

Committee Secretary  
Foreign Affairs, Defence and Trade Committee  
Department of the Senate  
Parliament House Canberra ACT 2600  
*Submitted via email*

22 October 2021

Dear Committee Secretary

We welcome the opportunity to make a submission to the Foreign Affairs, Defence and Trade Committee on the *Inquiry into Australia's Engagement in Afghanistan*. (the **Inquiry**).

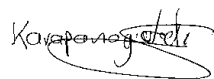
We work with people seeking asylum and refugees, many of whom are victims of conflict, war and persecution in Afghanistan. While our troops fought to rid Afghanistan of terrorism and provide a conducive environment for development of a peaceful and prosperous Afghanistan, our Government continues to do everything in its power to punish the victims of the very same war, especially those refugees from Afghanistan who arrived by sea.

Government policy settings have systematically denied them and their Australian-born children durable protection, subjected many to protracted arbitrary detention in inhumane conditions both on and offshore, and denied nearly all opportunities for family reunion, attacking the very core of the Afghan Australian community. These policy settings in place over a long period, meant that it was an already devastated Afghan Australian community prior to the more recent traumatic events of Afghanistan falling to the Taliban in mid-August this year. And now many Afghan Australian community members are enduring new pain and trauma as they watch in horror events take shape in Afghanistan.

Our submission highlights the comprehensive range of legislative and policy architecture that have worked to deliberately and permanently discriminate against, and punish, refugees from Afghanistan, especially those who arrived in Australia by boat. This is also a story which is directly related to Australia's engagement in Afghanistan and needs to be told in this Inquiry.

We would welcome the opportunity to appear before the Committee.  
at the earliest opportunity.

Yours faithfully



Kon Karapanagiotidis OAM  
CEO Asylum Seeker Resource Centre

# 1. Introduction

## 1.1 The Asylum Seeker Resource Centre

1.1.1 Founded in 2001, the Asylum Seeker Resource Centre (ASRC) is Australia's largest independent aid and advocacy organisation for people seeking asylum and refugees, supporting and empowering people at the most critical junctures of their journey.

1.1.2 The ASRC's Human Rights Law Program (HRLP) and the Advocacy and Campaigns team have provided legal assistance and advocacy to refugees and people seeking asylum over the past fifteen years. We work directly with individuals and their families fleeing persecution. The HRLP exists to provide access to justice through legal representation at all stages of the application process. The HRLP has a long history representing and advising refugees from Afghanistan in Australia, particularly those from minority backgrounds who are some of the most persecuted groups in the world. We have been witness to the different government approaches to this cohort and feel that we are well-placed to comment on the plight of this group in Australia. In August 2021, the HRLP in partnership with private firms working pro bono established a special Afghanistan Legal Clinic in response to the overwhelming demand from visa holders from Afghanistan in Australia requiring legal advice and assistance regarding their family members in Afghanistan. We welcome the opportunity to provide this submission to the committee based on our experiences working directly with refugees from Afghanistan in Australia and witnessing how the recent fall of Kabul has impacted them and their families.

## 1.2 Terms of Reference

1.2.1 Our submission is based on our longstanding and comprehensive work with refugees and people seeking asylum from Afghanistan in Australia. Given our expertise, we have primarily focused our submission on the following Terms of Reference:

- Terms of Reference (b) – the adequacy of Australia's preparation for withdrawal from Afghanistan, including:
  - (ii) the evacuation of Australian citizens, permanent residents and visa holders, and
  - (iii) decisions relating to evacuation of at risk Afghan nationals and partners and family members of Australian citizens and permanent residents.
- Terms of Reference (c) – how the Australian Government should respond to recent developments in Afghanistan in order to:
  - (ii) prevent or mitigate damage to Australia's international reputation, if necessary,
  - (iv) protect Australian citizens, visa holders, and Afghan nationals who supported Australian forces, where they remain in Afghanistan.

## 1.3 Overview of submission

- 1.3.1 Australia's engagement in Afghanistan is a history of 20 years of contradiction. Contradiction in that we went to war to fight terrorism but, simultaneously, punished people fleeing the same terrorism when they arrived on our shores seeking safety. Any more obligation we felt as a nation to enter the war in Afghanistan stopped the second anyone from Afghanistan sought asylum on our shores. This contradiction is one which is Australia's shame and is one that is to be acknowledged and reflected on in our submission.

Instead of offering safety, protection and freedom we locked people up, both in Australia and in offshore detention centres, kept people separated from family, offered only temporary protection and denied basic access to basic human rights. The comprehensive range of mechanisms intentionally put into place by the Government to punish refugees arriving by sea, have caused immeasurable suffering to the Afghanistan-Australian community: suffering which has never been publicly acknowledged but is the tragic, painful backdrop to the contemporary events in Afghanistan, which are the primary focus of this inquiry. Our submission aims to tell a part of this prequel story, which provides a crucial aspect of the context of Australia's engagement in Afghanistan. As one community leader from Afghanistan told us:

"In Afghanistan when they catch us they kill us quickly. In Australia they torture us slowly, killing us on the inside: robbing us of our freedom, our families and our hope. We never imagined that our pain would go on like it has. It still shocks me that this has been the Government's plan all along."

- 1.3.2 The reality of our punitive and deterrence-based asylum policy is that, while "we certainly don't have any concern about being involved in action against those people who were responsible for the terrorist attack",<sup>1</sup> we showed no responsibility towards people from Afghanistan fleeing terrorism.

The intentional decision to deny people seeking asylum from Afghanistan safety and protection has negatively impacted the lives of over 10,000 men, women and children in Australia. Likely triple that number, now left behind in Afghanistan, including the spouses and children of temporary protection visa holders and other unresolved family reunion applicants, find themselves at high risk in Taliban-controlled Afghanistan with no pathway to safety in Australia.

We also failed in our responsibilities to provide safety to those made prime Taliban targets due to the assistance they provided to Australian interests and presence in Afghanistan. Our Locally Engaged Employees (LEE) program was fundamentally flawed. The eligibility criteria did not meet its stated purpose, with arbitrary cut-off dates and covering only a small spectrum of those whose lives are now at risk due to their service to Australia. The program proceeded at a glacial pace, resulting in many eligible people and their families

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<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/IV256%22>

being left behind to face very uncertain fates: fates with Australia's breached legal and moral duty of care written all over them.

## 1.4 Summary of recommendations

### 1.4.1 We recommend that the Australian Government:

**Recommendation 1:** Commit to an additional humanitarian intake of at least 20,000 people from Afghanistan that is separate and in addition to the current refugee and humanitarian intake stream of 13, 750 places.

**Recommendation 2:** Prioritise and expedite processing of these 20,000 humanitarian visas and allow family members in Australia to propose their immediate family members, and apply for family reunion visa categories, irrespective of their own visa status.

**Recommendation 3:** Grant permanent protection to refugees from Afghanistan currently in Australia on temporary visas, including bridging visas, or held in detention or in offshore processing

**Recommendation 4:** Accelerate Ministerial consideration of bulk bar lifts allowing people seeking asylum from Afghanistan in Australia to lodge fresh protection applications, and expedite the processing of these protection visa applications.

**Recommendation 5:** Remove Direction 80 (which automatically de-prioritises family reunion visa applications for refugees who arrived by sea) and properly resource processing, expedite, and prioritise all family reunification visa applications made by Afghanistan-Australians.

**Recommendation 6:** Expedite processing of citizenship by conferral applications for nationals from Afghanistan whose applications remain unfinalised.

**Recommendation 7:** Adapt assessment of identity documents and health requirements for all visa application types for people from Afghanistan, recognising that identity and health checking in Afghanistan are no longer possible, and that many Afghans are now unable to secure relevant civil documentation to support their visa applications.

**Recommendation 8:** Amend Schedule 1 so that special humanitarian visa applicants from Afghanistan are able to lodge their applications via email and do not need to courier their applications to Jordan, (at present an impossible bar for applicants inside Afghanistan.)

**Recommendation 9:** Renew the subclass 449 visas held by all people from Afghanistan, including those in Afghanistan and third countries, for a further 12 months

**Recommendation 10:** Provide 449 visas and safe passage to Australia for the immediate family members of subclass 449 visa holders in Australia.

