



Australian
Human Rights
Commission

Lives on hold:
Refugees and asylum seekers
in the 'Legacy Caseload'

2019



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2019

Australian Human Rights Commission 2019



Contents

Commissioner's foreword	7
1 Executive summary	9
1.1 The Legacy Caseload	9
1.2 Australia's human rights obligations	9
1.3 Structure and scope of the report	10
1.4 Consultation process	10
1.5 Key findings	11
(a) Refugee status determination	11
(b) Bridging Visas	12
(c) Temporary protection	12
(d) Family separation	13
(e) Immigration detention	13
1.6 Conclusions	14
1.7 Recommendations	15
2 Refugee status determination	25
2.1 Background	25
2.2 Summary	26
2.3 Legal framework and application assistance	26
(a) The Legacy Caseload Act	26
(b) Criteria for refugee status	27
(c) 1 October 2017 deadline	28
(d) 'Fast track' merits review	28
(e) Exclusion from merits review	31
(f) Judicial review	32
(g) Government-funded application assistance	32
(h) Non-government application assistance	33
(i) Impacts of limited access to application assistance	34
(j) Human rights implications	35
2.4 Processing timeframes	39
(a) Delays in processing	39
(b) Impacts on mental health	39
(c) Impacts on refugee status determination outcomes	42
(d) Access to mental health support	42
(e) Human rights implications	43
2.5 Children and families	44
(a) Impacts on children and young people	44
(b) Impacts of parental mental illness on capacity to parent	45
(c) Impacts on family wellbeing	45
(d) Human rights implications	46
3 Bridging Visas	49
3.1 Background	49
3.2 Summary	50
3.3 Income support payment rates	50
(a) Overview	50
(b) Risk of financial hardship	50
(c) Support from non-government organisations and community groups	52
(d) Human rights implications	53
3.4 Eligibility for income support	54
(a) 'Finally determined' cohort	54
(b) Changes to SRSS eligibility	55
(c) Transferring money internationally	56
(d) Human rights implications	56
3.5 Access to services and entitlements	58
(a) Casework assistance	58
(b) Work rights and employment	58
(c) Health care	60
(d) Mainstream support services	61
(e) Human rights implications	61

4	Temporary protection	65
	4.1 Background	65
	4.2 Summary	66
	(a) 'Permanent temporary' status	66
	(b) Reassessment process	67
	(c) Pathways to permanency	68
	(d) Human rights implications	68
	4.4 Mental health	70
	(a) Impact of previous temporary protection arrangements	70
	(b) Human rights implications	72
	4.5 Settlement outcomes	72
	(a) Impact of temporary status	72
	(b) Support services and entitlements	73
	(c) Tertiary education	76
	(d) Limitations of regional settlement	77
	(e) Human rights implications	78
5	Family separation	81
	5.1 Background	81
	5.2 Summary	82
	5.3 Restrictions on family reunion opportunities	82
	(a) Eligibility criteria	82
	(b) Travel restrictions	84
	(c) Separation resulting from policy settings	85
	(d) Separated children	85
	(e) Human rights implications	86
	5.4 Impacts of family separation	90
	(a) Mental health	90
	(b) Settlement outcomes	90
	(c) Family wellbeing	91
	(d) Risk of constructive refoisement	92
	(e) Human rights implications	93
6	Immigration detention	95
	6.1 Background	95
	6.2 Summary	96
	6.3 Closed detention	96
	(a) Re-detention	96
	(b) Code of Behaviour	98
	(c) Human rights implications	99
	6.4 Community detention	101
	(a) Overview	101
	(b) Impacts of long-term community detention	101
	(c) Services for unaccompanied children	102
	(d) Human rights implications	103
7	Conclusions	105
	Appendices	106
	Appendix 1: Timeline of legal and policy developments affecting people in the Legacy Caseload	107
	Appendix 2: Summary of services provided under the Status Resolution Support Services Program	109
	Appendix 3: Key terms and acronyms	111



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Edward Santow

*Human Rights Commissioner
Australian Human Rights Commission*



Commissioner's foreword

Between 2009 and 2013, over 50,000 people arrived in Australia by boat to seek asylum. While unexceptional in the context of record global displacement, this represented an unprecedented increase in movement by sea towards Australia. Hundreds of people lost their lives on these perilous voyages.

In response, successive Labor and Coalition Australian Governments implemented a series of measures aimed at deterring people smuggling operations by preventing the arrival of asylum seekers by boat. These measures included third country processing and boat turnbacks.

Ultimately, the majority of asylum seekers who arrived during this period were permitted to remain in Australia in order to have their refugee claims assessed. While some had the opportunity to apply for substantive visas soon after their arrival, thousands more faced prolonged delays in the processing of their claims.

This latter group numbers approximately 30,000 people, and has come to be known as the 'Legacy Caseload'. This report examines the human rights implications of policies affecting these refugees and asylum seekers.

In addition to processing delays, people in the Legacy Caseload have faced a range of challenges during their time in Australia. While most have been released from closed detention, they have limited access to support services while living in the Australian community. If found to be refugees, they are not eligible for permanent residency in Australia. Due to restrictions on family reunion opportunities, they face the prospect of indefinite separation from their family members.

These challenges have led to financial hardship, deteriorating mental health and poorer settlement outcomes. In the words of one of the people interviewed by the Commission during the development of this report, people in the Legacy Caseload 'are living in the shadows'.

They also face a heightened risk of *refoulement* due to changes in Australia's processes for assessing refugee claims, including the removal of access to comprehensive merits review.

This report identifies a range of ongoing concerns faced by people in the Legacy Caseload. In particular:

- the lack of access to a fair and thorough process for determining their refugee claims
- uncertainty about their visa status and ongoing entitlement to protection for a prolonged period of time
- whether there is sufficient support for asylum seekers to maintain an adequate standard of living in the community
- the impact of restrictions on access to family reunion opportunities
- the ongoing risk of arbitrary detention.

Each of these concerns raises issues regarding Australia's compliance with its international human rights obligations.

The recommendations in this report can help guide Australia towards a policy approach that reflects not only our international human rights obligations, but also our hard-earned reputation as a successful multicultural nation and safe haven for people fleeing persecution.



Edward Santow
Human Rights Commissioner

July 2019

1 Executive summary

1.1 The Legacy Caseload

This report examines the human rights implications of policies affecting asylum seekers in the 'Legacy Caseload'.

The Legacy Caseload is a group of approximately 30,000 asylum seekers who arrived in Australia by boat prior to 1 January 2014 and were permitted to remain in Australia in order to lodge applications for substantive visas, but had not had their status resolved by this date.

People in the Legacy Caseload come from many countries of origin, including Afghanistan, Bangladesh, Burma (Myanmar), Iran, Iraq, Lebanon, Pakistan, Somalia, Sri Lanka, Sudan and Vietnam. A significant number are stateless.¹

Due to a number of changes to legal and policy settings since 2012,² asylum seekers in the Legacy Caseload are treated differently from other groups of asylum seekers. They have also faced lengthy delays in the processing of their visa applications.

Because the Legacy Caseload comprises a distinct group of asylum seekers, the Commission has conducted research and consultations to gain a better understanding of the practical issues and challenges faced by people in this group.

The project set out to examine the human rights implications of policies adopted by successive Australian Governments affecting asylum seekers in the Legacy Caseload. The report, which builds on previous research,³ aims to clarify Australia's human rights obligations in relation to people in the Legacy Caseload, and to identify policies and practices that may be inconsistent with these obligations.

1.2 Australia's human rights obligations

Australia has ratified seven of the core international human rights instruments.⁴ Several of these treaties contain obligations that are particularly relevant to refugees, people seeking asylum and people in immigration detention. These include:

- the *International Covenant on Civil and Political Rights* (ICCPR)
- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)
- the *Convention on the Rights of the Child* (CRC)
- the *Convention on the Rights of Persons with Disabilities* (CRPD)
- the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).

Australia also has a range of specific obligations towards refugees under the *Convention relating to the Status of Refugees* (the Refugee Convention).

This treaty applies to people who are refugees within the meaning of article 1 of the Convention—that is, people who are outside their country of origin and unable or unwilling to seek the protection of their country due to a well-founded fear of being persecuted on the basis of their race, religion, nationality, membership of a particular social group or political opinion.⁵

The term ‘asylum seeker’ is not used in the Refugee Convention. Consequently, the applicability of this treaty to people who are in the process of seeking asylum (and whose legal status is, by definition, undetermined) is not clear-cut.

As noted by the United Nations High Commissioner for Refugees (UNHCR), however, ‘a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition’—that is, from the moment they flee their country due to a well-founded fear of persecution—which would ‘necessarily occur prior to the time at which his refugee status is formally determined’.⁶

Australia’s obligations under the Refugee Convention are therefore relevant to the situation of people in the Legacy Caseload, given that a significant number may be, or have already been, determined to be refugees.

1.3 Structure and scope of the report

This report focuses on five key policy areas that affect the enjoyment of human rights by people in the Legacy Caseload:

1. the implications of the **refugee status determination** process for people in the Legacy Caseload
2. the situation of asylum seekers living in the community on **Bridging Visas**
3. the use of **temporary protection** arrangements for people in the Legacy Caseload who are found to be refugees

4. **family separation** resulting from restrictions on access to family reunion opportunities
5. the use of **immigration detention** for a small number of people in the Legacy Caseload.

Each section of the report focuses on a distinct policy area and includes detailed analysis of the human rights obligations relevant to that area. The report has been structured in this manner to reflect the current policy context and to allow each section of the report to stand alone.

Some human rights obligations are relevant to more than one policy area. For ease of reference, relevant obligations are briefly outlined in the introduction to each section and summarised in the graph at the end of this section.

The Commission notes that some of the issues addressed in this report are also relevant to other groups of asylum seekers living in Australia. This includes asylum seekers who arrived in Australia on valid visas and were subsequently granted Bridging Visas; and people subject to third country processing who have been transferred to Australia temporarily for medical treatment or other reasons.

The findings and recommendations outlined in this report may therefore have broader applicability to the situation of asylum seekers living in Australia generally, and are not necessarily confined to people in the Legacy Caseload.

1.4 Consultation process

The Commission conducted consultations on the Legacy Caseload between September and December 2017. The consultations consisted of one-to-one interviews and small group discussions, conducted both face-to-face and via telephone.

Focus questions for the consultations were guided by international human rights standards and the key themes identified in previous research on the Legacy Caseload group.

Participants in the consultation process included academics, community groups, health workers, legal practitioners, migration agents, non-government organisations involved in research and advocacy on refugee policy issues, refugee community leaders and support workers.

Participants were selected on the basis of their first-hand experience in working with people in the Legacy Caseload, either through directly providing services and support to this group of asylum seekers, or through conducting research involving people in the Legacy Caseload.

In total, approximately 130 people participated in the consultation process. To ensure that participants were able to provide frank and accurate feedback, the consultations were conducted on the understanding that the identities of participants would remain confidential.

The Commission did not consult directly with asylum seekers in the Legacy Caseload, due to concerns that the consultation process may adversely affect the mental health of people in this group (see [Section 2.4](#) of this report for further discussion of mental health concerns).

However, this report includes a number of case studies that provide examples of the impacts of particular policies on individuals in the Legacy Caseload. Most of the case studies were provided by consultation participants. Excepting cases that have already been reported publicly, names have been changed in order to protect privacy. Pseudonyms were either provided by consultation participants, or allocated by the Commission.

A draft of this report was shared with the Department of Home Affairs (the Department) in advance of its publication, to provide an opportunity for the Department to respond to the report's recommendations. This final report incorporates a small number of changes in response to the Department's comments. The Commission will make available the Department's full response on its website.

1.5 Key findings

(a) Refugee status determination

Since 2014, a number of significant changes have been made to Australia's refugee status determination process, many of which have significant implications for people in the Legacy Caseload.

The Commission considers that the current refugee status determination process for people in the Legacy Caseload—in particular, the 'fast track' merits review process—does not provide adequate safeguards against *refoulement*.

The introduction of additional criteria for refugee status, which do not reflect the Refugee Convention; the use of a limited merits review process; the lack of access to merits review in some circumstances; and the withdrawal of access to government-funded legal advice from most asylum seekers, all undermine the capacity of asylum seekers to present their refugee claims, as well as the capacity of decision-makers to undertake fully informed and accurate assessments of visa applications.

There is a significant risk that some people in the Legacy Caseload who are in need of protection will be denied refugee status and removed from Australia, contrary to Australia's *non-refoulement* obligations. A robust legal framework for refugee status determination is essential for Australia to comply with its international obligations.

The Commission considers that the 'fast track' merits review process and restrictions on access to government-funded legal advice—measures that apply only to some asylum seekers based on their mode of arrival—discriminate unjustifiably against certain asylum seekers, and may effectively operate as penalties for irregular entry.

The Commission also has serious concerns about the impact of prolonged delays in the processing of claims on the mental health of many asylum seekers in the Legacy Caseload; and the significant negative impacts of the refugee status determination process on the wellbeing of some families, women and children.

The Commission makes recommendations about changes to the legislative framework for refugee status determination; the handling of cases processed to date under the 'fast track' merits review process; providing access to government-funded application assistance; resource allocations for visa processing and mental health services; and measures to support children and families.

(b) Bridging Visas

Most people in the Legacy Caseload who have not been granted a substantive visa are living in the Australian community on Bridging Visas. Bridging Visas are short-term visas that are granted to people who are in the process of resolving their immigration status.

The level of income support available to asylum seekers living in the community on Bridging Visas is currently insufficient to ensure an adequate standard of living.

Previous research and feedback gathered by the Commission consistently indicate that many asylum seekers living in the community on Bridging Visas are unable to meet their basic needs, and in some cases face severe financial hardship. The Commission is also concerned by policies that may result in asylum seekers, including families with children, being left without any source of income.

The Commission considers that the reintroduction of work rights for Bridging Visa holders in the Legacy Caseload has helped to strengthen Australia's compliance with its international obligations. Notwithstanding this positive development, additional measures may be necessary to ensure that the rights of asylum seekers relating to employment and health care are adequately protected.

The Commission further considers that the casework model for asylum seekers on Bridging Visas provides limited scope for addressing their support needs. A more comprehensive casework model could assist in addressing these needs through supporting asylum seekers to navigate Australian services and systems, and to overcome barriers to participation in community life.

The Commission makes recommendations about income support payment rates for asylum seekers on Bridging Visas; changes to the eligibility criteria for income support; streamlining the process for renewing Bridging Visas; and reviewing the adequacy of casework assistance.

(c) Temporary protection

Refugees who arrive in Australia without valid visas are not eligible for permanent residency. They are instead granted temporary visas that are valid for between three and five years, after which time the visa holder must have their refugee claims reassessed. The vast majority of people affected by these temporary protection arrangements are asylum seekers in the Legacy Caseload.

The Commission considers that current temporary protection arrangements discriminate unjustifiably against certain asylum seekers based on their mode of arrival, and may effectively operate as penalties for irregular entry.

The Commission considers that temporary protection arrangements create a significant risk of serious and ongoing mental health issues among refugees in the Legacy Caseload. There is clear evidence that the ongoing uncertainty resulting from temporary protection arrangements contributes to negative mental health outcomes among refugees subject to these arrangements.

While refugees on temporary visas have access to a number of additional entitlements as compared to Bridging Visa holders, they have limited access to support services designed to assist refugees to settle in Australia, which may hamper the full enjoyment of rights relating to settlement outcomes.

The Commission makes recommendations about abolishing temporary protection arrangements; and amending current temporary protection arrangements to mitigate their negative impacts.

(d) Family separation

Family separation is a common consequence of forced displacement. For people in the Legacy Caseload, however, the challenges associated with family separation are magnified due to restrictions on family reunion opportunities.

The Commission acknowledges that, in most cases, the initial cause of family separation for people in the Legacy Caseload was the experience of forced displacement, rather than Australian policy settings. However, restrictions on family reunion opportunities will prolong family separation for this group in a manner that would not occur for other humanitarian entrants to Australia.

Many people in the Legacy Caseload lack access to any viable opportunity for family reunion, and consequently face the prospect of remaining separated from their families—including minor children—on an indefinite basis.

The Commission therefore considers that the restrictions on access to family reunion opportunities affecting people in the Legacy Caseload may interfere with Australia's obligations to afford the 'widest possible' protection and assistance to the family.

The blanket application of family reunion restrictions to all asylum seekers who arrived by boat at a particular point in time does not allow for adequate consideration of the best interests of children, or of whether the impacts of these measures are reasonable in the circumstances.

Restrictions on family reunion opportunities that lead to prolonged and indefinite family separation may also hamper the full enjoyment of rights relating to settlement outcomes, and create a potential risk of constructive *refoulement*.

The Commission makes recommendations about harmonising access to family reunion opportunities among humanitarian entrants; removing travel restrictions; and providing exemptions from family reunion restrictions for vulnerable children.

(e) Immigration detention

The vast majority of people in the Legacy Caseload are living in the Australian community, rather than in closed immigration detention facilities. The Commission welcomes the Australian Government's ongoing commitment to using alternatives to closed detention for people seeking asylum.

Where re-detention of people in the Legacy Caseload in closed detention facilities does occur, however, it may not be reasonable and necessary in all instances. This includes cases where closed detention results from a visa cancellation on the basis of a criminal charge, in circumstances where the person would not otherwise be subject to detention prior to conviction (such as where they have been granted bail); and where a risk of closed detention arises from breaches of the 'Code of Behaviour' for asylum seekers living in the community on Bridging Visas.

The Commission also notes concerns regarding the situation of people in long-term community detention; and the challenging transition process for unaccompanied children in community detention who reach the age of 18.

The Commission makes recommendations about amending the grounds for cancellation of a Bridging Visa; removing the requirement to sign a 'Code of Behaviour' as a condition of being granted a Bridging Visa; reviewing the implications of long-term community detention; and providing additional transition support to young people in community detention.

1.6 Conclusions

This project has identified some positive developments for people in the Legacy Caseload. These include the release of most asylum seekers and almost all children from closed immigration detention; the reintroduction of work rights for asylum seekers living in the community on Bridging Visas; and the recommencement of the refugee status determination process after long delays.

However, other policy measures significantly limit the human rights of people in the Legacy Caseload, including measures that have led to financial hardship, deteriorating mental health, a heightened risk of *refoulement* and poorer settlement outcomes. Some measures have also fallen short of Australia's obligations to protect families and the best interests of children.

The limitations on the enjoyment of human rights documented in this report have not been shown to be necessary, reasonable and proportionate in the circumstances of people in the Legacy Caseload.

The Commission does not underestimate the challenges that flight by sea poses for the Australian Government, or the risks that dangerous boat journeys pose to asylum seekers. However, policies that cause serious hardship for refugees and asylum seekers are unlikely to be reasonable and proportionate mechanisms for addressing these risks.

In any event, many policies that currently apply to people in the Legacy Caseload have not been demonstrated to be effective in achieving the aim of preventing people smuggling and loss of life at sea.

The Commission encourages the Australian Government to consider the recommendations in this report closely, to ensure that Australia's treatment of asylum seekers in the Legacy Caseload reflects our international human rights obligations.



1.7 Recommendations

Recommendation 1

The Australian Government should introduce legislation to repeal the amendments to the *Migration Act 1958* effected by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

Recommendation 2

The Australian Government should provide asylum seekers who have been subject to the fast track process and whose visa applications are considered 'finally determined' with an opportunity to apply to the Migrant and Refugee Division of the Administrative Appeals Tribunal for merits review of their visa applications.

Recommendation 3

The Australian Government should not involuntarily remove any asylum seeker who has been subject to the fast track process from Australia, until such time as Recommendations 1 and 2 have been implemented.

Recommendation 4

The Australian Government should reinstate access to the Immigration Advice and Application Assistance Scheme to all asylum seekers who are experiencing financial hardship.

Recommendation 5

The Department of Home Affairs should ensure government-funded interpreting services under the Translating and Interpreting Service (or an equivalent program) are available without charge to not-for-profit, non-government organisations providing assistance to asylum seekers.

Recommendation 6

The Department of Home Affairs should allocate additional resources to expedite the processing of visa applications lodged by asylum seekers in the Legacy Caseload.

Recommendation 7

The Department of Home Affairs should allocate additional resources to increase mental health services and support for asylum seekers in the Legacy Caseload, including suicide prevention training for Departmental staff and contracted service providers, and targeted services for children and young people.

Recommendation 8

The Department of Home Affairs should establish a dedicated support service for families and children in the Legacy Caseload.

Recommendation 9

The Department of Home Affairs should commission independent research on options for establishing clear divisions between the Department and other government agencies and public services that provide assistance to asylum seekers.

Recommendation 10

The Australian Government should align payment rates for income support under the Status Resolution Support Services program with the standard Centrelink payment rates.

Recommendation 11

The Department of Home Affairs should revise policies relating to eligibility for income support under the Status Resolution Support Services program, to ensure that asylum seekers facing financial hardship remain eligible for income support unless they have secured a verified alternative source of income that is sufficient to ensure an adequate standard of living.

Recommendation 12

The Australian Government should ensure that an asylum seeker remains eligible for the Status Resolution Support Services program while they have a substantive visa application under active consideration, including by the courts.

Recommendation 13

The Australian Government should ensure that asylum seekers whose visa applications are 'finally determined' and who are experiencing financial hardship are provided with sufficient support (including income support) to ensure an adequate standard of living, until such time as they are either granted a substantive visa or removed from Australia.

Recommendation 14

The Minister for Home Affairs should expedite the renewal of Bridging Visas for asylum seekers in the Legacy Caseload.

Recommendation 15

The Australian Government should introduce legislation to:

- a) repeal s 46A of the *Migration Act 1958*
- b) require Bridging Visas to be automatically renewed in cases where a person has an application for a substantive visa, and any applications for merits or judicial review on foot.

Recommendation 16

The Australian Government should include the Status Resolution Support Services Payment as a qualifying payment for a Health Care Card.

Recommendation 17

The Department of Home Affairs should review the casework model under the Status Resolution Support Services program to determine whether it adequately meets the support needs of asylum seekers living in the community on Bridging Visas.

Recommendation 18 [superseded]⁷

Recommendation 19

If Recommendation 1 is not implemented, the Australian Government should grant permanent Protection Visas to all Temporary Protection Visa and Safe Haven Enterprise Visa holders who are determined to be in ongoing need of protection when their current visas expire.

Recommendation 20

If Recommendation 1 is not implemented, the Australian Government should ensure that Temporary Protection Visa and Safe Haven Enterprise Visa holders have access to the same services and entitlements as permanent Protection Visa holders, including settlement services, tertiary education assistance schemes, and the full range of income support payments administered by the Department of Human Services.

Recommendation 21

If Recommendation 1 is not implemented, the Department of Home Affairs should extend the timeframe for exiting people from the SRSS program after the grant of a Temporary Protection Visa or Safe Haven Enterprise Visa, to allow adequate time for the provision of transition support.

Recommendation 22

The Department of Home Affairs should afford the same priority and apply the same eligibility criteria to all applications for family reunion lodged by humanitarian entrants, regardless of the type of humanitarian visa held by the applicant or their mode of arrival of Australia.

Recommendation 23

If Recommendation 1 is not implemented, the Australian Government should amend the *Migration Regulations 1994* so that condition 8570 (which restricts overseas travel) does not apply to Temporary Protection Visas and Safe Haven Enterprise Visas.

Recommendation 24

If Recommendation 1 is not implemented, the Australian Government should introduce legislation to permit holders of Temporary Protection Visas and Safe Haven Enterprise Visas to sponsor family members overseas for temporary residence in Australia.

Recommendation 25

If Recommendations 22 to 24 are not implemented, the Department of Home Affairs should introduce exemptions from restrictions on family reunion opportunities for humanitarian visa holders who arrived in Australia as unaccompanied children, or have a child living overseas who is not under the care of another parent.

Recommendation 26

Where members of the same family unit are subject to different policy settings due to having arrived in Australia on different dates, the Department of Home Affairs should implement strategies to harmonise their status, including through:

- a) transferring family members subject to third country processing to Australia
- b) granting all family members the same class of Australian visa, based on the visa of longest duration held by any member of the family unit.

Recommendation 27

The Australian Government should amend the *Migration Regulations 1994* in order to remove a criminal charge as a prescribed ground for cancellation of a Bridging Visa E under s 116(1)(g) of the *Migration Act 1958*.

Recommendation 28

Where a Bridging Visa has been cancelled under s 116 of the *Migration Act 1958* on the basis of criminal charges, withdrawal of these charges or a non-adverse judicial outcome should automatically trigger a review of the decision to cancel the visa by the Department of Home Affairs.

Recommendation 29

The Australian Government should remove the requirement to sign the Code of Behaviour as a condition for the grant of a Bridging Visa.

Recommendation 30

The Department of Home Affairs should commission an independent review of the situation of people in long-term community detention, to assess the extent to which the program can continue to promote positive health and wellbeing outcomes over time.

Recommendation 31

In cases where a young person receiving services under Band 2 of the Status Resolution Support Services program turns 18, the Department of Home Affairs should:

- a) automatically transition the young person onto Band 4 of the program, with an opportunity to transition onto Band 5 where ongoing intensive support is required
- b) extend the timeframes for transition of young people between the various bands of the SRSS program, to allow adequate time for provision of transition support.

Human rights obligations relevant to people in the Legacy Caseload

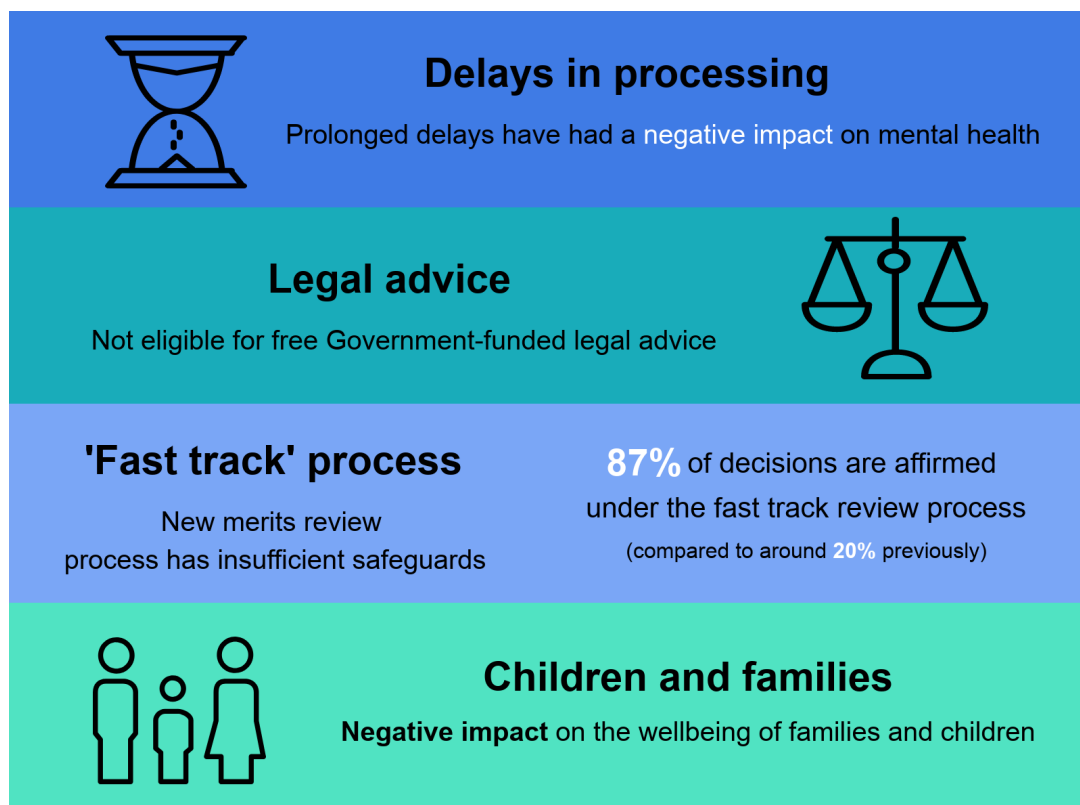
	Refugee status determination	Bridging Visas	Temporary protection	Family separation	Immigration detention
<i>Non-refoulement</i>	✓			✓	
Non-discrimination and non-penalisation	✓		✓	✓	
Health	✓	✓	✓	✓	✓
Work		✓	✓	✓	
Education			✓	✓	
Social security		✓			
Adequate standard of living		✓	✓	✓	
Protection and assistance for families	✓			✓	
Freedom from arbitrary interference with family				✓	
Prevention of gender-based violence	✓			✓	
Freedom from arbitrary detention					✓
Best interests of the child	✓			✓	✓

	Refugee status determination	Bridging Visas	Temporary protection	Family separation	Immigration detention
Maximum possible development of the child	✓				✓
Protection and care of the child				✓	
Child can know and be cared for by parents				✓	
Facilitation of family reunification for separated children				✓	
Protection of the child from violence, abuse and neglect	✓				
Protection and assistance for refugee and asylum seeker children	✓		✓		
Promotion of recovery for child victims of torture			✓		
Protection of people with disabilities in situations of risk			✓		
Facilitation of assimilation and naturalisation of refugees			✓	✓	



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2 Refugee status determination



2.1 Background

Refugee status determination is the process through which a person seeking asylum has their refugee claims assessed, to determine whether they are entitled to protection as a refugee. In Australia, refugee status determination occurs through the visa application process.

