Cth) (**Migration Act**) to permit onshore applications for skilled visas, a Subclass 408 (Government Endorsed Event (COVID-19 Pandemic) Stream) visa and certain student visas despite the applicant previously having an application refused or visa cancelled;
  - facilitating and encouraging further applications for temporary skilled visas;
  - amending partner visa provisions to permit subsequent onshore applications and to increase the period an offshore grantee has to enter Australia;
  - increasing the period of time that a person may hold a visitor visa while onshore;
  - increasing the period of time a permanent visa holder may be outside of Australia to still qualify for a resident return visa;
  - continuing the use of the Subclass 408 Australian endorsed events (COVID 19 Pandemic Event) Stream with consideration for increasing the period of the visa from one year to two years for the critical skills sector;
  - reviewing the need for two separate lists being *Medium and Long-term Strategic Skills List* (**MLTSSL**) and the *Short-term Skilled Occupation List* (**STSOL**) given they no longer accurately reflect skills shortages in Australia or the need for Australian employers to maintain or retain overseas workers long term, given the STSOL does not allow for a permanent residency pathway in Australia. The review should include consideration of whether the STSOL still meets the purpose of restricting visa holders from permanent residency under the employer sponsored

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<sup>1</sup> Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, Government delivers largest Partner Program in over 25 years (Media Release, 21 September 2021), <[link](#)>.

<sup>2</sup> Department, 'Covid-19 visa concessions' (website), <[link](#)>, accessed on 21 September 2021.

category and independent skilled migration category when there are skill shortages and a drop in migration generally since the pandemic;

- considering a review of the Direction No 69,<sup>3</sup> which does not reflect consideration of the pandemic on Australia's critical skills and sectors or the educational sector;
  - facilitating increased health examinations during lockdown; and
  - temporarily increasing the age thresholds for persons who have been unable to meet certain requirements for a permanent visa due to lockdowns.
4. Finally, the Law Council suggests the concessions be published on a single page of the Department's website.
  5. The Law Council notes the announcement by Immigration New Zealand on 30 September 2021 of a new one-off residence visa pathway for some temporary work visa holders.<sup>4</sup> The pathway is available for holders of certain work visas, who have lived in New Zealand for at least three years to 29 September 2021, earn at or above the median wage, and work in a role on the 'scarce work list'. The amendments proposed in the present submission are modest in comparison to that program but are effectively directed to the same objective: retaining and making valuable use of skilled workers already in Australia during the pandemic period, when travel to and from the country is limited and skilled workers are needed to contribute to economic recovery.

## Business Innovation and Investment visas

### Overview of proposals

6. The COVID-19 period has made it more difficult for holders of a Subclass 188 (Business Innovation and Investment (Provisional)) visa to meet the various turnover, business ownership, and family-related criteria of the visa.
7. Practitioners have reported that holders feel disenfranchised due to uncertainty with their visa pathway and they fear losing their investments and livelihood if they are ineligible for a permanent visa. Those practitioners have conveyed an understanding that those in business will not continue with their investments if there is little or no confidence in the business migration program, and it is likely that people will cease their business in Australia and will look abroad for other opportunities.
8. The processing of Subclass 188 and Subclass 888 applications remains slow. The Subclass 188 Visa (Business innovation) stream, for example, has a processing time of around 30 months and the Subclass 888 (Business innovation) stream has a processing time of around 26 months.<sup>5</sup> The allocation of resources to this section is needed to improve processing times in a period of economic uncertainty.
9. A number of concessions are recommended which are directed to providing those visa holders with confidence to continue with their business innovation and investments in Australia, and certainty that there will be concessions to facilitate extended stay or permanent residency.

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<sup>3</sup> 'Direction Number 69 – Assessing The Genuine Temporary Entrant Criterion For Student Visa And Student Guardian Visa Applications (Section 499)' (2016), <[link](#)>.

<sup>4</sup> Immigration New Zealand, 'New 2021 Resident Visa' (website), <[link](#)>, accessed on 30 September 2021.