**Recommendation 11:** Expand the eligibility criteria for the Locally Engaged Employee visa category to anyone who now faces persecution by the Taliban due to their service to Australia, (irrespective of employed/contractor status) and expedite the grant of LEE visas (in addition to the 20,000 recommended above)

**Recommendation 12:** Provide concerted assistance to ensure the safe passage and

travel arrangements to Australia for all LEE and subclass 449 visa holders.

**Recommendation 13:** Provide clear, detailed and regular updated information on the Home Affairs and DFAT websites and allow persons to register for notification of these updates. Expand the Home Affairs and DFAT services to respond to queries for information.

**Recommendation 14:** Provide funded legal assistance to specialist community immigration lawyers so they can provide legal information and assistance to people from Afghanistan seeking assistance with all migration options.

**Recommendation 15:** Immediately lift the ban on resettlement of refugees to Australia through the United Nations High Commissioner for Refugees in Indonesia.

## **2. Terms of reference (b) - the adequacy of Australia's preparation for withdrawal from Afghanistan**

- (i)** The evacuation of Australian citizens, permanent residents and visa holders
- (ii)** Decisions relating to evacuation of at risk Afghan nationals and partners and family members of Australian citizens and permanent residents.

### **2.1 Maladministration of Locally Engaged Employees Visa Scheme**

2.1.1 The rapid fall of Afghanistan to the Taliban as coalition forces pulled out of the country was a fully foreseeable outcome. The handling of Australia's withdrawal from Afghanistan has placed the lives of thousands of people from Afghanistan at unnecessary risk.

2.1.2 Joe Biden announced on 14 April 2021 that US forces would leave Afghanistan before September 2001 and a day later the Australian Government made a similar announcement about the remaining Australian troops. By late April, the Government had already received advice from Defence and the Office of National Security that closure of the Embassy may be necessary due to the deteriorating security situation.

2.1.3 This was the period when a concerted, rapid evacuation effort should have commenced while Australia still had personnel in place and therefore capacity to meet its legal and moral duty of care to the people from Afghanistan now placed at risk of being targeted by the Taliban due to their service to Australia in Afghanistan.

2.1.4 However the Government did not do this. Instead, it was the first country in the Western alliance to "cut and run", closing its Embassy in late May 2021,<sup>2</sup> and effectively removing any capacity for the Government to undertake a safe and planned evacuation of those now at risk of Taliban reprisal due to their association and assistance to Australia. The early closure of the Embassy was the moment that Australia effectively abandoned those it owed a moral and legal duty to evacuate.

2.1.5 This decision capped off years of incompetence and an unduly rigid and moribund approach by the Government in administering the Locally Engaged Employees (LEE) visa scheme. This scheme, introduced by the Gillard Government on 13 December 2012, was fundamentally flawed from the outset as it was designed to minimise the class of people eligible for a visa to Australia, despite it being well known that a much wider class of people were at risk due to their service to Australia in Afghanistan.

2.1.6 The LEE eligibility criteria set out in legislative instrument IMMI12/127 (which commenced on 1 January 2013, and remains in effect) refer to persons 'employed with' specified Australian Government agencies in Afghanistan, leaving out the thousands of contractors who are also equally considered targets by the Taliban. It is obvious that the modality of a person's formal

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<sup>2</sup> Announced in a duplicitous move immediately after Minister Payne returned from Afghanistan where she had just met with the Afghanistan Government to assure them the opposite. See <https://www.theguardian.com/australia-news/2021/sep/14/australian-foreign-minister-was-told-to-close-embassy-before-may-visit-to-kabul-documents-reveal>.

contractual arrangements is irrelevant to the Taliban, which does not distinguish between employees and contractors in metering out its threats and targeting those associated with the Australian war effort. The criteria for this visa should have been based on assessment of whether the person, due to their association with Australian interests in Afghanistan, whatever its form, now faces a heightened risk of persecution.

2.1.7 In addition, the Instrument required that applications be lodged within six months of completing service, or before 30 June 2013 or “where the relevant agency Minister is satisfied that exceptional circumstances apply”. Many applicants were refused for not meeting these arbitrary deadlines, despite them being at risk, demonstrating an unduly inflexible, bureaucratic approach by the Government, completely divorced from the fundamental issue of providing safety to those placed at risk due to their service to Australia.

2.1.8 The application process was protracted and required multiple separate steps across multiple Australian agencies, which were often impossible for otherwise eligible applicants to fulfil. Applicants had to first have their employment certified by the relevant agency. Many former interpreters and other staff struggled to even get to this first base due to a lack of centralised records of employees and individual agencies not responding to requests for certification. While the Government claims that few LEE applications remain unfinalised, this data does not include those still waiting, some for years, for their employment to be certified.

2.1.9 Once certified, then applicants had to be assessed as “being at significant individual risk of harm as a result of their support to Australia’s whole of Government mission in Afghanistan due to their role, location, employment period and currency of employment” and also had to meet health and character criteria. Many applicants sat for years in a moribund process despite facing imminent threats to their lives and their families. The Government demonstrated a callous indifference to their situation, with little effort made to triage or accelerate those at immediate risk, and a glacial pace of processing for all. The results speak for themselves. In July 2021, Defence Minister Peter Dutton stated that only around 1480 visas in total had been granted under the LEE scheme, over a 9 year period; a mere 164 visas per year, and just a small proportion of those now at risk due to their service to Australia.

2.1.10 This was the state of incompetence even before the chaotic evacuation process commenced. With the volatile, fast changing security conditions across the country, many LEE applicants and others who provided service to Australia and now found themselves at risk, were unable to travel to Kabul in order to be evacuated. Those in Kabul were confronted with harrowing scenes of being unable to safely enter the airport and be evacuated. Even those who have now somehow managed to escape from Afghanistan, have no means of being granted a visa or arranging their safe travel to Australia. And as noted above, many who are now at risk, were never even eligible to apply for a LEE visa.

2.1.11. The result of this litany of errors over many years, has had catastrophic effects for those now left behind, who now face great danger, also to their families, and are living in constant fear of being hunted down and killed. Some may already have been. The Government will never know how many of those who served Australia, paid the ultimate price for that service.

## Case Study - Mohammad

Mohammad was employed by the Australian Defence Force as an interpreter in 2009/10. He is married and has young children. He lived with Australian troops in the field and on platoon bases. His father was shot and killed by the Taliban directly because of his work, trying to assure the Taliban that his son would not work with the Australians any more. Mohammad was himself threatened and followed by the Taliban and shot three times. He was very lucky to survive.

He applied for a visa to come to Australia early this year as an Afghan Locally Engaged Employee (LEE). He was refused on 15 July 2021, as follows, as the Taliban was advancing apace throughout the country:

*"Your application has been considered in accordance with Instrument Number IMMI 12/127 under the Migration Regulations 1994. Based on the information available, you have been found ineligible. The reason for this decision is that you did not seek to be certified within the prescribed period, and no exceptional circumstances were established."*

Mohammad could not apply earlier as he was only able to get in touch with his Australian Commander in December 2020. His Commander appealed directly to Peter Dutton but got no response. His last advice to Mohammad was to flee the country by whatever means he could.

Given that the purpose of the LEE visas was to provide protection and save lives, Mohammad's situation highlights the high cost to him and many others of the glacial and unduly bureaucratic and inflexible approach taken by the Government and by the Department. Fault lies in establishing such unwieldy criteria and process for processing the visas of a high risk group who faced ongoing imminent protection risks due to their service to Australia. These only worsened in the aftermath of the Taliban's takeover of Afghanistan and have left a sense of betrayal of those who contributed to the Australia war effort and who deserved much better than they have received.

**Recommendation 11:** Expand the eligibility criteria for the Locally Engaged Employee visa category to anyone who now faces persecution by the Taliban due to their service to Australia, (irrespective of employed/contractor status) and expedite the grant of LEE visas.

**Recommendation 12:** Provide concerted assistance to ensure the safe passage and travel arrangements to Australia for all LEE and subclass 449 visa holders.

## 2.2 Separation of immediate family members in evacuation process

2.2.1 After the Taliban took control of Kabul, those agencies (Home Affairs, DFAT and Defence) working to evacuate people faced a worst case scenario for the conduct of evacuations under extraordinary pressure. The chaos and panic which ensued as individuals and families struggled for their lives to get close to and through the airport barricades, resulted in a significant numbers of family units being separated.

2.2.2 We have been in contact with a young women from Afghanistan who was literally pulled through the barricade into the airport, granted a 449 visa on the spot and then evacuated and brought to Australia. While she is one of the "lucky ones" to have made it out, she remains highly distressed, as her husband and two young children, aged 8 and 10 were left behind at the airport.



