

Introduction

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. Our services include casework, legal, housing, medical, education, employment and emergency relief. Based on what we witness through our service delivery, we advocate for change with refugees to ensure their basic human rights are upheld.

The ASRC welcomes the opportunity from the Parliamentary Joint Committee on Human Rights to provide a submission on the human rights framework in Australia.

The concept of fairness is central to the Australian way of life and underpins our national motto of 'giving someone a fair go'. Sadly, there are many Australian residents who are being treated unfairly and have no pathway to seek justice. Refugees and people seeking asylum are regularly denied access to their basic human rights, such as the right to healthcare and the right to work. Concerningly, refugees and people seeking asylum are also indefinitely held in immigration detention and permanently separated from their families.

Everyone deserves to live with dignity and in safety with their family. A federal Human Rights Charter (Charter) will make this a reality for everyone in Australia. The ASRC endorses the Australian Human Rights Commission's report and recommendations regarding the Charter.¹

Australia is the only liberal democracy in the world that does not have a national act or charter of rights that protects people's basic rights. It is time that Australia no longer remains an outlier on the international stage and legislates a federal Charter, similar to models in the United Kingdom and New Zealand. Whilst Australia is a party to several international human rights treaties,² our commitments are not wholly reflected in domestic law. Victoria, the Australian Capital Territory (ACT) and Queensland have enacted human rights legislation, which is operating effectively at the state

¹ Australian Human Rights Commission, A Human Rights Act for Australia Position paper: Free and Equal, December 2022, <https://humanrights.gov.au/human-rights-act-for-australia>.

² UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, <https://www.refworld.org/docid/3ae6b3aa0.html>; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, A/RES/2200, <https://www.refworld.org/docid/3b00f47924.html>; UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, <https://www.refworld.org/docid/3ae6b3940.html>; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, <https://www.refworld.org/docid/3ae6b3970.html>; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, <https://www.refworld.org/docid/3ae6b3a94.html>; UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, <https://www.refworld.org/docid/3ae6b38f0.html>; UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, <https://www.refworld.org/docid/45f973632.html>.

and territory level. However, this piecemeal approach has resulted in many people in Australia not having access to the same rights and protections under the law. In relation to federal issues, such as the treatment of refugees and people seeking asylum, only a national Charter can address the gaps that exist in our current legal system to ensure everyone's human rights are respected.

A Charter will promote a human rights culture in our society, which will lead to the interpretation of existing laws in a manner that is consistent with human rights and improve decision-making. Also, the Charter will provide a pathway to enforceable remedies, which will significantly improve access to justice and accountability for government decision making. In the context where the Minister for Immigration, Citizenship and Multicultural Affairs has no less than 47 personal powers under the Migration Act³ – more than any other Commonwealth Minister – which are immune from merits review,⁴ greater mechanisms for accountability regarding human rights standards are urgently required.

In addition to the Charter, further action is vital to protect the lives of people in immigration detention and promote transparency and accountability. The establishment of an independent body to review a person's detention and make enforceable recommendations is necessary to ensure that no one is indefinitely detained and denied access to their human rights.

Recommendations

Recommendation 1: Legislate a federal Human Rights Charter.

Recommendation 2: Establish an independent body to review a person's immigration detention and make enforceable recommendations.

Right to liberty and security of person

Refugees and people seeking asylum are routinely subjected to indefinite and arbitrary detention, resulting in devastating consequences including irreparable damage to their health and permanent family separation. Concerningly, the average time that people spend in closed immigration detention has rapidly increased over the previous decade from 81 days in 2013 to 735 days.⁵ The average period of detention remains just above two years largely due to the significant number of

³ *Migration Act 1958* (Cth).

⁴ Liberty Victoria Rights Advocacy Project, *Playing God - the Immigration Minister's Unrestrained Powers*, 2017, https://static1.squarespace.com/static/6126d454650f333db2d27357/t/613ad3ace2230f30503a6e92/1631245243818/YLIR_PlayingGod_Report2017_FINAL2.1-1.pdf.

