

Submission to the **Joint Standing Committee on Migration** inquiry **Migration, Pathway to Nation Building**

Dear Committee Members,

I make this submission in an individual capacity as an independent writer and researcher with a deep interest in migration matters. I am the author of *Not Quite Australian: How Temporary Migration is Changing the Nation* (Text publishing, 2016, <https://www.textpublishing.com.au/books/not-quite-australian>) and have written extensively about migration for various media outlets including *Inside Story*, *SBS*, *ABC*, and *The Age*.

My submission comes in two parts and addresses two separate topics listed in the inquiry's terms of reference:

4. Policy settings to strengthen skilled migrant pathways to permanent residency

5. Strengthening labour market participation and the economic and social contribution of migrants, including family and humanitarian migrants and the partners of working migrants

My submission might also be considered relevant to:

7. Other related matters that may assist the inquiry

I would be happy to provide further oral or written evidence to the committee or your staff at any time.

Thank you for taking the time to consider this submission.

Peter Mares
1 February 2023

***Part 1 Submission in relation to terms of reference point 4:
Policy settings to strengthen skilled migrant pathways to permanent residency***

In response to point 4 in the inquiry's terms of reference, I want to draw the committee's attention to a broad matter of principle — Australia's migration regime must be consistent with the principles of representative democracy, which are constitutive of Australia as a nation. As a consequence, pathways from temporary to permanent residence must be shaped by this democratic understanding.

The structure of this section of my submission is as follows:

- Introduction: temporary migration and democratic principles
- Who are "*the people of the Commonwealth*"?
- Pathways to permanent residence cannot just be *skilled* migrant pathways
- Conclusion and recommendations

Introduction: temporary migration and democratic principles

Over recent decades, Australia has shifted from the post-War model that generally assumed almost all migrants arrived as settlers and future citizens, to a hybrid model that involves a mix of temporary and permanent migration, with the potential of the former to be a stepping-stone to the latter (so-called two-step migration) if certain threshold conditions are met.

In a globalised world, this hybrid mix of temporary and permanent migration is likely to be characteristic of Australia's migration program for the foreseeable future. Point 4 in the Committee's terms of reference invites us to consider the threshold conditions under which temporary migrants should be allowed to transition to permanent settlement.

From a national interest perspective, answers to this question will generally be framed around the perceived usefulness or value of a migrant to the Australian economy, through such factors as the labour market demand for their skills and qualifications, their English language proficiency, their age, their health, and their prospective years of future productive employment (all things that are currently considered in applications for skilled migration).

I wish to look at the question from an alternative perspective that places emphasis on the rights accrued by temporary migrants over time and on the corresponding obligations owed to migrants by a democratic nation. When considered from this vantage point, the threshold question is not (or not only) under what conditions should we *allow* a temporary migrant to access a pathway to permanent residency, but at what point are we *required* to enable them to do so.

My submission does not attempt to provide a specific numerical answer to this question or to outline detailed policy settings to strengthen skilled migrant pathways to permanent residency. Rather, it argues that those policy settings must always be consistent with the fundamental

principles of representative democracy and fairness, which I take to be constitutive principles of the Australian nation.

These principles include, at a minimum, the right of all members of society:

- to have a say in the formation of laws by which they are governed
- to be involved in choosing the government
- to be politically represented
- to stand for public office
- to have an equal voice with other members of society
- to be treated equally with others in society

This final right of equal treatment, which goes to the principle of fairness, must be spelled out in more detail. It requires that all members of society should have equal access to the entitlements and supports provided by the state, including such things as:

- universal access to healthcare
- universal access to schooling
- access to government support payments and benefits when required
- equal access to services funded through taxation

It should be evident from the above, that these rights and entitlements are not generally available for temporary visa holders. That is, of course, perfectly normal, and acceptable, *but only up to a point*.

It would be unreasonable for a tourist to Australia to expect to vote in an election or access unemployment benefits and it is no infringement of democratic principles to deny them such rights and entitlements. We can make a similar argument in relation to a student who is in Australia for two years to complete a postgraduate qualification; they cannot expect to stand for public office or access free healthcare. The question, however, becomes more complex over time. What if a temporary migrant has been resident in Australia for an extended period – say more than eight years?

Who are “the people of the Commonwealth”?

