

SOUTH AFRICAN LAW REFORM ESSAY COMPETITION 2021

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DEGREE PROGRAMME:	BACHELOR OF LAWS (LLB)
YEAR LEVEL:	5 OF 5 (IN 2021)
TITLE OF ESSAY:	A CALL FOR REFORM ON THE SOUTH AFRICAN CRITICAL SKILLS WORK VISA
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A CALL FOR REFORM ON THE SOUTH AFRICAN CRITICAL SKILLS WORK VISA

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Prior to becoming a law student, I had the benefit of working as a Compliance Officer in the area of South African immigration law and thereafter as a Case Manager in the area of Australian Immigration law. In this time, I assisted clients with applications for the South African Critical Skills Work (CSW) visa and the Australian General Skilled Migration (GSM) Skilled Independent (subclass 189) visa – both relating to the immigration of skilled migrants. My experience has shown me that Australia has a more developed and effective process than South Africa. Moreover, I have seen how South Africa can benefit from adopting some of the approaches taken by Australia regarding skilled migration. It is from these experiences and further research that I write this essay.

I. INTRODUCTION

South Africa provides for the immigration of skilled foreign workers through *inter alia* the issuing of CSW visas to skilled foreigners.¹ The main objectives of the CSW visa are contained in the preamble of the Immigration Act² (hereinafter ‘the Act’) which reads:

... [T]he Immigration Act aims at setting in place a new system of immigration control which ensures that-

... economic growth is promoted through the employment of needed foreign labour, ... the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased ...;³ [and]

the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers.⁴

It is, however, contended in this paper that the requirements and application process for the CSW visa are deficient in achieving and the aforementioned objectives for the reasons below. First, the CSW visa process fails to provide a quota system to control the number of visas allocated for every ‘critical’ occupation. As a result, there is no limit on the number of CSW

¹ s 19(4) Immigration Act 13 of 2002.

² Immigration Act 13 of 2002.

³ Preamble (d) Immigration Act.

⁴ Preamble (i) Immigration Act.

visas that may be issued in respect of a particular profession. This potentially defeats the aforementioned objects in that there is no indication as to the specific skills shortage of the country and whether such shortage continues to exist. Secondly, the Act does not specify how often skills or qualifications should be reviewed. As a result, the skills and qualifications deemed to be critical for purposes of a CSW visa may become redundant if not reviewed often enough. Lastly, the requirements for a CSW visa do not consider factors such as age and official language ability. These factors are crucial to the contribution of skills as age speaks to how many years a CSW visa holder is likely to contribute until retirement age and language ability speaks to one's ability to understand instruction and impart knowledge. This paper aims to provide recommendations on ways to improve the existing skilled migration model in South Africa to be more effective in achieving the said objectives. This will be done through comparing the CSW visa with its predecessor, the Quota Work (QW) permit; and the Australian subclass 189 visa.

II. THE CONFLICT BETWEEN THE NEED FOR FOREIGN LABOUR AND SOUTH AFRICA'S UNEMPLOYMENT CRISIS

South Africa is currently faced with what has been described as an 'acute critical skills crisis'.⁵ This crisis has been on the increase since the 1970s.⁶ When a skills shortage is acute, 'it is likely to hamper the quality and quantity of [a country's] output'.⁷ It is contended by academic writers that the skills shortage in South Africa is as a result of various factors including a lack of investment in skills development;⁸ 'the apartheid system, where skills were profoundly racialised and gendered';⁹ and the immigration of skilled South Africans to other parts of the world.¹⁰ This has had and continues to have a major impact on South Africa, both socially and economically. In regard to the former, it contributes to high levels of unemployment, which ultimately affects the quality of work performance.¹¹ In so far as the latter is concerned, a skills

⁵ 2020/2021 Critical Skills Survey Report' available at <https://xpatweb.com/downloads/2020-2021-Xpatweb-Critical-Skills-Survey-Report.pdf> (accessed on 13 May 2021)

⁶ Bhorat H, Meyer JB and Mlatsheni C 'Skilled Labour Migration from Developing Countries: Study on South and Southern Africa' (2002) 52 *International Migration Papers* 23.