⁵ Refugee Council of Australia, *Statistics on people in detention in Australia*, May 2023, <https://www.refugeecouncil.org.au/detention-australia-statistics/5/>.

people (135) who have been detained for longer than five years.⁶ Data from August 2022 showed that **at least 30 people have been detained for longer than nine years.**⁷ This is an extraordinary amount of time for people seeking asylum and refugees to be denied their liberty and is simply unacceptable. The significant and irreversible damage to people's health and well-being cannot be overstated.

Disturbingly, the Migration Act permits indefinite detention despite its direct contradiction with Australia's international human rights obligations. The infamous High Court of Australia judgment, *Al-Kateb v Godwin*,⁸ found that a law that resulted in a person being held in immigration detention indefinitely was constitutionally valid. The majority in *Al-Kateb* did not consider that international law principles regarding human rights were applicable to interpreting domestic legislation.⁹ However, a Charter will permit our laws to be interpreted in a manner that is consistent with upholding human rights. Had a Charter existed at the time of *Al-Kateb*, the High Court may have reached a different conclusion.

Case study

Joseph fled Iran in 2013 and sought asylum. In 2016, his bridging visa was cancelled. He was transferred to immigration detention in 2017 and has remained there since this time.

His protection visa application was refused by the Department of Home Affairs (Department) and at the merits review stage, and he sought judicial review before the Courts. The Immigration Assessment Authority (IAA), a limited merits review body, made a number of unlawful decisions, meaning that Joseph has faced multiple processes at the IAA and court. He is awaiting the outcome of a judicial review matter of his third IAA decision.

Joseph has been seeking asylum for over a decade and has been detained for six years, with no certainty regarding when he will be released from detention.

A Charter will prevent Joseph from being indefinitely detained and enable him to live in the community while seeking asylum.

In addition, Australia's offshore detention regime has caused immense suffering to refugees and people seeking asylum in breach of their human rights. During 2012 and 2013, people seeking asylum were transferred to Papua New Guinea (PNG) and Nauru for offshore processing. Since this time, there has been a significant deterioration of people's mental and physical health due to a lack

⁶ Department of Home Affairs, Immigration Detention and Community Statistics Summary, April 2023, <https://www.homeaffairs.gov.au/research-and-stats/files/immigration-detention-statistics-30-april-2023.pdf>.

⁷ Department of Home Affairs, Freedom of Information Request FA22/08/00717, 4 October 2022, <https://www.homeaffairs.gov.au/foi/files/2022/fa-220800717-document-released.PDF>.

⁸ [2004] HCA 37.

⁹ Ibid, [63].

of appropriate medical treatment, indefinite separation from their families, and no permanent pathway to safety in sight. **At least 14 people subject to offshore processing have died,¹⁰ and many others have been subjected to human rights abuses and neglect.** 80 men remain in PNG unable to rebuild their lives, reunite with family or have any certainty about their future. After a decade held offshore, there is an urgent need for evacuation.

Australia's offshore detention regime has been widely criticized by United Nations human rights bodies.¹¹ In 2022, the United Nations Committee Against Torture reported that Australia's offshore detention regime breached basic human rights and noted:

"The Committee is particularly concerned about reports of mandatory detention, including of children, overcrowding, inadequate health care, including mental health care, and assault, sexual abuse, self-harm, ill-treatment and suspicious deaths. The combination of the harsh conditions, the protracted periods of closed detention and the uncertainty about the future reportedly creates serious physical and mental pain and suffering and has allegedly compelled some asylum-seekers to return to their country of origin, despite the risks that they face there. The Committee is also concerned about severe restrictions on access to and information regarding the offshore immigration processing facilities, including a lack of monitoring by independent inspection bodies.

It is further concerned that, following the closure of the Manus Island (Papua New Guinea) regional processing centre on 31 October 2017, refugees and asylum-seekers who were transferred there by the State party were left without services, protection measures or adequate arrangements for long-term viable relocation solutions".¹²

Case study

Mohammad is a Hazara man from Afghanistan who is in PNG. He has been recognised as a refugee. **Mohammad has suffered in offshore detention in PNG for over nine years.**

Mohammad has several untreated health conditions which makes it difficult for him to eat. He also suffers from depression. His doctor suggests he exercises, but Mohammad does not want to leave his house for fear of his safety.

