Immigration Advice and Rights Centre

Senate Legal and Constitutional Affairs Committee

Inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions

Submission by the Immigration Advice and Rights Centre
03 May 2021

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Introduction

About IARC

The Immigration Advice and Rights Centre (**IARC**) is a specialist, not-for-profit community legal centre providing free immigration advice and assistance to people throughout New South Wales. IARC has been helping people navigate Australian immigration and citizenship law for over 30 years.

Our clients are financially disadvantaged, come from culturally and linguistically diverse backgrounds, and often speak little or no English. Many experience multiple layers of disadvantage including homelessness, low education levels, disability and past experience of torture and trauma.

IARC's work is split across three focus areas:

- Our Domestic and Family Violence (**DFV**) program assists people - overwhelmingly women - on temporary visas who have experienced or are at risk of DFV.
- Our general practice provides legal advice and assistance in relation to a broader range of matter including family and humanitarian visas, visa cancellations and citizenship.
- Our Visa-Assist partnership with Unions NSW provides free immigration advice and assistance to union members, including migrant workers at risk of workplace exploitation.

Our impact in 2019-20

2,233
legal advice appointments

1,315
clients assisted

1,596
referrals

1,106
DFV-related services

IARC welcomes the opportunity to make a submission to the Committee's inquiry into the efficacy, fairness, timeliness and costs of the processing and granting of visa classes which provide for or allow for family and partner reunions. Our work crosses the breadth of the terms of reference and our submission highlights just some of the challenges that our clients face when they engage with Australia's immigration system. We have included recommendations that we believe will contribute to a fairer immigration system for everyone, regardless of means.

Historical context and overview

Successive governments have used Australia's migration program to address skills/labour shortages, respond to an international humanitarian crisis, adhere to Australia's non-refoulment obligations and, of most relevance to this inquiry, to allow permanent members of the Australia community to reunite with family members.

In determining the type and numbers of visas that are to be made available to non-citizen, it is common for the government to balance competing interests such as economic, social, humanitarian

and environment factors. From time to time, the government may decide that certain visa subclasses are no longer necessary or appropriate. The Committee will recall, for example, the *Migration Amendment (Repeal of Certain Visa Classes) Regulations* 2014 saw the repeal of several family visa subclasses. These visas were, of course, reinstate following a successful disallowance motion in the Senate.

The *Migration Act* 1958 (**Act**) also empowers the Minister to manage visa intake numbers by imposing limits (known as caps) on the number of visas that may be granted within a visa class in a financial year[1]. Application exceeding the imposed limit are placed in a queue for the following financial year - this is commonly referred to as the 'cap and queue'. The considerable delay in the processing of some family visa subclasses (mainly those sought to be repealed in 2014) is directly linked to the low cap numbers imposed by the Minister. Delays in other cases may be because of inadequate resourcing or a Ministerial Direction which sets out the order of considering and disposing of visa applications.

There are also provisions under the law that regulate sponsor and applicant eligibility for family visas. For example:

- sponsors for family visas must usually be over the age of 18 and be an Australian citizen, Australian permanent resident (or a permanent visa holder) or an Eligible New Zealand citizen;
- there are provisions that restrict serial sponsor and sponsors who have been charged or convicted of certain serious offences;
- some family visas require a sponsor to be 'usually resident' and/or settled in Australia;
- visa applicants may be prevented from applying for a visa if they in Australia and subject to a statutory bar under s48 of the Act or have a 'no further stay' condition imposed on their visa; and
- visa applications may be refused if the applicant does not satisfy Public Interest Criteria (**PIC**) relating to health or character or cannot provide an 'Assurance of Support' where it has been requested.

Over recent years, the family visa program has seen significant changes to legislation and policy which has made it increasingly difficult for family members of Australian citizens and permanent residents to migrate and settle in Australia. IARC sees the impact of these policies on some of the most disadvantaged members of our community, many of whom have been separated from family for years with little prospect of being reunited. Processing times have blown out to the point that some visa applicants will not see the visa granted in their lifetime and Visa Application Charges (**VAC**) for many visas are now prohibitively unaffordable.

In our view, family migration should not be about balancing economic and/or social policy. The appropriate approach must be about recognising and giving full effect to the understanding that family is the fundamental unit of society and should be respected and protected by the State[2].

[1] The Act prevents the Minister from placing a limit on the number of 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] See Article 23(1) of the International Covenant on Civil and Political Rights.

Partners

Australian citizens, permanent residents and eligible New Zealand citizens may be eligible to sponsor their spouse or de facto partner to migrate to or permanently settle in Australia through a Partner visa.

There are four subclasses of Partner visas (not including the Prospective Marriage visa):

	Onshore	Offshore
Temporary	820	309
Permanent	801	100

As the above table indicates, Partner visas are processed in two stages. In most cases, a visa applicant who meets the criteria for a Partner visa is first granted a temporary Partner visa. It is at this stage that an offshore applicant (that it an applicant who applied from outside Australia) may travel to Australia to live as a temporary resident while their permanent visa is finalised. The applicant is usually eligible to be granted a permanent Partner visa two years after their application is made.

Costs and processing times

Partner visa applicants face significant wait times for the grant of their visa. According to the Department's website, current processing times are:[3]

	Onshore	Offshore
Temporary	27 months	24 months
Permanent[4]	21 months	21 months

These processing times mean that an offshore applicant will be waiting two years or more for a temporary visa that will allow them to reunite with their partner in Australia and an overall wait time of nearly four years before they become a permanent resident.

Partner visas have a significant cost. The VAC for a permanent Partner visas is currently $7,715 for the primary applicant with additional charges applying if there are dependents included in the application.

In our experience, the excessive wait time at each stage of the process and the high cost of applying for the Partner visa places undue strain on visa applicants and their Australian partners.