The vast majority of asylum seekers in the Legacy Caseload have now lodged applications for substantive visas. As at December 2018, there were 10,268 people in the Legacy Caseload who had submitted an application and were awaiting a decision at either the primary or merits review stage of the status determination process.⁸

A further 20,780 people had received a decision on their visa application.⁹ Of these, 14,603 people had been granted a substantive visa, and 6,177 had received a negative decision.¹⁰ It is unclear how many people in the latter category are pursuing judicial review of a negative decision.

Human rights obligations relevant to the refugee status determination process include:

- *non-refoulement*
- rights to non-discrimination and non-penalisation
- right to the highest attainable standard of health
- consideration of the best interests of the child; rights of the child to maximum possible development and protection from violence, abuse and neglect; and right of refugee and asylum seeker children to protection and assistance
- protection from gender-based violence
- right of families to protection and assistance.

2.2 Summary

Since 2014, a number of significant changes have been made to Australia's refugee status determination process, many of which have significant implications for people in the Legacy Caseload.

The Commission considers that the current refugee status determination process for people in the Legacy Caseload—in particular, the 'fast track' merits review process—does not provide adequate safeguards against *refoulement*.

The introduction of additional criteria for refugee status, which do not reflect the Refugee Convention; the use of a limited merits review process; the lack of access to merits review in some circumstances; and the withdrawal of access to government-funded legal advice from most asylum seekers, all undermine the capacity of asylum seekers to present their refugee claims, as well as the capacity of decision-makers to undertake fully informed and accurate assessments of visa applications.

There is a significant risk that some people in the Legacy Caseload who are in need of protection will be denied refugee status and removed from Australia, contrary to Australia's *non-refoulement* obligations. A robust legal framework for refugee status determination is essential for Australia to comply with its international obligations.

The Commission considers that the 'fast track' merits review process and restrictions on access to government-funded legal advice—measures that apply only to some asylum seekers based on their mode of arrival—discriminate unjustifiably against certain asylum seekers, and may effectively operate as penalties for irregular entry..

The Commission also has serious concerns about the impact of prolonged delays in the processing of claims on the mental health of many asylum seekers in the Legacy Caseload; and the significant negative impacts of the refugee status determination process on the wellbeing of some families, women and children.

The Commission makes recommendations about changes to the legislative framework for refugee status determination; the handling of cases processed to date under the 'fast track' merits review process; providing access to government-funded application assistance; resource allocations for visa processing and mental health services; and measures to support children and families.

2.3 Legal framework and application assistance

(a) The Legacy Caseload Act

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the Legacy Caseload Act), passed in December 2014, made numerous and wide-ranging changes to Australia's legislative framework for assessing refugee claims and providing protection, most of which had significant implications for people in the Legacy Caseload.

Among other changes, the Legacy Caseload Act:

- removed most express references to the Refugee Convention from the Migration Act and replaced them with a new statutory refugee status determination framework, reflecting the Australian Government's interpretation of its protection obligations¹¹
- introduced a limited, 'fast track' merits review process for asylum seekers who arrived by boat between 13 August 2012 and 1 January 2014¹²
- introduced an amendment stipulating that Australia's *non-refoulement* obligations are 'irrelevant' to removals carried out under s 198 of the Migration Act.¹³

Non-refoulement is a principle of international human rights and refugee law, stipulating that a person should not be returned to a country where they would be at risk of persecution or other forms of serious harm.

(b) Criteria for refugee status

The new statutory framework introduced by the Legacy Caseload Act does not specifically refer to the Refugee Convention. However, most of its criteria for the grant of refugee status are similar or identical to those enumerated in the Convention.¹⁴

The Legacy Caseload Act also introduced several additional criteria that are not reflected in the Refugee Convention. Specifically:

- In order to be deemed to have a 'well-founded fear of persecution', an asylum seeker must establish that they have a real chance of being persecuted in 'all areas' of their country of origin.¹⁵
- A person will be deemed not to have a well-founded fear of persecution if 'effective protection measures' are available in their country of origin from either the government of that country, or a non-state party or organisation (including an international organisation) that controls the country or a substantial part of the country.¹⁶

- A person will be deemed not to have a well-founded fear of persecution if they could take 'reasonable steps' to modify their behaviour so as to avoid persecution (with significant exceptions).¹⁷
- An asylum seeker will be deemed to be a member of a 'particular social group' (one of the five eligibility categories under the Refugee Convention) if they have, or are perceived to have, a characteristic that is shared by each member of that group, which is either: innate or immutable; so fundamental to a person's identity or conscience that they should not be forced to renounce it; or something that distinguishes the group from society.¹⁸

There is a risk that these amendments could narrow the grounds in the Refugee Convention, resulting in some people being denied refugee status even if they have a well-founded fear of persecution within the meaning of the Convention.

For example, the amendment requiring that a person's fear of persecution extend to all areas of their country suggests that asylum seekers would be required to relocate to other parts of their country of origin in order to avoid persecution—regardless of whether the person could reasonably relocate there in light of their individual circumstances.

In addition, the revised statutory definition of 'particular social group' could exclude people at risk of persecution due to factors such as their profession or social status (such as private entrepreneurs in a socialist country or wealthy landowners targeted by guerrilla groups). If these factors are not considered to be fundamental to a person's identity or significant enough to distinguish the group from society, some asylum seekers could be denied protection even if they are at risk of harm.

During the Commission's consultations, a number of participants reported that the removal of references to the Refugee Convention from the Migration Act did not appear to have significantly altered the assessment of refugee claims, as the legal tests for refugee status remained broadly similar.

However, some did report that certain criteria introduced by the Legacy Caseload Act, such as the internal relocation provision, had led to some applications being rejected when they may previously have been successful. One legal practitioner provided the following example:

In terms of the new definition and the application of that, we're certainly seeing that particularly in the Afghan caseload ... We were getting refusal after refusal after refusal for Afghans [on the basis] that they could relocate to Kabul, that they wouldn't be persecuted in Kabul. That's a really clear cohort and example of how the new definition let them down. Under the previous definition, they would likely have been granted protection.

(c) 1 October 2017 deadline

In May 2017, the Minister announced that all people in the Legacy Caseload, who had not yet lodged a visa application, must do so by 1 October 2017. Those who did not lodge an application by this deadline would be 'deemed to have forfeited any claim to protection' and be subject to removal from Australia.¹⁹

All but 71 people in the Legacy Caseload lodged a substantive visa application by the 1 October deadline.²⁰ Nonetheless, participants in the Commission's consultation process reported that the sudden imposition of the deadline had placed significant pressure on both asylum seekers themselves and non-government organisations providing free legal services to them.

A small number of participants also raised concerns about the possible impacts of the 1 October deadline on refugee status determination outcomes.

For example, it was argued that some asylum seekers may have rushed to complete their applications in order to meet the deadline, potentially compromising the quality and comprehensiveness of their applications.

It was also claimed that the imposition of the deadline had unfairly disadvantaged asylum seekers who had been unable to apply for a visa until relatively recently. Under s 46A of the Migration Act, people who arrived in Australia as 'unauthorised maritime arrivals' are barred from making a valid visa application, unless the Minister personally makes a determination that the bar does not apply to them (a process colloquially referred to as 'lifting the bar').²¹

People in the Legacy Caseload—all of whom arrived in Australia as 'unauthorised maritime arrivals'—were therefore unable to make a valid application for a substantive visa until such time as the Minister 'lifted the bar'.

Due to the 1 October deadline, those asylum seekers for whom the bar had been lifted relatively recently had less time to prepare their applications than those for whom the bar had been lifted some time ago. This issue was reported to have disproportionately affected families, due to the Department's processing priorities.

(d) 'Fast track' merits review

As a result of changes introduced by the Legacy Caseload Act, asylum seekers who arrived by boat between 13 August 2012 and 1 January 2014 (a group comprising most people in the Legacy Caseload) who receive a negative decision on their visa application at the primary stage of processing are subject to a 'fast track' merits review process.

Under this process, visa applicants are not permitted to apply to the Administrative Appeals Tribunal (AAT) for a review of the negative decision.²²

Instead, their applications will be referred to the Immigration Assessment Authority (IAA) for review²³ (unless the person is an ‘excluded fast track review applicant’—see [Section 2.3\(e\)](#) below). The IAA is an independent body established specifically for the purpose of reviewing the claims of asylum seekers subject to the fast track merits review process.

The fast track process differs in several important respects from the ordinary merits review process administered by the AAT. Under the AAT’s ordinary processes, the decision-maker reconsiders the facts, law and policy aspects of the original decision, and determines what is the correct and preferable decision based on all of the relevant facts. The AAT may take into account new information that was not before the original decision-maker; and typically conducts hearings during which evidence can be tested and additional evidence can be presented orally.

The IAA, by contrast, must generally review decisions by considering the material used by the primary decision-maker to reach their findings, without accepting or requesting new information, and without interviewing the visa applicant.²⁴ The IAA can only consider new information relevant to the visa application in exceptional circumstances.²⁵

Consequently, asylum seekers subject to the fast track process must generally provide all information relevant to their claims during the first stage of visa processing. This is likely to be very challenging for many people seeking asylum, who may have suffered significant trauma, lack understanding of Australian migration law and/or have limited English language or literacy skills.

Furthermore, it is not uncommon for asylum seekers to withhold certain information about their experiences of persecution initially, because those experiences were traumatic, or due to feelings of shame or fear. As noted by UNHCR:

A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case.²⁶

This trend is frequently observed in cases involving claims of persecution based on gender, sexual orientation, gender identity or variations in sex characteristics. For example, UNHCR’s procedural guidelines on gender-related persecution note that ‘particularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information’.²⁷

A legal practitioner who participated in the Commission’s consultation process similarly commented that ‘there’s always something that comes through late. Sometimes that’s stuff that is sensitive, like LGBTQA [lesbian, gay, bisexual, transgender, queer and asexual] issues, or sometimes it’s about taboo subjects like sexual violence.’

The fast track process may therefore have a particularly detrimental impact on women, girls and people fleeing persecution based on their sexual orientation, gender identity or variations in sex characteristics. This is further seen in relation to credibility assessments, due to the IAA’s standard practice of not conducting interviews with visa applicants.

Legal commentators have argued that an oral hearing is an essential component of the credibility assessment process, as it allows decision-makers to observe the applicant’s demeanour (including facial expressions and body language) and clarify inconsistencies. Consequently, the lack of an oral hearing ‘could result in reviewers making an incomplete credibility assessment’.²⁸

In circumstances where applicants have limited documentary evidence to support their claims—as is often the case for applicants claiming persecution based on their gender, sexual orientation, gender identity or variations in sex characteristics²⁹—decision-makers may rely primarily on an applicant’s oral testimony to assess credibility. Without the opportunity to provide testimony through an oral hearing, these applicants may be at a particular disadvantage.

No 'exceptional circumstances' to provide new information: Balan

Balan arrived by boat from Sri Lanka in 2013. He lodged a substantive visa application in 2017. Later that year, the Department notified Balan that his visa application had been refused. The application was referred to the IAA for review.

Balan submitted documents to the IAA with new information about his fears of persecution. This information related to his involvement in the Sri Lankan civil war and his experiences of physical abuse.

Balan explained that he had not initially disclosed this information due to fears that he may be detained or deported.

The IAA did not consider Balan's new claims, as the decision-maker was not satisfied that there were exceptional circumstances to justify considering the new information.

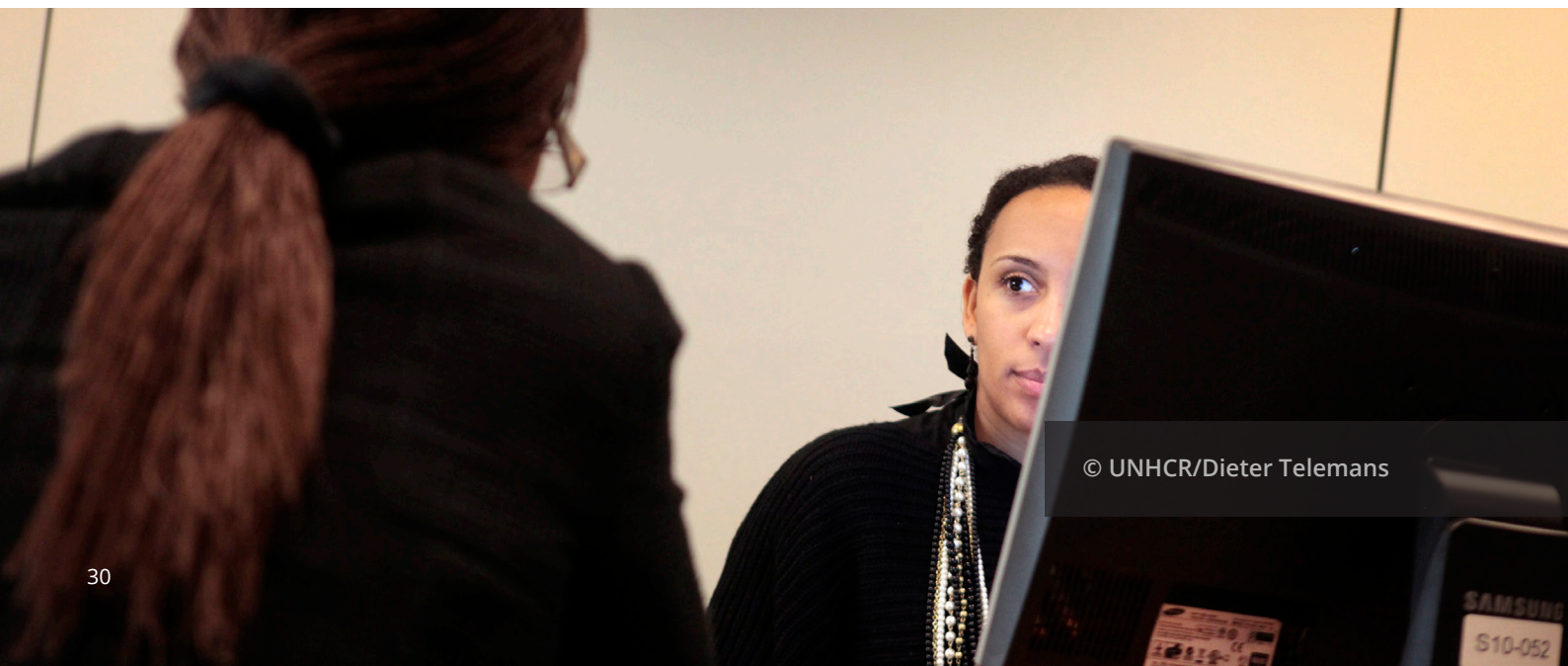
In 2018, the IAA affirmed the Department's decision to refuse Balan's visa application.

Available statistics suggest that the IAA affirms a higher proportion of primary decisions (that is, comes to the same finding as the primary decision-maker) than bodies previously tasked with conducting merits review for similar caseloads.

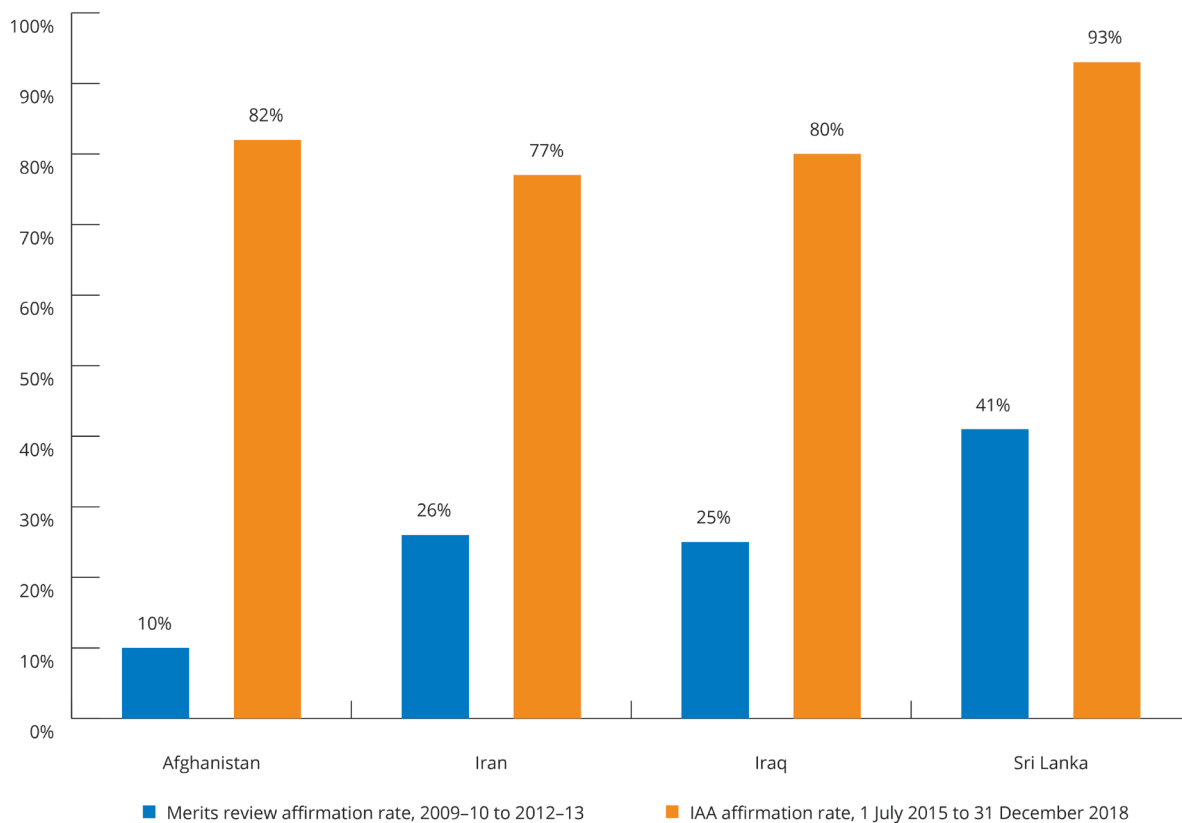
For example, between 2009–10 and 2012–13, merits reviewers affirmed primary decisions for around 20% of asylum seekers who arrived by boat.³⁰ Between 1 July 2015 and 31 December 2018, by contrast, the IAA affirmed 86% of primary decisions.³¹

Some of this disparity may be due to differences in demographics between the Legacy Caseload and previous groups of asylum seekers (such as differences in the proportion of claims lodged by people from particular countries of origin).

However, even when merits review affirmation rates for specific countries of origin are directly compared, the affirmation rate for decisions reviewed by the IAA remains considerably higher than that of its predecessors, as shown in the graph below.



Merits review affirmation rates for selected countries of origin, 2009–2018³²



The significant disparities in affirmation rates between the IAA and its predecessors may be the result of the limitations of the fast track review process, rather than the merits of the applications under review. One participant in the Commission’s consultation process argued that the fast track process is ‘almost designed to see a high rejection rate’.

(e) Exclusion from merits review

Under the fast track process, some asylum seekers are not eligible for any form of merits review. These applicants (referred to as ‘excluded fast track review applicants’) include people who, in the opinion of the Minister: have previously had their protection claims rejected in Australia, by another country or by UNHCR; have provided a ‘bogus document’ in support of their application without a reasonable

explanation; or make a ‘manifestly unfounded’ claim.³³

Feedback received by the Commission during the consultation process suggests that a relatively small number of people in the Legacy Caseload have been determined to be ‘excluded fast track review applicants’.

Nonetheless, the lack of access to any form of merits review for certain asylum seekers is of serious concern, as people in this category have no opportunity to correct errors of fact made by a primary decision-maker.

Consequently, ‘excluded fast track review applicants’ may be at heightened risk of being incorrectly denied a visa and returned to situations of danger or persecution, in breach of Australia’s *non-refoulement* obligations.

In its initial consideration of the Bill that became the Legacy Caseload Act, the Parliamentary Joint Committee on Human Rights concluded that the exclusion of certain applicants from merits review under the fast track process is 'incompatible with Australia's obligations of *non-refoulement*'.³⁴

(f) Judicial review

People who have received a negative decision on their substantive visa application at both the primary and merits review stage of the status determination process may apply for judicial review of the decision.

Judicial review performs a different function from merits review. Judicial review allows for correction of legal errors in the making of a decision, but (unlike merits review) does not consider whether the decision itself was correct or preferable.

A court can consider factors such as whether a decision-maker applied the wrong criteria in coming to their decision, failed to take relevant information into account, or was affected by bias. A court generally cannot, however, consider whether the decision-maker was correct in determining that a person is not a refugee.

It should also be noted that the scope of judicial review, in respect of decisions made under the Migration Act, is considerably narrower than judicial review of almost all other categories of administrative decision-making. It is certainly narrower than is provided under the Commonwealth's general judicial review statute, the *Administrative Decisions (Judicial Review) Act 1977*. Comparatively speaking, therefore, the courts have a diminished capacity to review and correct errors made by decision-makers exercising powers under the Migration Act.

Merits and judicial review each play different roles. Both are necessary to ensure that decision-making is robust, accurate and is consistent with the rule of law. Judicial review under the Migration Act cannot, on its own, address the limitations in the fast track merits review process identified above.

(g) Government-funded application assistance

Many people seeking asylum face significant challenges in navigating migration processes and lodging visa applications.³⁵ Access to legal advice and other application assistance can therefore play a critical role in ensuring that people who are in need of protection are able to understand the refugee status determination process and lodge applications that are complete, accurate and provide all relevant information.

UNHCR considers legal advice and representation to be 'an essential safeguard, especially in complex asylum procedures', and recommends that asylum seekers are provided with access to free legal assistance and representation.³⁶ UNHCR has argued that access to legal advice is particularly important 'for asylum seekers in the so-called "fast track" refugee status determination process which has inadequate procedural safeguards'.³⁷

The Immigration Advice and Application Assistance Scheme (IAAAS), funded by the Federal Government, provides access to free, independent migration advice and application assistance for people seeking asylum at the primary stage of visa processing.³⁸ As of 31 March 2014, people who arrived in Australia without a valid visa (whether by boat or by plane, and including those who arrived prior to this date) are no longer eligible for IAAAS.³⁹

Some people who are ineligible for IAAAS can access application assistance through the Primary Application and Information Service (PAIS). PAIS is available to a small percentage of asylum seekers who are assessed by the Department to be exceptionally vulnerable.

As at mid-2017, out of the total Legacy Caseload of around 30,000 people, only 3,224 had received PAIS assistance.⁴⁰ As with IAAAS, PAIS is available at the primary stage of decision-making only (with an exception for unaccompanied children).⁴¹

As a result of the reduction of IAAAS and the restrictive eligibility criteria for PAIS, most people in the Legacy Caseload are not eligible to receive free government-funded legal advice and assistance with their visa applications.

The Translating and Interpreting Service (TIS), provided by the Department, delivers a Free Interpreting Service (FIS) to not-for-profit, non-government organisations offering a range of casework and emergency services.⁴² The FIS is funded by the Department of Social Services.

This free service is only available to organisations assisting Australian citizens and permanent residents.⁴³ Organisations that work exclusively with asylum seekers are therefore ineligible for the free service.

Due to the lack of access to the FIS, non-government organisations providing legal advice to asylum seekers may either have to meet the considerable costs of professional interpreting services, or use volunteer and non-professional interpreters who may not provide accurate interpretation. As described by a legal practitioner who participated in the Commission's consultations:

You've got a very complex area of law with lots of different contingencies that you need to explain, and you've got no money to get interpreters to help you do that. You do rely on family members and then you do try and be really brief and direct when you do get interpreting because you just simply don't have access to that interpreting. All of that puts you under a lot more pressure.

Some participants also noted that written correspondence from the Department—often containing important information about a person's visa application—is provided in English only, rather than in the person's first language. If the person does not have access to translating services, they may be unable to understand the information sent to them.

(h) Non-government application assistance

A number of non-government organisations provide free, specialist legal services to asylum seekers lodging substantive visa applications. However, these organisations have limited capacity.

Participants in the Commission's consultation process reported that demand for free legal services provided by non-government organisations had increased markedly since eligibility for IAAAS was withdrawn from asylum seekers who arrived without valid visas. Participants further reported that free legal services remained insufficient to meet the needs of all people in the Legacy Caseload requiring assistance.

Reductions in access to government-funded legal advice may have a particularly significant impact on people living in parts of Australia where legal providers specialising in refugee cases are either very small in size or do not exist. One consultation participant, for example, reported that providers in the Northern Territory, Tasmania, Queensland and Western Australia 'had very limited capacity to assist people and significant waiting periods'.

Asylum seekers who are not eligible for government-funded legal advice may also face challenges in securing assistance from private and for-profit legal providers. As discussed in [Section 3](#) of this report, many asylum seekers living in the community on Bridging Visas subsist on very low incomes, and may therefore struggle to afford private legal or migration agent fees.

A support worker who participated in the Commission's consultation process stated that:

That has potentially created a lot of future financial hardship for people. We're talking \$3,500 for an application to be lodged. That is a lot for a person who is receiving [Status Resolution Support Services; see [Section 3.3](#)] considering that that's got to fund their other daily living expenses, accommodation, food, transportation, all of that sort of stuff. I think it's putting a significant amount of pressure on people to access those legal services and in doing so, it's creating much more hardship for them.

Several consultation participants raised specific concerns about limited access to legal representation for asylum seekers applying for judicial review. It was noted, for example, that community legal centres providing pro bono assistance with visa applications typically do not offer representation beyond the merits review stage, leaving applicants with few options other than to pay for representation (with costs potentially running into the thousands of dollars).

(i) Impacts of limited access to application assistance

As a consequence of the limitations and barriers outlined above, many people in the Legacy Caseload have had to navigate the refugee status determination without any professional advice or support. This may in turn have a significant negative impact on their capacity to engage in the refugee status determination process.

A number of participants in the Commission's consultations, for example, reported that some asylum seekers who had been unable to secure legal advice had lodged inaccurate or incomplete applications, and may consequently have their visa applications refused even if they have genuine protection needs. As described by one legal practitioner:

Those who weren't provided with PAIS have had an increase in mistakes in applications, which has meant that they have had incorrect or bad decisions made on preventable issues. The overall result is likely to be that genuine refugees are refused. If they had been given some form of legal advice, they probably wouldn't have had those decisions and they would have been accepted.

In addition, participants reported that some asylum seekers, being unable to secure professional legal or migration advice, had instead sought assistance from friends or other contacts in the Australian community. Participants expressed concern that these individuals—while they may be well-meaning—generally lack the requisite expertise to provide assistance with visa applications and may consequently offer inaccurate advice.

In the words of one legal practitioner, 'It's the blind leading the blind ... When you leave a vacuum of legal advice, it gets filled by something, and that something is generally incorrect information'. A support worker from an organisation that did not provide legal assistance reported:

In terms of people who aren't lawyers or migration agents offering migration advice, we have to be really careful and really clear about our role within that, and making sure that we don't cross that line. But when you've got somebody who is just completely lost, it becomes really challenging. I think we have had other advocates just wanting to help, and so stepping across that line, which creates all sorts of issues, particularly as these are people who are well-meaning but untrained or unqualified. Ultimately, that can have some serious ramifications for the applicant. But if it's a 60-page form, they're open to any help they can get.

A small number of participants reported that some people in the Legacy Caseload had been exploited by unscrupulous lawyers or migration agents, or had sought assistance from providers who lacked sufficient expertise to offer accurate advice to asylum seekers—and, consequently, had lodged visa applications that were inaccurate or otherwise risked being rejected for reasons unrelated to the merits of the applicants' refugee claims.

Future in doubt due to a careless migration agent: Arun and Parvati

Arun and Parvati enlisted a migration agent to assist them in preparing their visa applications. A few months later, Arun and Parvati provided copies of their applications to a support worker.

The support worker noticed that several paragraphs from Arun's application had been copied word-for-word into Parvati's application. After speaking with Arun and Parvati, the support worker realised that Parvati's application was consequently inaccurate. For example, Parvati's application claimed that she had been imprisoned, when in reality only Arun had been imprisoned.

Arun and Parvati explained that they had not been able to read their applications due to their limited English language skills, and their migration agent had not used an interpreter.

The support worker helped Arun and Parvati to make a complaint to the Migration Agent Registration Authority, which resulted in their migration agent being given a warning. However, the couple is concerned that the inaccuracies in Parvati's statement may result in her visa application being refused on credibility grounds.

(j) Human rights implications

Australia has an obligation under article 33(1) of the Refugee Convention not to return a person to another country if their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion (a principle known as ***non-refoulement***).⁴⁴

Australia also has *non-refoulement* obligations under articles 6 and 7 of the ICCPR, article 37(a) of the CRC and article 15(1) of the CRPD, which protect the right to life and prohibit Australia from subjecting anyone to cruel, inhuman or degrading treatment or punishment;⁴⁵ and under article 3(1) of the CAT, which prohibits Australia from returning a person to another country if they would be in danger of being subjected to torture.⁴⁶

The Commission considers that the refugee status determination process for people in the Legacy Caseload does not provide adequate safeguards against *refoulement*. The introduction of additional criteria for refugee status that are not reflected in the Refugee Convention; the imposition of the 1 October deadline; and the withdrawal of access to government-funded legal advice from most asylum seekers, have undermined the capacity of asylum seekers to present their refugee claims, as well as the capacity of decision-makers to assess those claims accurately.

