Law Council
OF AUSTRALIA

Office of the President

10 July 2023

Ms Maria Vamvakinou MP
Chair
Joint Standing Committee on Migration
PO Box 6021
Parliament House
Canberra ACT 2600

By email: migration@aph.gov.au

Dear Chair

Migration, Pathway to Nation Building inquiry – response to questions taken on notice

The Law Council of Australia was grateful for the opportunity to appear on 12 May 2023 before the Joint Standing Committee on Migration in relation to its inquiry into the role of permanent migration in nation building, titled 'Migration, Pathway to Nation Building'.

During the hearing, the Law Council took four questions on notice. The Law Council's response to these questions is attached.

The Law Council is grateful to the Migration Law Committee of its Federal Dispute Resolution Section and the Law Society of New South Wales each for the input they have provided to this response.

If you would like to discuss this matter further, please contact Matthew Wood, Principal Policy Lawyer, [redacted]

Yours sincerely

[redacted]

Luke Murphy
President

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Supplementary submission—Migration, Pathway to Nation Building

Joint Standing Committee on Migration

10 July 2023

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes 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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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 Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

The Law Council of Australia acknowledges the considerable input of the Migration Law Committee of its Federal Dispute Resolution Section to this submission. It also thanks the Law Society of New South Wales for its contribution.

Question on notice number: 01

Subject: Unlawful non-citizens in the community

Asked by: *Dr Anne Webster MP*

Question:

***Dr WEBSTER**: **Has the Law Council considered solutions for the long-term illegal noncitizens who are working in our country?** ... I need to clarify that I am talking about a resolution for those who are in the country now.*

***Mrs Pereira**: We suggested a resolution status visa in one of our submissions; that was a good idea. It was our collective thoughts on having a resolution status visa because people are in the country for different reasons. For some of them, it is because of the backlogs in the tribunals; for others, it is because of the backlogs in the courts. We are happy to consult with the profession. **We can take that on notice and send you an informed view**, because that was one of our ideas.*

Response

Introduction

1. The Law Council has in this response:

   - suggested in general terms the contours of a proposal for a short-term amnesty which could be introduced for a limited cohort of regional workers, who are unlawful non-citizens and/or may be subject to an unmeritorious protection visa process; and

   - provided an overview of prevailing structural disincentives for unlawful non-citizens to regularise status through application for a bridging visa.

2. As both of these responses demonstrate, for a person whose temporary substantive visa has expired, there can be comparative benefits in lodging an application for a visa whose criteria they do not expect or intend to be able to meet, compared with making an application for a bridging visa to regularise their status. This action can result in time being expended by the Department of Home Affairs (**Department**), the Administrative Appeals Tribunal (**AAT**) and the courts in dealing with spurious applications.

3. The Law Council considers it to be in the public interest for non-citizens to be lawful—that is, hold a visa, as opposed to being unlawful in the community. Being unlawful can also have a significant impact on a person's mental health. An unlawful non-citizen will not have work rights or social supports (such as Medicare) and is thus vulnerable to poverty and workplace exploitation.

4. Under subsection 235(3) of the *Migration Act 1958* (Cth) (**Migration Act**) it is an offence for an unlawful non-citizen to work in Australia.[1] Notably, the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth), would, if passed,

[1] Migration Act ss 235(3).

repeal section 235.[2] The Explanatory Memorandum for that bill indicates the purpose of the repeal of section 235 is as follows:[3]

> *The repeal of current section 235 of the Migration Act is intended to have the principal effect of preventing an employer from arguing that a migrant worker is not entitled to the same workplace protections as other workers in Australia because of their immigration status or right to work, and to encourage increased reporting of employer non-compliance with workplace laws (exploitation). The existence of section 235 has resulted in findings that certain contracts for or of service entered into by migrant workers are void for illegality and thereby enabling some employers to abrogate their obligations to provide safe and fair workplaces. Section 235 has also been cited as a reason temporary migrants refrain from reporting exploitation in the workplace.*

5. The conduct of employers of unlawful non-citizens and non-citizens on bridging visas is not regulated by the *Migration Act 1958* (Cth) (**Migration Act**), which leaves that person at particular risk of exploitation in the workplace. In both circumstances, their employer is not required to be approved as a work sponsor nor subject to obligations through the extensive regulations made for the purposes of sections 140E and 140H of the Migration Act.

6. Also, there is a reported reluctance[4] by undocumented workers to report exploitative behaviour for fear of detention[5] and removal from Australia as soon as reasonably practicable.[6]

7. This risk has been found to pervade particularly in regional areas. The Report of the Migrant Workers' Taskforce noted the following, which while it relates to working holiday maker visas, may also have a broader application to unsponsored visas:[7]

> *Many [working holiday makers] also undertake work in regional Australia, including in horticulture, agriculture, forestry and fishing to satisfy the three months of 'specified work' requirement for a second year visa. The [Fair Work Ombudsman's] experience with these sectors indicate that employers' compliance with workplace laws is relatively low and disputes involve a disproportionately significant number of temporary visa holders. As an unsponsored visa, there is limited data on the types of work and locations working holiday makers undertake.*

8. Some unlawful non-citizens may have a pathway for residency through an application for a subclass 820 (Partner) visa if they are in relationships with Australian citizens or permanent residents. However, they will need to be subject to a waiver of Schedule 3 to the *Migration Regulations 1994* (Cth) (**Migration Regulations**). Schedule 3 conditions require a person to have lodged an application for a visa within a particular period after holding a substantive visa. To obtain the waiver, the person must show compelling reasons for lodging the application in Australia.[8] The Law Council suggests consideration be given to interpreting compelling reasons broadly to ensure that those who are in relationships that are genuine and continuing may be granted a

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[2] Item 39 of Schedule 1 to the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth).
[3] Explanatory Memorandum, Migration Amendment (Strengthening Employer Compliance) Bill 2023 (Cth) [465].
[4] Laurie Berg, Bassina Farbenblum and Sanmati Verma (Migrant Justice Institute), 'Breaking the Silence – A proposal for whistleblower protections to enable migrant workers to address exploitation' (February 2023) 9 https://static1.squarespace.com/static/593f6d9fe4fcb5c458624206/t/64010cb82e0bd4510e01c6a3/1677790407417/Feb+23+Breaking+the+Silence+Proposal+for+Whistleblower+Protections.pdf.
[5] *Migration Act 1958* (Cth) (**Migration Act**) section 189.
[6] Ibid section 198.
[7] Professor Allan Fels AO and Professor David Cousins AM, 'Report of the Migrant Workers' Taskforce' (March 2019) 68 (**Report of the Migrant Workers' Taskforce**) https://www.dewr.gov.au/migrant-workers-taskforce/resources/report-migrant-workers-taskforce 112.
[8] Migration Regulations 820.211(d)(ii) of Schedule 2.

visa. The Law Society of New South Wales has also suggested there should be guidelines around the exercise of Ministerial discretion under that power, to ensure that long-term contribution to the Australian economy is considered in relevant administrative decision-making.

Short-term amnesty for a limited cohort of regional workers

9. Regularisation of the status of unlawful non-citizens will better enable the Department to manage and monitor the movements and wellbeing of non-citizens in the community.

10. The outline of the following proposal was suggested on a preliminary basis by the Humanitarian and Protection Visa Working Group of the Migration Law Committee of the Law Council's Federal Dispute Resolution Section. Further time and consultation would be required to resolve a final position on it. It is provided to the Joint Standing Committee on Migration (**Committee**) as a possible framework for a more detailed solution.

11. This proposal would provide for a one-off amnesty for a confined cohort of non-citizens working in regional areas who are either:

    - unlawful non-citizens; or
    - holding a bridging visa associated with a protection visa application process which objectively has little or no merit.

