

9. Migration

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Summary

9.1 Australia’s skilled migration policy is designed to target migrants with skills for which there is a shortage in the Australian labour market. The skilled migration program is selective and discriminates between applicants on the basis of a range of criteria, including age, to determine which applicants are likely to make the greatest economic contribution. While such an approach does not necessarily sit easily with the position under Australian law—that discrimination on the basis of age is unlawful—for a number of reasons, the ALRC does not propose reforms in this area.

9.2 The focus of the Terms of Reference for this Inquiry is on Commonwealth legislation and related legal frameworks that impose limitations or barriers that could discourage mature age persons from participating in the workforce or other productive work. The failure by an applicant to obtain a skilled visa is not primarily a limitation or barrier to participation in the workforce, but rather is a barrier to entering or remaining in Australia for the purposes of work.

9.3 The ALRC is informed by stakeholder submissions emphasising that: there are policy reasons for retaining age as a criterion; there are a range of skilled visa options for potential migrants, only some of which contain age restrictions, and points tests and exemptions operate to the benefit of highly skilled applicants regardless of age; and the Australian Government’s priority should be on developing an Australian skilled labour supply.

Australia’s skilled migration framework

9.4 The Department of Immigration and Citizenship (DIAC) is responsible for the administration of the *Migration Act 1958* (Cth), the object of which is to ‘regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’.¹ The *Migration Act* empowers the Minister for Immigration and Citizenship to grant a non-citizen a visa to remain in Australia, either temporarily or permanently.² The *Migration*

1 *Migration Act 1958* (Cth) s 4.

2 *Ibid* s 29.

Regulations 1994 (Cth) address matters of detail within the framework established by the *Migration Act*.

9.5 Australia's skilled migration program plays a 'crucial role in assisting Australia to meet human capital needs',³ and one of the key policy goals is to 'maximise lifetime earnings—and therefore the maximum contribution to productivity growth and fiscal impact'.⁴ There are several key pathways by which a person can gain entry into Australia as a skilled migrant: the General Skilled Migration (GSM) program (for those who are not sponsored by an Australian employer); Employer-Nominated Categories (employer-sponsored visas);⁵ and the temporary skilled worker program (referred to as the '457 scheme').

General Skilled Migration

9.6 The current age limit for GSM visas is set at 50 years of age.⁶ The age limit 'reflects the level of benefit to the Australian work force and economy expected of persons entering Australia under this stream of the migration program'.⁷

9.7 In order to obtain a range of visas under the GSM category, applicants must obtain a pass mark in a 'points test'.⁸ The points test provides a 'transparent and objective method of selecting skilled migrants' based on a number of factors, including the applicant's age at the time of application.⁹ The points awarded for age reflect the applicant's 'potential contribution to the Australian economy in their lifetime'.¹⁰ The points that may be awarded for age for GSM visa applicants range from 0–30, with the fewest points for applicants aged 40–44 and no points for those aged 45–49.¹¹

9.8 In correspondence, DIAC emphasised that there are strong arguments for using the points test in order to target those potential migrants with the most 'human capital'.

3 R Cameron, 'Responding to Australia's Regional Skill Shortages Through Regional Skilled Migration' (2011) 14 (3) *Journal of Economic and Social Policy* Article 4, 12.

4 Department of Immigration and Citizenship, Correspondence, June 2012.

5 See Department of Immigration and Citizenship, *Professionals and other Skilled Migrants* <www.immi.gov.au/skilled/general-skilled-migration/visa-options.htm> at 10 April 2012. Some GSM visas require sponsorship by a relative or nomination by a state or territory government.

6 The requirement that a person be under 50 years of age is expressed as a criterion for making a valid application. See, eg, *Migration Regulations 1994* (Cth) sch 1 item 1135(3)(b) in relation to a Skilled (Independent) subclass 175 visa. For applications made prior to 1 July 2011, the age limit was 45 years.

7 Department of Immigration and Citizenship, *Procedures Advice Manual 3*, sch 6B General points test—Qualifications and points (General Skilled Migration visas).