They are now in hiding in Kabul moving from house to house as her husband has been told by his former employer that the Taliban has threatened him and is looking for him.

2.2.3 While family separation was inevitable in the chaotic and dangerous situation at Kabul airport, now more than six weeks later, there is still no clear communication from the Government, process or pathway by which she can put forward her case and no assistance being provided to her to help her be reunited with her husband and two children in safety. In addition, many people from Afghanistan who hold 449 visas and are in Australia still lack basic information about what their visa pathways will be. Many are unable to benefit very much from the recently announced package of support, especially regarding trauma counselling, when the key current source of their trauma is separation from family members who were left behind, and being powerless to do anything to bring them to safety.

**Recommendation 10:** Provide 449 visas and safe passage to Australia for the immediate family members of subclass 449 visa holders in Australia.

### **2.3 Lack of timely and detailed information provided by the Government**

2.3.1. Even six weeks since the fall of Afghanistan, there remains a real lacunae of information, not only about the Government's policy settings regarding its response to people seeking safety from Afghanistan. We still do not know how many subclass XB visas will be granted or any special accelerated processing arrangement or amendments to lodgement requirements which would make it easier for people to lodge their applications. The Government statement made on 14 October 2021 covered only a package of support for those 449 visa holders already in Australia and was notably silent as to the plight of those who hold valid visas but no means to travel to Australia, or indeed for those hoping to be granted a Class XB visa.

2.3.2. Equally crucial, there is also a continuing lack of detailed, accurate information from Home Affairs and DFAT regarding migration pathways, and notably no public information being provided by these agencies in local languages. There is also a dire lack of resourced help and information lines in Home Affairs and DFAT. There is also a dire lack of free or low cost quality legal assistance available to people from Afghanistan to provide them with accurate and realistic information, referral and legal assistance, so that they can make informed decisions about their options, exercise their legal rights to make and progress their visa applications. This is urgently needed to prevent people being exploited by unscrupulous actors who are charging high fees for unqualified and often dubious advice and assistance.

**Recommendation 13:** Provide clear, detailed and regular updated information on the Home Affairs and DFAT websites and allow persons to register for notification of these updates. Expand the Home Affairs and DFAT services to respond to queries for information.

**Recommendation 14:** Provide funded legal assistance to specialist community immigration lawyers so they can provide legal information and assistance to people from Afghanistan seeking assistance with all migration options

### **2.4 Subclass 449 visa holders stranded in Afghanistan or third countries: time is running out**

2.4.1. An estimated 4000-5000 subclass 449 visas, valid for only 90 days, were reportedly granted to people from Afghanistan by the Australian Government in the chaotic evacuation period from mid-August 2021. Most of these visas will expire by mid November 2021, unless the Government decides to renew them. The Government remains silent on whether it intends to renew these visas and some commentators say they are unlikely to renew them. This means that subclass 449 visa holders have only until mid-November to try to get to Australia. We have continued to be contacted by subclass 449 visa holders who are either still stuck in Afghanistan or who managed to escape to Pakistan or other third countries, but have been unable to use their Australian visas for safe passage to Australia. The impending visa expiry periods are understandably creating panic and fear that many will not be able to use their visas in time, causing some people to take high risks to their safety to try to get out of Afghanistan to utilise their visas.

2.4.2. For those stuck in Afghanistan, international flights from Kabul are yet to resume, leaving only unsafe border crossing exits for those trying to cross borders to attempt to use their visas to get to Australia. Many subclass 449 visa holders have been stuck at the Pakistan border because Pakistani authorities will only let them cross into Pakistan if Australia guarantees their uplift from Pakistan. The Australian Government has refused to provide this guarantee to some subclass 449 visa holders as they are accompanied by immediate family members, who do not also hold subclass 449 visas, and are understandably desperate not to be, (likely) permanently, separated. There are desperate families stuck in dangerous situations, being asked to make "Sophie's Choice" decisions at the Afghanistan/Pakistan border crossings because the Australian Government has so far refused to provide visas and guaranteed uplift from Pakistan also to immediate family members or dependents.

2.4.3. Other subclass 449 visa holders have made it to Pakistan or other third countries but unless they are one of the lucky few able to access organised assistance from DFAT (some people have been bussed from the Pakistan border and flown on chartered flights from Islamabad), others have been left trying to get to Australia on their own steam. This is very challenging, given the lack of information provided to them by the Australian Government about their options. While individuals are being told by the Government that the Smart Traveller registration system is the means by which DFAT will be remaining in touch with visa holders, and urges individuals to keep their contact details updated, this important information does not appear anywhere on the Smart Traveller website, which continues to state that registration with DFAT is only for Australian citizens and permanent residents, and their immediate family members with visas and exemption to travel to Australia. This is another example of the overall appalling lack of information provided by the Government to people in crisis, both in the lead up to, during and since the evacuation effort.

2.4.4. Additional barriers for subclass 449 visa holders outside of Afghanistan trying to get to Australia before their visas expire, include: lack of access to flights to Australia; the need for ABF travel exemptions; lack of quarantine options for them on arrival. On top of these are also financial barriers, as all elements of travel to Australia are currently very expensive. However, given that time is running out for them to use their visas prior to expiry, many people are doing everything in their power to take out loans and to do whatever they can to try to make it to Australia before their visas expire.

2.4.5. It seems that while the Australian Government was initially willing to provide these subclass 449 visa holders a lifeline by granting these visas, there is now a fear it will pull up the drawbridge

and turn its back on them by allowing these visa lifelines to simply expire. We urge the Government to renew all 449 visas, for those in and outside of Australia and to follow through on the commitment that it made to bring these visa holders to safety. We also urge that there be improved efforts to provide these visa holders with information and support to make the arrangements for their safe travel to Australia.

**Recommendation 9:** Renew all subclass 449 visas held by people from Afghanistan, including those still in Afghanistan and third countries, for a further 12 months

**Recommendation 10:** Provide 449 visas and safe passage to Australia for the immediate family members of subclass 449 visa holders in Australia.

**Recommendation 13:** Provide clear, detailed and regular updated information on the Home Affairs and DFAT websites and allow persons to register for notification of these updates. Expand the Home Affairs and DFAT services to respond to queries for information.

## 2.5 Australia has a moral obligation to increase its intake of refugees from Afghanistan to deal with a 'once in a generation' humanitarian crisis

2.5.1. Australia has committed to resettling only a very low number of refugees from Afghanistan in comparison to other countries whose forces served in the Afghanistan War. In the wake of the Taliban takeover of Kabul the Morrison Government announced that Australia would offer only 3,000 humanitarian visas to people from Afghanistan. This was later clarified to be a "minimum" figure and not a cap, however, it was also clarified this intake is not additional to Australia's intake of 13,750, but carved out of it. Not only is this annual intake target of 13,750 already significantly less than the 18,750 places offered in 2018-19, but it has not even been met this year due to COVID-19. **The announcement of 3,000 places within the established intake is not an adequate response to the situation in Afghanistan, especially given the high numbers of people from Afghanistan or Afghanistan heritage living in Australia and the previously strong bilateral ties between the two countries.**

2.5.2. Australia is currently trailing embarrassingly behind comparable countries whose forces served in the Afghanistan War with its response to the emergency intake of refugees from Afghanistan. Canada initially announced an additional 20,000 humanitarian visas for people from Afghanistan, which was later increased to 40,000; similarly the UK has committed to 20,000 additional visas. The US, while not officially setting an explicit amount, has indicated that it will be offering an additional 95,000 humanitarian visas for people from Afghanistan and Germany will offer 40,000. Given Australia's long-term role in the Afghanistan War, we have a moral and ethical obligation to take an increased number of refugees from Afghanistan, particularly those with a connection to Australia or who assisted Australian organisations overseas including the Australian Defence Forces, the Australian Department of Foreign Affairs and AusAid.