¹⁰ Human Rights Law Centre, #9YearsTooLong, July 2022, <https://www.hrlc.org.au/timeline-offshore-detention>.

¹¹ United Nations High Commissioner for Refugees, United Nations observations on Australia's transfer arrangements with Nauru and Papua New Guinea (2012-present), October 2021, <https://www.unhcr.org/au/publications/united-nations-observations-australias-transfer-arrangements-nauru-and-papua-new>.

¹² Committee Against Torture, Concluding observations on the sixth periodic report of Australia, CAT/C/AUS/CO/6, 5 December 2022, <https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6OkG1d%2FPPrICAqhKb7yhsoQ6oVlgGLf6YX4ROs1VbzEru4wycl%2FqOolrzLep%2BJZyT2klvroOhuMblG1ioCx4Z3eXyrZ%2FkEdUDMwgHAnBoh0v9T4FjuSgv4v9weZd7XDc>.

He is under severe mental stress because he is worried about his family in Afghanistan who are living under Taliban rule.

"My hopes are to be with family, find work, stand on my own feet, feel independent and feel like a human. To have a peaceful life. Just do not forget us and hopefully, you can help us get out of this situation. We are stuck and cannot do anything to change our life for the better".

A Charter will prevent Mohammad from being indefinitely held in offshore detention.

Currently, there are over 1,000 people in Australia who were previously held offshore. Many of them were arbitrarily detained, including in hotels used as alternative places of detention (known as hotel detention). Hotel detention was oppressive and denied people access to their basic human rights such as access to medical treatment. The Australian Human Rights Commission's June 2023 report provides further details of how hotel detention infringes human rights.¹³ The Commission's report also highlights that the use of hotel detention was completely arbitrary due to the God-like powers of the Minister for Immigration to decide who is released from detention, and there was no objective criteria to determine who would remain detained or released.¹⁴ This arbitrary detention caused widespread distress for people who remained detained as well as others in the community.

Plainly, our current laws enable the indefinite and arbitrary incarceration of people seeking asylum and refugees, which amounts to torture. A Charter will mitigate the risk of indefinite and arbitrary detention.

In addition to the Charter, further action is essential to protect people in immigration detention and promote accountability in decision-making regarding detention. There is currently no mechanism available for the review of immigration detention conditions, which has created an opaque and unjust system with many people languishing in detention for protracted periods. Although the Commonwealth Ombudsman has reporting powers under the Migration Act for anyone held in detention for over two years,¹⁵ its powers are not binding and rarely result in the release of people from detention. The ASRC strongly recommends the establishment of an independent body to review a person's detention and make enforceable recommendations to ensure that no one is indefinitely detained.

¹³ Australian Human Rights Commission, The Use of Hotels as Alternative Places of Detention, June 2023, https://humanrights.gov.au/hotel_apods_2023.

¹⁴ Ibid, p. 49.

¹⁵ Migration Act 1958 (Cth), s 486O.

Protection of children

Concerningly, the current migration framework does not ensure that the best interests of the child are a primary consideration in migration decisions regarding children. As a result, refugee children or those seeking asylum are unable to live in safety and with dignity in Australia.

For example, **Australia's mandatory immigration policy applies to children, who have been held in offshore detention and onshore closed detention, including remote locations such as Christmas Island.** Although the Migration Act "affirms as a principle that a minor shall only be detained as a measure of last resort",¹⁶ this principle is not a binding requirement and has not prevented the detention of children. Consequently, children have suffered immense harm to their physical and mental health, including impacts on their development. It has also prevented children from accessing their basic human rights such as healthcare and education.

