THE LAW SOCIETY
OF NEW SOUTH WALES

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19 July 2022

Ms Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
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By email: matthew.wood@lawcouncil.asn.au

Dear Margery,

Management of Migration to Australia – Family Reunion and Partner Related Visas

The Law Society of NSW appreciates the opportunity to contribute to the Law Council's submission to the Australian National Audit Office for the purposes of its performance audit into the Department of Home Affairs titled 'Management of Migration to Australia — Family Reunion and Partner Related Visas'. The Law Society's Human Rights Committee has contributed to this submission.

Capping and queuing of all Parent and Other Family visas

Successive Australian governments have used the Migration Program to address skill and labour shortages, respond to international humanitarian incidents, adhere to Australia's non-refoulement obligations and allow members of the Australian community to reunite with family members. In determining the type and numbers of visas that are to be made available, the government will typically balance competing interests such as economic, social, humanitarian and environmental factors. With respect to family visas, however, it is our view that the appropriate approach should be to recognise and give full effect to the understanding that family is the natural and fundamental unit of society and should be respected and protected by the State.[1]

The *Migration Act 1958* (Cth) (**Act**) allows the relevant Minister to manage Australia's annual visa intake numbers by imposing limits on the number of visas that can be granted in a financial year. Visa applications that exceed the imposed limit are placed in a queue for consideration in the next financial year (this is commonly referred to as the 'cap and queue'). Relevantly, this limit cannot be imposed on visas that can be granted on the grounds of being a spouse, de-facto partner or a dependent child of an Australian permanent resident or citizen.[2]

[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23(1).
[2] *Migration Act 1958* (Cth), s 87.

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Governments have adopted a variety of strategies for managing Other Family visas. These include attempts to repeal family visa subclasses,[3] issuing Ministerial Directions under s 499 of the Act with respect to processing, and increasing visa application charges to make visas less accessible.

Parent visas are subject to capping and queuing arrangements, with 4,500 places available in the Parent stream in 2021-22 and 6,000 places in 2022-23.[4] Despite this increase, we note there continues to be significant delays. For example, while the Department does not provide processing times for Contributory Parent, Parent, Contributory Aged Parent and Aged Parent visa applications, they provide the following estimates:

- New Contributory Parent visa applications lodged that meet the criteria to be queued are likely to take at least 67 months to be released for final processing;
- New Parent and Aged Parent visa applications lodged that meet the criteria to be queued are likely to take at least 30 years for final processing.[5]

We note that the delays for Parent and Aged Parent visas as a result of the imposed cap are likely to be further exacerbated by Direction 80 which prioritises the processing of Contributory Parent visas.

The following examples provided by a member of the Law Society's Human Rights Committee with the consent of her clients illustrate the impact of these delays.[6] In our view, it would be helpful if parents were allowed to be onshore through a bridging visa during the waiting time. As demonstrated in Example 2 below, however, there are sometimes extenuating circumstances that mean that even if a parent is onshore, delays may have a detrimental impact on a child's welfare.

> **Example 1:**
> Ms Bui lodged a Contributory Parent Visa subclass 143 in June 2015, sponsored by a relative, on behalf of her daughter who was under 18 years of age at the time of lodgement. Ms Bui is a single mother of two teenage daughters who are Australian citizens by descent. Her daughters were required to remain in Australia while the application was being processed and they lived with their cousin during this time. At lodgement, the estimated processing time was two years. Ms Bui was required to apply for a visitor visa to remain in Australia lawfully and she was granted a six months or 12 months visitor visa at a time. She was only permitted to remain in Australia for a maximum period of three months on each entry. The processing time for her application was longer than two years. The Department of Home Affairs refused Ms Bui a visitor visa on the last occasion and one of the reasons provided was that she was using the visitor visa as a reason to remain in Australia on a long-term basis. Ms Bui had no choice but to return to Vietnam while her teenage daughters remained in Australia. This caused Ms Bui extreme stress as her daughters required the support of their mother during this stage in their development. Ms Bui was granted the subclass 143 visa in November 2019, double the estimated processing time.

[3] See, for example, Migration Amendment (Repeal of Certain Visa Classes) Regulations 2014 (Cth).
[4] Department of Home Affairs, 'Migration Program planning levels' https://immi.homeaffairs.gov.au/what-we-do/migration-program-planning-levels.
[5] Department of Home Affairs, 'Parent visas - queue release dates and processing times', https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates.
[6] Names in these examples have been anonymised.