<sup>5</sup> Department of Home Affairs, 'Visa processing times' (website), <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times>, accessed on 29 September 2021.

10. The Law Council notes recent comments from Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs<sup>6</sup> that priority will be given 'to skilled visas that drive economic growth, job creation and investment in Australia' and that the 2021-22 Migration Program will include 'the flexibility to move places within the Skill stream to provide flexibility to support Australia's response to managing COVID-19'.
11. A number of the amendments proposed in this submission are consistent with that objective and would seek to give effect to that objective.

## **Subclass 188 (Business Innovation and Investment (Provisional)) visa**

### **Removing the two-year business requirement for the Business Innovation Extension stream**

12. The Law Council recommends that consideration be given to removing the two-year business requirement for the Subclass 188 (Business Innovation and Investment (Provisional)) visa – Business Innovation Extension stream (**Business Innovation Extension Stream visa**) to allow for visa applicants who have been affected by the extended lockdowns to continue their visa pathway.
13. The Business Innovation Extension stream visa is a temporary visa available for people who hold or have recently held a Subclass 188 visa in the Business Innovation stream.<sup>7</sup>
14. Presently, clause 188.232 of Schedule 2 to the Migration Regulations requires that for at least two years before the application was made, an applicant for a Business Innovation Extension stream visa must have an ownership interest in one or more main businesses operating in Australia.
15. This clause is already subject to a 'COVID-19 concession' – the Migration Amendment (COVID-19) Concessions Regulations 2020 (Cth) amended<sup>8</sup> that clause to relax the requirement that the ownership interest needed to be held for the two years *immediately before* the application to allow for cumulative periods of at least two years.
16. However, this criterion is still difficult to achieve, particularly if visa holders are unable to enter the State or Territory that nominated them, or they are unable to commence their business or continue operating their business due to the Chief Health Officer's Directions. Additionally, it is not possible to buy or run a business during a lockdown if the business has been forced to close as directed by the state government.

#### **Recommendation**

- **The Law Council recommends that consideration be given to removing the two-year business requirement for the Subclass 188 (Business Innovation and Investment (Provisional)) visa – Business Innovation Extension stream.**

<sup>6</sup> Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, n 1.

<sup>7</sup> Subregulation 1202B(5) of Schedule 1 to the *Migration Regulations 1994* (Cth).

<sup>8</sup> Item 17 of Sch 1 to the *Migration Amendment (COVID-19) Concessions Regulations 2020* (Cth).

## Subclass 888 (Business Innovation and Investment (Permanent)) visa

### Relaxing requirements when person granted a Subclass 408 visa

17. Under the current law, the only option for persons who hold a Subclass 188 Business Innovation Stream visa, but who do not satisfy the two-year business requirement<sup>9</sup> and would like to prolong their stay, is to apply for a Subclass 408 – Temporary Activity (Australian Government endorsed events (COVID-19 Pandemic event)) visa.
18. Currently, it is disadvantageous for persons holding a Subclass 188 Business Innovation Stream visa, who wish to ultimately apply for a Subclass 888 (Business Innovation and Investment (Permanent)) visa, to apply for and be granted a Subclass 408 – Temporary Activity (Australian Government endorsed events (COVID-19 Pandemic event)) visa.
19. Specifically, the grant of a Subclass 408 visa would jeopardise their pathway to permanent residency because:
  - a Subclass 408 visa is not a prescribed visa for a Subclass 888 visa;<sup>10</sup> and
  - not all of the time spent operating a business while holding a Subclass 408 visa can count towards the business requirement for the Subclass 888 visa.
20. The latter dot point is the consequence of an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Business Innovation stream being required:
  - at the time of application, to have either hold a Subclass 188 visa in the Business Innovation Stream,<sup>11</sup> or held one that has expired during a concession period;<sup>12</sup> and
  - to have held the Subclass 188 visa for at least 12 months in the last two years.<sup>13</sup>
21. This latter requirement means that persons need to ensure that they have operated their business at least to some degree in the final 12 months of their Subclass 188 visa, and to have not run their business for more than 12 months while on another visa (e.g. a Subclass 408 or Bridging Visa A).