8 See Department of Immigration and Citizenship, *What is the points test?* <www.immi.gov.au/skilled/general-skilled-migration/points-test.htm> at 10 April 2012. These include: Skilled (Migrant) (Class VE) Independent subclass 175; Skilled (Migrant) (Class VE) Sponsored subclass 176; Skilled (Provisional) (Class VC) Regional—Sponsored subclass 487; Skilled (Provisional) (Class VF) Regional—Sponsored subclass 475; Skilled (Residence) (Class VB) Independent subclass 885; Skilled (Residence) (Class VB) Sponsored subclass 886.

9 See *Migration Regulations 1994* (Cth) sch 6. Other factors include the applicant's English skills, employment in a skilled occupation in Australia or overseas, educational qualifications and nomination or sponsorship by a state/territory government.

10 Department of Immigration and Citizenship, *Procedures Advice Manual 3*, sch 6B General points test—Qualifications and points (General Skilled Migration visas).

11 *Migration Regulations 1994* (Cth) sch 6B which applies to GSM visa applications made after 1 July 2011.

In selecting migrants in order to achieve the policy goal of maximising lifetime earnings and therefore contribution, DIAC modelling indicates that the optimal points differential for age includes zero points for those aged 45–49 as there is ‘some risk that their lifetime earnings in Australia may not reach the base case’, that is of the ‘typical’ Australian male commencing work at age 20 whose earnings trajectory follows that of all males based on a median figure.¹² It then follows that the age limit of 50 reflects a concern about the higher risk that a migrant’s lifetime earnings in Australia may not reach the base case.

9.9 Both New Zealand and Canada have similar skilled migration programs. In New Zealand, the age limit is set at 55 years of age and points are available under the points test for those in the 40–44, 45–49 and 50–55 age ranges.¹³ In Canada, there is no upper age limit, however, zero points are awarded for those who are aged 54 years and over at the time of application.¹⁴ In the Issues Paper, the ALRC noted that in addition to imposing a barrier to mature age skilled migrants seeking to work in Australia, the age limits may also in turn affect Australia’s ability to compete with other countries for such skilled workers. It is important to note, however, that there are structural and contextual differences with respect to the migration policy of each of these countries. For example, Australia’s GSM program designates significantly more skilled migration occupations than Canada.¹⁵ The age criterion and other criteria for skilled migration may therefore reflect the need to impose some form of restriction in order to limit applicants for GSM visas.

Employer-sponsored visas

9.10 While most permanent employer-sponsored visas do not require an applicant to meet the points test, one criterion for applying for such visas is that the applicant is under 50 years of age.¹⁶ This age limit will apply unless the person is an ‘exempt person’ specified in the relevant legislative instrument.¹⁷ The current instrument specifies exempt persons to include ministers of religion,¹⁸ researchers, scientists and

12 Department of Immigration and Citizenship, Correspondence, June 2012.

13 These are 20, 10, and 5 points, respectively. See Immigration New Zealand, *Points and bonus points* <www.immigration.govt.nz/migrant/stream/work/skilledmigrant/caniapply/points/default.htm> at 10 April 2012.

14 See Citizenship and Immigration Canada, *Skilled Workers and Professionals—Selection factors Age* <www.cic.gc.ca/english/immigrate/skilled/factor-age.asp> at 10 April 2012.

15 There are approximately 190 skilled occupations on the Skilled Occupation List for Australia which applies to applicants for GSM visas on or after 1 July 2012: Department of Immigration and Citizenship, *IMMI 12/023 Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migration Visas, Schedule 1*. In Canada’s equivalent General Skilled Migration Program, there are only 29 ‘designated occupations’: Government of Canada, *Ministerial Instructions (MI 3): Federal Skilled Workers, Immigrant Investor Program, Entrepreneurs* <www.cic.gc.ca/english/department/mi/index.asp#mi3> at 11 September 2012.

16 See, eg, *Migration Regulations 1994* (Cth) sch 2, subclass 186–Employer Nomination Scheme, cl 186.221 (Temporary Residence Transition Scheme), cl 186.231 (Direct Entry Scheme).

17 Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*. The age exemptions apply in relation to the Temporary Transition and Direct Entry Scheme.