Case study

The Australian Government's treatment of the Murugappan family (also known as the Biloela family) demonstrates the harsh conditions imposed on children and families who are seeking asylum, with devastating consequences to their health.¹⁷

Nadesalingam (known as Nades) and Priya fled Sri Lanka and sought asylum in Australia. They met here and had two daughters, Kopika (born in 2015) and Tharnicaa (born in 2017).

In March 2018, Australian Border Force officials (accompanied by police and Serco private security guards) arrived at the family's home in Biloela and removed them due to the expiry of Priya's bridging visa. They were moved to a Melbourne immigration detention centre, and later Christmas Island where **their family were the sole occupants of the immigration detention centre.**

The family remained detained at Christmas Island while court proceedings continued, despite the COVID-19 pandemic and concerns over exposure to COVID-19 from guards.

The family's prolonged detention in an isolated location had a devastating impact on them, particularly the children. The lack of sunlight due to their closed detention led to a vitamin D deficiency, which caused infections and other medical problems. Tharnicaa's nutritional needs were not met and her teeth started to rot. At age two, she had surgery to have teeth removed.

¹⁶ Ibid, s 4AA.

¹⁷ SBS News, From Sri Lanka to Biloela, to Perth and back: A timeline of the Nadesalingam family's journey, June 2022, <https://www.sbs.com.au/news/article/from-sri-lanka-to-biloela-to-perth-and-back-a-timeline-of-the-nadesalingam-family-journey/jfmofat70>; BBC News, Biloela family: Locked up by Australia for three years, May 2021, <https://www.bbc.com/news/world-australia-56768529>.

In 2021, Tharnicaa (aged 4 at the time) had to be evacuated from Christmas Island for medical treatment following a blood infection.

A Charter of Human Rights would have prevented Kopika and Tharnicaa from being held in immigration detention and suffering serious medical conditions due to their detention, and their family would have been able to live in the community in safety while seeking asylum.

A Charter will ensure that children's human rights are protected and that the best interests of the child is a primary consideration in decisions concerning them.

Protection of families

The protection of families is an important human right and essential for refugees to rebuild their lives in Australia. However, refugees and people seeking asylum are often indefinitely separated from their families due to intentional policy decisions by the Australian Government. For example, the cruelty of the temporary protection regime is heightened by restrictions that prevent family sponsorship for temporary protection visa holders. As a result, **families have been torn apart and separated for protracted and indefinite periods of time, which has caused a profound impact on their mental health.**

Case study

Noor fled Myanmar with her husband and daughter in 2013 and sought asylum in Australia by sea. Their son, Jamal, was 15 years old at this time and he remained in Myanmar with his grandparents. Noor expected her son to join their family soon in Australia once they were granted visas.

Noor and her family were recognised as refugees and granted temporary protection visas in 2017. However, as they arrived by sea, Noor was not eligible to sponsor any family members, including Jamal. **Noor has been separated from her son for over a decade.**

A Charter will protect Noor's family unity and enable her to reunite with her son.

Also, mandatory detention and offshore processing continues to separate families in Australia, including those with Australian citizen and permanent resident family members, causing devastating impacts on their communities.

Case study

Said is a refugee who spent over nine years in Nauru. His brother is an Australian citizen. In 2021, several of Said's family members were evacuated to Australia, including his wife and three children. However, Said remained in Nauru.

Said was finally transferred to Australia in December 2022 and reunited with his wife and children.

A Charter would have enabled Said to reunite with his brother, wife and children in a timely manner without enduring years of separation.

Refugees should not have to choose between their fundamental human rights to live in safety and reunite with their families. A Charter will prevent refugee families from being indefinitely separated.