#### **Recommendation**

- **The Law Council recommends consideration being given to allowing time spent on a different visa, such as a Subclass 408 (Australian Government endorsed events (COVID-19 Pandemic event)) visa, to count towards meeting the business and residency requirements for the Subclass 888 visa.**

<sup>9</sup> Clause 188.232 of Schedule 2 to the Migration Regulations.

<sup>10</sup> Subclause 888.221(1) of Schedule 2 to the Migration Regulations.

<sup>11</sup> Item 1AA of the table in subclause 1104BA(4) of Schedule 1 to the Migration Regulations.

<sup>12</sup> Ibid, item 1A.

<sup>13</sup> Paragraph 888.221(1)(a) of Schedule 2 to the Migration Regulations.

## Relaxing turnover and business ownership requirements for the Subclass 888 visa

22. The Law Council recommends that the Department considers relaxing the turnover concession and business requirements for the Subclass 888 (Business Innovation and Investment (Permanent)) visa.
23. Practitioners have reported that Subclass 188 (Business Innovation and Investment (Provisional)) visa holders in Victoria are unable to maintain their turnover because of the significant periods of lockdowns. Therefore, many visa holders are unable to satisfy the turnover requirement of \$300,000 in the 12 months immediately before the application was made under subclause 888.225(5) of Schedule 2 to the Migration Regulations.
24. The Law Council notes that a turnover concession currently only applies to businesses operating in an area specified as a Designated Regional Area (which do not include Melbourne, Sydney and Brisbane)<sup>14</sup> under subclause 888.226(2) of Schedule 2 to the Migration Regulations, and where the State or Territory government determines that there are exceptional circumstances.
25. In addition, businesses are also required to employ two full-time employees<sup>15</sup> in the 12 months immediately before the application was made, which is difficult during lockdowns as they may have stood-down staff during the period.

### **Recommendation**

- **The Law Council recommends consideration being given to amendments to:**
  - **the turnover concession in subclause 888.226(2) of Schedule 2 to the Migration Regulations to, during the pandemic period:**
    - **include businesses located outside of the regional areas; and**
    - **remove the requirement that State or Territory governments have determined there to be exceptional circumstances for the granting of the concession;**
  - **paragraph 888.225(1)(a) of Schedule 2 to the Migration Regulations, so that it only requires one of the subclauses (2)-(4) need be met (i.e. the assets owned in business requirement, the employee requirement and business and personal assets requirement respectively), instead of the current two.**

<sup>14</sup> Department, 'Designated regional areas' (website), <[link](#)>, accessed on 30 September 2021.

<sup>15</sup> Subclause 888.225(3) of Schedule 2 to the Migration Regulations.

## Preserving family unity

26. The Law Council recommends a number of amendments to family-related criteria for the Subclass 188 visa and the Subclass 888 visa, directed at maintaining family unity.
27. Specifically, it recommends that amendments be made to allow dependents over 23 to be included in the Subclass 188 Extension streams as a member of family unit. This exception would be added to those set out in the table in subregulation 1.12(5) of the Migration Regulations, which already includes persons who apply for a Subclass 888 visa.<sup>16</sup>
28. Subclass 188 holders may apply for the Extension stream because they may not have met the turnover requirements or business requirements for the Subclass 888 visa. The Law Council understands that the children of such persons who are now over 23 are being refused under the Subclass 188 Extension stream.
29. This could be done by adding a new item to the table in regulation 1.12(5) to include dependents (over 23 years old) who hold a Subclass 188 (as a secondary visa holder) to still be recognised as a member of family unit for the Subclass 188 Extension Streams (i.e. the Business Innovation Extension stream and Significant Investor Extension stream).
30. The Law Council also recommends extending the member of family unit definition for the Subclass 888 for applicants who no longer hold the Subclass 188 visa. This is especially important where the Subclass 188 provisional visas have expired during the COVID-19 concession period and individuals no longer hold the Subclass 188 at the time of applying for Subclass 888 permanent visa.<sup>17</sup>
31. To that end, the Law Council recommends amending the member of family unit definition in regulation 1.12, to include a person who previously held Subclass 188 provisional visa on the basis of being a member of the family unit at time of an application for a Subclass 188 Extension stream or Subclass 888 visa.