2.5.3. The current proposal of 3,000 places for refugees from Afghanistan is microscopic compared to the refugee demand for resettlement from Afghanistan in the years ahead. At the beginning of 2021, 2.6 million citizens of Afghanistan were refugees, 239,000 were seeking asylum and 2.9 million were internally displaced. By 8 September 2021, UNHCR had reported 22,120 newly arrived refugees in neighbouring countries and 592,531 people internally

displaced since January 2021. On 11 October 2021, the Guardian reported that over 100,000 people from Afghanistan had applied for humanitarian visas in Australia since Kabul had been taken by the Taliban. This was confirmed by the Department of Home Affairs, which indicated that this figure was based on 26,000 applications having been lodged in the last seven weeks, including family groups.<sup>3</sup>

2.5.4. There is also precedent for increasing our intake of humanitarian arrivals in response to the Afghanistan humanitarian crisis. Various governments on both sides of politics have made generous contributions in response to past refugee crises. For example, in 2015 the Abbott Liberal-National Coalition Government committed to providing an additional emergency 12,000 humanitarian places for people from Syria and Iraq in response to the escalating displacement crisis. Over the five years to June 2020, Australia issued offshore humanitarian visas to 46, 085 Syrian and Iraqi refugees.<sup>4</sup> In 1989 following the Tiananmen Square Massacre the Hawke Government committed to providing an additional emergency 42,000 humanitarian intake;<sup>5</sup> between 1975-83 the Fraser Government committed to providing an additional emergency 70,000 humanitarian intake in the wake of the Vietnam War.

2.5.5. Recent cuts to Australia's refugee program as well as the fact that we have not been meeting our targets due to the Covid-19 pandemic mean that we have the facilities *and* infrastructure to increase our intake of people from Afghanistan. After increasing Australia's annual refugee and humanitarian intake to 16,250 in 2017-18 and 18,750 in 2018-19, the Australian Government reduced the annual program by 5000 places in 2020-21 to 13,750. In recent years the Government has redefined the program target as a "ceiling" with the 2019-20 and 2020-21 programs falling short because of Covid-19 related travel restrictions.<sup>6</sup>

2.5.6. Committing to a special intake of 20, 000 refugees from Afghanistan which is distinct and *separate* from the refugee and humanitarian intake process is within Australia's capacity. Indeed, we note that a previous concern of refugee groups was the limited number of places within the hotel quarantine system for international arrivals entering Australia. The announcement by the NSW State Government last week that international arrivals who are fully vaccinated will no longer be required to quarantine upon entry to NSW suggest that hotel quarantine may soon be phased out for the majority of arrivals to Australia, with limited facilities kept available for unvaccinated travellers.

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<sup>3</sup> David Hurst, "More than 100, 000 Afghan nationals vying for initial 3, 000 humanitarian visas from Australia", 11 October 2021, *The Guardian* (online), available at: <https://www.theguardian.com/australia-news/2021/oct/11/more-than-100000-afghan-nationals-vying-for-initial-3000-humanitarian-visas-from-australia>

<sup>4</sup> Refugee Council of Australia, "Why Additional Places are Needed for Australia's Refugee Intake from Afghanistan", September 2021, available at: [https://www.refugeecouncil.org.au/wp-content/uploads/2021/09/Brief\\_Afghanistan\\_resettlement\\_2109.pdf](https://www.refugeecouncil.org.au/wp-content/uploads/2021/09/Brief_Afghanistan_resettlement_2109.pdf)

<sup>5</sup> [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/BN/1011/SeekingAsylum](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/1011/SeekingAsylum)

<sup>6</sup> Refugee Council of Australia, "Why Additional Places are Needed for Australia's Refugee Intake from Afghanistan", September 2021, available at: [https://www.refugeecouncil.org.au/wp-content/uploads/2021/09/Brief\\_Afghanistan\\_resettlement\\_2109.pdf](https://www.refugeecouncil.org.au/wp-content/uploads/2021/09/Brief_Afghanistan_resettlement_2109.pdf)

2.5.7. We also note that there is widespread community support to increase the intake of refugees from Afghanistan across all sides of the political spectrum. In the aftermath of the Taliban takeover of Kabul, over 300 organisations, businesses and community groups signed a petition instigated by the Refugee Council of Australia to urgently increase its intake of people from Afghanistan in response to the crisis.<sup>7</sup> There were countless other similar petitions instigated by refugee advocacy groups, veterans affairs groups and others calling on the government to increase the intake of refugees from Afghanistan. Indeed, it is noteworthy that Australian veterans who served in Afghanistan have been some of the most vocal proponents of increasing Australia's intake of refugees from Afghanistan in response to the current humanitarian situation.<sup>8</sup> This group in particular has set up various responses within their own community to assist refugees from Afghanistan to resettle in Australian society, because they have been so overwhelmed by requests from veterans as to how they can help in this current crisis.<sup>9</sup> There is clearly strong community will to increase the humanitarian intake of refugees from Afghanistan and taking this measure would be an appropriate response to the current crisis. Now what is needed is political will by the Government.

***Case Study 1 – Barat Ali Batoor, Afghan national in Australia***

"Australia is home to the fourth largest population of the Hazaras in the world. The Hazaras are facing ethnic cleansing by the Taliban and Islamic State – Khorasan Province (ISKP). The recent attacks and forced displacement of the Hazaras have proven that they are the most vulnerable group in Afghanistan.

The events happening in Afghanistan are directly affecting a large population of the Hazara Australian citizens and permanent residents as most of them have their families and loved ones trapped in Afghanistan.

If Australia grants 20,000 additional humanitarian visas, it will help many people to be saved from being persecuted and will be able to be reunited with their families or have peaceful lives here in Australia."

**Recommendation 1:** Commit to an additional humanitarian intake of at least 20,000 people from Afghanistan that is separate and in addition to the current refugee and humanitarian intake stream of 13, 750 places.

**Recommendation 2:** Prioritise and expedite processing of these 20,000 humanitarian visas and allow family members in Australia to propose their immediate family members, irrespective of their own visa status.

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<sup>7</sup> "Over 300 organisations, businesses and community groups call on all Parliamentarians to respond to the crisis in Afghanistan", 20 September 2021, Refugee Council of Australia.

<sup>8</sup> Andrew Greene, "Veterans burn medals to protest Australia's 'failure' to protect Afghan translators from the Taliban", 19 July 2021, ABC News, available at: <https://www.abc.net.au/news/2021-07-19/veteran-burn-medals-protest-australia-afghan-translators-taliban/100305398>

<sup>9</sup> Defence Families of Australia, "Support for Afghan refugees", 30 August 2021, available at: <https://dfa.org.au/support-for-afghan-refugees/>

**Recommendation 7:** Adapt assessment of identity documents and health requirements for all visa application types for people from Afghanistan, recognising that identity and health checking in Afghanistan are no longer possible, and that many people from Afghanistan are now unable to secure relevant civil documentation to support their visa applications.

**Recommendation 8:** Amend Schedule 1 so that special humanitarian visa applicants from Afghanistan are able to lodge their applications via email and do not need to courier their applications to Jordan, (at present an impossible bar for applicants inside Afghanistan.)

## 2.6 Permanent protection for people from Afghanistan in Australia

2.6.1. There are currently thousands of refugees and people seeking asylum from Afghanistan residing in Australia who are prevented from being granted permanent protection by the Australian Government by virtue of the date they arrived in Australia and their mode of arrival.<sup>10</sup>

2.6.2. The refugee processing system in Australia is unnecessarily complicated by the fact that different legislative processes apply based on an asylum seeker's mode of arrival (i.e. whether they arrived by boat or plane) and the date of their arrival in Australia. For example, refugees who arrived by boat (characterised as "unauthorised maritime arrivals" under section 5AA of the *Migration Act 1958*) on or after 13 August 2012 until 31 December 2013, are only eligible to be granted a Temporary Protection visa (Subclass 785) or a Safe Haven Enterprise visa (subclass 790) and only if the Minister lifts the statutory bar that prevents unauthorised maritime arrivals from making a valid visa application.<sup>11</sup>

### Impact of Temporary Protection on Refugees

2.6.3. People on temporary protection visas are required to reapply for protection prior to the expiry of their temporary visas. In essence, this means that the personal circumstances of applicants are reassessed with respect to their protection claims and the situation in their country of origin. For applicants on Temporary Protection visas, a "no further stay"<sup>12</sup> condition applies to their visa which prevents them from applying for any other substantive visa apart from a subsequent Temporary Protection visa or Safe Haven Enterprise visa. Safe Haven Enterprise visa applicants may be able to access a pathway to permanent residency if they meet the SHEV pathway requirements and satisfy the criteria for a limited number of visas provided in reg.2.06AAB. However, to date, not a single SHEV holder has been granted a permanent visa as part of this purported permanent visa pathway, leaving in reality, no permanent visa pathway.