Right to work

The right to work is essential to ensure that people can live with dignity. However, thousands of people seeking asylum in Australia are denied the right to work while awaiting the outcome of their protection visa application. While people seeking asylum await their final outcomes, generally they are granted a bridging visa to regularise their migration status. However, bridging visas were not designed for extended periods due to the limited rights available to visa holders. **Due to the excessive delays in visa processing,¹⁸ people seeking asylum remain on bridging visas for up to a decade and are unable to work during this time.**

Of the 7,000 people seeking asylum who access services at the ASRC, around 57 percent are without work rights and 66 percent are without study rights. This occurs simply due to the Department not granting work rights to people seeking asylum on bridging visas. Also, it is estimated that approximately 20 percent of people seeking asylum in the community on Bridging E Visas (BVE) are denied work rights.¹⁹

The denial of work rights to people seeking asylum forces them into destitution and prevents them from accessing basic necessities such as food, housing and healthcare. Also, it fosters an environment where people seeking asylum are forced to accept employment in exploitative conditions, including being underpaid and overworked in dangerous conditions, in order to

¹⁸ As of August 2022, the average Department of Home Affairs processing time for a Protection visa was 1,076 days. As of May 2023, the median AAT processing times for refugee cases is 1,127 days. In addition, applicants seeking judicial review of their Protection visa refusals wait for at least two to three years for their matter to be finalised. See Refugee Council of Australia, Statistics on people seeking asylum in the community, June 2023, <https://www.refugeecouncil.org.au/asylum-community/5/>; Administrative Appeals Tribunal, Migration and Refugee Division Caseload Report Financial year to 31 May 2023, <https://www.aat.gov.au/AAT/media/AAT/Files/Statistics/MRD-Detailed-Caseload-Statistics-2022-23.pdf>.

¹⁹ This estimate is based on data available from Senate Estimates in October 2021 (SE21-332) and October 2022 (OBE22-124).

financially support themselves and their families. They are rendered powerless to speak out against illegal work conditions because they may lose their only source of income.

Case study

Benjamin arrived in Australia on a student visa after fleeing his country of origin due to facing serious harm because of his sexuality. He was unaware that he could apply for a protection visa on these grounds in Australia.

Benjamin's mental health declined due to past experiences of trauma and ongoing threats he received from his ethnic community in Australia. He was unable to meet his student visa requirements and his student visa was cancelled.

Benjamin experienced homelessness, was extremely unwell and unable to seek legal assistance. He was taken into detention and at this time he was connected with the Asylum Seeker Resource Centre who advised him about his legal rights.

Benjamin applied for a protection visa and while awaiting the outcome of his protection visa application, he was granted a bridging visa with no work rights. He applied for work rights several times, however the Department refused to grant him work rights.

Benjamin waited over five years for his protection visa to be granted and was prohibited from working during this time. Benjamin was ready and willing to work and could have financially supported himself during his protection visa application process and avoided experiencing homelessness if he had work rights.

A Charter would have enabled Benjamin to have the right to work while he was seeking asylum and awaiting the outcome of his protection visa application.

Granting people the right to work is crucial for a cohesive and flourishing society. A Charter will ensure that people seeking asylum have the right to work for the duration of their protection visa application process, including merits and judicial review, which will enable them to live in safety and with dignity.

Right to health

Sadly, there are many people in Australia who cannot access basic healthcare. **People seeking asylum who do not have work rights are ineligible for Medicare and cannot access medical**

treatment. An estimated 20 percent of people seeking asylum on bridging visas do not have access to Medicare. Also, the constant requirement to renew bridging visas means that people seeking asylum often lose access to Medicare, which can occur at critical times, such as during pregnancy or medical emergencies. The denial of access to healthcare has serious repercussions on people's physical and mental health as well as an adverse impact on public health.

Case study

Ahmed fled his country of origin and sought asylum in Australia by sea in 2012. He has been seeking asylum for over a decade. While he awaits an outcome for his protection visa application, the Department has granted him a temporary bridging visa without work rights. This means that **Ahmed cannot access Medicare despite his serious health conditions including Post-Traumatic Stress Disorder and diabetes.**

As Ahmed does not have access to Medicare, he was not aware that he could attend a public hospital for a medical emergency and he became very unwell. Ahmed relies on charities to assist with his medical needs, however they cannot provide the required treatment.

A Charter will allow Ahmed to access healthcare via Medicare while he is seeking asylum and awaiting the outcome of his protection visa application.