12. While the latter cohort is not, strictly speaking, within the terms of the question, the advice of practitioners is that they contribute to a significant backlog of protection visa applications and associated merits and judicial review cases which are bound to fail, as they are directed to the sole purpose of maintaining the person's stay in Australia.[9]

13. The Law Council notes that the countries producing the highest rates of protection visa[10] and merits review applications,[11] such as Malaysia, China, Thailand, India and Fiji have low grant rates[12] and low set-aside rates.[13] Recent data suggests that the number of plane arrivals who subsequently applied for a protection visa rose from 4,978 in the first half of 2022 to 8,333 in the second half of 2022, with the greatest numbers from China, India and Malaysia.[14]

14. The experience of practitioners, which is supported by a recent article from a former Departmental official,[15] is that the following process is common and effectively allows

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[9] Dr Martin Parkinson AC PSM, Chair Professor Joanna Howe Mr John Azarias, Review of the Migration System Final Report (March 2023) 177 https://www.homeaffairs.gov.au/reports-and-pubs/files/review-migration-system-final-report.pdf (**Migration Review Report**).
[10] Department of Home Affairs (**Department**), 'Onshore Humanitarian program 2021-22 - as at 30 June 2022' https://www.homeaffairs.gov.au/research-and-stats/files/ohp-june-22.pdf.
[11] Administrative Appeals Tribunal, 'MRD Caseload Report 2022-23' 5 https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2022-23.pdf.
[12] For example and in lieu of compiled financial year data: Department, 'Update to the Onshore Protection PPV visa processing – May 2023 (https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-may-2023.pdf) and Department, 'Update to the Onshore Protection PPV visa processing – May 2023 https://www.homeaffairs.gov.au/research-and-stats/files/monthly-update-onshore-protection-866-visa-processing-april-2023.pdf.
[13] Above n 8.
[14] Department, Response to question on notice no. 451, *Senate Legal and Constitutional Affairs Committee*, question asked by Senator Paul Scarr on 23 January 2023
[15] Abul Rizvi 'Labour trafficking is leading to a growing underclass of undocumented workers' (Sydney Morning Herald online) (30 October 2022) https://www.smh.com.au/national/labour-trafficking-is-leading-to-a-growing-underclass-of-undocumented-workers-20221030-p5bu2q.html.

a person to remain in Australia while the various application and review processes play out for around five years:

- a person is brought in by an operative to undertake work primarily in the agricultural industries, starting with, for example, the grant of a Subclass 601 Electronic Travel Authority visa;
- on arrival or before the visa expires, an application for a protection visa is made to obtain a bridging visa and right to work. The right to work will continue until their protection visa is refused;
- if they have made an application for merits review with the AAT within time, the bridging visa with work rights is generally maintained; and
- if the person applies for judicial review of the AAT decision to affirm their refusal decision, they may continue to qualify to hold a bridging visa with work rights.

15. However, a person in this cohort may not retain their bridging visa and accompanying right to work through this process. Despite becoming an unlawful non-citizen without a right to work, that person may nevertheless continue to work.

16. The proposal is to permit a strictly defined group of regional workers who are non-citizens in the above cohorts with a finite opportunity to be offered a pathway to regularise their status, obtain work rights and provide a permanent residence pathway for the purpose of encouraging person/s to come forward.

17. The affected cohort would not come within the Skilled Migration Program. These workers are semi-skilled and, while recognising they often perform a vital role in supporting regional and agricultural industries, they should not be classified as skilled in the sense that it is used in the migration system. Instead, the proposal is to provide a bespoke temporary visa, e.g. a regional worker visa (Temporary), which could qualify a person for a Subclass 851 Resolution of Status or bespoke permanent visa, e.g. a regional worker visa (Permanent), if certain minimum criteria are met.

18. It would be a threshold requirement that the person withdraws from any Ministerial intervention or protection visa process (be it visa application, merits review or judicial review) on foot. This relates to one of the key objectives of this visa, which is to bring undocumented and unregulated workers, clogging up the protection visa processes with spurious applications, into the regulated migration framework.

19. Care would need to be taken in the design of the policy to ensure that any genuine protection visa applicant was not disincentivised from maintaining their application. A person who has been refused a protection visa will be subject to a visa application bar which can only be lifted by a decision of the Minister.[16] To assist with this, the proposal should be associated with education and access to appropriate levels of legal advice, to assist potential applicants to understand the program.

20. Possible criteria could include that the applicant:

- is working in a prescribed regional area;
- has been working for an Australian employer which holds an ABN, subject to a signed contract, for a prescribed period; and/or
- is working in a prescribed industry for a prescribed period.

[16] Section 48A of the Migration Act.

21. Regulations would need to be prescribed to lift application bars which are ordinarily imposed on unlawful non-citizens and those who have had their visa refused. This would enable non-citizens in those circumstances to make a visa application.[17]

22. In order to qualify for the permanent visa, the holder would be required to work for a prescribed period (between one and two years), either for a designated employer or in a prescribed industry, before being eligible for the grant of permanent residence. At this point, an applicant should be an employee and able to provide evidence of payment of a wage under a particular award with relevant workplace benefits.

23. This would be a short-term and one-off solution for people who satisfy the time of application criteria at the time it commences. It is essential that it is one part of a broader program of reforms to address the circumstances that generated and continue to generate this situation. As a general point, the Law Council reiterates the points made in its submission that a holistic response to migrant worker exploitation is required which:

    - reduces the incentives for exploitation that arise by tying a visa applicant to a single employer in order to stay on a pathway to permanent residency;
    - supports workers to make complaints about unscrupulous employers and providing visa certainty while they seek a new employer; and
    - enforces the offences for migrant worker exploitation which already exist.[18]

24. The Law Council suggests that the scheme should be allied with a tailored means to support people to come forward to report persons who are promoting and profiting off bringing workers into Australia through the kind of model outlined at [14]. It is the experience of practitioners that migrant workers in these circumstances will not take any action against those kinds of persons because they don't want to bring themselves to the attention of the Department; they are scared of retribution; or they don't know how or where to complain.

Application of the section 48 bar

25. More generally, consideration could be given to expanding the subclasses of skilled visas which are not subject to the bar which would otherwise prevent persons whose visa is refused or cancelled from lodging another visa.[19]

26. Regulation 2.12 of the Migration Regulations, which prescribes the visas exempt from the operation of that bar, was amended with effect from 13 November 2021,[20] to enable migrants to apply for a subclass 494 (Skilled Employer Sponsored Regional (Provisional), subclass 491 (Skilled Work Regional (Provisional)) and a subclass 190 (Skilled—Nominated) visa. The ostensible purpose of this amendment was to facilitate 'applications in Australia by applicants who are prevented from leaving due to COVID-19 related travel restrictions but meet all other requirements for making an application for the visa[21]. The feedback from practitioners is that it has been working well.

27. The Law Council suggests that the Committee could ask the Department about the consequence of expanding regulation 2.12 in November 2021. Further expanding

[17] For example, under subsection 46(2) and paragraph 48(1A)(b) of the Migration Act.
[18] Law Council, Submission to the Joint Standing Committee on Migration, 'Migration, pathway to Nation Building' (31 March 2023) [114]-[118].
[19] That is, imposed by section 48 of the Migration Act.
[20] *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021* Schedule 1.
[21] Explanatory Statement, *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021.*

this exception would provide another means by which persons unable to apply for a visa, who may or may not be relying on a Ministerial intervention decision to enable them to apply for a visa, may be able to access the Skilled Migration Program.