2.6.4. In total there are more than 5,100 refugees from Afghanistan, predominantly from the historically persecuted Hazara ethnic groups, who are currently on temporary protection visas in Australia. They are prevented from establishing a permanent home while on temporary protection visas, limited in the support they receive, work opportunities, healthcare and study. This is due to longstanding Government policy settings aimed at deterring others from arriving by sea by deliberately treating with cruelty those refugees who did arrive by sea. In essence,

<sup>10</sup> Discriminating against an asylum seeker's mode of arrival is contrary to the Refugee Convention 1951, Article 31(1).

<sup>11</sup> See section 46A of the *Migration Act 1958* (Cth).

<sup>12</sup> *Migration Regulations 1994* (Cth), Schedule 8, item 8503.

even though they are fleeing persecution and therefore allowed under international law to arrive by any means possible when their lives are at risk, the Government punishes them by withholding any durable status simply because they arrived by sea without a pre-arranged visa.

2.6.5. Maintaining the fiction that the security situation in Afghanistan will improve in the medium to long-term future has meant that refugees from Afghanistan on three-year Temporary Protection visas or five-year Safe Haven Enterprise visas are required to re-prove their refugee status each time they renew their protection visa. This requirement exacerbates the constant state of uncertainty they face, creating unnecessary difficulties for them establishing themselves in the Australian community through secure long-term employment and housing. Moreover, it places an unnecessary and inefficient administrative burden on the Department of Home Affairs. Independent country information regarding Afghanistan predicts that even looking to the medium-long term, the security situation and capacity of the State of Afghanistan to protect basic human rights, will likely remain very weak.

### **Case Study – Amir Hussein, Temporary visa holder**

“Due to being on temporary protection visa, I have been living a temporary and uncertain life in Australia for the past 10 years. I hope the Australian government understands that 10 years are far too long for not being able to plan our lives or see our families...

I am a businessman; my visa limitations have significantly limited my abilities to live my life in the Australian social and economic sphere with my full potential. Granting permanent residency to us on temporary visas will not only be saving our lives but it will also give us more opportunities to contribute back to the Australian community in our greater capacity.”

### **Denial of Family Reunion Pathways**

2.6.6. People on temporary protection visas are also cruelly prevented from eligibility to initiate any family reunion visa applications. Nor are they eligible to be “proposers” of Class XB humanitarian visas, which would increase the priority of their applications in the overwhelming processing queue tsunami. Instead, they can only be listed on the application as a relative in Australia, which places these applications in lower priority.

2.6.7. Since the Taliban takeover of Afghanistan, we have been contacted by hundreds of distraught temporary protection visa holders from Afghanistan, who despite having been in Australia for almost ten years, now find themselves in further anguish, unable to assist their spouses and children to get to safety in Australia despite their loved ones facing life threatening situations. The vast majority of temporary protection visa holders from Afghanistan are men, and many of them had no choice but to leave their wives and children behind. They have already endured nearly ten years of family separation; the heartache of all those missed milestones in the lives of their children. Now many of these wives and children find themselves at particular risk of the Taliban, especially for women without the protection of their husbands or other male relatives.

**Case Study – Mehdi**

Mehdi is a Hazara male from Afghanistan. Mehdi arrived in Australia by boat in 2012. He lodged his application for a SHEV in 2017 after the statutory bar was lifted, and is waiting for his interview with the Department of Home Affairs. Mehdi has a wife and three children in Pakistan who he has been separated from since 2012. Mehdi has not seen his wife and children in 9 years. As he is on a Bridging Visa E, he cannot leave Australia as he will lose the opportunity to be granted the SHEV. Mehdi's mental health has declined due to the protracted processing times which have meant lengthy separation from his family. Mehdi has been diagnosed with major depressive disorder by his psychologist.

Even if Mehdi is granted a SHEV, he must seek permission from the Australian Government to leave Australia and visit his wife and children in Pakistan. He will not be able to sponsor his wife and children to come to Australia so that they are reunited as a family. He is not even eligible to propose his family members under a special humanitarian visa. The requirements for the SHEV pathway are very difficult and it is unlikely Mehdi will be able to transition to a permanent visa under the current SHEV pathway arrangements.

Even if he were able to meet these requirements and was granted a permanent visa, and was able to afford the \$8,000+ to lodge a family reunion application, that application would likely never be processed as under Direction 80, it would automatically be pushed to the end of the processing queue. Even if Mehdi was eligible for Australian citizenship (which would allow him to overcome Direction 80 in his family reunion application), because he is from Afghanistan, his citizenship application would likely be placed in the "complex" category and take years to be processed. While Mehdi can be given permission to travel and to visit his family overseas, it is unlikely Mehdi will ever be able to permanently live in safety with his family.



### ***Case Study – Abdul***

Abdul was employed as a truck driver for Coalition forces in Afghanistan. In around 2010 Abdul left Afghanistan and travelled to Europe where he was granted protection. After a few years in Europe Abdul realised it would be very difficult for him to sponsor his family to come and join him there and he decided to travel to Australia. Abdul travelled to Australia and on his arrival at Melbourne Airport he spoke with immigration officials about the fact that he had been granted protection in Europe and why he was coming to Australia. Abdul was transferred to immigration detention where he lodged an application for protection. Abdul's first application for protection was refused by the Department and he ultimately won on appeal and was granted a Temporary Protection visa in March 2017 which was valid for three years.

In or around late 2019 Abdul's wife, who remains in Kabul with their small children, was diagnosed with cancer. Abdul wished to travel to see his wife but he was unable to do so because his TPV was due to expire in early 2020. In or around April 2020 Abdul applied to renew his protection visa application. Abdul is still waiting on a decision from the Department. Abdul has made multiple requests for his application to be expedited so that he can leave Australia to visit his family in Pakistan. In 2021, Abdul's wife was diagnosed with Covid-19 and she was hospitalised around the time Kabul fell to the Taliban. Abdul's wife and children remain in Kabul at risk of harm. The Department has not responded to his request for a decision to be made on the papers or for his application to be processed as a priority on account of his wife's health.

2.6.9. Abdul has to live daily with the torment that there is little more he can do to address his family's suffering and protection needs, unless he is willing to sacrifice his own status in Australia and return to Afghanistan to help them, where they would then all be at risk. As a temporary visa holder, he cannot apply for a partner visa, nor, should his partner pass away, child visas to enable him to care for his children in Australia. Nor can he even propose them in Class XB humanitarian visa applications. Rather, he can only be listed as a regular relative on their Class XB applications, meaning that his family's applications will be de-prioritised.

Had Australia not chosen this cruel pathway to keep families separated, his wife and children would have been safely in Australia years ago. His wife would have had his support throughout her illness and the comfort of knowing that if she were to pass away, her children will not be left without care in an extremely dangerous situation. Many of the wives and children of other temporary protection visa holders, would also be living safely in Australia too, had the Government not deliberately prevented this

**Recommendation 2:** Prioritise and expedite processing of 20,000 humanitarian visas and allow family members in Australia to propose their immediate family members and apply for family reunion visa categories, irrespective of their own visa status.

**Recommendation 5:** Abolish Direction 80 (which automatically de-prioritises family reunion visa applications for refugees who arrived by sea) and properly resource processing, expedite, and prioritise all family reunification visa applications made by Afghanistan-Australians.

**Recommendation 6:** Expedite processing of citizenship by conferral applications for people from Afghanistan whose applications remain unfinalised.

### **Inherited impact of temporary protection upon children born in Australia**

2.6.10. In addition to the enduring and indefinite status of “unauthorised maritime arrival” given to those who themselves arrive by sea, this status is also inherited by their Australian-born children, even though they are clearly not maritime arrivals at all, but rather born in Australia. This status as a UMA means that these children cannot even apply for protection or any other visa without the Minister’s personal permission. They can also never secure permanent residence in Australia, leaving them in a constant state of limbo, like their parents.

2.6.11. Most Australian would be shocked and appalled by this approach of penalising children throughout their entire lives, because of Government policy to penalise the sea arrival of their refugee parents decades ago. Current law creates intergenerational injustice for the children of people who arrived by sea. Even if these children are permitted by the Minister to apply for protection, and are successful (and there is no guarantee they will receive the same outcome as their parents, and they could potentially face removal from Australia and permanent separation from their parents), they will still have to continuously re-apply for protection in order to remain lawfully in Australia, like their parents. They will also be unable to apply for other visa types, such as a spouse visa, and will be ineligible for certain Government supports.