Under the Australian Constitution, members of the House of Representatives are “directly chosen by *the people of the Commonwealth*”. My contention that “migrant pathways to permanent residency” must be consistent with core democratic principles thus requires us determine the point at which a migrant must be included in the category “the people of the Commonwealth”. Legally, this may be when they become a citizen; my argument, however, is not one of legality but of democratic principle. If significant numbers of long-term residents of Australia are denied inclusion in the category “*the people of the Commonwealth*”, (either

deliberately or inadvertently), that would constitute a manifest injustice and a betrayal of core democratic principles.

In a moral, if not legal, sense, democratic rights and entitlements cannot be seen as something only bestowed by government on those migrants who successfully jump through the hoops of language tests, health checks and skills assessments. Such basic rights and entitlements accrue to a migrant by dint of living and participating in the life of the nation over time.

I draw here on the writings of the North American political philosopher Joseph Carens, who argues that it is unacceptable for liberal democracies to admit people to their societies for an extended period without “putting them on a path to citizenship” and “granting them most of the rights that citizens enjoy”¹ His reasoning is more detailed and complex than I can do justice to in this submission, but can be condensed into a few core points:

- Time spent living in a state creates ties that lay down the foundation for a claim to membership: “Home is where one lives, and where one lives is the crucial variable for interests and for identity, both empirically and normatively”.²
- The longer a person lives in a given state, the stronger becomes their claim “to full membership in society and to the enjoyment of the same rights as citizens, including, eventually, citizenship itself”.³ In other words, the passage of time carries a moral force that cannot be ignored.⁴
- Democratic states are “obliged to respect the claims of belonging that arise from living in a political community on an ongoing basis”.⁵
- Both “the inner logic of democracy and a commitment to liberal principles require the full inclusion of the entire settled population...Therefore, to meet the requirements of democratic legitimacy, every adult who lives in a democratic political community on an ongoing basis should be a citizen, or, at the least, should have the right to become a citizen if she chooses to do so.”⁶

To summarize these ideas in my own words, anyone who lives in Australia for a significant time acquires democratic rights and entitlements. Though it is hard to say after what period the threshold is crossed, at some point the core principles of democracy require that they must be included as full and equal partners in the life of the Australian nation (i.e., counted in the category *people of the Commonwealth*) — and this means that they must be enabled to transition to permanent residency (and eventual citizenship) should they choose to do so. It is at least partly on this understanding, that Australia has generally rejected the European *guest worker* model of labour migration.

¹ Joseph H. Carens, ‘Live-in Domestic, Seasonal Workers, and Others Hard to Locate on the Map of Democracy’, *The Journal of Political Philosophy*, 16 (4):419-445 (2008)

² Joseph H. Carens, *The Ethics of Immigration*, Oxford University Press, 2013, p.31

³ Joseph Carens, ‘Live-in Domestic ...’

⁴ Joseph Carens, ‘Live-in Domestic ...’

⁵ Carens *Ethics of Immigration*, p.45

⁶ Carens *Ethics of Immigration* p.50

Pathways to permanent residence cannot just be *skilled* migrant pathways

The wording of point 4 of the Committee's terms of reference is problematically narrow in its scope, as it only refers to *skilled* migrant pathways. As should be evident from my submission, the moral argument that democratic rights accrue over time applies with equal force to all categories of temporary migrants, not just those on skilled visas. Obvious examples here include:

- New Zealanders, who are entitled to live in Australia indefinitely, without necessarily gaining the status of permanent resident,
- migrants who arrived as children and spend their formative years in Australia without necessarily becoming citizens in the process,
- refugees on temporary protection visas, and,
- temporary migrants who have moved across a succession of different visas over time (e.g., working holiday visa, student visa, post study work visas), without necessarily acquiring the "points" needed for permanent residency.

Another important consideration is the potential to create a cohort of migrants who are permanently excluded from the life of the nation because they are periodically "swapped out" for another similar group. I am thinking here of programs such as the PALM (Pacific Australia Labour Mobility) scheme, under which a group of migrant workers may be admitted to Australia to work in a particular sector for a fixed term, and then be replaced by another similar group of migrant workers for another fixed term when their visas expire. To provide a concrete example, the PALM scheme and its predecessors have been promoted as a way to fill labour market gaps in the aged care system in regional and remote Australia. We can imagine a situation in which a cohort of PALM migrants works in Australia's aged care system for three years without gaining the full rights and entitlements of permanent residency or citizenship. They then return home to be replaced by a different cohort of PALM workers for another three years, who also fail to acquire those rights, and so on. While no single worker has spent more than three years living and working in Australia (and so has not crossed the threshold of entry into the category of "the people of the Commonwealth", we have created a category of guest workers ("Pacific migrant aged care workers") who are, as a group, perpetually denied rights and entitlements that essential to representative democracy. Such an outcome would also offend democratic principles and notions of fairness.