⁷ Richardson S *What is a skills shortage?* (2010) 8.

⁸ Ibid.

⁹ Letseka M 'Understanding skills development in South Africa' (2004) 11 *The Development Education Journal* 20.

¹⁰ Crush J 'Losing Our Minds: Skills Migration and the South African Brain Drain' (2000) 18 *The Southern African Migration Policy* 1.

¹¹ Wallis G 'The Effect of Skill Shortages on Unemployment and Real Wage Growth: A Simultaneous Equation Approach' (2002) 5.

shortage prevents South Africa from being competitive in the global market.¹² Therefore, there is a genuine need to alleviate the acute critical skills crisis that South Africa finds itself in. To accommodate for this, South Africa relies on the immigration of foreign skilled workers through *inter alia* the issuing of a CSW visas. The CSW visa was introduced to achieve the objective set out in the National Development Plan (NDP).¹³ The main objective of the NDP in so far as skilled migration is concerned is to relax the immigration requirements for skilled immigrants¹⁴ to promote a labour market that is more responsive to economic opportunity.¹⁵ However, while it true that the immigration of foreign labour may contribute positively toward the economy, it is also true that it poses a threat to the existing labour market. Despite the skills shortage in South Africa, South Africa's unemployment rate currently stands at 32.5%.¹⁶ This translates to an unemployment crisis. Thus, South Africa is faced with a two-fold dilemma. On the one hand, South Africa has a responsibility toward its unemployed citizens to alleviate unemployment. On the other hand, South Africa requires the skills for foreign nationals to accommodate for its skills shortage. It is averred in the paper that as it stands, the CSW visa process has the potential to adversely affect unemployed South Africans in that the process does not accommodate for the specific needs of the labour force due to a lack of control mechanisms. Therefore, it is necessary to reform the CSW visa process and requirements to ensure that the process is used to acquire the skills that South Africa genuinely needs.

III. AN OVERVIEW OF THE CRITICAL SKILLS WORK VISA APPLICATION PROCESS AND REQUIREMENTS

The CSW visa was introduced into South African immigration law when the Immigration Amendment Act, 2011¹⁷ came into effect on 26 May 2014. A CSW visa is issued in terms of section 19(4) of the Act which reads:

Subject to any prescribed requirements, a critical skills work visa may be issued by the Director General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the Gazette and to those members

¹² Rasool F and Botha C 'The nature, extent and effect of skills shortages on skills migration in South Africa' (2011) 9 1 *SA Journal of Human Resource Management* 11.

¹³ National Planning Commission *National Development Plan 2030 Our Future-make it work* (2012).

¹⁴ *Ibid* at 71.

¹⁵ *Ibid* at 40.

¹⁶ 'South African Employment Rate' available at <https://tradingeconomics.com/south-africa/employment-rate> (accessed on 16 May 2021).

¹⁷ Immigration Amendment Act 13 of 2011.

of his or her immediate family determined by the Director- General under the circumstances or as may be prescribed.¹⁸

The skills or qualifications determined to be critical for South Africa have been set out by the Minister of Home Affairs¹⁹ (hereinafter ‘the Minister’) in the *Government Gazette* in the form of a list of occupations, commonly referred to as the critical skills list.²⁰ The list was published on 3 June 2014 and is still currently in effect.²¹ In addition to the list of occupations deemed to be critical, the critical skills list provides for a list of Professional Accreditation Bodies and Councils.²² This coincides with the following requirements:

An application for a critical skills work visa shall be accompanied by proof that the applicant falls within the critical skills category in the form of –

- a) confirmation, in writing, from the professional body, council or board recognised by SAQA in terms of section 13(1) of the National Qualifications Framework Act, or any relevant government Department confirming the skills or qualifications of the applicant and appropriate post qualification experience;
- b) if required by law, proof of application for a certificate of registration with the professional body, council or board recognised by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act; and
- c) proof of evaluation of the foreign qualification by SAQA and translated by a sworn translator into one of the official languages of the Republic.²³

Additionally, the applicant must submit proof of employment.²⁴ If, however, the applicant has no proof of employment, he/she may submit such proof within 12 months after receiving the visa.²⁵ In such a case, a CSW visa will be granted for a period of 12 months.