[3] Department of Home Affairs, 'Global visa processing times' https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/global-visa-processing-times (accessed 25 April 2021).

[4] From eligibility date (in most case this is two years after application is lodged).

Case study: Hugo

Hugo met his wife Ingrid in 2016 while she was on a working holiday visa in Australia. Their relationship became serious when Hugo and Ingrid spent 6 months travelling together around rural Australia. Hugo and Ingrid were married in 2017 but shortly after, Ingrid returned to her home country as her visa was due to expire and they could not afford the cost of a Partner visa.

Hugo and Ingrid visited each other when they could and tried to save the money for a Partner visa which they finally managed to do in October 2019. Shortly after they applied for the visa, Ingrid discovered she was pregnant.

Hugo and Ingrid's first child was born in July 2020. Hugo could not be there for the birth as he could now not afford to pay for the flights and the borders were closed. Ingrid has been struggling to look after their child on her own and Hugo lost his job in hospitality during the pandemic.

Ingrid is frustrated that Hugo isn't doing more to speed up the visa process. Their relationship is strained and Ingrid has told Hugo that she's not sure if she should continue with the visa process. Hugo misses his wife and is devastated that he has still not met his daughter.

Hugo and Ingrid's story is typical of many clients who approach IARC for help. Many cannot afford to pay the upfront VAC that will take four years or more to be finalised. This issue may, in part, be addressed if the Regulations allowed for a significantly reduced VAC for applicants who can demonstrate financial hardship.

Recommendations:

That the Migration Regulations should be amended to allow for a reduced VAC where a visa applicant can demonstrate financial hardship.

That the Department be adequately resourced to allow decision ready Partner visa applications to be processed within 90 days of application in the case of temporary Partner visas and 90 days of becoming eligible for second stage processing in the case of permanent Partner visas.

Assessing relationships

To be granted a Partner visa, the visa applicant must demonstrate that they are the spouse or de facto partner of their Australian sponsor. The terms 'spouse' and 'de facto partner' are defined in the Act and the Regulations.

The Regulations require that all the circumstances of the relationship must be considered when assessing the relationship but specify that the decision maker consider the following aspects of the relationship:[5]

- financial;
- nature of the household;
- social; and
- nature of persons' commitment to each other.

While these considerations are generally consistent with other jurisdictions[6], in our experience, decision makers tend to treat them as an exhaustive checklist without giving meaningful consideration to other aspects of the relationship or to cultural/social reasons which may explain why adequate evidence about these four matters cannot be produced.

Despite the multicultural and diverse configuration of relationships within Australia, the Migration Regulations and the Department's policy focuses predominantly on a western, heteronormative concept of a 'genuine relationship' with policy offering little guidance to decision makers to allow them to make a realistic finding about whether two people have genuine commitment to shared life together.

Case study: Sam

Felicia met Sam in 2016 when she was travelling overseas. Over time their relationship blossomed into a romance for the ages. If they were not by each other's side, they would be calling or texting. Felicia would visit Sam once a year for a surprise adventure before Felicia would return to Australia. Not many of Felicia's friends in Australia had met Sam as she lived overseas.

In July 2019, Felicia and Sam had a small wedding attended by Sam's family. After the wedding, Felicia returned to Australia and Sam submitted a Partner visa application.

Sam and Felicia do not live together so cannot provide evidence about the nature of their household. Felicia works as a lawyer and Sam's scholarship to complete a PhD is enough to support a humble lifestyle in Sydney. They do not have a shared bank account and Felicia's family and friends have not met Sam yet and cannot provide a reference in support for their application. Felicia and Sam are worried that they cannot meet the evidentiary requirements for the visa.

[5] *Migration Regulations 1994* (Cth) regs 1.09A and 1.15A

[6] See, for example *Interpretations Act 1987* (NSW) s 21C 'relationship as a couple'.

Recommendations:

That decision makers:

- receive appropriate training on culturally appropriate assessments when making decisions on the genuine and continuing nature of a relationship; and
- be required to consider the reasons why there may be inadequate evidence to demonstrate the four factors under Regulations 1.09A(3) and 1.15A(3).

Family violence provisions

In our experience, applicants seeking to satisfy the requirements for a Partner visa under the family violence provisions generally have a harder time satisfying a decision maker that their relationship with their partner was genuine and continuing before it ended. The challenge for victim-survivors of family violence is that they will often not have adequate evidence about relationship either because:

- they are forced to leave home in a hurried manner which does not allow them the time or opportunity to collect evidence in support of their relationship; and
- where the abusive relationship involves financial and/or social control there will often be little evidence in support of these aspects of the relationship.

In our submission, the Migration Regulations are in need of urgent reform to allow all women on temporary visas to safely leave violent relationships and to ensure that the family violence provisions achieve their objectives. For more information, we refer the committee to IARC's submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs[7] and the National Advocacy Groups Blueprint for Reform.[8]

Recommendation:

That the recommendations of the National Advocacy Group on Women on Temporary Visas Experiencing Family Violence's *Blueprint for Reform* are implemented as a priority.

That decision makers receive appropriate and regular training on family violence that includes the perspective of people with lived experience.

[7] IARC submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry into family, domestic and sexual violence, 24 July 2020, https://iarc.org.au/wp-content/uploads/2021/03/sub098.pdf.

[8] National Advocacy Group on Women on Temporary Visas Experiencing Violence, *Blueprint for Reform,* https://iarc.org.au/wp-content/uploads/2020/07/Blueprint-for-Reform_web-version-021019.pdf.

Proposed English requirement for applicants and sponsors

In the October 2020 budget, the Federal Government announced that new English language requirements would be imposed for permanent Partner visa applicants. Little additional information has been made available since then, but in February 2021, the Department of Home Affairs invited public comments on the proposed changes.