#### **Case Study – Zahra, 4 years old**

Zahra is four years old. She was born in Australia. Her parent arrived by sea in 2013 and have ongoing court applications seeking review of decisions to refuse their protection visa applications. Zahra cannot be joined to her parents’ applications as she was not part of their original applications. Zahra currently has no lawful status in Australia, as the Minister has not granted her permission to lodge a protection, or any other visa application. She is unable to access Medicare. She is unable to access any childcare, kindergarten and once she reaches school age, she will be unable to legally enroll in a public school. Under existing law, she is subject to mandatory indefinite detention until she is either granted a visa or removed from Australia.

Even if the Minister allows her to lodge an application for protection, she will then need to show she independently meets the definition of a refugee. If she is successful, then she will be granted only a temporary visa, which she must renew and show she continues to meet the criteria, every 3 or 5 years. She may face separation from her parents, if they are unsuccessful in their applications, and she may be placed in state care, as there is no guarantee of family unity in the Migration Act. If she later marries an Australian citizen or permanent resident, she will still be unable to lodge a spouse application to remain in Australia unless she has earlier met pathway requirements of working or studying in a regional area for at least three and a half years and is able to meet the other spouse visa criteria and the hefty application fee.

**Recommendation 3:** Remove provisions in s5AA(1A) of the Migration Act imposing Unauthorised Maritime Arrival (UMA) status on children born in Australia whose parents arrived by sea.

### **Heavy administrative burden of constant visa processing**

2.6.12. Moreover, this constant cycle of visa processing, places a heavy and inefficient administrative burden on the Department of Home Affairs. For many so-called Fast Track applicants, it took more than 5 years of processing to be granted a three year visa. The renewal of their temporary protection visa may well take another 5 years by the time it has been processed.

### **No utility in maintaining a temporary protection regime**

2.6.13. As noted above, in addition to causing great suffering to affected individuals, temporary protection for people from Afghanistan has no utility from an administration perspective. Independent country information providing long-term forecasts about likely scenarios in Afghanistan indicate that the security situation is very unlikely to improve anytime in the near future and there are already ominous signs that returning refugees will be targeted and at high risk. For example, in August 2021, the Taliban government in Afghanistan stated that it would accept any refugees from Afghanistan returned from Europe but would bring them before a court. It is not clear on what basis they would be charged, however the Taliban clearly has very little tolerance of those considered westernised and returnees can be easily spotted due to even subtle differences in their gestures and language which could cause them to be targeted.<sup>13</sup>

2.6.14. On 17 August 2021 UNHCR, the UN Refugee Agency, released a non-return advisory for Afghanistan, calling for a bar on forced returns of people from Afghanistan, including asylum seekers who have had their claims rejected:

“UNHCR calls on States to suspend the forcible return of nationals and former habitual residents of Afghanistan, including those who have had their asylum claims rejected. A moratorium on forced returns to Afghanistan would need to stay in place until the situation in the country has stabilised, pending an assessment of when the changed situation in the country would permit return in safety and dignity...”

UNHCR notes that: “[f]or individuals whose claim had been rejected prior to recent events, the current situation in Afghanistan may give rise to changed circumstances, which need to be considered if a new asylum claim is submitted.”<sup>14</sup>

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<sup>13</sup> “Taliban would take back Europe’s Afghan deportees to face courts, say spokesman”, Reuters, 30 August 2021, available at: <https://www.reuters.com/world/taliban-would-take-back-europes-afghan-deportees-face-courts-says-spokesman-2021-08-30/>

<sup>14</sup> UNHCR, UNHCR Position on Returns to Afghanistan, August 2021, available at: <https://www.refworld.org/pdfid/611a4c5c4.pdf>

### **Case Study – Asmat, Temporary Protection visa holder**

Asmat, a Hazara man from Afghanistan, arrived in Australia by sea as an unaccompanied minor in 2013. Despite being an unaccompanied minor and having a brother living in the community in Australia, he was detained. During his detention, his mental health deteriorated and he attempted suicide. He was eventually released onto a bridging visa but then struggled for several years to survive with limited eligibility for Government support, including mental health services. In October 2021, he was finally granted a temporary protection visa for 5 years and will need indefinitely reprove his refugee status every five years unless he can meet unreachable permanent visa pathway requirements and application criteria. His brother, who also arrived by sea at an earlier time, is already an Australian citizen. One of the factors which has contributed to Asmat's ongoing mental health issues, is the understandable difficulty he has had making sense of why he has been denied any durable protection and treated so much more harshly than his brother, despite them both arriving in similar circumstances and having identical protection claims.

**Recommendation 3:** Grant permanent protection to refugees from Afghanistan currently in Australia on temporary visas, including bridging visas, or held in detention or in offshore processing

### **Impact of rigid asylum processes preventing fresh assessments**

2.6.15. There are still many people from Afghanistan seeking asylum in Australia who are yet to receive even a temporary protection visa and who struggle to survive on protracted rolling bridging visas, or even worse, have now become unlawful and left with no status at all. Many in this situation were denied protection many years ago, often based on country information suggesting that Afghanistan had become safe for people to return there. Instead the opposite has occurred and yet there has been no systemic mechanism by which those whose cases were previously rejected can be reconsidered against relevant contemporary country information.

2.6.16. While the Minister has power to intervene in individual cases to allow them to lodge a fresh application for refugee status, until recently the Minister has declined to do so, leaving many people from Afghanistan still stuck in protracted court proceedings or at a "dead end" in the asylum process, suffering years of deprivation through denial of access to basic services such as access to social welfare, torture trauma counselling, Medicare and even work rights. It is encouraging that the Minister approved a "bulk bar lift" last year, allowing some people from Afghanistan in this situation to make fresh applications for protection. Hopefully the Minister will soon approve others, allowing all members of this group to lodge fresh applications and have their protection claims re-assessed. However, even this favourable process will still likely take further months if not years to be completed; causing further uncertainty and pain for a group of people who have already been made so vulnerable through being left to drift without proper status or support for a decade or more.

2.6.17. It is wrong from all vantage points to continue to deny permanent protection to people from Afghanistan. It needlessly holds people back from properly settling and investing in their lives in Australia and being reunited with their families; its costs the taxpayer a fortune in endless visa processing and detention; and all in a context where it will remain impossible to even consider returning people to Afghanistan for the foreseeable future.

**Case study: Ali, Hazara man from Afghanistan living in Australia for 10 years without status**

Ali, an Afghan Hazara man from Afghanistan, has lived in Australia for the past 10 years. He arrived by sea in 2011 and was not allowed to apply for a protection visa. Instead, his case was assessed by an internal Department body and then a merits review body, both which had refused his applications by 2013 on the basis that he could safely relocate from his home province of Hazarajat to Kabul. He has been left without a visa status in Australia for the past 7 years, unable to access Medicare, unable to legally work and living in constant fear of being detained. While others in his situation have been invited by the Minister to make applications for protection visas, he has not been and does not know why he is yet to receive an invitation and he has no legal rights to compel the Minister to consider his situation or to provide reasons why he has not been invited to apply. Especially given the major changes in the security situation in Afghanistan since his case was refused in 2013, he is desperately hoping that the Minister will favourably consider his recent request to finally be allowed to lodge a protection visa application to regularise his status and have his refugee claims assessed against contemporary circumstances.

**Recommendation 4:** Accelerate Ministerial consideration of bulk bar lifts allowing people seeking asylum from Afghanistan in Australia to lodge fresh protection applications, and expedite the processing of these protection visa applications.

**Plight of refugees from Afghanistan taken to offshore processing centres, including permanent family separation**

2.6.18. There is also the continuing persecution by the Australian Government of those people from Afghanistan who sought Australia's protection in 2012/13 but who were then taken against their will to offshore processing centres in Nauru and Papua New Guinea. There remain 15 people from Afghanistan who are still held in offshore processing centres after over 8 years. The conditions of offshore processing are extremely dangerous, with refugees commonly facing discrimination and violence. This situation is further exacerbated by COVID-19. Some of these people held for years in offshore processing centres have also been separated from their families in Australia due to the arbitrary nature of the legislative cut-off dates through which people were sorted between those permitted to apply for protection onshore, versus those carted offshore.