(a) Summation of the CSW visa requirements and process

First, the applicant’s occupation must be on the critical skills list.²⁶ Secondly, if the applicant has foreign qualifications, such qualifications must be evaluated by SAQA (the South African Qualifications Authority) to determine the comparability of those qualifications with South

¹⁸ s 19(4) Immigration Act.

¹⁹ Former Minister of Home Affairs, Mr Malusi Gigaba.

²⁰ Critical skills list GN 588 GG 37716 of 3 June 2014.

²¹ Ibid at 12 – 25.

²² Ibid at 24 – 25.

²³ reg 18(5) Immigration Regulations in RGN 413 GG 37679 of 24 May 2014.

²⁴ reg 18(5)(c) Immigration Regulations.

²⁵ Critical skills list at 12 – 25.

²⁶ s 19(4) Immigration Act.

African qualifications registered on the NQF (National Qualifications Framework).²⁷ Thirdly, the applicant must apply to the relevant professional body, council or board recognised by SAQA or any relevant government department to confirm that the applicant has the necessary qualifications, skills and/or experience required for the critical occupation.²⁸ Lastly, if required by law, the applicant must register with a professional body, council or board recognised by SAQA.²⁹ Where the applicant submits an application with an offer of employment, the visa is valid ‘for a period not exceeding five years’.³⁰ Where no proof of employment is submitted, the applicant is granted a visa for a period of twelve months, giving the visa holder an opportunity to seek employment whilst residing in South Africa.³¹

IV. PROPOSAL FOR A QUOTA SYSTEM

A quota system in the context of skilled migration refers to a system whereby a certain number of visas are allocated to be issued in respect of a particular skilled occupation, usually on an annual basis.³² The Australian subclass 189 visa is currently subject to a quota system whereby ‘occupational ceilings’ are imposed on occupations and reviewed annually.³³ Furthermore, South Africa previously adopted a quota system in respect of the QW permit.³⁴ However, the QW permit was abolished and replaced by the CSW visa which is not subject to a quota system.³⁵ This section will provide a discussion on the approach previously taken by South Africa under the QW permit regime and the approach currently adopted by Australia in respect of the subclass 189 visa. Thereafter, a discussion will be provided on issues arising from the absence of a quota system and how the CSW visa process can be improved with the adoption of a quota system.

²⁷ reg 18(5)(c) Immigration Regulations.

²⁸ reg 18(5)(a) Immigration Regulations.

²⁹ For example, in terms of the Health Professions Act 56 of 1974, a health professional must register with the Health Professionals Council of South Africa (HPCSA) to practise as a within South Africa.

³⁰ reg 18(6) Immigration Regulations in RGN 413 GG 37679 of 24 May 2014.

³¹ Critical skills list at 12 – 25.

³² s 19(1) Immigration Act (section deleted by the Immigration Amendment Act 13 of 2011).

³³ ‘Skilled occupation list’ available at <https://immi.homeaffairs.gov.au/visas/working-in-australia/skill-occupation-list> (accessed on 13 May 2021).

³⁴ s26 of the Amendment Act substituted the words ‘permit’ and ‘permits’ with words ‘visa’ and ‘visas’, respectively. Thus, permit is used in respect of permits that existed prior to the amendment such as the Quota Work Permit and Exceptional Skills Permit.

³⁵ s 12(a) Immigration Amendment Act.