Example 2:
Ms Vu came to Australia on a student visa and had a relationship with an Australian citizen. She has a child from the relationship. The child was born in Australia to an Australian citizen which means that the child is an Australian citizen by descent. Ms Vu applied for a contributory parent visa subclass 143 in April 2018, sponsored by her son, a three-year-old child. Ms Vu had appointed her aunt as the guardian for her child and lodged the application on his behalf. The child's father does not wish to have a relationship with the child or Ms Vu. Ms Vu was required to renew her student visa, or obtain another visa, to remain in Australia lawfully. The child was diagnosed with autism and developmental delay. When he was four years of age, the child was involved in an accident where he was hospitalised for months, and his developmental condition worsened. Ms Vu is required to work as well as caring for her child, as she is not entitled to any childcare or after school care subsidies or any other benefits as she is not a resident. Ms Vu's application is still yet to be processed and the Department is currently processing applications lodged in July 2016. It is unclear how long Ms Vu will have to wait until her application is finalised.

Example 3
Mr Duong sponsored his nephew on a carer visa lodged in February 2015, to come to Australia to care for his wife, Mrs Nguyen. Mr Duong and Mrs Nguyen have no children and Mrs Nguyen is estranged from her siblings. Mr Duong and Mrs Nguyen are in a loving and caring relationship. However, Mrs Nguyen suffered from dementia at the age of 65 years. Her health deteriorated rapidly and she relied on Mr Duong to care for her as she had forgotten the basic skills to care for herself. Mr Duong also has his own health problems. He has had two back operations and is unable to carry or lift heavy items. Mrs Nguyen suffered from a stroke in early 2022, however she was not able to receive hospital care as the doctors advised that she was more likely to die from the infection of COVID-19 if she was admitted to hospital than from the stroke. Mrs Nguyen was unable to walk for months, and Mr Duong had to care for her at home. Mr Duong is now 72 years of age. Mr Duong's back problem has worsened. The Department did not give Mr Duong's nephew a queue date until July 2018. It has been over seven years and the application is still pending.

These examples are reflective of the evidence in the *Inquiry into the efficacy, fairness, timeliness and costs of visas for family reunion* conducted by the Senate Legal and Constitutional Affairs References Committee (**the Inquiry**) where the process within the family stream of the migration program was described as 'expensive, opaque (and) lengthy'.[7]

While we understand that the Department of Home Affairs is tasked with serving the policy priorities of the Australian Government, our members have cited experiences with departmental processes that are inefficient and difficult for a vulnerable migrant cohort to navigate. For example, it is the experience of our members that carer visa applicants face significant challenges satisfying the criteria for the grant of a visa, which requires a demonstration, amongst other things, that the required care cannot reasonably be provided by other relatives or obtained from welfare, hospital, nursing or community services in Australia. Our members have observed that many applicants (and their sponsors) lack a sufficient understanding of immigration law and the disability and aged care system, to be able to gather acceptable evidence to address this requirement without the assistance of a migration agent or lawyer.

[7] Parliament of Australia, Senate Legal and Constitutional Affairs Committee, 'The efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions' (March 2022), 90.

Furthermore, we note that persons needing a carer, because of a serious illness or disability, must show that they need the assistance at the time of application, but face a waiting time of over four years for a visa to be granted. This includes a waiting time of approximately two years for the application to be assessed and added to the queue. This suggests, in our view, that in addition to a need to increase the annual quota for Carer visas, there is a need for further staffing/resources to process these visas.

Priority processing under Ministerial Direction 80

Direction 80 sets out the priority with which Family visa applications should be considered. The direction is intended to 'reflect the Government's policy intentions in relation to the size, composition and integrity of the Migration Program, and the management of Australia's borders'.[8] Of particular note, s 8(1)(g) of the Direction requires delegates to give the lowest priority to an application where the sponsor entered Australia as an 'Illegal Maritime Arrival'.

It is the experience of our members that Direction 80 has caused significant delay for many refugees in Australia seeking family reunion. In some cases, our members report that the Department has refused to commence any aspect of the visa processing until the sponsor becomes an Australian citizen and has declined to approve an exception to the order of processing (under s 9 of the Direction), even where there has been unreasonable delay in processing and the sponsors have provided evidence of significant hardship as a result of family separation. Further, as noted by the Human Rights Law Centre in its submission to the Inquiry, such 'lowest priority' applications will likely never be considered in spite of the fact that applicants have paid the relevant application fees and satisfied the criteria for the visa for which they are applying.[9]

We question whether the Direction is punitive and/or can rationally be seen as a necessary tool of additional deterrence for future 'Illegal Maritime Arrivals' in light the Government's existing policies of boat turn-backs, regional processing, and s 46A of the Act which prevents an application for any visa without the permission of the Minister.

Thank you for the opportunity to contribute to the Law Council's submission. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at sophie.bathurst@lawsociety.com.au or (02) 9926 0285.

Yours sincerely,

Joanne van der Plaat
President

[8] Department of Home Affairs, *The Administration of the Immigration and Citizenship Programs* (Ninth Edition, February 2022), 30.
[9] Human Rights Law Centre, Submission 32 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, 'The efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions' (May 2021), 9.