In addition, people held in immigration detention face significant barriers in accessing adequate healthcare, in particular for those located in remote areas such as Christmas Island or in offshore detention. At least 14 people subject to offshore processing have died, and many of these deaths related to treatable illnesses. These deaths could have been prevented if the Australian Government had transferred people to Australia for urgent medical care. In 2018, an Australian coroner found that a young refugee man's death was directly related to inadequate medical care and the Australian Government's failure to transfer him for appropriate medical treatment in a timely manner.²⁰

80 men remain in PNG, who have been unable to access adequate healthcare for over a decade. There is an urgent need for medical evacuation.

Case study

Ishmael is a refugee in PNG. He suffers from physical and mental health conditions. Ishmael has spent the last 10 years without access to proper medical treatment for his conditions.

²⁰ Inquest into the death of Hamid Khazaei by Queensland State Coroner, File 2014/3292, 30 July 2018, https://www.courts.qld.gov.au/_data/assets/pdf_file/0005/577607/cif-khazaei-h-20180730.pdf.

He does not feel safe to leave his house. Ishmael applied for resettlement in New Zealand one year ago.

"We have been living in this situation for 10 years with no proper medical facilities. The Australian government is spending a lot of money on health care and security, but we are not getting the care and support we need, we are dying here and we are not getting the support we are supposed to have. It is better for me to be in Australia for proper healthcare, it would help to facilitate a smooth transition for me to go to New Zealand.

I hope I will be going somewhere much better where I can recover from 10 years in detention, and I can study, learn and earn, and access proper healthcare. I have wasted 10 years here. I ask the Australian government to support us and help us out of this situation, there are other people who may not be able to express their ordeal, some impacted worse than me who are mentally disturbed and cannot express their situation."

Access to medical treatment is essential for everyone to live safe and healthy lives. A Charter will guarantee that everyone in Australia, including refugees and people seeking asylum, can access basic healthcare.

Right to housing

The right to access adequate housing is fundamental to ensure that people can live in safety. Unfortunately many refugees and people seeking asylum in Australia are unable to access housing and experience homelessness because they are forced into poverty and destitution due to visa restrictions and denial of their basic rights. Unsurprisingly, these living conditions impede people seeking asylum's participation in the refugee status determination process, which has dire consequences for their future.

Case study

Maryam is a single woman from Bangladesh seeking asylum in Australia and is a victim-survivor of family violence.

Maryam lodged her protection visa application as a dependent on her husband's application. Their protection visa application was refused and her husband appealed to the Administrative Appeals Tribunal (AAT). Her husband was perpetrating family violence throughout the six years that the Department and AAT were assessing their visa applications.

After the AAT refused their application and Maryam and her husband lodged at the Federal Circuit Court, Maryam separated from her husband.

Maryam urgently needed access to crisis accommodation, however the accommodation provider would not admit Maryam because she only held a temporary bridging visa without work rights.

A Charter would have allowed Maryam to access crisis accommodation while seeking asylum.

No one in Australia should be forced into homelessness. A Charter will ensure that people seeking asylum can access housing while awaiting the outcome of their protection visa application.

Right to social security

Social security is designed as a safety net to ensure that people can access their basic necessities such as food, clothing and healthcare, in particular when they are facing tough times. **Currently, 98 percent of people seeking asylum waiting for their protection visa applications to be processed have no access to integral social support systems, including income, housing, educational assistance and legal aid.**²¹ Approximately three percent of people seeking asylum receive Status Resolution Support Services (SRSS), which the government refers to as a 'transitional allowance'. However, the support provided through SRSS is wholly inadequate to meet the cost of living in Australia as SRSS housing and income support are only provided at 89 percent of the rate of mainstream support.

Due to protection visa processing times skyrocketing, many people seeking asylum wait for up to a decade for a final outcome.²² The bridging visas held by people seeking asylum were never designed for protracted periods, and people are often driven into poverty due to the limited rights available to them, including ineligibility for mainstream social support.