(a) The South African Quota Work Permit

The CSW visa emanates from a merger of the Exceptional Skills and QW permits, the latter being subject to a quota system.³⁶ In so far as the QW permit is concerned, the Amendment Act deleted section 19(1) of the Act which created the QW permit. Section 19(1) read:

A quota work permit may be issued by the *Department* as *prescribed* to a *foreigner* if the *foreigner* falls within a category determined by the *Minister* at least annually by notice in the *Gazette* after consultation with the *Ministers* of Labour and Trade and Industry and as long as the number of work permits so issued for such category does not exceed the quota determined in the notice.³⁷

The QW permit operated similar to the CSW visa in that eligibility was subject to a list of occupations determined by the Minister.³⁸ However, one of the distinct differences between section 19(1) of the Act relating to QW permits and section 19(4) of the Act (as amended) relating to CSW visas is the provision of a quota on occupations. In terms of section 19(1) of the Act, a specific number of QW permits had to be allocated to each occupation and once a quota for a particular occupation had been reached, the DHA would not issue applicants in that profession a QW permit unless a new quota had been established the following year. Accordingly, the Minister published the QW Permit list in the *Gazette*. However, the DHA struggled to achieve its skill quotas.³⁹ It is contended that this may have been part of the rationale behind abolishing the QW permit.⁴⁰

(b) Occupational Ceilings in Australia

The Australian General Skilled Migration (GSM) Skilled Independent (subclass 189) visa (hereinafter ‘subclass 189 visa’) operates similar to how the QW Permit operated in that eligibility is subject to a list (hereinafter the ‘skilled occupational list’) of occupations deemed to be in demand which are all subject to ‘occupational ceilings.’⁴¹ According to the Australian government, the purpose behind imposing occupational ceilings on skilled occupations is ‘to

³⁶ ‘Critical Skills Visa’ available at <http://www.dha.gov.za/index.php/immigration-services/scarce-skills-work-permits> (accessed on 10 May 2021).

³⁷ s 19(1) Immigration Act 13 of 2002 deleted by s 12(a) Immigration Amendment Act 13 of 2011.

³⁸ Ibid.

³⁹ Abacus Advisory *A review of the critical skills immigration policy* (2014) 24.

⁴⁰ Ibid.

⁴¹ The terms ‘occupational ceiling’ and ‘quota’ have the same meaning. The former is used in the context of Australian skilled migration whereas the latter is used in the context of South African skilled migration.

help regulate Australia's labour market according to its specific needs and to ensure that the skilled migration program is not dominated by a small number of occupations'.⁴²

(c) Issues relating to the absence of a quota on 'critical skills'

The absence of a quota on critical skills creates a loophole for the Department of Home Affairs to issue an unlimited number of CSW visas in respect of any occupation deemed to be critical, regardless of the specific needs of the South African labour market. The main issue in this regard is that the absence of a quota is likely to result in influxes of foreign national workers in certain professions, particularly, professions which require lower levels of skill and experience. This would likely negatively impact on the South African labour market as it would have the effect of creating competition in the labour market between skilled South Africans and CSW visa holders. This is grave concern, given the high unemployment rate in South Africa. Moreover, this approach appears to contradict the purposes set out in the Act's preamble in that the absence of a quota system has the potential to hamper economic growth rather than promote it. Furthermore, an influx of foreign workers in certain occupations would adversely impact on existing labour standards and the rights and expectations of South African workers as foreign labour would be utilised in the absence of a genuine need for foreign labour. It is therefore necessary for South Africa to adopt a quota system to avoid such influxes.

(d) Recommendation for a quota system

As can be seen above, there is a need for a quota system in the CSW visa process. This is largely due to the fact that without it, that there is no indication as to the specific skills shortage of the country and whether such shortage continues to exist. I therefore, propose legislative intervention to the effect that a quota system be imposed on the CSW visa. This will ensure that the specific needs of South Africa as to avoid influxes in certain occupations. This will mitigate the impact of foreign labour on the existing unemployment crisis in South Africa.

⁴² Occupation ceilings available at <https://immi.homeaffairs.gov.au/visas/working-in-australia/skillselect/occupation-ceilings> (accessed on 15 May 2021).