2.6.19. For example, in the case of one of the families we work with, Mum and two children came on a boat a week prior to Dad, and received different outcomes. Mum and two children were allowed to remain in Australia, released from detention and eventually granted 5 year Safe Haven Enterprise Visas (SHEVs). One of the children has now met the SHEV pathway for a permanent visa and is hoping her mother and brother will also be granted permanent visas as members of her family unit. Whereas, Dad was carted off to PNG and separated for years from his wife and children. When he was finally transferred to Australia for medical treatment, for unfathomable reasons he was still held in closed detention separated from his family. Only later

was he placed on a residence determination and is now able to live with them. However, he can only do so on a temporary basis as under Government policy he will never be able to remain in Australia, even if his wife and two children become Australian permanent residents and then citizens. Instead, his only "choices" are to try to secure a resettlement place in the United States or elsewhere, or to return to PNG, or to return to Afghanistan. This family from Afghanistan have already endured so much suffering, but there is still further pain to come at the point when they will face permanent separation.

2.6.20. Government willingness to destroy families such as this one, is in clear breach of its international obligations to protect family life and family unity and is also a clear contradiction with the Government's stated "family values."

**Recommendation 3:** Grant permanent protection to refugees from Afghanistan currently in Australia on temporary visas, including bridging visas, or held in detention or in offshore processing

### **Use of Protracted, Arbitrary Onshore Detention**

2.6.21. In addition to the use of offshore detention as a system of punishment against boat-arriving refugees from Afghanistan, there are also some 50 refugees from Afghanistan currently being held in Australia's onshore network of immigration detention centres. The conditions in these centres are woefully inadequate and pose a serious mental and physical health risk to those detained, especially for protracted periods. Despite all of these detainees clearly now having strong protection claims, they remain in detention, some for over 8 years.

2.6.22. Our client, a Hazara man from Afghanistan was been held in closed detention for almost five and a half years, separated throughout that period from his Australia citizen partner and two children, aged 3 and 6. He has never had a visa cancelled (rather, he was detained as his bridging visa lapsed) and has only minor convictions related to a single period of previous drug use.

2.6.23. He arrived in Australia by sea in 2010. He was refused protection under non-statutory processes back in 2012, due to authorities thinking at that time that it would be safe for him to live in Kabul. The Minister refused to release him or allow him to apply for a fresh protection application, despite multiple recommendations from the Ombudsman that the Minister do so. For years he was essentially lost in the system. In November 2020 the Minister finally permitted him to lodge a fresh application for protection. He has been found to be owed protection obligations, and has also had confirmation some weeks ago that his protection visa will not be refused on character grounds. 11 months since he lodged his fresh application for protection, he was finally granted a visa and released from detention.

**Recommendation 3:** Grant permanent protection to refugees from Afghanistan currently in Australia on temporary visas, including bridging visas, or held in detention or in offshore processing

## **2.7 Family reunification of people from Afghanistan in Australia**

The key pathways that visa holders from Afghanistan who are in Australia can reunite with their family members overseas are through the Family Migration Program or the Offshore Humanitarian

Program. However, as discussed below, neither of these options are available for refugees holding temporary protection visas.

## **The Family Migration Program**

2.7.1. The Family Migration Program is comprised of partner, child, orphan relative, remaining relative, parent, carer and aged dependent visas. Only permanent residents of Australia can sponsor their family member on one of these visas. However, even if a person originally from Afghanistan is a permanent resident, barriers to family reunion remain. This is due to the operation of Direction 80 – order for considering and disposing of Family visa applications under s 47 and 51 of the *Migration Act 1958* (Cth) which provides the order of priority for Department officers to consider and process family visas. Pursuant to Direction 80, family visa applications in which the sponsor is an unauthorised maritime arrival who holds a permanent visa are given the lowest priority.<sup>15</sup> Delegates may depart from the order of priority where there are “special circumstances of a compassionate nature” and “compelling reasons” to do so.<sup>16</sup> However, the length of waiting time cannot be the basis for such departure. The impact of this Direction (which delegates deciding visa applications are legislatively required to follow) is that family reunion applications made by Australian permanent residents from Afghanistan who arrived by sea, are prevented from ever being considered. This is because their applications are, by design, always pushed to the bottom of the queue, and every other applicant will always be prioritised ahead of them. In essence, Afghan Australians are left endlessly trying to climb to the top of the ladder and never reach their family reunion destination.

2.7.2 Australian Afghanistan community members also face additional challenges to reuniting with their family members. These include prohibitive visa application fees and other costs, more stringent processes around establishing identity and other documentation to engage with visa processing partners such as VFS Global and caps on visas leading to lengthy processing timeframes.

2.7.3 The current visa application fee for a partner visa is \$7,850, with \$3,930 for each additional applicant over 18 and \$1,965 for each additional applicant under 18 years of age.<sup>17</sup> Visa applicants face additional costs relating to health checks, police clearances and airfares. These costs can be prohibitive for applicants from Afghanistan who are often supporting family members overseas as the head of household. The high costs associated with lodging partner, child or parent visas often forces visa holders from Afghanistan who are in Australia to consider proposing their overseas family for a an offshore humanitarian visa (Subclasses 200, 201, 202 or 204), for which there is no lodgment fee. However, the offshore humanitarian visa program has very low prospects of success for even the most compelling cases and visa processing times are extremely lengthy.

2.7.4. UNHCR has urged states to expedite family reunification procedures for refugees from Afghanistan. Commenting upon the inaccessibility of family reunion procedures, the UNHCR has called on states to simplify and expedite family reunification processes and apply an expansive approach when processing applications from Afghanistan. UNHCR has noted that for many

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<sup>15</sup> Clause 8(1)(g) of Direction 80.

<sup>16</sup> Clause 9 of Direction 80.

<sup>17</sup> Items 1124B and 1129, Schedule 1, *Migration Regulations 1994* (Cth).

refugees from Afghanistan, the prohibitive costs, lengthy wait times and strict documentation requirements may be a barrier to them securing urgent protection and safety. UNHCR is also calling on states to consider the diverse family structures that are characteristic of Afghanistan culture, and to include extended family members where they can establish a relationship of dependency.<sup>18</sup>

### **Case study: Yusuf, interpreter with Australian forces in Afghanistan**

Yusuf was an interpreter with the Australian troops in Afghanistan. The Afghan LEE program was not legislated at the time and as he was at risk of serious harm due to his working with the Australian troops, he arrived in Australia by boat in late 2011.

In 2014 he lodged a family reunion partner visa application for his wife and child. His application remains unfinalised because it has been continuously de-prioritised and pushed to the end of the processing queue due to the impact of Direction 80. His wife and child remain in a perilous security situation in Quetta, Pakistan; the location of multiple terror attacks against people from Afghanistan as recently as September 2021. Here is the timeline of the processing of his application:

- November 2014: Application lodged and acknowledged as valid.
- September 2017: Direction 72 (the first version of Direction 80) introduced and Yusuf is given an opportunity to make a request for waiver of Direction 72 on grounds of "compassionate and compelling circumstances."
- September 2017: Department refuses Yusuf's request for the waiver.
- August 2018: Department asks for further information regarding Yusuf's family composition and is interviewed, and takes issue with why family members cannot provide all requested identity documents.
- December 2019: Yusuf requests waiver of Direction 80 on grounds of "Compassionate and compelling circumstances."
- January 2020: Department refuses his request for waiver of Direction 80.
- January 2020: Yusuf seeks reassessment of the Direction 80 decision.
- March 2020: Department again refuse his request for waiver of Direction 80.
- October 2021: Still no finalisation of Yusuf's visa application.

Quite aside from the extraordinary multiple decisions not to consider Yusuf's separation from his wife and child as compelling and exceptional, there is clearly an unreasonable delay in processing his application. For periods totaling 87 months, or more than 7 years, there is no indication of the Department undertaking any active processing of his visa application.

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<sup>18</sup> UNHCR, "UNHCR calls on states to expedite family reunification procedures for Afghan refugees", 15 October 2021, available at: <https://www.unhcr.org/news/briefing/2021/10/616935614/unhcr-calls-states-expedite-family-reunification-procedures-afghan-refugees.html>



**Recommendation 5:** Remove Direction 80 (which automatically de-prioritises family reunion visa applications for refugees who arrived by sea) and properly resource processing, expedite, and prioritise all family reunification visa applications made by Afghanistan-Australians.