The Commission has also previously raised concerns that the 'fast track' review process does not provide an adequate system of merits review.⁴⁷ The heavy reliance of the IAA on information used by the primary decision-maker; the inability of the applicant to present new information in support of their claims in most circumstances; and the default practice of making decisions without interviewing applicants, limit the capacity of the IAA to undertake fully informed assessments of visa applications.

As the Department has noted, the High Court has found that in reviewing decisions, the IAA engages in de novo merits review, notwithstanding the 'limited form' of the review.⁴⁸ The Commission considers that the limited merits review undertaken by the IAA does not ensure robust and fully-informed assessments, for the reasons discussed above.

Where applications for merits review are unsuccessful due to procedural factors (as opposed to factors related to the merits of asylum claims), the risk of *refoulement* for a proportion of asylum seekers is likely to increase.

In the concluding observations from its most recent periodic report of Australia in 2017, the UN Human Rights Committee expressed concern that the fast track assessment process 'removes key procedural safeguards at merits review, including a limited paper appeal process and restrictions on consideration of new evidence' and 'excludes certain categories of asylum seekers even from the limited form of merits review'. The Committee recommended that the Government consider repealing the Legacy Caseload Act.⁴⁹

UNHCR has similarly expressed concern that 'the fast track review process is inadequate and lacks appropriate safeguards and flexibility to ensure a fair and efficient protection assessment process to identify persons in need of international protection'.⁵⁰

In addition, as a result of amendments introduced by the Legacy Caseload Act, the Migration Act explicitly permits removals of unlawful non-citizens irrespective of Australia's *non-refoulement* obligations.⁵¹ The UN Human Rights Committee has recommended that these amendments be repealed and replaced with 'a legal obligation to ensure that the removal of an individual must always be consistent with [Australia's] *non-refoulement* obligations'.⁵²

There is a significant risk that some people in the Legacy Caseload who are in need of protection will be denied refugee status and removed from Australia, contrary to Australia's *non-refoulement* obligations. A robust legal framework for refugee status determination is essential for Australia to comply with its international obligations.

The Commission therefore recommends that the changes to the Migration Act effected by the Legacy Caseload Act should be repealed.⁵³

Recommendation 1

The Australian Government should introduce legislation to repeal the amendments to the *Migration Act 1958* effected by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

The Commission notes that the refugee status determination process for people in the Legacy Caseload has already been very prolonged (see [Section 2.4](#)), and is therefore reluctant to recommend measures that may result in further delays in processing.

Due to the issues identified above, however, the Commission considers that negative decisions made on applications under current arrangements—particularly under the fast track merits review process—cannot be reliably deemed compliant with Australia's *non-refoulement* obligations.

Until such time as a robust status determination procedure is reinstated, transitional arrangements will be needed to ensure that asylum seekers are not removed from Australia contrary to our *non-refoulement* obligations.

The Department has stated that under Australian Border Force policy, a person's circumstances are reviewed to assess if their removal is contrary to Australia's *non-refoulement* obligations. The Commission considers that a discretionary administrative arrangement is not an adequate substitute for a robust first instance and merits review process, with a foundation in statute and full rights to judicial review.

The Commission suggests that people whose applications have been processed under fast track arrangements and whose applications are currently considered to be 'finally determined' should be given the opportunity to have their visa applications reviewed by the AAT. The AAT offers a more appropriate form of merits review for decision-making in relation to protection visa applications.

In the interim, the Commission considers that no asylum seeker should be removed from Australia on the basis of having received a negative decision under the fast track process.

Recommendation 2

The Australian Government should provide asylum seekers who have been subject to the fast track process and whose visa applications are considered 'finally determined' with an opportunity to apply to the Migrant and Refugee Division of the Administrative Appeals Tribunal for merits review of their visa applications.

Recommendation 3

The Australian Government should not involuntarily remove any asylum seeker who has been subject to the fast track process from Australia, until such time as Recommendations 1 and 2 have been implemented.

The Commission notes the important role of legal advice and application assistance in ensuring that asylum seekers are able to present their claims, in turn providing an added safeguard against *refoulement*.

In its 2017 concluding observations on Australia, the UN Human Rights Committee expressed concern about policy changes resulting in 'narrower access to free government-funded legal assistance for most asylum seekers', and recommended that asylum seekers have access to legal representation where appropriate.⁵⁴ The Commission agrees with this recommendation.

Recommendation 4

The Australian Government should reinstate access to the Immigration Advice and Application Assistance Scheme to all asylum seekers who are experiencing financial hardship.

The Commission also suggests that organisations offering services to asylum seekers (including legal advice) should be able to access the free government-funded interpreting services, or provided with alternative support to ensure equivalent translation services are available to assist asylum seekers with their claims.

The Commission notes that the FIS, the current government-funded interpreting service is designed to assist Australian citizens and permanent residents, and is funded by DSS.

The Commission considers that there are potentially serious consequences flowing from inadequate access to interpreters, including possible *refoulement*.

Recommendation 5

The Department of Home Affairs should ensure government-funded interpreting services under the Translating and Interpreting Service (or an equivalent program) are available without charge to not-for-profit, non-government organisations providing assistance to asylum seekers.

Australia has obligations under article 2(1) of the ICCPR, article 2(2) of the ICESCR and article 2(1) of the CRC to ensure that **everyone can enjoy human rights without discrimination of any kind**; under article 26 of the ICCPR to uphold the **right to freedom from discrimination on any ground**; and under article 2(1) of the CRC to ensure that **children are protected against all forms of discrimination or punishment on the basis of the status and activities of their parents, guardians or family members**.⁵⁵

Australia also has an obligation under article 31(1) of the Refugee Convention **not to impose penalties on refugees who enter or are present in Australia without authorisation**.⁵⁶

The fast track merits review process and restrictions on access to government-funded legal advice apply only to certain asylum seekers, based on their mode of arrival in Australia. These measures therefore constitute a form of discrimination based on mode of arrival.

In order for this discrimination to be compatible with Australia's international human rights obligations, it must be in pursuit of a legitimate objective, be rationally connected to that objective and be a reasonable and proportionate means of achieving that objective.⁵⁷

The Statement of Compatibility with Human Rights accompanying the Legacy Caseload Act argued that the discriminatory application of the fast track process is necessary to prevent the pursuit of vexatious claims:

It is the Government's view that UMAs [unauthorised maritime arrivals] with unmeritorious claims are often encouraged by private contacts to pursue vexatious merits review to prolong their stay. The length of time a person remains in Australia is relevant to a people smuggler's message. As such, while these measures may be said to engage Articles 2(1) and 26 [of the ICCPR] by facilitating different review rights for certain fast track applicants, they are both reasonable and proportionate in achieving their aim.⁵⁸

Preventing unmeritorious visa applications may be a legitimate objective. However, discriminatory measures such as the fast track process do not appear to be sufficiently connected to this objective. The Commission is not aware of any evidence suggesting that people in the Legacy Caseload are more likely than other groups of asylum seekers (or, indeed, other groups of visa applicants) to make unmeritorious claims or lodge vexatious applications for merits review.

Historically, asylum seekers who arrived by boat have been significantly more likely to be recognised as refugees than asylum seekers who arrived with valid visas.⁵⁹ This trend has remained consistent for people in the Legacy Caseload.

The Department estimates that approximately 60–70% of people in the Legacy Caseload will likely be found to be owed protection and will be granted a substantive visa.⁶⁰ Of the 20,780 substantive visa applications lodged by people in the Legacy Caseload that have been finalised as at December 2018, more than 70% resulted in a visa grant.⁶¹

Not all of the remainder could be said to be unmeritorious.

In the Commission's view, the fact that a minority of people in the Legacy Caseload may lodge unmeritorious visa applications does not justify curtailing the opportunity to obtain legal advice and removing access to full merits review for this whole cohort on the basis that some merits review applications may be 'vexatious'. The Commission considers that these measures discriminate unjustifiably against certain asylum seekers based on their mode of arrival, and may therefore operate effectively as penalties for irregular entry.

The Commission reiterates its recommendations that the changes to the Migration Act effected by the Legacy Caseload Act should be repealed, and access to government-funded legal advice reinstated for all asylum seekers experiencing financial hardship.

2.4 Processing timeframes

(a) Delays in processing

As noted elsewhere in this report, a number of the challenges faced by people in the Legacy Caseload are shared with other groups of refugees and asylum seekers living in Australia. One factor, in particular, has made the circumstances of this group exceptional: the prolonged delays in processing their visa applications.

Processing of visa applications for people in the Legacy Caseload was 'paused' for a considerable period of time following the reintroduction of third country processing in 2012.⁶² Processing was further delayed after the Federal election in 2013, pending the implementation of a range of policy and legislative changes such as the reintroduction of temporary protection arrangements⁶³ (ultimately achieved through the passing of the Legacy Caseload Act).

Processing recommenced in May 2015⁶⁴ and is now well underway. However, around a third of the people in the Legacy Caseload are still waiting for their applications to be finalised.⁶⁵ The Department estimates that primary assessments for people in the Legacy Caseload will be completed by December 2021.⁶⁶

The Legacy Caseload comprises asylum seekers who arrived in Australia by boat prior to 1 January 2014, and had not had their status resolved by that date. All people in the Legacy Caseload have therefore been residing in Australia for at least five years, and in some cases for substantially longer.

During the Commission's consultation process, many participants expressed serious concerns about the prolonged delays in the commencement of processing, noting that they had left many asylum seekers living in a state of 'limbo' for several years.

Once underway, the refugee status determination process itself can also be significantly prolonged. During 2017–18, the average length of visa processing at the primary stage for people in the Legacy Caseload was 384 days.⁶⁷ Some participants in the Commission's consultations provided examples of cases where asylum seekers had waited for more than a year for an interview with the Department after lodging their visa applications.

(b) Impacts on mental health

Many people from refugee backgrounds experience mental health issues resulting from pre-arrival trauma and post-arrival stressors, including those resulting from the asylum process itself.

In 2012, for example, researchers described a clinical syndrome seen amongst asylum seekers living in the community. Termed 'protracted asylum seeker syndrome', this condition stems from the stressors associated with prolonged waiting times for the finalisation of refugee status determination.⁶⁸

These findings are pertinent to the situation of people in the Legacy Caseload, given the prolonged delays in the processing of their claims. Available evidence suggests that the mental health impacts of these prolonged delays have been particularly acute for many people in the Legacy Caseload, even in comparison to other groups of refugees and asylum seekers.

As part of the Commission's consultation process, participants were asked to describe the current situation of people in the Legacy Caseload in a few words. The most common answers provided by participants were 'anxious' and 'uncertain'. Other replies included 'confused', 'desperate', 'afraid', 'frustrated' and 'despair'. None of the answers provided by participants had positive connotations.

Since the beginning of 2014, at least nine people in the Legacy Caseload have committed suicide while living in the Australian community.⁶⁹ Researchers studying this phenomenon have described the situation of people in the Legacy Caseload as follows:

There are increasing reports of many people within the asylum seeker community being at advanced stages of feeling mentally trapped, figuratively boxed in, and especially hopeless and helpless. The picture is one of *lethal hopelessness* [emphasis in original].⁷⁰

Mental health experts consulted by the Commission for this project also drew attention to the severity of mental health symptoms generally, and the prevalence of suicidality in particular, among this group of asylum seekers. One expert reported that some people in the Legacy Caseload were experiencing suicidal ideation in the absence of any underlying mental health disorder, a trend they described as 'something that's new to us'.



Another mental health expert who had worked with people in the Legacy Caseload stated that ‘this type of despair ... has a quality about it that’s unlike any other population I’ve seen’. This expert went on to highlight the specific mental health impacts on children in the Legacy Caseload:

Suicidal ideation in children is generally quite rare as a phenomenon. Many people would not encounter a suicidal child under the age of ten or 11. But there are children under ten or 11 who are in suicide-related distress. It is remarkable that they have developed a vocabulary for that. That is a distinctive marker.

Several other consultation participants who worked directly with people in the Legacy Caseload indicated that they had encountered suicidality among their clients on a regular basis. One support worker, for example, reported that ‘The suicide threats have been a consistent thing ... for the last five years’. A mental health worker stated that a significant proportion of their clients were experiencing ‘ongoing chronic suicidal ideation’.

‘Lethal hopelessness’: Suicides of asylum seekers in the Legacy Caseload

1 June 2014: 29-year-old Sri Lankan asylum seeker **Leo Seemanpillai** dies after setting himself alight outside his house in Melbourne. He was living in the community on a Bridging Visa, and had reportedly been admitted to hospital for mental health treatment in January.⁷¹

13 March 2015: 29-year-old Iranian refugee **Omid Ali Avaz** is found dead in Brisbane. It is believed that he took his own life. He was living in the community on a Temporary Humanitarian Stay Visa. His mental health had reportedly deteriorated since learning of the death of his mother and due to concerns about his visa status.⁷²

17 June 2015: Afghan asylum seeker **Raza** dies after jumping in front of a train in Perth. He was living in the community on a Bridging Visa and had been interviewed by police a day earlier.⁷³

18 October 2015: 30-year-old Afghan asylum seeker **Khodayar Amini** dies after setting himself alight in a Melbourne park. He had been released from detention on a Bridging Visa in 2013 but was re-detained for 11 months in 2014, before being released again. In the days leading up to his death, he had been hiding in Melbourne bushland due to fears that he was about to be re-detained again.⁷⁴

27 October 2015: 26-year-old Iranian asylum seeker **Reza Alizadeh** commits suicide at Brisbane Airport. He had been living in the community on a Bridging Visa for two years and was reportedly suffering from ‘severe mental health issues’.⁷⁵

April 2016: 35-year-old Afghan asylum seeker **Mohammad Nazari** hangs himself on a construction site in Sydney.⁷⁶

June 2016: 23-year-old **Mohammad Hadi** hangs himself in a park in western Sydney. He had been living in the community on a Bridging Visa since being released from detention in 2013.⁷⁷

August 2016: 27-year-old Iranian asylum seeker **Saeed Hassanloo** takes his life in Hobart, where he had been living on a Bridging Visa. He had arrived in Australia in 2009 and been detained for several years before his release. In 2015, Mr Hassanloo had engaged in a widely-publicised hunger strike at the Yongah Hill Immigration Detention Centre, after learning that his visa application had been refused.⁷⁸

August 2018: A 45-year-old Sri Lankan asylum seeker dies when his life support is switched off in a Brisbane hospital, following a suicide attempt that left him brain dead. He had previously been subject to third country processing in Nauru, before being transferred back to Australia in 2014. He had reportedly been experiencing depression after his visa application was rejected.⁷⁹

(c) Impacts on refugee status determination outcomes

In late 2017, UNHCR's Regional Representation in Canberra issued a guidance note on the 'psychologically vulnerable' applicant in the refugee status determination process. The guidance note advised that asylum seekers' capacity to engage in the refugee status determination process may be impaired by mental illness and psychological trauma, warning that 'the fairness and accuracy of protection visa assessment may be compromised unless each stage of the process is informed by the applicant's mental state and cognitive abilities'.⁸⁰

UNHCR further advised that the guidance note was 'particularly significant for individuals assessed under the Fast Track process' in light of their mental health status:

Most applicants in the Fast Track process have been living in Australia for many years without having their protection claims assessed. This prolonged period of uncertainty, coupled with the prospect of the grant of only a temporary visa, which prevents family reunification, may be likely to contribute to protracted impairments in mental health. In the context of the Fast Track process, it is thus critical that an applicant's psychological vulnerability is identified as early as possible, and that the implications of such vulnerabilities are considered at every step of the protection visa assessment.⁸¹

These concerns were echoed by several participants in the Commission's consultation process, who argued that mental health issues could have a negative impact on engagement with refugee status determination.

As described by one legal practitioner, 'That just makes it harder to get instructions, harder to get them to recall their story and put it in their statement, harder for them to retain information and act on instructions'. Some also claimed that decision-makers did not consistently take mental health into account as a factor affecting the presentation of refugee claims.

Several participants in the Commission's consultation process also raised more general concerns about the negative impact of delays in processing on asylum seekers' ability to engage with the refugee status determination process, particularly with regard to the accurate recall of information. In the words of a mental health worker:

What we're seeing in terms of people's claims is that they're having to document claims that are increasingly a long time ago. Whereas traditionally [for] asylum seekers, the legally relevant events may have occurred quite recently, or in the last years, for some people the events occurred seven or eight years ago. That obviously has consequences in terms of recollection, the ability to document what's relevant. It makes the whole task more difficult in terms of giving a coherent account of their claims.

Some participants expressed particular concern about the situation of asylum seekers who had arrived in Australia as unaccompanied children, but had turned 18 while awaiting the processing of their visa applications and thus are now legally adults.

It was noted, for example, that young people in this situation are not entitled to certain forms of assistance (such as intensive casework support and funded legal advice), which would otherwise have been available to them if their applications had been processed in a more timely fashion, and despite the fact that many remained in a vulnerable situation due to their relatively young age and often traumatic childhood experiences.

(d) Access to mental health support

People in the Legacy Caseload who are eligible for Medicare may be able to access mental health support through publicly-funded services. In some cases, however, these mainstream mental health services may not have the capacity to address the unique and complex mental health needs of people in the Legacy Caseload.

For example, the mental health issues experienced by people in the Legacy Caseload appear to be primarily situational, in that they are directly linked to an identifiable stressor⁸² (in this case, prolonged uncertainty). Many mainstream mental health services, by contrast, typically specialise in treating mental health disorders that may not be related to specific stressors (such as schizophrenia or clinical depression).

As a result, asylum seekers in the Legacy Caseload may not be able to receive adequate support through mainstream services. As described by one mental health worker who participated in the Commission's consultations:

A really substantial issue we face is that when somebody becomes so exhausted that they do actually need emergency care, it can be extremely difficult to have someone appropriately admitted, because the assessment from mainstream Western mental health is that the stress is environmental and circumstantial. It's not an organic mental health issue as such, like schizophrenia, that can be medicated and fixed. Often there aren't appropriate support services available for people who are at imminent risk of suicide. They actually don't want to die but they are not able to keep themselves safe. It's really difficult to get someone admitted to hospital.

People receiving Status Resolution Support Services (see [Section 3.3](#)) can also access specialist torture and trauma rehabilitation services that are specifically designed for people from refugee backgrounds.⁸³ However, these services may not be fully effective for people in the Legacy Caseload while their situation remains uncertain.

According to the Victorian Foundation for Survivors of Torture, for example, a key 'recovery goal' for survivors of torture and trauma is to restore safety, enhance control and reduce fear and anxiety.⁸⁴ This goal may be difficult to achieve in situations where the survivor lacks certainty about their future.

(e) Human rights implications

Australia has obligations under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the **right to the highest attainable standard of health**.⁸⁵

The UN Committee on Economic, Social and Cultural Rights advises that these obligations require states not only to take measures to ensure access to adequate health care services, but also to 'refrain from interfering directly or indirectly with the enjoyment of the right to health'.⁸⁶ This includes avoiding actions, laws and policies that 'are likely to result in bodily harm, unnecessary morbidity and preventable mortality'.⁸⁷

The Commission has serious concerns about the impact of prolonged delays in the processing of claims on the mental health of many asylum seekers in the Legacy Caseload, including children. As these delays were the result of specific policy decisions, and may have been avoidable, the Commission considers that delays in processing have prevented people in the Legacy Caseload from enjoying the highest attainable standard of health.

There is clear evidence that the prolonged delays in the processing of claims has contributed significantly to the current prevalence, and future risk, of mental health issues among people in the Legacy Caseload. Consequently, the Commission considers that the processing of claims should be finalised as a matter of urgency.

Recommendation 6

The Department of Home Affairs should allocate additional resources to expedite the processing of visa applications lodged by asylum seekers in the Legacy Caseload.

The Commission further considers that, in light of identified gaps in mental health support for asylum seekers, additional resources should be allocated to provide increased access to mental health services, with a focus on suicide prevention.

Recommendation 7

The Department of Home Affairs should allocate additional resources to increase mental health services and support for asylum seekers in the Legacy Caseload, including suicide prevention training for Departmental staff and contracted service providers, and targeted services for children and young people.

2.5 Children and families

(a) Impacts on children and young people

The refugee status determination process can have distinct impacts on children and young people. For example, as they are often able to develop more advanced English language skills than their parents, children may play a key role in supporting their family's visa application.

This can in turn result in children assuming responsibilities beyond their years or being exposed to distressing information about the persecution experienced by their parents. As described by a support worker who participated in the Commission's consultations:

They [children] are often used as the interpreters. They pick up the language and the culture quite quickly compared to their parents, so they are the person that the parents often look to for support and for their connection to the community, which can hold a very heavy burden for children ... They are then privy to a lot of information that they might not otherwise or should probably not know in terms of their parents' trauma.

The stressors associated with the refugee status determination process can have a very significant impact on children, who may be facing similar challenges to adults but are at a more critical stage of their social, emotional and cognitive development. Another support worker who participated in the consultations argued:

It is really difficult because childhood and teenage years, they are very formative years and it really does not last that long. These kids are living out their childhood, away from family and also just in their mind in a very precarious situation. Because in their minds, until they've got that visa and they know that they're allowed to be in Australia, in their minds anything could happen. For a kid that causes a lot of fear ... It is just too much pressure for a child to have to comprehend and work with.

A number of participants reported working with children in the Legacy Caseload who were experiencing developmental delays or behavioural issues due to the stressors faced by their families. Specific issues included attachment difficulties, separation anxiety, emotional withdrawal, language delays, tearfulness and difficulties with impulse and emotional control (including risk-taking behaviour and aggression). As described by one support worker:

Many parents think that their child is naughty, but the children are showing signs of post-traumatic stress ... They are worried that the children are behaving badly but the kids have parents who are totally, totally distressed, constantly.

A small number of participants also expressed concern about the impacts of the interview process on children, arguing that some decision-makers did not sufficiently adapt their interviewing style to make allowances for the special needs of children.

The challenges faced by children and young people undergoing refugee status determination are not exclusive to asylum seekers in the Legacy Caseload. However, the impacts of refugee status determination on this group may be magnified due to their particular circumstances.

For example, limited access to legal advice and interpreting services may lead to an increased reliance on children and young people to assist with the visa application process; and exposure to stressors may have been more prolonged due to delays in the processing of claims.

(b) Impacts of parental mental illness on capacity to parent

The Commission's 2014 National Inquiry into Children in Immigration Detention found that parental mental illness can deprive children of adequate emotional support and care, and may have a negative impact on children's development. Parental mental illness may also compel older children to assume responsibilities for which they are not sufficiently mature (such as caring for younger siblings), and force them to ignore or suppress their own developmental needs as young people.⁸⁸

Feedback from participants in the Commission's consultations suggests that similar dynamics may be occurring among some families in the Legacy Caseload. A number of participants reported that the mental health issues experienced by parents as a result of the prolonged refugee status determination process had implications for the wellbeing of their children.

As stated by one support worker, 'A parent who is very under stress and is unable to provide warm parenting or holistic parenting, that is likely to have flow-on effects for the child'. Another support worker asserted:

Their parents [are] struggling mentally and they're not coping. That has an impact on children's ability to develop normally and ability to engage in school and all of that. The domino effect of that is that if the parents aren't coping, that then impacts the whole entire family, and specifically the children.

Some also reported cases in which children had been compelled to take on adult responsibilities or caring roles because of their parents' mental ill-health. As one support worker described:

So Dad's depressed, he hasn't gotten up for two days, and so older kids are helping younger kids to get organised, get off to school, and getting organised and really taking a lead role because of the fall-out from the adults in the family unit and their mental health.

A mental health expert similarly reported that:

Some children don't leave the house if they're worried about a mother or father. I have seen that they won't go to school that day. Some children take on a huge caring and parenting role for a parent or both parents that are struggling. It's a kind of remarkable thing, they age before their time. A child that is 12 or 13 has characteristics of an 18-year-old. That's specific to this group [i.e. the Legacy Caseload].

(c) Impacts on family wellbeing

The stress associated with the process of seeking asylum—particularly when combined with other stressors such as pre-arrival trauma or financial insecurity—may have a negative impact on the wellbeing of some families.

A number of participants in the Commission's consultations, for example, reported instances of family conflict and breakdown resulting from factors such as these among people in the Legacy Caseload. As stated by one support worker:

We've had families where they were essentially quite healthy and functioning families in terms of family relationships, with children and so on. But the stressors, one from their own trauma, and two from this process, take people to the edge with their ability to tolerate frustration.

Where family conflict escalates into violence, victims who are still undergoing refugee status determination may be reluctant to report the perpetrator to the police or seek help from domestic violence services.

In some cases, this reluctance may stem from the fact that the perpetrator of violence is the primary applicant on the family's visa application, meaning that the family's prospects of remaining in Australia hinge on the perpetrator's refugee claims. As one support worker explained:

Those that are dependent on that application are often fearful, are more reluctant at times to report to the police about family violence because that could put the whole family's application in jeopardy.

In other cases, concerns about the perpetrator potentially being re-detained could deter victims from reporting violence. As described by a legal practitioner:

People aren't seeking the help that they need in order to keep themselves and their children safe because they know the consequences for the other party are so disproportionate that they don't want to risk it. They've been in detention themselves and they don't want to subject a family member to what is indefinite detention, they don't know for how long they might be detained. And so they stay in that situation, and they have the kids in that situation, and they can't access the services that anyone else in the community would because of the immigration policies.

Research indicates that women seeking asylum who are experiencing family violence face barriers to accessing mainstream family violence support services (including refugees), due to factors such as their temporary visa status and limited incomes.⁸⁹

Several consultation participants also raised concerns about the treatment of family units in cases where different family members are subject to different legal frameworks (for example, because they arrived in Australia on different dates) or are at different stages of the status determination process. As one legal practitioner stated, 'For some families, they've come at different times, so they aren't being processed together. They're in different cohorts, they're subject to different rules. The amount of confusion that that causes is immense'.

(d) Human rights implications

Australia has an obligation article 3(1) of the CRC to ensure that in all actions concerning children, **the best interests of the child shall be a primary consideration.**⁹⁰

Australia also has obligations under articles 6(2), 19 and 22(1) of the CRC to **ensure to the maximum extent possible the survival and development of the child**; to take appropriate measures to ensure that **children are protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation**; and to ensure that **a child who is seeking refugee status or who is considered a refugee receives appropriate protection and humanitarian assistance.**⁹¹

The Committee on the Elimination of Discrimination against Women has indicated that **gender-based violence** is a form of discrimination as defined by article 1 of CEDAW.⁹² Australia therefore has obligations under CEDAW to adopt legislation and policies aimed at eliminating gender-based violence, including through measures such as providing services to protect women from gender-based violence and preventing its reoccurrence.⁹³

In addition, Australia has obligations under articles 23(1) of the ICCPR and 10(1) of the ICESCR to **afford protection and assistance to the family** as the natural and fundamental group unit of society.⁹⁴

The Commission notes that the refugee status determination process for the people in the Legacy Caseload appears to have had significant negative impacts on the wellbeing of some families, in particular women and children. While some of these impacts also affect other groups of asylum seekers, they may be more significant for people in the Legacy Caseload given their limited access to services and the prolonged delays in the processing of their claims.

To ensure that families and children receive adequate protection and assistance in accordance with Australia's international obligations, the Commission considers it would be beneficial to establish an additional, targeted support service for families and children in the Legacy Caseload (possibly within the framework of the Status Resolution Support Services program; see [Section 3.3](#)).

The purpose of this service would be to assist families, in particular women and children, in coping with stressors while their visa applications are being processed; and to facilitate the identification of potential child protection and other safety concerns, such as family violence.

Recommendation 8

The Department of Home Affairs should establish a dedicated support service for families and children in the Legacy Caseload.