### Recommendation

- **The Law Council recommends consideration being given to the amendments to the member of family unit definition in regulation 1.12 Migration Regulations to:**
  - **enable dependents (over 23 years old) who hold a Subclass 188 (as a secondary visa holder) to still be recognised as a member of family unit for the Subclass 188 Extension Streams;**
  - **include a person who previously held a Subclass 188 provisional visa on the basis of being a member of the family unit, at time of an application for a Subclass 188 Extension stream or Subclass 888 visa.**

<sup>16</sup> Item 4 of the table in reg 1.12(5) of the Migration Regulations.

<sup>17</sup> As currently required by item 4 of the table in reg 1.12(5) of the Migration Regulations.

## Section 48

32. Section 48 of the Migration Act relevantly provides that persons who do not hold a substantive visa and who (subject to some limited exceptions) were refused a visa or had their visa cancelled may only apply for visas of a kind prescribed in regulation 2.12 of the Migration Regulations.
33. The Law Council understands that the purpose of section 48 is to prevent persons from remaining indefinitely in Australia by lodging successive and/or vexatious visa applications. However, it can have a disproportionate application which is not consistent with that objective in circumstances where a visa application is refused on technical grounds or due to change in circumstances, particularly in this COVID-19 era, when travel to and from Australia is severely limited.

### Skilled visas

#### Proposed list

34. Consistent with a submission made by the Law Council's Federal Litigation and Dispute Resolution Section to the Joint Standing Committee on Migration regarding its Inquiry into Australia's skilled migration program,<sup>18</sup> and recently by the LIV in its letter to the Hon Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, the Law Council recommends consideration be given to prescribing certain skilled visas under regulation 2.12 of the Migration Regulations.
35. The visa classes the Law Council proposes be added to regulation 2.12 are listed below. As is demonstrated, the proposed changes would only allow skilled persons to lodge a valid application where either the Minister for Home Affairs (or delegate) has already approved the position as being genuine, or a State/Territory has identified the applicant through its own screening mechanisms.
36. The Law Council would be happy to discuss these with deidentified examples in any related meeting with Departmental officials though it is aware the Law Institute of Victoria has also presented the Minister Hawke's office with examples.
  - **General Skilled Migration visas (Class SI; Class SN; Class SP; Class PS)** – these visas are subject to receiving an invitation from SkillSelect (and/or State/Territory Government nomination);<sup>19</sup>
  - **Temporary Skill Shortage (Class GK)** – these visas are subject to the Minister approving a nomination by a work sponsor under section 140GB of the Migration Act;<sup>20</sup>
  - **Employer Nomination (Permanent) (Class EN)** – these visas are subject to a nominated position being approved by the Minister under regulation 5.19 of the Migration Regulations;<sup>21</sup>

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<sup>18</sup>Federal Litigation and Dispute Resolution Section of the Law Council, Letter to the Joint Standing Committee on Migration, 'Inquiry into Australia's skilled migration program' (3 March 2021), <[link](#)>.

<sup>19</sup> Clauses 189.221, 190.211, 489.221 and 491.213 of Sch 2 to the Migration Regulations. An exception is the criteria for the New Zealand stream of the Subclass 189—Skilled—Independent visa.

<sup>20</sup> Clause 482.212 of Sch 2 to the Migration Regulations.

<sup>21</sup> Clause 186.242 of Sch 2 to the Migration Regulations.