V. PROPOSAL FOR AN AMENDMENT REGARDING THE DETERMINATION OF CRITICAL SKILLS

The authority to determine critical skills is vested in the Minister.⁴³ Section 19(4) of the Act provides that such determination may occur ‘from time to time’.⁴⁴ By contrast, under the QW permit regime, section 19(1) required the Minister to determine skills ‘at least annually .. after consultation with the Ministers of Labour and Trade and Industry’.⁴⁵ As can be seen, there are two distinct differences between these provisions in so far as the determination of skills is concerned. The first, relating to how often skills must be determined and the second, relating to the parties involved in the determination of critical skills.⁴⁶ In comparing these provisions, section 19(4) appears to present certain problems. The first problem relates to the use of the words ‘from time to time’ and the second relates to the omission of parties to consult with. The discussion to follow will provide a comparison between sections 19(1) and 19(4) of the Act and a discussion on the approach currently adopted by Australia in regard to the determination of skills. Thereafter, a discussion will be provided on issues regarding the manner in which skills are determined and how the CSW visa process can be improved in regard to the determination of critical skills.

(a) A comparison between determination of skills under the QW permit regime and the CSW visa regime

In comparing the wording under section 19(1) of the Act relating to the QW permit and section 19(4) relating to the CSW visa, it is clear that section 19(1) of the Act imposed a duty on the Minister to review skills at least annually after consultation with the Ministers of Labour and Trade and Industry; whereas section 19(4) merely bestows on the Minister a right to determine skills. This is based on the use of the words ‘from time to time’.⁴⁷ As a result, the Minister is under no legal obligation to determine skills⁴⁸ and is given the discretion as to when critical skills should be determined. Thus, the skills and qualifications as contemplated in the critical skills list may have become redundant. The consequence of this is that CSW visas may have been and continue to be granted to foreign nationals with skills and/or qualifications that may no longer be ‘critical’. Accordingly, there may be skills and qualifications that are in fact

⁴³ s 19(4) Immigration Act 13 of 2002.

⁴⁴ Ibid.

⁴⁵ s 19(1) Immigration Act deleted by s 12(a) Immigration Amendment Act.

⁴⁶ Neither of these issues were discussed in parliamentary meetings regarding the Amendment Act.

⁴⁷ See *Commissioner, South African Revenue Service v Trend Finance (Pty) Limited and Another* 2007 (6) SA 117 (SCA) at para 27.

⁴⁸ Quinot G (ed), Bleazard J and Budlender S et al *Administrative Justice in South Africa: An Introduction* 271.

critical that are not deemed to be critical for purposes of a CSW visa due to the fact that the list has not been updated in over seven years. This is evident in the disparities between the existing critical skills list and the draft critical skills list⁴⁹ which is not yet in effect where many of the existing occupations have been removed and many additional occupations have been included.⁵⁰ Furthermore, the omission of parties to be consulted appears to be an arbitrary decision in that that issue of skills shortages relates directly to the Departments of Labour and Trade and Industry rather than the Department of Home Affairs. The effect of this omission is that the Ministers determination of critical skills is less likely to reflect to genuine needs of the country due to the fact that skills shortages fall outside the scope of his portfolio but relate directly to Labour and Trade Industry. The effect of this omission in section 19(4) thus potentially defeats the objects of the Act in that there is a risk that the skills determined by the Minister may not reflect the genuine needs of the country.

(b) The Australian approach to the determination of skills

To respond to changes in the Australian labour market, the skilled occupations list is reviewed annually by the National Skills Commission (NSC).⁵¹ The NSC was created by the National Skills Commissioner Act⁵² to *inter alia* assist the Australian Department of Home Affairs by providing expert advice on Australia's labour market and current, emerging and future workforce skills needs.⁵³ One of the main functions of the NSC is 'to publish an annual report about Australia's current, emerging and future workforce skills needs'.⁵⁴ The Australian Department of Home Affairs relies on this report to determine which occupations should be regarded as skilled for purposes of migration. More recently, the Department established the Priority Skilled Occupation List (PSOL) in response to the COVID 19 pandemic.⁵⁵ This list consists of occupations which are in critical demand due to the effects of the COVID 19 pandemic, primarily, health professionals.⁵⁶

⁴⁹ Draft critical skills list 2021 GN 96 GG 44164.