Case study

Layla sought asylum from Malaysia due to experiencing family violence. She arrived on a tourist visa and her friend connected her with someone who met her at the airport and took her straight to a regional area to commence farm work. Layla was unaware that she did not have work rights. Her passport was confiscated by the farm owner and she was paid below the minimum wage. The farm owner handled all her migration matters and lodged a protection visa application on her behalf in which her actual claims for protection were not included. Layla was not interviewed by the Department and her protection visa application was refused. The farm owner did not advise Layla that her application had been refused.

²¹ Asylum Seeker Resource Centre, Poverty through Policy: The impact of excluding people seeking asylum from mainstream social support, 2023, https://asrc.org.au/wp-content/uploads/2023/04/ASRC_Policy_Through_Poverty_Finalv1.pdf.

²² See n18.

Layla's bridging visa expired and she became unlawful. The farm owner told Layla that he could not help her anymore and that she had to return to Malaysia.

Layla was too afraid to return to Malaysia given her experiences of family violence so she escaped from the farm. Fortunately, she was connected with some support services in the regional town. She received migration advice and has lodged a ministerial intervention request to submit another protection visa application on the basis of her experiences of family violence.

As her previous bridging visa did not have work rights, she is ineligible for work rights. She is also ineligible for SRSS. She has several health issues relating to the injuries she sustained as a result of family violence, however without work rights she is unable to access Medicare. She has experienced periods of homelessness during which she has been sexually assaulted. Layla is severely anemic as she is unable to afford food or supplements. It is likely that the Department will take years to assess her ministerial intervention request, during which time she will have no means to support herself.

A Charter will ensure that Layla could access mainstream social support to avoid poverty and live in safety.

Access to mainstream social support is essential to ensure that no one lives in poverty. A Charter will ensure that refugees and people seeking asylum have the right to access mainstream social support.

Right to education

People seeking asylum are frequently denied their right to education. For example, people seeking asylum on bridging visas are often not granted study rights, which can prevent them from enrolling at school or vocational training and higher education institutions. Also, the Department sometimes mutually exclusively grants work rights or study rights to bridging visa holders, which prevents people seeking asylum from upskilling and working. For example, people with the right to work are not able to complete basic upskilling that their employer requires due to restrictions on study rights, and people who secure apprenticeships through study opportunities are not able to proceed because they lack work rights. A Charter will ensure that refugees and people seeking asylum can access their right to education.

Case study²³

The ACT Education and Training Directorate implemented a policy to charge certain international students to attend ACT public schools. International students affected by

²³ Human Rights Law Centre, Charter of Rights, 2022, <https://charterofrights.org.au/101-cases/2022/10/26/case-16-access-to-public-school-education-for-asylum-seekers>.

these policies included children and young people who were refugees and those seeking asylum while living in Canberra.

The specific circumstances of these students were relevant to the reasonableness and proportionality of the Directorate's policies under human rights and discrimination law, including the ACT Human Rights Act.

The ACT Human Rights and Discrimination Commissioner worked with the Directorate over two years to develop new policies and procedures that better met the Directorate's human rights and discrimination law obligations, including policies confirming that ACT public education is free for refugee children and those seeking asylum.

A Charter will ensure that all refugees and people seeking asylum in Australia have access to their right to education.

Recognition and equality before the law & freedom from discrimination

Successive government policy has discriminated against refugees and people seeking asylum based on their mode of arrival to Australia. Consequently, people who sought asylum by sea have been subjected to punitive measures, even after they have been recognised as refugees, and denied equality before the law.

For example, in December 2014, the Australian Government introduced an unfair process to assess the protection claims of people seeking asylum who arrived by sea - this process is referred to as 'Fast Track' and applies to people who arrived by sea after August 2012. Under the Fast Track process, if a person seeking asylum had their protection visa application refused by the Department, they can only seek limited merits review before the Immigration Assessment Authority (IAA).²⁴ However, the IAA is not required to observe minimum standards of procedural fairness. IAA decisions are generally based on a paper review of information before the Department, and people seeking asylum do not have a right to a hearing to present their protection claims. Applicants are only allowed to provide a five-page submission, which must be provided within three weeks from the date their case is referred to the IAA from the Department.