- **Regional Employer Nomination (Permanent) (Class RN)** – these visas are subject to a nominated position being approved by the Minister under regulation 5.19 of the Migration Regulations;<sup>22</sup>
- **Skilled Employer Sponsored Regional (Provisional) (Class PE)** – these visas are subject to the Minister approving a nomination by a work sponsor under section 140GB of the Migration Act;<sup>23</sup>
- **Business Skills (Provisional) (Class EB)** – these visas can be applied for by invitation only.<sup>24</sup>

37. The proposed amendments will allow employers with a legitimate need for skilled workers to achieve business continuity and State/Territory governments to address their own skills shortages.

#### Recommendation

- **The Law Council recommends consideration being given to amending regulation 2.12 to prescribe the visa classes listed in paragraph 36 as an exception to the section 48 bar.**

### Temporary Activities visa

38. The Law Council recommends continuing the use of the Subclass 408 Australian endorsed events (COVID 19 Pandemic Event) Stream visa, which it considers has assisted with critical skills areas and meeting demands of health sectors under pressure.

39. It also recommends consideration be given to increasing the period of the visa from one year to two years for the critical skills sector.

40. The Law Council also recommends consideration be given to prescribing the Temporary Activities (Class GC) visa under regulation 2.12 to enable a person covered by section 48 to apply for the Government Endorsed Event (COVID-19 Pandemic) Stream of the Subclass 408 visa.

41. Noting that section 48 requires the Migration Regulations to prescribe a ‘class’ of visa, rather than a subclass, it may be necessary to make further amendments to the Subclass 408 visa criteria to limit the effect of this amendment to the Government Endorsed Event (COVID-19 Pandemic) Stream.

42. The Law Council also recommends the following amendments to allow persons to apply for that visa without having to satisfy the requirement to have held a substantive visa in the preceding 28 days:

- remove item 5 of the table in subclause 1237(3) of Schedule 1 to the Migration Regulations;
- consequentially, amend or remove subparagraphs 8(1)(c)(ii), 8(2)(c)(ii) and 8(3)(b)(ii) of *LIN 20/229* (Cth) so that they each no longer impose a time of application criterion that an application for the Government Endorsed Event (COVID-19 Pandemic) Stream of the Subclass 408 visa held a substantive visa

<sup>22</sup> Clause 187.223 of Sch 2 to the Migration Regulations.

<sup>23</sup> Clause 494.213 of Sch 2 to the Migration Regulations.

<sup>24</sup> Clauses 188.221, 188.241, 188.251 and 188.281 of Sch 2 to the Migration Regulations.

within 28 days of an application when that person is employed in certain critical sectors.

#### Recommendation

- **The Law Council recommends consideration being given to:**
  - **continuing the use of the Subclass 408 Australian endorsed events (COVID 19 Pandemic Event) Stream visa and to increasing the period of the visa from one year to two years for the critical skills sector;**
  - **amending regulation 2.12 to prescribe the Temporary Activities (Class GC) visa and make any relevant amendments to restrict this to persons who previously held the Government Endorsed Event (COVID-19 Pandemic) Stream of the Subclass 408 visa.**

## Student visas

43. The Law Council recommends consideration be given to measures to encourage onshore applications for Student visas. This will allow migrants, including those who may otherwise be unable to leave Australia, to contribute to supporting the Australian vocational and higher education sectors while in Australia.

44. Specifically, the Law Council recommends the following measures:

- prescribing the Student Temporary (Class TU) visa under regulation 2.12 to enable a person covered by section 48 to apply for a Subclass 500 Student visa. This concession should allow onshore applications for a student visa in the Higher Education Sector and Vocational Sector for occupations that are on the critical skills list;
- consider reviewing Direction 69 when assessing whether a student is genuine temporary entrant to more accurately reflect the impact of the pandemic on Australia's critical skills and critical sectors, the Australian educational sector and the ability for a student to leave Australia.