**Recommendation 7:** Adapt assessment of identity documents and health requirements for all visa application types for people from Afghanistan, recognising that identity and health checking in Afghanistan are no longer possible, and that many Afghans are now unable to secure relevant civil documentation to support their visa applications.

**Recommendation 8:** Amend Schedule 1 so that special humanitarian visa applicants from Afghanistan are able to lodge their applications via email and do not need to courier their applications to Jordan, (at present an impossible bar for applicants inside Afghanistan.)

## 2.8 Discriminatory delays in granting Australian Citizenship to people from Afghanistan in Australia

2.8.1. The extensive delays in processing citizenship by conferral applications<sup>19</sup> has also contributed to people from Afghanistan being separated from their families overseas. A 2017 report by the Commonwealth Ombudsman found that applicants for citizenship from Afghanistan were disproportionately impacted by these delays relative to other cohorts due to enhanced identity and integrity checks. Problematically, it was revealed that some citizenship applications by people from Afghanistan were left un-progressed for years at a time because of a perception that they were too complex to finalise, contributing to “administrative drift”. Additionally, the Ombudsman indicated that the Department appeared to view the process of assessing citizenship applications as another opportunity to correct errors previously made in granting visa decisions, particularly with respect to previous identity or nationality findings. Problematically, by the time some people from Afghanistan receive an outcome on their citizenship by conferral applications, they have already resided in Australia for many years.

2.8.2. As stated above, Australian permanent residents who arrived by boat and apply to sponsor their family to Australia are de-prioritised according to *Ministerial Direction 80 - order for considering and disposing of Family visa applications under sections 47 and 51 of the Migration Act 1958* (Cth). An exception exists where the applicant is able to show compelling reasons why the delegate should depart from the order for priority processing in their case. People who acquire Australian citizenship are no longer subject to Ministerial Direction 80, even if they arrived in Australia by boat.

2.8.3. Two Hazara applicants from Afghanistan who sought judicial review with the support of the Refugee Council of Australia had been waiting 18 to 23 months for a decision on their citizenship applications. The court found that in both cases there had been unreasonable delay in deciding their citizenship applications finding that a reasonable time for processing of the

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<sup>19</sup> Australian Government, Department of Home Affairs, Citizenship processing times (last updated 15 September 2021), available at: <https://immi.homeaffairs.gov.au/citizenship/citizenship-processing-times>

applications was between 6 and 7 months from the time the citizenship test was taken.<sup>20</sup> Despite these recommendations, the unreasonable delays in processing of applications for citizenship for asylum seekers who arrived by boat has continued.

### **Case Study – Rahul**

Rahul lodged his Australian citizenship by conferral application in 2017 after he had held his subclass 866 permanent resident visa for at least one year. As at the time of writing this submission, he is still awaiting an outcome on this application, despite published processing times that state 90% of applications are processed within 16 months of lodgment. Rahul lodged a partner visa to bring his wife to Australia in 2018, but as a result of the fact that his citizenship has not been processed, his application has been relegated to the bottom of the queue. He is still waiting on an outcome on both applications.

**Recommendation 6:** Expedite processing of citizenship by conferral applications for people from Afghanistan whose applications remain unfinalised.

## 2.9 Lifting the ban on resettlement of refugees to Australia through the UNHCR in Indonesia

2.9.1 In 2014 then Immigration Minister Scott Morrison announced that people seeking asylum and refugees registered with the United Nations High Commissioner for Refugees in Indonesia are excluded from Australia's refugee intake. This ban, while unnecessary nearly a decade ago, is unacceptable due to recent developments.

2.10 There are currently 13,416 registered refugees in Indonesia, this includes 3,622 children (77 are unaccompanied). The majority of the refugees in Indonesia are from Afghanistan, with the number currently at 7,490.<sup>21</sup> The refugees in Indonesia have registered with the UNHCR and are entitled to protection in Australia.

**Recommendation 15:** Immediately lift the ban on resettlement of refugees to Australia through the United Nations High Commissioner for Refugees in Indonesia.

## 4. Conclusion

4.1 This submission has highlighted the systemic injustices faced by people from Afghanistan in Australia as a result of successive punitive and deterrence-based measures. The current system which heavily penalises asylum seekers who have arrived by boat has consigned thousands of visa holders from Afghanistan to a life of uncertainty. These visa holders will clearly never be able to return to Afghanistan, yet our Government forces them to periodically reprove their refugee

<sup>20</sup> See Refugee Council of Australia, Ombudsman reports on citizenship delays (25 January 2019), available at: <https://www.refugeecouncil.org.au/ombudsman-citizenship-delays/>. See also *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530.

<sup>21</sup> <https://reporting.unhcr.org/sites/default/files/Indonesia%20Statistical%20Report%20June%202021.pdf>

status as a result of the temporary protection visa system.

4.2 Every avenue by which visa holders from Afghanistan might reunite with their family members in Afghanistan has been cut off, as they are not eligible to sponsor their family members via the partner, parent or child visa pathway. Nor are they eligible to propose their family members for an offshore humanitarian visa. Even for those who are Australian permanent residents, the impact of Ministerial Direction 80 combined with the lengthy processing times for citizenship by conferral applications means that their applications for family union are relegated to the bottom of the processing queue.

4.3 This is not a humane way to treat people from Afghanistan, who have suffered through many years of civil war and foreign intervention. Australia's long-term military engagement with Afghanistan demands that we do more to help at this critical time in Afghanistan's history. We have submitted above, that Australia has the capacity, infrastructure and should also have the political will to increase our humanitarian intake of refugees from Afghanistan and to take the additional steps outlined in our recommendations to this Committee. Acting upon these recommendations would undoubtedly improve Australia's standing and bring us in line with our allies whose forces served bravely alongside our own in Afghanistan.

**Recommendation 1:** Commit to an additional humanitarian intake of at least 20,000 people from Afghanistan that is separate and in addition to the current refugee and humanitarian intake stream of 13, 750 places.

**Recommendation 2:** Prioritise and expedite processing of these 20,000 humanitarian visas and allow family members in Australia to propose their immediate family members, and apply for family reunion visa categories, irrespective of their own visa status.

**Recommendation 3:** Grant permanent protection to refugees from Afghanistan currently in Australia on temporary visas, including bridging visas, or held in detention or in offshore processing

**Recommendation 4:** Accelerate Ministerial consideration of bulk bar lifts allowing people seeking asylum from Afghanistan in Australia to lodge fresh protection applications, and expedite the processing of these protection visa applications.

**Recommendation 5:** Remove Direction 80 (which automatically de-prioritises family reunion visa applications for refugees who arrived by sea) and properly resource processing, expedite, and prioritise all family reunification visa applications made by Afghanistan-Australians.

**Recommendation 6:** Expedite processing of citizenship by conferral applications for nationals from Afghanistan whose applications remain unfinalised.

**Recommendation 7:** Adapt assessment of identity documents and health requirements for all visa application types for people from Afghanistan, recognising that identity and health checking in Afghanistan are no longer possible, and that many Afghans are now unable to secure relevant civil documentation to support their visa applications.

**Recommendation 8:** Amend Schedule 1 so that special humanitarian visa applicants from Afghanistan are able to lodge their applications via email and do not need to courier their applications to Jordan, (at present an impossible bar for applicants inside

Afghanistan.)

**Recommendation 9:** Renew the subclass 449 visas held by all people from Afghanistan, including those in Afghanistan and third countries, for a further 12 months

**Recommendation 10:** Provide 449 visas and safe passage to Australia for the immediate family members of subclass 449 visa holders in Australia.

**Recommendation 11:** Expand the eligibility criteria for the Locally Engaged Employee visa category to anyone who now faces persecution by the Taliban due to their service to Australia, (irrespective of employed/contractor status) and expedite the grant of LEE visas (in addition to the 20,000 recommended above)

**Recommendation 12:** Provide concerted assistance to ensure the safe passage and travel arrangements to Australia for all LEE and subclass 449 visa holders.

**Recommendation 13:** Provide clear, detailed and regular updated information on the Home Affairs and DFAT websites and allow persons to register for notification of these updates. Expand the Home Affairs and DFAT services to respond to queries for information.

**Recommendation 14:** Provide funded legal assistance to specialist community immigration lawyers so they can provide legal information and assistance to people from Afghanistan seeking assistance with all migration options.

**Recommendation 15:** Immediately lift the ban on resettlement of refugees to Australia through the United Nations High Commissioner for Refugees in Indonesia.