18 Ministers of religion who have applied for a visa under the *Migration Regulations 1994* (Cth) to occupy a position as nominated by a religious institution: Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*.

technical specialists;¹⁹ senior academics;²⁰ and holders of a 457 visa for at least four years immediately prior to applying whose annual earnings for each year in that period were at least the equivalent to the ‘Fair Work high income threshold’.²¹

9.11 In 2011, DIAC undertook a comprehensive review of the permanent employer-sponsored visa program. As a result of the review, the upper age limit was increased from 45 to 50 years of age,²² and revised exemptions were introduced in order to ‘provide more clarity and certainty to applicants, while ensuring that visa programs are still able to respond flexibly to unique cases’.²³

Other visa categories

9.12 The temporary 457 visa scheme is ‘the most commonly used program for employers to sponsor overseas workers to work in Australia on a temporary basis’,²⁴ subject to certain sponsorship and eligibility requirements. As at 31 March 2012, the total number of 457 visa workers in Australia had increased by 22% in the previous year.²⁵ There is no age limit on applications under the 457 scheme or a cap on the number of 457 visas issued.

Approach to reform

9.13 The focus of the Terms of Reference for this Inquiry is on Commonwealth legislation and related legal frameworks that impose limitations or barriers that could discourage mature age people from participating in the workforce or other productive work. The ALRC has formed the view that the failure by an applicant to obtain a skilled visa, whether as a result of being barred from making an application or being unsuccessful, is not primarily a limitation or barrier to their participation in the workforce, but rather is a barrier to entry to Australia for the purposes of work. In light of this, the ALRC considers that it would extend beyond the scope of this Inquiry to make proposals for reform in this area.

9.14 However, during the Inquiry to date, stakeholders have raised a number of issues of general concern discussed below.

19 At ANZSCO skill levels 1 or 2: Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*. The *Procedures Advice Manual 3* suggests that such specialist positions could include Chief of Division, Chief Research Scientist, Director of Institute, Post-doctoral Fellow and Principal Researcher: Department of Immigration and Citizenship, *Procedures Advice Manual 3*.

20 A senior academic is a person to be employed at an Academic Level of B, C, D or E as a University Lecturer (ANZSCO: 242111) or Faculty Head (ANZSCO: 134411): Department of Immigration and Citizenship, *IMMI 12/058 Classes of Persons (Exempt from the Age Criteria)*.

21 See *Ibid.* The Fair Work high income threshold is indexed annually. From 1 July 2012 it is \$123,000. See *Fair Work Regulations 2009* (Cth) reg 2.13; Fair Work Ombudsman, *Website* <www.fairwork.gov.au> at 6 September 2012.

22 Department of Immigration and Citizenship, *Reforms to the Permanent Employer-Sponsored Visa Program* <www.immi.gov.au/skilled/skilled-workers/_pdf/perm-sponsored-reforms.pdf> at 10 April 2012.

23 *Ibid.*

24 R Cameron, ‘Responding to Australia’s Regional Skill Shortages Through Regional Skilled Migration’ (2011) 14 (3) *Journal of Economic and Social Policy* Article 4, 19.

25 ACTU, *Submission 38*.

Should age limitations be increased or removed?

9.15 As a general matter a number of stakeholders supported either an increase in the age limitations for GSM and employer-sponsored visas to 55 years,²⁶ or their removal altogether.²⁷ Some stakeholders expressed the view that age restrictions are ‘lagging behind the eligibility criteria in many OECD countries’ and highlighted the economic advantages of mature age workers.²⁸

9.16 The Government of South Australia argued that, as age limits for qualification for the Age Pension increase, ‘so too should age limits under skilled migration programs increase to reflect current realities and expectations of the working age population’.²⁹

9.17 In addition, as the effects of ‘ageing populations and declining fertility rates’ are felt worldwide, it is likely that global competition for skilled migrants will intensify.³⁰ The Brotherhood of St Laurence submitted that age restrictions create

risks of losing the global competition for older workers, losing potential knowledge and skills. The existing age restrictions on migration should be reviewed with reference to international developments (eg in the OECD) and the overall contribution that older migrants could make to productivity.³¹

9.18 The ALRC acknowledges these concerns. However, if the policy goal of the skilled migration program is to maximise lifetime earnings and therefore contribution, on the basis of DIAC modelling it appears that the age limit of 50 may be appropriate in order to achieve that goal. It is also ‘difficult to argue that the barriers to entry based on age should be removed all together, given the valid public policy function that they serve’.³² Nonetheless, the ALRC suggests that, in light of the views expressed above, it may be appropriate for DIAC to consider the role of age as a criterion in the skilled migration program.