Reports that some victims of family violence may remain in dangerous situations due to fear of negative repercussions are also of significant concern. To ensure that asylum seekers in situations of risk are able to engage with support services, the Commission suggests that the Government consider options for establishing 'firewalls', or clear divisions between enforcement agencies and service providers.⁹⁵

Following his mission to Australia in 2016, the Special Rapporteur on the human rights of migrants recommended that the Australian Government

implement 'firewalls' between public services and immigration enforcement, thereby offering better access to effective labour inspection, access to justice, and access to other public services such as housing, health care, education, and police and social services, for all migrants, regardless of status, without fear of detection, detention and deportation.⁹⁶

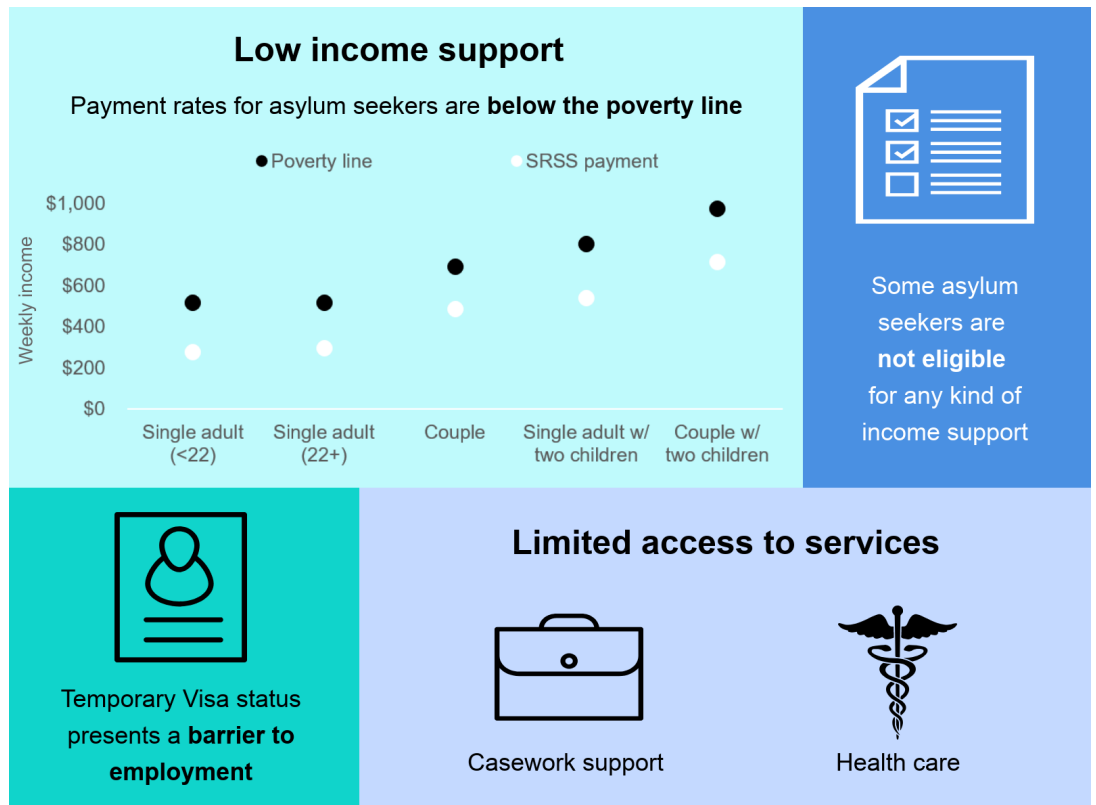
The Special Rapporteur's comments were made in the context of concerns about labour exploitation. However, the Commission considers that the establishment of 'firewalls' may also facilitate access to justice and support services for vulnerable migrants (including asylum seekers) who are experiencing family violence or are otherwise at risk.

Recommendation 9

The Department of Home Affairs should commission independent research on options for establishing clear divisions between the Department and other government agencies and public services that provide assistance to asylum seekers.



3 Bridging Visas



3.1 Background

Bridging Visas are short-term visas that are granted to people who are in the process of resolving their immigration status, either through lodging an application for a substantive visa, awaiting the outcome of a substantive visa application, or making arrangements to leave Australia.

People in the Legacy Caseload typically hold a Bridging Visa E, which is granted to unlawful non-citizens (that is, non-citizens who do not hold a valid visa) or people who were refused immigration clearance on arrival in Australia, and are in the process of resolving their status.⁹⁷

Between November 2011 and December 2018, a total of 36,874 Bridging Visas were granted to asylum seekers who had arrived by boat. Of these, 15,674 people were still living in the community on Bridging Visas, while the remainder had either been granted a substantive visa, departed Australia, been returned to closed immigration detention or passed away.⁹⁸

Human rights obligations relevant to the situation of asylum seekers on Bridging Visas include:

- right to social security
- right to an adequate standard of living
- right to work
- right to the highest attainable standard of health.

3.2 Summary

The level of income support available to asylum seekers living in the community on Bridging Visas is currently insufficient to ensure an adequate standard of living.

Previous research and feedback gathered by the Commission consistently indicate that many asylum seekers living in the community on Bridging Visas are unable to meet their basic needs, and in some cases face severe financial hardship. The Commission is also concerned by policies that may result in asylum seekers, including families with children, being left without any source of income.

The Commission considers that the reintroduction of work rights for Bridging Visa holders in the Legacy Caseload has helped to strengthen Australia's compliance with its international obligations. Notwithstanding this positive development, additional measures may be necessary to ensure that the rights of asylum seekers relating to employment and health care are adequately protected.

The Commission further considers that the casework model for asylum seekers on Bridging Visas provides limited scope for addressing their support needs. A more comprehensive casework model could assist in addressing these needs through supporting asylum seekers to navigate Australian services and systems, and to overcome barriers to participation in community life.

The Commission makes recommendations about income support payment rates for asylum seekers on Bridging Visas; changes to the eligibility criteria for income support; streamlining the process for renewing Bridging Visas; and reviewing the adequacy of casework assistance.

3.3 Income support payment rates

(a) Overview

Asylum seekers living in the community on Bridging Visas may be eligible to receive assistance under the Status Resolution Support Services (SRSS) program. This program provides assistance to non-citizens who are seeking to resolve their immigration status, or transitioning to mainstream services after resolving their status.

There are six 'bands' within the SRSS program that offer varying levels of assistance and support. An overview of services provided under the SRSS program can be found in Appendix 2.

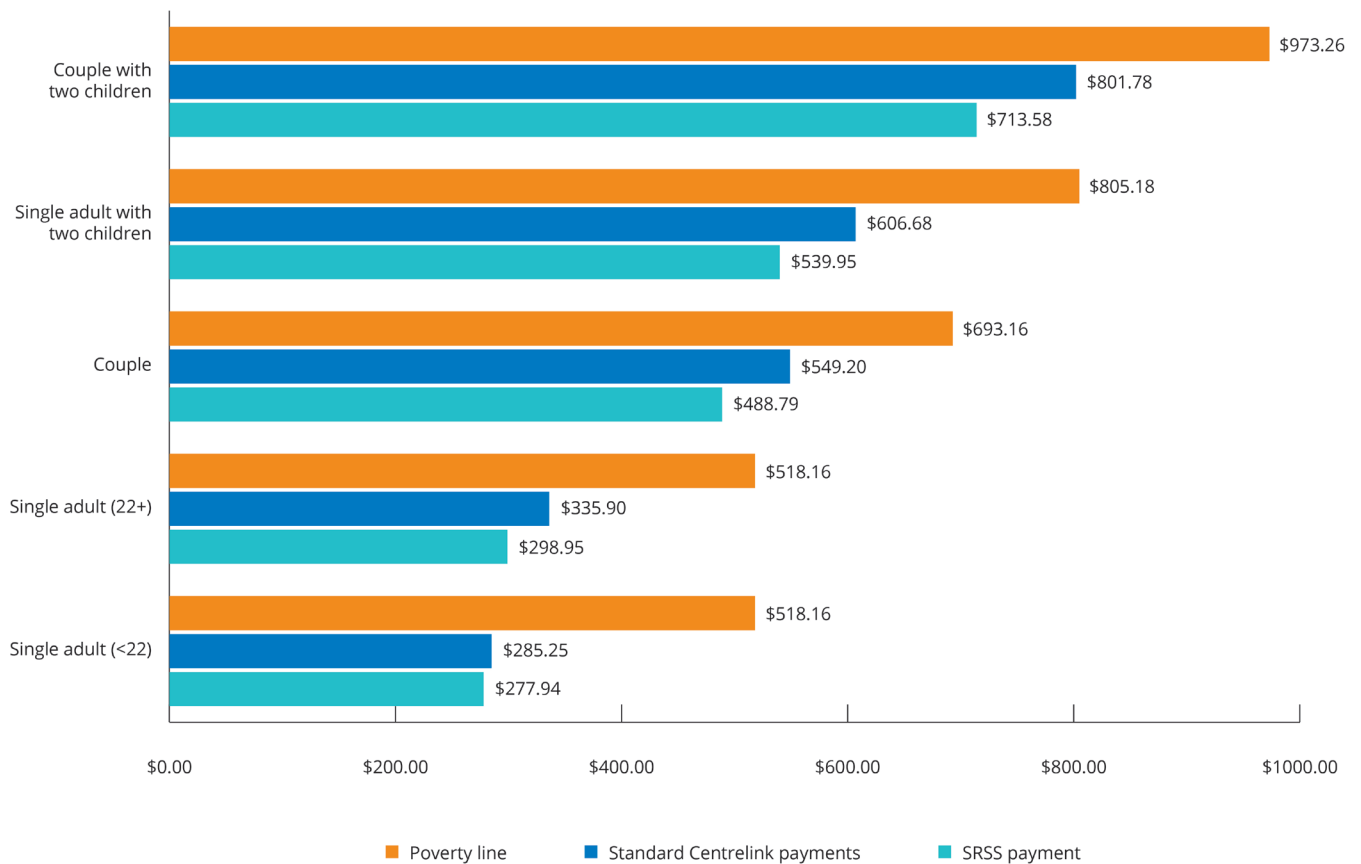
Bands 4 to 6 are designed for people on temporary visas, including Bridging Visas. People receiving assistance under these bands are eligible for income support comprising a living allowance, rent assistance and (where relevant) dependent child allowance, paid at 89% of equivalent Centrelink rates.

(b) Risk of financial hardship

Payment rates under the SRSS program fall well below the poverty line, particularly for single adults without children.

According to estimates produced by the Melbourne Institute of Applied Economic and Social Research at the University of Melbourne, the poverty line for a single adult in the workforce as at December 2017 was \$518.16 per week, including housing costs.⁹⁹

Comparison of income support payments to poverty line (per week), December 2017¹⁰⁰



The maximum payment rate over the same period for a single adult receiving the Newstart Allowance and Rent Assistance (against which SRSS payments are benchmarked) over the same period was \$671.80 per fortnight, or \$335.90 per week.¹⁰¹

A single adult receiving income support under the SRSS program would therefore have received approximately \$597.90 per fortnight, or \$298.95 per week—around 58% of the income level for a person at the poverty line.

The Melbourne Institute’s estimates are based on the Henderson Poverty Line, which is benchmarked according to the disposable income required to meet basic needs.¹⁰²

Other methodologies for measuring poverty may result in different estimates, although available data suggests that poverty line estimates in Australia are broadly similar across methodologies.¹⁰³

Previous studies on asylum seekers living in the community suggest that the level of income support available under the SRSS program is insufficient to meet basic needs.¹⁰⁴

A 2013 report by the Australian Red Cross, for example, found that almost half of asylum seekers who were receiving government support did not have access to quality long-term housing.¹⁰⁵

A consultation conducted by UNHCR in 2013, focusing on asylum seekers living in the community on Bridging Visas without work rights, found that that many were 'unable to meet their basic needs and [were] living in a state of destitution'.¹⁰⁶

These findings were echoed by participants in the Commission's consultations. Participants reported that people receiving income support under the SRSS program may experience significant financial hardship, including housing difficulties (with susceptibility to overcrowding and even homelessness) and inability to afford essentials including adequate food, medication and transport. Several participants described asylum seekers in the Legacy Caseload as living in a situation of poverty or destitution.

The challenges of living on a very low income: Mariam

Mariam arrived in Australia by boat in 2013 with her husband and three children. After spending time in several closed immigration detention facilities, during which time Mariam gave birth to her fourth child, the family was released into community detention and was later granted Bridging Visas.

Mariam's family currently receives approximately \$3,000 per month under the SRSS program. Their rental expenses total \$1,500 per month, leaving the family of six with an average of \$375 per week for other expenses (including food, utilities, transport and medical expenses). Mariam reports that she maintains a strict budget for the family but still cannot afford some essentials, such as clothing and footwear.

Mariam and her husband both have work rights but have faced barriers to employment, including their short-term visa status and the fact that their qualifications are not recognised in Australia.

As a result of these barriers, Mariam and her husband have been unable to supplement their income support through paid employment.

(c) Support from non-government organisations and community groups

A number of non-government organisations provide a range of support services for asylum seekers in the community who are facing financial hardship. These services include various forms of material assistance, such as emergency relief, subsidised housing and food banks.

These organisations, however, have limited capacity, as they typically do not receive Government funding and rely largely on donations, philanthropic contributions and the support of volunteers.

During the Commission's consultation process, for example, several participants expressed the view that these service providers, despite their best efforts, simply were not able to assist all people in the Legacy Caseload who were facing financial hardship. As stated by a support worker from one of these organisations, 'We're all running on donations and are underfunded and have incredible teams of casework staff and other staff, but it's never enough to meet the need that is out there'.

A small number of participants also highlighted the significant pressures placed on established refugee communities to assist people in the Legacy Caseload, often on a voluntary basis. One participant, for example, noted that refugee community leaders ‘provide very high levels of unpaid support to vulnerable people in their community.’

It was further noted that the capacity of refugee community groups to provide this support could vary considerably, with the result people in the Legacy Caseload from certain communities may have less access to community support than others.

(d) Human rights implications

Under article 11(1) of the ICESCR and article 28(1) of the CRPD, Australia has committed to uphold the **right to an adequate standard of living**, including adequate food, clothing and housing, and to the continuous improvement of living conditions.¹⁰⁷ Australia also has obligations under article 27(1) of the CRC to ensure that **children have a standard of living adequate for their physical, mental, spiritual, moral and social development**.¹⁰⁸

The level of income support available to asylum seekers living in the community on Bridging Visas is currently insufficient to ensure an adequate standard of living. Previous research and feedback gathered during the Commission’s consultations consistently indicate that many asylum seekers living in the community on Bridging Visas are unable to meet their basic needs, and in some cases may face destitution.

The support available from mainstream and non-government support services may assist in addressing some of the unmet needs of asylum seekers, but is not available as a right, nor is it available consistently across the country. Consequently, such support is not an adequate substitute for comprehensive government-funded services.

Australia also has obligations under article 9 of the ICESCR and article 26 of the CRC to uphold the **right to social security**;¹⁰⁹ and under articles 23 and 24 of the Refugee Convention to **treat refugees in the same manner as citizens with regard to public relief and social security**.¹¹⁰

The UN Committee on Economic, Social and Cultural Rights has provided detailed guidance on the rights of non-citizens in relation to social security. Specifically, the Committee advises that any restrictions on non-citizens’ access to social security must be reasonable and proportionate; and that refugees, stateless people, asylum seekers and other disadvantaged and marginalised people ‘should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support’.¹¹¹

Given that low levels of income support contribute to a risk of destitution among asylum seekers, the payment of income support to asylum seekers under the SRSS program at a lower rate than standard Centrelink payments may not be compliant with these commitments.

In its concluding observations on the most recent periodic report of Australia in 2017, the UN Committee on Economic, Social and Cultural Rights expressed concern about ‘insufficient amounts of benefits under the Status Resolution Support Services programme for asylum seekers on bridging visas’. The Committee recommended that these benefits be increased ‘to ensure that [asylum seekers] enjoy an adequate standard of living’.¹¹² The Commission supports this recommendation.

Recommendation 10

The Australian Government should align payment rates for income support under the Status Resolution Support Services program with the standard Centrelink payment rates.

3.4 Eligibility for income support

(a) 'Finally determined' cohort

People whose applications are considered 'finally determined'—that is, who have received a negative decision on their substantive visa application at both the primary and review stage of the status determination process (referred to as a 'double negative')—are generally ineligible for SRSS. As at December 2018, there were 6,177 people in the Legacy Caseload whose applications were considered 'finally determined'.¹¹³

Upon receiving a 'double negative', people are transitioned out of the SRSS program and have no ongoing access to income support or casework assistance. Depending on the conditions attached to their Bridging Visa, they may not have permission to work and may be ineligible for Medicare.¹¹⁴

During the Commission's consultations, concerns were raised that people in the 'finally determined' cohort may experience serious financial hardship (to the point of becoming destitute or homeless) and deterioration in their physical and mental health. A number of participants specifically highlighted the vulnerable situation of families with children, noting that the withdrawal of income support from these families may give rise to child protection concerns (such as a risk of homelessness).

People in the 'finally determined' cohort, who are not eligible for Medicare but have significant health care needs, may be eligible to receive Band 5 Medical, a subset of Band 5 services that provides assistance with health care costs. Recipients of Band 5 Medical do not receive casework assistance or income support.

During the consultation process, a small number of consultation participants reported that individuals receiving Band 5 Medical may experience serious financial hardship to the extent that they cannot afford housing or pharmaceuticals.

People in the 'finally determined' cohort are eligible to apply for judicial review and therefore may not have received a 'final' decision on their visa application. If they receive a positive outcome, their visa application may be reconsidered and they may ultimately be granted a substantive visa.

Judicial review can, however, be a lengthy process. People in the 'finally determined' cohort who are seeking judicial review, and who are unable to secure paid employment, may consequently face the challenge of surviving in the community without a source of income for an extended period of time.

During the Commission's consultation process, for example, it was reported that people in the 'finally determined' cohort would typically face a waiting period of more than a year, and in some cases longer, for a court hearing. One mental health worker stated, 'One of my clients is now listed for 2020 at the Federal Circuit Court. That will mean he'll be destitute for all that time.'

'Finally determined' and living without stable income: Imad and Anousha

Imad arrived in Australia by boat in 2012. He was removed from the SRSS program after his visa application was deemed 'finally determined'. Imad was subsequently evicted from his private rental property after being unable to meet his rental payments.

Imad has since experienced serious difficulties in securing stable accommodation. He was initially able to stay with a relative but the relationship soon came under strain, as Imad was unable to contribute to household expenses due to his lack of income. He has also been unable to find another rental property as he does not have sufficient funds for a bond payment or ongoing rental payments.

As a result of these challenges, Imad became homeless and was sleeping in his car for a period of around six months. He also struggles to afford adequate food and medication for a chronic medical condition.

Anousha arrived in Australia by boat with her husband and son in 2012. The family initially received income support under the SRSS program. After their application for refugee status was deemed 'finally determined', they were removed from the program and no longer have access to income support, work rights or Medicare.

Due to her lack of stable income, Anousha is in significant rental arrears and has accrued a debt of over \$7,000 for utilities. She has borrowed a large amount of money from people in her community but has no means of repaying these debts.

Anousha is the primary carer for her son and her husband, who has significant mental health issues and struggles to leave the house. She has reported experiencing difficulty sleeping, but has been reluctant to seek counselling due to her family's care needs.

Anousha is seeking judicial review of her visa application. She has been allocated a hearing before the Federal Circuit Court in 2019. Anousha's family therefore faced the prospect of living in the Australian community for at least a year without stable income before their case is resolved.

(b) Changes to SRSS eligibility

The Department has recently introduced significant changes to eligibility criteria for the SRSS program. Beginning in mid-2018, people who have work rights attached to their Bridging Visa will no longer be eligible to receive the SRSS living allowance, unless they face barriers to employment.

Significantly, the Department has indicated that 'not being able to find a job does not make an individual eligible for SRSS support'.¹¹⁵ In addition, adults who have the capacity to work but choose to undertake tertiary study will not be eligible for income support.¹¹⁶

A fact sheet on the changes issued by the Department states that 'SRSS is not a social welfare program and financial assistance is only intended to support individuals who are unable to work while resolving their immigration status'.¹¹⁷

The Commission did not receive feedback from consultation participants on these changes, as most of the consultations were conducted prior to the announcement of the changes. However, the Commission notes that these changes are likely to result in a significant number of people becoming ineligible for SRSS income support even if they have no other source of income.

The Special Rapporteur on extreme poverty and human rights, Professor Philip Alston, has expressed concern that the changes may result in asylum seekers facing significant hardship, advising that Australia 'need[s] to ensure that a minimum level of social protection is available' to asylum seekers.¹¹⁸

(c) Transferring money internationally

Under the eligibility criteria for the SRSS program, people receiving support under Bands 5 and 6 who send or receive \$1,000 or more internationally within any given 12-month period cease to qualify for income support, and may be issued with a debt for the income support provided in the period after the money was sent or received.¹¹⁹

The Department has indicated that this restriction is intended to apply in circumstances where an SRSS recipient may have been receiving undeclared income, and therefore no longer requires income support through the SRSS program:

It's recognised that individuals might send small amounts of money to family members offshore while in receipt of payment, provided that amount is consistent with the income that they're receiving through SRSS and which we believe is their only form of income. Were they to send significant amounts of money offshore, that might suggest that they have an alternative form of support that we are not aware of and might call into question their qualification for the support.¹²⁰

Feedback received from participants in the Commission's consultations, however, suggests that income support had been withdrawn or denied on the basis of international transfers even in circumstances where the person was not receiving undeclared income.

For example, some participants claimed that the policy had been applied to people who had sent money overseas during a period where they were in paid employment and had consequently exited the SRSS program. When these individuals had subsequently sought to re-enter the program following a change in circumstances (such as losing their job), they had been deemed ineligible for SRSS—despite the fact that the money had been sent overseas during a period when they were not receiving the SRSS living allowance.

While the Commission cannot verify these accounts, the situations described are possible under the current SRSS eligibility criteria. The use of a general dollar amount does not allow for consideration of the full circumstances in which the transfers occurred. If these factors are not considered, there is a risk that some individuals may become ineligible for income support when they do not in fact have an alternative source of income.

Given that the benchmark used to determine eligibility for income support in the context of international transfers may not be a reliable indicator that a person is receiving undeclared income, the criteria should be amended to ensure that SRSS payments are only terminated in situations where it is clear that the individual or family does not need continued SRSS support.

(d) Human rights implications

The Commission notes the Department's assertion that SRSS is 'not a social welfare program'.¹²¹ Regardless of how the SRSS is characterised, however, Australia remains obliged to uphold the **right to an adequate standard of living, as explained above.**

Therefore, the Commission considers that Australia must maintain a program that provides basic assistance to ensure an adequate standard of living for asylum seekers experiencing financial hardship.

The Commission recommends that asylum seekers who have work rights should remain eligible for income support under the SRSS program until such time as they have secured a verified alternative source of income (such as paid employment).

This approach would be more consistent with the eligibility requirements for the Newstart Allowance (one of the benchmark payments for SRSS living allowance), under which people who are unemployed and looking for work can continue to receive income support payments until their total income exceeds a certain threshold.¹²²

The Commission further considers that applications for substantive visas should not be considered 'finally determined' while they remain under active consideration (including by the courts). People seeking judicial review of a 'double negative' decision should therefore remain eligible for the SRSS program.

Recommendation 11

The Department of Home Affairs should revise policies relating to eligibility for income support under the Status Resolution Support Services program, to ensure that asylum seekers facing financial hardship remain eligible for income support unless they have secured a verified alternative source of income that is sufficient to ensure an adequate standard of living.

Recommendation 12

The Australian Government should ensure that an asylum seeker remains eligible for the Status Resolution Support Services program while they have a substantive visa application under active consideration, including by the courts.

The Commission acknowledges that, under any refugee status determination system, a proportion of applicants will be found not to be refugees and will be expected to return to their countries of origin. The Legacy Caseload will therefore eventually include a cohort of people whose visa applications are 'finally determined' and who have no further options to seek review of the decision or otherwise extend their stay in Australia.

The Commission is concerned, however, that removing access to any form of assistance to people in this group who are facing financial hardship is likely to give rise to human rights concerns.

The Commission therefore recommends that asylum seekers whose visa applications have been 'finally determined' and who are experiencing financial hardship should remain eligible for some form of income support, until such time as they are either granted a substantive visa or removed from Australia.

This could be achieved through extending eligibility for the SRSS living allowance to people in this situation, or by providing support through other programs (such as Special Benefit, which is designed for people experiencing financial hardship who are ineligible for other forms of income support).¹²³

Recommendation 13

The Australian Government should ensure that asylum seekers whose visa applications are 'finally determined' and who are experiencing financial hardship are provided with sufficient support (including income support) to ensure an adequate standard of living, until such time as they are either granted a substantive visa or removed from Australia.

3.5 Access to services and entitlements

(a) Casework assistance

Asylum seekers may encounter a range of challenges when navigating life in Australia. Factors such as limited income and entitlements, language barriers and lack of familiarity with Australian systems and processes can present barriers to participation in the community and make it difficult for asylum seekers to meet their basic needs and achieve independence.¹²⁴

In this context, casework assistance—which can facilitate identification of needs and allow for the provision of information, referrals and other practical support—can play a significant role in assisting asylum seekers to overcome these barriers.

The majority of people in the Legacy Caseload receive support under Band 6 of the SRSS program,¹²⁵ which (in addition to income support) provides a basic level of casework assistance.

SRSS caseworkers are required to develop a 'Case Plan' for each SRSS recipient to serve as 'an interactive record reflecting the recipient's current requirements, goals, health status and progress'.¹²⁶ Case Plans should 'outline strategies to meet the needs of the SRSS recipient and build upon their strengths', in areas such as accommodation, education, physical and mental health needs, financial support, strategies for linking SRSS recipients with community support, meaningful engagement and (where relevant) child wellbeing.¹²⁷

Case Plans should be reviewed and updated each time an SRSS provider makes contact with an SRSS recipient.¹²⁸ Caseworkers are required to contact recipients at least once a month (either face-to-face or by phone), and more frequently for recipients displaying a higher level of need. Face-to-face contact must occur at a minimum of once every three months.¹²⁹

While the casework model under the SRSS program ostensibly provides scope for addressing a wide range of support needs, the limited contact between caseworkers and recipients may preclude the provision of comprehensive assistance.

During the Commission's consultation process, it was reported that SRSS caseworkers typically manage dozens of cases at a time and have very limited contact with individual clients beyond the minimum requirements. As described by one support worker from a non-SRSS service provider:

The support provided by SRSS is limited. Their contracts don't allow them to do an extensive amount of work with people. Often it's only one hour per month that they're able to access that kind of support. Often caseworkers are trying really hard with very large caseloads.

People in the Legacy Caseload, who are particularly vulnerable or have complex needs, may be eligible for more intensive casework assistance under Band 5 of the SRSS program. However, consultation participants reported that fewer referrals for Band 5 services were being accepted, with the result that it had become more difficult for people with complex needs to access the support they needed.

(b) Work rights and employment

Beginning in late 2012, people in the Legacy Caseload who were released from detention on Bridging Visas did not have the right to work.¹³⁰ This policy changed in 2014,¹³¹ with the result that most Bridging Visa holders in the Legacy Caseload now have work rights.¹³² The Commission has welcomed the reinstatement of work rights for people in the Legacy Caseload.¹³³

However, people seeking asylum may face significant barriers to employment, such as language barriers, lack of Australian work experience, limited access to employment support services and training, and ongoing mental health issues.¹³⁴ A support worker, who participated in the Commission's consultation process, said:

That's great that people might have their work rights but in fact they haven't been able to access any study or training, and their mental health is in a state that in fact, they're nowhere near being job ready anyway.

Temporary visa status may also have a significant negative impact on employment prospects. During the consultation process, it was reported that the duration of Bridging Visas granted to people in the Legacy Caseload was typically between one and six months, and employers were often reluctant to hire people whose visas would expire within such a short period of time. In the words of one support worker, 'Nobody wants to employ them for six months. A place will not invest in training for an employee with such a short visa.'

Delays in the renewal of Bridging Visas may create a further barrier to employment. As at 31 December 2018, there were 15,674 asylum seekers who had arrived by boat living in the community on Bridging Visas. Around 12% of these people (1,931) were awaiting the grant of a further Bridging Visa.¹³⁵

Participants in the Commission's consultations reported that the renewal of Bridging Visas could take a significant amount of time, with the result that a person's Bridging Visa may expire before the visa renewal is completed. As explained by a support worker:

The Bridging Visa is essentially three months or six months depending on circumstances, but clients then have gaps between [the visa expiration date and] when the Department of [Home Affairs] send out the new letter with the new Bridging Visa. There could be one or two months, or three months' gap between [the expiration date and] clients actually receiving their new Bridging Visa, which means that employers can't actually sustain employment because of it.

A number of participants also raised concerns about the risk of exploitation in employment resulting from visa insecurity, providing examples of cases where people in the Legacy Caseload had felt compelled to accept precarious or unsafe conditions of employment due to their lack of access to more stable employment options. As stated by one support worker, 'It builds this kind of black market for things like poor work conditions and dangerous work'.



The impact of delays in Bridging Visa renewals: Malik and Nylah

Malik and Nylah arrived in Australia by boat in 2013 to seek asylum. They later had a child in Australia and Malik was able to secure paid employment.

After their substantive visa application was deemed 'finally determined', Malik and Nylah applied for judicial review of the decision. At that time, their Bridging Visas were about to expire.

The Department was notified of Malik and Nylah's situation. However, they did not receive new Bridging Visas before their existing visas expired.

Due to his Bridging Visa expiring, Malik was unable to continue working. As their substantive visa application is considered 'finally determined', Malik and Nylah are not eligible for SRSS and therefore had no alternative source of stable income.

Malik and Nylah instead relied on emergency relief from community welfare organisations and support from their families.

Approximately four months after their visas expired, Malik and Nylah received new Bridging Visas and Malik was able to regain employment.

(c) Health care

Most people in the Legacy Caseload who are living in the community on Bridging Visas and whose substantive visa applications have not yet been finally determined are eligible for Medicare. However, people in the Legacy Caseload may nonetheless face a number of barriers to accessing adequate health care.

For example, eligibility for a Health Care Card—which provides access to cheaper prescription medicines under the Pharmaceutical Benefits Scheme—is linked to receipt of specific Centrelink payments (such as the Newstart Allowance). The SRSS living allowance is not among the eligible payments,¹³⁶ despite the fact that it is paid at 89% of equivalent Centrelink payments.

Some consultation participants expressed concern that asylum seekers on Bridging Visas may be unable to afford medication without a Health Care Card, with potentially negative consequences for their health.

One support worker provided the example of a client who had been instructed to take her medication three times a day, but was unable to afford sufficient medication on the SRSS living allowance: 'She started to take it once a day, then once every second day. She was very sick, she was very unwell without her medication. I was really so worried.'