IARC does not support the proposed changes and believes that they are unnecessary, unfair, discriminatory, will further contribute to the separation of families and will make it harder for Partner visa applicants to leave violent relationships.

For more information, we refer the committee to our submission to the Department of Home Affairs' consultation.[9]

Recommendation:

That the implementation of an English language requirement for Partner visa applicants does not proceed as proposed.

[9] IARC submission to the Department of Home Affair, 31 March 2021, https://iarc.org.au/wp-content/uploads/2021/04/DHA-consultation-on-English-Language.pdf

People with disability

Carer visas

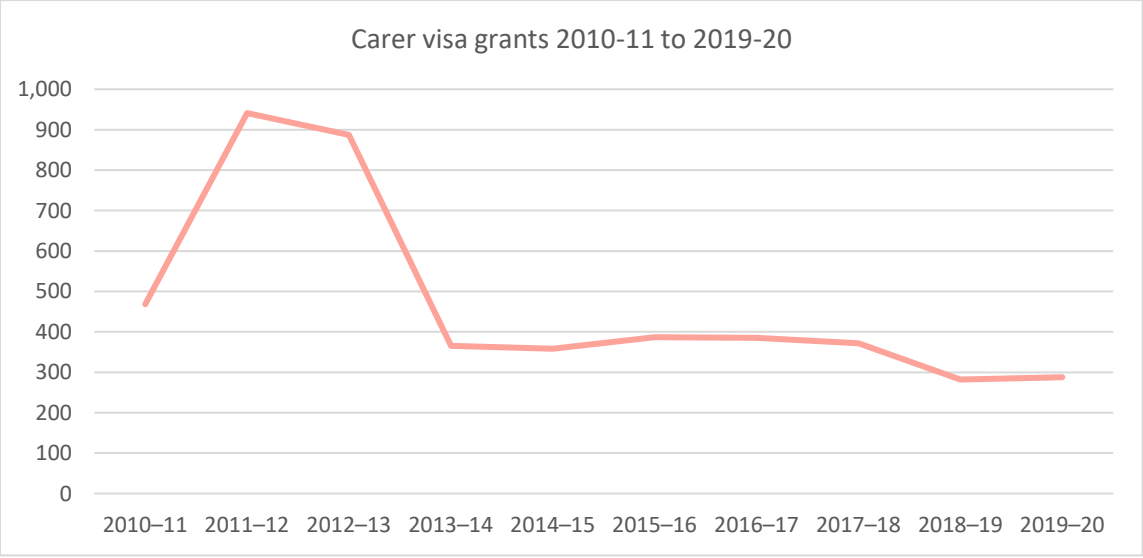
Carer visas allow a person to permanently settle in Australia in order to care for a family member who has a long-term medical condition or disability.

Carer visa applicants must satisfy the decision maker that they have an Australian relative who:

- has a long-term medical condition causing physical, intellectual, or sensory impairment affecting their ability to manage daily activities such as showering, dressing, going to the toilet and preparing meals;
- has been assessed as having a rating under the Social Security Impairment Tables of at least 30 points;
- has no other relative in Australia who can reasonably provide the care; and
- is unable to reasonably obtain the care from welfare, hospital, nursing or community services in Australia.

Carer visas and other visas within the Other Family class are a small proportion of the overall migration program with an average 614 visas granted each year between 2013-14 to 2019-20. Of those, approximately 56% were Carer visas.

As the table below shows, the number of Carer visas granted fell dramatically in 2013-14 and has remained at this low level since:



Source: Department of Home Affairs, Response to FOI request FA21/02/2010, 12 March 2021.

The small number of Carer visas granted each year is the result of the government's cap and queue approach to family visas since 2013/14. This has resulted in wait times of approximately four and a half years for grant of a Carer visa.[10]

Processing times

It is a failure of the migration program that those with a serious illness or disability must show that they need help at the time of application but face a wait of more than four years for a visa to be granted to their carer.

This delay is causing significant distress and hardship to people with a disability and serious illness and their families who are desperate for help and fearful for the future.

Case study: Mary

Mary is 16 years old and has a number of serious medical conditions including a rare genetic condition, autism spectrum disorder and developmental delay. Mary has trouble communicating and needs help with daily activities such as bathing, going to the toilet and getting dressed. Mary also requires a special diet and is fed with a feeding tube.

Mary needs 24-hour care and is looked after at home by her mother. Her father died in a car accident when she was 4. This has put increasing pressure on Mary's mum who is her primary carer. Mary receives 3 hours daily personal care through NDIS and occasional weekend respite for her mother.

Mary's mother is doing her best but as Mary gets older it is becoming harder and harder to care for her alone. Mary's mother is also worried about what will happen to Mary when she is no longer there to care for her. The family sponsored Mary's cousin in Colombia for a Carer visa in 2018 and are still waiting for a decision.

In our view, the Australian Government can alleviate some of this suffering by removing the cap on the number of Carer visas that may be granted each year. This would enable more Australians with a serious illness or disability to be cared for at home by a loved one and contribute to reducing the pressure on the aged care and disability system. This is a simple change that can be implemented immediately by legislative instrument.

Recommendation:

That the Minister removes the cap on the number of Carer visas that may be granted each year.

Capping and queuing is only part of the story. In IARC's experience, Carer visa applicants face a wait of approximately two years just to have their application assessed and added to the queue. This is nearly half the anticipated processing time for the visa.

The wait times that Carer visa applicants face can be significantly reduced by ensuring that sufficient resources are allocated to the prompt processing of Carer visa applications. Faster resolution of applications will also reduce the workload on both the Department and the client because due to

[10] Department of Home Affairs, ' Other Family visas - queue release dates and processing times' https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/other-family-visas-queue-release-dates (accessed 18 April 2021).

current processing times, decision makers often require updated information on the person in need of care's circumstances before the visa can be finalised. This forces applicants to go through the process of collecting evidence all over again, compounding the difficulties they experience.