Structural disincentives to applying for a bridging visa while unlawful

28. Under the migration visa framework, a bridging visa may be available to a person who does not hold a substantive visa, so they can remain lawfully in Australia while a process relating to their migration status—visa application, merits or judicial review process or Ministerial intervention request, for example—remains on foot, or they prepare to depart. That bridging visa may or may not accord them work rights.

29. There are different types of bridging visas which apply to different scenarios, have different criteria, are subject to various conditions and provide for different benefits or restrictions.

30. Generally speaking, when a non-citizen becomes an unlawful non-citizen due to either having:

- overstayed their substantive visa;
- overstayed their existing bridging visa following the refusal of a substantive visa; or
- had their visa cancelled,

they are expected to report to the Department.

31. While there is no actual 'requirement' under the Migration Act or Migration Regulations that compels the person to do so, this expectation is communicated to the migrant in the notification letter accompanying the visa grant, refusal, or cancellation. Upon reporting to the Department and being confirmed as an unlawful non-citizen, they will be interviewed by status resolution officers and be considered for the grant of a subclass 050 Bridging visa E.

32. A Bridging visa E can be granted in a range of circumstances, including if the applicant is making arrangements to depart Australia, or has demonstrated an intention to apply for a further substantive visa. If the application for a Bridging visa E is refused, or it is found that the applicant falls within a cohort that is barred from applying for or being granted a Bridging visa E, section 189 of the Migration Act would impose a duty on every 'officer' to detain them. Section 198 of the Migration Act would then require their removal from Australia as soon as reasonably practicable.

33. For the reasons that follow, there are several disincentives that may apply to an unlawful non-citizen seeking to regularise their status, which may mean that they form the view that it is not in their interest to report to the Department. Specifically, they may instead choose to remain an unlawful non-citizen for a prolonged or indefinite period—such as until they have applied for a substantive visa or are ready to depart Australia—as to do so can lead to being granted a more beneficial Bridging visa (a Bridging visa C), having better prospects of obtaining work rights, and/or having more substantive visa options available to them.

34. The Law Council does not, in this submission, recommend particular amendments to address these issues, although it would be happy to give further consideration if time permits. It raises them for the information of the Committee to demonstrate:

- factors which contribute to persons remaining unlawful non-citizens rather than regularise their status; and

- the incentives which can lead to a person lodging a permanent visa for the purpose of validating the remaining stay in Australia.

35. In order to benefit from work rights attached to their bridging visa, the more compelling visa to apply for is a Bridging visa C. However, as it is a criterion for that visa that the person has lodged a substantive application for a visa, this provides an incentive for the person to lodge an application for a substantive visa.

36. A key reason a Bridging visa C is a more compelling visa to apply for, if the person seeks work rights, is that it sets a lower threshold to be granted such rights, in two respects, captured in scenarios 1 and 2 below.

Scenario 1—application for a protection visa

37. Take the scenario of a person who applies for a protection visa after becoming an unlawful non-citizen (for example, because their substantive visa expired). If that person:

    (a) soon after becoming an unlawful non-citizen, applied for a Bridging visa E to regularise their status and then later applied for a protection visa; or

    (b) did not apply for a Bridging visa E initially, but instead spent a period as an unlawful non-citizen before applying for a protection visa and then applying for a Bridging visa C,

    the person in scenario (b) will find it easier to obtain work rights.

38. That is because:

    - if applying for a protection visa as the holder of Bridging visa E, the applicant can only be granted work rights associated with their bridging visa if:
        - there is a compelling need to work (defined as 'financial hardship'); and[22]
        - the reasons for the delay in making the application for the protection visa are acceptable to the Minister;[23]
    - if the person did not regularise their status prior to applying for the protection visa, they can apply for a Bridging visa C and can get work rights through only satisfying the compelling need to work criterion.

39. In the experience of practitioners, 'acceptable reasons for delay' is a very high threshold.

Scenario 2—application for a partner visa

40. If scenario 1 is repeated, except the visa in question is a partner visa, the criteria for the Bridging visas C and E will be the same—the acceptable reasons for delay provision only applies to protection visas.

41. However, in the experience of practitioners, it is still beneficial to apply for a partner visa while unlawful and be granted a Bridging visa C, rather than apply for a Bridging visa E while unlawful. While the criteria are the same, the experience of practitioners is that the 'compelling need to work' assessment by the partner visa processing office (when applying for a Bridging visa C as a Partner visa applicant), is more flexible and

[22] Ibid paragraph 1.08(a).
[23] Ibid subparagraph 050.212(8)(c)(i) of Schedule 2.

more fairly applied than the same assessment by status resolution teams (when applying for a Bridging visa E as an unlawful non-citizen).

Scenario 3—overstayer

42. If a previous visa holder overstays their visa by fewer than 28 days, there are a number of substantive visas that they can apply for during that time, such as a subclass 600 Visitor visa. However, if the person has sought to regularise their status through application for a Bridging visa E during that time, the only substantive visas they can apply for are a protection and partner visa.

Scenario 4—willing to depart

43. Some unlawful non-citizens whose visas have been cancelled and who are willing to depart, may feel that they are better off staying in Australia unlawfully until their affairs are settled and they can afford to just leave, rather than seeking to regularise their status first. This is because the standard Bridging visa E granted on departure grounds is 28 days and this is often not enough to settle the person's affairs, and non-citizens fear that non-compliance will lead to detention.

Scenario 5—Investigation of employers, family and friends

44. When applying to regularise their status, applicants in this cohort are generally required to be interviewed.[24] As part of this process, applicants can be expected to be asked about where they are living and how they are supporting themselves. If the person is applying for work rights, they will be asked for evidence of income and three months of bank statements. It is the experience of practitioners that many applicants are concerned that the employers who have been giving them work, or the friends and family that have been giving them shelter will be investigated and face a penalty if they give up this information.

45. The Law Council does not suggest that unlawful behaviour should not be investigated. It raises this information to demonstrate a general perception that exists, which could be addressed through education.

[24] Ibid subclause 050.221(1) of Schedule 2.

Question on notice number: 02

Subject: Skills Assessment

Asked by: *Dr Anne Webster MP*

Question:

Dr WEBSTER: ... *It seems like part of the delay in people being able to enter the country and work, which we desperately need them to do, is that our systems are inefficient. This might be better directed to the tech council,* ***but has there been any discussion in the Law Council about how that might be achieved?***

Mr Spentzaris: *In terms of the skills assessment process, you rightly highlight the fact that it is a very important part of the migration program, yet it sits outside the program. Each assessing body or licensing authority has its own requirements that need to be met, which are rigid and potentially, in certain circumstances, narrower than the migration law provides. So it delays migration, and it delays the processing of applications. Unfortunately, there is no mechanism under law to appeal those decisions. The body might have an internal review process, but you cannot appeal the decision if the internal review does not go in your favour. Unfortunately, we have seen—****on notice, we can provide you with examples—****scenarios of where they would otherwise have met the migration legislation and obtained either permanent residency or temporary residency, had the assessing body assessed their qualifications differently. ...*

Response

The skills assessment statutory framework

46. The following introductory paragraphs set out the statutory basis for skills assessments under the Migration Regulations.

Specifying skills assessment authorities

47. Subregulation 2.26B of the Migration Regulations provides that the Minister may specify a person or body as the relevant assessing authority (**skills assessment authority**) for:

    - a skilled occupation; and
    - one or more countries;

    for the purposes of an application for a skills assessment made by a resident of one of those countries.

48. Subject to the proviso described in the following paragraph, the power to specify a skills assessment authority is not subject to any criteria—the Minister is not obliged, for example, to be satisfied of the person or body's capacity to perform the assessment to any particular standard or subject to any particular processes.