In addition, while Bridging Visa holders with Medicare eligibility can access general health care services through bulk billing general practitioners, health clinics and hospitals, they may not be able to afford health services that are not covered by Medicare (such as dentistry, physiotherapy and some mental health services) due to their low incomes.

The fact that renewals of Bridging Visas can involve delays, as described above, may also have an impact on access to health care. Consultation participants reported that Bridging Visa holders' Medicare cards typically expire at the same time as their visas, thus delays in renewing visas could result in people becoming ineligible for Medicare.

These barriers can have serious impacts on the health and wellbeing of pregnant women, as well as women and their young children.

Some raised concerns about cases where clients had been unable to access critical health care due to the expiration of their Medicare cards. A health worker provided the following example:

When they are going through visa changes, it might mean that a child who is on the waiting list to have an operation, a very important operation, is then not Medicare-eligible when it is time for them to have that operation and then [are] kicked off a waiting list. Then we rinse, recycle, repeat, back to the GP to write another referral, back to the end of the waiting line.

(d) Mainstream support services

People in the Legacy Caseload whose needs are not being fully met by Federal Government services may face challenges in accessing alternative forms of support through mainstream services.

For example, many mainstream support services and concessions that are intended to address the needs of people who are vulnerable or facing financial hardship are only available to people who hold a Health Care Card and/or are Australian citizens or permanent residents.¹³⁷

Asylum seekers living in the community on Bridging Visas—who are not eligible for Health Care Cards and do not have permanent residency—may therefore be (inadvertently) excluded from accessing these services. As described by one support worker during the Commission's consultation process:

We find it very difficult to find support services for our clients that they're eligible for, whether it's mental health support or whether it's homelessness support, even material aid, maybe food and these types of things. A lot of the services that are there for the citizens or the permanent residents of our country, they're not there for our particular client group because of their visa status.

So we find it very difficult to find services that will accept our clients. In the groups that I'm working with, [there is] a lot of homelessness in our caseloads at the moment. It's very, very difficult to find even hostels and boarding houses that accept clients because of their visa status. I think that's a major issue.

Another support worker noted:

There are quite a lot of groups or community organisations that want to be available for everybody and they think that by saying, if you have a Health Care Card or if you have a Centrelink card, then they're getting everybody who is in a poor situation. But our guys don't have that until they get some form of protection. They aren't eligible for a Health Care Card.

In cases where people in the Legacy Caseload are eligible for mainstream services, service providers may not be adequately equipped to address the often complex needs of this group. Some consultation participants, for example, noted that mainstream services may lack experience in working with interpreters or may not have a strong understanding of the specific challenges faced by asylum seekers.

(e) Human rights implications

Australia has a commitment under article 6(1) of the ICESCR to uphold the **right to work**.¹³⁸ Australia also has an obligation under articles 17, 18 and 19 of the Refugee Convention to **treat refugees at least as favourably as non-citizens in the same circumstances with regard to employment**.¹³⁹

Australia has committed under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the **right to the highest attainable standard of health**; and under article 12 of CEDAW to ensure women enjoy **non-discriminatory access to health care** (including family planning services) and access to **appropriate services** in connection with pregnancy and lactation.¹⁴⁰

The Commission considers that the reintroduction of work rights for Bridging Visa holders in the Legacy Caseload has helped to strengthen Australia's compliance with its international obligations relating to employment.

As the lack of work rights has been identified as a factor contributing to mental ill-health among asylum seekers,¹⁴¹ this measure may also have strengthened compliance with obligations relating to the right to health.

Notwithstanding this positive development, the Commission considers that additional measures may be necessary to ensure that the rights of asylum seekers relating to employment and health care are adequately protected. Specifically, the Commission considers that delays in Bridging Visa renewals—and the consequent loss of entitlements such as work rights or Medicare—may hamper the enjoyment of these rights by people in the Legacy Caseload.

The Minister must personally 'lift the bar' under s 46A of the Migration Act to allow asylum seekers in the Legacy Caseload to apply for a visa. During 2015, the Minister started to make a series of determinations under s 46A(2) lifting the bar for this cohort.¹⁴² In February 2017, the Department said that the Minister had lifted the bar for 'virtually the whole cohort of 30,000'.¹⁴³

The Commission understands that there may be differences in the way in which the bar was initially lifted. Section 46A(2) allows the Minister to lift the bar in relation to visas of a particular class. The Commission understands that in some cases the bar was lifted to allow the making of a protection visa application and an association Bridging Visa, but not to allow for further Bridging Visa applications to be made. In those cases, it would require a personal decision of the Minister to again 'lift the bar' for a subsequent Bridging Visa application to be made.

The Department has acknowledged that there is a cohort of individuals whose Bridging Visas can only be granted by the Minister personally. In circumstances where the Minister must intervene

personally to allow for the grant or renewal of Bridging Visas, this appears to be a factor contributing to delays in renewals.

The Commission notes that other groups of asylum seekers living in the community on Bridging Visas (such as those who arrived by plane on valid visas) are able to have their visas renewed by delegates of the Minister, without requiring the personal intervention of the Minister in every instance.

As a result, the Commission can see no reasonable justification for maintaining a different standard for asylum seekers who arrived in Australia by boat, particularly when it appears to be contributing to significant hardship.

Consideration could also be given to allowing Bridging Visas to be renewed automatically in cases where a person has an application for a substantive visa, and any applications for merits or judicial review on foot.

Recommendation 14

The Minister for Home Affairs should expedite the renewal of Bridging Visas for asylum seekers in the Legacy Caseload.

Recommendation 15

The Australian Government should introduce legislation to:

- a) repeal s 46A of the Migration Act 1958
- b) require Bridging Visas to be automatically renewed in cases where a person has an application for a substantive visa, and any applications for merits or judicial review on foot.

Additionally, in line with the principle that refugees and asylum seekers should enjoy equal treatment in relation to social security (including health care), the Commission considers that asylum seekers receiving support under the SRSS program should have similar entitlements to other low income-earners, including eligibility for a Health Care Card.

Recommendation 16

The Australian Government should include the Status Resolution Support Services Payment as a qualifying payment for a Health Care Card.

The Commission further considers that the casework model under the SRSS program provides limited scope for addressing the support needs of asylum seekers on Bridging Visas, including needs related to employment and health care.

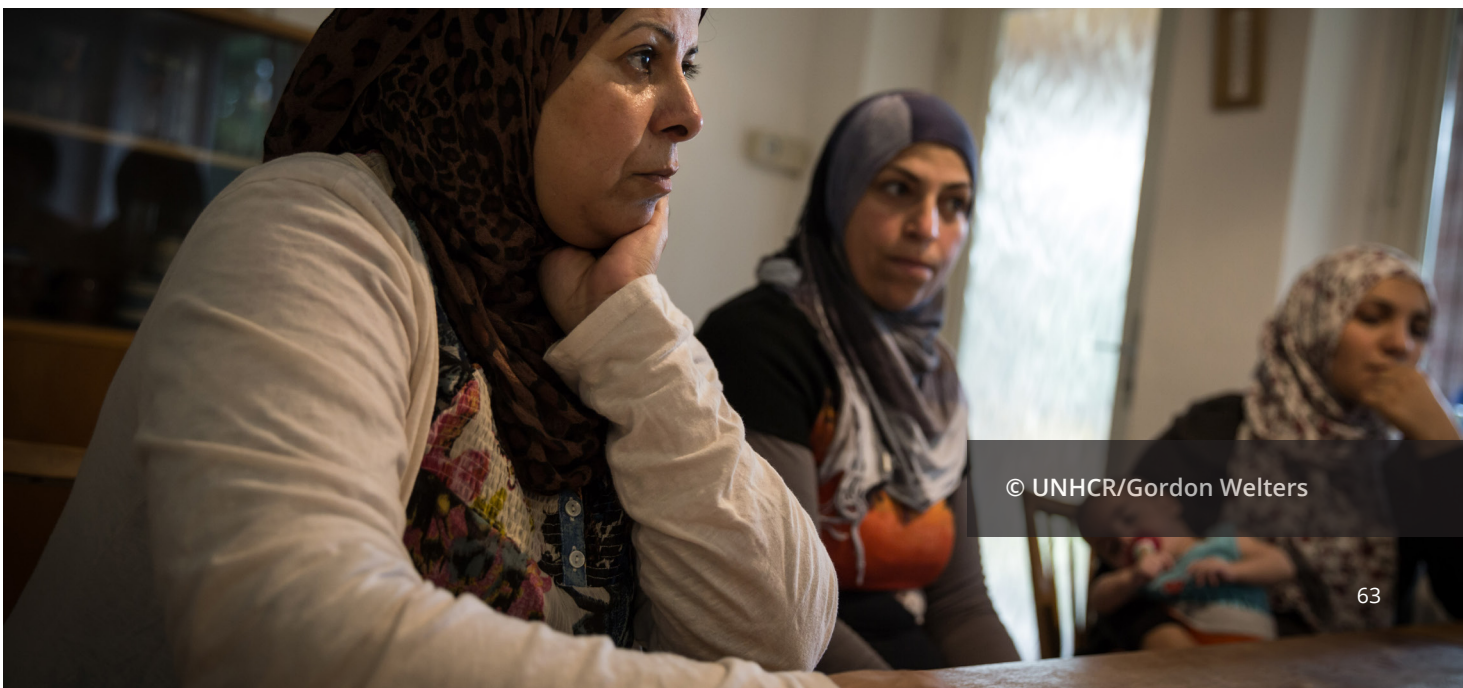
A more comprehensive casework model could assist in addressing these needs through supporting asylum seekers to navigate Australian services and systems, and to overcome barriers to participation in community life (including participation in employment).

The Commission suggests that it may be beneficial to review the SRSS casework model against the models used for other government-funded services designed for humanitarian entrants, such as the *Humanitarian Settlement Program* and *Settlement Grants*.¹⁴⁴

While these programs are designed for humanitarian entrants who are settling in Australia on a long-term basis, their focus on providing practical support, fostering social and economic participation and assisting people to achieve independence is highly relevant to the situation of asylum seekers living in the community on Bridging Visas (particularly in the context of long-term delays in processing, as discussed in [Section 2.4](#)).

Recommendation 17

The Department of Home Affairs should review the casework model under the Status Resolution Support Services program to determine whether it adequately meets the support needs of asylum seekers living in the community on Bridging Visas.





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4 Temporary protection


Support services and entitlements

Refugees on temporary visas do not have access to the same support services and entitlements as other refugees, including

- ✗ Local student fees for tertiary education
- ✗ Higher education loans and Commonwealth-supported places
- ✗ Longer term settlement services


Limited pathways to permanency

Refugees on temporary visas have **limited pathways** to permanent residency in Australia



Settlement outcomes

Temporary status has a **negative impact** on the capacity of refugees to settle successfully in Australia



Mental health

Ongoing uncertainty has a **negative impact** on mental health

4.1 Background

Temporary protection arrangements for refugees were first used in Australia between 1999 and 2008. During this period, Temporary Protection Visas (TPVs) were granted to refugees who had arrived in Australia without visas, primarily by boat. They were valid for up to three years, after which time the visa holder had their refugee claims reassessed. If they were found to be in ongoing need of protection, they could be granted a permanent Protection Visa.

TPVs were reintroduced in 2014 through the Legacy Caseload Act and, like their predecessors, are valid for up to three years. The Legacy Caseload Act also introduced the Safe Haven Enterprise Visa (SHEV), which is valid for up to five years.

The purpose of the SHEV is 'both to provide protection and to encourage enterprise through earning and learning while strengthening regional Australia'.¹⁴⁵ SHEV holders who meet certain 'pathway requirements', related to working or studying in regional areas, may be eligible to apply for a range of other visas, as discussed in further detail below.

An asylum seeker who arrives in Australia without a visa (whether by boat or by plane) and is subsequently determined to be a refugee is now eligible for a TPV or a SHEV only, not a permanent Protection Visa. The vast majority of people affected by the reintroduction of temporary protection arrangements are asylum seekers in the Legacy Caseload.

As at December 2018, 5,280 people in the Legacy Caseload had been granted a TPV and 9,323 had been granted a SHEV.¹⁴⁶

Human rights obligations relevant to temporary protection arrangements include:

- rights to non-discrimination and non-penalisation
- right to the highest attainable standard of health
- rights relating to settlement outcomes (including the rights to work, education and an adequate standard of living, and the rights of particular groups to protection, support and integration assistance).

4.2 Summary

The Commission considers that current temporary protection arrangements discriminate unjustifiably against certain asylum seekers based on their mode of arrival, and may effectively operate as penalties for irregular entry.

The Commission considers that temporary protection arrangements create a significant risk of serious and ongoing mental health issues among refugees in the Legacy Caseload. There is clear evidence that the ongoing uncertainty resulting from temporary protection arrangements contributes to negative mental health outcomes among refugees subject to these arrangements.

While refugees on temporary visas have access to a number of additional entitlements as compared to Bridging Visa holders, they have limited access to support services designed to assist refugees to settle in Australia, which may hamper the full enjoyment of rights relating to settlement outcomes.

The Commission makes recommendations about abolishing temporary protection arrangements; and amending current temporary protection arrangements to mitigate their negative impacts.

4.3 Ongoing uncertainty

(a) 'Permanent temporary' status

Temporary protection arrangements for refugees are not explicitly prohibited under the Refugee Convention or international human rights law. However, UNHCR recommends that such arrangements are best suited to situations where 'individual status determination is either not applicable or feasible' (such as large-scale influxes) and should not be used if the stay becomes prolonged or to discourage people from seeking asylum.¹⁴⁷

UNHCR also emphasises that 'refugees should not be subjected to constant review of their refugee status', and any review of their status should be triggered by 'fundamental' and 'durable' changes in their country of origin, rather than occurring periodically.¹⁴⁸

The temporary protection arrangements used in Australia do not reflect these standards. TPVs and SHEVs are granted to people who have been recognised as refugees after having undergone an individual status determination process. They are granted to people who, by virtue of their identified protection needs, can be expected to remain in Australia for an extended period of time. The protection needs of all TPV and SHEV holders are periodically reviewed, regardless of whether there has been any change in conditions in their country of origin.

Following his mission to Australia in 2016, the Special Rapporteur on the human rights of migrants raised concerns about what he described as the 'permanent temporary' situation of refugees subject to temporary protection arrangements. The Rapporteur advised that 'the unbearable uncertainty of "permanent temporary" situations should be avoided at all costs'.¹⁴⁹

Participants in the Commission's consultation process similarly raised concerns about the ongoing uncertainty faced by TPV and SHEV holders.

In the words of a community leader, 'They are moving from an unstable life to another unstable life, just a little bit longer'. Another participant said:

My own opinion is that basically whether you're on a Bridging Visa or you're on a TPV visa [sic], your status, yes it is regularised but the outcome and the ability to actually start a new life and integrate, and settle, and feel like your journey has begun to come to an end—it's not there. That's the main concern, is actually that it is just prolonging that state of uncertainty.

An especially striking trend in the feedback gathered by the Commission on temporary protection arrangements was the numerous descriptions provided by consultation participants of the negative reactions of asylum seekers upon being informed that they had been granted a TPV or SHEV.

These descriptions—provided in separate consultations, and without participants having been prompted by the interviewer—were cited as evidence that the grant of a TPV or SHEV does not meaningfully resolve the situation of people in the Legacy Caseload.

One legal practitioner, for example, described their 'new experience of people bursting into tears *after* you've told them they've been granted a [Temporary] Protection Visa. Surely that's a moment of celebration. But it's only temporary.' A mental health worker asserted that the typical reaction of people who had been granted a TPV or SHEV was 'very brief elation followed by a realisation that there's no real change'. Another legal practitioner reported:

The visa grant is the end point for us with our clients and where we've been successful, usually that's quite a joyous time ... With TPV/SHEV visa grants, there's none of that. Tell them they've got the visa, it's for the next three to five years, then you'll be assessed again ... It's just deflation. 'I'm still in the process. You'll never get out of it.'

(b) Reassessment process

As was the case under the previous TPV regime, TPV or SHEV holders who are in ongoing need of protection after their initial visa ceases must reapply for another visa.

The Department's website states:

We will consider the information you provide in your new application, together with information provided in your previous application, and other information (including information about the country against which you have claimed protection) available at the time you apply for your subsequent TPV or SHEV. If we need further information or an interview, we will contact you after you lodge your application.¹⁵⁰

The application form for a subsequent TPV or SHEV does not require applicants to provide a detailed statement of protection claims, but instead requests information regarding whether the person's reasons for claiming protection have changed since the grant of their initial visa.¹⁵¹

Nonetheless, a number of details about the reapplication process remain unclear, including:

- the expected timeframes for the reassessment process
- whether decisions made by the Department in relation to subsequent TPV and SHEV grants will be subject to merits review
- whether disadvantaged applicants will have access to PAIS or a similar scheme during the reapplication process
- how family units will be affected in cases where previously dependent children have turned 18 and may no longer be fully dependent on their parents
- processes for ensuring that TPV and SHEV holders do not become unlawful if their visas cease before the reassessment process has been completed.

The Commission notes that the Department recently released a website that provides information about the reassessment process for TPV and SHEV applications.¹⁵² This website contains information that addresses the above queries about the reassessment process, which were the subject of recommendation 18 in this report. While it has now been superseded, the original text of recommendation 18 is noted below for context.

The Commission notes that consideration of the human rights implications of the reassessment process, as outlined on this website, is outside the scope of this report.

(c) Pathways to permanency

In contrast to the first TPV regime, TPVs issued under the current Migration Act no longer provide a pathway to permanent residency. Once their original visa ceases, a TPV holder may only apply for another TPV or a SHEV, not a permanent Protection Visa.¹⁵³

SHEV holders, however, may be eligible to apply for a range of other visas (including some permanent visas) if they meet certain 'pathway requirements'. To meet these requirements, a SHEV holder must be either employed in a designated regional area without receiving certain social security benefits, enrolled and physically attending full-time study in a designated regional area, or a combination of the two, for at least three-and-a-half years.¹⁵⁴

Those who are successful in meeting the pathway requirements become eligible to make applications for certain temporary and permanent migration visas (not including permanent Protection Visas). SHEV holders applying for these visas must meet the standard eligibility criteria and pay any associated visa fees. These requirements may be challenging for SHEV holders to meet.

For example, eligibility for several permanent skilled visas is limited to people who are qualified to work or train in an 'eligible skilled occupation'¹⁵⁵ and have 'competent English'¹⁵⁶ (equivalent to a score of six in the International English Language Testing System).¹⁵⁷

Due to the barriers to accessing tertiary education described in [Section 4.5\(c\)](#) below, SHEV holders may be unable to obtain the necessary competencies to meet these criteria.

Similarly, applicants for permanent family visas must be sponsored by a relative who is an Australian citizen, Australian permanent resident or eligible New Zealand citizen.¹⁵⁸ If a SHEV holder does not have relatives in Australia, or has relatives who hold a temporary visa only, they may be unable to find an appropriate sponsor.

SHEVs therefore may not offer a viable pathway to permanent residency for many, if not most, people in the Legacy Caseload. When the Bill that became the Legacy Caseload Act was first introduced, the then Minister indicated that the SHEV pathway requirements set 'a very high bar to clear', and that SHEVs would likely provide 'a very limited opportunity' for securing permanent residency.¹⁵⁹

(d) Human rights implications

Australia has obligations under article 2(1) of the ICCPR, article 2(2) of the ICESCR and article 2(1) of the CRC to ensure that **everyone can enjoy human rights without discrimination of any kind**; under article 26 of the ICCPR to uphold the **right to freedom from discrimination on any ground**; and under article 2(1) of the CRC to ensure that **children are protected against all forms of discrimination or punishment on the basis of the status and activities of their parents, guardians or family members**.¹⁶⁰

Australia also has an obligation under article 31(1) of the Refugee Convention **not to impose penalties on refugees who enter or are present in Australia without authorisation**.¹⁶¹

Temporary protection arrangements are used only for refugees who arrived in Australia without valid visas and may therefore constitute a form of discrimination based on mode of arrival.

In order for this discrimination to be compatible with Australia's international human rights obligations, it must be in pursuit of a legitimate objective, be rationally connected to that objective and be a reasonable and proportionate means of achieving that objective.¹⁶²

The Statement of Compatibility with Human Rights accompanying the Legacy Caseload Act argued that temporary protection arrangements are ‘a key element of the Government’s border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia’.¹⁶³ The Statement further asserted that temporary protection arrangements are needed to ‘maintain the integrity of Australia’s migration system and encourag[e] the use of regular migration pathways to enter Australia’.¹⁶⁴

Maintaining the integrity of Australia’s migration system and preventing people smuggling are legitimate objectives. However, the use of temporary protection arrangements does not appear to be rationally connected to these objectives.

First, available evidence suggests that temporary visas do not act as an effective deterrent to people smuggling. When TPVs were first introduced in late 1999, the numbers of asylum seekers coming to Australia increased to then record highs during the following two years.¹⁶⁵

More recently, the significant decline in boat arrivals to Australia between 2013 and 2014 occurred *prior* to the reintroduction of TPVs and SHEVs, suggesting that the use of temporary protection arrangements was not a significant factor in this decline.¹⁶⁶

Furthermore, temporary protection arrangements in their present form cannot realistically discourage asylum seekers from attempting dangerous journeys to Australia in the future. The Legacy Caseload includes only those individuals who arrived in Australia by boat before 1 January 2014. All asylum seekers who arrive in Australia by boat from this date onwards will either be denied entry to Australia and returned to their point of departure, or will be subject to third country processing arrangements.

Consequently, future arrivals will never have an opportunity to apply for or be granted a TPV or SHEV. It is improbable that an asylum seeker currently considering whether to attempt a boat journey to Australia would be discouraged from this course of action by measures that cannot apply to them.

The Special Rapporteur on the human rights of migrants has asserted in relation to temporary protection arrangements that ‘this two-tier system, with differentiations in the rights enjoyed by those on full protection visas and those on temporary protection visas, is discriminatory’.¹⁶⁷

The Commission agrees that current temporary protection arrangements discriminate unjustifiably against certain asylum seekers based on their mode of arrival, and may effectively operate as penalties for irregular entry.

The Commission’s primary recommendation in relation to temporary protection arrangements is that TPVs and SHEVs be abolished, and access to permanent Protection Visas be reinstated for all asylum seekers in Australia who are determined to be in need of protection.

This could be achieved through the implementation of Recommendation 1, relating to the repeal of amendments introduced by the Legacy Caseload Act.

If this recommendation is not implemented, the Commission considers that measures should be implemented to ensure that subsequent TPV and SHEV applications are assessed fairly and accurately; and to provide realistic pathways to permanent residency.

Recommendation 18 [superseded]¹⁶⁸

If Recommendation 1 is not implemented, the Department of Home Affairs should publish clear information about the reassessment process for subsequent Temporary Protection Visa and Safe Haven Enterprise Visa applications, including in relation to merits review of negative primary decisions and the provision of funded legal advice to disadvantaged applicants.

Recommendation 19

If Recommendation 1 is not implemented, the Australian Government should grant permanent Protection Visas to all Temporary Protection Visa and Safe Haven Enterprise Visa holders who are determined to be in ongoing need of protection when their current visas expire.

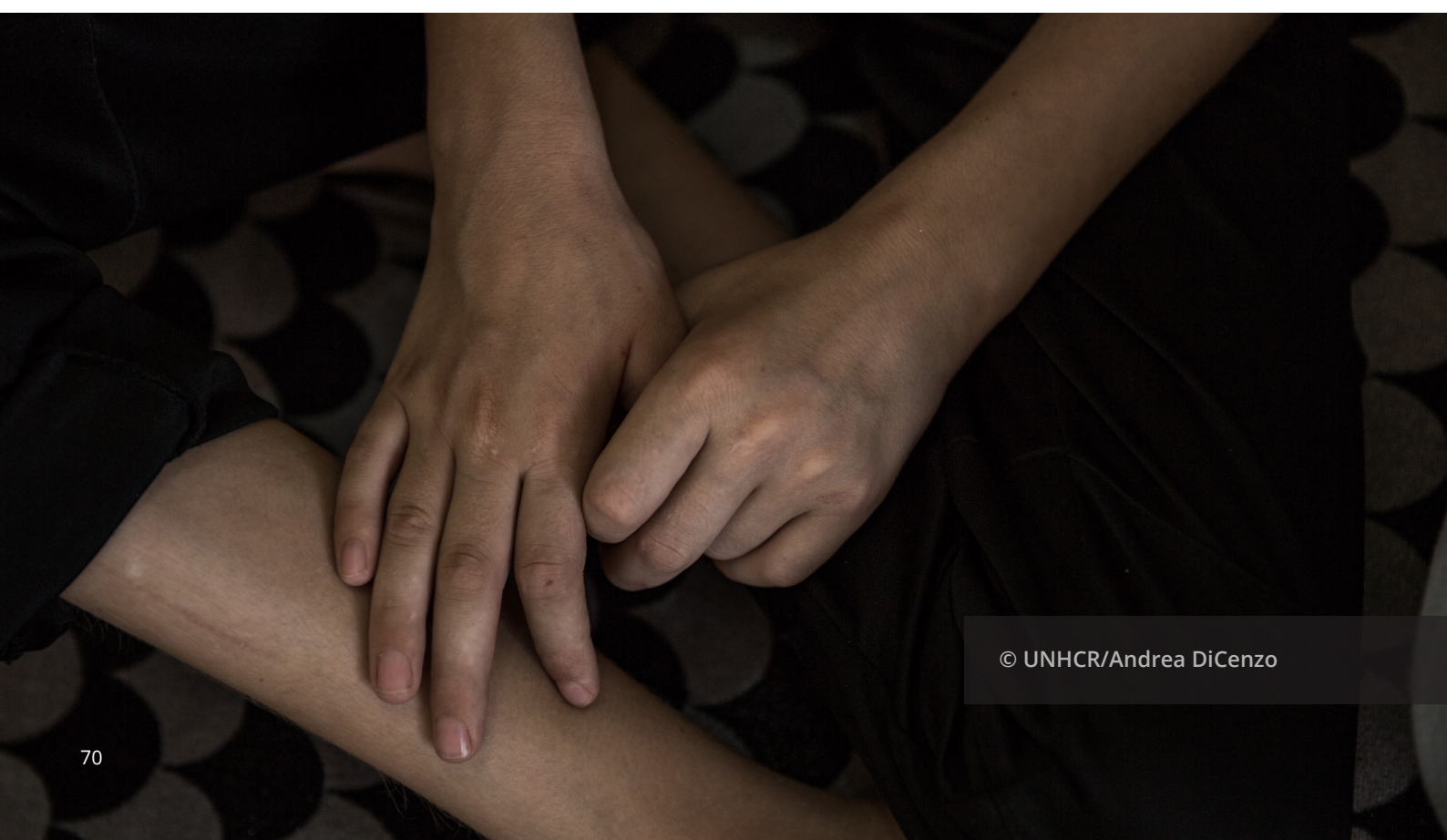
Uncertainty about their future, the inability to make long-term plans and the stress associated with having to reapply for protection (including the anticipatory distress of potentially being returned to the country from which they had fled) caused significant distress and anxiety amongst TPV holders, hampered their capacity to recover from past trauma and resulted in poorer settlement outcomes.¹⁶⁹

Research comparing the mental health outcomes of TPV holders and other humanitarian entrants has also consistently found that temporary visa holders experience poorer mental health outcomes than permanent visa holders.¹⁷⁰

4.4 Mental health

(a) Impact of previous temporary protection arrangements

Numerous studies focusing on people who were granted TPVs between 1999 and 2008 have found that temporary protection arrangements had a detrimental impact on mental health.



'Interminable uncertainty': The mental health impacts of temporary status

A study published in 2006 compared the mental health of Persian-speaking TPV and permanent Protection Visa (PPV) holders attending an early intervention program in Sydney. The study found that both TPV and PPV holders had experienced similar levels of pre-arrival trauma and persecution. However, 'TPV holders exceeded PPV holders on all measures of psychiatric disturbance and mental disability'. TPV status was also 'by far the greatest predictor of PTSD [post-traumatic stress disorder] symptoms'. The study concluded that 'the sequence of post-migration stresses experienced by TPV holders appears to impact adversely on their mental health'.¹⁷¹

Another study, also published in 2006, compared the mental health of Iraqi Mandaean refugees who held TPVs and PPVs. The study found that TPV holders had experienced more pre-arrival trauma than PPV holders, which may have been due to increasing persecution of Mandaeans in Iraq over the relevant time period. However, TPV holders also reported experiencing more post-arrival living difficulties (including fear of repatriation and family separation) than PPV holders, as well as higher rates of depression, PTSD and disability.¹⁷²

A study published in 2009 compared the mental health outcomes of Iraqi refugees who had either arrived in Australia as asylum seekers and been granted TPVs, or been resettled in Australia from overseas on permanent humanitarian visas. The study found that the two groups, 'in broad terms, had similar pre-arrival refugee experiences'. However, there was 'a highly significant difference between the groups in their reporting of psychological distress and their wellbeing'.¹⁷³

Specifically, the study found that TPV holders 'suffered a higher prevalence of symptoms consistent with clinical depression, higher mean psychological distress and lower sense of wellbeing' compared to refugees on permanent humanitarian visas. Feedback provided by TPV holders also tended to focus 'on the pervasive and detrimental impact of the interminable uncertainty about their future, social isolation, anger and sense of injustice'.¹⁷⁴

Another study published in 2010 compared the mental health of Iraqi Mandaean refugees on TPVs and permanent visas. Data was gathered through two surveys, conducted two years apart. During this time, most of the respondents transitioned from TPVs onto permanent visas. The study found that a 'change in visa status from TPV to PR [permanent residency] was associated with substantial reductions in PTSD and depression symptoms'. This change contrasted with 'the stability in the mental health of participants who held permanent visas over the time period'.¹⁷⁵

The Commission's first National Inquiry into Children in Immigration Detention, conducted in 2004, considered the impacts of TPVs on children. It found that granting temporary protection was more likely to compound mental health problems for these children than facilitate their rehabilitation and integration into Australian society.