Recommendation:

That the Department allocates sufficient resources to the processing of Carer visas to ensure that decision ready applications are assessed within 90 days of application.

Complexity of the Carer visa process

Carer visa applicants and their families face significant challenges in satisfying decision makers that they meet the requirements for a Carer visa.

Demonstrating that care is not available in Australia (either from another relative or an institution) is particularly difficult, with the person in need of care essentially required to show that the non-citizen family member is their last possible resort to get the help that they need.

In practice, this means spending hours on the phone contacting nursing homes, private care providers and community organisations to obtain information about their services, collecting extensive supporting documents such as financial records and quotes and preparing statutory declarations outlining why no appropriate services are available.

This approach also denies the person in need of care the agency and dignity to decide how they want to live their life. Under the Migration Regulations and current policy settings, the preference of a person with disability to be cared for at home by a family member is irrelevant to the determination of the visa application. If institutional care can reasonably be obtained, the visa must be refused.

Case study: Elizabeth

Elizabeth is a 45-year-old woman who became paraplegic following a car accident 5 years ago. She lives in a regional town in New South Wales.

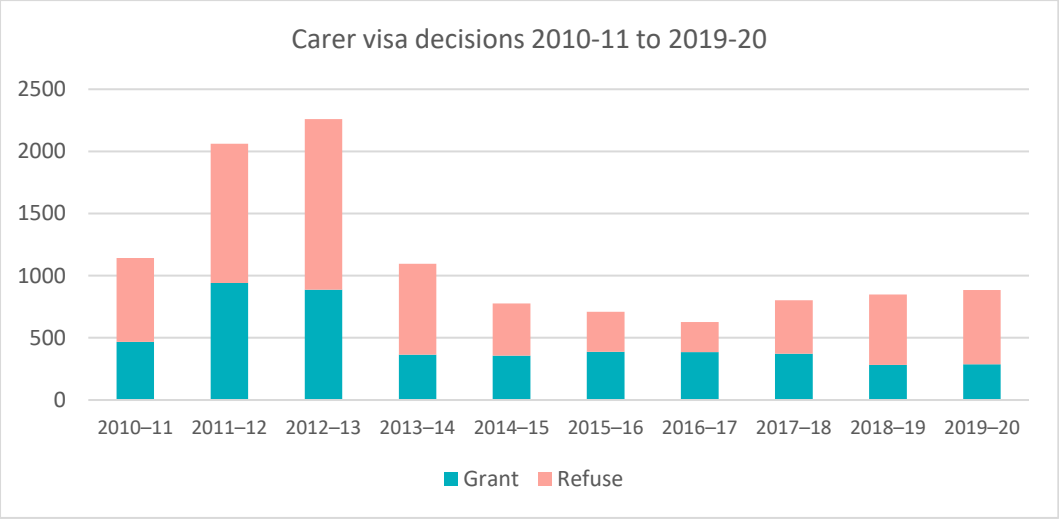
Elizabeth needs help with all aspects of daily life including showering, dressing, going to the toilet and administering her medication. Elizabeth's husband is her primary carer while working two jobs to support the family. She also receives a few hours assistance for some personal care through NDIS.

Elizabeth has sponsored her sister for a Carer visa and has received a request for further information from the Department which is 8 pages long. The letter has asked her to provide evidence that no support is available in the community. A social worker has told her that there is a bed for her at a local aged care facility. She is only 45 and does not want to live in an aged care facility away from her children but doesn't know what she needs to do to satisfy the Department of Home Affairs why she needs her sister to care for her. Elizabeth tried to get help from a private migration lawyer but it was going to cost $10,000 which the family can't afford.

In our experience, many Carer visa applicants or their sponsors simply do not have the capability to manage the visa application on their own. This may be because of language, lack of understanding of Australia's disability and aged care systems and the additional barriers that they may face because of their disability. Many also lack the resources to engage private immigration assistance.

As a result, many applicants do not provide sufficient evidence with their initial application to satisfy decision makers and receive invitations to provide additional evidence before a decision is made. It is usually at this point that applicants or sponsors contact IARC for assistance, often at a loss as to what they need to do.

These difficulties may partly explain why Carer visas have such a high rate of refusal:



Source: Department of Home Affairs, Response to FOI request FA21/02/2010, 12 March 2021.

Improved access to immigration legal assistance will go some way to addressing these challenges, improving the quality of initial applications, reducing processing times by avoiding the need to request further information during processing and ensuring that prospective applicants have had advice about whether a Carer visa is suitable and that they can meet the criteria for the visa.

Recommendation:

That the Australian Government provides specific and sufficient funding to community legal centres and State and Territory Legal Aid Commissions to provide immigration legal assistance to prospective Carer visa applicants and sponsors in accordance with need.

In many cases, the reasons why people in need of care are unable to access it in the community are obvious. The high costs of private care, the barriers to accessing care (particularly culturally appropriate care) in regional areas and the lack of suitable facilities for young people with disability are well established.

Recommendation:

That the Department's policy be updated to require decision makers to consider publicly available information about the state of the disability and aged care sector before requesting evidence from the visa applicant

For NDIS and MyAgedCare recipients, assessments have already been made as to what support the community - through the Australian Government - is able to provide.

It is often the case that support through those programs as substantially less than the level of care that the person in need of care has been assessed as requiring. In such circumstances, we believe it is unnecessary for applicants and their sponsors to be forced to go through the time consuming and usually pointless task of calling service providers to obtain evidence that they are not able to assist.

Recommendation:

That the Department's policy is updated so that NDIS and MyAgedCare assessments are accepted as conclusive evidence of the availability of care through the community.

Impact on carers

It is important to recognise that many Carer visa applicants are already in Australia providing care to their loved ones while they await the outcome of their application. Many carers have made significant sacrifices and commitments to ensure that their family member has the support they need to live a fulfilling life.