49. The proviso is that the 'Skills Assessment Minister' or their delegate (the Secretary, an SES (Senior Executive Service) employee or acting SES employee of the Skills Assessment Department)[25] must first approve the person or body in writing to be a skills assessment authority. The 'Skills Assessment Minister' is defined as the Minister responsible for skills assessment services,[26] which is currently the Minister

[25] Defined as the Department administered by the Skills Assessment Minister (Migration Regulations reg 1.03), which is currently the Department of Employment and Workplace Relations – see footnote 25.
[26] Migration Regulations reg 1.03.

administering the Department of Employment and Workplace Relations.[27] Again, there are no express criteria or considerations which pertain to that approval.

50. The Migration (LIN 19/051: Specification of Occupations and Assessing Authorities) Instrument 2019 prescribes assessing authorities for the purposes of reg 2.26B.

51. Importantly, subregulations 2.26B(2) and (3) of the Migration Regulations provide, respectively, that:

- the standards against which the skills of a person are assessed must be the standards set by the skills assessment body itself; and
- the skills assessment body may set different standards for assessing a skilled occupation for different visa classes or subclasses.

52. That is, as far as the legislation itself is concerned, a person or body of any corporate structure, undertaking a process of any kind, may determine itself what standards are appropriate to assess the skills of an applicant for a particular kind of visa.

Relevance of skills assessments for visa criteria

53. Many temporary and permanent visas in the Skilled Migration Program require a skills assessment by a skills assessment authority. This includes visas in both the employer sponsored visa program and the General Skilled Migration program (i.e. visas that do not require an employer sponsor).

Employer sponsored visa program

*Subclass 482 Temporary Skilled Shortage (**TSS**) visa*

54. To make a valid application for a Subclass 482 Temporary Skilled Shortage (**TSS**) visa in the Short-term or Medium-term streams, if the applicant has nominated an occupation and is in a class of persons specified by the Minister, the applicant must have requested a skills assessment which has assessed their skills as suitable or is incomplete.[28] The instrument made by the Minister specifies applicants of certain nationalities who must always satisfy that requirement.[29] The applicants of other nationalities will also need to satisfy that requirement if not exempt.[30] The exemptions are:[31]

(a) current primary visa holders employed in the nominated occupation;

(b) employees of a company operating an established business overseas in the same or similar occupation as the nominated occupation which nominates the person for the visa;

(c) the holder of a 'relevant qualification' for the occupation obtained in Australia or a 'permitted country';

(d) the person has been granted a license, registration or membership required in the nominated occupation; or

[27] Administrative Arrangements Order – 14/10/2022.
[28] Migration Regulations paragraph 1240(3)(g) of Schedule 1.
[29] Migration (IMMI 18/039: Mandatory Skills Assessment—Subclass 482 Visa) Instrument 2018 subsection 6(2).
[30] Ibid.
[31] Ibid subsections 7(1) and (2).

(e) the person met the standards set by Trades Recognition Australia under the Offshore Skills Assessment Program for the nominated occupation to which the application relates.

55. There are management-related occupations which visa applicants will only be subject to the exemptions in (c)–(e) of the previous paragraph if they hold a relevant occupation, receive annual earnings of $180,000 and are nominated by an accredited sponsor.[32]

56. While there is no express statutory provision requiring the applicant to have been assessed as suitable (if the assessment was incomplete at time of application), the applicant is required to have 'the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation'.[33] In practice, an applicant required to undergo a skills assessment will be requested to provide evidence of successful completion to satisfy that requirement.[34]

Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa

57. To satisfy the time of application criteria for a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa in the employer sponsored stream, unless exempt,[35] a specified skills assessment body[36] must have assessed the applicant's skills as suitable for the occupation within three years of the visa application[37] or for the purposes of a previous subclass 457 or 482 visa for the same occupation.[38]

Subclass 186—Employment Nomination visa

58. To satisfy the time of application criteria for a Subclass 186—Employment Nomination Scheme (**ENS**) visa in the Direct Entry stream (i.e. for an applicant who does not hold a TSS visa), a specified skills assessment body[39] must have assessed the applicant's skills as suitable for the occupation within three years of the visa application.[40] In contrast, an ENS applicant in the Temporary Residence Transition (**TRT**) stream (that is, one who holds or has held a temporary skilled visa, such as a Subclass 482 visa),[41] does not need a skills assessment, although the Minister may require the applicant to demonstrate that he or she has the skills that are necessary to perform the tasks of the occupation to which the position relates.[42]

[32] Ibid subsection 7(4).
[33] Ibid subclause 482.212(3) of Schedule 2.
[34] Department of Home Affairs, *Procedures Advice Manual 3*: Regulations – Schedule 2 (to Visa 500) [4.3.5.1].
[35] Migration Regulations paragraph 494.224(1)(c).
[36] See Migration (LIN 19/260: Assessing Authorities for Subclass 494 Visas) Instrument 2019.
[37] Ibid paragraph 494.224(1)(a) of Schedule 2.
[38] Ibid paragraph 494.224(1)(b) of Schedule 2.
[39] See Migration (Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Amendment Instrument (LIN 21/009) 2021.
[40] Ibid clause 186.234 of Schedule 2.
[41] Ibid paragraph 5.19(5)(a) and (e).
[42] Ibid clause 186.225 of Schedule 2.

*General Skilled Migration (**GSM**) program*

59. As noted in the Law Council's previous submission to this inquiry, a person may only apply for GSM visas if, having lodged an expression of interest (**EOI**), they are invited to apply for the visa.[43]

60. At the time of the invitation to apply for a Skilled Independent visa (subclass 189) and Skilled Nominated visa (subclass 190) (**permanent GSM visas**) or Skilled Work Regional (Provisional) (subclass 491) visa, the applicant's skills must have been assessed as suitable by a specified skills assessment body within three years of the application (unless the assessment specified a shorter timeframe).[44]

61. At the time of application for a Temporary Graduate (subclass 485) visa in the Graduate Work Stream, the applicant must have been assessed as suitable for the occupation within three years of the application.[45]

Unavailability of review

62. As the Law Council noted in its submission, the assessments by skills assessment authorities are not subject to independent review by the AAT, although some skills assessment authorities maintain their own internal review processes. Practitioners report that these internal review process can be time-consuming, unpredictable and costly. That means that, if the applicant's skills are not assessed as suitable by an authority applying standards that it has set out outside of the legislative framework, there is no means by which that person may independently challenge the merit of that assessment.

Examples of inefficiencies in the skills assessment processes

63. In the following passages, the Law Council has set out examples provided by the profession of inefficiencies and arguably unreasonable outcomes arising as a result of standards set by skills assessing authorities or the operation of the legislative framework.

TSS visas

64. TSS applicants nominating a trade occupation, such as motor mechanic from specified countries,[46] are among those obliged to undertake a skills assessment.

65. For applicants who are not in Australia, they are required to travel to a test centre, to undertake a Practical Assessment and/or Technical Interview. For example, the Law Council understands that a motor mechanic from South Africa (who must always undertake a skills assessment)[47] would need to travel to Johannesburg to undertake an assessment, through VETASSESS. The Law Council understands that this process can take many months to complete, and the TSS visa cannot be granted until the assessment has been completed.

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[43] Law Council, Submission to the Joint Standing Committee on Migration, 'Migration, Pathway to Nation Building' (31 March 2023) [122] https://lawcouncil.au/publicassets/e96123eb-04d4-ed11-947b-005056be13b5/2023%2004%2003%20-%20S%20-%20%20Migration%20-%20Pathway%20to%20Nation%20Building.pdf (**Law Council submission to this inquiry**).
[44] Ibid clauses 189.222, 190.212 and 491.214 of Schedule 2. u
[45] Ibid clause 485.224 of Schedule 2.
[46] Migration (IMMI 18/039: Mandatory Skills Assessment—Subclass 482 Visa) Instrument 2018 item 18 of the table in subsection 6(2).
[47] Ibid

66. If the applicant is in Australia, they must still undertake the skills assessment, and VETASSESS has acknowledged they have long delays with assessing motor mechanics and engineering trades because of a shortage of qualified assessors in Australia to undertake the assessment.[48] The onshore applicant will need to wait for the assessment to be completed before their visa can be granted. As work rights are not automatically granted to a TSS applicant, the person may not be able to work while waiting for their TSS visa.