The logical extension of this argument is that temporary migrants are filling ongoing gaps in the Australian labour market, then those temporary migrants should also be offered a pathway to permanent residence, rather than being periodically "swapped out" for a new cohort of temporary migrants

Conclusion and recommendations

I note the inclusion of the concept of nation building in the title of the Committee's inquiry. If we think of nation building purely in instrumental terms then this will lead to a focus on the

attributes of migrants that may be economically desirable such as labour market skills, English language proficiency, and age. While there is no doubt that these are all important considerations for Australia's migration program, we should be wary of a tendency to conceive of migration in purely contractual terms — a migrant brings their skills to Australia, and in return, we grant them the rights and entitlements of permanent residency. Migration is not a transaction but a process. The move to another country is a momentous life decision — it involves aspirations and dreams, hopes and fears, risks and rewards. Over time we are changed by the place in which we live — it becomes part of us, and we become part of it. We may arrive intending only to stay a short time, and then find ourselves putting down roots and becoming settled, even if our visa is marked temporary. In a democracy, nation building needs to respond to this migration experience and recognise that democratic rights are not just granted or acquired through birth but accrue over time by dint of living in a particular society.

I encourage the committee to include in its final report the following recommendations in relation to the development of pathways to permanent residency:

1. Pathways to permanent residency cannot be based solely on skills but must also consider a temporary migrant's connections to Australia and the democratic rights and entitlements that accrue to migrants over time.
2. It would breach the core principles of representative democracy and fairness — principles that sit at the core of the Australian nation — to create a situation where fundamental rights and entitlements are denied to long-term residents of Australia on temporary visas
3. It would breach the core principles of representative democracy and fairness to create a cohort of temporary migrants to whom fundamental rights and entitlements are denied as a group because they are periodically "swapped out" for a different cohort.

***Part 2 Submission in relation to terms of reference point 5:
Strengthening labour market participation and the economic and social contribution of migrants,
including family and humanitarian migrants and the partners of working migrants***

In response to point 5 in the inquiry's terms of reference, I want to draw the committee's attention to a specific issue — **the lack of a visa pathway for the foreign parents of Australian-citizen children to remain in Australia** — and to urge you to recommend the creation of such a visa pathway.

The structure of this section of my submission is as follows:

- A hypothetical example to illustrate the problem
- Links to real-life case studies
- Administrative and legal burdens on the immigration system
- Rights issues
- Recommendations and summary

A hypothetical example: Hari, Suzi and Issi

“Hari”, an international student, and “Suzi”, an Australian citizen, start a relationship. The couple have a child, “Issi” who is automatically a citizen by birth. The couple do not apply for a partner visa, because the cost is prohibitive (in excess of \$8000) and, anyway, Hari already has a valid visa, so they think the partner visa can wait for a later date. Subsequently, though, their relationship falls apart. Hari shares custody and care of Issi, perhaps by private arrangement or perhaps under a court ruling. When Hari completes his studies, though, he no longer has any right to remain in Australia. The fact that he is Issi's father does not create a clear visa pathway for him. Nor does a court ruling under family law granting Hari shared custody give rise to any immigration pathway or right to stay.

As a result, if Hari cannot find another pathway to PR (such as through skilled migration), he will be forced to leave Australia and be permanently separated from his daughter. What is more, Issi will be permanently separated from her father.

Real Life Case Studies

While the story of Hari, Suzi and Issi is hypothetical, I have come across many cases in which the foreign parents of Australian-citizen children face similar problems. They reveal a wide range of potential variations on the situation. For example, it may be a female international student who falls pregnant to an Australian father, and who has no right to stay if the relationship falls apart before a substantive application for a partner visa has been made. The mother then faces the choice of abandoning her child or ending her child's contact with the father (if she can do so, since it is unlawful for her to take the child to live in another country without the father's consent).