45. The Law Council understands anecdotally that there are a large number of students who have had their student visa refused under the genuine temporary entrant criterion, and therefore are subject to section 48.<sup>25</sup> If the section 48 bar were removed, then it would be easier for students onshore to meet the requirements for a student or other visa. The students may be studying in areas of critical need and are highly employable. With COVID-related travel restrictions difficulties with travel, this will ensure that

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<sup>25</sup> The Law Council has not identified a statistic to support this. It understands that over the last 18 months Student visa grant rates have been above 90% (except offshore applications made under the Vocational Education and Training Sector) - Department, 'Student visa and Temporary Graduate visa program report at 31 December 2020 (BR 0097)', <[link](#)>. Student visa decisions were the subject of a little under 35% of the non-Protection visa caseload of migration decisions lodged with the Administrative Appeals Tribunal in 2019-2020 – Administrative Appeals Tribunal, *Annual Report 2019-20*, Table 3.14, 42-43. Of those, 24% were set aside – AAT, MRD caseload summary by subclass 2019-20, <[link](#)>. The set aside figure for student visa applications in 2020-2021 was up to 34% - AAT, MRD caseload summary by subclass 2020-21, <[link](#)>. Student visas made up 58% of the non-Protection visa caseload of migration decisions before the Federal Circuit Court – Federal Circuit Court of Australia, *Annual Report 2019-20*, Figure 3.10, 40.

Australia can keep those already onshore who can contribute to Australia's economic recovery.

#### Recommendation

- **The Law Council suggests that consideration be given to:**
  - **making amendments to lift the section 48 bar to allow onshore applications for a student visa related to a Higher Education Sector and VET Sector whose occupations are on the Critical Skills list.**
  - **reviewing Direction 69 when assessing whether a student is genuine temporary entrant to more accurately reflect the impact of the pandemic on Australia's critical skills and critical sectors, the Australian educational sector and the ability for a student to leave Australia**

## Skilled visas

### Temporary skills shortage visas

46. The Law Council recommends consideration be given to removing the current requirement that a person who has held more than one Subclass 482 (Temporary Skill Shortage) visa in the Short-term stream be outside of Australia before applying for another such visa.<sup>26</sup>
47. The Law Council recommends this short-term adjustment given the difficulties in traveling to and from Australia during the COVID pandemic and the reduction in other skilled visa grantees entering Australia generating a need to fill skills shortages with available workers. This short-term adjustment will prevent valuable skills and talent in Australian being lost. Similar to the recent concessions for certain offshore family visa applicants implemented by the *Migration Amendments (2021 Measures No 1) Regulations 2021* (Cth), the COVID 'concession period' would be defined in subregulation 1.15N(1) of the Migration Regulations as the period commencing on 1 February 2020 and ending on a day specified by the Minister by legislative instrument.
48. Alternatively, or additionally, the Law Council supports folding the STSOL into the MLTSSL so that the occupations on that list have access to a permanent residence pathway.
49. Currently, applicants for a Subclass 186 visa must declare the position is one nominated under regulation 5.19 of the Migration Regulations.<sup>27</sup> However, the *Migration (LIN 19/049: Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2019*, prescribed for the purpose of that regulation, does not prescribe occupations on the STSOL. This means a person who holds a Subclass 482 visa having

<sup>26</sup> Paragraph 1240(3)(b) of Sch 1 to the Migration Regulations.

<sup>27</sup> Paragraph 1114B(3)(d) of Sch 1 to the Migration Regulations.

worked in an occupation listed on the STSOL,<sup>28</sup> does not have a Subclass 186 pathway expect in limited circumstances.

50. Maintaining an STSOL no longer accurately reflect skills shortages in Australia or the need for Australian employers to maintain or retain overseas workers long-term.

#### Recommendation

- **The Law Council recommends consideration being given to:**
  - **amending paragraph 1240(3)(b) of Schedule 1 to the Migration Regulations to enable repeated applications for a Subclass 482 (Temporary Skill Shortage) visa in the Short-term stream in Australia.**
  - **folding the STSOL into the MLTSSL. This will provide a permanent residence pathway for Subclass 482 visa holders who apply for the Subclass 186 Visa. This could be across all subclasses or specifically for Subclass 186 visa to address the inability of employers being able to sponsor Subclass 482 STSOL visa holders.**

### Grandfathering provisions for Employer Nomination Scheme

51. Consistent with the previous recommendation, the Law Council recommends consideration be given to extending the grandfathering provisions for the Employer Nomination Scheme which are due to end on 18 March 2022. These provisions apply to persons who, on 18 April 2017, either held a Subclass 457 visa, or had applied for a Subclass 457 visa that was subsequently granted. The effect of the grandfathering provisions is that a 'specified person'<sup>29</sup> is not subject to the changes made to the Subclass 186 and 187 visas which came into effect in 2018, unless they apply for such visas after 18 March 2022.