ENS and subclass 494 visas

Difficulties faced by some experienced applicants

67. The Law Council was provided the example of a negative skills assessment outcome issued by the Australian Computer Society (**ACS**) for an applicant for an ENS visa in the Direct Entry scheme. The applicant had completed a Bachelor of Information and Computing Science from a 'Section 1' university under the Australian Department of Education Country Education Profiles, which is comparable to the educational level of an Australian bachelor's degree.

68. It is understood from the ACS guidelines that a bachelor's degree is deemed as being an ICT Major in computing if only 33 per cent of the qualification is information and computing technology (**ICT**). Despite this qualification being in Information and Computing Science, the assessing case officer in the first instance assessed it as being an ICT Minor not closely related to the applicant's nominated occupation of ICT Business Analyst. This assessment meant the applicant was required to evidence six years of relevant ICT work experience, instead of the three years' experience required had the case officer initially assessed this qualification as being an ICT Major. The applicant provided evidence of over four years of relevant work experience with the application, and this experience was all assessed positively. However, due to the assessment of the applicant's Information and computer science qualification being deemed not sufficiently ICT-related by the assessing case officer, the applicant was refused, based on the applicant not holding six years of relevant work experience.

69. The applicant lodged an application for review of the decision, which was finally approved based on the applicant's qualification in fact being an ICT Major related to the nominated occupation, and therefore requiring evidence of only three years of relevant work experience.

70. This example can be contrasted with the approach a Departmental delegate decision-maker may take to assessing an applicant for a TSS visa. As noted, these applicants, may be exempt from the need to undergo a skills assessment, although the decision-maker must be satisfied the applicant has demonstrated having the skills, qualifications, and employment background necessary to perform the role.[49] Decision-makers are directed to use the Australian and New Zealand Standard Classification of Occupations (**ANZSCO**) as the principal source of information on the skill requirements for occupations. In the case of an ICT Business Analyst, this is a bachelor's degree or higher. As the applicant's bachelor's degree in Information and Computing Science is comparable to an Australian bachelor's degree, it is anticipated that, had the qualification been submitted to the Department, it would have been accepted as being evidence that the applicant's qualification was suitable for their proposed nominated occupation.

[48] VETASSESS, Trade Occupation Migration Skills Assessment (webpage, accessed on 4 July 2023) https://www.vetassess.com.au/skills-assessment-for-migration/trade-occupations.
[49] Migration Regulations subclause 482.212(3) of Schedule 2.

71. To further contrast the ACS approach with visa requirements, the employment experience requirements for TSS and ENS visas are not variable based on the content of the applicants' qualifications. For the TSS, the employment experience requirement is two years and for ENS in the Direct Entry scheme the employment experience requirement is three years. The employment experience must be completed in the nominated occupation or a closely related occupation and completed at the appropriate skill level. As noted above the applicant provided evidence of over four years of relevant work experience to the ACS which was assessed positively. Therefore, had this evidence been provided to the Department, it would have been accepted as suitable for their proposed nominated occupation for the TSS and ENS visas.

72. By being required to lodge the assessment application, and subsequently lodge the review for the negative outcome, the applicant lost significant time (approximately around six months), application costs and professional fees, and was also caused significant distress.

Qualification requirements

73. VETASSESS assesses over 200 professional occupations all of which require formal qualifications. As a result of the standards applied by VETASSESS, an applicant who has relevant work experience, but does not hold an Australian Qualifications Framework (**AQF**) equivalent qualification will not be able to obtain a skills assessment. This can present circumstances where applicants who may in fact have sufficient skills and experience for the role, cannot meet the criteria because they do not have a bachelor's degree.

74. Practitioners have identified that the requirements imposed on applicants with a nominated role of Management Consultant can impact the ability of experienced and qualified applicants to obtain positive skills assessment. For example, a Management Consultant who holds an Executive Master of Business Administration degree (**MBA**), with 15+ years of experience will not be able to obtain a skills assessment because VETASSESS requires an AQF equivalent bachelor's degree or higher,[50] and the MBA is not equivalent.

75. VETASSESS also requires farmers, such as aquaculture farmers, crop farmers, livestock farmers, to hold bachelor's degrees for a VETASSESS skills assessment.[51] As noted, the skills assessment is mandatory for the subclass 494 visa. A farmer with no qualifications will not be able to obtain a skills assessment and therefore cannot apply for a subclass 494 visa under the employer-sponsored stream.

GSM visas

Expiration of a skills assessment

76. As noted above, applicants for permanent GSM visas must have been assessed as suitable no more than three years before the time of invitation to apply for the visa.

77. The Law Council understands that the date of expiration of a skills assessment is not captured within the Skills Select program which the Department uses to manage the

[50] VETASSESS, '202111 Information Sheet - Management Consultant' (webpage, accessed on 4 Julye 2023) https://www.vetassess.com.au/Portals/0/Downloads/qualification_assessment/202111%20Information%20Sheet%20-%20Management%20Consultant.pdf?ver=2021-12-01-150400-453.

[51] See search results for 'farmer' at VETASSESS, 'Find Occupation for Migration Skills Assessment' (webpage, accessed on 4 July 2023) https://www.vetassess.com.au/skills-assessment-for-migration/professional-occupations/nominate-an-occupation.

EOI process. This can result in automatic invitations being issued to those who were not eligible. On 8 December 2022, the Department issued 35,000 invitations for over 180 occupations under the subclass 189 visa. The Law Council understands that many selected applicants who had received invitations were not able to take up the invitation to lodge an application, because their skills assessment had expired.

78. Under current case law, an applicant in these circumstances could potentially obtain a new skills assessment after the date the invitation is sent, provided the new assessment was obtained within a 60-day period to lodge the visa (given the invitation is valid for 60 days).[52] However, practitioners report that processing delays from a skills assessment authority can prevent a person in this situation from obtaining a new skills assessment within 60 days.

79. The Law Council queries whether it is reasonable for a person who has already been assessed as suitable by a skills assessment authority, and has continued to work in their occupation, to be precluded from applying for a permanent visa because of the time passed since the assessment. In its submission to this inquiry, the Law Council recommended that the Migration Regulations be amended so that a valid skills assessment provided at the time of an EOI is sufficient.[53]

Deeming dates

80. As noted in the Law Council's submission to this inquiry, a person invited to apply for a GSM visa will be required to accrue a number of 'points'.[54] Points are allocated under Schedule 6D to the Migration Regulations by reference to qualifications relating to age, English language, overseas employment experience, Australian employment experience, Australian professional year, education including Australian study and study in regional areas, community language, study in designated regional area and their partner.[55] Under Schedule 6D, an increasing number of points are allocated for employment in the applicant's nominated skilled occupation or closely related skilled occupation based on their years employed.[56]

81. Some skills assessment authorities impose a 'deemed' skilled date—a date on which the applicant is 'deemed' to be skilled in their nominated occupation based on closely related employment.[57] These skills assessment authorities deem a person 'eligible' to accrue employment points under the GSM program only based on employment undertaken after the 'deeming' date. That is, the authorities take the view that employment which resulted in the person becoming deemed 'skilled' does not count towards the accrual of points.