In some cases, the person in need of care may pass away before the visa is granted. This is particularly the case given the long processing times for the grant of the visa. When this happens, the visa must be refused and the carer will likely have no options of remaining in Australia.

We believe that carers have made a significant contribution to our community by taking on the unpaid and undervalued work of caring for a family member with disability or serious illness. They have done so with no certainty that they will be able to remain in Australia. Their contribution should be recognised and greater certainty should be provided to those willing to do this important work.

Recommendation:

That the Migration Regulations be amended so that onshore Carer visas (subclass 836) may be granted in the event of the person in need of care dies and the applicant has been providing the required care for a reasonable period of time.

Health criteria

Most people are required to satisfy a health requirement before a visa can be granted to them. This is usually through the requirement to satisfy Public Interest Criteria (**PIC**) 4005 or 4007. For some visas, these health requirements are also imposed on members of the applicant's family unit (including those not applying for the visa).

To satisfy PIC 4005 an applicant must:

- comply with a request to undertake a medical assessment;
- be free from tuberculosis;
- be free from any disease or condition that is, or may result in them being, a threat to public health or a danger to the Australian community;
- not have a disease or condition that:

- ‘during the period of the applicant’s proposed stay in Australia’ would be likely to require health care or community services or which would meet the medical criteria for the provision of a community service; or
- would result in significant cost (the policy threshold for the level of cost regarded as significant is currently $49,000) to the Australian community in the areas of health care and community services or prejudice the access of Australians to such resources; and

- have provided a signed health undertaking if asked by a Medical Officer of the Commonwealth.

The above criteria apply regardless of an applicant’s intention to access the health care or community services. There is no waiver available for PIC 4005. The requirements for PIC 4007 are identical to PIC 4005 except that PIC 4007 provides a discretion for the requirements to be waived in some circumstances.

The main concern about the operation of PIC 4005 is that it does not allow for consideration to be given to the contribution the visa applicant would make to social, cultural and economic life in Australia or the contribution the person would make to meeting the costs associated with their disability (or whether they would actually access any services). It also does not allow the decision maker to consider the best interests of the child[11] and arguably amounts to a breach of Article 18 of the Convention on the Rights of Persons with Disabilities. The requirement that a visa can be refused on the basis that a family member not included in the application fails the health criteria makes the operation of PIC 4005 even more problematic.

Recommendation:

That PIC 4005 be removed as a Public Interest Criteria.

That there be no requirement for non-migrating family members to satisfy a health criteria

[11] See Article 3 of the Convention on the Rights of the Child

Refugees

Family reunion is often cited by our clients and settlement workers as the most pressing issue for refugees who have settled in Australia. Separation from family, particularly in the context of the traumatic experiences that forced them to leave their home country, is an ongoing source of distress and anguish for refugees in Australia.

While refugees who have settled in Australia and wish to reunite with family in Australia may propose or sponsor their relative for a Global Special Humanitarian visa or a visa in the Family stream, the reality is that few will be able to achieve the outcome they desire.

Family visas are often out of reach due to the long processing times and high costs which are discussed throughout this submission, while the demand for Special Humanitarian visas far exceeds the number of visas granted and the visas are subject to opaque 'settlement priorities'.

Special Humanitarian Program

Applicants under for Special Humanitarian visas must show they have a link to Australia. That may involve spouse or de facto partners or dependent children and their parents ('split-families'), other family members, friends or community organisations. Except in cases of split-family applications, the visa applicant must be outside their home country and prior to leaving, were subject to substantial discrimination amounting to a gross violation of their human rights. Processing times for Special Humanitarian visas are not available but the Department's website states that they may take 'many months or even years'.[12]

Split-family applicants must also show that there are 'compelling reasons for giving special consideration to granting the application having regard to the extent of the applicant's connection to Australia. Non-split family applicants must show there are compelling reasons having regard to the degree of discrimination, the extent of the connection to Australia, whether there is a suitable third country that the applicant may go to and the capacity of the Australian community to provide for permanent settlement.

The following table breaks down lodgements, grants and refusals for Special Humanitarian visas over the past five years:[13]

	2015-16	2016-17	2017-18	2018-19	2019-20
Applications	38,186	47,695	46,236	48,760	40,232
Granted	7,268	10,604	6,916	7,661	5,099
Refused	19,193	59,418	46,447	40,800	46,700

[12] Department of Home Affairs, 'Global Special Humanitarian visa' https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/global-special-humanitarian-202 (accessed 26 April 2021).

[13] Department of Home Affairs, *Australia's Offshore Humanitarian Program 2019-20*, https://www.homeaffairs.gov.au/research-and-stats/files/australia-offshore-humanitarian-program-2019-20.pdf (accessed 26 April 2021).

As the Department's statistics show, the overwhelming majority of Special Humanitarian visas are refused. Applications are processed in three stages, with the first being an initial assessment on the basis of the Government settlement priorities and visa criteria.[14]

In our experience, most applicants receive a pro forma refusal notice acknowledging that the applicant has been subject to the gross violation of their human rights in their home country, has a sufficient link to Australia and no suitable third country option, but nonetheless refusing the visa on the basis that Australia lacks the capacity to help them. This suggests that Special Humanitarian visas are being refused primarily on the basis of settlement priorities and without a detailed examination of the applicant's individual circumstances.

Case study: Nami

Nami was 15 years old when her village was attacked in the middle of the night. She was badly injured but escaped the family home into the jungle, losing sight of her parents and brother while they ran. Nami travelled by foot for 3 days to a refugee camp. She could not locate her family at the refugee camp. Nami lived in the refugee camp for two years before she was granted a Refugee visa and travelled to Australia.

Nami is now 20 and recently discovered that her brother survived the attack and is now living in a different refugee camp. A Remaining Relative visa has a 50 year wait to be processed so she proposed her brother for a Special Humanitarian visa.