52. The Law Council understands from practitioners that there are specified persons under the grandfathering provisions, who will not be able to meet the 18 March 2022 deadline. This is due to the following factors:

- changes of employers during COVID occurring after 18 March 2020, therefore the specified persons are unable to satisfy the 2 years working with their sponsoring employer before the 18 March 2022 deadline;
- COVID lockdowns have impacted on English language test centres being able to conduct an English test required for the Subclass 186 visa.

53. In the circumstances, the Law Council recommends either removing or extending by another 24 months the grandfathering provisions deadline of 18 March 2022 so that a specified person is able to lodge a Subclass 186 and 187 after 18 March 2022. This could be given effect by amending the repeal date of 18 March 2022 under section 9 of the Legislative Instrument IMMI 18/052 (Cth).

54. At least extending the validity of the grandfathering provisions for a further 24 months, would greatly assist employers in securing talent from the onshore labour market which

<sup>28</sup> See the *Migration (LIN 19/048: Specification of Occupations—Subclass 482 Visa) Instrument 2019*.

<sup>29</sup> Section 6 of Legislative Instrument IMMI 18/052 (Cth).

has been significantly reduced by the international border closure. Extending the permanent residency pathway for Subclass 457 visa holders with occupations in the STSOL would assist employers in retaining highly skilled workers in Australia on a more permanent basis.

#### **Recommendation**

- **The Law Council recommends either removing, or extending by 24 months, the current deadline of 18 March 2022 to allow specified persons under the grandfathering provisions to apply for an Employer Nomination Scheme or Regional Sponsored Migration Scheme visa, beyond 18 March 2022**

## Partner visas

### Subsequent application

55. The Law Council recommends a temporary amendment to the Migration Regulations to remove the restriction on a further onshore partner visa application, where the applicant's circumstances have changed considerably since the last application. Examples may include:

- a person who has experienced family violence and is now in a new relationship with a new partner; and
- a person who has had a child since a decision of the Administrative Appeals Tribunal to affirm a refusal decision, but who cannot apply for another partner visa onshore.

56. The requirement to travel overseas to lodge a visa application for a Partner visa causes significant difficulties in departing and returning to Australia. This is in line with the COVID concessions currently available to Partner (Temporary) (Subclass 309), allowing for onshore grants introduced on 27 February 2021.<sup>30</sup>

#### **Recommendation**

- **The Law Council recommends consideration being given to amending paragraph 1124B(3)(e) of Schedule 1 to the Migration Regulations to remove the restriction on a further onshore partner visa application, where the applicant's circumstances have changed considerably since the last application.**

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<sup>30</sup> See Schedule 1 to the *Migration Amendment (2021 Measures No. 1) Regulations 2021*.

## First entry flexibility

57. The recipients of all partner visas which may or must be granted offshore (Subclasses 100, 309 and 801) should be given the flexibility of five years to make their first entry date (or subject to Condition 8504), akin to the position of a person granted a Global Talent Visa.<sup>31</sup> Currently, first entry must be made within a date set by the Minister, which is usually 12 months.<sup>32</sup>

### Recommendation

- **The Law Council recommends consideration being given to extending the ‘initial entry date’ for a person granted an offshore partner visa to allow additional time to make their ‘initial entry’ or comply with condition 8504 to come to Australia.**

## Visitor visas

58. The Law Council recommends amendments be made to the Migration Regulations (or relevant policy established) to permit holders of a Subclass 600 Visitor visa to have their stay in Australia extended by grant of a further visitor visa to enable them to stay for longer than 12 months without needing to establish that COVID-19 renders their circumstances to be exceptional.