Age and the structure and operation of the skilled visa program

9.19 In addition to the overriding limitation set by the scope of the Inquiry concerning the making of proposals for reform in this area, and arguments around the policy function of age as a criterion in assessing visa applications, the ALRC considers that the structure and operation of skilled visas may mean that reform is unnecessary. For example, there is no age restriction on the increasingly used 457 visas and age

26 Government of South Australia, *Submission 30*. See also Australian Chamber of Commerce and Industry, *Submission 44*, which supported the increase but with other restrictions.

27 National Seniors Australia, *Submission 27*.

28 Brotherhood of St Laurence, *Submission 54*. See also National Seniors Australia, *Submission 27*.

29 Government of South Australia, *Submission 30*.

30 R Cameron, ‘Responding to Australia’s Regional Skill Shortages Through Regional Skilled Migration’ (2011) 14 (3) *Journal of Economic and Social Policy* Article 4,14.

31 Brotherhood of St Laurence, *Submission 54*.

32 Law Council of Australia, *Submission 46*. See also Universities Australia, *Supplementary Submission to the Department of Immigration and Citizenship on the Review of General Skilled Migration Points Test* (April 2010) in which Universities Australia recognised the value of the age point system for national benefit, but recommended its recalibration along the lines of reforms subsequently implemented.

restrictions under the GSM and employer-nominated visas are offset to a certain degree by the operation of the points test and the exemptions to the age restriction.

9.20 The age limit and the points test for GSM visas reflect the ‘level of benefit to the Australian workforce and economy expected of persons entering Australia’ under the GSM stream of the migration program.³³ The structure of the points test therefore makes provision for highly skilled and capable mature age workers, up to age 50, to meet the pass mark. As no points are awarded for age where the applicant is aged 45–49, applicants in that age bracket ‘will have to have outstanding results in other areas in order to meet the pass mark’.³⁴

9.21 The exemptions allow migrants in a range of professions, outlined above, to be exempted from age restrictions. This appears to strike an appropriate balance between valuing the skills and experience of mature age workers in line with the underlying objective of filling labour and skills shortages.

Australian labour supply and market

9.22 A number of stakeholders recognised the important role of migration in filling labour and skills shortages, but expressed the view that the Government’s priority ‘should be on training and assisting Australian workers, including older workers, to find employment before looking to fill the gaps through migration’.³⁵

9.23 Stakeholders such as Olderworkers highlighted the existing barriers facing Australian mature age workers in obtaining employment;³⁶ and the Australian Council of Trade Unions emphasised the need for ‘genuine labour market testing before employers can sponsor overseas workers’.³⁷

9.24 In addition, the Australian Industry Group stated that it ‘does not believe that raising age limits should be a priority’, and noted that:

without a significant increase in the overall intake (and more than proportional increases in immigration of younger people), raising the immigration age limits would detract from the benefits that immigration has in ameliorating the impacts of our ageing society.³⁸

33 Department of Immigration and Citizenship, *Procedures Advice Manual 3*, sch 6B General points test—Qualifications and points (General Skilled Migration visas).

34 *Ibid*, sch 6B General points test—Qualifications and points (General Skilled Migration visas).

35 ACTU, *Submission 38*. See also R Cameron, ‘Responding to Australia’s Regional Skill Shortages Through Regional Skilled Migration’ (2011) 14 (3) *Journal of Economic and Social Policy* Article 4, 15.

36 Olderworkers, *Submission 22*.

37 ACTU, *Submission 38*.

38 Australian Industry Group, *Submission 37*.