Nami recently received a notification that the visa was refused because Australia does not have the capacity to settle her brother.

Our clients often speak of the distress caused by the lack of clarity on Australia's 'settlement priorities', the long processing times, non-existent responsiveness to enquiries and use of pro forma decisions.

The use of pro forma decisions is particularly concerning as they raise questions about the extent to which decision makers have considered the other relevant compelling circumstances in the case and the process by which the considerations were weighted. Given that Special Humanitarian applications are not subject to merits review, we believe that there is a need for greater transparency around the decision-making process in relation to Special Humanitarian visas.

Recommendations:

That the overall number of visas granted under the Refugee and Humanitarian program be increased with a greater number allocated for visas under the Special Humanitarian program.

That the Australian Government regularly publishes information about its settlement priorities and the process through which these are decided.

That the Australian Government considers introducing a concessional visa application charge for Family visas sponsored by refugees on low incomes whose Special Humanitarian applications are refused on the basis of Australia's capacity to settle them.

[14] Ibid, page 3.

Direction 80

Section 499 of the Act provides that the Minister may give directions to decision makers about how they are to exercise their powers. Direction 80 requires delegates of the Minister to consider and dispose of family visa application in the order set out under s 8(1) of the Direction. Relevantly, s 8(1)(g) of the Direction requires delegates to give the lowest priority to an application in which the sponsor is a person who entered Australia as an "Illegal Maritime Arrival". The Committee would be aware that the term "Illegal Maritime Arrival" is not a recognised term under the legislation, however, s 6(2) of the Direction provides that the term has the same meaning as 'unauthorised maritime arrival' under s 5AA of the Act.

Case study: Amir

Amir fled persecution from Iraq in 2007. He left his wife and three children behind in Malaysia because the journey was too dangerous. Amir arrived in Australia in 2011 and was granted a protection visa in 2012. He sponsored his wife and children for a Partner visa in 2013 when he was finally able to save the money for the application.

As Amir arrived by boat, he was subject to Direction 80. Although Partner visas were subject to processing times of approximately 12 months at the time Amir's family applied, they were not granted their visa until 2018, five years after they applied and after they had been separated for more than 11 years.

The 'Preamble' to the Direction suggests that its purpose is to advance the national interest by facilitating the integrity of the program and management of Australia's border. The stated purpose is, in our view, questionable. Direction 80 cannot rationally be a tool of deterrence to future unauthorised maritime arrivals - this is because s 46A of the Act would prevent an application for any visa, let alone a permanent visa, without the permission of the Minister. On its face, Direction 80 appears punitive and creates a second class of Australian permanent residents. Direction 80 is unfair, discriminatory and exacerbates the trauma that many refugees and their families are facing.

Recommendation:

That Direction 80 be revoked and replaced with a new Direction that does not discriminate against permanent residents based on their mode of arrival in Australia.

Parents

Processing times and costs

There are four subclasses of visas that permit a non-citizen to remain in Australia permanently based on their relationship with an Australian citizen child:

- Parent (subclass 103);
- Contributory Parent (subclass 143);
- Aged Parent (subclass 804); and
- Contributory Aged Parent (subclass 864)

The following table broadly summarises the difference between the between the various permanent Parent visas:

	Parent	Contributory Parent	Aged Parent	Contributory Aged Parent
Application charge[15]	$6,415	$47,755	$6,415	$47,755
Age requirement	N/A	N/A	Pension age	Pension age
Processing time[16]	30 years	58 months	30 years	58 months
Bridging visa[17]	No	No	Yes	Yes

All permanent parent visas are subject to capping and queuing. In 2019-20, the following caps applied:

- Contributory Parent visas (including temporary Contributory Parent visas): 6,096; and
- Parent and Aged Parent visas: 1,275

The consequence of the capping and queuing of parent visas has been extremely long processing times, particularly for Parent and Aged Parent visas. This has been exacerbated by Direction 80, which prioritises the processing of Contributory Parent visas over Parent and Aged Parent visas.

In our experience, the capping and queuing of Parent visas, high costs and other requirements of Parent visas mean that few (if any) of the people who engage our service will have any prospect of seeing a Parent visa granted. The Parent visa system results in the separation of families and is fundamentally unfair because it favours the wealthy who can afford the nearly $50,000 application fee for a Contributory Parent visa.

[15] The costs noted here are the costs that would apply to most applicants. This cost combines the first and second visa application charges.

[16] Department of Home Affairs, 'Parent visas – queue release dates and processing times' available at: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-processing-times/family-visa-processing-priorities/parent-visas-queue-release-dates (accessed 22 April 2021).

[17] Some Parent (subclass 103) and Contributory Parent (subclass 143) applicants may be able eligible for a Bridging visa during the COVID-19 concession period or if they held a temporary Contributory Parent (subclass 173) visa at the time of application.

We regularly see firsthand the distress that the lack of realistic visa options causes for Australian citizens or permanent residents and their parents. Our clients include Australian children seeking migration options for widowed mothers left alone following the death of their spouse, children of elderly parents who need care during their final years and single parents who need the support of family caring for children.

Recommendation:

The cap on Parent and Aged Parent visas should be greatly increased or removed altogether.

Parents of minor Australian children

The lack of a meaningful migration pathway for parents has a particularly harsh impact on mothers of Australian children who are in violent relationships and do not have any other options to remain in Australia but cannot take their child with them if they leave.

Case study: Alexis

Alexis is 31 years old and is currently in Australia on a Student visa that is expiring soon. She has a one-year-old child, Samantha. Samantha is an Australian citizen because she was born in Australia and her father, Tim, is an Australian citizen. Tim kept promising to sponsor Alexis on a Partner visa so they could remain in Australia as a family. But Tim just used this promise to compel Alexis to remain in an abusive relationship.