59. This could be given effect through the following amendments:

- an amendment to subclause 600.215 of Schedule 2 to the Migration Regulations (or an equivalent policy position adopted) so that exceptional circumstances for the grant of a subsequent visitor visa will always apply over the COVID-19 pandemic period and thus allow a person who has stayed for 12 consecutive months to be granted another visitor visa; and
- an amendment to the condition in clause 8558 of Schedule 8 to the Migration Regulations as that condition applies to visitor visas by operation of clause 4013(2)(b) and item 4065B of the table in Part 2 of Schedule 4 to the Migration Regulations.

### Recommendation

- **The Law Council recommends consideration being given to amendments to the Migration Regulations (or relevant policy established) to permit holders of a Subclass 600 Visitor visa to streamline their extended stay in Australia by grant of a further visitor visa, to enable them to stay for longer than 12 months**

## Resident return visas

60. The Law Council suggests that consideration be given to extending the period of time that a person may be outside of Australia but still qualify for a Resident Return visa (RRV) by at least two years to give permanent visa holders unable to meet subclause 155.212(2) of Schedule 2 to the Migration Regulations additional time to return.

<sup>31</sup> See cl 858.511 of Sch 2 to the Migration Regulations.

<sup>32</sup> Clauses 100.611 and 309.111 of Sch 2 to the Migration Regulations.

61. RRVs are granted in a range of circumstances to permanent residents or previous citizens who have been outside of Australia for less than a continuous period of five years before the application.<sup>33</sup>
62. RRV holders working overseas gain important skills and are a benefit to Australia when they return from overseas. Some are also overseas due to caring obligations for family members and a variety of other reasons.
63. Many permanent visa holders who were offshore at the time (or after) the pandemic commenced have been unable to travel back to Australia. Availability of flights, risks related to travelling and restrictions on numbers being allowed to enter and quarantine in Australia have had a major impact on permanent residents and Australian citizens.
64. An extension to the period of time such persons are able to be overseas before coming back to Australia and still be able to be granted an RRV would recognise that difficulties with international travel may have contributed to some permanent visa holders not coming home sooner than they might otherwise have done so.

#### **Recommendation**

- **The Law Council suggests that consideration be given to extending the period of time that a permanent visa holder may be outside of Australia but still qualify for an RRV by at least two years to give permanent visa holders unable to meet subclause 155.212(2) of Schedule 2 to the Migration Regulations additional time to return as a COVID-19 concession.**

## Continuing health examinations during lockdowns

65. The Law Council recommends that Bupa, the preferred provider for immigration health examinations, continues to provide examinations during lockdowns where to do so would be consistent with State and Territory Public Health Orders.
66. Some practitioners report that by not processing health examinations, there is a potential to cause substantial delays in processing visas when services reopen due to the demand.

#### **Recommendation**

- **The Law Council recommends consideration being given to:**
  - **engaging additional health insurance providers to meet the demand;**
  - **extending the validity of previously completed health examinations to enable individuals to have their visas processed quickly.**

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<sup>33</sup> See subclauses 155.212(1) and 157.212(1) of sch 2 to the Migration Regulations.

## Persons who have exceeded age thresholds but been unable to meet requirements due to lockdowns

67. Across a range of temporary visas, a number of applicants may have exceeded the age threshold in certain time of application criteria for a permanent visa (for example, the Subclass 186 – Employer Nomination Scheme)<sup>34</sup> during the course of the last 12 months at a time when it was not possible to complete English examinations (or possibly other requirements such as skills assessments which required in person attendance).

### **Recommendation**

- **The Law Council recommends consideration being given to amendments providing exemptions to people who no longer comply with time of application age-related criteria due to complications arising from COVID.**

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<sup>34</sup> For example: clauses 186.221, 186.231 and 186.241 of Sch 2 to the Migration Regulations.