82. While these authorities cannot alter the content of the relevant parts of Schedule 6D, this approach can in effect reduce the available points to be claimed by an applicant, as the letter from the skills assessment authorities states a shorter period of 'skilled employment'. The experience of practitioners is that an applicant then conservatively,

[52] Thapa v Minister for Immigration [2021] FCCA 686.
[53] Law Council submission to this inquiry [135] and the recommendation box under [138].
[54] Ibid [123].
[55] Migration Regulations subregulation 2.26AC(3) and Parts 6D.1 to 6D.11 of Schedule 6D.
[56] Ibid Parts 6D.3 and 6D.4 of Schedule 6D.
[57] See, for example, ACS, 'Migration Skills Assessment Guidelines for Applicants April 2023' 15 https://www.acs.org.au/content/dam/acs/acs-skills/Skills%20Assessment%20Guidelines%20for%20Applicants-V8.0%20May%202023.pdf and VETASSESS 'SRG01 − Explanatory notes for Skills Assessment' (February 2018) 1 https://www.vetassess.com.au/portals/0/downloads/qualification_assessment/srg1%20explanatory%20notes.pdf?id=31082&id=31082.

undervalues their work experience so that they do not overclaim their points for fear of visa refusal.

83. This can impede the entry into Australia of skilled workers, because they are discouraged from claiming their correct points because they have based their experience on the 'deemed' skilled date that appears on their skills assessment.

Summary recommendations for reform

84. The Law Council acknowledges that there is still a role for skills assessments for certain visas. It also notes that many of the standards imposed by skills assessment authorities may be justifiable in many cases. However, the Law Council's view remains that these processes should align with visa criteria and a migration statutory framework and that the Department and Minister should have oversight of the standards they impose.

85. The Law Council reiterates its submission to this inquiry that the skills assessment framework should at least be reviewed and fundamentally reformed. As a general principle, given these assessments form part of the criteria for a visa, they should be the responsibility of Departmental delegates. To the extent that some independent assessment is required, it should be based on factors determined under law and subject to independent merits review.

86. Within the context of the current approach, the Law Council maintains its previous submissions that skills assessments should not be required for:[58]

- TSS visa applicants who have demonstrated a substantial number of years of work experience in their occupation; and
- ENS Direct Entry stream visa applicants in certain highly paid occupations.

87. In its submission to this inquiry, the Law Council also:

- expressed support for the Law Institute of Victoria proposal that the skills assessment requirement be removed for the subclass 494 visa and other regional visas;[59]
- submitted that skills assessments should not be required for holders of a PhD completed in Australia;[60] and
- advocated for a review of whether international graduates with an Australian qualification should require a skills assessment for an ENS application.[61]

[58] Law Council submission to this inquiry [157].
[59] Ibid [155].
[60] Ibid recommendation box under [158].
[61] Ibid [158].

Question on notice number: 03

Subject: Skills Assessment

Asked by: *Ms Maria Vamvakinou MP*

Question:

CHAIR: ...*Have comparable countries found a way forward on this [the skills assessment] issue, and what can we learn from them? What can you suggest to us that is legal and appropriate which we can pursue in medicine and elsewhere to try to make it easier for everybody? What is the impediment? Do we have an attitudinal problem to some countries as opposed to others in relation to confidence in the standard of their training and qualifications?*

Mrs Pereira: *The funny thing is that AQF standards have to be skills assessed. I don't understand why an Australian Quality Framework qualification has to have a skills assessment. The whole scenario needs to be looked at carefully.* ***We are happy to take that on notice and provide some suggestions****. With registrable occupations like doctors and nurses, the power vests in the registration body.*

CHAIR: *And trades.*

Mrs Pereira: *And trades, yes. That might be something for the registration bodies to think about. But with the other occupations, we can put some points forward to you on notice. In the legislation, Regulation 2.26B allows for the skills assessment bodies to set their own standards; that is wrong, and it has to be changed.*

…

Mr Spentzaris: *It is a very important question. It will be worthwhile for our committee to do a deeper dive, particularly looking at a comparative analysis of what other countries might be doing in this space, as you have raised.* ***We will come back to the committee with some recommendations around that area.***

Response

Overview of registration and licence requirements

88. In addition to the skills assessment requirement above, a visa applicant may be required to have obtained an Australian registration, licence or membership in the state or territory in which they are working.

89. The requirements imposed by those state and territory authorities are established separately to the migration statutory framework. Those bodies are usually different to the skills assessment authorities which are described above. As a result, some visa applicants are required to comply with two assessment processes—the skills assessment process and any relevant registration, licence or membership—in addition to any visa criteria. The Migration Regulations generally do not provide any dispensation or exception from a requirement to undertake a skills assessment if a person is also required to hold a registration, licence or membership.[62] The exceptions are that for some medical practitioners and for legal practitioners, registration with the Australian Health Practitioner Regulation Agency (**AHPRA**),

[62] Subject to the exception noted above at [53] which applies to some TSS visa applicants.

through the Medical Board of Australia, or admission to practice law is accepted for the purposes of a skills assessment requirement.[63]

90. The requirement in the Migration Regulations to hold an applicable Australian registration, licence or membership may be applied as a mandatory condition of a temporary TSS visa[64] and subclass 494 visa[65] which requires the visa holder to hold the relevant authorisation within 90 days of arriving in Australia (if offshore when the visa was granted) or within 90 days of grant (if onshore when the visa was granted).[66]

91. All applicants for the permanent ENS visa must hold any applicable Australian registration, licence or membership at the time of application.[67]

92. In contrast, it is not an obligation of most GSM visas to hold any potentially applicable Australian registration, licence or membership, subject to those medical and legal practitioner exceptions referred to above. However, some State Governments may require a person to hold registration before they are nominated under the subclass 190 visa.

93. The requirement in most circumstances to both hold any relevant registration, licence or membership *and* be assessed as having suitable skills through a skills assessment process can produce onerous results. For example:

- a nurse who wishes to obtain a skilled visa (either GSM or ENS) must:
  - obtain a skills assessment through Australian Nursing & Midwifery Accreditation Council Limited in order to be granted the visa; *and*
  - if assessed as suitable would then need to apply to AHPRA for registration to work in Australia; and
- a financial advisor who wishes to obtain a skilled visa (either GSM or ENS) must:
  - obtain a positive skills assessment from VETASSESS as a financial investment advisor in order to be granted the visa; *and*
  - could not lawfully work in Australia unless they have obtained the relevant license from the Australian Securities and Investments Commission (**ASIC**). To obtain a license from ASIC, they may be required to undergo a professional year of work and training and sit a professional exam. ASIC as the regulator, would not require the person to have a skills assessment through VETASSESS.

94. This issue was identified in the Migration Review Report, which endorses the following two recommendations originally made by the Productivity Commission:[68]

(1) Consider pursuing international mutual recognition of occupational licences from a broader range of countries. Automatic mutual recognition allows occupational licences obtained elsewhere to be recognised, without the need to formally apply for recognition. This drives efficiency and facilitates the flow of workers between jurisdictions.

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[63] See, for example, items 95-126 and 153-154 of the table in subsection 8(1) of Migration (LIN 19/051: Specification of Occupations and Assessing Authorities) Instrument 2019
[64] Migration Regulations clause 482.611 of Schedule 2.
[65] Ibid clause 494.612 of Schedule 2.
[66] Ibid subclause 8607(6) and 8608(6) of Schedule 8, respectively.
[67] Ibid clause 186.211 of Schedule 2.
[68] Migration Review Report 161.

(2) Consider driving greater synchronisation between skills assessments and licence/registration processes. Where skills assessments are maintained as part of the migration system, migration system settings should be better informed by occupational licensing requirements. This means aligning skills assessment criteria with occupational licensing criteria. It also means considering migration system settings where occupational licensing, for example, requires Australian work experience.