⁵⁰ Ibid.

⁵¹ 'Skilled occupation list' available at <https://immi.homeaffairs.gov.au/visas/working-in-australia/skill-occupation-list> (accessed on 13 May 2021).

⁵² National Skills Commissioner Act 76 of 2020.

⁵³ 'Skilled Migration Occupation Lists' available at <https://www.nationalskillscommission.gov.au/consultation/closed/skilled-migration-occupation-lists> (accessed on 17 May 2021)

⁵⁴ s 5(b) National Skills Commissioner Act 76 of 2020.

⁵⁵ Priority Migration Skilled Occupation list available at <https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/pmsol> (accessed on 31 January 2022).

⁵⁶ Ibid.

(c) Recommendation regarding the determination of critical skills

From this discussion, I propose that section 19(4) be amended according to the wording under section 19(1). This is necessary to ensure that the critical skills list is reviewed regularly and that all relevant parties are consulted in the determination of critical skills. In addition, I propose that a body akin to Australia's NSC be established to assist the Department of Home Affairs in determining critical skills on an annual basis. The effect of these changes will ensure that the critical skills list reflects the genuine skills shortage that the country is faced with.

VI. PROPOSAL FOR ADDITIONAL REQUIREMENTS

The issuing of an Australian subclass 189 visa is subject to certain requirements such as official language ability, age and experience.⁵⁷ However, the aforementioned requirements do not apply to the CSW visa. The following section will provide a discussion these factors and how introducing these factors could improve the CSW visa process to be more effective in alleviating the existing skills shortage without negatively impacting on the South African labour market.

(a) Official language ability

As it stands, official language ability is not a requirement or consideration when applying for a CSW visa. By comparison, the Australian government requires that an applicant must prove that s/he has 'competent English'.⁵⁸ According to the Australian Department of Home Affairs, competent English may be evidenced in one of two ways.⁵⁹ The first is where the applicant submits proof that s/he is a citizen of the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland.⁶⁰ The second which applies to applicants who are not citizens of the aforementioned countries is where an applicant has obtained one of the following English language test results:⁶¹

⁵⁷ Ibid.

⁵⁸ English Language – Competent English' available at <https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/english-language/competent-english> (accessed on 10 May 2021).

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

Test	Required score
International English Language Testing System (IELTS Academic or General Training) ⁶²	At least 6 for each of the four components ⁶³
Test of English as Foreign Language internet-based Test (TOEFL iBT) ⁶⁴	At least 12 for listening, 13 for reading, 21 for writing and 18 for speaking
Pearson Test of English Academic (PTE Academic) ⁶⁵	At least 50 for each of the four components
Occupational English Test (OET) ⁶⁶	At least B for each of the four components
Cambridge C1 Advanced Test ⁶⁷	At least 169 in each of the four components

Academic writers Birell, Hawthorne and Richardson drafted a report⁶⁸ for the Australian Department of Home Affairs⁶⁹ on the General Skilled Migration visas wherein the rationale behind official language ability as a requirement for skilled migration was explained.⁷⁰ In this report, it was explained that ‘competence in the language of the settlement country has a powerful impact of the labour market outcomes of immigrants’ to the extent that those with better English are more likely to use their qualifications in their job.⁷¹ Moreover, the report indicated toward studies which show that ‘the higher... an immigrant’s official language capability, the greater the employment and earnings opportunities’⁷² Hawthorne cautions that if a hiring employer is uncertain as to whether a prospective employee would understand what is happening around him/her then such hiring employer would be less likely to hire such employee, albeit for a draftsman position.⁷³ The same rationale is relevant in the context of

⁶² See <https://www.ielts.org/>.