Consequently, the IAA's decision-making has been unjust and riddled with errors. Since 2020, over 30 percent of IAA decisions (i.e. over 300 decisions) reviewed by the courts were found to be

²⁴ The Immigration Assessment Authority is a review body within the Administrative Appeals Tribunal (AAT), which is responsible for independent merits review of administrative decisions made by the Australian Government.

unlawful,²⁵ noting that many people would not have been able to access judicial review or legal representation, meaning the number of unlawful decisions is likely to be considerably higher. There is a real concern that the errors made at the Department stage are not rectified throughout the review process, with the IAA effectively acting as a rubber stamp for the Department and affirming the Department's decisions over 90 percent of the time.²⁶ As a result, **a significant number of refugees who sought asylum by sea have been refouled to their countries of origin.**

In addition, people who sought asylum by sea are subjected to a temporary protection regime. The cruelty of temporary protection is heightened by restrictions that prevent family sponsorship and limitations on overseas travel causing families to be torn apart and separated for protracted and indefinite periods of time. In 2019, the Australian Human Rights Commission published a report on the impact of the Fast Track process and temporary protection on refugees and people seeking asylum, which confirmed that temporary protection continues to inflict immeasurable harm on refugees.²⁷

In contrast, people who arrive in Australia by plane with a valid visa are entitled to apply for a permanent protection visa and sponsor their families.

Case study

Abdul fled Afghanistan due to his Hazara ethnicity and came to Australia by sea in 2013. As Abdul arrived by sea, he required permission from the Minister for Immigration to apply for a visa. In 2017, he was only permitted to apply for a temporary protection visa via the Fast Track process with limited merits review rights. The Department and IAA refused his protection visa application, and Abdul is now seeking judicial review of his IAA decision before the Courts. **He has been seeking asylum for a decade and separated from his wife and children in Afghanistan during this time.**

By contrast, Mohammed fled Afghanistan due to his Hazara ethnicity and came to Australia by plane in 2016. As Mohammad arrived by plane, he was permitted to apply for a permanent protection visa immediately. His visa application was initially refused by the Department, however he was able to seek merits review before the Administrative Appeals Tribunal with full merits review rights. In 2019, the Tribunal confirmed that Mohammad was owed protection and remitted his matter to the Department. Mohammed was granted a permanent protection visa and he was able to sponsor his wife and children to live in Australia.

²⁵ Administrative Appeals Tribunal, Annual Report 2021-22 - Chapter 4 - Immigration Assessment Authority, 2022, <https://www.transparency.gov.au/annual-reports/administrative-appeals-tribunal/reporting-year/2021-22-44> (see appeals remitted in relation to total appeals finalised).

²⁶ Ibid.

²⁷ Australian Human Rights Commission, Lives on Hold: Refugees and asylum seekers in the Legacy Caseload, 2019, https://humanrights.gov.au/sites/default/files/document/publication/ahrc_lives_on_hold_2019.pdf.

A Charter would have ensured that Abdul was treated equally to Mohammed when seeking asylum, including his rights during the refugee status determination process, eligibility for a permanent protection visa and the ability to sponsor his family.

A person's mode of arrival to Australia must not determine their eligibility for permanent protection and access to their human rights; this practice is discriminatory, unfair and results in certain refugees being treated as second class. A Charter will ensure that all refugees and people seeking asylum are treated equally before the law regardless of their mode of arrival.

Conclusion

Everyone deserves to live with dignity and in safety with their family. Sadly, this is not a reality for many people in Australia. Refugees and people seeking asylum are frequently denied access to their basic human rights, including the right to healthcare and the right to work. Refugees and people seeking asylum, including children and families, are indefinitely held in immigration detention and permanently separated from their loved ones, resulting in irreparable harm to their health and well-being. **A federal Human Rights Charter will ensure that everyone's human rights are respected.**

In addition to the Charter, the establishment of an independent body to review a person's immigration detention and make enforceable recommendations is essential for accountability and to prevent indefinite detention.