The Inquiry concluded that the use of TPVs for refugee children had resulted in breaches of those children's rights to mental health, maximum possible development and recovery from past torture and trauma, and of Australia's obligations to address the best interests of the child as a primary consideration.¹⁷⁶

A Senate inquiry conducted in 2006 concluded in relation to the TPV regime that 'there is little real evidence of its deterrent value ... but there is no doubt that its operation has had a considerable cost in terms of human suffering'.¹⁷⁷

(b) Human rights implications

Australia has obligations under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the **right to the highest attainable standard of health**.¹⁷⁸

The UN Committee on Economic, Social and Cultural Rights advises that these obligations require states not only to take measures to ensure access to adequate health care services, but also to 'refrain from interfering directly or indirectly with the enjoyment of the right to health'.¹⁷⁹ This includes avoiding actions, laws and policies that 'are likely to result in bodily harm, unnecessary morbidity and preventable mortality'.¹⁸⁰

There is clear evidence that the ongoing uncertainty resulting from temporary protection arrangements contributes to negative mental health outcomes among refugees subject to these arrangements. Based on these past experiences, it can be expected that TPVs and SHEVs may have significant negative impacts on the mental health and wellbeing of refugees.

These impacts may be particularly pronounced for people in the Legacy Caseload, who have already experienced a prolonged period of uncertainty due to delays in processing their claims, and many of whom already face significant mental health issues (as described in [Section 2.4](#)).

In addition, as TPVs and SHEVs do not provide clear pathways to permanent residency, the mental health impacts of temporary protection arrangements in their current form may be even more significant than under the previous TPV regime.

The Commission considers that temporary protection arrangements create a significant risk of serious and ongoing mental health issues among refugees in the Legacy Caseload, and therefore interfere with their enjoyment of the highest attainable standard of health.

The Commission reiterates its recommendation that TPVs and SHEVs be abolished (as per Recommendation 1, relating to the repeal of amendments introduced by the Legacy Caseload Act).

4.5 Settlement outcomes

(a) Impact of temporary status

Due to delays in processing the claims of people in the Legacy Caseload, it is only relatively recently that TPVs and SHEVs have been granted to refugees in significant numbers. It is therefore difficult to assess the impact of temporary protection arrangements on the long-term settlement outcomes of people in the Legacy Caseload.

However, studies conducted during the previous TPV regime found that temporary status had a negative impact on the capacity of refugees to settle successfully in Australia.¹⁸¹

A 2006 study, for example, concluded that ‘the limitations and uncertainties of the TPV has resulted in lowered standards of living and the marginalisation for those on TPVs as compared to those in the rest of the community’.¹⁸² The Commission found in 2004 that ‘the uncertainty faced by TPV holders has a direct impact on their capacity to settle in the Australian community’.¹⁸³

Participants in the Commission’s consultation process similarly expressed concern that the uncertainty resulting from ongoing temporary visa status would impede the capacity of TPV and SHEV holders to ‘put down roots’ in Australia and make long-term plans for their future.

A number of participants reported that, despite this challenge, some TPV and SHEV holders demonstrated considerable resilience and may be able to achieve positive settlement outcomes. In general, however, ongoing uncertainty was highlighted as a significant barrier to successful settlement.

As stated by one support worker, temporary protection arrangements provide ‘a breather, if anything, but it’s not an opportunity to really commit to a life in Australia and that’s something that people articulate a lot, that they’re wanting’. A mental health expert said that ‘To be settled as a human being and to be able to function and have a flourishing life, you need certainty, safety, security. Those things are beyond reach [for TPV and SHEV holders]’.

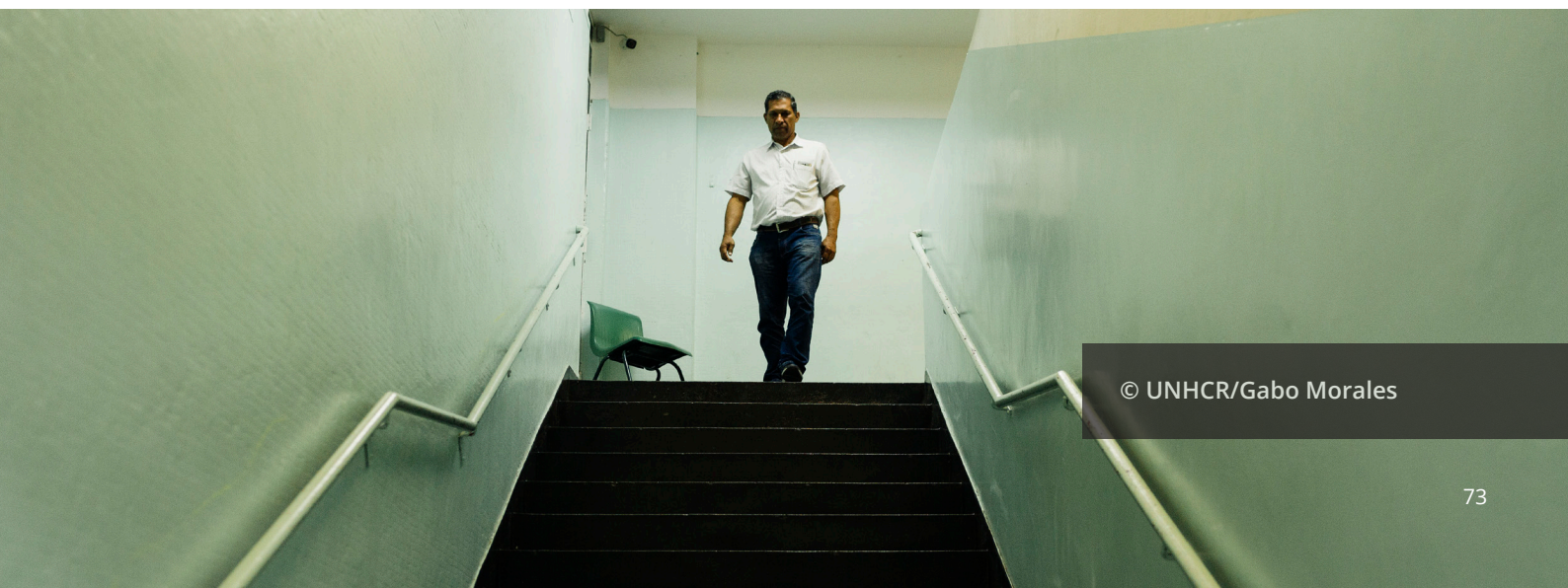
In addition, it is likely that many of the hallmarks of successful long-term settlement—such as entering into a long-term rental agreement, undertaking education or training, and securing stable employment—will be more difficult for TPV and SHEV holders to achieve by virtue of their temporary status. As described by a legal practitioner:

People getting into school, people getting funding for things, people getting jobs, all of those sorts of integration aspects that people should have the right to do living in a community are being undermined by this idea that they’re on these short-term visas and have no security.

The UN Committee on the Elimination of Racial Discrimination has noted that SHEV holders may be at heightened risk of workplace exploitation. In its 2017 concluding observations on Australia, the Committee expressed concern that migrant workers on temporary visas (including SHEV holders) may refrain from making complaints about working conditions due to ‘heavy reliance on their employers, combined with a lack of knowledge about their rights and entitlements’.¹⁸⁴

(b) Support services and entitlements

Refugees who hold TPVs and SHEVs do not have access to the same support services and entitlements as refugees on permanent humanitarian visas. The table below summarises the entitlements available to each group of visa holders.



Access to support services and entitlements by humanitarian visa holders

Support service or entitlement	Offshore resettlement (200-204)	Onshore permanent Protection (866)	TPV (785) and SHEV (790)
EDUCATION			
Free primary and secondary education ¹⁸⁵	✓	✓	✓
Local student fees for tertiary education ¹⁸⁶	✓	✓	✗
Higher education loans and Commonwealth-supported places ¹⁸⁷	✓	✓	✗
English language tuition ¹⁸⁸	✓	✓	✓
EMPLOYMENT			
Work rights ¹⁸⁹	✓	✓	✓
Employment support services ¹⁹⁰	✓	✓	✓
SOCIAL SERVICES			
Medicare ¹⁹¹	✓	✓	✓
Social security*	✓	✓	—
On-arrival settlement services**	✓	—	—
Longer term settlement services ¹⁹²	✓	✓	✗
<p>*TPV and SHEV holders are eligible for a limited range of payments and primarily receive income support through the Special Benefit payment.¹⁹³</p> <p>**Holders of Protection Visas, TPVs and SHEVs are only eligible for the Specialised and Intensive Services component of the on-arrival Humanitarian Settlement Program, subject to the approval of the relevant Department.¹⁹⁴</p>			

TPV and SHEV holders have access to a wider range of services than was the case under the previous TPV regime. For example, they are able to access English language tuition under the Adult Migrant English Program. Nonetheless, TPV and SHEV holders have limited access to support services designed to assist refugees to settle in Australia.

For example, people who are receiving support under Band 6 of the SRSS program must transition out of the program within ten business days of being notified that they have been granted a TPV or SHEV.¹⁹⁵ A number of participants in the Commission's consultation process claimed that this very short transition period did not allow sufficient time to provide referrals and other forms of transition support, resulting in a sudden 'drop off' in services.

As described by a mental health worker:

The moment the clients get their Temporary Protection Visas, all of a sudden, all the other services they pull away ... Everyone takes off and you find that everything becomes overwhelming and [the client] becomes overwhelmed. As if you're trying to help someone who is drowning.

Limited access to transition support is particularly significant for TPV and SHEV holders in light of the fact that they do not have access to the on-arrival settlement services typically available to other humanitarian entrants.

While most people in the Legacy Caseload have been living in the community for long periods of time, many have not been in a position to 'settle' due to their uncertain status. As explained by a support worker:

Someone can have been in the community for two or three years ... but that does not mean that they actually have settled, because their life has actually been still and paused because they are waiting for a visa. So in a lot of areas, they have not progressed, settlement has not actually happened successfully.

People granted a TPV and SHEV may therefore still encounter new settlement challenges despite having resided in Australia for several years. While some TPV and SHEV holders may not require intensive casework assistance, the lack of any 'point of contact' may present a significant barrier for these groups when confronting new challenges or engaging with unfamiliar aspects of life in Australia.

One support worker argued:

They just need someone to go to, to help with Centrelink forms or to explain English classes, just somewhere to go when they've got a question to ask, someone who can advise and offer that support. They're going around to various agencies or they're not going to anyone at all. That's a big issue at the moment ... They still need settlement support.

In addition, TPV and SHEV holders may not be eligible for a range of mainstream support services that would otherwise be available to humanitarian entrants, due to their temporary visa status.

For example, eligibility for services under the National Disability Insurance Scheme (NDIS) is restricted to citizens, permanent residents and holders of certain Special Category Visas.¹⁹⁶ Holders of offshore humanitarian visas and permanent Protection Visas would therefore be eligible to access services under the Scheme, but TPV and SHEV holders would not.

Limited access to services may lead to an increase in demand for alternative forms of support provided by non-government organisations and established refugee communities. Research conducted during the previous TPV regime, for example, found that gaps in service provision for TPV holders had placed increased pressure on non-government organisations and informal support community support networks.¹⁹⁷

Navigating complex systems without support: Bassam

Bassam arrived in Australia by boat and has been living in the community since 2012. He is married and has a young child. Bassam is well-educated and speaks English fluently.

In early December 2016, Bassam's SRSS caseworker told him that he was no longer eligible for the SRSS program because he had been granted a TPV. Bassam had received verbal confirmation of the visa grant from his lawyer, but had no documentation to demonstrate that he had been granted a TPV.

Within days, Bassam stopped receiving income support under the SRSS program. He had not been told that he needed to lodge an application with Centrelink in order to continue receiving income support, and did not know how to apply.

Bassam eventually applied for the Special Benefit payment. The processing of his application was delayed after Centrelink misplaced some of Bassam's information. As a result, Bassam's family was left without income for a considerable period of time. Bassam borrowed money in order to meet rental payments and living expenses.

In mid-January 2017, Bassam and his wife began receiving the Special Benefit payment. Due to an error in the processing of their application, the couple did not receive additional income support for their son. The child's name was also mistakenly left off the family's Health Care Card.

Bassam has tried to notify Centrelink of these mistakes. However, he has found it challenging to complete the complex Centrelink forms and finds letters from Centrelink difficult to understand. He has also experienced difficulty understanding the reporting requirements for Special Benefit recipients, which are significantly different from the SRSS reporting requirements.

(c) Tertiary education

TPV and SHEV holders are permitted to undertake tertiary study in Australia. However, as TPV and SHEV holders are considered to be international students, they must pay far higher fees than local students and are ineligible for higher education loans or Commonwealth-supported places. As a result, tertiary education may be unaffordable for many TPV and SHEV holders.

Affordability of tertiary education is likely to present a particularly significant challenge for young people on TPVs and SHEVs who are leaving high school. As argued by a mental health worker who participated in the Commission's consultation process:

For young people out of school age, beyond compulsory school age, it is particularly bleak because there is no access to higher education unless they pay full fees or can access a scholarship. So their training and education options are severely limited ... Young people at that stage are particularly disadvantaged.

Some tertiary education institutions provide scholarships, subsidised places and other forms of support to assist TPV and SHEV holders to access tertiary education.¹⁹⁸ However, as these initiatives are limited in number and are not offered by all institutions, it is unlikely that they will be sufficient to meet the needs of all TPV and SHEV holders seeking to engage in tertiary education.¹⁹⁹

In addition, TPV and SHEV holders are not eligible for social security payments designed specifically for students. Those who are eligible to receive the Special Benefit payment can only undertake tertiary study while continuing to receive income support in limited circumstances.

For example, Special Benefit recipients may receive approval to undertake full-time vocational short courses of less than 12 months duration, but only if it is likely to lead to an early employment outcome. Tertiary studies at the Bachelor level or higher generally would not be approved, and under no circumstances can full-time study of more than 12 months duration be approved.²⁰⁰

A recipient of Special Benefit therefore cannot continue to receive the payment if undertaking a course of study for longer than 12 months. Even in cases where TPV and SHEV holders manage to obtain a scholarship or pay tuition fees, income support restrictions may effectively preclude their participation in tertiary education.

(d) Limitations of regional settlement

There have been many positive examples of regional settlement in Australia. An evaluation of an initiative to settle Karen refugees in the regional town of Nhill in Victoria, for example, found that refugee settlement had positive social and economic impacts both for the refugees themselves and the local community.

The evaluation concluded that the availability of employment had been the single most important factor in ensuring the success of the settlement initiative. However, it emphasised that other factors had also played a critical role:

Without the right combination of leadership in both communities; careful preparation of both the host and the resettling Karen communities for the changes they were about to experience; consideration of the degree of 'cultural adjustment' that would be required; and attention to practical matters such as accommodation and the availability of a settlement support services, the resettlement of the Karen would not have been the success story that it is today.²⁰¹

Similarly, a study focusing on the settlement of refugees in Rockhampton, Queensland, identified several factors that were crucial to the success of refugee settlement in the area. These included the availability of employment opportunities, strong partnerships with the local community (including businesses), a history of welcoming migrant workers to the region and the availability of local settlement services.²⁰²

Feedback from participants in the Commission's consultation process suggests that these conditions may not necessarily be met in the case of SHEV holders who move to regional areas in order to meet the pathway requirements.

Several participants highlighted the potential pitfalls of encouraging increased regional settlement without considering its implications for long-term settlement outcomes, or ensuring that the local community is adequately prepared to support refugee settlement.

For example, some participants reported that many people in the Legacy Caseload already had significant support networks or investments (such as business ventures) in metropolitan areas. It was felt that in these circumstances, relocating to a regional area in order to meet the SHEV pathway requirements may hinder rather than facilitate the achievement of positive settlement outcomes.

A mental health worker provided the following example:

I had one client who was actually quite successful in [Australian city]. He started his own business. When he got a SHEV, that brought up the issue of, he either has to give up the chance of getting permanent residency with a SHEV, and maintain his business ... or close down his business, and that would involve dismissing four staff members who were Australian citizens, and then trying to start it up again in [a regional area], and hoping he can produce enough and hoping that this might get him through in three-and-a-half to five years.

Participants also raised concerns that some regional areas may not have the capacity to provide adequate settlement assistance to people from refugee backgrounds, including relevant employment opportunities and specialist support services (such as torture and trauma rehabilitation services).

(e) Human rights implications

Australia has an obligation under articles 6(1) and 7 of the ICESCR to uphold the **rights to work and to just and favourable conditions of work**.²⁰³ Australia also has an obligation under articles 17, 18 and 19 of the Refugee Convention **to treat refugees at least as favourably as non-citizens in the same circumstances with regard to employment**.²⁰⁴

Australia has obligations under article 11(1) of the ICESCR and article 28(1) of the CRPD to uphold the **right to an adequate standard of living**, including adequate food, clothing and housing, and to the continuous improvement of living conditions.²⁰⁵ Australia also has obligations under article 27(1) of the CRC to ensure that **children have a standard of living adequate for their physical, mental, spiritual, moral and social development**.²⁰⁶

Australia has obligations under article 13 of the ICESCR, article 28 of the CRC and article 24(1) of the CRPD to uphold the **right to education**, including through making higher education 'equally accessible to all, on the basis of capacity, by every appropriate means'; and under article 22 of the Refugee Convention to **treat refugees in the same manner as citizens with regard to primary education and at least as favourably as non-citizens in the same circumstances with regard to education other than primary education**.²⁰⁷

In addition, several treaties impose specific obligations to support the settlement of refugees and promote their recovery from past trauma. These include:

- article 34 of the Refugee Convention, which obliges states to **facilitate as far as possible the assimilation and naturalisation of refugees**²⁰⁸
- article 11 of the CRPD, which obliges states to **take all necessary measures to ensure the protection and safety of people with disabilities in situations of risk**, including humanitarian emergencies²⁰⁹
- articles 22(1) and 39 of the CRC, which oblige states to **ensure that a child who is seeking or has refugee status receives appropriate protection and humanitarian assistance; and to promote the physical and psychological recovery and social reintegration** of a child victim of torture or any other form of cruel, inhuman or degrading treatment or punishment.²¹⁰

The Commission notes that TPV and SHEV holders have access to a range of services and entitlements—including an entitlement to work, access to certain social security benefits, and access to free primary and secondary education for school-aged children—that facilitate the enjoyment of the rights outlined above.

Nonetheless, the Commission considers that temporary visa status and restrictions on access to certain entitlements may hamper the full enjoyment of these rights by TPV and SHEV holders. Specifically:

- Temporary visa status may prevent TPV and SHEV holders from securing stable employment and maintaining an adequate standard of living, while the requirement to maintain employment in order to meet the SHEV pathway requirements (and consequent risk of exploitation) may interfere with their enjoying just and favourable conditions of work.

- Lack of access to reduced tuition fees, higher education loans and Commonwealth-supported places present significant barriers to tertiary education for TPV and SHEV holders.
- Lack of viable pathways to permanent residency may prevent TPV and SHEV holders from being able to settle in Australia on a long-term basis, obtain Australian citizenship, or enjoy full protection in Australia on an equal basis with other humanitarian entrants.

Restricting the rights of temporary residents in relation to employment, tertiary education and long-term settlement would not necessarily lead to breaches of Australia's international obligations, provided that the restrictions are for a legitimate aim and are reasonable and proportionate to the achievement of that aim.

In the case of TPV and SHEV holders, however, these restrictions do not appear to be reasonable or proportionate. As noted in [Section 2.4](#), all people in the Legacy Caseload have been residing in Australia for at least five years, and in some cases for considerably longer. If they are granted a TPV or SHEV, they will be entitled to remain in Australia for a further three to five years.

Additionally, given that the majority of TPV holders under the previous TPV regime were eventually granted permanent visas,²¹¹ it can be expected that a significant proportion of TPV and SHEV holders may continue to be eligible for protection in Australia after their initial visas expire.

Furthermore, TPV and SHEV holders—by virtue of being refugees—are not able to return to or access support from their country of origin.

Given the length of their residence in Australia, and inability to access alternative supports from their country of origin, the Commission considers that TPV and SHEV holders should have access to the same services and entitlements as permanent Protection Visa holders. This could be achieved through the implementation of Recommendation 1, which proposes the repeal of amendments introduced by the Legacy Caseload Act.

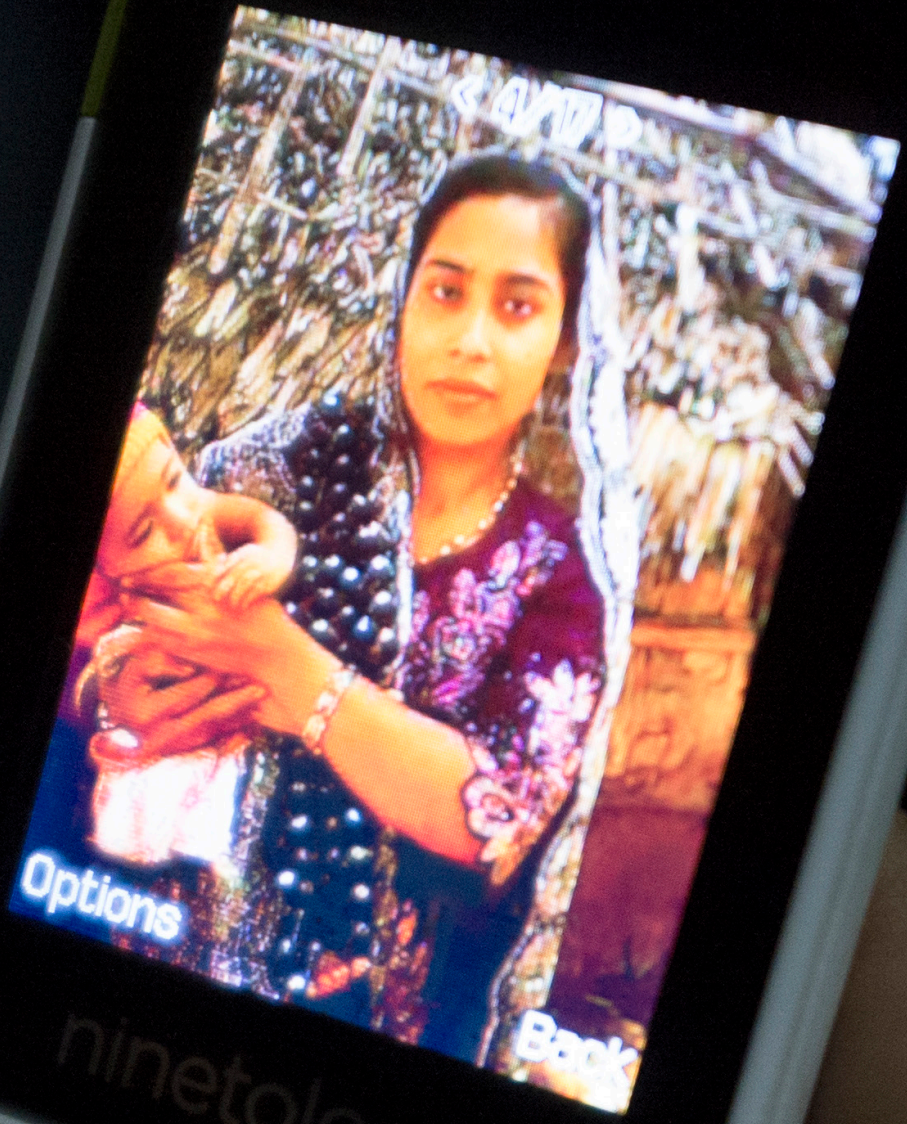
If this recommendation is not implemented, TPV and SHEV holders should be granted access to additional services and entitlements so as to alleviate the potentially negative impacts of temporary protection arrangements on settlement outcomes.

Recommendation 20

If Recommendation 1 is not implemented, the Australian Government should ensure that Temporary Protection Visa and Safe Haven Enterprise Visa holders have access to the same services and entitlements as permanent Protection Visa holders, including settlement services, tertiary education assistance schemes, and the full range of income support payments administered by the Department of Human Services.

Recommendation 21

If Recommendation 1 is not implemented, the Department of Home Affairs should extend the timeframe for exiting people from the SRSS program after the grant of a Temporary Protection Visa or Safe Haven Enterprise Visa, to allow adequate time for the provision of transition support.



ninetology

5 Family separation



Restrictions on family reunion opportunities

Asylum seekers who arrived by boat and/or without valid visas have limited or no opportunities for family reunion

Prolonged family separation can have a **negative impact on**



Mental health
Settlement outcomes
Family wellbeing



5.1 Background

Family separation is a common consequence of forced displacement. Family members may become separated from each other either accidentally or intentionally during the course of flight, and may face barriers to reunification even after protection has been secured.

For refugees settling in Australia, including both people resettled from overseas and people who arrived as asylum seekers, family separation remains a consistent and pressing concern.²¹²

For people in the Legacy Caseload, however, the challenges associated with family separation are magnified due to restrictions on family reunion opportunities.

Within this report, the term 'family' is used in a general sense to refer to a person's immediate family members—that is, their partner and children or, in the case of children, their parents—as well as other relatives with whom they have a relationship of dependency (physical, financial, psychological or emotional).²¹³

Human rights obligations relevant to restrictions on family reunion opportunities include:

- right of families to protection and assistance
- consideration of the best interests of the child; and rights of the child to protection and care, to know and be cared for by their parents, and to have applications for family reunification treated in a positive, humane and expeditious manner
- right to freedom from arbitrary interference with family
- rights to non-discrimination and non-penalisation
- right to the highest attainable standard of health
- rights relating to settlement outcomes (including the rights to work, education and an adequate standard of living, and the rights of particular groups to protection, support and integration assistance).

5.2 Summary

The Commission acknowledges that, in most cases, the initial cause of family separation for people in the Legacy Caseload was the experience of forced displacement, rather than Australian policy settings. However, restrictions on family reunion opportunities will prolong family separation for this group in a manner that would not occur for other humanitarian entrants to Australia.

Many people in the Legacy Caseload lack access to any viable opportunity for family reunion, and consequently face the prospect of remaining separated from their families—including minor children—on an indefinite basis.

The Commission therefore considers that the restrictions on access to family reunion opportunities affecting people in the Legacy Caseload may interfere with Australia's obligations to afford the 'widest possible' protection and assistance to the family.

The blanket application of family reunion restrictions to all asylum seekers who arrived by boat at a particular point in time does not allow for adequate consideration of the best interests of children, or of whether the impacts of these measures are reasonable in the circumstances.

Restrictions on family reunion opportunities that lead to prolonged and indefinite family separation may also hamper the full enjoyment of rights relating to settlement outcomes, and create a potential risk of constructive *refoulement*.

The Commission makes recommendations about harmonising access to family reunion opportunities among humanitarian entrants; removing travel restrictions; and providing exemptions from family reunion restrictions for vulnerable children.

5.3 Restrictions on family reunion opportunities

(a) Eligibility criteria

There are several avenues under Australia's Refugee and Humanitarian Program through which people in Australia can seek to reunite with relatives living overseas who are in humanitarian need:

- 'split family' provisions, which allow humanitarian visa holders in Australia to propose their immediate family members (that is, their partner and children or, in the case of a child, their parents) for resettlement²¹⁴

- the Special Humanitarian Program, which allows eligible people and organisations in Australia to propose a person overseas for resettlement, with applications prioritised on the basis of the closeness of the relationship between the proposer and the person being proposed²¹⁵
- the Community Support Program, which allows individuals, communities and businesses to propose humanitarian visa applicants for resettlement through an approved proposing organisation. Proposers are required to pay substantial application and processing fees and demonstrate that they can support the applicant to achieve financial self-sufficiency within their first year in Australia. Applicants must also meet a range of eligibility criteria relating to their capacity to become financially self-sufficient within their first year in Australia.²¹⁶

People who hold a permanent Protection Visa or Resolution of Status visa, regardless of their mode of arrival in Australia, are considered the lowest processing priority for family reunion applications under the Refugee and Humanitarian Program, other than in exceptional circumstances.²¹⁷ They must also meet additional eligibility criteria.²¹⁸

TPV and SHEV holders and people who arrived in Australia by boat on or after 13 August 2012 are not eligible to propose relatives for resettlement under the Refugee and Humanitarian Program.²¹⁹

Outside of the Refugee and Humanitarian Program, the Family stream of the Migration Program offers an additional pathway for family reunification. People applying for Family stream visas must be sponsored by a relative in Australia. Sponsors must be either Australian citizens, Australian permanent residents or eligible New Zealand citizens.²²⁰

Applications for Family stream visas lodged by permanent residents who arrived in Australia by boat receive the lowest processing priority, unless there are special circumstances of a compassionate nature or other compelling reasons.²²¹

TPV and SHEV holders are ineligible to act as sponsors for Family stream visas, as they do not hold Australian citizenship or residency.