However, when Tim began to be violent towards Samantha too, Alexis decided that they had to escape. Alexis is now in a women's refuge with Samantha. Tim has placed Samantha on the Family Law Watchlist (formerly the Airport Watchlist) and has started family law proceedings.

Alexis cannot leave Australia with Samantha. Her visa is going to expire soon but she has no viable visa options to remain in Australia. Even though she is currently Samantha's sole caregiver, she cannot afford a Contributory Parent visa and with a 30 year wait without a Bridging visa, a Parent visa is not a realistic option for her.

IARC regularly assists women in Alexis' situation. In most cases, the only option available to them is to seek Ministerial intervention which is only available in limited circumstances where a visa application has been refused and unsuccessfully reviewed at the Administrative Appeals Tribunal. In our experience, this is a futile exercise as the Minister rarely exercises the discretionary and unreviewable intervention powers in these circumstances.

In the rare case that a victim-survivor is able to afford the application charge for a Contributory Parent visa, the requirement for the application to be sponsored by an Australian citizen, permanent resident or eligible New Zealand citizen over the age of 18 may mean they may not be able to make an application in any event.

While a relative may act as sponsor on behalf of a child under 18, that usually means someone on the father's side, making the victim-survivor to be dependent on the family of her abuser.

Recommendation:

The Migration Regulations should be amended so that a non-citizen parent who has sole or shared parental responsibility for an Australian citizen child (minor) is able to make an on-shore Parent visa application (with an associated Bridging visa) without the need for a sponsor.

Balance of family test

The majority of applicants for permanent parent visas must pass the 'balance of family test'. Essentially, this test requires that the parent has at least half their children living permanently in Australia (or more children living permanently in Australia than any other single country). The rationale behind this requirement, according to Departmental policy, is to ensure that only those with close ties to Australia are eligible for the limited number of parent visas available.

However, the rigid numerical approach of counting children by location to determine whether a parent has close ties to Australia is problematic. It does not account for situations where a parent is estranged from a child. Under the current balance of family test, if the whereabouts of a child are unknown, the child is taken to be living in the last known country of residence. Accordingly, even where a parent has lost contact with children who were last living outside Australia, those children still factor into the balance of family test.

The only children who are not factored into the test are children that the parent no longer has custody by order of a court, children who are refugees or resident in a country where they suffer persecution or abuse of human rights.

The numerical approach to assessing a parent's ties to Australia also fails to consider how strong the relationship between the parent is to their child, and possibly grandchildren, in Australia.

Recommendation:

The Migration Regulations should be amended to require decision makers to consider the nature of the relationship between the parent and their children when assessing whether the applicant has close ties to Australia.

Ongoing sponsorship requirement

All applicants for permanent parent visas must still be sponsored when their application is released from the queue for final processing. Unlike Partner visas, there are no exceptions in cases where there has been family violence or the sponsor has died.

The ongoing sponsorship requirement puts parents at risk of elder abuse because seeking help may cause their child to withdraw sponsorship. Even the threat of withdrawal gives the abusive child leverage over their parent.

Case study: Mia

Mia is 78 years old and holds a Bridging visa while her Aged Parent visa application is being processed. She is from the United Kingdom.

Mia has been subject to abuse by her daughter (who is also her sponsor) and is isolated and has lost control of her bank accounts. Mia spoke to a service who assists victims of elder abuse and considered seeking help but was scared of how her daughter will react.

When Mia's daughter found out that she had spoken to someone she threw her out of the house and called the Department of Home Affairs to withdraw her sponsorship. As Mia was no longer sponsored the Department refused her visa. Mia is now living in a homeless shelter. Her Bridging visa expires in three weeks and she must leave Australia. She has nowhere to live when she returns to the UK as she sold her home and gave the funds to her daughter. She has no living relatives who can support her back home.

This dynamic often plays out in the context of Partner visas, but unlike Partner visa applicants whose sponsor is abusive, parent visa applicants do not have a safety net that will allow them to leave an unsafe situation while ensuring they still have a visa pathway.

Recommendation:

The Migration Regulations should be amended so that Parent visa applicants who have been subjected to family violence may be granted a visa even if they do not meet the sponsorship requirement at the time of decision.

Children

Child visas (subclasses 101 and 802) are permanent visas available to children of Australian citizens, permanent residents and eligible New Zealand citizens. Child visas are limited to children under 25 years of age unless the child is incapacitated for work due to the total or partial loss their bodily or mental functions.

Children aged 18 to 24 must meet specific requirements related to financial dependency, work and study and must not be engaged to marry or have ever had spouse or de facto partner. In our experience, these requirements can have harsh outcomes causing significant distress to families who are separated with no realistic prospect of being reunited.

Dependency

A Child visa applicant must be dependent on their sponsoring parent. Under the Regulations, children are deemed to be dependent on their parents if they are under 18 of age or are incapacitated for work due to the total or partial loss their bodily or mental functions.

Children who are over 18 or over must show that they are wholly or substantially dependent on their sponsoring parent's financial support to meet their basic needs of food, clothing and shelter. Children who cannot show they are financially dependent on their parent will be refused a visa.

Case study: Peggy

Peggy migrated to Australia in 2013 after she was granted a Refugee visa. She had previously been living in a refugee camp for many years after fleeing from persecution. When she fled, she left her 5-year-old daughter, Kira, with her grandparents because it was unsafe for her to take her with her.

Kira is now 19 years old. Peggy has sent Kira all the money she can. However, she had to rely on relatives to provide most of the money to meet Kira's basic needs. As a result, Kira would not meet the requirements for a Child visa because Kira is not wholly or substantially dependent on her mother.

Kira previously unsuccessfully applied for a humanitarian visa.