95. The Law Council's preliminary view is that these are sensible recommendations. Some preliminary ideas as to how these proposals may be achieved follows. These examples are provided on an indicative basis for the assistance of this inquiry, but would require further consultation before the Law Council could adopt them as recommendations:

- Expand the Skilled-Recognised Graduate visa (subclass 476) to include other overseas qualifications. The subclass 476 currently provides recent graduates (from certain overseas universities) an 18-month visa to travel to Australia. The visa is currently only available to graduates from an Engineering discipline[69] under 31 years of age.[70]
- Expand the Training (subclass 407) visa—which is designed to provide the holder with workplace-based training required to obtain the necessary registration, membership or license—to include non-corporate employer sponsors and non-sponsored applicants.

Comparable countries

96. The Law Council has attached a table at **Attachment A** which provides an overview of how skills are assessed in New Zealand, Canada, the United States of America (**USA**), the United Kingdom and Singapore. This table, prepared with the advice of practitioners in a multinational law firm, is provided to assist the Committee understand how comparable countries, which also attract high quality applicants for skilled visas, perform skills assessments.

97. The key take-away from that material is that no other country requires a skills assessment to be performed by a non-government agency. Specifically:

- New Zealand and Canada do not impose any independent skills assessment process;
- the USA does not impose any independent skills assessment process. In cases where skills are assessed for a visa type which requires a particular kind of knowledge or skills, non-government organisations may be asked to evaluate qualifications, which is effectively conveyed in a letter of advice to inform the visa decision;
- in the United Kingdom, skills assessments are performed by the prospective employer or sponsor; and
- in Singapore, skills assessment bodies are public authorities.

[69] Migration Regulations 1994 – Institutions and Disciplines for Subclass 476 (Skilled Recognised Graduate) Visas – IMMI 14/010.
[70] Migration Regulations paragraph 1228(3)(c) of Schedule 1.

Question on notice number: 04

Subject: ABF Powers

Asked by: *Hon Jason Wood MP*

Question:

Mr WOOD: *This may be a question on notice. You may have the issue of modern slavery or a labour hire company doing the wrong thing. The ABF, for example, look after modern slavery, but, when it comes to taking out a search warrant to seize evidence to prove a case to take people to court, they don't have that authority as an authorised officer. They rely on the Australian Federal Police to take out search warrants and even be present at those searches. I'm interested in your view on supporting the ABF to have these powers. If you need to take it on notice, do so. They'll also be presenting, we believe, before the committee.*

Mrs Pereira: *Thank you, Mr Wood.* ***We'd love to take that on notice. We'll look at the legislation and get back to you****, and we'll consult with the profession as well.*

Response

98. The Law Council reserves its position on this question at least until the Australian Border Force (**ABF**) provides evidence to the Committee. The Law Council would benefit from further information about the powers available to the ABF, both directly and in reliance on other agencies, and the ABF's views on the operational limitations of these powers and the consequences of not having certain powers.

99. The Law Council notes views provided to it for the purposes of this submission that a compelling case that existing investigatory powers are inadequate would be necessary. Also, that any such proposal should ensure that appropriate safeguards attached to the warrant or in the form of appropriate policy and training are in place, including to support any victim-survivors of modern slavery identified in the course of executing such a warrant.

100. The Law Council also intends to await the publication of the report by former Victorian Police Commissioner Christine Nixon into migrant worker exploitation,[71] which recent reporting in *The Age* suggests will make findings about whether these powers should be extended.[72]

[71] The Hon Clare O'Neil MP, Interview with Patricia Karvelas (transcript, 18 April 2023) Interview with Patricia Karvelas (homeaffairs.gov.au).
72 Nick McKenzie and Michael Bachelard, 'Grotesque abuses': Secret review of migration system scathing of failures (14 May 2023, The Age online), https://www.theage.com.au/politics/federal/grotesque-abuses-secret-review-of-migration-system-scathing-of-failures-20230419-p5d1ms.html.

Attachment A - International examples of how skills are assessed for migration purposes

Country	Temporary/ permanent migration program	Work experience - *What is the requirement?* - *Who assesses work experience?*	Licensing/registration - *What is the requirement?* - *What point in the process is registration required? (i.e. time of application?)*	Qualifications - *What is the requirement?* - *Who assesses qualification?*	Work Experience - *Can lack of qualification or qualification at the right level be substituted for a certain number of years of work experience?*	Independent skills assessment requirement - *Are the skills assessing authorities public or private?* - *What criteria do the skills assessment authorities use?* - *Are the assessment outcomes reviewable?*
New Zealand	Temporary	Applicants are generally required to demonstrate that they are suitably qualified by training or experience to do the job. An applicant will need to meet specific work experience requirements where they are applying for a visa which allows certain exemptions (such as labour market). Immigration New Zealand (government) assesses the work experience directly.	Per the New Zealand Immigration Operations Manual, certain occupations require licensing/registration. The Operations Manual also sets out the relevant industry body for the requisite licensing/registration. Licensing/registration should be obtained before the visa is lodged, however evidence of applying for registration is recommended where lodging a visa without evidence of registration.	The New Zealand Qualifications Authority is a government agency responsible for setting the standards for New Zealand qualifications and recognising overseas qualifications. It administers the New Zealand Qualifications Framework and assesses overseas qualifications against it. Per the Operations Manual, some qualifications are exempt from assessment.	Yes, where the job requirements do not require a qualification to do the role and this is listed on the Job Check advertisement.	No independent skills assessment requirement.
	Permanent	This is dependent on the visa type. For Straight to Residence visa applications, work experience requirements are listed for each eligible occupation. For Residence from Work pathway, two years of work experience on an AEWV in an eligible occupation or eligible salary is required. For Skilled Migrant Category, no work experience is required however points will be awarded for skilled work experience. Under the proposed new program, points can only be claimed for skilled work experience in New Zealand. Immigration New Zealand (government) assesses the work experience directly.	As above.	As above.	This depends on the type of visa. As an example, under Skilled Migrant Category instructions, for ANZSCO skill 1 occupations, 5 years' work experience may substitute in lieu of qualifications. However, for an occupation requiring registration separate requirements apply. For Straight to Residence visa – applicant must meet occupation specific requirements.	No independent skills assessment requirement
Canada	Temporary and Permanent	Varies depending on the visa category. In most cases, no work experience is necessary. When it is necessary, applicants refer to World Education Services (WES) or the relevant regulatory body (generally, the provincial licensing organization).	Per IRCC, depending on the visa types, certain occupations in regulated jobs, including trades, require licensing/registration.	Requirements vary depending on the visa category. The Canadian government considers the relevant regulatory body's official notice and decides applications accordingly.	Whether lack of qualification or qualification at the right level can be substituted for a certain number of years of work experience depends on the regulatory body and the province. The province gives the	No independent skills assessment requirement