As a result of these eligibility restrictions, the majority of people in the Legacy Caseload have no avenues through which to reunite with relatives (including immediate family members) who did not accompany them to Australia.

For the small number of people who are eligible to propose relatives for resettlement under the Refugee and Humanitarian Program or apply for Family stream visas, processing priorities may significantly delay the progress of family reunion applications.

Due to the lack of viable avenues for reunification, people in the Legacy Caseload are likely to face prolonged and indefinite separation from their families. Even those who are able to eventually secure permanent residency may remain separated from their families for many years before reunification becomes possible.

As described by a migration agent who participated in the Commission's consultation process, some people in the Legacy Caseload will be 'looking at a ten to 12-year gap between when they left their wife and kids and when they're going to be in a position to actually bring them here'.

Prolonged family separation: Ahmad Khan

Ahmad Khan fled his country of origin after his life was threatened and his family home attacked by an extremist group, injuring his children. Along with his wife and five children, he travelled to a neighbouring country to seek asylum.

However, Ahmad Khan discovered that the same extremist group was also operating in this country, and feared that his family would be in ongoing danger. His children were not able to leave the house to attend school due to fears that they would be targeted.

Ahmad Khan decided to travel to Australia by boat to seek asylum. He arrived in 2012 and was released from detention onto a Bridging Visa. After living in the Australian community for three years, Ahmad Khan was invited to apply for refugee status. He decided to apply for a SHEV in the hope that he would be able to meet the pathway requirements and secure a permanent visa.

If Ahmad Khan is granted a SHEV, it will take a minimum of three-and-a-half years for him to meet the pathway requirements. If he is successful in meeting these requirements, he will have the opportunity to apply for a range of permanent visas.

If he is able to meet the eligibility criteria for one of these visas and secure permanent residency, Ahmad Khan's family will be able to apply for a visa under the Family stream of the migration program. As he arrived in Australia by boat, any application for a Family stream visa lodged by Ahmad Khan will receive the lowest processing priority.

Ahmad Khan has now been separated from his family for six years. Taking into account the time required to meet the SHEV pathway requirements and apply for subsequent visas, it is likely that Ahmad Khan's family will be separated for at least a decade before having the opportunity to reunite.

Ahmad Khan's youngest child was a baby when he left for Australia. By the time he is able to reunite with his family, she may be a teenager.

(b) Travel restrictions

In most circumstances, holders of a Bridging Visa E, TPV or SHEV are unable to retain their visas if they travel outside Australia. A Bridging Visa E and a TPV or SHEV granted before 16 December 2014 will cease if its holder leaves Australia.²²²

TPV and SHEV holders whose visas were granted on or after 16 December 2014 are subject to travel condition 8570, under which they can only travel outside Australia if there are 'compassionate or compelling circumstances' justifying the travel, and the travel has been approved in writing.²²³ Those who travel outside Australia without approval will breach condition 8570 and their visa may be considered for cancellation.²²⁴

Permanent Protection Visa holders, by contrast, may travel outside Australia (except to their country of origin) without breaching the conditions of their visa. They can also seek approval to travel to their country of origin if there are compassionate and compelling circumstances justifying their travel (such as to visit a close relative who is seriously ill or dying, or to attend the funeral of a close relative).²²⁵ TPV and SHEV holders cannot seek approval for travel to their country of origin in any circumstances.²²⁶

In light of their inability to propose their family members for resettlement in Australia, overseas travel may provide the only means through which TPV and SHEV holders can have face-to-face contact with their relatives, whom in many cases they have not seen in person for several years. However, unless this is considered to be a sufficiently 'compassionate and compelling' reason for overseas travel, condition 8570 may prevent TPV and SHEV holders from being able to visit relatives overseas.

(c) Separation resulting from policy settings

In addition to the specific restrictions described above, changes in policy settings affecting asylum seekers who arrived in Australia by boat may also result in cases of family separation.

This may occur, for example, where members of the same family unit arrived in Australia on different dates, and Australian policy settings changed in the interim. This could result in some members of the family being able to obtain permanent residency while others are eligible for temporary protection only; or in some members being permitted to remain in Australia for processing of their asylum claims while others are subject to third country processing.

At present, there do not appear to be viable avenues through which families in these situations can reunite or harmonise their status. During the Commission's consultation process, it was reported that family separation in these circumstances can cause significant distress, both due to the fact of separation itself and due to concern about the welfare of relatives in vulnerable situations (such as those living in difficult circumstances in Nauru or Papua New Guinea).

Australia's resettlement arrangement with the United States—whereby people subject to third country processing who are found to be refugees can apply for resettlement in the United States²²⁷—could lead to further cases of family separation.

One participant in the Commission's consultation process provided the example of a family in which some members had obtained residency in Australia while others had been resettled in the United States, noting that there did not appear to be clear avenues through which all members of the family could secure residency in the same country.

The UN Committee on Economic, Social and Cultural Rights and the Special Rapporteur on the human rights of migrants have both expressed concern about family separation resulting from changes in policy, particularly in relation to third country processing.²²⁸

(d) Separated children

Asylum seeker and refugee children who are separated from their parents are often particularly vulnerable. A set of interagency guiding principles on unaccompanied and separated children, developed by UNICEF, UNHCR and several leading humanitarian organisations, notes that 'Children separated from their parents and families because of conflict, population displacement or natural disasters are among the most vulnerable.'²²⁹

The principles advise that unaccompanied and separated children should be reunited with their parents or guardians 'as quickly as possible'.²³⁰ However, the restrictions on family reunion opportunities described above apply equally to adults and children. There are no specific provisions or exceptions for unaccompanied, separated or other vulnerable children.

During the Commission's consultation process, several participants raised concerns that restrictions on family reunion opportunities may have particularly significant implications for children in the Legacy Caseload who are separated from one or both of their parents.

Some highlighted the vulnerable situation of young people who had arrived as unaccompanied children and now faced the prospect of settling in Australia without the support of their families. Others provided examples of cases where children with a parent in Australia were living in highly vulnerable situations overseas (including cases in which the child's other parent had passed away) but had no option to reunite with their parent in Australia.

(e) Human rights implications

Australia has obligations under articles 23(1) of the ICCPR and 10(1) of the ICESCR to **afford protection and assistance to the family as the natural and fundamental group unit of society**.²³¹ The ICESCR further stipulates that the protection and assistance provided to families should be the 'widest possible', and that this obligation is of particular significance when families are established and while they are responsible for the care and education of dependent children.²³²

The UN Human Rights Committee has affirmed that article 23 of the ICCPR places positive obligations on States Parties to 'adopt legislative, administrative and other measures' to ensure the protection provided for in that article.²³³ The Committee has further stated:

The right to found a family implies, in principle, the possibility to procreate and live together ... the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.²³⁴

The Refugee Convention does not contain a specific right to family reunification. However, family unity is considered to be a central component of refugee protection. The UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which was convened to complete the drafting of the Refugee Convention, recommended that governments

take the necessary measures for the protection of the refugee's family, especially with a view to: ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country; the protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.²³⁵

UNHCR has advised that separated refugee families 'who have no other country ... [in which] to lead a normal family life together should be entitled to family reunion in the country of asylum or resettlement', and that family reunion should occur 'with the least possible delay'.²³⁶

Several conclusions adopted by UNHCR's governing body, the Executive Committee, have also emphasised the importance of family reunification for refugees and of measures to support the reunification of refugee families, including the adoption of 'liberal criteria' for the admission of family members.²³⁷

In relation to children, Australia has an obligation under article 3 of the CRC to **ensure that in all actions concerning children, the best interests of the child be a primary consideration**; and to 'take all appropriate legislative and administrative measures' to '**ensure the child such protection and care as is necessary for his or her wellbeing**'.²³⁸

Australia also has obligations under article 7(1) of the CRC to **ensure 'as far as possible' that the child can 'know and be cared for by his or her parents'**; and under article 10(1) of the CRC to **treat applications by a child or their parents for family reunification in a positive, humane and expeditious manner**.²³⁹

UNHCR's Executive Committee has similarly called on states to prevent the separation of child and adolescent refugees from their families, and promote family reunification for unaccompanied minors.²⁴⁰

The Commission acknowledges that, in most cases, the initial cause of family separation for people in the Legacy Caseload was the experience of forced displacement, rather than Australian policy settings. However, restrictions on family reunion opportunities will prolong family separation for this group in a manner that would not occur for other humanitarian entrants to Australia.

Many people in the Legacy Caseload lack access to any viable opportunity for family reunification, and consequently face the prospect of remaining separated from their families—including minor children—on an indefinite and potentially permanent basis.

The Commission acknowledges that the obligations under article 23(1) of the ICCPR, article 10(1) of the ICESCR and articles 7(1) and 10(1) of the CRC do not equate to a right to family reunification. Nonetheless, they place a significant positive obligation on states to support and facilitate family unity, and contact between a child and their parents, to the extent possible.

The Commission therefore considers that the restrictions on access to family reunion opportunities affecting people in the Legacy Caseload likely interfere with Australia's obligations to afford the 'widest possible' protection and assistance to the family.

The application of family reunion restrictions to adults and children equally also prevents adequate consideration of the best interests of children, including those in highly vulnerable situations. A general policy that effectively prevents certain refugee children from being reunited with their parents in Australia is not primarily informed by a concern for the best interests of the child.

In order for restrictions on family reunion opportunities to be compliant with Australia's obligations to protect and assist families, they must be in pursuit of a legitimate objective, be rationally connected to that objective and be a reasonable and proportionate means of achieving that objective.²⁴¹

The Statement of Compatibility with Human Rights accompanying the Legacy Caseload Act said that restrictions on family reunion opportunities

provide a disincentive for people who wish to remain united with their families by indicating that travelling to Australia via unauthorised means will not result in the reunification of their family should they choose to travel separately. The measures further the legitimate aim of encouraging people to arrive in Australia via regular means.²⁴²

The Statement of Compatibility further argued in relation to article 10 of the CRC that:

The Australian Government will not provide a separate pathway to family reunification that will allow people smugglers to exploit children and encourage them to risk their lives on dangerous boat journeys. As such, to the extent that the rights under Article 10 are limited by the introduction of Temporary Protection visas, Australia considers that these limitations are necessary, reasonable and proportionate to achieve a legitimate aim.²⁴³

As with temporary protection arrangements, however, the restrictions on family reunion opportunities described in this section cannot realistically discourage asylum seekers from attempting unauthorised journeys to Australia in the future, as they only apply to people who arrived by boat in the *past*. The Commission therefore considers that these restrictions are not rationally connected to a legitimate objective.

Furthermore, given the unique status of children as a group requiring special care and assistance,²⁴⁴ and the particularly vulnerable situation of unaccompanied and separated children, the Commission questions whether denying children the opportunity to reunite with family members can be considered reasonable and proportionate in the circumstances.

In its 2017 concluding observations on the most recent periodic report of Australia, the UN Committee on Economic, Social and Cultural Rights raised concerns about the restrictions on family reunion opportunities faced by people in the Legacy Caseload. The Committee recommended that the Australian Government 'prioritise family reunification for all asylum seekers granted protection' and 'ensure equity and transparency in processing claims for permanent protection and requirements for family reunification'.²⁴⁵

The UN Committee on the Elimination of Racial Discrimination has similarly recommended that holders of temporary work visas (including SHEVs) be permitted to sponsor family members to join them in Australia.²⁴⁶

In line with these recommendations, the Commission considers that refugees who previously arrived in Australia by boat should have the same entitlements to family reunion opportunities as other humanitarian entrants to Australia.

Recommendation 22

The Department of Home Affairs should afford the same priority and apply the same eligibility criteria to all applications for family reunion lodged by humanitarian entrants, regardless of the type of humanitarian visa held by the applicant or their mode of arrival of Australia.

The removal of restrictions on family reunion opportunities affecting TPV and SHEV holders could be achieved through the implementation of Recommendation 1, relating to the repeal of amendments introduced through the Legacy Caseload Act.

If TPVs and SHEVs are not abolished, however, the Commission considers that measures should be implemented to facilitate access to family reunion for these visa holders.

Recommendation 23

If Recommendation 1 is not implemented, the Australian Government should amend the *Migration Regulations 1994* so that condition 8570 (which restricts overseas travel) does not apply to Temporary Protection Visas and Safe Haven Enterprise Visas.

Recommendation 24

If Recommendation 1 is not implemented, the Australian Government should introduce legislation to permit holders of Temporary Protection Visas and Safe Haven Enterprise Visas to sponsor family members overseas for temporary residence in Australia.

If the recommendations outlined in this section are not implemented, the Commission considers that, at a minimum, the Government should introduce exceptions to allow for family reunification in cases where children in Australia are separated from one or both of their parents; or who are living overseas, have a parent residing in Australia and are not under the care of another parent (such as in cases where the child has become separated from their other parent, or the child's other parent has passed away).

Recommendation 25

If Recommendations 22 to 24 are not implemented, the Department of Home Affairs should introduce exemptions from restrictions on family reunion opportunities for humanitarian visa holders who arrived in Australia as unaccompanied children, or have a child living overseas who is not under the care of another parent.

Australia has obligations under article 17(1) of the ICCPR and article 16(1) of the CRC **not to subject anyone to arbitrary or unlawful interference with their family.**²⁴⁷ The UN Human Rights Committee has stipulated that any interference with family life must be 'reasonable in the particular circumstances'.²⁴⁸

Cases of family separation that occur as a direct result of changes in Australian policy settings may engage Australia's obligations to avoid arbitrary interference with the family.

The blanket application of policy measures to all asylum seekers who arrived in Australia by boat at a particular point in time does not allow for consideration of whether the impacts of these measures are 'reasonable in the particular circumstances' of the individuals affected. Where such measures result in an individual facing indefinite and possibly permanent separation from their family members (including minor children), they may have a disproportionately negative impact that is not 'reasonable' in the circumstances.

The Commission notes that measures such as third country processing and temporary protection arrangements are aimed at deterring people smuggling ventures. As noted elsewhere in this report, the prevention of people smuggling may be a legitimate objective under international human rights law.

However, the Commission does not accept that the achievement of this objective would be significantly undermined by facilitating reunification of the small (and finite) number of families who face separation due to changes in policy settings. Evidence gathered during the Commission's 2004 National Inquiry into Children in Immigration Detention suggests that family separation may act as an incentive to engage in dangerous boat journeys, rather than a deterrent.²⁴⁹

The Commission therefore considers that families in this situation should have the opportunity to reunite.

Recommendation 26

Where members of the same family unit are subject to different policy settings due to having arrived in Australia on different dates, the Department of Home Affairs should implement strategies to harmonise their status, including through:

- a) transferring family members subject to third country processing to Australia
- b) granting all family members the same class of Australian visa, based on the visa of longest duration held by any member of the family unit.

5.4 Impacts of family separation

(a) Mental health

Prolonged family separation can have a significant negative impact on the health and wellbeing of refugees. The Commission's first National Inquiry into Children in Immigration Detention found that restrictions on family reunion applied to TPV holders had 'a serious impact on the best interests of children, particularly in the context of mental health and family unity'.²⁵⁰

A 2006 study focusing on Sudanese refugees who had been resettled in Australia found that worry about family members not living in Australia was the most commonly-reported post-migration stressor by study participants, and that family separation was a significant predictor of depression.²⁵¹

Another 2006 study focusing on TPV holders similarly found that worry about family members overseas and separation from family were among the most common living difficulties nominated by study participants as causing serious or very serious stress.²⁵²

A 2009 study involving recently-arrived refugees settling in Melbourne found that family separation, and consequent worry about family members overseas, was related to a range of mental health symptoms including 'sleeplessness, nightmares, poor concentration, feelings of guilt, depression, headaches, pain and difficulty breathing'.²⁵³

During the Commission's consultation process, many participants also raised concerns about the negative impact of prolonged family separation on mental health and wellbeing. It was noted that family separation could both be a source of significant distress in its own right, and deprive people of support that may aid their recovery from existing mental health issues. As described by a mental health expert:

Family connections and human connectedness is a known mental health protective factor. The absence of that is an inevitable deterioration into despondency and despair that becomes compounding in its own right. There is no substitute for family connectedness or bonding.

A support worker similarly stated that:

Family and connection with family is one of the most significant protective factors in terms of feeling like you are safe and that you have the resilience to actually face what's in front of you ... That's the implication of not allowing that, is that people are less resilient and less able to draw on the strength and the protection that they get from having their family nearby.

Concern about the welfare of relatives living in precarious situations overseas, and in some cases under imminent threat of violence or persecution, may also have a negative impact on mental health and settlement outcomes in cases where family reunion opportunities are not available.

A number of consultation participants, for example, reported that the recent Rohingya refugee crisis had had a particularly negative impact on the wellbeing of people in the Legacy Caseload from the Rohingya community who are unable to propose relatives for resettlement in Australia. As described by one support worker:

In my experience for our Rohingya clients ... everything is amplified when a crisis happens because they can't do anything to help their family. They can see what's happening to their family and hear what's happening to their family and their village has been burnt down and their whole family is living in one room and they can't do anything about it.

(b) Settlement outcomes

UNHCR has advised that family reunification 'assists [refugees] to adjust and integrate to the country of resettlement', with the family unit playing a critical role in emotional and spiritual wellbeing, economic self-sufficiency and other key aspects of settlement.²⁵⁴

Conversely, family separation may 'create serious obstacles to a refugee's integration in a new country'.²⁵⁵ Specifically, family separation

can affect refugees' ability to engage in many aspects of the integration process, from education and employment, to putting down roots, while it also impacts negatively on their physical and emotional health.²⁵⁶

The 2009 study of recently-arrived refugees settling in Melbourne similarly found that family separation 'impacts on participation and prevents a person from taking advantage of new opportunities or to plan for the future':

The participants in this study reported [that they] were typically working in casualised, manual labour that did not utilise their skills or require English in an effort to earn money quickly to look after their family members abroad. Some participants had stopped studying English or a vocational course in order to take up such employment and others had put career plans on hold.²⁵⁷

Feedback gathered during the Commission's consultation process indicates that these trends are reflected among people in the Legacy Caseload.

For example, some participants reported that family separation, due to its negative impact on mental health, reduced the capacity of people in the Legacy Caseload to meet key settlement goals. One support worker asserted that 'Their capacity levels are zero because they are wracked with guilt and concern and worry. They can't concentrate in English classes, they can't get motivated to do anything.'

Others argued that people in the Legacy Caseload could not make meaningful plans for their future without knowing whether their families would be part of that future.

As stated by one support worker, 'Rebuilding your life, what does it turn into when you know that it's not going to be with your wife and kids?'. A mental health worker provided the example of a client who had described himself as a 'severed limb', going on to assert that 'It is nearly impossible for some people to go forward without that [family reunification]'.

(c) Family wellbeing

Prolonged separation may have a negative impact on family relationships. During the Commission's consultation process, for example, several participants claimed prolonged separation could undermine the health of family relationships, with the result that couples may separate or a family may no longer be able to function effectively as a unit.

As described by one support worker, 'The family doesn't function by visiting them once every year ... It's not that easy to run a family when a person is somewhere else, separate. [It] will really break the family'.

A number of participants also reported cases of family breakdown resulting from a mistaken belief that the person in Australia had deceived their relatives overseas about family reunion opportunities. As one mental health worker explained:

In general, I've seen an increase in relationship breakdown. Mostly for people who are here and the family is still in the country of origin, where the family in the country of origin is often pressured to by the family members, or make the choice themselves, to divorce or end the relationship with the person here ... It often seems to be in relation to the person overseas not understanding or not believing that person here in Australia actually can't go back to visit them or can't bring them to Australia, and they think they're lying.

(d) Risk of constructive refoulement

'Constructive' *refoulement* occurs when a person is indirectly but effectively compelled to return to a situation where they are at risk of persecution or other forms of serious harm.²⁵⁸ Concerns around constructive *refoulement* may arise in cases where a person is subject to conditions or circumstances that they find very difficult to tolerate and, as a result, may consider returning to a situation of danger.

Following his mission to Australia in 2016, the Special Rapporteur on the human rights of migrants expressed concern that TPV and SHEV holders faced 'indefinite separation of family members' due to the lack of access to family reunion opportunities. He reported that he had 'heard of cases where people had voluntarily returned to their home country—including Syrians, whose country is in the midst of a war—just to be with their family'.²⁵⁹

Participants in the Commission's consultation process similarly reported that concern about family members overseas could drive some people in the Legacy Caseload to consider returning to their country of origin (even if they had a well-founded fear of persecution) or to precarious circumstances in a country of asylum. As one legal practitioner described:

What I've experienced myself is people saying, I've got my SHEV but I don't know if I can stay, because I'm not going to be with my family. Especially mothers who have left children behind, actually contemplating returning to refugee camps where they left the children because they've realised that they're not going to be able to bring them to Australia.

Considering return to reunite with family: Pavan

Pavan arrived in Australia by boat in 2012, leaving behind his wife and two young children. After spending several months in immigration detention, he was released on a Bridging Visa.

Due to prolonged delays in processing the claims of people in the Legacy Caseload, Pavan was not permitted to lodge a substantive visa application until 2016. In early 2017, he was found to be a refugee and granted a SHEV.

After receiving his SHEV, Pavan applied for and was granted permission to travel overseas to visit his family. His wife and children travelled from their country of origin to meet him in a third country. By this point, Pavan had not seen his family for five years. The reunion was difficult as his two children did not recognise their father.

Pavan is working to support his family but believes that he is unlikely to meet the SHEV pathway requirements or the eligibility criteria for a permanent visa. He is worried that his children are growing up without a father, and his relationship with his wife is becoming increasingly strained due to prolonged separation.

Despite having been determined by Australia to have a well-founded fear of persecution, Pavan has contemplated returning to his country of origin in order to reunite with his family.

(e) Human rights implications

Restrictions on family reunion opportunities that lead to prolonged and indefinite family separation may have similar human rights implications to temporary protection arrangements. Specifically, these restrictions may:

- represent an **unjustifiable form of discrimination** against certain asylum seekers based on their mode of arrival, as the restrictions will not apply to people who arrive by boat in the future and therefore are not rationally connected to a legitimate objective
- create serious obstacles to the successful settlement of people in the Legacy Caseload, hampering their full enjoyment of rights relating to settlement outcomes (such as the **rights to work, education and an adequate standard of living**, and the **rights of particular groups to protection, support and integration assistance**)

- have a significant negative impact on the mental health of people in the Legacy Caseload, precluding their enjoyment of the **highest attainable standard of health**.

The Commission therefore considers that the findings on temporary protection arrangements outlined in [Section 4](#) of this report are also relevant to the issue of family separation.

The Commission is also concerned by feedback indicating that some people in the Legacy Caseload may elect to return to situations of danger or persecution, due to the lack of any other means through which to reunite with relatives overseas.

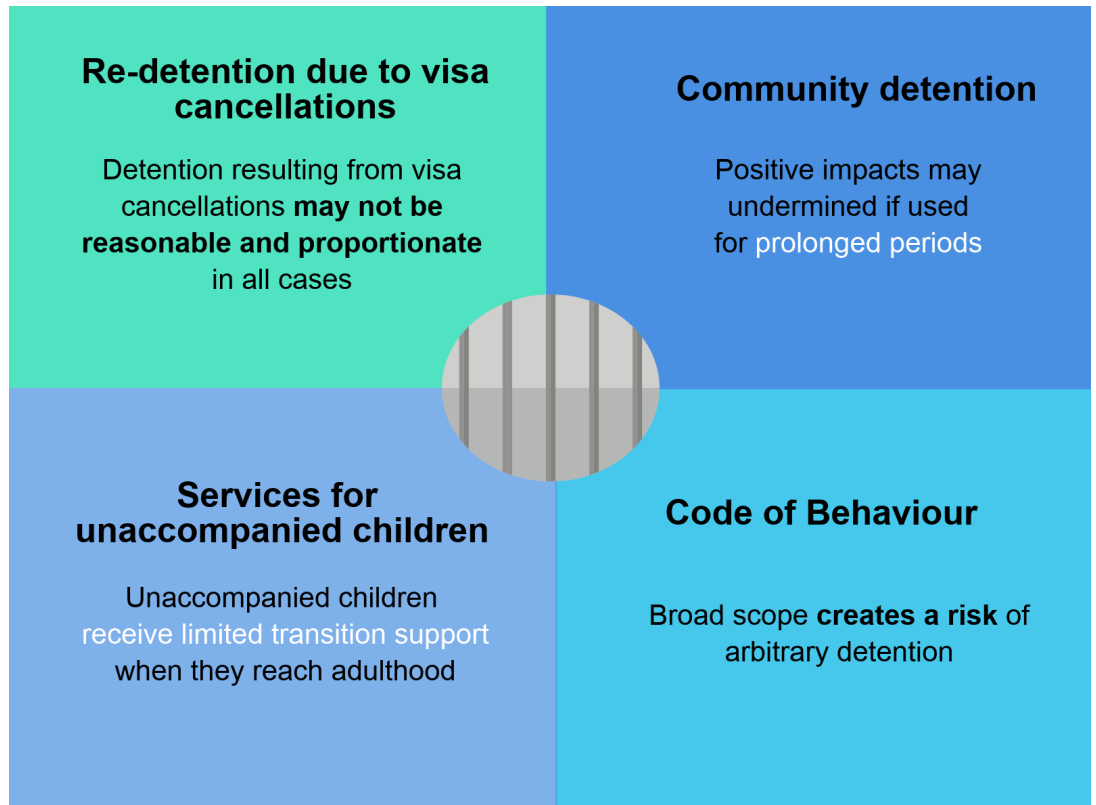
As these decisions may be directly influenced by Australian policy settings that limit opportunities for family reunion, there is a significant risk that returns in this context may amount to 'constructive' *refoulement*.

The Commission therefore considers that the recommendations outlined in this section should be given due weight in light of Australia's **non-refoulement** obligations (outlined in [Section 2.3\(j\)](#)).





6 Immigration detention



6.1 Background

Under s 189 the Migration Act, immigration detention is mandatory for all unlawful non-citizens (that is, non-citizens who do not hold a valid visa), regardless of circumstances. Once detained, unlawful non-citizens must remain in detention until they are either granted a visa or removed from Australia.²⁶⁰

As they did not hold valid visas prior to their arrival in Australia, all people in the Legacy Caseload have at some point been subject to immigration detention (other than those born in Australia to parents who had been released from detention).

Under s 197AB of the Migration Act, the Minister may make a determination (known as a 'residence determination') that a person is to reside at a specified place rather than being held in an immigration detention facility.²⁶¹ This residence determination power allows for the release of people from closed detention facilities into community-based accommodation, referred to as community detention or community placement.

In 2010, the Australian Government began releasing children and families from closed detention facilities into community detention arrangements.²⁶² The use of alternatives to detention (particularly the use of Bridging Visas; see [Section 3](#)) was further expanded in 2011.²⁶³

Thousands of Bridging Visas were granted to people in the Legacy Caseload over the subsequent years. By the time processing of claims recommenced in mid-2015, over 28,500 people in the Legacy Caseload were living in the community on Bridging Visas.²⁶⁴

As at December 2018, of the 10,268 people in the Legacy Caseload whose substantive visa applications had not yet been finalised, almost all were living in the Australian community on Bridging Visas. Just 107 people were in immigration detention, including 95 people in closed facilities and 12 in community detention.²⁶⁵

Human rights obligations relevant to the situation of people in immigration detention include:

- right to freedom from arbitrary detention
- right to the highest attainable standard of health
- consideration of the best interests of the child and right of the child to maximum possible development.

6.2 Summary

The vast majority of people in the Legacy Caseload are living in the Australian community, rather than in closed immigration detention facilities. The Commission welcomes the Australian Government's ongoing commitment to using alternatives to closed detention for people seeking asylum.

Where re-detention of people in the Legacy Caseload in closed detention facilities does occur, however, it may not be reasonable and necessary in all instances. This includes cases where closed detention results from a visa cancellation on the basis of a criminal charge, in circumstances where the person would not otherwise be subject to detention prior to conviction (such as where they have been granted bail); and where a risk of closed detention arises from breaches of the 'Code of Behaviour' for asylum seekers living in the community on Bridging Visas.

The Commission also notes concerns regarding the situation of people in long-term community detention; and the challenging transition process for unaccompanied children in community detention who reach the age of 18.

The Commission makes recommendations about amending the grounds for cancellation of a Bridging Visa; removing the requirement to sign a 'Code of Behaviour' as a condition of being granted a Bridging Visa; reviewing the implications of long-term community detention; and providing additional transition support to young people in community detention.

6.3 Closed detention

(a) Re-detention

As noted above, only a small proportion of the people in the Legacy Caseload are detained in closed immigration detention facilities. Feedback received during the Commission's consultation process reflected this trend, with participants consistently reporting that only a small number of people in the Legacy Caseload had been re-detained after initially being released into the community.

Where re-detention of people in the Legacy Caseload does occur, however, it may not be reasonable and necessary in all instances.

This is a particularly significant risk in cases where a person has their Bridging Visa cancelled on the basis of criminal charges.

Under s 116 of the Migration Act, the Minister or a delegate of the Minister may cancel a person's visa if, inter alia, a 'prescribed ground' for cancelling a visa applies to the holder.²⁶⁶ A criminal charge is one of the prescribed grounds for cancelling a Bridging Visa E under s 116.²⁶⁷

In 2016, the Commonwealth Ombudsman conducted an inquiry into the situation of people who had been detained after their having their Bridging Visas cancelled on the basis of a criminal charge or conviction.