The problem is not restricted to international students but can arise for a variety of other temporary visa holders, as these real-life examples from my own reporting demonstrate:

1. "I don't want to be one of those absent fathers", Inside Story, 20 December 2019, <https://insidestory.org.au/i-dont-want-to-be-one-of-those-absent-fathers/>
2. "Young mother about to be deported with 4yo daughter in immigration maze", Sydney Morning Herald, 8 July 2016, <https://www.smh.com.au/national/young-mother-about-to-be-deported-with-4yo-daughter-in-immigration-maze-20160706-gpzlvj.html>
3. 2. "Foreign parents, Australian children", the Law Report, ABC Radio National, 7 July 2015 <https://www.abc.net.au/radionational/programs/lawreport/foreign-parents-australian-children/6597136>
4. "Australian children, foreign parents, and the right to stay", Inside Story, 2 March, 2015: <https://insidestory.org.au/australian-children-foreign-parents-and-the-right-to-stay/>

Since I first published a story on this problem, I have been approached by several other foreign parents in complex and distressing circumstances. Most were not able to speak publicly. Sometimes this was because public comment could jeopardise ongoing family law proceedings. In other cases, it was out of concern to protect the privacy of their child or former partner.

The number of people who inadvertently fall into this category is relatively small, but the personal distress created by this small number of cases is very large indeed. What is more, this small number of cases generates a considerable administrative burden on the visa processing and immigration appeals system as foreign parents seek ways to remain in the same country as their child.

A lack of visa options creates legal and administrative burdens

To return to the hypothetical case above, it would be theoretically possible for Issi to sponsor her father Hari to remain in Australia under a Contributory Parent Visa (subclass 143). However, the costs and charges associated with this visa add up to more than \$50,000, putting it out of reach in practice. In any case, this visa class is a poor fit as it was designed to enable adult migrants who have settled in Australia to sponsor their parents to join them here. Hari cannot apply in his own right. As a minor, Issi's mother Suzi would need to consent to Hari's sponsorship and sign the forms on Issi's behalf.

With a lack of legitimate visa pathways, the foreign parent faces the invidious choice of having to abandon their child by leaving Australia, or of seeking to take their child overseas, effectively ending the child's relationship with their Australian parent and other friends and family.

To avoid such a forced separation, the foreign parents of Australian-citizen children will usually seek convoluted ways to stay in Australia, such as making a manifestly unfounded application for a protection visa and pursuing futile appeals via the Administrative Appeals Tribunal. This is the only way of eventually bringing their case to the attention of the Minister for Immigration in the hope of being granted a visa under the Minister's public interest powers.

This process takes years. It not only constitutes a massive waste of time and resources in an already overstretched visa processing and immigration appeals system, but it creates high levels of stress and uncertainty, damaging the health and wellbeing of the foreign parent and their child, and quite possibly, also causing distress and anxiety to the Australian-born parent and extended family members (such as grandparents, aunts, uncles, cousins and sometimes, half-siblings).

The Rights of the Child

The fundamental rights at stake here are not just the rights of the temporary visa holder to have a close ongoing relationship with their child, but the right of the Australian-citizen child to have a close ongoing relationship with both their parents.

The lack of a visa pathway for the foreign parents of Australian children can put Australia in breach of its obligations under the Convention on the Rights of the Child, which states at Article 9.1 that:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Also at stake are the interests of the Australian parent to have the financial and practical support in raising their child. Under Australian family law, both parents have an obligation to contribute to the costs of a child's upbringing, even if they do not play a direct role in the care of that child. If a foreign parent is forced to leave Australia, then such legal and moral obligations are less likely to be met and are impossible to enforce.

Recommendations

I urge the committee to recommend the creation of a straightforward visa pathway for the foreign parents of Australian-citizen children. The advantages of such a visa pathway would be:

- Preserving the relationship between parent and child
- Upholding Australia's international obligations under the Convention on the Rights of the Child,
- Reducing the burden of such cases on the visa processing and immigration appeals system
- Reducing the number of appeals to the Minister to exercise discretion under public interest powers.
- Ensuring that the legal obligations of both parents to contribute to the financial costs of the child's upbringing are met

- Reducing the intense distress caused to children, parents and wider family members caught up in such situations

I appreciate that this specific matter is not central to the thrust of your inquiry and is quite narrow and specific in its scope. But for the people involved, the emotional, psychological and financial toll of such cases is very high. What is more, the rights of Australian children to have access to both their parents are at stake.

In relation to the Committee's terms of reference, it should be self-evident that a pathway to permanent residence for the foreign-parents of Australian-citizen children would *strengthen the labour market participation and the economic and social contribution* of migrants who find themselves caught up in situations like those I describe.