Study requirement

Children aged 18 to 24 must also show that they have been undertaking a full-time course of study since turning 18, or within six months or a reasonable time after completing the equivalent of year 12.

The purpose of the work and study requirement is to exclude independent adult children from the Child visa pathway. Departmental policy states that generally children are considered independent once they turn 18 unless they progress to further studies after finishing high school.

We believe that inflexible eligibility criteria based on employment and education status unfairly favours wealthy families who can afford to support their children through tertiary education. This socio-economic distinction is demonstrated in Departmental policy which makes an exception for

children undertaking a 'gap year' between finishing high school and starting university but not for those taking time out of studies or studying part time due to financial pressures.[18]

It is overly simplistic to look at family relationships simply through the lens of whether or not a child is enrolled in full-time study. Our clients include people whose children have been unable to finish high school or undertake tertiary education for financial reasons; because they have carer responsibilities for a family member; because they have learning disabilities; and because they are afraid to go to the school where they have been harassed on account of their sexuality or gender identity. None of these children would meet the criteria for a child visa.

Case study: Michelle

Michelle migrated to Australia as a Partner visa holder. A few years after she arrived Michelle was subjected to violent abuse by her now ex-husband which left her with a disability.

Michelle has two sons from a previous marriage who remained in her home country when she moved to Australia. She would like one or both of them to be with her in Australia to support her as she recovers from the trauma she experienced and adjusts to living with a disability.

Michelle's oldest son is 26 so is too old for a Child visa. Her younger son is 18 and started a marketing degree supported by his mother but he left university so that he could travel to Australia to be with her while she recovered from her injuries. He applied for a Child visa but as he is no longer enrolled in full-time study the visa was refused.

While there may be valid policy reasons for excluding adult children, we believe that there is a need to reform the Child visa system to ensure that outcomes are not dictated by socio-economic status and to enable decision makers to take into account individual circumstances in all cases.

Recommendation:

The Migration Regulations should be amended so that a Child visa may be granted to an applicant over 18 years of age who does not meet dependency or study requirements where there are compelling or compassionate circumstances.

[18] Department of Home Affairs, *Procedures Advice Manual (PAM 3)*, 'The AH-101 Main Applicant'.

Other Family

Two final visas of note are the Aged Dependent (**ADR**) and Remaining Relative visas.

The ADR visa is for relatives that are financially dependent on their Australian citizen, permanent resident or eligible New Zealand citizen relatives. They must be financially dependent for a reasonable period (under policy this is three or more years). To qualify, the applicant must be at least 65 years of age (men) and between 60-65 for women, depending on when they were born.

The Remaining Relative visa is for applicants who are the remaining relative of an Australian citizen, permanent resident or eligible New Zealand citizen. An applicant can not have any near relatives other than those who are usually resident in Australia. If they have a spouse or de facto partner, they must also have no near relatives other than those in Australia.

The extremely low cap numbers for these visas means that current processing times for both visas is approximately 50 years. For ADR visas, this creates an absurd situation where an applicant who is not eligible to apply for an ADR visa until they are at least 60 years of age must live until they are at least 110 to see the visa granted.

Case study: Sabrina

Sabrina is the 54 year old sister of an Australian citizen. Sabrina lives in Iran, and until a few years ago, she was the sole carer of her mother and father, who had dementia and eventually passed away. Sabrina never married because she was caring for her parents. Sabrina's only near relative is her brother, who is an Australian citizen.

She lodged a Remaining Relative visa in July 2020. She completes the requested health check, and then is advised her application has progressed to the queue. Current processing time for applications that meet the criteria to be queues is approximately 50 years. Sabrina would be 104 years old by the time her application progressed to consideration for grant

The criteria for Remaining Relative visas also means that during the 50 years that they are waiting for their visa, applicants are unable to have children (because once their children become independent they will no longer meet the criteria) or get married unless their partner also does not have any near relatives other than those living permanently in Australia.

Case study: Luna

Luna and her husband live in Peru with their two young children. Luna’s only other near relative is her brother who is an Australian citizen. Luna applies for a Remaining Relative visa in July 2020. The application takes approximately 50 years to process, however after 10 years Luna, her husband and her children become ineligible for the visa because Luna’s children turn 18 years of age and are no longer dependent. This makes Luna’s children “near relatives” of Luna and her husband, meaning they no longer meet the criteria for the grant of the visa.

The first stage application fee for the main applicant for ADR and Remaining Relative visas is currently $4,350. Additional charges apply for secondary applicants. This must be paid at the time of application. In our view, it is unconscionable that a visa application charge of this magnitude is payable for a visa that will not be granted for 50 years, if at all.

Case study: Frank

Frank is a 72 year old man from Russia. He made an onshore Aged Dependent Relative visa 5 years ago and has held a Bridging visa A since that time. He lives with his daughter, who is also his sponsor for the visa, and her husband and children in their home.

Unfortunately, a few months ago Frank was subjected to domestic violence perpetrated by his daughter and her husband, and he is now living in a refuge after the police applied for an ADVO to protect him. His daughter has told him she no longer wishes to sponsor him for the Aged Dependent Relative visa. Without his daughter to sponsor him, Frank will not meet the criteria for the grant of the visa. Frank sold his home in Russia and has nothing to return to. He is deeply worried about his future.

We also note that the family violence provisions do not apply to Other Family visas and are concerned about the risk that the 'inconsistent and differential application of the family violence exception across different visa subclasses' poses to the safety of people experiencing family violence.[19]

Recommendations:

That the cap on Other Family visas is increased so that visas are processed within a reasonable time.

That the family violence provisions are extended to Other Family visas.

[19] Australian Law Reform Commission, *Family Violence and Commonwealth Laws— Improving Legal Frameworks Final Report*, 30 November 2011, https://www.alrc.gov.au/wpcontent/uploads/2019/08/whole_alrc_117.pdf (accessed 26 April 2021).