The term 'criminal charge' is very broad and applies to a wide range of criminal activity—from the very minor to serious offences. The Ombudsman expressed concern about 'the proportionality of decisions to cancel a visa ... in relation to charges that sit on the more minor end of the spectrum', noting that the Department 'tends towards cancellation of a visa even if the charge is not serious'.²⁶⁸

In addition, a criminal charge is, by definition, an allegation that has not been proven in a judicial process, and may never be proven. The Ombudsman found that, in cases where the relevant charges had been withdrawn or resolved without a finding of wrongdoing, processes for reviewing cases and reinstating visas were inconsistent and did not ensure timely release from detention:

While it would seem reasonable that the resolution of the charge that led to a person being re-detained would prompt a review of their circumstances, this investigation has established that this does not happen. In reality, people in this situation are dependent on the capacity of a poorly supported case management and escalation framework to adequately review the circumstances of their individual case. Release from detention for these people depends on whether they happen to fall within scope of the department's wider priorities.²⁶⁹

As noted previously, due to the operation of s 46A of the Migration Act, people in the Legacy Caseload whose Bridging Visas are cancelled on the basis of criminal charges can only apply for a new visa if the Minister personally intervenes to 'lift the bar'.

The Ombudsman raised specific concerns about the impacts of these provisions on people in the Legacy Caseload, noting that the Department's case management system was not equipped to address the needs of a large cohort of people requiring the Minister's personal intervention for every visa grant:

The department's case management processes appear overwhelmed by the number of people who require personal intervention by the minister in order to resolve their immigration status. Although the case management framework supports individualised assessments of a case, this was not supported by the department's framework for preparing submissions, sometimes in relation to thousands of people at a time, for the minister to consider.²⁷⁰

As a result, former Bridging Visa E holders may remain in detention for significant periods of time, despite the fact that no charge against them has been proven, regardless of the severity of their alleged offence, and even if the reasons for their visa being cancelled have effectively ceased to exist.

Their situation stands in contrast to that of other visa holders and Australian citizens who are charged with offences, who in most cases would be entitled to bail, would not be subject to detention for any significant period prior to conviction and would not remain in detention if the relevant charges were resolved without a finding of wrongdoing.

Prolonged detention after criminal charges dropped: Mr X²⁷¹

Mr X arrived in Australia by boat to seek asylum in November 2012. He was released from detention onto a Bridging Visa in May 2013.

In September 2014, Mr X was charged with a sexual offence against a minor. His Bridging Visa was subsequently cancelled and he was re-detained.

The charges against Mr X were dropped in February 2015. His case was not referred to the Minister for consideration of a Bridging Visa re-grant until almost a year later. The Minister declined to grant Mr X a Bridging Visa in February 2016.

A few months later, Mr X reported that he had been physically assaulted in detention and was taken to hospital. During a subsequent counselling session with the facility's mental health team, Mr X reported that he feared for his safety, was staying in his room and had difficulty sleeping.

Mr X was granted a Bridging Visa and released from immigration detention in August 2017. He had remained in detention for more than two-and-a-half years after the charges against him were dropped.

The Commission is also aware of a small number of cases in which families with young children have been re-detained in closed facilities. It remains the Commission's position that children and families should not be held in closed immigration detention.²⁷²

(b) Code of Behaviour

A Code of Behaviour for asylum seekers living in the community on Bridging Visas was introduced in 2013. The Code 'contains a list of expectations about how [Bridging Visa holders] will behave at all times while in Australia'.²⁷³

People applying for a Bridging Visa E are required to sign and abide by the Code in order to be granted the visa, and must abide by the Code as a condition of the visa.²⁷⁴ Breaches of the Code may result in cancellation of the Bridging Visa and consequent re-detention; transfer to a third country processing facility; or the reduction or suspension of SRSS income support payments.²⁷⁵

The Code of Behaviour stipulates that Bridging Visa holders:

- must not disobey any Australian laws or become involved in any kind of criminal behaviour
- must cooperate with all lawful instructions given to them by police and other government officials
- must not make sexual contact with another person without that person's consent, or with a person under the age of consent
- must not harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community
- must not refuse to comply with any health undertaking provided by the Department or direction issued by the Chief Medical Officer to undertake treatment for a health condition for public health purposes
- must co-operate with all reasonable requests from the Department or its agents in regard to the resolution of their status.²⁷⁶

The Code of Behaviour captures a broad range of behaviour, including acts that are not criminal in nature. Due to the breadth of the Code, relatively minor matters—such as receiving a fine for travelling on public transport without a ticket—may lead to serious penalties.

In its consideration of the Code of Behaviour regulation in 2014, the Parliamentary Joint Committee on Human Rights stated that the Minister 'has not demonstrated objective and reasonable grounds for adopting a specific behaviour regime which is applicable only to [Bridging Visa E] holders'.²⁷⁷

The Committee also raised concerns about:

- the broad and discretionary nature of visa cancellation powers under the Code
- the possible exclusion of cancellation decisions from merits review
- the proportionality of consequences for breaching the Code, including re-detention and reduction or suspension of income support
- ad hoc mechanisms for monitoring the impacts of the Code.²⁷⁸

On the basis of these concerns, the Committee concluded that it was unable to determine that the Code of Behaviour was compatible with human rights.²⁷⁹

Following his mission to Australia in 2016, the Special Rapporteur on the human rights of migrants reported that the 'constant fear about status [and] also the possibility of being returned' resulting from the Code of Behaviour 'leads to an increased level of instability, which further reflects in migrants' mental health'. The Special Rapporteur recommended that 'due to its discriminatory nature, the code's implementation should cease', noting that migrants were already subject to existing criminal law.²⁸⁰

During the Commission's consultation process, a number of participants similarly reported that, despite the relatively low incidence of re-detention among people in the Legacy Caseload, the level of fear within this cohort about potential re-detention was considerable. Some participants specifically attributed this fear to the Code of Behaviour.

Concerns were also raised that the Code of Behaviour may inadvertently discourage people from seeking help, including when they had been the victim of a crime, due to fears that simply coming into contact with authorities could result in a breach of the Code.

One mental health worker stated, 'I think regardless of what's actually happening, the perception is that it's not safe for them to go to the police or to the hospital'. A community leader similarly claimed that members of the Legacy Caseload 'don't assert rights even if they have rights because they are worried about the impact of the Code ... and being returned back to detention'.

(c) Human rights implications

Australia has an obligation under article 9(1) of the ICCPR **not to subject anyone to arbitrary detention**.²⁸¹ According to the UN Human Rights Committee, 'arbitrary detention' includes detention that, although lawful under domestic law, is unjust or disproportionate. In order for the detention of a person not to be arbitrary, it must be a reasonable and necessary measure in all the circumstances.²⁸²

The Commission welcomes the Australian Government's ongoing commitment to using alternatives to closed detention for people seeking asylum. The routine consideration of alternatives to closed detention for the vast majority of people in the Legacy Caseload provides a mechanism for assessing whether ongoing detention is reasonable and necessary, helping to avoid cases of potentially arbitrary detention.

However, the Commission is concerned that detention of people in the Legacy Caseload resulting from visa refusals or cancellations may not be reasonable and necessary in all cases, creating a risk of arbitrary detention.

This risk is particularly significant in cases where a visa has been cancelled on the basis of a criminal charge alone (as opposed to a conviction), especially where the person concerned has been granted bail; where the charge relates to a non-violent or minor offence that would not ordinarily lead to a custodial sentence; or where the charge that led to a visa cancellation is withdrawn or resolved without a conviction.

The Commission considers that the risk of arbitrary detention resulting from visa cancellations could be significantly reduced by removing criminal charge as a prescribed ground for Bridging Visa cancellation under s 116 of the Migration Act.

In addition, the Commission shares the view of the Commonwealth Ombudsman that, where Bridging Visas are cancelled under s 116 on the basis of criminal charges, 'a non-adverse judicial outcome should be a trigger for an urgent review of a person's circumstances'.²⁸³

The Commission notes that the existing system of bail for people charged with criminal offences provides a means of managing potential risks to the community posed by alleged offenders.

Recommendation 27

The Australian Government should amend the *Migration Regulations 1994* in order to remove a criminal charge as a prescribed ground for cancellation of a Bridging Visa E under s 116(1)(g) of the *Migration Act 1958*.

Recommendation 28

Where a Bridging Visa has been cancelled under s 116 of the *Migration Act 1958* on the basis of criminal charges, withdrawal of these charges or a non-adverse judicial outcome should automatically trigger a review of the decision to cancel the visa by the Department of Home Affairs.

The Commission also notes that a person whose Bridging Visa is cancelled due to a breach of the Code of Behaviour would be subject to mandatory immigration detention, regardless of the seriousness of the breach in question. Given that the Code captures a broad range of behaviour, there is a risk that visa cancellations for breaches of the Code may lead to arbitrary detention.

For example, if the conduct that led to the breach was a minor or non-criminal matter, and the person subject to visa cancellation did not pose any identifiable risk to the community, their detention may be arbitrary under international human rights law.

The Commission shares the concerns of the Parliamentary Joint Committee on Human Rights that the application of the Code of Behaviour regime to Bridging Visa E holders, solely on the basis of the type of visa they hold, does not appear to be adequately justified.

In the absence of evidence substantiating the need for a specific behaviour management regime for Bridging Visa E holders (as opposed to all other visa holders), the Commission considers that the requirement to sign a Code of Behaviour as a condition of being granted a Bridging Visa should be removed.

Recommendation 29

The Australian Government should remove the requirement to sign the Code of Behaviour as a condition for the grant of a Bridging Visa.

6.4 Community detention

(a) Overview

As noted above, the residence determination power under s 197AB of the Migration Act allows for the release of people from closed detention facilities into community-based accommodation, commonly referred to as community detention. Community detention is typically used for people who are vulnerable or have complex needs, such as unaccompanied children and people with significant health issues.²⁸⁴

People in community detention must reside at a specified address and are subject to reporting requirements.²⁸⁵ As they are still administratively detained, they do not hold visas and are not permitted to work or undertake vocational education or training.²⁸⁶ However, school-aged children in community detention can access free primary and secondary education.²⁸⁷

Services for people in community detention are provided under Bands 1 to 3 of the SRSS program. Further information about these services can be found in Appendix 2.

(b) Impacts of long-term community detention

Community alternatives to detention generally promote better health and wellbeing outcomes than closed detention, provided that fundamental rights are respected and basic needs are met.²⁸⁸ During the Commission's consultation process, however, a small number of participants raised concerns that community detention—while undoubtedly preferable to remaining in closed detention—may nonetheless have negative impacts if used for very long periods of time.

Of the 696 people in community detention as at December 2018, close to half had been residing in community detention for over a year. This included 265 people who had been in community detention for more than two years.²⁸⁹

Only a small number of the people currently in community detention are members of the Legacy Caseload group. However, these figures indicate that a significant number of the people subject to residence determinations spend prolonged periods of time in community detention.

Consultation participants reported that remaining in a situation of uncertainty and dependence for such prolonged periods, with limited opportunities to engage in meaningful activities (such as employment and further education), could be detrimental to the health and wellbeing of people in community detention.

One support worker, for example, claimed that among people in community detention, 'The learned helplessness becomes quite prevalent [because] they're not paying rent, they're not paying utilities and not allowed to work'. A mental health worker who had worked with families in community detention reported that, over time, 'there has been very little shift in their presentation. More often, there has been deterioration in their presentation'.

The impacts of long-term community detention: Benham, Soraya and their children

Benham and Soraya arrived in Australia by boat. After spending a short period in closed immigration detention, they were released into community detention. They have three children, all of whom were born in Australia.

The family has been living in community detention for over seven years. Both Benham and Soraya have experienced significant mental health issues, including depression, self-harm and suicidal ideation, which have worsened during their time in community detention.

Soraya has reported feelings of intense anxiety relating to the long period of time her family has spent in community detention, separation from family living overseas and uncertainty about her family's future.

Benham and Soraya's children, who have spent their entire lives in community detention, also display signs of stress and trauma in several areas of development, including physical health, sensory processing, regulation of emotions and behaviours, and emotional and social development.

Benham has expressed a desire to seek employment in order to support his family. Soraya wishes to improve her skills through undertaking English language tuition and tertiary education. However, as they remain administratively detained, Benham and Soraya are not eligible to work or to undertake vocational study or training.

The challenging situation faced by Benham and Soraya has placed their relationship under considerable pressure, resulting in significant family conflict. The couple has separated on several occasions.

Benham and Soraya's eldest child has exhibited behavioural issues at school, including aggression, which are thought by support workers to be related to the family conflict witnessed by the children at home.

(c) Services for unaccompanied children

Unaccompanied children in community detention receiving support under Band 2 of the SRSS program are typically accommodated in group housing arrangements, with a live-in carer providing day-to-day care.²⁹⁰ A small number of participants indicated that the support provided under Band 2 was generally adequate.

Nonetheless, some likened community detention to other out-of-home care environments, noting that these contexts were not necessarily conducive to positive child development. In the words of one support worker, 'It's not the best environment for any child, let alone a person that's gone through this experience and most likely a lot of trauma'.

Some participants also indicated that the parameters of the Band 2 program were not sufficiently flexible to allow service providers to address identified needs.

Particular concerns were raised about the limited transition support for unaccompanied children who turn 18 and are therefore legally adults. It was reported that young people in this situation are typically granted Bridging Visas and transitioned onto Band 6 of the SRSS program (see [Section 3](#)) within a short period of time, resulting in an abrupt reduction in services and support.

Young adults who had arrived as unaccompanied minors may remain vulnerable due to their past experiences of trauma, disrupted childhood and lack of a normal family environment. The rapid transition from Band 2 of the SRSS program to more limited support could therefore have a particularly significant impact on this group.

As described by one support worker:

They go from having wraparound support to almost nothing in a very short space of time. That can have significant impacts on their capacity to succeed, because it's really rare that that happens in ordinary life. These are kids who have potentially experienced traumatic events. Also, these are kids, who if they've been in the [Unaccompanied Humanitarian Minor] program, by definition, they do not have family supports. That can be pretty traumatic.

Another support worker similarly expressed concerns about '18 to 25-year-olds who are not considered children anymore but who often need support extended as young people', noting that 'at 18 they're regarded as adults across the board but we know that they need a lot more support'.

(d) Human rights implications

Australia has obligations under article 12(1) of the ICESCR, article 24(1) of the CRC and article 25 of the CRPD to uphold the **right to the highest attainable standard of health**.²⁹¹

The Commission considers that the making of residence determinations is critical to mitigating the negative impacts of closed detention on mental health and wellbeing. The Commission also notes that Bands 2 and 3 of the SRSS program allow for the provision of more intensive support than bands designed for people living in the community on Bridging Visas, and thus play an important role in ensuring adequate support for people who are vulnerable (including those with complex health needs).

Community detention therefore assists in safeguarding the right to the highest attainable standard of health.

However, the Commission is concerned by feedback suggesting that these positive impacts may be undermined if people remain in community detention for very prolonged periods of time. Given that community detention is primarily used for people who are vulnerable or have complex needs, the Commission considers that this feedback warrants particular attention.

The Commission suggests that it would be beneficial to conduct a review of the situation of people in long-term community detention to examine this issue in further detail. Particular consideration should be given to options for enhancing access to meaningful activities (such as education and employment).

Recommendation 30

The Department of Home Affairs should commission an independent review of the situation of people in long-term community detention, to assess the extent to which the program can continue to promote positive health and wellbeing outcomes over time.

The Commission has welcomed the release of almost all children from closed immigration detention facilities. This has strengthened Australia's compliance with its international human rights obligations regarding the detention of children.

However, the Commission has some concerns regarding the challenging transition process for unaccompanied children in community detention who reach the age of 18. While this group of young people may legally be adults, their situation is materially different from that of most other young adults given their isolation from family support networks and the exceptional challenges they have faced during their formative years.



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Australia's obligations under article 3(1) of the CRC to **ensure that in all actions concerning children, the best interests of the child shall be a primary consideration**; and under article 6(2) to **ensure to the maximum extent possible the survival and development of the child**, may therefore remain relevant to the situation of unaccompanied children exiting community detention.²⁹²

The Commission considers that young adults who arrived as unaccompanied children should still be treated as a vulnerable group (with commensurate entitlements to support services) until such time as an individualised needs assessment indicates that intensive support is no longer required.

Recommendation 31

In cases where a young person receiving services under Band 2 of the Status Resolution Support Services program turns 18, the Department of Home Affairs should:

- a) automatically transition the young person onto Band 4 of the program, with an opportunity to transition onto Band 5 where ongoing intensive support is required
- b) extend the timeframes for transition of young people between the various bands of the SRSS program, to allow adequate time for provision of transition support.

7 Conclusions

This project has identified some positive developments for people in the Legacy Caseload. These include the release of most asylum seekers and almost all children from closed immigration detention; the reintroduction of work rights for asylum seekers living in the community on Bridging Visas; and the recommencement of the refugee status determination process after long delays.

However, other policy measures significantly limit the human rights of people in the Legacy Caseload, including measures that have led to financial hardship, deteriorating mental health, a heightened risk of *refoulement* and poorer settlement outcomes. Some measures have also fallen short of Australia's obligations to protect families and the best interests of children.

The limitations on the enjoyment of human rights documented in this report have not been shown to be necessary, reasonable and proportionate in the circumstances of people in the Legacy Caseload.

The Commission does not underestimate the challenges that flight by sea poses for the Australian Government, or the risks that dangerous boat journeys pose to asylum seekers. However, policies that cause serious hardship for refugees and asylum seekers are unlikely to be reasonable and proportionate mechanisms for addressing these risks.

In any event, many policies that currently apply to people in the Legacy Caseload have not been demonstrated to be effective in achieving the aim of preventing people smuggling and loss of life at sea.

The Commission encourages the Australian Government to consider the recommendations in this report closely, to ensure that Australia's treatment of asylum seekers in the Legacy Caseload reflects our international human rights obligations.



Appendices

Appendix 1:

Timeline of legal and policy developments affecting people in the Legacy Caseload

Year	Boat arrivals ²⁹³	Key developments
2009	2,726	Boat arrivals to Australia begin to increase significantly. ²⁹⁴
2010	6,555	In October , the Australian Government begins to expand the use of community detention for children and vulnerable family groups. ²⁹⁵
2011	4,565	In November , the Government begins to expand the use of Bridging Visas as an alternative to closed immigration detention. ²⁹⁶
2012	17,204	<p>In June, the Government announces the creation of an Expert Panel to provide advice and recommendations on policy options 'to prevent asylum seekers risking their lives on dangerous boat journeys to Australia'.²⁹⁷</p> <p>The Expert Panel releases its report on 13 August, making 22 recommendations. A key component of the approach recommended by the Panel is the establishment of a 'no advantage' principle, which seeks to ensure that asylum seekers arriving in Australia by boat do not gain an 'advantage' over asylum seekers arriving through other pathways.²⁹⁸</p> <p>In line with the 'no advantage' principle, the Panel recommends that the Australian Government re-establish third country processing of asylum claims in Nauru and Manus Island, Papua New Guinea as 'a necessary circuit breaker to the current surge in irregular migration to Australia'.²⁹⁹</p> <p>After August, however, boat arrivals increase markedly.³⁰⁰ The number of people arriving by boat exceeds the capacity of the newly-established third country processing facilities in Nauru and Manus Island.</p> <p>In response, the Government introduces a new policy to extend the application of the 'no advantage' principle to asylum seekers who arrived by boat but will remain in Australia for the processing of their claims. Asylum seekers who had arrived by boat are released from detention onto Bridging Visas, without the right to work.³⁰¹</p>
2013	20,587	<p>In July, the Government begins processing the refugee claims of people in Australia subject to the extended 'no advantage' policy.³⁰²</p> <p>On 19 July, the Australian Government announces that people subject to third country processing who are found to be refugees will be permanently settled in Papua New Guinea.³⁰³ The arrangement applies to asylum seekers who arrived by boat from the time of the announcement onwards.³⁰⁴ Accordingly, people who had been subject to third country processing in both Nauru and Papua New Guinea up until this time are returned to Australia.³⁰⁵</p> <p>Following the Federal election in September, the Australian Government introduces Operation Sovereign Borders, a military-led border security operation that aims to counter people smuggling. Under this operation, boats are intercepted and returned to their point of departure 'where it is safe to do so'.³⁰⁶ After boat turnbacks commence in December, very few boats are permitted to arrive in Australia.³⁰⁷</p>

Year	Boat arrivals ²⁹³	Key developments
2014	160	<p>In December, the <i>Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014</i> is passed. The Act makes numerous and wide-ranging changes to Australia's legislative framework for assessing refugee claims and providing protection.</p> <p>At the time the Act is passed, the Government pledges that children and their families who had arrived in Australia by boat after 19 July 2013, and had been detained indefinitely on Christmas Island pending transfer to a third country processing facility, will be released from closed detention and permitted to remain in Australia.³⁰⁸ A number of children born in Australia whose parents had been subject to third country processing in Nauru are also permitted to remain in Australia.³⁰⁹</p> <p>The Government further pledges to extend work rights to asylum seekers in the Legacy Caseload who are living in the community on Bridging Visas.³¹⁰</p>
2015	0	In May , the Minister commences the process of 'lifting the bar' under s 46A of the Migration Act to enable people in the Legacy Caseload to lodge valid visa applications. ³¹¹
2016	0	By September , the 'bar' under s 46A of the Migration Act has been lifted for the majority of people in the Legacy Caseload. ³¹²
2017	0	<p>In May, the Minister announces that all people in the Legacy Caseload who have not yet lodged a visa application must do so by 1 October. Those who do not lodge an application by this deadline will be 'deemed to have forfeited any claim to protection' and be subject to removal from Australia.³¹³</p> <p>All but 71 people in the Legacy Caseload lodge a visa application by the deadline.³¹⁴</p>

Appendix 2:

Summary of services provided under the Status Resolution Support Services Program³¹⁵

Band	Immigration status	Eligible group	Services provided	Recipients as at 30/09/18
1	People detained in closed facilities	Unaccompanied children	Carer and casework support Independent observer services	1
2	People living in the community under a residence determination (community detention)		Carer and casework support (including provision of a live-in carer) Independent observer services Orientation support Accommodation (typically group housing) and utilities Living allowance paid at a proportion of 89% of the Youth Allowance, depending on age	14
3			Families and adults	Casework support Orientation support Provided accommodation and utilities Living allowance and dependent child allowance paid at 60% or 70% of equivalent Centrelink rates

Band	Immigration status	Eligible group	Services provided	Recipients as at 30/09/18
4	People living in the community on temporary visas (including Bridging Visas)	People transitioning from detention onto a visa	<p>Casework support, including orientation support and referrals</p> <p>Accommodation and assistance to find ongoing accommodation</p> <p>Living allowance, rent assistance and dependent child allowance paid at 89% of equivalent Centrelink rates</p>	9
5		People with a medium to high level of need who are disadvantaged by one or more vulnerabilities, and as a result are unable to support themselves, manage independently or resolve their immigration status	<p>Intensive casework support to address identified vulnerabilities</p> <p>Living allowance, rent assistance and dependent child allowance paid at 89% of equivalent Centrelink rates</p>	253
6		Asylum seekers with a low to medium level of need who are experiencing financial hardship	<p>Basic casework support</p> <p>Living allowance, rent assistance and dependent child allowance paid at 89% of equivalent Centrelink rates</p>	8,556

Appendix 3:

Key terms and acronyms

Acronym	Description
AAT	Administrative Appeals Tribunal Independent body that conducts merits review of administrative decisions made under Commonwealth laws
Asylum seeker/person seeking asylum	A person who claims to be a refugee but whose status has not yet been formally determined
Bridging Visa	Short-term visas granted to people who are in the process of resolving their immigration status
CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
Child	A person under the age of 18
Constructive <i>refoulement</i>	Indirectly but effectively compelling a person to return to a situation where they are at risk of persecution or other forms of serious harm.
CRC	<i>Convention on the Rights of the Child</i>
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
Department	Department of Home Affairs Commonwealth Government agency responsible for law enforcement, national and transport security, criminal justice, emergency management, multicultural affairs and immigration and border-related functions
Double negative	Having received a negative decision on a visa application at both the primary and merits review stage of the refugee status determination
Fast track	A limited form of merits review for asylum seekers who arrived by boat between 13 August 2012 and 1 January 2014
Finally determined	A visa application that has received a negative decision at both the primary and merits review stage of the refugee status determination process

Acronym	Description
IAA	Immigration Assessment Authority Independent body that conducts merits review of decisions made under the 'fast track' process
IAAAS	Immigration Advice and Application Assistance Scheme Government-funded program providing access to free, independent migration advice and application assistance for certain people seeking asylum
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
Judicial review	Review of a case by a court
Legacy Caseload	Group of approx. 30,000 asylum seekers who arrived in Australia by boat prior to 1 January 2014 and were permitted to remain in Australia in order to lodge applications for substantive visas, but had not had their status resolved by this date
Merits review	Administrative reconsideration of a case
NDIS	National Disability Insurance Scheme Government-funded scheme providing support to people with disability, their families and carers
<i>Non-refoulement</i>	A principle of international human rights and refugee law, stipulating that a person should not be returned to a country where they would be at risk of persecution or other forms of serious harm
PAIS	Primary Application Information Service Government-funded program providing access to free, independent migration advice and application assistance for certain asylum seekers who arrived by boat, in particular those who are exceptionally vulnerable and unaccompanied children
Permanent visa	A visa that grants its holder permanent residency
PPV	Permanent Protection Visa Permanent visa granted to asylum seekers who arrived in Australia on valid visas and are subsequently determined to be refugees

Acronym	Description
PR	<p>Permanent Residency</p> <p>Refers to the situation of non-citizens of Australia who hold permanent visas and who typically have the right to live, work and study in Australia indefinitely</p>
Primary decision/ decision-maker/stage	Refers to decisions made at the first stage of visa processing, typically by an officer of the Department of Home Affairs
PTSD	<p>Post-Traumatic Stress Disorder</p> <p>A mental health disorder that can be experienced by people who have experienced or witnessed a traumatic event</p>
Refugee	A person who is outside their country of origin and is unable or unwilling to seek the protection of their country due to a well-founded fear of being persecuted on the basis of their race, religion, nationality, membership of a particular social group or political opinion
Refugee status determination	The process through which a person seeking asylum has their refugee claims assessed, to determine whether they are entitled to protection as a refugee
Separated child	A child who is separated from their parents or legal guardians, but not necessarily from other relatives
SHEV	<p>Safe Haven Enterprise Visa</p> <p>Temporary visa (up to five years) granted to asylum seekers who arrived in Australia without valid visas and are subsequently determined to be refugees</p> <p>Provides limited pathways to permanent residency for those who meet certain requirements relating to employment and education in regional areas</p>
SRSS	<p>Status Resolution Support Services</p> <p>Government-funded program providing assistance to non-citizens who are seeking to resolve their immigration status, or transitioning to mainstream services after resolving their status</p>
Substantive visa	Any visa other than a Bridging Visa, criminal justice visa or enforcement visa
Temporary visa	A visa that grants its holder the right to reside in Australia temporarily

Acronym	Description
Third country processing	Policy whereby asylum seekers arriving in Australia by boat are transferred to other countries (currently Nauru and Papua New Guinea) for processing of their refugee claims
TIS	<p>Translating and Interpreting Service</p> <p>Government-funded program providing telephone and onsite interpreting to people who do not speak English and for agencies and businesses that need to communicate with non-English speaking clients</p>
TPV	<p>Temporary Protection Visa</p> <p>Temporary visa (up to three years) granted to asylum seekers who arrived in Australia without valid visas and are subsequently determined to be refugees</p>
UHM	<p>Unaccompanied Humanitarian Minor</p> <p>A child who is seeking asylum or has refugee status, is separated from their parents or legal guardians and is not being cared for by an adult</p>
UN	United Nations
Unaccompanied child/ minor	A child who is separated from their parents or legal guardians and is not being cared for by an adult
UNHCR	<p>United Nations High Commissioner for Refugees</p> <p>United Nations agency responsible for providing international protection to refugees and seeking permanent solutions to refugee problems</p>
Vulnerable	Used in the context of this report to refer to people who face particular risks due to factors such as their age, gender, health care needs, financial situation, visa status or experiences of trauma

Endnotes

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- 139 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) arts 17–19. According to article 6 of the Refugee Convention, the term 'in the same circumstances' implies that any requirements that a person would have to fulfil for the enjoyment of a particular right if they were not a refugee (such as length of residence) must also be fulfilled by a refugee, with the exception of requirements that they cannot fulfil by virtue of being a refugee. In light of their prolonged stay in Australia, the Commission considers people in the Legacy Caseload who are still in the process of seeking asylum to be 'in the same circumstances' as long-term temporary residents.

- 140 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24(1); *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 25; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981), art 12.
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- a person would have to fulfil for the enjoyment of a particular right if they were not a refugee (such as length of residence) must also be fulfilled by a refugee, with the exception of requirements that they cannot fulfil by virtue of being a refugee. In light of their prolonged stay in Australia, the Commission considers people in the Legacy Caseload who are still in the process of seeking asylum to be 'in the same circumstances' as long-term temporary residents.
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