		In other cases, Immigration, Refugees and Citizenship Canada (**IRCC**) (government) assesses the work experience directly.	Applicants generally contact the provincial licensing body – as applicable – or other group for an occupation to confirm the need for assessment. Depending on the province and visa category, licensing/registration may or may not be obtained before the candidate applies for the visa.	IRCC will use the regulatory body's information to assess the qualifications.	regulatory bodies the power to decide how they assess suitable experience. For example, for lawyers, this is not possible; for nurses – an occupation in demand - this is possible in some provinces.	
USA	Temporary	Varies based on visa classification. If specific work experience is required to qualify for a visa classification, any immigration agency charged with adjudicating eligibility for the classification will assess whether the work experience is qualifying. These immigration agencies may include U.S. Citizenship and Immigration Services (**USCIS**), U.S. Customs and Border Protection (**CBP**) or the Department of State, depending on which agency adjudicates the request. USCIS and CBP are sub-agencies of the U.S. Department of Homeland Security.	Varies based on the visa classification and profession. The point in the process by which the registration is required varies based on the visa classification and profession. For certain occupations in the TN classification, eligible to certain Canadian and Mexican professionals, licensure in the occupation is required to qualify for the visa classification (before the application is filed).	Varies based on visa classification. Any immigration (government) agency charged with determining eligibility for the visa classification assesses the qualification. Generally, these agencies are USCIS, CBP or the Department of State.	Varies based on visa classification. For H-1B visas, which require a bachelor's degree or the equivalent to qualify for the classification, 3 years of work experience can equate to one year of a bachelor's-level education. A foreign national lacking a bachelor's degree may be able to still qualify for the H-1B classification if they have 12 years of related work experience that is evaluated to be equivalent to a bachelor's degree in the specific H-1B specialty occupation.	No independent skills assessment requirement, but consultation letter may be required from a non-government organization. Skills are only assessed if the NIV (non-immigrant visa) category requires a specific set of knowledge or skills in the work category, such as for specialized knowledge in the L-1B. Ultimately the government reviews/decides but in a narrow set of both NIV and IV categories, outside (generally, non-government organizations) are asked to evaluate the applicant's qualifications; this letter is submitted as part of the application package to the government in requesting the status. Category O (Individuals with Extraordinary Ability or Achievement) and P (Athlete) petitions (temporary or NIV categories) require a "consultation letter" issued by a relevant organisation; USCIS cannot approved the application without it.
	Permanent	Varies based on the employment-based permanent residence pathway. For employment-based green card applications that require a labour market test, the employer offering the position determines the education and experience required for the position. The U.S. Department of Labor and USCIS (both government agencies) will determine if the foreign national meets the company's stated requirements.	Varies based on the profession, immigrant visa classification, and, for applications that require a labour market test, based on the employer requirements for the position. If a license is required to qualify for an immigrant visa classification, then applicants must obtain the license before the application filing.	Varies based on the employment-based permanent residence pathway. The U.S. Department of Labor and USCIS assess qualification.	Yes. For employment-based green card applications that require a labour market test, the minimum education and experience requirements and any alternative requirements that might be acceptable to the employer are defined by the employer itself. Alternate requirements must be substantially similar to the primary requirement under certain U.S. Department of Labor rules.	No independent skills assessment requirement, but a consultation letter from a non-government organization may be required. Ultimately the U.S. government reviews/decides the applicant's skills but in a narrow set of both NIV and IV categories, outside (generally, non-government organizations) are asked to evaluate the applicant's qualifications. This letter is submitted as part of the application package to the government,

United Kingdom	Temporary	N/A – there is **no** visas sub-class that is conditional on "work experience" *per se.* All routes are conditional on qualifications necessary to undertake a job in respect of which entry is sought. **For skilled worker visas generally**, the work in respect of which entry is sought must be must be an occupation that is (1) at an appropriate skill level and (2) recognised as eligible, demonstrated by it having a 'SOC code' that appears in published lists of acceptable occupations. A Home Office (UK government) approved sponsor – the prospective employer – selects the appropriate SOC code to demonstrate that it is satisfied of applicant's ability to meet the skill required for that job; it issues a job offer confirmed by way of a certificate of sponsorship. Application is submitted accompanied by COS and then assessed by UK Visas and Immigration (UKVI). For applications under the **Global Talent route**, the requirements include proof of "exceptional talent" or "exceptional promise" by way of 'endorsement' from a government- approved endorsing body.	Varies depending on the visa subclass. Where applicable, the applicant must demonstrate they are "working *towards* a recognised professional qualification [as required for a particular UK regulated profession in relation to which a job offer is relied upon].	The UK national Agency for international qualifications and skills (formerly UK NARIC) - operated and managed by Ecctis – is generally responsible for recognition and evaluation of international skills and qualifications where required for immigration purposes. 'Ecctis provides official UK national agency services on behalf of the UK Government in qualifications, skills, and migration'.	All visa routes are conditional on qualifications necessary to undertake a job in respect of which entry is sought. Skills assessment is performed by prospective employer/sponsor.	Skills assessment is performed by prospective employer/sponsor.
	Permanent	N/A – there is no visas sub-class that is conditional on "work experience"	Varies depending on the visa subclass. Where applicable, the applicant must demonstrate they are "working *towards* a recognised professional qualification [as required for a particular UK regulated profession in relation to which a job offer is relied upon].	The UK national Agency for international qualifications and skills (formerly UK NARIC) - operated and managed by Ecctis – is generally responsible for recognition and evaluation of international skills and qualifications where required for immigration purposes. 'Ecctis provides official UK national agency services on behalf of the UK Government in qualifications, skills, and migration'.	Skills assessment is performed by prospective employer/sponsor.	Skills assessment is performed by prospective employer/sponsor
Singapore	Temporary	Varies based on visa classification (Employment Pass (EP) or S Pass) – For the S Pass, the applicant's work experience must be suitable for the job for which the S Pass is submitted. For the EP, the applicant must have relevant work experience, specialized or managerial /executive level skills. The Ministry of Manpower (**MOM**) (government) assesses work experience.	Varies depending on application/role. Where professional licenses and registrations are required to practice (such as those required for foreign lawyers looking to practice in Singapore), the relevant organization issues the license.	Varies based on visa classification (EP or S Pass) – For the S Pass, the applicant's qualifications must be suitable for the job for which the S Pass is submitted (diploma or technical certification). For the EP, the applicant must hold a competent degree, professional qualifications, or	Yes. MOM assesses applications holistically so a lack in qualifications can be substituted by the applicant's salary and generally, the salary should be commensurate with the years of work experience. Qualifications/work experience requirement exemptions apply to	The skills assessing authorities are public - The MOM assesses skills. As part of the overall work pass application, MOM requires that the employer provide the applicant's educational qualifications (a copy of the certificate must be uploaded during the application process), previous occupation, the new occupation to be held in Singapore, the salary and the total years of work experience, and the years of relevant work experience.

			The work passes can be processed and approved without the applicant's license/registration, but only after obtaining the necessary licenses/registration can the successful applicant start working in Singapore (as applicable to their profession).	specialist skill; a tertiary degree is preferable. MOM assessment qualifications.	candidates who earn a minimum of $22,500/monthly, among other criteria.	When the points-based system for Employment Passes (Eps) takes effect in September 2023, all educational qualifications declared must be accompanied by a verification report from MOM's accredited background screening vendor for the applicant to earn points against it. The assessment outcomes are not released; rather the applicant's eligibility for the work pass is assessed holistically.
	Permanent	For the permanent residence program, a combination of length of accumulated stay in Singapore, age, educational qualifications, occupation, salary, work experience and kinship ties are considered as part of the application assessment process. The Immigration and Checkpoints Authority (**ICA**) assesses work experience.	Varies depending on the role and skills/professional certifications required (e.g., doctors, lawyers). These licenses/registrations should be available and submitted during the Permanent Residence application process.	For the permanent residence program, a combination of length of accumulated stay in Singapore, age, educational qualifications, occupation, salary, work experience and kinship ties are considered as part of the application assessment process. The MOM assesses qualifications.	Yes. Like the EP/S Pass, Permanent Residence applications are also assessed holistically: a lack in qualifications can be substituted by the applicant's years of relevant work experience.	The skills assessing authorities are public. The ICA assesses skills. Like the EP/S Pass, Permanent Residence applications are also assessed holistically: educational certificates and any applicable professional certificates or licenses/registrations must be submitted as part of the application process. The ICA will conduct their internal checks to verify them. The assessment outcomes are not released.