⁶³ The four components are reading, writing, speaking and listening.

⁶⁴ See <https://www.ets.org/toefl/ibt/about>.

⁶⁵ See <https://www.pearsonpte.com/the-test>.

⁶⁶ See <https://www.occupationalenglishtest.org/>.

⁶⁷ See <https://www.cambridgeenglish.org/exams-andtests/advanced>.

⁶⁸ Department of Immigration and Multicultural Affairs *Evaluation of the General Skilled Migration Categories (2006)*.

⁶⁹ The Australian Department of Home Affairs was previously referred to as the Department of Immigration and Multicultural Affairs (DIMA).

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⁷¹ Department of Immigration and Multicultural Affairs (2006) 84.

⁷² Ibid

⁷³ Ibid at 103.

South Africa. As it stands, the CSW visa process does not consider whether an applicant can communicate in English or any of the other official languages of South Africa. As indicated in the Australian Department of Home Affairs' report, this has the potential to adversely affect the South African labour market and defeat the objects of the Act as a CSW visa holder who cannot communicate in any of the official languages is unlikely to contribute effectively to the South African labour market.⁷⁴

(i) Recommendation for official language ability as a requirement

I propose that Ministerial intervention to the effect that the Minister delegates his legislative authority to each of the relevant professional bodies and councils to determine the level of official language ability that is required in respect of each skilled occupation. For example, it is reasonably expected that the language requirement for an academic would be higher than a draftsman. This would ensure that the skilled worker has the language ability required to contribute effectively to the South African workforce. Furthermore, it would enable to CSW visa to assist in empowering South African workers through skills transfer.

(b) Age

As it stands, there is no age restriction imposed on CSW visa applicants as opposed to the subclass 189 which is limited to applicants between the ages of 18 and 45.⁷⁵ While it is true that an older applicant is more likely to contribute to the workforce through bringing experience, it is also true that the lack of an age restriction creates a loophole in the process to the extent persons within retirement age are eligible to apply for a CSW visa provided that such applicant can satisfy the relevant professional body or council that s/he has the required qualifications and experience to be regarded as skilled. This entirely defeats the purposes set out in the Act in that a person in retirement age or close to retirement is less likely to contribute to the South African workforce.⁷⁶

(i) Recommendations for age as a requirement

I propose that the Minister adopt the approach taken by Australia and amend the Immigration regulations to impose an age restriction so as to restrict persons in retirement age from applying

⁷⁴ Department of Immigration and Multicultural Affairs (2006) 103.

⁷⁵ 'Subclass 189 points tested stream eligibility' available at <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/skilled-independent-189/points-tested#Eligibility> (accessed on 31 January 2022).

⁷⁶ Gafner, C. and Yale-Loehr, S 'Attracting the best and the brightest: critique of the current u.s. immigration system' (2010) 38 1 *Fordham Urban Law Journal* 209.

for a CSW visa. This would ensure that the CSW visa process is not abused by persons in retirement. Furthermore, it is more likely to ensure that the CSW visa will contribute for a longer time period.

VII. CONCLUSION

In comparing the QW permit and subclass 189 visa against the CSW visa, it is manifestly evident that there is a serious need for law reform on the CSW visa. As it is, the CSW visa is more likely to negatively impact of the labour market than it is to achieve the objects set out in the preamble. The recommendations set out in this paper will, however, assist parliament and the Department of Home Affairs to balance the need for skilled labour against the unemployment crisis in South Africa. The adoption of the quota system will ensure that the issuing of CSW visas is limited to needed labour as contemplated in the preamble. Moreover, an amendment to section 19(4) in relation to the determination of skills will ensure that the critical skills list is relevant. Finally, the additional requirements of age and English language ability will ensure that the CSW visa is more likely to positively contribute to the South African economy.

Word count (including footnotes, titles, subheadings and quotes): 4932

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